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УКРАЇНСЬКОГО ПРАВА

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КРИМІНАЛЬНО-ПРАВОВІ НАУКИ

INTRODUCTION

Nowadays more than a hundred specialized legal journals and collections are annually issued in Ukraine, in which thousands of scientific articles from various branches of legal science are published.

In 2008 by the decision of the Presidium of the Academy the nationwide scientific periodical – Yearbook of Ukrainian law was founded, in which the most important legal articles of academicians and corresponding Members of the National Academy of Legal Sciences of Ukraine and also research associates, who work in research institutions of the National Academy of Legal Sciences of Ukraine and other leading research and higher education institutions of Kiev, Kharkiv, Donetsk, Lviv, Odessa are published.

Yearbook aims to become a kind of guide in the field of various scientific information that has already been printed in domestic and foreign journals during the previous year. «Yearbook of Ukrainian law» is a unique legal periodical dedicated to the widest range of legal science's problems that should be concentrated source of modern scientific and legal thought on current issues in the theory and history of state and law, constitutional, criminal, civil, economic, international and other branches of law, that has no analogues in Ukraine. On the pages of this journal modern legal concepts and theories of further development of Ukraine as a democratic, social, law-governed state, the most interesting and current ideas, fundamental and priority issues of jurisprudence are accumulated.

Selection of articles is carried out by the branches of the Academy (theory and history of state and law, state-legal sciences and international law, civil-legal sciences, environmental, economic and agricultural law, criminal-legal sciences), which combine leading scientists and legal scholars from all over Ukraine.

This is the seventh number of Yearbook that from now on will be published in English. The main purpose of these changes – enable scientists from other countries to get acquainted with the problems relevant to Ukrainian legal science both the general theoretical, so in different branches of law, modern Ukrainian legislation and practice, to provide opportunities for international scientific cooperation.

This periodical will be of interest to a wider audience: academic and teaching staff, graduate students, adjutants, students of higher educational institutions and to all those who are interested in the main lines of development of the Ukrainian legal science.

Editor in chief,
President of the National Academy
of Legal Sciences of Ukraine
V. Ya. Tatsii.

O. Petryshyn, First Vice President of the National Academy of Legal Sciences of Ukraine, Head of the Department of Theory of State and Law of Yaroslav the Wise National Law University, Doctor of Laws, Professor, Academician of the National Academy of Legal Sciences of Ukraine

VASYL YAKOVYCH TATSII

On the 13th, September, 2015 the prominent scholar and lawyer, talented educator, Doctor of Legal Sciences, professor, member of the National Academy of Sciences of Ukraine, President of the National Academy of Legal Sciences of Ukraine, Rector of Yaroslav Mudryi National Law University, Honoured Worker of Science and Engineering of Ukraine, Ukrainian State Prizes Winner, State Counsellor of Justice of the 1st Class, Hero of Ukraine ***Vasyl Yakovych Tatsii*** *celebrates his 75th anniversary and 50 years of scientific, pedagogical and public activity.*

V. Ya. Tatsii was born in Poltava in the family of employees. He started his work career in 1957 as a turner of the Poltava locomotive depot. After graduating from the Kharkiv Law Institute he worked as a district prosecutor's assistant and a prosecutor of the department of supervision over criminal proceedings in the Poltava Regional Prosecutor's Office.

Since 1966 Vasyl Yakovych Tatsii's life and activity are connected with Yaroslav Mudryi National Law University (former Kharkiv Law Institute): a postgraduate researcher, senior lecturer, associate professor, deputy dean of the full-time faculty, Vice-Rector for Scientific Work, since July, 1987 till present time – Rector of Yaroslav Mudryi National Law University and simultaneously (since 1991) Head of Department of Criminal Law of the University.

He defended his Candidate's thesis in 1970, and was awarded the title of Associate Professor in 1973. He defended his Doctor's thesis on the topic «Problems of Responsibility for Economic Crimes: the Object and the System» in 1984. In 1985 he was awarded the title of Professor.

V. Ya. Tatsii is an author of over 500 scientific publications, including about 50 monographs, manuals and textbooks that made an important contribution to the development of legal science. Areas of his current scientific activity are Criminal Law, problems of Theory of State and Law, Constitutional Law.

Being a talented scientist and a gifted person, V. Ya. Tatsii explores a wide range of criminal and legal issues: issue of an object and a target of a crime, a subject of a crime, systematization of crimes; issue of criminal responsibility for crimes against persons, crimes against the state, economic crimes, crimes against the environment, etc.

V. Ya. Tatsii has developed the scientific theory of social relations as an object of a crime, making a clear classification of objects of crimes is his merit.

The scientist paid special attention to research of such complex social category as interest and its criminal and legal aspects. V. Ya. Tatsii proved that interest cannot be a part of the structure of social relations, and is to some extent independent phenomenon. However, he was against the artificial division and contrasting categories of «public relations» and «interest», showing their inseparable dialectical relationship.

While projecting the general doctrine of crime object, created and developed by him, on the system of economic crimes, V. Ya. Tatsii gave a definition of a generic object of these crimes, which has not lost its relevance even after those significant changes that took place in the economic system of the country and its internal structure.

Making criminal law research, drafting proposals for improvement of current legislation, V. Ya. Tatsii has always been guided by the principles of the rule of law, legality, humanism, democracy. Scientific heritage of V. Ya. Tatsii has significant effect on the correct application of current legislation in criminal proceedings, protection of rights and interests of a person as the main value of our society.

V. Ya. Tatsii's research activities also include a number of current trends of modern jurisprudence. He has published a lot of scientific papers, dedicated to methodology of legal science, methodology of comparative and legal studies and, importantly, methodology of law enforcement.

V. Ya. Tatsii is actively developing a theory of a law governed state and directions of its formation in Ukraine, which was reflected not only in his publications, but also in the Constitution of Ukraine, the draft of judicial reform, legal acts.

One of the areas of V. Ya. Tatsii's research activity is problems of constitutional law. The scholar has comprehensively justified proposals concerning structure of the parliament, principles of legislative drafting process, legal nature and hierarchy of legal acts, adopted by different subjects of executive power and local self-government bodies, which materialized in corresponding bills.

V. Ya. Tatsii is a recognized organizer of higher legal education in Ukraine. Heading Yaroslav Mudryi National Law University since 1987, he has made a significant contribution to orga-

nization of its activities, creation of appropriate conditions for educational process, work and leisure of students, professors, lecturers and staff. Today it is the leading law higher education institution in Ukraine, which trains highly qualified specialists for different areas of legal practice. The University conducts significant research work, makes significant contribution to the development of the law governed state in Ukraine, has a strong scientific and pedagogical potential, modern resource base.

V. Ya. Tatsii has made a significant contribution to renovation of the entire system of legal education in Ukraine, to improvement of its content, scientific organization and methodology of the teaching process, expansion of advanced teaching methods, intensification of integration of education, research and legal practice.

He is a talented educator, a brilliant lecturer. He conducts significant work on training of the academic staff. Many candidates and doctors of legal sciences began their scientific activity under his leadership. He headed the Expert Council on Legal Sciences of the Ministry of Education and Science of Ukraine for many years, was a member of the Higher Attestation Commission of Ukraine.

Since 1993 V. Ya. Tatsii is the President and Full Member (Academician) of the National Academy of Legal Sciences of Ukraine – the highest sectoral self-governing research institution in Ukraine in the field of state and law, established on his initiative and with direct active participation. The Academy is a legal research centre, recognized in Ukraine and abroad. It works on consolidation of intellectual potential of legal scientists of Ukraine, organization and conduction of fundamental and applied research in the field of state and law, coordination of research work, promotion of integration of academic and university science, generalization of European and international experience of legal regulation of social relations. The Academy makes a significant contribution to scientific substantiation of legislative work of the Verkhovna Rada of Ukraine, state executive bodies and law enforcement bodies. He was elected a Full Member (Academician) of the National Academy of Sciences of Ukraine (Department of History, Philosophy and Law) in 1997.

Vasyl Yakovych Tatsii is significantly involved in public work. He is a member of several presidential and governmental commissions, public organizations, including the State Prizes Committee of Ukraine in the Field of Science and Technology, the Scientific and Methodological Council of the General Prosecutor's Office of Ukraine, Consultative and Expert Council of the Ministry of Internal Affairs of Ukraine, the Scientific and Expert Council of Security Service of Ukraine, the Presidium of the National Academy of Sciences of Ukraine, the Interagency Coordination Council on Fundamental Research, the Council Bureau of the North-East Scientific Centre of the National Academy of Sciences of Ukraine and the Ministry of Education of Ukraine, the Council of the Union of Lawyers of Ukraine, the Coordinating Council of the International Union of Lawyers, the International

Association of Legislation, the International Association of Legal Methodology, the Board of Directors of the European Public Law Organization, the International Criminal Law Association, the head of PO «Ukrainian Association of Criminal Law», Vice-President of the Union of Rectors of Higher Education Institutions of Ukraine and others.

As a member of the Constitutional Commission, he participated in the drafting of the Constitution of Ukraine of 1996, was the chairman of the working group of the Cabinet of Ministers on development of the Criminal Code of Ukraine of 2001. He headed the government delegation of Ukraine at the Diplomatic Conference of Plenipotentiaries of States under the auspices of the UN on creation of the International Criminal Court. He participated in drafting the Statute of the International Criminal Court and in the preparation of many other draft laws.

V. Ya. Tatsii actively participated in the activities of the Constitutional Assembly. The Commission on Law Enforcement Activity Issues under his leadership conducted a great work: analysed constitutions of other countries, provided suggestions on the Concept of Amending the Constitution of Ukraine, drafted sections «The Prosecutor's Office», «The Constitutional Court of Ukraine», proposed new sections of the Constitution of Ukraine – «Bodies of the Constitution Protection and State Control» and others.

V. Ya. Tatsii pays special attention to Kharkiv community, taking an active part in its life not only as the head of the powerful educational and scientific institutions, but also as a member of the Executive Committee of the Kharkiv City Council, Kharkiv Regional Committee on Economic Reforms of Kharkiv Regional State Administration, the First Deputy Head of the Coordination Council on Development and Implementation of the «Technopolis «Pyatykhatky» project, a member of Kharkiv Regional Council, Kharkiv Scientific Coordination Council and others. Reasonable views, professional legal thinking, ability to convincingly defend his position, responsiveness and kindness of Vasyl Yakovych always help the city and regional authorities to solve complex questions of Kharkiv and its inhabitants' life, he is the example of selfless work for the benefit of his native city.

Due to activities of Yaroslav Mudryi National Law University and the National Academy of Legal Sciences of Ukraine, Kharkiv acquired the status of the leading legal centre of Ukraine. V. Ya. Tatsii's efforts help to rebuild the city centre. On his initiative the Palace of Students of Yaroslav Mudryi National Law University was built in Kharkiv – an architectural «miracle», equipped with the latest technology. Group of architects and builders led by Vasyl Yakovych, who created this complex, was awarded the State Prize of Ukraine in Architecture. The Palace of Students has become the traditional venue for local and regional business events, celebrations and concerts in Kharkiv and all Slobozhanshchyna. Work on construction of a new building of scientific library of the university is in progress – a

10-storey building with a total area of over 16,000 square meters. The complex will be a resource centre that accumulates books and electronic publications on law, published in Ukraine and abroad.

Vasyl Yakovych also pays significant attention to his home town – Poltava. Poltava Law Faculty (now – Poltava Law Institute of Yaroslav Mudryi National Law University) was created in 2002 in order to provide Poltava and adjacent regions with legal staff. The Institute has a modern resource base, consisting of educational buildings, library, sport complex with swimming pool, canteen, students' hotel, etc. The teaching complex of Poltava Law Institute is a unique structure, which is considered one of the five best buildings of the Eastern region.

Vasyl Yakovych Tatsii takes care of current problems of childhood, orphanage, social vulnerability, family problems. Movement of philanthropic support of children's education institutions for orphans started in Kharkiv with his active participation. He initiated the establishment of Kharkiv regional higher humanitarian college for orphans and children from disadvantaged and socially vulnerable families in 1997.

V. Ya. Tatsii is the editor-in-chief of the collection of scientific articles «Bulletin of the National Academy of Legal Sciences of Ukraine», the managing editor of the collection of scientific articles «Problems of Legality», the Chairman of the Scientific Council of the journal «Law of Ukraine», the editor-in-chief of the electronic edition «Bulletin of the Association of Criminal Law of Ukraine», the Chairman of the Editorial Board of the newspaper «Vivat Lex», a member of editorial boards and scientific councils of a number of editions.

V. Ya. Tatsii is an Honorary Doctor of T. G. Shevchenko Kiev National University, Kharkiv National University of Internal Affairs, I. I. Mechnikov Odessa National University, Emeritus Professor of Yaroslav Mudryi National Law University, Honorary Academician of Ostrog Academic Fellowship, Honorary Academician of the Community of Academicians of Petro Vasylenko Kharkiv National Technical University of Agriculture, Emeritus Professor of Alfred Nobel Dnipropetrovsk University and others.

For significant merits to the science and the state V. Ya. Tatsii is awarded the title of the Hero of Ukraine with awarding the Order of the State, and has received many state awards: the Order of Prince Yaroslav Mudryi of the 5th, 4th and 3rd ranks, the Order «For Merits» of the 2nd and 1st ranks, the Honorary Diploma of the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine, Order of the Badge of Honour, two medals. He is the Honoured Worker of Science and Engineering of Ukraine, Ukrainian State Prize Winner in Architecture, Ukrainian State Prize Winner in Science and Engineering, winner of V. Vernadsky Prize, Yaroslav Mudryi Prize, the «Themis-99» Prize. He has a number of institutional, public, church and governmental awards of other states. He is a State Counsellor of Justice of the 1st Class.

THEORY AND HISTORY OF STATE AND LAW

UDC 340.15:94(477)

V. Honcharenko, Doctor of Law, Professor, Head of the Department of History of State and Law of Ukraine and foreign countries of Yaroslav the Wise National Law University

Procedure for the formation of the all-ukrainian congress of soviets in nep period (1921–1929)

Introduction. Statement of the problem. There are many supporters of the reorganization of the Parliament of Ukraine toward bicameralism among modern domestic researchers of its organization and activities. At the same time they offer a wide variety of options for the formation of the upper house of parliament. Search for the optimal model of the way of formation of such a Chamber requires not only refer to the current practice of electing the members of the upper chamber in a number of foreign countries, but also to the experience of modern Ukrainian constitutionalism at different stages of its history. A quite useful and original was the experience of formation of the supreme legislative body in Ukraine in the period of New Economic Policy (1921 – 1929), when All-Ukrainian Congress of Soviets of Workers', Peasants' and Red Army Deputies was such a kind of the authority.

Status of the study. Certain issues about the republican congress of Soviets' formation during the NEP were observed in the works of modern scientists: B. Borev, S. Brodovich, A. Butsenko, G. Gurvich, A. Malitsky, E. Engel. In the later Soviet period, some aspects of the procedure for forming the All-Ukrainian Congress of Soviets were studied by B. Babii, A. Taranova, D. Yakovenko. However these researchers were not in the depth of scientific analysis of this problem presented. Moreover, current Ukrainian historians don't pay enough attention to the study of the organization and activities of the supreme bodies of USSR's state power during the period of the New Economic Policy.

Relevance of the research topic. It consists primarily in the fact that knowledge of a wide variety of models of the formation of the higher representative bodies at different stages of their history helps to find the ways of creation an efficient design of the parliament in mod-

ern Ukraine. In the Ukrainian historical and legal science there is still a significant gap in the objective knowledge of the organization and activities of the representative bodies in the UkrSSR that also actualizes the research topic.

The purpose of the article. The purpose of this paper is to highlight the formation's mechanism of the supreme body of the Ukrainian SSR under the New Economic Policy, which provided a sufficiently rapid and effective renovation and stable development of the national economy in the analyzed period. The novelty of the publication lies in a comprehensive approach to the consideration of these issues and in use of comparative legal method for presentation of the materials.

Basic material. At the beginning of the New Economic Policy the highest legal status of the All-Ukrainian Congress of Soviets was determined by the Constitution of the USSR of 1919. Thus, the article 10 of the Constitution states: «Congress of Soviets is the supreme governing body of the Ukrainian Soviet Socialist Republic». The Constitution of the All-Ukrainian Congress of Soviets as amended in 1925 assigned the status of «supreme authority of the USSR». The Constitution of the Ukrainian SSR 1929 fixed that «the supreme authority of the Ukrainian Soviet Socialist Republic is the All-Ukrainian Congress of Soviets of Workers', Peasants' and Soldiers' Deputies»[1]. On behalf of a public authority it meant, that it was a kind of republican forum of the Soviets, the system, which was also regulated by the Constitution of the USSR of 1919 and 1929. Thus, the article 18 of the Constitution of the USSR 1919 provides: «18. The Soviet authorities in the field are: a) the Soviets of Workers', Peasants' and Soldiers' Deputies (urban and rural), as well as elected executive committees (the Board), and b) Congress of Soviets (provincial, district and county), as well as elected executive committee (ExCom)»[2]. The Constitution of the Ukrainian SSR in 1929 defined also the system of local government in the country, taking into consideration the administrative-territorial reform undertaken in the mid-1920s in the USSR. According to Article 49 of the Constitution of the USSR 1929 the Soviet authorities in the field are: a) the Soviets of Workers', Peasants' and Soldiers' Deputies; b) Congress of Soviets – district and county and their elected executive committees (ExCom). The Soviets were divided into urban, village and settlement territorial entities[3].

Regular re-election campaigns for grassroots Soviets (urban, village and settlement), provided by the legislation of the republic in the USSR in 1920, having passed a stage of convening and work of Congresses' Soviets of the corresponding administrative and territorial units, finished with regular convocation

[1] Історія конституційного законодавства України : Зб. док. / Упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 89.

[2] Съезды Советов в документах. Сборник документов. 1917–1922 гг. Том 2. – М.: Государственное издательство юридической литературы, 1960. – С. 56.

[3] Історія конституційного законодавства України : Зб. док. / Упоряд. В. Д. Гончаренко . – Х.: Право, 2007. – С. 95.

of All-Ukrainian Congress of Soviets of Workers, Peasants and Soldiers Deputies. During the period of NEP seven Ukrainian Congresses' Soviets were held. In 1921 V and VI All-Ukrainian Congress of Soviets, in 1922 – VII All-Ukrainian Congress of Soviets, in 1924 – VIII All-Ukrainian Congress of Soviets, in 1925 – XI All-Ukrainian Congress of Soviets, in 1927 – X All-Ukrainian Congress of Soviets and, finally, in 1929 – XI All-Ukrainian Congress of Soviets took place.

Each of the All-Ukrainian Congresses' Soviets was formed on the basis of multistage elections. Elections to the republican congress of Soviets in literature sometimes also defined as «multi-step»[1]. This method of forming the All-Ukrainian Congress of Soviets prescribed in All-Ukrainian Central Executive Committee's resolution on May 26, 1920 «On All-Ukrainian Congress of Soviets of Workers', Peasants' and Soldiers' Deputies». The resolution stated that «if the All-Ukrainian Congress of Soviets immediately precedes the provincial congress, delegates from the provinces are sent directly to the Provincial Congress of Soviets, if provincial congress of Soviets doesn't preceded by the All-Ukrainian Congress of Soviets, delegates may be sent directly to the county congress of Soviets. Elections directly from the members of the Red Army are held in cases where one part of the institutions can't take part in provincial, district conventions and City Hall's elections»[2]. Enshrined in the VUTsIK's resolution from May 26, 1920 the principle of the formation of the All-Ukrainian Congress of Soviets delegates, which were primarily elected by Congresses of Soviets of the largest administrative-territorial unit of the Republic (in this case, the Provincial Congress of Soviets), was consistently adhered to in legislation and in future. Since the X All-Ukrainian Congress of Soviets the delegates at the Republican Congress of Soviets were elected not by provincial, but by other Congress of Soviets. Thus, carrying out the changes in the administrative-territorial division of the Republic on the basis of IX All-Ukrainian Congress of Soviets Resolution «On the transition to the three-stage management system in Ukraine» led to the elimination of provinces. They were replaced by districts. The right to elect delegates of the Republican Congress of Soviets was given by the district Congresses of Soviets[3]. After the formation of the Moldavian Autonomous Soviet Socialist Republic (MASSR) in 1924 as a part of the USSR's right to elect delegates of the All-Ukrainian Congress of Soviets obtained All-Moldavian Congress of Workers', Peasants' and Soldiers' Deputies.

Thus, the legislation specified that the delegates to the All-Ukrainian Congress of Soviets were elected by the most fully-fledged local authorities – the Con-

[1] Высшие органы государственной власти и органы центрального управления РСФСР (1917 – 1967 гг.) Справочник . – М.: Центр. гос. архив РСФСР, 1971. – С. 35; Сыродоев Н. А. Крупный шаг на пути реформы политической системы / Н. А. Сыродоев // Известия вузов. Правоведение . – 1989 . – №2 . – С. 4.

[2] СУ УССР . – 1920 . – №44 . – Ст. 209.

[3] СУ УССР . – 1925 . – №44 . – Ст. 295.

gress of Soviets (at the beginning of the NEP – provincial, and since the mid-1920s – district and the All-Moldavian). Nevertheless, this did not mean that the All-Ukrainian Congress of Soviets was, so to speak, cut off from other subordinate local authorities. After local congresses of Soviets at all levels, including those, that directly elected delegates to the Republican Congress of Soviets, primary elections to local Soviets were held. This situation can be well illustrated by the following example. Thus, in accordance with Article 2 of the «Regulations on the District Congress of Soviets and district executive committees» from July 1, 1925, a District Congress of Soviets, which was competent to elect delegates to the All-Ukrainian Congress of Soviets constituted «of representatives elected municipal and village councils and regional congress of Soviets, as well as factories and plants located outside the city and factory settlements»[1]. According with Article 2 of the «Regulations on the Regional Congress of Soviets and district executive committee» of 28 October, 1925, a Regional Congress of Soviets was formed of delegates, «elected by village, settlement and city councils in the Area»[2]. Thus, the District Congress of Soviets formed of representatives of all Soviets existed on the territory of the district. From them the delegates from this Congress were elected to the Republican Congress of the Soviets. Eventually, the delegates of the All-Ukrainian Congress of Soviets were representatives of local councils – local authorities directly elected by the citizens. It should be noted that the vast majority of delegates to the local congresses of Soviets were elected from among the deputies of local councils – urban, rural, village.

The elections of local Congresses and the convening of Congresses of the Soviets until the Republican Congress of Soviets were successive stages of formation of a single public authority in the period under review. This unified system functioned on the territory of the Soviets of the USSR crowned by the All-Ukrainian Congress of Soviets originated in local councils. There are interesting opinions expressed by P. Stuchka on the unity government with the Congressional version of their construction. He, in particular, wrote that the features of the Soviet system lie in the fact that «in this system the power of the particle are closely linked and soldered together from top to bottom. Our Constitution puts forward the principle of close and continuing contact with the center without stagnation of the state's circulation «of the organism»[3]. As rightly pointed out in the literature, «not lower bodies are the result of the differentiation of the supreme bodies of state power, but the supreme bodies are the result of an integrated combination of lower public authorities. Lower bodies – the Council – is a primary body, supreme bodies are secondary, but not *vice versa*... Principled position that the supreme bodies are the result of the integrated organizational

[1] СУ УССР . – 1925 . – № 44 . – Ст. 295.
[2] СУ УССР . – 1925 . – № 84 . – Ст. 488.
[3] Стучка П. И. Учение о советском государстве и его конституции / П. И. Стучка . – М.-Л., 1931. – С. 150.

unification of the lower bodies – the Soviets – is also emphasized by the structure and the name of the main body of each higher administrative unit – the Congress of Soviets»[1].

Multistage procedure of the formation of All-Ukrainian Congress of Soviets included a number of rational principles. It provided in the supreme body of the Ukrainian SSR such participants, who were well-informed about the situation in those regions of the country, from where they arrived in the capital of Ukraine – Kharkov at the All-Ukrainian Congress of Soviets as its delegates. After the All-Ukrainian Congress of Soviets of the delegates the majority of deputies was from the local Soviets, so that they were well versed in the affairs of these basic grassroots authorities, working in the midst of the masses, and therefore knew the mood of the voters. In addition, the delegates of the provincial (and then the county and All-Moldavian) Congresses of the Soviets received during the plenary session of the Congress comprehensive information about the status and prospects of the state, economic, social and cultural development of the territory of such a large administrative unit, as the province (District), from which they were delegated to the Republican Congress of Soviets. Verbatim records of local congresses of the Soviets, legal acts adopted by their, as well as other very important for delegates information materials were also published. At the same time, the order of formation of the All-Ukrainian Congress of Soviets prevented the decrease of the knowledge level of its delegates. The matter is that the end of work of local congresses of Soviets that had the right to elect and to be elected by the delegates to the Republican Congress of Soviets, held in conjunction with the beginning of working time of the All-Ukrainian Congress of the Soviets. The Presidium of the All-Ukrainian Central Election Commission followed this. Thus, having considered the issue of «Convocation of the VII All-Ukrainian Congress of Soviets and the beginning of the election campaign», 23 August, 1922, the Presidium of VUTsIK determined the time of the convening of the Congress (10 December, 1922) and also stated: «end of the county congresses of Soviets to time directly to the convening provincial congresses, and the latter to coincide with the convening of the 7th All-Ukrainian Congress of Soviets»[2]. Having reviewed the November 17, 1923 issue of convening VIII All-Ukrainian Congress of Soviets and going to convene it in the period from 8 to 10 January 1924 Small Presidium of VUTsIK agreed: «offer provincial executive committees time Provincial Congress of Soviets to the convening of All-Ukrainian Congress of Soviets, in advance having reported about the date of their convocation». Having considered at its meeting on February 27, 1929 issue of the preparation of XI All-Ukrainian Congress of Soviets,

[1] Колесников А. Взаимные отношения между высшими и низшими органами РСФСР / А. Колесников // Власть Советов . – 1923 . – №4 . – С. 26.

[2] Государственный архив Харьковской области . – Ф. Р-203 . – Оп. 1 . – Д. 777 . – Л. 63.

the Presidium of VUTsIK agreed with the need «to coincide with the convening of the District Executive Committees to propose district congresses of Soviets to the convening of the XI All-Ukrainian Congress of Soviets».[1]

Thus, the delegates of the All-Ukrainian Congress of Soviets, well-informed on the progress of state, economic and socio-cultural development in its territory, having finished involvement of local congresses of Soviets immediately went to the Republican Congress of Soviets, bringing back the business spirit and the activity that reigned at meetings of local congresses of Soviets. As noted, for example, a review of the previous IX Ukrainian Congress of Soviets of the provincial congresses of Soviets, «according to each report at congresses of persons interested to act was so much that if pledged all the word, it should drag out congresses for some weeks».[2] That is, the delegates could constructively, thoroughly discuss the issues for consideration by the All-Ukrainian Congress of Soviets, competently adopt legal acts of the highest authority of the republic.

This was largely facilitated by the fact that the agenda of the All-Ukrainian Congress of Soviets, as a rule, were such questions that have been previously considered at the provincial (then district) Congress of Soviets, although at a local level. We illustrate this with the example of X All-Ukrainian Congress of Soviets, held 6 – 13 April, 1927. In the agenda of this congress there were such questions: 1. The Report of the Government of Ukraine. 2. Report on the state of the industry and its development prospects. 3. Status of Agriculture and objectives for its development: a) land management; b) agricultural cooperation; a) agricultural credit. 4. Report on the Red Army. 5. Organization of trade and cooperation. 6. Information on changes in individual items of the Constitution of Ukraine. 7. Report on the work of the Soviets. 8. Elections.[3] The agenda of District Congress of Soviets, held on the eve of the X-Ukrainian Congress of Soviets, was the question, which in many respects was similar to the issues of the agenda of the Republican Congress of Soviets. Thus, the District XI Congress of Soviets of Izum Region (26-31 March 1927) had the following agenda: 1. Report of the Government of Ukraine. 2. Report of the District Executive Committee on its work. 3. Status of industrial districts and the prospects for its development; municipal and road development. 4. Status of Agriculture: a) land management; b) agricultural cooperation and collectivization; a) loans and the value of its reorganization in agriculture. 5. Construction of the Red Army. 6. Status of trade cooperation and the implementation of the directive on the reduction of retail prices. 7. Adoption of the

[1] Центральный государственный архив высших органов власти и управления Украины. – Ф. 1 . – Оп. 5. – Д. 36. – Л. 33 оборот.

[2] Радянська Україна . – 1925. – № 3. – С. 46.

[3] X Всеукраїнський з'їзд Рад робітничих, селянських та червоноармійських депутатів.6 – 13 квітня 1927 р. Стенографічний звіт та постанови. – Харків : Оргінстр ВУЦВК, 1927. – С. 7.

lay judges. 8. Elections of: a) the District Executive Committee members and candidates; b) delegates to the All-Ukrainian Congress of Soviets; c) delegates to the All-Union Congress of Soviets.[1] Opened on March 27, 1927 the District X Congress of Soviets Kiev district was approved the following agenda: 1. Report of the Government of Ukraine. 2. Report of the District Executive Committee and approval of the district budget. 3. Report on the state of agriculture, the problem on its development and land management. 4. Report on Education. 5. Report on the Trade and Cooperation. 6. Elections.[2] Similar questions were on the agenda and other district Congress of Soviets.[3] This suggests that the consideration of identical questions on the level of local congresses of Soviets and the All-Ukrainian Congress of Soviets is one of the many compelling confirmations of the existence of the integrity and unity of the Republic of Soviets as the representative bodies of power and that is especially important to emphasize build from the bottom up.

In the literature, attention was drawn to the close relationship with the regions and center at Congressional model of power organization. Thus, according to G. Gurvitch, inextricably linked with the local Councils central Congresses of Soviets was that «Congress delegates leave the Soviets, remain to be deputies of the Council during a brief session of Congress and come back to the Soviets after Congress occupation. The Congress is concise, focused energy of the same Soviets».[4] In another work G. Gurvich, referring to the same problem, noted that local Soviets report to the Congress of Soviets their rights and authority, and not vice versa. «This – the researchers note, – achieved the most correct architecture of power: not from the top down and the bottom up. But thus given and highly valuable content inside of power: essentially, here and get it direct rule, people's rule, where people either for a moment no one assigns his power, and actually implementing it continuously». Reduced G. Gurvich's point of view shared by A. Malitsky, who noted that «the principle of the Soviet state system, the Soviet state apparatus from below and not from above – is one of the basic principles of the Soviet state law.» In this connection it should be noted that the procedure for the formation of multi-stage-Ukrainian Congress of Soviets was not the exclusive invention of Soviet power. Indirect elections to the supreme representative body were provided by a number of constitutions of foreign countries in which acted bicameral parliaments. For example, according to the Constitution of Belgium 1831, the Senate as the upper house of parliament, was formed on the basis of election. Half of the members of the Senate were elected directly by the population, and half of

[1] Государственный архив Харьковской области . – Ф. Р – 1639 . – Оп. 1 . – Д. 148 . – Л. 12-12 оборот.

[2] Государственный архив Киевской области. – Ф. Р-112 . – Оп. 1 . – Д. 3363 . – Л 11.

[3] Попередні підсумки окружних з'їздів Рад // Радянська Україна . – 1927 . – №3–4. – С. 85.

[4] Гурвич Г. С. О Союзе ССР : Общие основы советской конституции / Г. С. Гурвич . – М.: Власть Советов, 1931. – С. 14.

the Senate elected by the provincial councils.[1] According to Article 46 of the Constitution of Argentina 1860 Argentina's upper house of Congress – the Senate, had a composition, which consists of two Senators from each province, elected by the legislatures of the provinces, and the two senators from the capital[2]. Speaking about the positive qualities of the multistage procedure of formation of the highest representative body of the country, should pay attention to the judgment, which was expressed at the expense of Leon Duguit. In his opinion «no doubt, indirect voting provides the best selection, weakens the bitterness of the election struggle, protects against reckless lifestyle. Therefore, in countries where education is not widely where political education is also poorly developed, it is prudent to establish a two-level voting».[3] Domestic and foreign practice of constitutionalism allows you to design different models of the order of the upper chamber formation of the Parliament of Ukraine in the case of its introduction in the country. Members of this chamber can be, for example, to vote on the regional congress in an amount established by the Constitution of Ukraine. This will facilitate the integration of the interests of the country's regions in the multi-faceted practice of state building.

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[1] Современные конституции, Сборник действующих конституционных актов : в 2 т. Т. 1. Конституционные монархии / пер. под ред. и со вступ. очерками В. М. Гессена и Б. Э. Нольде . – СПб.: Изд-е юрид. книж. склада «Право», 1905 . – С. 125.

[2] Современные конституции, Сборник действующих конституционных актов : в 2 т. Т. 2. Федерации и республики / пер. под ред. и со вступ. очерками В. М. Гессена и Б. Э. Нольде . – СПб.: Изд-е юрид. книж. склада «Право», 1907. – С. 100.

[3] Дюги Леон. Конституционное право. Общая теория государства / Леон Дюги. – М. : Типография Т-ва И. Д. Сытина, 1908. – С. 506 – 507.

UDC 340

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Civic education: the moral and legal components

Nowadays, unfortunately, even a significant improvement of the economic situation in the country will not be able to put quickly in order the civil responsibility, the basis of which is a proper citizenship. However, in our view, the basis for overcoming these negative phenomena should be not only economic or social factors, but also its own citizenship, own ability to fight back negative manifestations of our lives. So, in other words, persevering, painstaking active citizenship in all spheres of society. In many ways, this «ability» for personal decisive action (the action's name, and not only complaints) depends on civil education.

This is the problem of personality formation that is able to think independently, make decisions, publicly express own opinions, to recognize and take responsibility for the consequences of public, including political, activity. Therefore, speaking today about the proper political and legal activity of the person, we should start from the beginning – from a proper civic education (as a process) and an appropriate civic education (as a result).

After all, only a person educated in the ideals of democracy, the best model for the development of civil society, humanity, decency, high service to humanity and devotion to civil position – can become a worthy member of the Ukrainian society.

Today, society needs a revival of respect for the law, the principle of the rule of law, strengthening the credibility of public opinion formation and development of citizenship.

Given a specific format, I would like to dwell on the consideration at a scientific category«civil education», more precisely, its moral and legal components of saturation. Civil education is composed of many different factors: ethics, aesthetics, religion etc. Nevertheless, moral and legal aspects are now lies at the basis of our attention as a foundation in the formation and development of civil education.

Morale is an important social institution. It is a set of principles, views, estimates, beliefs which are formed and developed historically, and based on these standards of conduct, define and regulate the relationship of people to each other, to society, state, family, collective, surrounding reality. Important immorality – an idea of good and evil[1].

One of the main problems facing the modern Ukrainian society is a significant moral and ethical inertia caused by the imposition of value priorities decades of totalitarian society. One of the main challenges of today's human science and education in the country is to overcome this negative tendency.

At first glance, it seemed that the spiritual, moral, national surge, which was observed at the beginning of Ukrainian independence, should contribute to the development of a new civil morality, which would be based on the principles of self-esteem and national dignity. At the beginning of Ukrainian independence was not unfounded hope that under the direct influence of germs of civil society will be held waking activity and enterprising people – this has not happened for a number of objective and subjective reasons and factors that are well known to all. In many ways, this process is due to the lack of people formed the ideal of civil behavior.

State rapidly absorbed from the Soviet model principles of nomenclature administration and stat corporate morality, while society had no moral and spiritual traditions of building democratic, equal relationship with the state. Revolutionary fervor quickly passes, and daily citizenship can only be based on a sound moral and value-conscious manner[2]. And it is quite significant in our time.

However, civil society does not appear out of nowhere. It is preceded by the formation of social and national development and perfection of both– society and the state in certain area dimensions depends on the degree of perfection of civil society, it more or less, unfortunately, less maturity and development.

About the moral and ethical content of civil society scientists have identified two approaches to this problem. Some authors prefer the civilizational approach to public consciousness, in contrast to the formation analysis that prevailed earlier directive, although not completely rule out the latter. I must admit that such separation is typical for social science both in Ukraine and abroad.

Formational approach is essentially historical: it considers the development of society as a change of qualitative states, therefore, society is constantly in the making. This means that none of its shape can`t be considered complete, including civil society. Civilizational approach, despite the diversity of its interpretations, «closes» the development of

[1] Moralnosc prawa в кн. Zeksykon wspolegesnej teorii i filologii prawa. 100 podstawowych pojec. Warscawa 2007. P. 195-196.

[2] Івченко О. Г. Моральні засади демократичного розвитку українського суспільства [Текст] / О. Г. Івченко // Гілея: науковий вісник : зб. наук. пр. / Нац. пед. ун-т ім. М. П. Драгоманова, УАН; голов. ред. В. М. Вашкевич. – К., 2011. - Вип. 43. – С. 551-560.

society. Under this approach, it is essential to first of all opposition to barbarism. It is believed that civilizational achievements (private property, state, family, etc.) are eternal. In addition, if the formation approach focuses on the changes in the form and perfection of society that emerged from barbarism, it warns against the degradation of civilization to barbarism. Formational approach sees the barbarity of the initial stage of history that is in the past, and considering the barbarism of civilization as a direct basis, a condition that must be constantly overcome that, in fact, is the essence of civilization.

The most important direction of scientific research is, so to speak, «microscopic» analysis of the morality of civil society. Modern scientists have not focused on criticism of moral consciousness and self-awareness of civil society, and in their explanations, study, theoretical arguments and especially – in the cultivation of the best postulates and manifestations. However, it is necessary to reflect on the fact that civil society can`t coexist two opposing morality as it is, unfortunately, is happening in Ukraine: the moral activists, protesters and morality of their opponents. Therefore, the moral principles sometimes turn into committing illegal acts by both parties, and civil society in this context reminds anarchist movements and expressions.

It is necessary to take into account the fact thatcivil society canserve asa kind of moralcanon.In turn, themoralityof civil societycalled the «ethic of citizenship», a newethic, which is based onlove of neighbor. Besides the moral state is defined as a natural morality, which idealizes the communal forms of life which is based on (pay special attention to this!) Is the love of neighboor?

Today, if a position to defend the truth and openness, it is hardly possible to imagine competitive and conflicting requirements of political relations «love thy neighbor» or «do not wish others what you do not want to imagine». What is it that you can and should be considered a moral civil society? At least that is written about these modern scholars?

Firstly, the morality of civil society is characterized by a high degree of reflex actions.

This means that their foundation is not a motivating feeling, customs, traditions or rituals, and careful calculation of all the «pros» and «cons». So, modern morality is rational – it is the main focus of the normative value system of civil society.

Second, the rational morality of civil society pragmatic, utilitarian-oriented success and performance. We are talking about morality specification on the various spheres of public life: politics, economics, law and the like.

Third, rational and pragmatic morality of civil society devoidovergoal (overvalued), which is outside the specific pragmatic activities. So, the society need to come to terms with the lack of a common ideal [1].

[1] Гусейнов А. А. Гимн гражданскому обществу и его морали (о книге В. И. Бакштановского и Ю. В. Согомонова «Гражданское общество: новая этика»). 2004 // Ведомости. Вып. 25: Обще профессиональная этика. Тюмень, 2004.

However, as noted by A. Guseynov, it is necessary to find out whether indeed morality morals or how it relates to morality and ethics, how to perceive and reproduce the concept of «justice», «dignity», «treason» and the like, what invest in these concepts representatives of different societies and different social strata[1]. Without this, civil education of the person will only «good intentions».

An important feature of the formation of humanistic morality of civil society in Ukraine is value in it national and universal priorities. It should be noted that the Ukrainian culture and public opinion have always had a humanistic foundation. Therefore, in connection with globalization processes that occur in the world, for our society, it is important not to lose humanistic anthropological potential. The principles of traditional family ethics, aesthetic perception of reality, indifferent attitude towards the suffering of others, the Orthodox religious morality, etc. must be stored and used in order to establish the humanistic moral compass of civil society[2].

Development of a national system of civil education and upbringing which is designed to affirm moral priorities of the person as a member of civil society is the immediate task of its structures, institutions and organizations. Here before us is a problem peculiar hermeneutic circle, when the availability of part depends on the presence of the whole, and the availability of the whole – the presence of its constituent parts. Indeed, scientists believe, is one of the most difficult problems of the societies that develop in the direction of democracy is not a natural way of centuries-old assertions of moral priorities of civil society, and on the advanced model. In this regard, we must first realize that the only deep personal experience and confidence in the value of civil virtue will enable us to overcome the problem of the «vicious circle» and get our national community in the new stage of development.

It should also be noted that at present the society takes great practical interest and demands on law and legal institutions, their efficiency and effectiveness. In practice, this trend is expressed in the desire to improve and enhance the effectiveness of legislative work and realization of law to protect the rights, freedoms and legitimate interests. Now, more than ever, updated the problem of obtaining proper legal education.

A few accents in the Orthodox worldview and Christian morality, which have in Ukraine a long tradition and deep roots. This gives hope that the formation of civil society, Ukraine will be able to use a humanistic and integrative potential of the Christian foundations of morality. Moreover, some researchers believe that it is from the perspectives of adoption in this country Christian morality depends on the future establishment of a civil society and rule of law.

It should also be noted that today's society there is a great practical interest

[1] Ib.

[2] Івченко О. Г. Національні й загальнолюдські засади розвитку гуманістичної моралі громадянського суспільства / О. Г. Івченко // Гілея: науковий вісник : зб. наук. пр. / Нац. пед. ун-т ім. М. П. Драгоманова, УАН; голов. ред. В. М. Вашкевич. – К., 2011. – Вип. 43. – С. 551–560.

and demands on law, legal institutions, their efficiency and effectiveness. This is reflected in the desire to improve and enhance the effectiveness of legislative work in the process of realization of the right to protect the rights, freedoms and legitimate interests. Today, more than ever, updated issue proper legal education.

How important category of «legal education» in human life? If we examine not only within the search of theoretical models and practical angles and directions, we can say that our quality of life is certainly connected with thiscategory of the business plan for the quality of health care, from proper working conditions in appropriate conditions of rest.

Thus, we are directly confronted with the necessity of personal mastery is not only «the ABC law», but need a higher level of legal literacy. No matter how many problems of our economic, social and political life, how many complaints about the extra power, the state, society, employers, etc. could have been avoided if every ordinary citizen, regardless of age, sex and social status would be characterized by greater legal literacy today.

Like every theoretical and applied problem, this is no exception and should be considered as new approaches, methods, methods of study, and the appropriate methodology for its implementation. According to the first position should immediately emphasize the need for the introduction of other, different from previous times approach: offer mastery is not «legal minimum» (this is not enough), as necessary, appropriate civilized society level of legal knowledge in the plane of the modern constitutional state.

Legal education can be regarded as a system of educational and training activities aimed at creating conditions for the formation of:

- respect for the law;
- their own perceptions and attitudes based on modern legal values of the society;
- concepts, sufficient to protect the rights, freedoms and legitimate interests of the individual and the realization of its legitimate citizenship.

The objectives of legal education are determined facing legal educational process. These include:

1) the formation and development of the citizens of legal knowledge in the field of public administration;

2) the development of respect for the law as a social value, the principles of the rule of law;

3) development of the needs and skills of active protection in accordance with the law of their rights, freedoms and legitimate interests.

Implementation of the above goals and objectives will form an adequate level of legal citizens.

Legal education can`t exist in isolation in society, it is based on data pedagogy and jurisprudence, and the pedagogy used for the most effective legal education, developed using the principles and methods, forms and methods of upbringing. In this regard, the theory and practice of formation and development of legal culture should be closely linked not only with the science of law, but also

with other branches of human knowledge. Extremely relevant today, the problems associated with legal pedagogy.

Successful conditions for the formation of this process should be considered:

• establishment and activities of non-governmental organizations (possibly on the basis of large corporate centers), which are involved in various social projects;

• training courses, providing a profile of broadening and deepening understanding of the law as much a social institution, the phenomenon of legal culture, its principles, characteristics of different forms of regulation of social relations, especially in the political and economic spheres to the general public.

Why this mission is not to take the College of Law, Institute, Faculty within and formats specified by the State? At the very least, it could indicate a certain degree of their social utility and necessity. As an example, it becomes indispensable when introduced into the legal life of the new institutions of law, say the institution of mediation.

Of great importance in connection with the above social gains control of the process of education law.

Introducing the process of integrated mini system, it can be noted that the content side of the panel consists of two areas: external and internal.

The first is a deliberate state action, which aims to organize and provide important from the point of view of legal policy directions for the implementation of educational influence and the development of public policy on legal education; as well as the organization of the subject composition of the educational process and the implementation of appropriate controls. The second – the inner direction that is displayed in the form of specific programs of educational influence implemented certain range of actors to implement this kind of educational activities.

The educational work in the field of law – is concrete measures to implement the subject of the effects of certain legal actions based on the implementation of the developed programs of legal education in the community. So, the educational process in the right – a set of activities carried out in order to achieve the optimum result possible under the educational impact of the subject of legal education in the society, aimed at creating a sense of justice and high legal culture, coupled with the use of special legal tools and educational tools.

Legal education – an integral part of the general culture of the citizen, the condition of the formation of justice. Life in civil society forms the legal consciousness (positive or negative), regardless of whether this process occurs spontaneously or purposefully within the legal education. But legal education is the guarantee that the right to life of the individual becomes a regulator rather than an obstacle to solving his personal problems. In modern conditions it is legal education can be an important factor in the development of personality, the development of civil society and the democratic rule of law in modern Ukraine, whose citizens can live in socio-legal

agreement with each other, with the state authorities, political parties, social movements and so on.

Formation of legal opinion (from external needs that society imposes the individual, to the inner conviction, and from him – to the action)– is a way of formation of legal consciousness as a prerequisite for the rule of law. Without formation of legal convictions can`t be a legitimate behavior. The process of implementation of legal norms – the interaction of its requirements with the consciousness of the individual. We can`t agree with the point of view of scientists that without studying human beliefs, his behavior, the psychological mechanism of interaction between the requirements of the human mind and it is impossible to understand the motives of legitimate behavior.

Acquired legal knowledge must pass through values, become inner conviction, get emotional, to gain a foothold in the legal habits.

The task of legal education is that in their implementation to achieve this level of justice when every member of society adhered to the rules of social behavior and the rule of law, solely by virtue of an inner necessity, their own beliefs, not in fear of coercion. This is the formation of motives and habits lawful, socially active behavior. Human behavior must be conscious. Development of habits of respect for the rule of law, to good behavior – the most important and most difficult task of legal education.

The ideological value of legal education is that it is socially necessary phenomenon, caused by the objective laws of construction and development of society.

The second consideration is the position of this methodology that is associated with the «tools» implementation of legal education. The current stage of legal development is marked by new trends in legal education. Their features are: practically-oriented approach in teaching the content of the legal rate, taking into account the social experience of people involved in various legal relations in real life, active citizenship identity, respect for human rights and international law, to ensure the required level of legal literacy man issues of professional orientation. Legal education should be focused on ways of understanding reality retransmission: thinking, activities, communication and behavior.

Legal education – is a unified national system of awareness of the role and effectiveness of the rights of existing laws; system that covers all segments of the population.

Given the above, we would like to emphasize once again that the great achievement of the **Revolution** of Dignity should be considered the formation and development of a new identity – media best democratic traditions regarding the education of citizenship.

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A jury trial in ukraine: historical and legal aspects (to the 150th anniversary of judicial reform of 1864)

On the basis of the constitutional provision that the carrier sovereignty and the only source of power in Ukraine ongenus h. 4 tbsp. 124 of the Constitution establishes the form of its participation in the administration of justice through people's assessors and jurors. The order of their election and the formation of the jury, the regulation of their powers and activities, the definition of the category of unfinished cases in which they are involved, defined by the Law of Ukraine «On the Judicial System and Status of Judges», as amended, and procedural codes. In this, the legislative strengthening resumption of trial by jury in Ukraine will contribute to solving one of the main tasks of the judiciary reform – the democratization of justice.

As you know, the jury is an integral part proceedings of many countries (UK, USA, Australia, Canada, Germany, Austria, Spain, the neighboring Russian Federation and others), in which are its various models. Authors of scientific and practical commentary the new Criminal Procedural Code of Ukraine noted that «the Ukrainian legislation to implement the European (Continental) model of the jury»[1] that certainly led to the development of the relevant provisions of the Satversme Ukraine and thus bring modern domestic legislation to recognized European and world democratic values.

However, this has not yet exhausted all the discussion of issues related to theory and practice of trial by jury, introducing it in Ukraine, Specifically, one of them, but enough is taken into account the legislator important condition as a

[1] Кримінальний процесуальний кодекс України. Науково-практичний коментар: у 2 т. / за заг ред. В. Я. Тація, В. П. Пшонки, А. В. Портнова. – Х., 2012. – С. 168.

clear understanding of democratic judges' traditional justice? After Basic Law obliges the state to promote the development of the Ukrainian nation, its historical consciousness, traditions and culture, identity-sti all indigenous peoples and national minorities.

According to our estimates, in 1992 the theme was devoted to a jury trial (or she dis-regarded among others) about 250 publications. At the same time, studies of historical and legal genesis of this institute legal proceeding in Ukraine, the experience of its functioning, have a few[1].

Therefore, the aim of this article is to define the basic traditions and stages of proceedings in Ukraine with the participation of national representatives on the materials the early Middle Ages, historical and legal capacity of the judicial statutes in 1864, Soviet legislation on People's Court, as well as presentation of our views on the administration of justice in the court jury in connection with the adoption of the Law of Ukraine «On the Judicial System and Status of Judges «and the new Procedural Code of Ukraine.

The history of civilization knows the different forms of participation of the people in Justice: College geliastov in ancient Greece, tidingi in the Nordic countries, the jury indictment in England, «the court equals» in France, in Germany Sheff. On their basis there was a modern Anglo-American and Franco-German (continental) model of the jury. This legal institution had every nation has its own prehistory and evolution stages.

Features the historical and legal genesis of the jury in Ukraine, in our view, suggest the following main stages. The first refers to the time of Kievan Rus', when the system Judiciary existed vervnye (community), the courts, the institution «Vessel men», the procedure to deal with civil and criminal cases with the participation of the local community,

[1] Пашук А. Й. Суд і судочинство на Лівобережній Україні в XVII – XVIII ст. (1648–1782) / А. Й. Пашук. – Л.: Вид-во Львів. ун-ту, 1967. – 179 с.; Щербина П. Ф. Судебная реформа 1864 года на Правобережной Украине / П. Ф. Щербина. – Л.: Вища. шк., 1974. – 191 с.; Чангулі Г. І. Суд присяжних – анахронізм чи необхідність? / Г. І. Чангулі // Антологія української юридичної думки. Т. 9. / за заг. ред. Ю. С. Шемшученка. – К., 2004. – С. 709–718; Довгий Т. Суд присяжних (до відновлення давньої правової традиції в Україні) / Т. Довгий // Сучасність. – 1994. – № 6. – С. 63–69; Русанова І. О. Суд присяжних в Україні: проблеми становлення та розвитку: [монографія] / І. О. Русанова. – Х.: ВД «ІНЖЕК», 2005. – 184 с.; Тернавська В. М. Інститут суду присяжних в Україні (історико-правовий аспект): автореф. дис. ... канд. юрид. наук / В. М. Тернавська. – К., 2007. – 20 с.; Гринишин А .Б. Вітчизняний досвід участі присяжних засідателів у здійсненні правосуддя в кримінальних справах / А. В. Гринишин // Держава і право. Вип. 48. – К., 2010. – С. 512–518; Мацькевич М. М. Суд присяжних в Україні після судової реформи 1864 р. / М. М. Мацькевич // Унів. наук. зап. – 2010. – Вип. 2. – Сер. Право. – С. 48–56; Сидорчук О. О. Компетенція та діяльність суду присяжних у Правобережній Україні за судовими статутами 1864 р. /О. О. Сидорчук // Наук. вісн. Львів. держ. ун-ту внутр. справ. – Сер. Юрид. – Вип. 2. – 2010. – С. 52–60; Сидорчук О. О. Функціонування суду присяжних у Правобережній Україні за судовими статутами 1864 р. / О. О. Сидорчук // Часоп. Київ. ун-ту права. – 2012. – № 2. – С. 105–108.

applied treatment oath, various tests (ordeal) for the determination of guilt defendant. Such proceedings found its legislative consolidation in the norms of Russian Pravda.

Another one of the oldest forms of popular participation in the implementation of Justice in Russia were Candlelight. Although the management and the court belonged to the exclusive jurisdiction of the princes, the Chamber often violated their jurisdiction, and the rulers recognize this right Candlelight[1]. Peculiar of prototype of the jury can be considered and the supreme court of ancient Russian Novgorod, where court cases have been governor of the prince, Posadnik or Tiunov together with representatives of the «ends» (streets) of the city.

The second stage of the history of jury trials in Ukraine falls on the Polish-Lithuanian domination in the Ukrainian lands late XIV – the first half of the XVII century. The legal system of the Kingdom of Poland and Grand Duchy of Lithuania was formed on the basis of a synthesis local customary law and regulations: Code of Law, Charter, decision of the Seimas, privileges and other acts continued operate a significant number of rules and Russian Pravda. Common in the Ukrainian lands was the Magdeburg Law, skirted the right to sue in accordance with its provisions, with the participation radtsev and shopkeepers. In Ukraine, a long time continued community there, «mop» courts, which at the request of victim, guided by custom to achieve justice together, «kopoy» independently carries out search of the accused, considered on the merits, handed down the sentence, which was final and is to be executed immediately. Despite the gradual limit the jurisdiction of the courts in mop Lithuanian statutes on Right-Bank Ukraine, they continued to exist in the first half of the XVIII century.

Peculiar democratic judicial system existed in Cossacks. Judicial functions are carried out by representatives of the Cossack. And in the most complicated cases as a court of first instance sometimes spoke all Kosh, and the highest court – council of war.

Ukrainian National Revolution of 1648 steps for the construction of State and Republican state initiated new, third stage, when the process of creating great power was founded his own judicial system – the General Court, regimental, hundreds and community (village) courts. In the Magistrate, Town Hall, mop courts will hold the previous legal proceedings on Civil and criminal cases, which are fixed as in the regulations and in administrative and judicial practice. Litigation meetings are usually held in public, with the active participation of the public. Continued to exist two forms of the process – adversarial and investigative (inquisition) latest subject to proceedings for serious crimes.

In the context of Ukrainian autonomy under the protectorate of Russia to 1654 there were significant changes in the substantive and procedural law, although all the hetman of clauses with the

[1] Єрмолаєв В. М. Вищі представницькі органи влади в Україні (історико-правове дослідження) / В. М. Єрмолаєв. – Х.: Право, 2005. – С. 35.

Muscovite tsar secured the inviolability of «Little Russian rights». The great influence of customary law in the proceedings Getmanschina showed frequent departures from the judges of written procedures. Remained wide competence regimental and hundreds of ships that could impose the death sentence without approval by the court. Cossacks subject to the jurisdiction of the court only Cossack, who acted on the principle that «where three Cossacks, where one is judged.» However, in Sloboda Ukraine actively implement the Russian legislation, displaces rules customary law. Since 1775 in suburban-Ukrainian, Kherson, Ekaterinoslav, Tauride province launched the Russian judicial system. Right-bank Ukraine continued to exist the judicial system of the Commonwealth. West-land in the second half of the XVIII century. were under the rule of the Austrian monarchy, began the process of replacing the Polish law Austrian.

Thus, the Ukrainian judicial process has long been characterized by the features of democracy. Vervnye courts, princely courts or courts posadniks, tiuns, «vessel husbands' mop courts considered the most important civil and criminal cases involving members of the public or local community. The process was transparent and had a competitive nature. This type of proceedings has much in common with European, especially French, model jury. On the judicial system and the administration of justice in Ukraine is largely influenced by the norms Russian Pravda, Lithuanian statutes, self-organization Goro-ing on the Magdeburg law Cossack government, customary law. Thus was born and developed judicial system Hetmanate with its integral attribute – representatives of the people: the Cossacks, peasants and commoners.

The fourth stage in the history of the jury in Ukraine is connected with holding in the Russian Empire judicial reform of 1864, implementation and operation of this institute proceedings in the Ukrainian lands. An important role in the development of ideas of separation of judicial and administrative authority, create a jury trial played reform projects of public and legal institutions MMSperanskii, Ukrainian-nezhintsa, the first doctor of law in Russia S. Yu. Desnitskogo, preparation of bills in the Council of State Russian Commission under the chairmanship of Ukrainian S. I. Zarudnogo who investigated models judiciary jury trial involving France, Belgium, Germany, Italy, and England and the United States[1].

Alexander II approved November 20, 1864 four reform act: «The establishment of judicial determination», the «Charter of civil proceedings «, the» Charter of criminal proceedings «, the» Charter of penalties imposed by magistrates «, which amounted to legislative framework for judicial reform[2]. For the first time such a reform based on the

[1] Кони А. Ф. Отцы и дети судебной реформы (к пятидесятилетию Судебных Уставов) / А. Ф. Кони. – М., 1914. – С. 76-90; Кульчицький В., Бойко І., Сидорчук О. Фундатор судової реформи у царській Росії С. І. Зарудний / В. Кульчицький, І. Бойко., О Сидорчук // Право України. – 2004. – № 8. – С. 114-115.

[2] Полное собрание законов Российской империи (далі – ПСЗРИ). – Т. 39. – Собр. второе. Отделение второе. – 1864. От 41319-41641. – СПб., 1867. – 573 с. (с доп.)

principles of separation the judiciary from the legislative, executive and administrative, independence and immutability of the court, and the court introduced vsesoslovnye institution of the jury in the district courts. The district court was the court of first instance in all criminal and civil cases, which are beyond the jurisdiction of the Magistrates' Courts.

Highlighting the most important provisions of the laws on the status and competence of the jury. The law «Establishment court of justice,» the legislator has provided the place of the jury system proceedings: «In order to determine guilt in criminal cases or innocence of the defendants in the court in the case referred to in the Charter of criminal proceedings are brought jurors »(№ 41475, p. 7). Chapter II, Section II «On jurors» establishes their composition, the procedure of election and preparation of general and regular lists (Articles 81 – 109). Here indicated that the jurors are elected from places-tion of inhabitants of all classes, who is in the Russian citizenship who are not less than 25 and not more than 70 years and who live at least two years in the county, where the election of jurors. They may not be the person under investigation, who are excluded from the service, the debtors, who is under the care of the blind, deaf, dumb, «mindless» who do not know the Russian language.

At the first stage a general list of jurors drawn up Interim Commission each county, appointed by the Zemstvo County Council. The law defines the range of persons entitled to be included in the lists of jurors and those who do not shall be included on such lists: the clergy and religious, military officials, teachers of public schools who serve private individuals. Set deadlines for changes in the general list, and then it are up to October 1, shall be submitted to the Governor for review and approval.

In the second stage the temporary county commission makes regular array of individuals who meet the requirements and have been called upon to participate in court hearings next year (no more than once a year). Simultaneously with a list drawn up list of spare assessors. The law regulated the number in According to the population of the county or city. In lists made only by persons of the Orthodox religion. Order attract jurors to participate in court hearings and resolving criminal cases regulated by the Charter of the criminal proceedings (№ 4176).

The Charter defines the basic principles of criminal proceedings, particularly in cases of crimes and wine, which entail penalty involving deprivation of civil rights or the loss of all or some special rights and privileges, determination of guilt or innocence of the defendants were charged the jury. The Constitution states that trials involving them occur in public, orally (Art. 624).

Three weeks before the opening of the courtroom with jury assessors from the next list of 30 appointed by draw assessors and 6 spare «for the presence during the whole period of meetings.» About the draw to draw up reports and elect jurors in court invited agendas (Articles 550 – 553). List their names heard

prosecution and the defense. Both parties have the right to unmotivated removal of six judges. Slips of paper with the names of 18 jurors selected so invested in the box for the draw, after which 12 people whose names are identified the draw, formed the jury box. Called and the names of two replacement jurors (Articles 654–658).

The opening of the court session with the participation of jurors began with the announcement of their composition and bringing it to the oath priest who proclaimed her a solemn sense. Everyone swears kissed oath, cross and pronounced the word «swear». The non-sworn in accordance with their rite faith. In the absence of a court session cleric non-Orthodox religious jurors are sworn in President of the Court (Articles 666–668). The jury foreman was chosen amongst themselves to organize their meetings.

Further explanation of the Charter defines the procedure for the Chief Justice a jury of their rights, duties and responsibilities. The court Therefore, they have an equal right to judge both the inspection should be crime, physical evidence and the right to put interrogated persons questions. Jurors also have the right to refer to the president of the court for clarification of content read in court documents, and other elements of a crime incomprehensible to them questions. They were allowed during the trial meeting to make written notes. Jurors were not allowed to leave the room, contact with outsiders without obtaining the permission of the court chairman. They were forbidden to collect any information on the case outside the court, to disclose secrets deliberation room. For violation of these rules sworn was eliminated from further participation in the proceedings and it impose fines (Articles 671–677).

Charter of criminal proceedings to regulate the procedure and rendering verdict and without a jury (Art. 755). After the presentation of the chairman of the court session foreman interrogation sheet, the chairman declared parting word, which explained the jury the most important facts and laws, concerning the definition of the category of the crime, general legal judgment on the evidence presented, and for against the defendant. The presiding judge reminded the jury about need to decide on the guilt or innocence of the accused by their inner conviction after joint discussion of all the circumstances of the case (Articles 801–804).

Under the Charter of the order of the decision by the jury provided a unanimous decision or, in the case of failure unanimity – the majority of votes. When the votes are equally, the decision was made in favor of the accused. If there was handed down a guilty verdict, the jury could be noted that the the defendant is entitled to mitigation of punishment. In such a case, the court had to sentence lower than required by law. The jury also endowed with the right to supplement your answer is «yes» or «no» by the presence or absence of intent, circumstances crime, etc. Answer jurors shall be signed by their elders, who are elected by a jury in a particular case. He announced their decision after the return

of all of the jury room, and their questionnaire handed to the presiding judge for signature. Judges do not always have to have to disagree with the decision of the jury, if their was unanimously condemned the innocent, the case was transferred to the new members of the jury, the solution of which in all cases was the final (Articles 801 – 818).

A well-known Russian lawyer A. F. Koni in the article «Judicial reform and the jury» noted that the jury «has combined both in focus all the general principles introduced in the administration of judicial statutes criminal justice»[1].

Thus, the legal forms of participation of the people in the administration Justice evolved historically in Ukraine and Russia and embodied in the classical model of a jury for judicial reform in 1864, implement the idea of separation of administrative and judicial authorities, taking into account the achievements of legal science, the best traditions of British and The French model of this legal institution.

The first district courts as courts of first instance occurred on Sloboda Ukraine in 1867. Thus, during 1867 – 1868. in the district Kharkiv Court of Justice have been eliminated and verbal county courts and introduced new – district. The jurisdiction of the District Court of Kharkiv spread to several provinces: Kharkov, Kursk, Orel, Voronezh[2]. Jury trials were opened in Kharkiv, Izyum, Sumy vessels. Odessa judicial courts Chambers were opened during the first third of 1869 in Kherson, Ekaterinoslav and Tauride province[3]. Thus, the territorial boundaries of the Chambers not only did not coincide with provincial, and were much wider, which contributed independence of the judiciary from the administration.

The functioning of the jury, the competence and the main indicators of its activity on the right bank of Ukraine on legal regulations in 1864, as illustrated by the works of AI Pashukov, PF Scherbyna, OO Sidorchuk and other scientists have general and specific features. Introduction of the jury was delayed, and the first of them appeared here only in 1880. The district courts in the right-bank provinces were created in Kiev, Uman, Zhytomyr, Kamenetz-Podolsk and Lutsk, which belonged to two judicial districts: Kiev and Odessa. Researchers led interesting information about part of the district courts, the composition of the jury, the dynamics annual amount of outstanding criminal cases involving them and without it during 1880-1916 gg, the data on the organization's performance meetings of the district courts, the percentage made by juries' convictions, etc.

During the 70 – 90th. XIX century in Russia as a result of counter-reform a system of general courts, democracy and the principles of the judicial system and legal proceedings have undergone serious limitations. Was narrowed compe-

[1] . Кони А. Ф. Собр. соч. в 8 т. – Т. 4. – М., 1967 – С. 202.

[2] ПСЗРИ. – Т. 42. – Отд. 1: 1867. – СПб., 1871. №44094, №45104;

9. ПСЗРИ. – Т. 43. – Отд. 1: 1868. –СПб., 1873. №45490

[3] ПСЗРИ. – Т. 43. – Отд. 1: 1868. – СПб, 1873. №46062;

tence of the jury: the Act of June 12, 1884 Police officials have been admitted to the formation of its composition, Act of April 28, 1887 doubles the property qualification jurors became optional procedure to bring them under oath, etc. On the first place of their allegiance.

The final pages of the history of formation and development of the court with the participation of representatives of the people in the judicial system of Ukraine connected with the epoch National liberation struggle of 1917 – 1920 years. After the collapse of the Russian Empire, the Ukrainian Central Rada began reform of the judicial system, trying to keep the well-established democratic forms of the judicial system, «streamline proceedings and lead to an agreement with the legal concepts people»[1]. However, the extremely difficult conditions of continuing world, the beginning of the civil war and the presence of foreign troops on Ukrainian lands led to the incompleteness of judicial reform in the UPR, the establishment of courts with special jurisdiction. The Ukrainian state hetman Skoropadsky acted «mixed» court system – with judicial institutions of the Russian Empire and the UCR, with the ordinary courts, as well as the military. During the Directory UNR in practice continued to operate emergency judicial system, far from the declared principles: the separation of administration from the court, independence of the judiciary, rule of law, and others. In the constitutional UCR legislation, the Hetmanate, the Directorate, the project «Basic State law UNR «1920 restoration of the jury was not provided, so consider some exaggeration to conclude researchers of the «further development of the jury in the court system of Ukraine during the 1917-1920»[2]. At the same time the jury continued to operate in the Ukrainian lands, which were part of the Austro-Hungary and Poland. The idea of participation the people in the administration of justice with the participation of lay judges or jurors secured in its constitutional draft «Constitution West Ukrainian Republic «(1920), Doctor of Laws S. Dnistryansky[3].

With the termination of the existence of a jury trial in Ukraine in Soviet times under the domination of the so-called dictatorship of the proletariat, dictates the Bolshevik Party, the class character of legislation declared in their participation of the people in the administration of justice took place through the elections of people's judges and lay judges. So began a new Soviet era in the history of popular participation in the implementation of justice in the form of elected judges and people's assessors. The first document of the new, Soviet court in Ukraine was the decision of the People's Secretariat on January 4, 1918 «On the introduction of the People's Court»[4]. According to the decree abolished the

[1] Українська Центральна Рада. Документи і матеріали: у 2-х т.– Т.1. – К.: Наук. думка, 1996. – С. 400.

[2] Тернавська В. М. Указ. работа, С. 4, 10; Гринишин А. Б. Вказ. робота, С. 516.

[3] Історія вчень про право і державу: хрестоматія для юрид. вищ. навч. закл. і ф-тів / авт.-уклад. Г. Г. Демиденко; за заг. ред. О. В. Петришина. – 6-те вид., допов. і змін. – Х.: Право, 2014. – С. 767.

[4] Вестн. УНР. – 1918, 10 січ.

old «bourgeois» courts instead created district, county and municipal people's courts. The judges were to be elected by direct universal suffrage of the population in elections that were organized by local Councils. With the development of «military communism «and the Civil War, when a state of emergency and non-judicial system of revolutionary tribunals VUCHK, supervision «Revolutionary legality» was carried out and the people's courts. People's Commissars of the USSR 26 October 1920 adopted the «Regulation on people's courts»[1]. In accordance with the situation of the Court acted as part of a single judge, or as part of a judge and two lay judges regular or regular judges and six lay judges (Art. 5). The final composition of the court dealt with criminal cases. The following articles are provisions regulate the composition of the court with the participation of people jurors in civil, criminal fine offenses equated with the legal status of judges to the status of judges determined the social composition of the lay judges, established the procedure for compiling their lists (for 6 months), the right of withdrawal lay judges and lay judges, etc. Thus, people's assessors become full participants in the trial.

After the Civil War, the refusal of the ruling Bolshevik Party from the policy of «war communism» and transition to the NEP was been restructured judicial system of Ukraine. December 16, 1922 VUTSIK adopted a resolution approving the «Regulation on Judicial System of the USSR»[2]. In accordance with the Regulation introduces a single judicial system – People's Court, consisting of a permanent judge and two lay assessors, provincial courts and the Supreme Court of Ukraine. With the adoption in 1924 of all-union law «Fundamentals of the judicial system of the USSR and the Union Republic «and the transition to three-tier management system VUTSIK in 1925 approved the new» Regulations on the judicial system of the USSR»[3]. Position to define the basis the judicial system of the USSR People's Court, which provides Justice collectively as part of the national judge and two lay behind-the President (Art. 3). Further development was the principle of election of people's judges and lay judges, expanded the list of the last for each area, reinforcing procedures for the election of candidates for lay judges (Art. 19-44).

The Constitution of the USSR in 1937, adopted after the «Stalinist» Constitution of the USSR in 1936, reproduce its main provisions, states that «consideration of cases in all courts is carried out with the participation of people's assessors, except as otherwise expressly provided by law» (Art. 103) and that «people's courts are elected by the citizens of the district on the basis of universal, direct and equal suffrage by secret ballot for a term of three years «(v. 108). important provisions on the implementation of procedural justice only by the court, the publicity of the trial, the legal status of people's assessors, the independence of judges and their subor-

[1] СУ УСРР. 1920. – № 25 – Ст. 536.

[2] СУ УСРР – 1922. – № 54. – Ст. 779.

[3] ЗУ УСРР. – 1925. – № 92–93. – Ст. 522.

dination only to the law in the face of massive repression had declarative.

Constitutional provisions for a Soviet court were developed and specified in the law «On the Judicial System of the USSR, union and autonomous republics» in August 1938, which, inter alia, regulate the procedure for the election of judges and lay judges, involvement of the latter to Casework, giving them rights of a judge, the order of their salaries, reviews voters[1]. Repressive practices of extrajudicial enforcement, courts dependence of Party and government bodies has led to the emergence of norms that is without tsedentnoy-in-law: «In the temporary absence of the national judges (disease-from the start, and so on. D.) to perform judicial duties during his absence rests District Soviets on one of the lay judges»(v. 19). The law has a special role of the court in the education of Soviet citizens.

In the postwar period in the time of de-Stalinization occurred significant changes in the organization of the judiciary, strengthening of democratic principles in their work. This was facilitated by increase in the number of lay judges, empowerment regional courts and the Supreme Court. Guided «Basic Law on the Judiciary of the USSR, union and autonomous republics» (1958), the Supreme Soviet of the USSR adopted a «Law Judicial System of the Russian Federation «(1960), according to which sets common people's courts and the district of the city, elected for 5 years[2]. The law increased the timing of its people's assessors duties in court from 10 to 14 days a year, introduced a new procedure for their election. Now they were elected at general meetings of the workers, servants and peasants at their place of work or residence, military – in military units. The election was conducted by open ballot for a term of two years (Art. 21). Such a rule of law contributed to the qualitative composition of lay judges, increase their accountability to the electorate. Although the law requires systematic reporting only lay judges before the voters, became the rule statements and people's assessors, which was supported by the possibility of early withdrawal. For the first time in the history of the Soviet judicial guarantees judges were extended to the lay judges of the Supreme Court of Ukraine. People's assessors of district and regional courts no such guarantees have[3]. But their responsibilities are not limited to participation in consideration and resolution of cases in court – they were explanatory work on the judgment of a court in groups of workers with probation and parole, assisted by friendly vessels read as judges, lectures for the public. In 1957-1958 for the first time there was a form of public initiative of lay judges, as councils of people's assessors, which are widespread in the country. Through them, the courts and sent coordinate the work of assessors[4].

[1] Сб. законов СССР и указов Президиума Верховного Совета СССР. 1938 – июнь 1944 г. – М.: Гослитиздат, 1944. – С. 207, 208.

[2] ВВР УРСР. – 1960. – №23. – Ст. 176

[3] Історія держави і права Української РСР: в 2-х т. / ред. кол. Б. М. Бабій та ін. – Т. 2. – 1937-1967 рр. – К.: Наук. думка, 1967. – С. 323.

[4] Історія держави і права Української РСР: в 2-х т. / ред. кол. Б. М. Бабій та ін. – Т. 2. – 1937–1967 рр. – К.: Наук. думка, 1967. – С. 324.

These important changes in the practice of Soviet justice and participation in the people's assessors were legislated by the Constitution of the USSR in 1978 according h. 1, 2, 4 tbsp. 150 of the Constitution all courts of the USSR were established on the principles of election of judges and lay judges. The Basic Law has made significant changes in the election of people's assessors: lay judges of district, municipal people's courts are elected at meetings of citizens at their place of work or residence by open ballot for a term of two and a half years, and lay judges of the higher courts – corresponding Councils of People's Deputies. Judges and people assessors are responsible to the voters or entities that elected them, are accountable to them and can be withdrawn. Democratic character had and Art. Art. 152, 153 of the Constitution: Civil and criminal cases in all courts is collegial; the Court of First instance – with the participation of lay judges who enjoy rights of a judge; judges and lay judges are independent and subject only to the law. Last remained purely constitutional norm declarative, because the Basic Law does not provide for separation authorities in the state, but in the art. 6 fixed the monopoly position of the Communist Party in the political system of the USSR as the leading and guiding force of Soviet society. For the Soviet proceedings important novel in the Constitution was the recognition of the rights of non-governmental organizations and labor groups to participate in proceedings in civil and criminal cases.

The broad involvement of the public in the administration of justice reflected and consolidated the procedural law. Thus, Code of Criminal Procedure of the USSR, approved by the Supreme Soviet of the USSR 28 December 1960, provided for the transfer of the case of minor crimes committed for the first time on consideration of the comrades' court (Art. 8) or to the Commission on Minors (v. 9), the possibility of transferring the guilty to Bail public organization or team of workers to rehabilitation and correction (Art. 10) [21]. PDAs for the participation of lay judges and collegiality in the proceedings, their rights (Art. 1, 2, 3, v. 17). As legislation and decisions of the Plenum Supreme Court of Ukraine on August 15, 1997 h. 2 and 3 tbsp. 17 were amended, this narrowed the scope of the participation of lay judges in criminal proceedings: they are involved only in the analysis criminal cases involving crimes for which the law prescribes imposition of the death penalty. Such cases are dealt with in a court of first instance composed of two judges and three lay judges that the administration of justice shall enjoy all the rights of a judge.

History of domestic and foreign jury trial does not know such publicity of the trial, the Criminal Procedure Code which provides for the USSR: in order to increase the educational role of litigation and prevent crimes «in necessary cases reported to workers at the place of work or residence of the accused trials» to be held, or their results. «The courts have widely practiced conduct trials directly on plants, construction sites, state and collective farms, with the participation, where necessary, public prosecutors and public defenders «(ch. 4, Art. 20). Civil Procedure Code of the Ukrainian SSR in 1963, as of June 20, 1997 also secured

the «participation in the process of government management, trade unions, enterprises, institutions, organizations and individual citizens, protecting the rights of others «(Ch. 14).[1] Trial cases held in the premises of the court, «and on the most urgent cases, having a wide public interest – directly on the plants, construction sites, offices, state farms, collective «(ch. 1, Art. 159). This was the Soviet democracy proceedings – with wide attraction to it public through the election of lay judges and lay judges, their accountability that, despite all the problems of the totalitarian regime in the USSR, it also has positive aspects and deserves objective study.

With the proclamation of an independent, democratic and development the state of Ukraine began a new, modern stage in the long history of the jury. Implementing regulations on direct participation of the people in the administration of justice through people's assessors and juries, legislator in the Law of Ukraine «On the Judicial System and Status of Judges» 2010[2] and procedural codes has fixed this form of justice. Named Law Institute determined the place of lay judges and juries in the organization of the judiciary, their status and powers (Art. 2, Art. 1, p. 3 art. 5 hr. 1, Art. 15; h. 1, 2, Art. 57) procedure for drawing up the list of People judges, jurors and approval (Articles 58, 58-1), the requirements for lay judges sworn (v. 59), the grounds and procedure exemption from the duties of a lay judge, Sworn (v. 60), the order to attract people's assessors, Sworn his duties in court (in. 61), identified guarantee their rights (Art. 62). In the law were made significant changes and additions (memory number 4652-VI of 13.04.2012, the, № 716-VI from 12.19.2013, the, № 769-VII from 02.23.2014, and others.) On the peer review of court Affairs, status, the list of jurors[3]. In our opinion, ch. 1, Art. 57 of the Law «On the Judicial System and Status of Judges» requires a clear separation of the Institute lay judges and of juries, and h. 1, Art. 58, para. 6, Art. 59 – conform to the requirements of the Law of Ukraine «On the Principles state language policy».

Categories of cases which involved consideration of the jury, defined the new Criminal Procedure Code of Ukraine, adopted by the Verkhovna Rada of Ukraine on April 13, 2012 jury recognized as citizens of Ukraine, which in the cases provided by procedural law, are involved in the administration of justice, ensuring compliance with the Constitution of Ukraine the people directly involved in the administration of justice (art. 30 of the Code of Criminal Procedure)[4]. Commented Chapter 30 Code of Criminal Procedure «Special the orders of the court of first instance «for the first time existence of the Ukrainian criminal process to define the concept, particularly the formation and activity of the jury, cemented mechanisms for implementing the citizens' right to participate in it. According to p. 3 art. 31 Code

[1] ВВР УРСР. – 1963. – № 30. – Ст. 464

[2] ВВР України. – 2010. – № 41-50. – Ст. 529

[3] ВВР України. – 2013. – № 21. – Ст. 201

[4] Кримінальний процесуальний кодекс України. Науково-практичний коментар: у 2 т. / за заг ред. В. Я. Тація, В. П. Пшонки, А. В. Портнова. – Х., 2012. – С. 167, 168.

of Criminal Procedure of criminal proceedings in the court of first instance in the offenses for which the punishment was life deprivation of liberty, is collegial court consisting of three professional judges, and at the request of the accused – by a jury consisting of two professional judges and three jurors.

Code of Criminal Procedure is defined and procedure for jury duty (Art. 383). Such a court created at the local general court of first instance. As the authors of the sword, the second volume of scientific and practical commentary of the Code of Criminal Procedure, «WHO-opportunity to exercise their constitutional right to participate in justice as a juror came from citizens only with the adoption of the new Criminal Procedure Code»[1]. This observation contradicts the historical experience of the court jury in Ukraine. As for the language in which the criminal proceeding is carried out, then, in our opinion, it is reasonable cause provisions of the new Code of Criminal Procedure set forth in Sec. 22 hr. and 1 hr. 2, Art. 7, as well as art. 29 In accordance with Art. 14 of the Law of Ukraine «On State Language Policy».

Code of Civil Procedure also suggests revival of the institute of people's assessors. In Sec. 2, Art. 18 GCA determined that in the cases established by this Code, civil cases in courts of first instance are considered by a panel of one judge and two lay judges, which in the administration of justice shall enjoy all the rights of judges.[2] Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine in connection with the adoption of the Criminal Procedural Code of Ukraine» was amended in the art. 185-5 of the Code of Administrative Offences, which refers to the obstruction of subpoena lay judge, juror. True, as noted by some legal scholars, to discuss the possibility for citizens Ukraine's participation in the administration of justice in all types of courts of general jurisdiction, regardless of their specialization[3].

Thus, the legislation of Ukraine – the Constitution of Ukraine, Law of Ukraine «On the Judicial System and Status of Judges», the procedural codes – to formalize the idea of the necessity of existence as an institution of people's assessors, and the Institute of Chartered. Thus the legislator at a qualitatively new, modern level strengthened and developed traditions and experience, domestic and foreign, this form of participation of the people in justice, made them an important part of the current judicial reform in Ukraine. Institutes of lay judges and juries are capable of positive impact on the democratization of the judicial system, to strengthen public confidence in the judiciary and judges, faith in justice and the law.

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[1] Кримінальний процесуальний кодекс України. Науково-практичний коментар: у 2 т. / за заг ред. В. Я. Тація, В. П. Пшонки, А. В. Портнова. – Х., 2012. – С. 167, 168.

[2] ВВР України. – 2004. – №40-41, 42. – Ст. 492

[3] Вільгушинський М. Участь громадськості у здійсненні правосуддя судами загальної юрисдикції / М. Вільгушинський // Юрид. Україна. – 2013. – №7. – С. 95, 96.

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Lustration legislation and practice: the experience of the czech republic

Experience in lustration' legislation and practice in post-communist countries of Central Europe drew attention of Ukrainian society. Attempts to conduct such activities at the level of amateur public cannot give a proper social impact. The problem in scientific terms should be treated in the context of formulation the legal instruments for mechanism of the political elite renewal. Legislation on lustration has been approved in a half dozen of states with totalitarian past. But the experience of Czech Republic attracts by its intensity and consequences.

Solution of the issue related to formation of new administrative elite after the «Velvet Revolution» in November 1989 in Czechoslovakia was one of the policy priorities. To that end, in the months after the revolution were carried out such organizational and legal measures as «personnel reconstruction» at representative bodies (co-optation by the laws among the deputies of the opposition» Civic Forum «and» Public against Violence» before the first free elections) as soon as possible conducting parliamentary elections as well as the nationalization of property which belonged to the Communist Party of Czechoslovakia[1]. Since 1990 the practice was introduced of prohibitions to occupy certain positions in the public administration and law enforcement authorities for certain categories of citizens, known as «lustration». What is the nature of this phenomenon?

To begin with that not only the new political leadership, but also wide public opinion clearly realized two things. First

[1] Ústavní zákon ze dne 16. listopadu 1990 o navrácení majetku Komunistické strany Československa lidu České a Slovenské Federativní Republiky // Sb. zákonů č. 496/1990. – S.1850–1851.

is that the state regime of 1948–1989 in Czechoslovakia was not a consequence of the public will and, in fact, had an illegal character. The «wrongfulness» of the previous regime was determined not only by historians, but also legally. On November 13, 1991 was approved the federal law «On the period of non-freedom», in which the provisions of Article 1 determined that «in the 1948–1989 the Communist regime violated human rights and its own laws».

Later, in 1993 in independent Czech Republic was approved another legislative act on the matter – «On the unlawfulness of the communist regime and the resistance against it»[1]. The preamble of the Act noted: «The Parliament notes that the Communist Party of Czechoslovakia, its leaders and members are responsible for the way of power in the country in the years 1948–1989. Namely for the systematic destruction of the traditional values of European civilization, for intentional violations of human rights and freedoms, for moral and economic decline, for carried out via justice crimes and terror against the carriers of other views, for the replacement of a functioning market economy by policy management, destruction of the traditional principles of property rights, the use of upbringing, education, science and culture for political and ideological purposes, reckless destruction of nature».

Secondly the law- enforcement bodies under a totalitarian regime used to serve primarily to the ruling party, and therefore after loose the monopoly on power by CP they find themselves in a situation of metamorphosis. Understanding of this led to the primary elimination of the State Security Service (SSS) in Czechoslovakia in February 1990, and to the management of newly established in its place initially Bureau on protection of the constitution and democracy, and later the Federal information Security Service gradually began to come people from the former dissident movement[2].

From a legal point of view «lustration» means an extract of relevant data from the official document. Matter is that at the time in the information assets of the interiors (federal and republican) were so-called «lustration cards» containing, among other things, information on whether for this person in the archives department is or is not any material evidence of its cooperation with the SSS[3].

Public opinion in the country was at that time concerned about the possible impact of the former secret service staff to the political process. Information from the Parliamentary Commission of Inquiry, which investigated the events of November 17, 1989 (beating the student demonstrations by police special forces), it appeared that the SSS had in its ranks 100 thousand undercover employees, ie.

[1] Zákon ze dne 9. července 1993 o protiprávnosti komunistického režimu a o podporu proti němu // Sb. zákonů č. 198/1993. – S.1010–1011.

[2] Див.: Лемак В. «Люстрація» державного апарату в Чехії і Словаччині // Державне управління та місцеве самоврядування в Україні: шляхи реформування. Матеріали міжнародної науково-практичної конференції 17–20 вересня 2000. – Ужгород, 2000. – С. 76–86.

[3] Gál F. Z prvej ruky. – Bratislava, 1991. – P. 108.

over 10 thousand agents. In addition to the three categories of secret staff (residents, agents and keepers safe house), for the SSS worked also informants – part-time assistants of security service[1]. In addition, according to K. Perknerovoyi, about 35 thousand citizens of Czechoslovakia were registered by the KGB in Moscow (not being in the relevant registers of undercover agents in their own country)[2]. This fact also has been perceived as a threat to young independent state.

The idea of «lustration» was implemented in the political practice during the preparation for first free parliamentary elections (June 1990). «Civic Forum» initiated «lustration» of all their candidates included to the electoral list. In Slovakia, this initiative has been supported by the movement «Public against Violence.» By the way, in this part of the Federation in July 1990 continuation of «lustration» supported by the 54.1% of respondents, but at the same time almost 20% of respondents believed that this was worth to be completed. Among doubted concerning the expediency of lustration were some prominent politicians. Chairman of the Federal Assembly of Czechoslovakia Alexander Dubcek, for example, said on this occasion: «Yes, I am against lustration. We must understand that the arguments and motives of cooperation with the SSS were different for different citizens. Some of them worked by conviction, or felt it was right in terms of national security. But there were people who were forced to that cooperation by concrete life situation ...»[3].

However, the first freely elected Czechoslovak parliament decided not only to continue the «lustration» of the state apparatus, but also to regulate it at the level of federal law. On October 4, 1991 Czechoslovakia Federal Assembly approved the law called «On Establishment certain preconditions for occupation certain positions in public bodies and organizations of Czechoslovakia, the Czech Republic and the Slovak Republic» (so-called « the lustration law»)[4]. It regulated grounds and mechanism of «lustration».

Under the provisions of §1of mentioned above Law, it is used only for the elected positions, appointment or approval, in such public bodies and organizations as: 1) governments of CSFR, the Czech Republic and the Slovak Republic; 2) The Czechoslovak Army (positions that correspond to the rank of colonel and general, DAs); 3) Federal information security, federal police corps, Police Corps of Castle; 4) Office of the President of CSFR, Office of the Federal Assembly, CPR Office, Office of the SPR, the government presidium CSFR, the Presidium of the Government of the Czech Republic, the government

[1] Gál F. Z prvej ruky. – Bratislava, 1991. – P. 15–116.

[2] Perknerova K. Komu slouži vnitro? – Praha, Grafit, 1992. – P.19.

[3] Dubček známy a neznámy. Zost. Tereza Michalova. – Bratislava, 1993. – P. 71

[4] Zákon ze dne 4. října 1991, kterým se stanoví některé další předpoklady pro výkon některých funkcí ve státních orgánech a organizacích České a Slovenské Federativní Republiky, České republiky a Slovenské republiky // Sb. zákonů č. 451/1991. – S.2106–2110.

presidium SR Office of the Constitutional Court of CSFR, the Czech Constitutional Court Office, Office of the Constitutional Court of the Slovak Republic, CSFR Office of the Supreme Court, the Office of the High court of the Czech Republic, Office of the Supreme Court of the Slovak Republic, the Presidium of the Czechoslovak Academy of Sciences and the Presidium of the Slovak Academy of Sciences; 5) Czechoslovak Radio, Czech Radio, Slovak Radio; Czechoslovak Television, Czech Television, Slovak Television; Czechoslovak News Agency, Czechoslovak News Agency of Czech Republic, Czech News Agency of the Slovak Republic; 6) State enterprises and organizations, corporations, where most of the shares owned by the government, the foreign trade enterprises, public organizations of the Czechoslovak state roads, public funds, public financial institutions, Czechoslovak State Bank. To the positions that fall under the «lustration» under this paragraph, refer only positions of top managers in these organizations and executives who are in their direct supervision and in universities – also office functionaries and elected academic positions, which are approved by the academic senate; 7) judges, jurors, prosecutors, investigators prosecutors, employees of state notaries, public arbitrators and the person who acted as «reserve» officers of justice, prosecutors, notaries and arbitration.

The above positions the citizen of CSFR under §2 of the Law could occupy only on condition that during the period from February 25, 1948 to November 17, 1989 he did not belong to any of the following categories of persons: a) National Security Corps officer in the State Security; b) was not registered within the State Security materials as resident agent, keeper of safe houses, apartments tenant, informant or voluntary employee of State Security; c) State Security conscious employee; d) The Secretary body of Czechoslovakia CP or Slovakia CP even from the district level and above it, a member of the Presidium of these bodies, Central Committee member or member of the Central Committee of the CPS; Bureau member of the leadership on party work in the Czech regions or member of the leadership of party work in the Czech regions, except for those who held these positions during the period from January 1, 1968 to May 1, 1969; e) the staff of the above party political leadership to the area of national security Corps; e) a member of the People's Militia; g) a member of the Action Committee of the National Front after 25 February 1948 .; Member of check commissions after February 25, 1948 or a member of verification commissions during the «normalization» after 21 August 1968 .; g) listener of the High School of KGB by F. E. Dzerzhinsky, for employees under the Council of State Security Ministers of the USSR; for employees after Graduate School of the USSR Ministry of Public Security; High political School of the USSR graduate student, or students of these schools with a term of more than three months of training.

In addition, further restrictions are imposed to people who wanted to take positions in the federal police and secu-

rity service. So, to occupy positions in the Federal Ministry of the Interior, the Federal Security Information Service, Federal Police Corps and Corps Police of Castle citizen could on condition that during the period from February 25, 1948 to November 17, 1989 also was not: a) an employee of the National Security Corps who served in the state security unit at the site counterintelligence direction; b) appointed chief of the above and in the bodies of national security; a) in the case of national security as secretary of the party committee Czechoslovakia CP or the CPS party committee member of the party committee of management or employee of the National Security Corps who served in the Office of political education, education, culture and propaganda of the Federal Ministry of the Interior (§3).

In the Czech Republic to restrict the following categories of persons to serve in the Ministry of Interior, police and correctional service of this subject of the federation on April 28, 1992 was adopted a separate law «On some additional conditions for some positions that are adopted or appointed by the Police of Czech Republic and employees of correctional Services of the Czech Republic «(so-called» small lustration law», №279/1992 g.)[1]. It, in particular, specified that persons who fall under lustration conditions provided by the federal law could occupy lower positions of investigators and police officers who were in no way related to management functions.

It should be noted that the Law of 1991 provided the right for the Federal Minister of Defense and Internal Affairs, Chief Information Officer and Director of the Federal Security Police Corps to grant exemptions to the general rules of «lustration» if their application would have caused serious prejudice to the interests of national security.

The Act provided for a procedure of «lustration». A citizen who has to take up powers in the bodies or organizations that are subject to restrictions, submit a certificate, personal official statement or the conclusion by leader of this body or organization that under the previous regime that person did not belong to any of the categories of persons covered by §2 of «lustration law». On issuing certificates the citizen makes a request to the Federal Ministry of the Interior. If a citizen is already working on one of the office envisaged by §1 of the Law number 451, a request for him makes the head of the authority or body which has the right to appoint (approve) for the position, and the request should be made no later than 30 days after the entry into force of the law (Article 6). Is interesting that itself reference, the conclusion and the data they contain and which serve to the implementation of «lustration» and litigation are not recognized by §10 of the Law as facts that are secret.

In order to verify a fact related to the conduct of «lustration» at the Federal

[1] Zákon České národní rady ze dne 28. dubna 1992 o některých dalších předpoklady pro výkon některých funkcí obsazovaných ustanovením nebo jmenováním příslušníků Policie České republiky a příslušníků Vězeňské služby České republiky // Sb. zákonů č. 279/1992. – S.1546-1549.

Ministry of the Interior was established an independent commission. Chairman, deputy chairman and a member of the commission had been appointed by the Presidium of the Federal Assembly of CSFR from the people who have an impeccable reputation and were not deputies of the Federal Assembly. Two members of the commission appointed by the Minister of Interior CSFR, three members – Presidium of the Czech National Council and the Presidium of the Slovak National Council, one member – Director of the Federal information Security Service, defense minister CSFR, the Minister of Interior of the Czech Republic, Minister of Interior of the Slovak Republic. This law required that members of the committee appointed by the Ministers and the Director of the Federal information Security Service must have completed a law degree, and immediately emphasized that so is not considered education received at the High School of National Security Corps. Commission meeting held behind closed doors. Citizen whom relates the matter before the meeting is provided the opportunity to review all records and facts, including written materials about him. During the meeting of the commission he is also provided the opportunity to speak on all the facts. Persons invited to undertake to come to the commission, to tell the truth and nothing to hide. On the duty to give testimony of a witness, on invitation, excuse, prohibition interrogation, right to refuse testimony, the right to speak as a witness and recruitment, his responsibilities were distributed by the criminal procedure law. Recent made effective the activity of such commission.

It must be emphasized specific sign of the Act of October 4, 1991 – it had inverse effect. According to §14 of this regulation, if the citizen does not meet the «lustration» requirements for the positions, an employment contract with him is terminated not later than 15 days from the day on which it became known to the organization. The illegality of termination of employment or service relationship can be appealed by citizen in court no later than 2 months from the date when should be terminated such a relationship with him. The complaint of the citizen is considered at regional court in the first instance at his place of residence (§18). Fair to be noted that some Czech researchers (including known legal scholars Yichinski S. and V. Mikuled) subjected to harsh criticism «lustration law» on constitutional and legal point of view. Their argument: the law cannot establish collective legal liability, especially – of retroactively; it cannot be based on individual guilt; on these and other reasons it conflicts with the rules of the Federal Constitution and international treaties that undertook Czechoslovak state, particularly in the field of human rights. These scholars argue that indeed for years 1948-1989 the Communist regime systematically and with different levels of intensity violated basic human rights in Czechoslovakia. For such acts are responsible persons «who created political and state power by their actions and actively supported it and helped to keep» but, they believe the legal responsibility (especially criminal)

to such persons may be used only on an individual basis, based on legal assessment of specific acts[1].

As for practice of application the federal law, we note that the de facto «lustration» of the state apparatus was held in the Czech Republic, much less – in the Slovak Republic, and was marked primarily as preventive in nature. Most civil servants from among those whom covered the «lustration law» left their own positions or were not pretending to the specified position.

Summarized data on the application of the rules of lustration were submitted by the Ministry of Interior of Czech Republic in accordance to case at the Constitutional Court of the Czech of 2001 on the constitutionality of two laws: the lustration № 451/1991 and so-called «small lustration law» № 279 / 1992 The data provided to the court contained the following numbers: Ministry of Interior of Czech Republic issued from 1991 to November 5, 2001 a total 366 980 «lustration statements», including «positive» (i.e. verifying compliance of citizens with lustration requirements) – 3,45%. After receiving «positive» statement 692 citizens disagreed with them and filed a complaint, and in 117 cases they have achieved their viewing[2]. The above means that for ten years in the Czech Republic more than 12 500 people were not admitted to positions in state bodies and institutions or have been released from them on the grounds set out in lustration law.

In Ukraine, as in other post-Soviet states, indicated legislative act, as well as its practical application, has repeatedly been criticized. However, in reality, but without legislative support, «lustration" practice regarding managerial personnel of security service has been applied in Ukraine since independence in August 1991, and in 2005 took place» cleaning» of the state apparatus, which was perceived as persecution for the political beliefs. This approach marked by legal nihilism, because took place without the legitimate reason and due process.

In the Czech Republic purposeful formation of new elite, as in other Central European countries had an undeniable influence on the directions sequence and pace of systemic reforms. First, in a few years has been formed a new administrative elite that was not associated with the past and, most importantly, unofficial relations among themselves. A new generation of politicians and civil servants (with a relatively young average age) did not know the experience of the previous system, guided by other values and this affected on the intensity of reform. Second, the Communist Party itself, though preserved in the Czech Republic its name (from 1990 it

[1] Jičinsky Z., Mikule V. Některé ústavněprávní otázky tzv. lustračního zákona // Právník, č. 3-4 / 1992. – S.227–233.

[2] Nalez Ustavního soudu České republiků ze dne 5. prosince 2001 o návrhu skupiny 44 poslanců na zrušeni zákona č. 451/1991 Sb., kterým se stanovi některe dalši předpoklady pro výkon některých funkci ve statnich organech a organizacich České a Slovenske Federativní Republiky, České republiky a Slovenske republiky, ve zneni pozdějších předpisů... // Sb. zákonů č. 35/2001. – S.616-636.

is called «Communist Party of Bohemia and Moravia»), has undergone significant internal change. Thirdly, the Czech Republic has avoided political and administrative crisis. The political the elite united around the policy priorities that are based on European values. Fourth, the lustration law decided another problem – the protection of the rights of persons whom it is addressed. These persons are protected from unlawful use of archival material regarding them, from possible use of information compromising them and therefore – manipulation. Based on the above, the appropriateness of legislative regulation of lustration in Ukraine is of no doubt.

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Classical and non-classical models of legal reality comprehension

the division into classical and non-classical (post-non-classical) with respect to characteristic features and stages of the development of philosophy as a science (as a whole and its separate branches) is rather spread in the modern scientific literature[1]. Such distinction can be seen in philosophy of law too, and besides not only on the problem of understanding of law as a whole[2], but comprehending particular legal phenomena[3]. At the same time the peculiarities as existence of law and its cognition which are significantly differ from existence and cognition of natural and other social processes determine the necessity of posing the question about possibilities and borders of the concepts 'classical' and 'non-classical' usage with regard to different conceptions of understanding of law evaluation. To decide this question is principal in conditions of post-Soviet jurisprudence search for its methodological identity.

The theme of classical and non-classical (or post-classical) paradigms correlation in comprehending law is actively discussed in the contemporary Russian and Ukrainian theoretical jurisprudence[4]. In particular, A. V. Polya-

[1] Постнеклассика: философия, наука, культура: Коллективная монография / отв. ред. Л. П. Киященко и В. С. Степин. – СПб., 2009.

[2] Неклассическая философия права: вопросы и ответы / Максимов С. И., Пермяков Ю. Е., Поляков А. В., Стовба А. В., Честнов И. Л., Четвернин В. А. Под ред. А. В. Стовбы. – Х., 2013.

[3] Карташева А. Філософський смисл класичної та некласичної концепцій авторського права / А. Карташева // Філософія права і загальна теорія права. – 2013. – № 1. – С. 260–267.

[4] Поляков А. В. Прощание с классикой, или Как возможна коммуникативная теория права / А. Поляков // Российский ежегодник теории права. – № 1. – 2008. – СПб., 2009. – С. 9–42; Максимов С. И. Правовая реальность: опыт философского осмысления / С. И. Максимов. – Х., 2002; Честнов И. Л. По-

kov, announcing 'farewell to classics' interprets non-classical legal understanding as integral understanding of law in the form of author's interpretation of communicative legal theory[1]. In the works of the author of this article's contradistinction of classical and non-classical ways of comprehension of law is used to the distinction of corresponding kinds of theories of natural law[2]. Giving advantage to the term 'postclassical' before the term 'non-classical' I. L. Chestnov offers a program of changing ontology and methodology of jurisprudence as a whole and the theory of law in particular[3]. Postclassical epistemology of law, according to his position, is, first of all, in application of three 'turnings' in the Humanities: linguistic, anthropological and pragmatic to the description and explanation of juridical reality. That is why, law, to his point of view, is a text created by a person and reproduced by the actions and mental representations of people. Thus, law is not a stated structure reduced to one of its levels, but «a process of *legal reality* reproduction (italic is mine. – *S. M.*)»[4].

There a considerable analytical-synthetical work on the features of classical and non-classical (or postclassical) legal understanding systematization and comparison should be mentioned. This work was done by H. V. Timoshina in her Doctor's dissertation[5]. Presenting these ways of legal understanding as definite styles of theoretical legal thinking, typological features of which are defined by the kind of scientific rationality, the researcher distinguished them according to some bases, on the way of interpretation of legal reality, first of all: on objectivist, or subject-object, essence of law interpretation from one hand, and constituting, processuality through interpretation practices of the subject – from the other. Together with 1) objectivist interpretation of existence of law, as scientists think, for classical legal understanding is characteristic: 2) representation of a subject as a viewer and no influence of the method on the object of cognition; 3) correspondent theory of truth; 4) exhaustive explanation of legal reality in the form of objective truth; 5) studying the object as a 'pure' one, without considering socio-cultural determinants; 6) prescriptive character of the theory which becomes the basis for theoretical schemes realization. In its turn, for non-classical conceptions together with 1) processuality of interpretation practices of the subjects also characteristic: 2) constituting the subject by a research method; 3) coherent theory of truth;

стклассическая теория права. Монография / И. Л. Честнов. – СПб., 2012; Тимошина Е. В. Теория и социология права Л. И. Петражицкого в контексте классического и постклассического правопонимания / Е. В. Тимошина. Автореф. дис. … докт. юрид. наук. – М., 2013.

[1] Поляков А. В. Прощание с классикой, или Как возможна коммуникативная теория права. – С. 9–42..

[2] Максимов С. И. Правовая реальность: опыт философского осмысления. – Х., 2002. – С. 76–142.

[3] Честнов И. Л. Постклассическая теория права. Монография. – С. 12.

[4] Ibid.

[5] Тимошина Е. В. Теория и социология права Л. И. Петражицкого в контексте классического и постклассического правопонимания. Автореф. дис. … докт. юрид. наук.

4) principal incompleteness of theoretical legal knowledge; 5) socio-cultural determination of legal reflection; 6) consideration of the theory of law not as abstract knowledge, but as an instrument of the decision choosing in problematic situation[1].

H. V. Timoshina stresses that in classical legal understanding the specifics of legal reality in comparison with the reality specified by the procedures of natural scientific methodology is not articulated. Jusnaturalismus and juspositivismus which present rationalist and empiric variant of legal philosophy's naturalism are typical examples of such understanding of law. Complication of the picture of the legal reality is characteristic for non-classical understanding of law, and that is why classical interpretation of law as priori idea of law, «sovereign's command» or «legal order» begins to be accepted as empty[2].

Generally agreeing with the conceptions of characteristic features of classical and non-classical (or post-classical) legal understanding and its methodological bases offered by I. L. Chestnov and H. A. Timoshina, I could not but pay attention to some divergences between them and to the typology of classical and non-classical in the literature in the context of epistemological models which appeared in the second half of XIX–XX centuries[3]. Extrapolation of these models on the subject sphere of philosophy of law allows introducing the concept 'legal reality comprehension model', methodological meaning of which will be explicated further in this work.

The author of the mentioned conception N. V. Bryanick distinguishes between three principally possible epistemological models based on the definite principles: 1) objectivist-realists, subordinated to the principle of reality; 2) constructionist (founded on the principle of construction) and 3) symbolic epistemological model which correspond to the principle of symbolism. These are not only historical, but actual and mutually complimentary each other ways of thinking[4]. Each of the main epistemological models has internal integrity, definite completeness and consistency as for the compliance with the principle accepted as basic, they differ on the interpretation of the nature of cognitive activity, knowledge and truth.

From the point of view of objectivist-realist epistemological model *cognition* is the way of reproduction by the cognizing subject of the reality, of the world surrounding us. Such approach fully realizes the principle of reality and backgrounds on the everyday world experience and corresponds to the 'natural setting' of a person's attitude to the world. In regard to the science the principle of reality is specified in the principle of objectivity according to which classical science performs. *Knowledge* is the summation of cognitive images bearing similarity with the cognoscible

[1] Ibid. S.10. – In this it should be noted that both researchers correlate their analysis of 'classics' with the concept of legal reality.

[2] Ibid. S. 22 – 23.

[3] Бряник Н. В. Введение в современную теорию познания. Учебное пособие / П. В. Бряник. – М.; Екатеринбург, 2003.

[4] Ibid. – S. 250-251.

object which are its 'portrait' (reflective, photographic) copy. This is the position of essentialism. *The truth* is understood as concordance, it is the measure with the help of which the accordance of knowledge with the real nature of the things themselves (processes, attributes) can be established. Such model originates from Plato-Aristotle tradition, and its proponents are Marx-Engels' tradition in philosophy, French materialism and classical positivism. It really coincides with naturalistic model in I. L. Chestnov and H. V. Timoshima's conceptions and is represented in classical (naturalistic) conceptions of natural law and juridical positivism including Marx theory of law based on the principle of objectivity.

The principles of the other – constructivist – model were reflected on the material of science by I. Kant, first of all. *Cognition* is interpreted as creation, construction, constructing of the cognoscible object[1]. Operationalism opposes its position to scientific realism: "In science a cognoscible object ('physical reality') – if speaking about physics, 'mathematical reality', if speaking about mathematics, 'linguistic reality' – if speaking about linguistics, etc (we add 'legal reality', if to speak about law. – *S. M.*)) is not as a kind of original datum for a researcher, it is a result of his (her) activity"[2]. *Knowledge* is transformation of a cognoscible subject's abilities, but not of the essence of an object. That is why such approach is phenomenalist. The essence of knowledge is focused on the subject. The truth is also focused within the sphere of the subject's activity; it is the evaluation of some mental conditions of human activity which can possibly be established with the help of special mental procedures. According to Kant, the truth is concordance of knowledge with the laws of cognitive – rational activity, i.e. the truth performs as concordance, coherence.

Objectivist-realist and subjectivist-constuctivist models of the world comprehension refer to classical epistemological tradition. Alongside with them, proper non-classical model – symbolic – stands out. This model considers influence of culture on cognitive process, its philosophical basis – 'philosophy of language' in the broadest sense. Creation of senses and sign system (text) makes the essence of culture. Thus, in this epistemological model *cognition* is notional, spiritual-energetic comprehension of the essence, given by the symbols (or expressed in the language), *knowledge* is symbolic (= language, verbal) reality, presented in notional images the essence of cognoscible, and the truth gains epistemological meaning and is expressed in authenticity, i.e. beingness, realness of the symbols.

Thus, if the aim of cognition in the first model is an explanation of the essence of the cognoscible, in the second model – a description of that how it is presented to us, but for the third (symbolic) model of cognition its aim is comprehension[3]. "Cognition as comprehension leads epistemology into thematic field of hermeneutics; and one of the

[1] Ibid. – S.258.
[2] Ibid. – S.260.
[3] Ibid. – S.276.

non-classical direction in the modern theory of cognition is being worked out in the contact with hermeneutics"[1]. Therefore, in this model hermeneutic (interpretational) approach to comprehension of cognition as a whole and comprehension of legal reality, in particular, is realized, expressing proper non-classical approach to legal understanding.

Difficulties with elicitation of epistemological nature of law (because it can not be presented as some thing that can be pointed at: this is law, but rather is a specific world) determined the necessity to apply to the category of 'legal reality' as ontological (onto-epistemological, if to be precise) basis for pointing out different models of law comprehension. Legal reality (similarly to the concepts of physical, social, cultural, moral, psychological and other realities)[2] is the category for expressing the features of the world of law in all its diversity. Systematic representation of the multi-faceted manifestations of law allowed formulating the 'conception of legal reality'[3].

It should be noticed, that combination of the concepts 'reality' and 'law' is so obvious, that combination 'legal reality' was found and still is in the works of many other researchers.

Sometimes (as in the above examined works by H. V. Timoshima and I. L. Chestnov) its application is appeared to be systematic and conceptually justified, but sometimes very arbitrary and without including in the system of other concepts and categories. Besides, very often epistemological category 'reality' is substituted by its ordinary interpretation – empiric manifestation of law, by that "how law really functions" (in this sense it would be more correct to use the concept 'legal reality'). As reality is inherent to phenomena character to have essence independent from our will and wish, thus, legal reality in that not only exist in the legal institutions and legal relations, but those obviousnesses which could not have substantive essence, but we could not but consider. This concept allows combining the question of what is law with the question how it exists (what is the way of its essence, to what type of reality it belongs). In this, legal reality should be perceived not as external for a person (the subject of comprehension) reality, but the one in which a person himself is involved in the process of communication with the other participants of legal life.

Legal reality is not some substantial part of reality, but just the way of organization and interpretation of definite aspects of a person's social life, the essence of a person. But this way is so essential, that in its absence the human world splits, and in this connection we perceive it as really existing. And right in this is the difference between the existence of law and the existence of properly social objects, because the world of law in its basis is the world of the due,

[1] Ibid.

[2] Максимов С. И. Правовая реальность: опыт философского осмысления. С. 146–147.

[3] Максимов С. И. Концепция правовой реальности // Неклассическая философия права: вопросы и ответы. С. 31–61.

but not factual (empiric) existence. But this does not mean that law, firstly, is inexistent phenomenon and does not have a status of existent, and, secondly, is not connected with society, and is not a social phenomenon. Law certainly is social phenomenon because it is determined by some social interests, but not only by them. Law is relatively independent from existing social relations, and in some sense has its own logic. Its existence could not be limited to the existence of factual, i.e. to the legal texts, legal institutions, and relations between people.

Intersubject interaction is ontological basis of law, but not as some substantional reality, but as its ideal-meaning aspect, when people's common existence threatens to turn into arbitrariness, possibility of making harm for another that is why it contains the moment of due to restrain from such threat. That is why legal ontology is ontology of intersubjectivity, and primal reality of law stands out as the meaning of law which consists of ought (absolutely categorically mutual demands between the subjects of social communication) and elicited (explicated) from the communicative relation of at least two subjects.

Thus, law is deontological reality, i.e., ideally constructed being, the essence of which is in the ought, and though it is not fixed on itself, appears in the empiric world, it is not confined to social facts. Legal reality has meaning construction. Legal meanings are subjected in mental settings, ideas and theories, in sign-symbolic forms of the norms and institutions, in human actions and relations, i.e. in different manifestations of legal reality.

Following from that has already been said, different models of law cognition are the models of legal reality comprehension. Starting point of any law comprehension is the question of possibility to comprehend. Can we say something about legal reality? What is the nature of such utterances? In what way can legal reality be given to us? Obviously, the answer to this question is closely connected with the answer about the nature and the ways of legal reality existence that, in its turn, suggests some preliminary understanding, taking us back to the prior question about the possibility of the latest.

The difficulty with entering into this circle is that because of the diversity and procedural nature of law it can not be 'caught' in its entire. We always see not all legal reality in general, but some of the forms of existence of law or stages of its realization: the idea of law, sign forms, interrelation between social subjects.

This circumstance conditions the acceptance of methodological pluralism in law comprehension, but not as eclectic conglomeration of different definitions of law, but as pointing out the main ideological and methodological approaches to its comprehension in their subordination and complementarity.

Depending on what is offered as the basis of authentic reality of law, i.e., such space, in which legal meanings are 'located', four main ways of legal reality comprehension can be pointed out, each of which is accented on one of its aspects:

1) legal positivism is accented on the external side of legal reality, the set of rules provided by the coercive power of a state;

2) legal objectivism is accented on the social conditionality of law, its enrooting into life;

3) legal subjectivism, or classical conceptions of natural law, is accented on ideal and moral side of law unfolding the idea of law in the subject's conscience;

4) legal intersubjectivity, or non-classical conceptions of natural law, accented on that side of law which is revealed in the process of the subjects interaction, in their communication and interpretation of the position of the Other[1].

Each of these approaches to legal reality comprehension (which can be marked as empiric, essentialist, deontological-constructivist, interpretation-communicative) has its advantages and disadvantages. Legal positivism is oriented on the comprehension of institutional side of law, and thanks to this it achieves definite severity and clearness of its provisions, but provides somehow depleted image of legal reality, ignoring its ideal side. Legal objectivism focusing attention on social basis of law, first of all, enrootness of law into human's life turns out to be insensitive to the problem of justice, other axiological foundations of law. Legal subjectivism, pointing at enrootness of legal meanings in conscience, offers wonderful models of legal world outlook but at the same time showing some detachment from real life.

Three above mentioned approaches express classical understanding of law based on the separation of essence and being (as the theory of natural law and legal positivism), subject and object (as subjectivism and objectivism), they proceed from external position of a researcher as observer. They are opposed by non-classical approach to law comprehension, based on overcoming of one sidedness of other approaches – the position of intersubjectivity, coming out from the position of a researcher as a participant of legal events which is realized, first of all, in phenomenological-hermeneutic and communicative-discursive forms.

According to this approach legal reality can not be embraced in all its entirety not only because of its dynamism, but because here we can not be in the position of the external observer, always manifesting ourselves as a participant of legal relations who comprehends his/her being-in-law from 'inside'. That is why the meaning of law is not dissolved in the subject's conscience or in the external social world, but is seen as the result of the meeting (communication) of the subjects immersed into the life-world in the process of which, thus, law is realized and reproduced.

Regarding to cognitive-methodological aspects of the conception of legal reality we can say the following: positivist-objective, subjectivist and intersubjectivist models of its comprehension correspond to the main epistemological models overviewed before: realist, constructivist, and symbolic; the first two of

[1] Максимов С. И. Правовая реальность: опыт философского осмысления. С. 138–142.

which relate to classical model, and the third one – to non-classical.

Such analysis gives ground to introduce some specifications in the interpretation of the models of comprehension of legal reality which have been discussed in the first part of the article.

First of all, it concerns characteristics of the second, subjectivist model. It can not be attributed to non-classical from the point of philosophical criteria. Classics in philosophy include both objectivist and subjectivist approaches, but in science constructivist subjectivism expresses its nature better than naïve realistic setting of objectivism. Here it would be more appropriate to speak about traditional and classical models of science, specifying that for cognition of law the way out into the sphere of constructivism is not spread much but an essential approach to it. No approach has absolute advantage. Largely, the choice of this or that approach focusing on a correspondent aspect of legal reality gives the opportunity to decide definite sphere of questions more or less satisfactory. Non-classical approach to law comprehension in the borders of post-Soviet jurisprudence can be inappropriate for philosophy and scientific knowledge as a whole. That is why when 'farewell to classics' is announced, that better means farewell to Marxist tradition in the theory of law (which in its basis is objectivist), as a call for true scientific character of the theory of law and all legal science as a whole.

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Some issues of preparation of judicial reform of 1864

the peasant reform became the turning point in the history of Russia in the 19-th century. It gave an immediate impetus to the territorial (Zemstvo), city, judicial, military and other reforms, which significantly transformed the political superstructure of the empire,

The judicial reform of 1864 became one of the largest, democratic and consecutive ones[1]. There had not been another reform where the ideology of formal equality was most fully reflected in its principles. All existing reforms established the guarding role of tsarism, protection of interests of the nobility distinctly enough. It must be kept in mind that courts, judicature are the systems that an ordinary citizen doesn't face daily, and he can easily live his life, but never attend court. Nevertheless, the judicial reform wasn't less important for the citizens of the Russian Empire than the other ones. It is a courtroom where vital interests of citizens clash. So, a highly-effective and accessible judicial system, a reasonable and transparent procedure and procedural guarantees are important for the whole society. From this point of view the judicial reform concerned the interests of all classes, all layers of Russian society.

The judicial reform still possesses special interest, although one and a half century has passed from the moment of its implementation: the principles of judiciary and legal proceedings embodied in the court statutes haven't sunk into oblivion; they are still the subject of direct law-making and practical application. Nowadays old legal ideas and legislation can't be directly transferred to life, while it is advisable to use all sensible and helpful ideas in the field of judicial system and legal proceedings in

[1] Коротких М. Г. Борьба в правительственных кругах по поводу принципов судебной реформы в России (1857-1859) / М. Г. Коротких // Государственный строй и политико-правовые идеи России второй половины XIX столетия – Воронеж, 1987. – Р. 5.

the course of the judicial reform in Ukraine.

The 1864 judicial reform, as well as other reforms of the 60–70th years in the 19-th century, was the consequence of crisis in Russian society, including the crisis of tops, i.e. when the ruling establishment became aware of the necessity of changing political and legal life in the state. Different links of the autocracy machine had become useless by the middle of the 19-th century, but, perhaps, no public unit was in so nasty state as the judicial system. «Corruption, bribery, lawlessness, unskillfulness of judges at different levels characterized the judicial system of the first half of the 19-th century which in general wasn't capable to solve legal problems»[1]. It should be mentioned that the society did not want to live as before, it demanded a judicial reform not less than it needed a peasant reform. All were interested in the court system reform, except the judicial officials who profited from injustice and who hampered any innovation. There is no surprise that the supporters of the judicial reforms were the emperor Alexander II[2] and his brother Konstantin Nikolayevich who adhered to more radical and liberal views.[3]

The judicial crisis demonstrated itself in a wide range of circumstances which predetermined the need for judicial reform. First of all, there was no strong legal base for the needed changes. The pre-reform court system was based on the legislation enacted by Peter I and Catherine II, particularly the standards of the Cathedral code of 1649 and the court decisions in the Decembrists' case. At the beginning of the 19–th century M. Speransky systematized Russian law. As a result, the judicial legislation was included into the second book of the 15-th volume of the Code of Laws of the Russian Empire, as A. Koni wrote, it turned out «incoherent collection of the rulings made at different times».

The pre-reform court is characterized by a variety of judicial bodies, complicacy and complexity of legal proceedings, in some cases by impossibility to establish jurisdiction of a judicial body to hear varying kinds of cases. Consequently, cases went from one court to another endlessly, often coming back to the court of first instance, from where again began a long way up, thus the procedure often took decades. In the annual report of 1842 the Minister of Justice V. Panin stated that the number of trials lasted more than ten years, where separate proceedings took 28 years[4].

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[1] Еволюція етосу юриста (історичний та соціально-психологічний нарис): за ред. В. О. Лозового, В. О. Рум'янцева. – Х. : Право, 2011. – Р. 151.

[2] Карпачев М. Д. Нарастание «кризиса верхов» в России второй половины XIX столетия / М. Д. Карпачев, М. Г. Коротких // Буржуазные реформы в России второй половины XIX века. – Воронеж, 1987. – Р. 9.

[3] Коротких М. Г. Борьба в правительственных кругах по поводу принципов судебной реформы в России (1857-1859) / М. Г. Коротких // Государственный строй и политико-правовые идеи России второй половины XIX столетия – Воронеж, 1987. – С. 18.

[4] Плетнев В. Работы по составлению проектов судебного преобразования до 1861 года / В. Плетнев // Судебная реформа : под ред. Н. В. Давыдова и Н. Н. Полянского. – М.: Объединение, 1905. – Р. 227.

One of the most serious defects of the pre-reform court system was bribery. Along with arbitrariness and ignorance of officials that was typical of all government ranks, bribery had gained so monstrous across-the-board size that even the most ardent defenders of autocratic and serf orders were compelled to recognize its existence. The vast majority of judicial officials considered their office as means of gain and demanded a bribe of everybody appealing to court in a free and easy manner. Any attempts of the government to struggle against bribery yielded no results as this disease affected the state apparatus entirely. Extreme total illiteracy of judges, not to mention legal ignorance, had a dramatic negative impact on the quality of legal proceedings. Actually, it resulted in concentration of all legal proceedings in the hands of clerical staff: officials and secretaries[1].

Pre-reform criminal procedure was conducted predominately by means of search (investigation) in strict secrecy. The principle of writing meant that the court decided a case only on the basis of written materials collected during the investigation rather than a lively, direct examination of evidence, personal case study, direct oral interrogation of the accused and witnesses. As for the proofs, they were assessed rather formally. The importance of evidence was in advance defined by the law which fixed what could be and what couldn't be considered the proof. The law also established the degree of reliability of the admitted evidence, classifying them as perfect and imperfect, i.e. those which raised a final sentence and which couldn't be refuted by the defendant. But the idea of pleading guilty determined by the legislation of Peter I as «the best recognition of the whole world»[2] stood out. In spite of the fact that torture was formally forbidden in 1801 it was widely practiced in order to force a confession during the first half of the 19-th century.

The attempts to reform the judicial system at the beginning of the 19-th century are certain evidence of understanding by the ruling circles of the judicial system' drawbacks. In 1803 M. Speransky offered the wide-ranging improvement program of the judicial system of Russia which gained further development in «Introduction to the Code of the State laws» of 1809[3]. In 1821 and 1826 he returned to the judicial transformation projects which were supported by V. Kochubey, Minister of Internal Affairs. In 1836 the Second Section of His Imperial Majesty's Own Chancellery (further – the 2-nd Section – V. R.) and the Ministry of Justice drafted the bills on the judicial system and legal proceedings based on the principles proposed by Secretary of State M. Balugyansky in 1827, but they weren't approved either. In

[1] Гессен И. В. Судебная реформа / И. В. Гессен. – М., 1905. – PP. 15–16.

[2] Российское законодательство X–XX веков: в 9-ти томах / под общей ред. О. И. Чистякова – М.: Юрид. лит., 1989–1992. – V. 4, 415 p.

[3] Сперанский М. М. Записка об устройстве судебных и правительственных учреждений в России / М. М. Сперанский // Проекты и записки. – М. – Л., 1961. – P. 95–101, 172–174.

1837 the 2-nd Section and the Ministry of Justice submitted the investigation-improvement project[1]. In 1844 chief of the 2-nd Section D. Bludov devoted his report to the same issue. If all those documents had been adopted it might have improved the judicial system of Russia significantly, but as they contained some bourgeois principles, so the government rejected them.

Though judicial reform, apparently, affected only one specific part of the state mechanism and the whole political system, it was obvious that it could be implemented separately from solution of all social cruxes, and first of all, the peasants' issue. It is the reason of failure in all attempts to reform the judicial system during the rule of Nicholas I. «After 1810 the mainstream of an organizational transformation of our legislation broke into separate streamlets, not disappearing completely in the surrounding desert of lawlessness and personal abuses»[2]. Only after Alexander II's accession to the throne the peasant reform was launched and practical steps to reform the judicial system were taken.

It was impossible to reform judiciary without emancipation of serfs. Landowners thought that surfs emancipation required transformation of the judicial system at least because emancipated peasants were out of jurisdiction of their former owners[3].

The starting moment in preparation of judicial reform was November 15, 1857 when the Emperor ordered to submit to the State Council the Statutes of civil proceedings drafted by the 2-nd Section[4]. The draft provided for adversary proceeding, reduction of the number of court instances and professional development and training of court staff.

Having caused ambiguous reaction the draft at issue split the high ranking officials into two camps of Liberals and Conservatives. Liberals strived for considerable reorganization of the judicial system and legal proceedings, Conservatives supported only limited, decorative changes. This differentiation intertwined with another problem: Liberals wanted to copy the west sample for judicial transformations in Russia, Conservatives insisted on looking for new decisions in own historical experience. Conservatives, and first of all Count D. Bludov, were afraid of great changes, in any case the Chief of the 2-nd Section didn't want to follow the West European standards, to establish the Bar and to enact the principles of oral procedure, publicity, directness and equality of the parties to a trial. Their opponent was Prince P. Dol-

[1] Шильдер Н. К. Император Николай I. Его жизнь и царствование. : в II т. / Н. К. Шильдер. – Спб., 1902. – V. II, PP. 459–460.

[2] Плетнев В. Проекты судебного преобразования эпох Екатерины II и Павла I / В. Плетнев // Судебная реформа : под ред. Н. В. Давыдова и Н. Н. Полянского. – М.: Объединение, 1905. – . 261.

[3] Коротких М. Г. Самодержавие и судебная реформа 1864 года в России / М. Г. Коротких. – Воронеж, 1989. – PP. 59–61.

[4] Коротких М. Г. Борьба в правительственных кругах по поводу принципов судебной реформы в России (1857-1859) / М. Г. Коротких // Государственный строй и политико-правовые идеи России второй половины XIX столетия – Воронеж, 1987. – P. 11.

goruky. In the autumn of 1857 the liberal sent a special note to Alexander II which made the Emperor join the liberal camp. He entrusted Prince D. Obolensky, member of the State Council, with drawing his conclusion on D. Bludov's draft. D. Obolensky made «Remarks on the draft law on new legal proceedings in Russia». Publicity of this document evoked broad resonance in society. It sharply criticized both the existing situation in judiciary and D. Bludov's draft law.

In 1858 discussion of the judicial reform went beyond the Establishment walls and appeared in the columns of journals and other periodicals. Debating the bill lasted two years and got crowned with the Liberals' victory – rejection of the draft Statutes of civil legal proceedings. During this discussion new trends were born. On September 8, 1858 D. Bludov submitted to the Emperor the report «On institution of solicitors», i.e. establishment of the Bar[1]. It was an important step as the Bar was a subject of sharp disputes. First, under domination of search in legal proceedings the function of defense lawyer was practically unnecessary. The legal representation was limited to intercessors and agents who usually were lay persons, and at times illiterate, whose purpose was win a case at any cost rather then assist justice. During preparation of the reform there was a steady opinion that it was necessary to abolish such representatives in court and establish legal profession. Second, since the reign of Catherine II who was frightened of the French Revolution and when lawyers ranked high the Russian emperors had assumed negative attitude towards the legal profession[2]. Hence a new draft by D. Bludov should be considered as decisive effort of the ruling circles to turn away from a negative stereotype toward the institute of the legal profession and to transform it into the effective institute of judicial representation authorized to protect rights and interests of citizens.

And yet investigation rather than civil procedure and the Bar became the first stage of the court reform. In May, 1860 the State Council adopted the law on investigators. The bill was developed by Secretary of State of the State Council S. Zarudny who specially studied the European legislation and practice on that subject.

At the same time drafting related to the judicial reform was under way. So, while considering the draft statute of civil procedure in the State Council Chairman of the board A. Orlov came to a conclusion that before adopting it, it was necessary to change the judicial system. He stated his thought in the special note to the Emperor. Alexander II agreed with A. Orlov. Consequently, D. Bludov submitted the draft regulation on the judicial system to the State Council on November 12, 1859. The document contained definite fresh ideas, in particular much attention was paid to introduction of the institute of magistracy. At the end

[1] Коротких М. Г. Самодержавие и судебная реформа 1864 года в России /М. Г. Коротких. – Воронеж, 1989. – P. 58.

[2] Черкасова Н. В. Формирование и развитие адвокатуры в России. 60 – 80-е годы XIX в. / Н. В. Черкасова. – М., 1987. – P. 10–18.

of the same year the chief of the 2-nd Section sent for consideration the draft statutes on crimes and minor offenses. However this document was grounded on conservative positions, specifically the drafters sought to retain the search form of legal procedure[1].

D. Bludov's drafts were sent for consideration to the interested departments where his proposals underwent criticism by Liberals and Conservatives. Remarks on the draft were discussed in the State Council during 1860 – 1861, but owing to D. Bludov's resistance only important changes were made in the text of documents. The reform reached an impasse which was overcome by implementation of the serfs' reform that urgently necessitated judicial reform. Somehow to accelerate development of proper documents related to the judicial system and legal proceedings, this task was delegated from the 2-nd Section to the State office of the State Council of the Russian Empire.

On October 19, 1861 D. Bludov submitted to the Emperor the report in which he summed up the results were summed up, current situation was described and suggestions for improvement of judicial system expressed. Alexander II approved the program presented in the report. The commission of the prominent lawyers of that time was created: officer of the State office L. Plavsky, Acting Secretaries of State of the State Council N. Stoyanovsky and S. Zarudny, Chief Secretary of the General Assembly of the Moscow departments of the Senate K. Pobedonostsev, and others. Actually S. Zarudny presided over the commission.

The commission consisting of like-minded persons took a course different from the «bludovsky» one. The general theory of bourgeois judicial system and legal proceedings, the West European legislation and practices served as the foundation of the reform. Thus the reformers took into consideration Russian reality and judicial traditions and tried to prove that such bourgeois institutes as jury or legal profession would not undermine fundamentals of autocracy at all. At this stage of the judicial reform preparation the replacement of a jury trial in crimes against the State by a trial of class representatives[2].

Like-mindedness of the members didn't exclude brisk disputes in the commission. For example, electivity of judges raised hot debates. The objection to the principle which put the judge in dependence on voters was reasoned. Finally, it was decided to introduce the appointment and irremovability of judges that in combination with the high official salaries proposed would make them quite independent of external influences[3].

Work of the commission resulted in «Basic Provisions of Judicial Transformation in Russia», which was presented

[1] Коротких М. Г. Самодержавие и судебная реформа 1864 года в России / М. Г. Коротких. – Воронеж, 1989. – P. 86.

[2] Середа О. В. Із історії впровадження суду присяжних в ході судової реформи 1864 р. / О. В. Середа // Вісник Нац. ун-ту внутр. справ. – 2006. – Вип. 33. – PP. 163–164.

[3] Российское законодательство X–XX веков: в 9-ти томах / под общей ред. О. И. Чистякова – М.: Юрид. лит., 1989-1992. – V. 8, P. 11.

to the Emperor in April, 1862 and later submitted to the State Council where its consideration continued until September, 1862.

On September 29, 1862 «Basic provisions» were approved by Alexander II. Not long before work was completed the State Council discussed the issue whether the results should be made public. It was a difficult question as drafting in secret had been usual practice in Russia till that moment. Supporters of publicity won, and the Emperor ordered to publish «Basic provisions». Thus the progressive character of the judicial reform was enriched with a new open, public way of its preparation.

«Basic provisions» consisted of three parts devoted to judicial system, civil procedure and criminal legal proceedings. They stipulated new principles of judiciary such as independence of justice from administration, elective magistrate's court represented by all classes, jurors in district court, the Bar. A new status was determined for the prosecutor's office: the prosecutor became the party not only in criminal court, but also in civil litigation, its rights were limited though[1].

Progressive ideas also penetrated procedural part of «Basic provisions». The principles of justice administration exclusively in court, adversarial character of the judicial process, public trial, and the two-instance criminal procedure was set forth, while the formal approach to evidence and the institute of being under suspicion was abolished.

At the same time some undemocratic institutes survived: special procedure for state crimes, some elements of the class belonging (for example, the volost court remained for peasants who made up more than 80% of the population).

In civil legal proceedings much attention was paid to magistrate's court. The primary task was conciliation of the parties as the court was authorized to settle minor cases. It was jurisdiction of district court to handle big claims. In civil process the principle of disposition played an important role, in certain cases the prosecutor sat with the court though. On September 27, 1862 the Emperor approved the report of State Secretary V. Butkov containing the further plan of the judicial reform. Besides the State office personnel the commission on preparation of draft laws included representatives of the 2-nd Section and Ministry of Justice. V. Butkov was entitled to get more officers involved in the work. As a result, the commission included the best legal intellects of that time from all Russia. Besides the permanent composition, various experts from university professors to police officers participated in it. The commission appealed to the public to render assistance in its efforts[2]. S. Zarudny managed the commission. The drafts were considered in the State Council from May to July, 1864 and were approved by the Emper-

[1] Казанцев С. М. Роль прокурора в гражданском процессе дореволюционной России / С. М. Казанцев // Буржуазные реформы в России второй половины XIX века. – Воронеж, 1987. – С. 82.

[2] Коротких М. Г. Самодержавие и судебная реформа 1864 года в России / М. Г. Коротких. – Воронеж, 1989. – PP. 145–146.

or on November 20.

The documents of the judicial reform include four laws. One of them is devoted to judiciary, the second one deal with civil and criminal procedures, and a new one, which «Basic provisions» lacked, is the Statute on the penalties imposed by magistrates, the code of substantive law containing the provisions on minor criminal and administrative offenses.

The laws at issue refocused the judicial system, procedural law and part of substantive law of the Russian Empire. The judicial reform made judicial authorities independent of executive and legislative bodies. The jury was introduced. The fact that peasants, often rather poor, actually serve as jurors proves democratic nature of this institute[1]. In fact the legal profession was founded for the first time. It became very prestigious and rewarding occupation which attracted even titled persons who received considerable fees not only for criminal cases but also for civil cases. Reorganization of the prosecutor's office resulted in exemption from the general supervisory function and concentration at work in court. Many contemporaries didn't welcome the changes though, for example, A. F. Koni saw it as disadvantage in activity of the updated prosecutor's office[2]. However, if the role of the prosecutor increased in criminal trial, in civil proceedings it decreased. No civil case protested by a prosecutor during 50 years[3].

The institute of investigators independent both from the police and from the prosecutor's office was established in district courts.[4]

In procedural law the principles of competitiveness, publicity, oral procedure were fixed.

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[1] Кони А. Ф. Собрание сочинений в 8 т. / А. Ф. Кони. – М. : Юрид. лит., 1976-1979. – V. 4, P. 264.

[2] Кони А. Ф. Собрание сочинений в 8 т. / А. Ф. Кони. – М. : Юрид. лит., 1976-1979. – V. 5, PP. 6–10.

[3] Казанцев С. М. Роль прокурора в гражданском процессе дореволюционной России / С. М. Казанцев // Буржуазные реформы в России второй половины XIX века. – Воронеж, 1987. – P. 84.

[4] Немытина М. В. Применение судебных уставов 1864 года / М. В. Немытина // Буржуазные реформы в России второй половины XIX века. – Воронеж, 1987. – P. 95.

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The idea of constitutionalism in islamic legal system*

In modern Western society national legal systems define the line that separates law from religion. Religious legal systems, opposed that, are based on close relationship and even interlacement of religion and law. But one can't deny fact that initially the legal systems of continental Europe, which are directing on implementing the rule of law today, are based on religion, especially Christian thought[1].

For a long time contact law with religion was as strong as the one that we see today in the legal systems of the Islamic world. However, epoch of the Enlightenment has changed legal thinking in Europe. The development of the modern state concept has provided that the legal institutions became more secularized and gradually disposed of its religious content. At the same time we have to agree that secular law still conceals some relics which can be understood only if we appeal to the Christian religion[2]. As noted in this regard Francis Fukuyama, initially rule of law is rooted in the religion in all societies. He sees the explanation of this in that law should reflect the broadest social consensus, based on the requirements of justice. In Europe the church initially performed as an institution that determined a consensus and ensured its preservation. Something similar happened in the Middle East too. There has been a functional separation of church and state: Ulams were legal scholars and custodians of Sharia law while the sultans implement-

[1] Krawietz B. Islam and the Rule of Law: Between Sharia and Secularization / Birgit Krawietz, Helmut Reifeld. – Konrad-Adenauer-Stiftung, 2008. – P. 36.

[2] Ibid. – P. 10.

ed political power. Thus, the rulers were in bondage under law, the source of which they were not. It was not a democracy, but it was something very close to the rule of law[1].

This traditional rule of law, based on religion, was destroyed in the Middle East as a result of the transition to the current stage of development. Absolute executive power replaced the rule of law, especially in the Arab world. Rulers did not recognize any restrictions – neither legislative nor judicial – on their powers.

Legal culture of the West counties today is based on the idea of natural law or law of reason, which is a Christian by birth. The understanding of the specified connection between law and religion allows to see on the question of legality and justice in Islamic societies at a completely different light, as well as gives a possibility for a broader view of the question of secularization of the Western world. (However, there is another point of view, which is to ensure that the europeism is not a product of Christianity, conversely Christianity is a product of Europe. Europeism, as supporters of this conception mention,-is primarily based on the ideas of antiquity and the European science revival of environmental determinism, criticism and positive belief in science. This in turn leds to the Reformation and religious tolerance, and later – to democracy. Being European does not mean to be a Christian. Being European is to be religiously tolerant and to respect freedom of religion, as well as political tolerance and freedom are the main elements of European culture[2]). Even more that you can not completely exclude the impact of dogma Shariah – as a set of rules of conduct for the Muslim – on the legal life of the Western tradition because of complex conglomerate and coexistence of different cultures, traditions and ideas[3] in states that adhere to the values of Western civilization.

However productive dialogue between Western and Eastern legal cultures is often doomed to failure. Largely this is because the researchers themselves are often in captivity of narrow idea about Sharia and Muslim legal system as a whole, which in turn leads to the granting unconditional priority of European type before legal thinking, based on the recognition of the rule of law, the universality of human rights and fundamental freedoms of others.

The reason of this attitude is even deeper. Western society became in the XXI century with a world view, which is well reflected in the concept of a «clash of civilizations» of S. Huntington. It was proposed by him in 1993 and is developed in his works over the next 15 years. As we know, the scientist has identified eight civilizations: Western, Confucian, Japanese, Islamic, Hindu,

[1] Fukuyama F. Iran, Islam and the Rule of Law. Islamic political movements have been one form of revolt against arbitrary government // http://online.wsj.com/news/articles/SB10001424052970203946904574300374086282670.

[2] Narrating Islam Interpretations of the Muslim World in European Texts / Ed. by Gerdien Jonker and Shiraz Thobani. – London – New York: Tauris Academic Studies, 2010. – P. 102.

[3] Горшунов Д. Н. Частное право и ислам / Д. Н. Горшунов // Ученые записки Казанского университета. Серия: Гуманитарные науки. – 2010. – Т. 152. – №4. – С. 53.

Slavic-Orthodox, Latin American and African. According to his conception the main global conflict is the conflict of civilizations. And the main conflict of the future is the Western and non-Western conflict of civilizations, mostly Islam. And the West has to provide a close integration of US and Western parts of Western civilization, as well as Europe and Latin America, which is close to the West for its culture. This is required for successfully confront to the new danger. Moreover the West has to strengthen international institutions that reflect Western values and bring to them the non-Western states. In general, the formula S. Huntington that describes the new geopolitical situation is «the West and the Rest»[1].

In the context of globalization there is no equality of cultures and civilizations. One civilization – liberal – dominates and imposes. The other – traditional – is allowed only as an exotic fad. Principles of ancient medicine, philosophy and cooking of traditional societies are penetrating to the life and culture of liberal civilizations. Western liberal principles of political pluralism and free market economy are penetrating to economics and politics of traditional societies[2].

The situation is complicated by the fact that the representatives of «Islamic civilization» frequently expose of the West in applying of «double standards». Thus, M. Hoffmann, European, who converted to Islam, gives an example. In a situation where Muslims are not allowed for the post of Emir (leader) Western society points to violations of human rights. However, such violations are not seen when an American citizen who was born outside the US territory US has no right to become presidential candidate[3].

The above evidences of Europeans bias against Muslims and Muslims distrust to the West prove once again that there are no pre-established only good decisions. Indeed, Islamic states are not facing with a choice between two extremes – Sharia or secularization. The rule of law is not proclaimed by the official laws of these countries.

At the same time, the fact is that all Islamic legal regimes are under pressure of necessary to meet the technical, economic and social development. It in turn requires political and legal transformations that as usual are accompanied by democratization. According to the general idea of modernization almost all Muslim countries have to introduce legal and political systems of the Western model and, as it is evident from their constitutions, they recognize the principle of popular sovereignty, either principle of the sovereignty of God. However, most of these countries are continuing to maintain the position of Islam, but only some of them are fully implementing Sharia. Moreover, most Muslim

[1] See Хантингтон С. Столкновение цивилизаций / С. Хантингтон; Пер. с англ. Т. Велимеева. Ю. Новикова. – М: ООО «Издательство АСТ», 2003. – 603 с.

[2] Комлева Н. А. Концепция столкновения цивилизаций: прагматический аспект / Н. А. Комлева. – Пространство и время. – 2011. – №2. – С. 36.

[3] Hofman M. Islam the Alternative / M. Hofman. – Beltsville, Maryland: Amana Publications, 1997. – P. 32.

countries are implementing the distribution of powers and the separation of powers, and are recognizing rights of citizens, as provided for in democratic systems, although there is different from Western terminology. But in general the process of democratization in most Muslim countries is not well promoted, except Turkey and Indonesia.

Islamic world should open its doors to meet changes in social, political, economic life which associated with objective processes of globalization that encompasses the entire world. In addition, it should be the opposite trend – Islam is growing rapidly throughout the world. It affects to the constitutional development of non-Muslim countries strongly, but at the same time it gives new possibilities for conflict resolution and coordination of global «clash of cultures».

In addition, researchers of Islamic legal thought state some changes in its main provisions, which permit to suggest that there is a movement towards western understanding of human rights and democratic values. In particular, it is noted that the debate about democracy and human rights is entrenched in Islamic discourse in the late twentieth century. And if in the early 90's Islamists insisted that there is no need for «Western democracy» and understood human rights as possibilities granted by God, that now we have to ascertain changes in their understanding of human rights and democracy. These changes are associated primarily with globalization, the penetration of Western ideas to every corner of the world, as well as the fact that the strength of democracy and human rights come from the strength of the international community[1].

The above trends determine the relevance of reference to the possibility of public perception of values which are recognized by Western societies as the universal in Islamic legal systems[2]. These are principles of liberty, democracy and the recognition of human rights, fundamental freedoms and the rule of law[3].

One of exhibition of the important changes that are taking place under the influence of Western legal and political systems is the idea of constitutionalism. It is determined by a number of basic rules: (1) to set the powers and responsibilities of the legislative, executive and judicial branches of government; (2) to separate of powers to different levels of government, including federal and local; (3) to transfer the rights of citizens in relation to each other as well as to public authorities such as the Bill of Human Rights; (4) to establish procedures for amending the constitution etc.

All Constitutions that are in force today in Muslim countries implement a system of government according to systems which are implemented in democratic countries. They correspond to

[1] Roald A. S. New Muslims in the European context : the experience of Scandinavian converts / by Anne Sofie Roald. – Brill Academic Pub, 2004. – P. 325.

[2] Максимов С. И. Концепция правовой реальности / Неклассическая философия права: вопросы и ответы. – Харьков: Библиотека международного журнала «Проблемы философии права», 2013. – С. 57.

[3] The European Union, Turkey and Islam. – Amsterdam: Amsterdam University Press, 2004. – P. 6.

principle of separation of state power. It can be concluded that Islam recognizes constitution as the basic rules of life in the state, an example of which was the Constitution of Medina from time of the Prophet Muhammad. In fact almost all Muslim countries did not accept the constitution until they got independence after World War II[1].

At the same time we must admit that the public and legal life in many countries of the Islamic world is still characterized by a significant deficit of democracy and lack of political freedoms. Political power can be seen as a democratic and legitimate in only a very small number of Muslim states. Most of countries have the political regime that can be described just «authoritarian»[2].

We can't ignore the fact that in many cases the existing political, social and economic problems are caused not only by historical prerequisites or external influence, but largely by lack of reform and political will to create a stable legal framework. However, constitutional democracy is perceived by most people who live in these countries as the best and most desirable form of government. If we look from the Middle East to Southeast Asia, we can see that democracy, rule of law, secularism are present even in Islamic countries. Islam in these countries is not appropriate for consideration it in those foreshortening in which it is seemed in Western tradition such as: Islam versus modernity, Islam versus democracy, and even Islam versus the Enlightenment. Instead, we have to focus on those elements that bind us together. As seen, it should be the desire to promote democracy, human rights, freedom, the rule of law – regardless of religious beliefs.

Not only «progressive» but many «conservative» Muslims are involved in intensive discourse on the requirements of democracy, rule of law and human rights. Muslim Brotherhood can be a example: while individual members of this force still believe that politic threatens the entire religious and try to stay away from it, others push each other for seats in Parliament to take political responsibility to themselves.

As looks the term «moderate» is the best for describing those Muslims with whom representatives of the so-called Western civilization would cooperate to overcome the existing differences of opinion on values such as democracy, rule of law and human rights. At the same time, Europeans indicate unwillingness to cooperate with Muslims whose political aim is to create a theocratic state, who takes the elements of Sharia that are contrary to the principles of humanity and human rights violations[3].

[1] Naeem N. The Influence of Religious Clauses on Constitutional Law in Countries with an Islamic Character / Naseef Naeem // in Krawietz B. Islam and the Rule of Law: Between Sharia and Secularization / Birgit Krawietz, Helmut Reifeld. – Konrad-Adenauer-Stiftung, 2008. – P. 72.

[2] Reifeld H. Developing democracy and the Rule of Law in Islamic Countries Helmut Reifeld / in Krawietz B. Islam and the Rule of Law: Between Sharia and Secularization / Birgit Krawietz, Helmut Reifeld. – Konrad-Adenauer-Stiftung, 2008. – P. 128.

[3] Krawietz B. Islam and the Rule of Law: Between Sharia and Secularization / Birgit Krawietz, Helmut Reifeld. – Konrad-Adenauer-Stiftung, 2008. – P. 110.

In other words, the question is not whether it is Islam and religion in general socially beneficial. The question is whether it is Islamic law, as it is generally understood and applied, to perform a major part of the social system that meets the requirements of constitutionalism.

In general some basic patterns in the development of the Islamic legal system can be called. One of the central questions: is Islam corresponded to the requirements of constitutionalism? At the stage of early development of Islamic law institutions that could contribute to the implementation of the requirements of this principle were laid to it. But in the long run these institutions losted their effectiveness. Modern Islamic law does not provide effective option for implementing the principle of constitutionalism. At the same time, as the history of Islamic law suggests, its practical implementation has never stopped its development. Since its inception it has been enriched, revitalized and changed in many ways. It is clear that the reformers have the aim to overcome the shortcomings in the legal regulation that are revealed by the practice of public life. However, reinterpretation, which is currently the primary means of modernizing of Islamic legal system, is not so intense and creative for making it compatible with the principle of constitutionalism.

Dialogue of civilizations has to become one of the most important prerequisites for future equitable enforcement[1]. The representatives of Islamic legal thought recognize that «Islam will have a chance in the XXI century only if it will overcome cultural differences through integration»[2]. On the other hand, there is a need for recognition from the European legal thought the existence of a pluralism within Islam itself, which is always characterized by a lively exchange with the environment. «Islam and the West are old friends. During 1300 years these two cultural worlds are experienced mutual influence and at the same time had confronting each other. Their meeting led to productive cultural exchange, which contributed to mutual growth. The confrontation conversely led to bloody clashes, such as at the time of the Crusades, which left a deep impression in the minds of Arabs than in the minds of Europeans»[3].

In modern terms approach that establishes cooperation and understanding while maintaining differences should be recognize the most promising. It allows to maintain the diversity of national and cultural identity. The problem requires concerted efforts and goodwill of all participants of the dialogue.

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[1] Рашковский Е. Ислам в динамике глобальной истории / Е. Рашковский. – Россия и мусульманский мир. – 2004. – № 5. – С. 155.

[2] Othman N. Muslim women and the challenge of Islamic extremism / N. Othman. – Sisters in Islam, 2005. – P. 112.

[3] Воге П. Н. Ислам в современном мире / П. Н. Воге. – Актуальные проблемы Европы. – 2008. – № 1. – С. 15; Democracy, Human Rights and Law in Islamic / Thought By Mohammed Abed al-Jabri I. B. Tauris Publishers In Association With The Centre for Arab Unity Studies. – London: I. B. Tauris & Co Ltd 6 Salem Road, 2009. – P. 74.

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Importance of the preparatory stage in the adoption of judicial reform of 1864

Definition of preparation experience of the judicial reform is extremely important for modern Ukraine. Reforming of judicial system and legislation, which would ensure its efficient actions in protection of rights and freedoms of citizens, has become of paramount importance. This is currently not about blind imitation, but about those instructive and useful approaches and principles for resolving such an important issue of the state as judicial reform.

The novelty of the provisions of this article is to determine ways of reforming the judicial system in Russia. In this search Russia turned to European experience carefully studied by highly professional lawyers and practitioners in judicial sphere. It was them who insisted on a systematical approach to judicial reform; a new look at the problem laid in the fact that it is impossible to reform the court without proper profound changes in court proceedings. This problem should be solved at the preparatory stage, and only professionals could solve it. Preparation experience of the reform in Russia showed that professionalism ensured evolution of opinions of the government and society from denying such institutions as attorneys, jury and progressive principles of justice to their complete acceptance and legislative fixation in legal statutes.

In the Russian Empire the issue of court reforming arose back in the early XIX century. In 1803 M. M. Speranskyi suggested an improvement program for judicial system that was further developed in the «Introduction to making state laws» in 1809[1]. The program was of progressive nature, although it did not concern serfdom[2].

The destiny of this and other projects, which included some bourgeois principles, clearly showed the impossibility of court reforming without aboli-

[1] Российское законодательство X–XX веков: в 9 т. / – М. : Юридическая литература, 1991– . – Т. 8. Судебная реформа. – 1991. – С. 8

[2] История СССР (XIX–XX в.): учебник / под ред. И. А. Федосов.-ИЗД.2е, – М. : Высшая школа, 1987.— с. 37–40

tion of serfdom. Abolition, in its turn, required changes in the judicial system, because free peasants left their owners' jurisdiction.

Therefore, preparation of the judicial reform began simultaneously with preparation of the peasant one.

By that time the judicial system had shown complete insufficience, the court was characterized by numerous flaws: cumbersomeness, complexity and confusion of procedural rules, uncertain jurisdiction. Cases were considered for years and even decades. For example, the case of disappearance of 115 thousand rubles from Moscow district treasury lasted 21 years. Bribery ruled in courts, professional level of judicial officials was extremely low, and it deepened the outrage. In their work courts were guided by outdated norms: the process was secret, cases were handled through formal assessment of written evidence obtained during the investigation, oral questioning of the defendant and witnesses was not used. Own confession remained the most important evidence, to obtain which tortures were used, although they were formally prohibited in 1801. In the early 50's, the police widely used tortures with thirst: the defendants were fed salted herring and were not allowed to drink until they confessed in crime[1].

The government tried to fight with bribery in courts, but it was impossible to overcome this evil without fundamental changes in the whole system. Judicial reform was welcomed by everyone, but for the court officials, who were making profit from non-justice. The Emperor Alexander II and his brother Constantine were proponents of the judicial reform.

In the summer of 1857 the Emperor ordered to introduce to the State Council a draft Charter of civil procedure prepared in in the II department of the imperial office led by Count D. Bludov. Introduction of this draft to the State Council started actual work on the judicial reform preparation.

Discussion of the draft by Bludov split the highest officials into its conservative supporters and liberal opponents, who advocated deep restructuring of the judicial system and court proceedings following the Western European model. Alexander II initially supported D. Bludov, and Constantine – liberals. It was him who gave D. Obolenskyi the task to prepare «Notes to the draft of new legal procedure in Russia». This document with sharp criticism of the draft received considerable attention of the society. Discussion of the judicial reform moved to the pages of printed publications. Comments on the draft by D. Bludov's were numerous, but the author did not agree to substantial review of his drafts, and opponents insisted on this. Eventually, after unsuccessful discussion of the drafts in the State Council (1860-1861) and discussions in the society in 1862, the draft Charter of civil proceedings was rejected[2]. But this work was not in vain.

[1] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907. – С. 688

[2] Российское законодательство X–XX веков: в 9 т. / – М. : Юридическая литература, 1991– . – Т. 8. Судебная реформа. – 1991. С. 9-10

The most significant concession of the imperial power to the public opinion was formation of attorneys.

The government almost till the abolition of serfdom denied the idea of attorneys following the Western example. Nicholas I was sure that attorneys Mirabeau, Marat and Robespierre lost France and categorically stated that while he ruled, attorneys were not required[1].

However, in preparation of the judicial reform, allowing competition and publicity of proceedings, declaring the defendant's right of defense, the monarchy had to agree to enter attorneys. In 1862, the State Council made an appropriate decision. An example for attorneys was the German-Austrian type, which is characterized by a combination of the functions on human rights protection. Organizational structure of attorneys was similar to the French one[2].

In addition to the idea of introducing attorneys, in the course of discussions there was offered to change the court organization, in particular, to create magistrate courts. Also a draft Code of criminal procedure was presented, but it was too conservative.

The most difficult issue was the one concerning the jury. In advanced nobility committees it was raised back in the 50's. But in official circles it was under the most severe veto: in 1858 the Emperor prohibited the State Council to concern the jury as a dangerous institution[3]. Count Bludov, in principle, recognized the jury institution, but considered its introduction in Russia premature because of the people's lack of not only legal, but also primary education, inability to analyze and to make logical conclusions. Supporters of this view were numerous enough. But after the abolition of serfdom the mood in the society changed, and the prohibition of the jury was removed.

In January 1862 the Emperor Alexander II ordered to establish a commission of eminent lawyers to develop the main provisions of the judicial reform following the science and experience of the European countries[4]. This practically meant prohibition removal from the «revolutionary» jury. Commission members at the second department of the imperial office were like-minded supporters of the bourgeois law general theory in the field of judicial system and court proceedings and European legislation. Among them there were practical activists, who knew Russian reality well. This contributed to European institutions coordination with Russian traditions and usages. Formally, the commission was headed by employee of the State Chancellery A. M. Plavskyi, but its actual head became Sergei Ivanovych Zarudnyi.

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[1] Российское законодательство X–XX веков: в 9 т. / – М. : Юридическая литература, 1991– . – Т. 8. Судебная реформа. – 1991. с. 11.

[2] Ярмиш О. Н. Судові органи царської Росії в період імперіалізму (1900–1917 рр.) / Ярмиш О. Н. – К. : УМКВО, 1991 – с. 67–68.

[3] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907 – с. 691.

[4] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907 – с. 691–692.

Opponents of the judicial reform considered S. I. Zarudnyi not prepared for this role because of his lack of legal education. Indeed, noble-born in Kupyanshchyna S. I. Zarudnyi graduated in 1842 from the Kharkiv University with the candidate's degree in mathematics. But it turned out that in 1843 he joined the Ministry of Justice, where he studied resolution of lawsuit in Russia, Italy, France, Austria-Hungary and other European countries. A highly educated person with knowledge of 4 foreign languages, with a quick mind and great working capacity, S. I. Zarudnyi soon became legal consultant of the Ministry of Justice. His authority was so high that chief prosecutors and senators started taking his advice in complicated cases[1]. He received opinions of the heads and prosecutors of courts about flaws of the existing legal rules in judicial system and court proceeding. S. I. Zarudnyi himself believed that these flaws started his study of the law, that it was his school[2].

In 1856 Sergei Ivanovych was included to the Commission for exposing embezzlement and bribery in the commissariat of the Southern and Crimean army during the Crimean War. He conducted the strictest investigation in Mykolaiv, Odesa, Simferopol, Sevastopol, Yalta, Kherson, Kharkiv and other cities, where these shameful phenomena under administrative arbitrariness and silence of the society gained enormous size. Here S. I. Zarudnyi definitively formed his position of a fighter against the pre-reform system[3].

As Assistant State Secretary of the State Council (1857), S. I. Zarudnyi suggested transmitting all of its previous conclusions to court officials and sending their comments to the Council members, lawyers and legal experts. This ensured transparency and, to some extent, public participation in preparation of the judicial reform, spreading progressive ideas of the judicial system and court proceedings.

We shall briefly note that in 1859-1860 S. I. Zarudnyi participated in development of the peasant reform, for which he was awarded a gold medal; in 1860, he developed a draft law on judicial investigators, which was adopted by the Parliament and sanctioned by the Emperor.

But the greatest merit of S. I. Zarudnyi and other commission members is development of the jury institution in Russia. The first person, who officially raised the issue of the jury in the commission in 1862, was Dmytro Oleksandrovych Rovynskyi, Moscow governorate prosecutor at that time. He was not only an outstanding lawyer, who worked his way up from Assistant Secretary to senator in the Ministry of Justice, an honorary member of the Academy of Sciences and several scientific public

[1] Набоков В. Работы по составлению судебных уставов. Общая характеристика реформы / Набоков В // Судебная реформа / под ред. Н. В. Давыдова и Н. П. Полянского. – М. : 1915. — с. 306–308

[2] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907 – с. 606

[3] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907 – с. 608

institutions, but also an outstanding archaeologist, art connoisseur, collector, writer, honorary member of the Academy of Arts[1]. Immediately after his call to the State Chancellery, D. O. Rovynskyi made a note about the jury, which started extensive work on development of this institution.

D. O. Rovynskyi and a prominent figure in the reform Mykola Andriyovych Butskovskyi noted in their memoirs that the jury or at least elective basics took place during the Russian Pravda and later. Old court men were guided by customary law, which they knew well. Further, class representatives, both by education and occupation, were not prepared to solve complicated legal issues, and therefore fell into hands of smart secretaries and turned to zero[2]. The authors saw a way out in the need to separate the issue of guilt or innocence of the defendant from determination of punishment in criminal cases[3].

S. I. Zarudnyi believed that the jury institutionwill boost confidence in judgments. He tried to prove non-political nature of the jury, its safety for imperial power. This idea was supported by M. A. Butskovskyi, who believed that the legislator has to provide this institution with such conditions, under which it could not in any way be of political nature, as it was done in Prussia and other German states, that in Russia it was possible to withdraw state crimes and crimes against public order and public service from the jury. So, the authors of the notes had the same positions in all the major issues. Comprehensive justification of the need in jury was due to the strongest opposition to it. Not only reactionaries, such as Minister of Justice, Count Panin, but even some prominent lawyers of liberal opinion (V. D. Spasovych, B. M. Chycherin et al.) were against it. The merit of S. I. Zarudnyi, M. A. Butskovskyi and D. O. Rovynskyi is that they managed to convince the bitterest enemies of the jury. The result of commission workat the State Chancellery was inclusion of the institution to the «Outline of judicial reforms in Russia». In April 1862, the «Outline» was presented to the Emperor, who commanded to transmit it to two departments (of law and civil cases) and then to expanded meeting of the State Council. The jury was voted for unanimously. Even Count Panin took its defense, stating that only the jury could be really independent. M. H. Korotkykh sees explanation of such fast with no debates acceptance of the jury in its prior approval by the Grand Duke Constantine, who stood by Alexander II, that's why his opponents did not dare to speak officially[4]. This opinion is very simplified, it does not take into account the evolution of public opinion (and opinion of

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[1] Смолярчук А. Ф. Кони и его окружение / Смолярчук А. Ф. – М. : Юрид. лит., 1990. – с. 325

[2] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907 – с. 694,711

[3] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907. – с. 712

[4] Коротких М. Г. Генезис суда присяжных в России по судебной реформе 1864 г. / Коротких М. Г. // Известия ВУЗов. Правоведение. – 1988. – №3 — с. 84

Alexander II, too) after the abolition of serfdom. «September 9, 1862 is the most important milestone in preparation of the judicial reform: Emperor Alexander II approved the «Outline» and ordered to make it public, despite active opposition of the publicity opponents. According to S. I. Zarudnyi, publication of the «Outline» in the «Collection of Statutes and Government Regulations» had to cause discussion of issues concerning the judicial reform.

For final preparation of draft legal regulations, a new commission was established, which included the authors of the «Outline», as well as representatives of the State Chancellery, departments of the State Council, Ministry of Justice and Internal Affairs and governorate justice. The commission was divided into 3 departments: court organization, criminal proceedings and civil proceedings. S. Zarudnyi was appointed the chairman of the 3rd department, but in fact he led all work.

The commission had the right to turn to experts. It considered appropriate to involve more competent and experienced people, for which it turned openly to all legal department officials, professors and, in general, everyone, who wished to give their comments and suggestions directly to the commission or through the press. In a short time, the commission received suggestions from 446 individuals. They were printed and made 6 large volumes[1].

In an unprecedentedly short period (11 months) draft legal regulations and explanatory notes thereto, which in the XX century were considered an unparalleled example of legislative creativity, were concluded [3]. In autumn 1863, the commission completed its work, and in December 1863, the draft legal regulations with numerous comments were submitted for discussion in the State Council. The discussion was going well, careful development of all issues of the judicial reform, in particular, institution of jurors, contributed substantially to it. The drafters of legal regulations came from the fact that «the jury may act beneficially, only when it relies on criminal proceedings, which harmonizes with the essence and needs of this institution». This idea is expressed by an expert in the jury history in Europe K. I. A. Mittermayer[2]. He thought that legislators did not always understand it, limited in a hurry by provisions on the juror justice without cancellation of the prior inquisitorial and secret investigation. Russian lawmakers, thanks to great work of scientists and practitioners, managed to avoid this error.

The State Council completed consideration of legal regulations on 02.10.1864. On November 20, 4 statutes were already approved by the Emperor and published following his order for illustrative purposes. The first printed copy of legal

[1] Набоков В. Работы по составлению судебных уставов. Общая характеристика реформы / Набоков В // Судебная реформа / под ред. Н. В. Давыдова и Н. П. Полянского. – М. : 1915 . – с. 338–340

[2] Митермайер К. И. А. Современное положение суда присяжных / Митермайер К. И. А. // Суд присяжных в Европе и Америке / под ред. Н. Ламанского. Т.1– СПб. : 1865 – с. 2

regulations was submitted to S. I. Zarudnyi with an inscription that the judicial reform owes its existence to him more than to others, and therefore this copy should rightfully belong to him[1].

The legal statutes radically changed the judicial system, procedural and part of substantive law of Russia. For the first time, attorneys were introduced, prosecution was reorganized, investigation independent from the police and prosecutors was founded. The law ratified the principles of competition, publicity, oral nature and other progressive norms. And the crown of the judicial reform was the jury – it was defined both by friends and enemies of the judicial reform.

30 years after approval of the legal regulations, A. F. Koni, a prominent Russian lawyer, stated that introduction of the jury in the country just liberated from serfdom was a very brave step. Serfdom could be a school for sense of legitimacy neither for peasants, nor for their owners... But the drafters of the legal regulations trustfully treated spiritual strength and health of their people[2].

The jurors acquitted this trust. Already in the first year of the jury activity, Minister of Justice D. Zamiatnin stated that jurors, sometimes consisting exclusively of peasants, solved complicated problems successfully and correctly.

With introduction of the jury, there disappeared from Russian reality such negative phenomena that seemed insurmountable in pre-reform courts: bribery, distrust to the court by population, court dependence on administration. Practice of the new institution also had some weaknesses corrected by current legislation. Changes in legal regulation were also dictated by an attack of Russian reactionary bureaucracy at the «crowd court opposing the state system of Russia». Most insignificant errors were a pretext of insane persecution of this court, limitation of its independence.

There were also complex theoretical issues, such as the issue of exculpatory verdicts when the defendant admitted his guilt as well as purely technical issues, important to the jury, but not fully resolved. Raising these issues showed how important it was for the legislator to consider all aspects of the jury activity (as well as other institutions of the judicial reform) for them to comply fully with their purpose.

Another important lesson in the history of preparation of the reform is the ability and willingness to defend democratic institutions from attacks of their opponents. Such lesson to modern legislators and politicians was given by the creators and defenders of the jury and other democratic institutions of the judicial reform: S. I. Zarudnyi, M. A. Butskovskyi, A. F. Koni, M. V. Muravyov, O. M. Unkovskyi, D. O. Rovynskyi and others, who countered unjust attacks with deep scientific analysis, journalistic skills, civic courage and fair fulfilling their duty.

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[1] Джаншиев Г. А. Эпоха великих реформ. Историческая справка / Джаншиев Гр. – Изд. 10-е, посм., доп. – СПб. : Типо-литография Б. М. Вольфа, 1907. – с. 615–616

[2] Кони А. Ф. О суде присяжных и суде с сословными представителями / Кони А. Ф. – СПб. : Тип. Правительствующего Сената, 1895. – с. 3–4

STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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Problems of ensuring the state sovereignty of Ukraine at the present stage (the constitutional-legal aspect)

State Sovereignty of Ukraine is presented as a feature that establishes and, simultaneously, provides the ability of the state to exercise its «supreme» and «sovereign» will, due to its inherent mechanisms and institutions of state power, as a characteristic of the state which declared itself at the constitutional level as democratic, legal and social state, in which a person's life and health, honor and dignity, integrity and security are the highest social values. In this context, state sovereignty reveals a complex structure that includes several elements or components that form the substance and essence of sovereignty. This problem has become especially forefront for Ukraine in 2014, in connection with the events in the Crimea and in the South East of Ukraine. Recently, this concept has undergone significant changes. First of all, that was due to rethinking of concepts such as state sovereignty, national sovereignty and people's sovereignty, forcing to speak not so much about the independence and sovereignty of the state power not as «absolute values and signs» but as a source of the state power, and forcing to speak how a sovereign state is able to realize the goals and objectives that underpin its sovereign power in the internal and external aspects. The main characteristics of the internal state sovereignty are considered: effective functioning of government (legislative, executive, judicial, control and supervision bodies), the presence of an effective and dynamicly progressing legal system, and assurance of basic internal functions of the state. In view of this, state sovereignty may be construed not as a self-sufficient goal, but as a sign of the state and the way the organization and functioning of state power.

Interior aspect of the sovereignty of Ukraine includes several important elements[1].

Firstly, the sovereignty of Ukraine covers to all its territory. The above rule was enshrined in the Constitution of Ukraine, Article 2, Part 1. This means that the State of Ukraine is a source of state law that is binding for its entire population. At the same time, this power is exceptional, since only the Ukrainian state has a legitimate right to use government coercion. Distribution of state sovereignty over all the territory does not mean that the State cannot transfer any part of its powers to the local level. Under conditions of democratic governance and different forms of state organization, it might appear in relation of the state to its territorial units with the autonomy status, and in relation to local governments.

Secondly, it should be noted that sovereign Ukrainian state, being a legal and social state, cannot issue legal acts based solely on its own interests and expediency. It means that the sovereign lawmaking process of the Ukrainian state is realized in accordance with certain legal values and principles: inalienability of the natural rights of man and citizen, priority human and civil rights, rule of law, legitimacy etc.

Third, the Ukrainian state sovereignty, which declared itself as democratic, legal and social state, arises not ex nihilo, but the sovereignty has its explicit source. This provision enshrined in Article 5 of the Constitution of Ukraine, which stipulates that the bearer of sovereignty and the only source of power in Ukraine is the people who exercise power directly and through bodies of state power and local self-government[2].

Fourth, the State Sovereignty of Ukraine is not only a number of initial universal characteristics (unity, indivisibility, inalienability, etc.), making it identical to the sovereignty of any other state, but it is also characterized by a specific outcome of the state daily functioning. The sovereignty of the state is not so much «freedom from something», when the state implements the slogan «the will of the state is the highest law», as «freedom for something.» Therefore, the sovereignty appears as a constant gain functional efficiency of the state, improvement of internal and external security, preventing any attempt external or internal expansion, which would have the effect of undermining the integrity of the state, reducing its economic potential deterioration social welfare of citizens, destruction of the constitutional order and so on.

In this respect, the sovereignty of Ukraine as an independent, democratic and constitutional state, is a complex, multidimensional and multilevel process, which includes such basic activities as to guarantee the stability of the Ukrainian country; development of all elements of the legal system of Ukraine (not just the legal system, but also legal relations, legal practice, legal social and

[1] Скрипнюк О. В. Державний суверенітет: ґенеза доктрини та визначення поняття // Публічне право. – № 2. – 2013. – С. 8–9.

[2] Чиркин В. Е. Конституционное право зарубежных стран / В. Е. Чиркин. – М.: Юрист, 2001. – С. 151.

individual consciousness, realization of human rights are implied); improving the efficiency of the organization and functioning of the system of government, not just the individual branches and / or public authorities; strengthen economic, cultural, social, political, environmental and security capacity of the state; positioning of Ukraine in foreign and domestic arena as an active subject, capable to solve challenges at national and global levels capable of predictable and reliable international cooperation; strengthening democracy Ukrainian state and guarantee the constitutional order of Ukraine; providing the evolutionary development of the government.

Those directions of ensuring sovereignty of Ukraine are set forth more meaningful in the following.

1. Guaranteeing the stable form of the Ukrainian state as one of the key areas of ensuring sovereignty. The form of the Ukrainian state system is understood as legitimate ways and means of organization and implementation of state power in Ukraine, stipulated by the Constitution and laws of Ukraine. Since the proclamation of independence, Ukraine has become firmly established as a state with a republican form of government.

Since 1991 till 2014, Ukraine, has changed several varieties of republican form of government:

1) since 1991 till 1996 – a presidential republic;

2) since 1996 till 2004/2006 – a presidential-parliamentary republic;

3) since 2004/2006 till 2010 – a parliamentary-presidential republic;

4) since 2010 till 2014 – a presidential-parliamentary republic;

5) since 2014 – a parliamentary-presidential republic.

Although the defined genesis of the republican form of government took place mostly de jure rather than de facto. However, the decision of the Constitutional Court of Ukraine of 2010, actually restoring the super-presidential model of state, not only reconstructed the entire system of government one more time, but it also raised some questions about the legitimacy of the government as a whole and some of its highest bodies in particular.

2. State sovereignty in Ukraine cannot be implemented beyond the democratic development of its political and legal regime. The practice of amending the Constitution in the last years and the events in Ukraine during the fall of 2013 – spring of 2014 show obvious need for further democratization of the political and legal regime in order to develop effective democratic institutions and an appropriate constitutional and legal mechanisms to guarantee state sovereignty of democratic Ukraine. The main tasks of further democratization of political and legal regime as the direction the sovereignty of Ukraine, by improving the Constitution of Ukraine may be:

– Improvement of legal mechanisms for the implementation of human and civil rights, and creation of effective safeguards for those rights[1];

[1] Проблеми реалізації Конституції України: теорія і практика. – К.: А. С. К., 2003. – С. 611

– introduction of real constitutional and legal mechanisms for direct implementation of national sovereignty through holding of an all-Ukrainian referendum (clear definition of subjects for the all-Ukrainian referendum in the Constitution and improvement of proceeding for initiating of the all-Ukrainian referendum by citizens of Ukraine);

– establishment of new forms of direct democracy, which produced positive results in Western Europe; rethinking and improving of the existing proportional electoral system to ensure implementation of the principle of popular representation in elected bodies of state power and local self-government bodies;

– changing the system of checks and balances between the legislative, executive and judicial branches of the state power and between the head of the state in order to prevent further new constitutional collisions;

– introduction of institutions for public control over the activities of the state authorities and local governments in Ukraine;

– optimization of local government system in Ukraine and provide effective mechanisms for exercising the right of communities to solve local issues within the Constitution and laws of Ukraine etc.

In the same context, the state sovereignty of Ukraine, as a modern democratic state, includes providing of targeted and effective legal policy that will be aimed primarily at:

– strengthening of the law and order, intensification of fighting against crime;

– provide effective mechanisms to protect freedom of expression of thoughts, free press, free peaceful rallies, meetings and demonstrations, free association in political parties and civil society organizations;

– establishing of clear procedural rules for the protection of rights and freedoms; prevention of any form of political repression;

– Introduction of clear regulations to protect intellectual property while increasing mechanisms of protection on international level for intellectual property of Ukrainian entities;

– implementation of effective institutional mechanisms to combat criminalization of the national economy;

– clear definition of the powers and functions of state authorities and local governments.

Constructive solution of these problems will contribute to both further democratization of political and legal regime in Ukraine and to improving of the system of guarantees for the sovereignty of Ukraine.

3. Improving the constitutional foundations of the national security and defense are among the most important directions to ensure sovereignty of Ukraine. The national security and defense of Ukraine is one of the most important elements of national sovereignty in modern circumstances, since the prerequisite for existence, development and survival of any state is a comprehensive deliberate policy to protect its national interests, providing the legal status (mode) of the state that is its national security and defense system[1]. This status

[1] Правове забезпечення державного суверенітету України / За заг. ред. акад. НАН України Ю. С. Шемшученка. – К.: Вид-во «Юридична думка», 2011. – С.84.

ensures the protection of vital interests of: (i) an individual (his rights and freedoms), (ii) the state (its constitutional order, sovereignty, territorial integrity and inviolability of frontiers) and (iii) the society (its material and spiritual values), from any internal and external threats. Thus, the basic elements of national security include political, economic, military, environmental, humanitarian, demographic, and other components.

4. Ensuring the sovereignty of modern Ukraine, which is of particular importance in the present circumstances, requires improving of constitutional guarantees for foundations of the state system of Ukraine. The constitutional foundations of the state system of Ukraine is the general principles of organization and functioning of the Ukrainian state, as defined in the Constitution of Ukraine, and which are developed in constitutional relationships, and which determine the nature and social purpose of the state. The constitutional foundations of the state system of Ukraine are defined, other than by forms of political (public-political) regime, form of government and form of state structure, also, by general principles of the legal regime of the national security and defense of Ukraine, the Ukraine's state border, as well as state symbols and so on. The main principles of the state system of Ukraine are: the principle of the sovereignty and independence; the principle of democracy of the state; the principle of a social and legal state; the unitary principle (unitarity and catholicity of the state); the principle of a republican form of the government.

5. State sovereignty of Ukraine is linked to the territorial integrity of the state, optimization of administrative and territorial units system and ensuring of their effective interaction. In this regard, the sovereignty requires an integrally organized and efficient system of government at all levels, from the central to the local ones. Events in Crimea and on the south-east of Ukraine in the spring of 2014 have showed the existence of a problem for ensuring of national sovereignty in that sense; those events aggravated the problem of the need to improve the system of government at the constitutional level.

Thus, the sovereignty of Ukraine, as a modern independent, democratic, social and constitutional state, includes activities of government authorities with the assistance of civil society institutions on:

– ensuring stability of the Ukrainian state form;

– development of all elements of the Ukrainian legal system;

– improving of structural and functioning efficiency of the government system, and not just any branches and / or government bodies; ensuring of the evolutionary development of the state power;

– strengthening of economic, cultural, social, political, environmental and security capacity of the state (in this case, special attention should be paid to the social security of the citizens of Ukraine);

– positioning of Ukraine at the international and domestic arena as an active player, capable to solve challenges on any national and global levels;

– strengthening of democracy in the Ukrainian state, guaranteeing of the constitutional order of Ukraine, strengthening of institutions of direct democracy which ensure the principle of popular sovereignty[1].

Each of those activities is accompanied by a system of direct legal action and means aimed at the creation and improvement of national legislation, including its highest constitutional level. Moreover, most of those measures may vary: e.g. constitutional and legal measures, administrative and legal measures, economic, legal, social and legal measures, security measures (primarily the national and state security of Ukraine is meant), implementation of criminal law (primarily for maintenance of rule of law and legitimate order in the Ukrainian state). It allows to develop an appropriate mechanism for the sovereignty of Ukraine, that will reveal as certain social relations of political, economic, cultural and other nature, and which will be stipulated by the Constitution and laws of Ukraine, defining the purpose and aim of the Ukrainian state, its nature and content, as well as social purpose, and will provide an orderly interaction of the state legitimate bodies. Concrete actions in this area should include:

– Improvement of legal mechanisms for the implementation of human and civil rights and creation of effective safeguards for those rights;

– introduction of real constitutional and legal mechanisms for direct implementation of national sovereignty through clear definition of subjects for the all-Ukrainian referendum in the Constitution and improvement of proceeding for initiating of the all-Ukrainian referendum by citizens of Ukraine;

– adoption of appropriate laws that would facilitate the development of new forms of direct democracy, which have shown to be effective in European constitutional and legal practice;

– improving of the existing proportional electoral system to ensure the implementation of the principle of popular representation in elected bodies of state power and local self-government bodies;

– changing the system of checks and balances between the legislative, executive and judicial branches of the state power and between the head of the state in order to prevent further new constitutional collisions;

– introduction of institutions for public control over the activities of the state authorities and local governments in Ukraine;

– optimization of local government system in Ukraine and provide effective mechanisms for exercising the right of communities to solve local issues within the Constitution and laws of Ukraine;

– realization of the constitutional reform, development and adoption of the Law of Ukraine on Amendments to the Constitution of Ukraine, which would have the highest level of legitimacy (rather than based on the controversial decision of the Constitutional Court);

[1] Політика, право і влада в контексті трансформаційних процесів в Україні: Монографія. – К.: Інститут держави і права України ім. В. М. Корецького НАН України, 2006. – С. 56–105.

– development of measures to strengthen national security in the external and internal aspects, improving law and order in the state and society; adoption of the strategic decision on international positioning of Ukraine in the «Europe – Russia» coordinates and its practical confirmation by signing of the relevant international treaties;

– real beginning and realization of the administrative-territorial reform, the reform of regional policy, coordination of strategic objectives and priorities among the state and regions, promoting stability and predictability of relations between central and local authorities for the development of territories, decentralization and separation of powers between the central and local executive authorities and local governments in provision of public services, empowering and strengthening of local governments' activities for solving social and economic problems of regional development, introducing a transparent monitoring mechanism, including the public one, at every level of government activity; clear delineation of functions between central, regional and local authorities on all issues of the budget, property, state powers and the mechanisms of public services; creation of legal, economic and organizational conditions for the effective implementation of the tasks and functions of local governments[1].

Thus, the state sovereignty of Ukraine can be properly secured only by its further strengthening and irreversible establishment as democratic, legal and social state, which recognizes and directly embodies the principles of such organization and functioning of the government in its daily activities.

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[1] Скрипнюк О. В. Теоретико-правові засади забезпечення державного суверенітету в Україні // Правове забезпечення державного суверенітету України. – К., 2011. – С. 95–96.

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The constitutional dimension of ukrainian democracy (historical and theoretical notes)

In the initially written constitutional document, the Basic Law of the USA of 1787 the category «democracy» is not mentioned in any way fashion. However, it is the Constitution of this country that is considered to be the perfect example of the embodiment of the democratic system and such its principles, as electivity of senior officials, separation of powers, judicial constitutional review etc.

Although the current Fundamental Law of Ukraine applies «democracy» in its terminology does not overly presume upon it: besides the first article, in which democracy is enshrined as the basis of the constitutional order, this category is also used in the Preamble and Art. 69, where elections and referendum are defined as forms of direct democracy.

However, this situation is not typical for the countries of budding democracies. Compared to other states, united earlier by the Warsaw Pact, the Constitution of Ukraine is quite restrained concerning the protection of democracy as an element of constitutionalism.

For example, the Constitution of Poland of 1997, besides the definition of Republic as a democratic country, this principle is also mentioned in the context of the tasks that are set before political parties («to influence the formation of state policy by means of democratic methods» (Art. 11), to establish civil and democratic control over the Armed Forces (Art. 26), to impose such restrictions in the implementation of constitutional rights and freedoms that are possible only in a democratic state (Art. 31), to create the opportunity to collect personal information only for the purposes that are acceptable in a constitutional democracy (Art. 51).

We tend to explain this difference in the approaches of Ukrainian and Polish legislators, (besides political and legal traditions, specific legal and political situation at the time of determination of the constitutional order) – by different attitude to the phenomenon of «militant (armed) democracy».

In a definite way this uncertainty of our politicians concerning further development orientations has an impact now, when with nostalgia for the Soviet era the political forces having representation in the parliament and regional councils, blow up and sometimes even head separatist movements at the East of the country.

It has to be noted that it is the «militant democracy» that has become a reliable mechanism to protect the free democratic order and to prevent the emergence of reactionary separatist movements in many countries, including Federal Republic of Germany (the founder of this constitutional doctrine).

However the constitutionalist should think not only of this issue. The competition of different forms of democracy, effectiveness of some of them, the introduction of new ones – all this must be on the agenda during the implementation of constitutional reform, and these are the questions that we shall try to answer in this paper.

When the Ukrainian state was being created, there were many hopes and aspirations that we could choose a new free democratic path. The introduction of truly democratic institutions and practices, and establishing thereof at the highest constitutional level was to become an important requisite to this.

It was stated in the Concept of the Constitution of Ukraine, approved by Verkhovna Rada on June 19, 1991, that the basis of future constitutional system should be the principle of democracy that provides for the possibility of power implementation by the sovereign, both directly and through the deputies of different levels.

The presence of legislative powers for the people to be exercised through a referendum – was recognized. At the same time holding the initiative referendum was presumed, including with the aim to resolve the state legal conflicts (as it is evidenced by possible subject of this type of referendum – early termination of President's authorities). The proposal concerning the necessity of establishing the principle «political power is achieved only through free democratic elections» draws attention.

On the next stage of the constitutional process an integrated project of the new Constitution of Ukraine (Verkhovna Rada of Ukraine Resolution of July 1, 1992 № 2525-XII) was proposed. This document is considered by us to be a remarkably interesting one in terms of fixing some democratic provisions of law. First of all, rather extensive incorporation of the principles of the election legislation should be noted. Here the periodic holding of parliamentary elections, freedom and equality in nominating candidates, as well as equality of opportunities for all candidates and control of the sources of funding and election campaign expenses can be found (Art. 118, 120 of the Draft).

Much attention is paid to the institute of All-Ukrainian referendum. Among the

points that are worthy of attention we would like to note the obligatory character of the holding of referendum to resolve the issue concerning Ukraine's entry into interstate alliances and military-political associations, and requirements in respect of formulating the questions of referendum (Art. 177 of the Draft). Of course, not all similar issues should be the object of constitutional regulation, but at the same time, some aspects of the electoral law, enshrined in the draft, look quite progressive under current conditions.

At this stage we can put some intermediate questions. For example, why did lawmakers refuse a number of quite useful above-listed issues, stating the question of democratic participation in implementation of power in a most laconic way? Perhaps the advice of saving constitutional text had place, to be more exact, a more efficient and generalized definition of the subject of constitutional regulation was used. Certain evidence of this could be the words of A. Korneev – the Chairman of the Working Group of the established Constitutional Commission: «In the draft of October 26, 1993 there were 2699 lines and 13 305 words, in our text (*draft prepared by a group – Y. B.*) – 1716 lines and 9517 words»[1].

However, it looks strange, for example, to abandon a clear and advanced in Western democracies institute of Access to Public Information: in promulgated project of 1992 it was stipulated to recognize the right of citizens to review the information about them, as well as to review the official documents that are maintained by government agencies and institutions, local and regional authorities (Art. 30).

Moreover, in the process of work with constitutional amendments in the frame of Constitutional Assembly, created by Ex-Head of state, it was emphasized many times that the expert community offered a number of interesting innovations. However, in reality, as in a well-known proverb about what is really new, and it turns out that such innovations were repeatedly initiated earlier and got into the text of drafts of the current Constitution.

For example, the institute of People Legislative Initiative was proposed both by the first Constitutional Commission (headed by Chairman L. Kravchuk) and by the second group of the Commission (headed by Co-Chairmen L. Kuchma and O. Moroz)[2]. In addition, in the latter case it was planned to establish the mentioned institute of democracy in the name of the relevant Section of the Constitution.

It was offered to name the third Section as «Elections. Referendum. People's Legislative Initiative» (according to the chairman of the Working Group A. Korneev «in this way all main forms of

[1] Конституція незалежної України. Книга третя. Частина друга. Документи. Стенограми. – К.: Право, 1998. – С. 243.

[2] Конституція незалежної України. Книга третя. Частина перша. Документи. Стенограми. – К.: Право, 1998. – С. 204; Конституція незалежної України. Книга третя. Частина друга. Документи. Стенограми. – К.: Право, 1998. – С. 243.

people's will expression are enshrined»[1]). Moreover, at the consequent stages of preparing of the Constitution there was an offer to introduce «people's constitutional initiative»: not less than 1 million of citizens of Ukraine who are eligible to vote could have the right to initiate amendments and supplements to the Constitution[2].

It is also clear that all further battles around the text of the Basic Law were concentrated around this issue of division of powers between the two power centers − the Parliament and the President. Only occasionally there arose discussions about language policy, state symbols and peculiarities of Crimea's status, caused by the presence of powerful factions of supporters of communist and national patriotic views in Parliament.

In the final version of the Constitution, as well as in the majority of the previous ones, the principles of democracy and people's power were established at the level of the fundamentals of the constitutional order. Instead, the mechanism of realization of people's power and the destiny of the institutions of democracy remained unclear.

First, attention of legislator was focused only on two components of democracy, namely on direct and representative democracy. This being said, the direct component of democratic governance of the people looked more like a slogan than like effective regulations. This conclusion allows to make analysis of the provisions of Chapter III of the Constitution from which it was not clear enough in which way the desired can be achieved by the people through initiating a referendum.

Constitutional Court also contributed additional arguments that interpreted these constitutional provisions in such a way that the initiative referendum could only be imperative, therefore there had to be a specific decision for it that was not subject to approval by any authority. At the same time a number of public institutions could be in the way of such initiatives, recognizing a referendum question as a non-constitutional one (decision of the Constitutional Court of Ukraine of March 27, 2000 № 3-rp/2000 and of April 16, 2008 № 6-rp/2008). The mentioned authorities, especially the Central Election Commission recognized this interpretation in its own way, in particular, determining that the binding character of the decisions of the referendum implies the need to issue exceptionally specific normative act concerning thereof. As a result – there was a number of initiative campaigns which failed because of a tough stance of Central Election Commission towards the wording of the proposed questions.

To this we can also add low efficiency of electoral law guarantees. This is most clearly illustrated with the introduction in Ukraine of the proportional election system with closed lists which is very questionable in terms of standards of the «effective European democ-

[1] Конституція незалежної України. Книга третя. Частина друга. Документи. Стенограми. − К.: Право, 1998. − С. 243.

[2] Конституція незалежної України. Книга третя. Частина третя. Документи. Стенограми. − К.: Право, 1999. − С. 464.

racy». Such steps of legislator concerning the change of the electoral system were replied by the Constitutional Court stating that determining of the type of system falls within the competence of the Verkhovna Rada of Ukraine and actually is a matter of «political expediency» (Decision of the Constitutional Court of Ukraine of February 26,1998, № 1-rp/98). There arose not less questions concerning the decision of the body of constitutional jurisdiction in respect of regular elections to the local self-governing authorities in Kyiv. Obviously, the idea of enshrining at the constitutional level of the principle of elections' periodicity should regain its relevance in the course of the constitutional reform (it also should be noted that the experts repeatedly insisted on this position during consideration of the current Constitution, with reference to the relevant international standard of i. 3 Art. 21 of the Universal Declaration of Human rights of 1948).

In other words, despite the loud-spoken provisions of Art. 5 of the Constitution, the actual democracy implementation mechanisms turned out to be far from ideal. However, in a case of direct democracy, we can at least see the general outlines of its real legal capacity, the separate institutions of democracy were left out of the attention of constitution expert (or, to be more exact, mentioning thereof in the constitutional text is too fragmentary).

The question is, first of all, about such widely accepted in European constitutional systems phenomenon as participatory democracy. It could have been the first time when the forms of this democracy were recorded at the level of the Lisbon Treaty of 2007 in the most concentrated way, by which the agreements to set up the EU were complemented. Thus, as a consequence of appropriate amendments Art. 8B appeared, providing for the constant sharing of information concerning its activity with the Union institutions with the aim to exchange views with all the parties concerned, their (institutions') obligation to maintain an open dialogue with representatives of the civil society, extensive consultations of the European Commission with all parties concerning any issue, the opportunity for at least not less than 1 million citizens of EU countries to initiate issues before the European Commission.

National researcher V. Bortnikov, describing democracy of participation (or «participatory democracy» in English fashion), defines it in the following way: «it is a system of government in which ordinary citizens rather govern themselves alone, than through electing the representatives, who ruled on behalf of them» [2, p.46]. Of course, this is so to say the ideal variant of functioning of the participatory democracy. In normal circumstances, it is rather a kind of substitute of referendum institutions and it acts in close contact with the institutions of the representative democracy. In fact, the implementation of participatory democracy institutions compensates shortcomings of representative forms of democracy, first of all, such as detachment of citizens from the processes of exercising power and frequent disregard of so-

ciety's demands by representative power institutions.

In this regard, B. Barber even made a classification of existing democratic regimes to the unitary democracies and strong democracies of participatory type. The advantages of the last one are that it «resolves the conflict if there is the lack of an independent basis with the help of constant participation in the political process, direct self-government and the establishment of political community that can transform dependent private individuals into free citizens, and partial and private interests – into public benefit»[1].

In addition there is a definite trend − the lower level of the exercising of power (from the center to the community) is, the more diverse the forms of participatory democracy are, and the greater is its effect on the final result. American researchers note significant activity specifically at the level of state and local governments. This is because of a significant public interest of the citizens in defending their rights and interests. For example, the mentioned institute of people's initiative which is stipulated in legislation of 23 states[2]. However, in general, we should not have illusions about the fact that citizens of USA, or Switzerland, or any other country where the positions of institutions of participatory democracy are strong enough, are daily engaged in writing petitions or developing corresponding initiatives. As it is reasonably noted in the literature, initially the founders of the institutes of people's initiative and referendum considered them «as arms, which citizens have to use to break the constancy and stagnation of state legislatures work», as «rebellion against the situation controlled monopolistically»[3].

Concerning our country, all the time our politicians repeat like a mantra that people needs to be given as many rights as possible to resolve issues of state importance. Instead, as it was already mentioned, some institutions of participatory democracy were rejected at the stage of the enactment of the final text of the Constitution, and the institutions of direct democracy that were remained, were either blocked or proved to be low effective.

In the context of thinking about participatory democracy it is expedient to recall the formula enshrined in i. 1, Art. 38 of the Constitution of Ukraine. In this article, the right of citizens to participate in elections and referendums is formulated along with the right to participate in regulating the public affairs, and in such a way that, to certain extent, it allows raising question about the independence of this authority. Certain additional argument in favor of this position may also be that in the Art. 69 it is indicated that the people's will may be im-

[1] Барбер Б. Сильна демократія: політика учасницького типу // Демократія: антологія. − К.: Смолоскип, 2005. − С. 259.

[2] Ціммерман Джозеф Ф. Учасницька демократія: відродження популізму // Демократія: антологія. − К.: Смолоскип, 2005. − С. 273.

[3] Ціммерман Джозеф Ф. Учасницька демократія: відродження популізму // Демократія: антологія. − К.: Смолоскип, 2005. − С. 279.

plemented both through elections and referendum, as well as through «other forms of direct democracy». In literature peaceful assemblies, petitions, local initiatives, etc. were referred to as to these «other forms»[1]. Herewith, to potentially extend this understanding and to have the right to take part in governing of state affairs.

However, in our opinion, these conclusions are not fully justified. Firstly, as we have been convinced, the creators of the Constitution at a certain stages of its creation, besides elections and referendum also provided for the possibility of establishing people's legislative and constitutional initiatives. Appropriate institutions were to be textually placed together with the above forms of direct democracy in the section that would begin with the cited norm of Art. 69 of the current Constitution. In this variant, the presence of the category «other forms of democracy» in the formula would seem more logical. Nevertheless, it is very likely that lawmakers in the final stages after deleting «initiative» institutions did not pay attention to the need to correct the norms of Art. 69.

Secondly, getting back to historical materials, we can see that the members of the Constitutional Commission drew special attention to the fact that it was not necessary to set apart «the right to participate in state affairs» with the help of syntactic means. As the question might appear concerning in what other forms this participation can be implemented. Therefore it was proposed to take as an example the approach to formulating such rights in the Universal Declaration of Human Rights: «Everyone has the right to take part in the government of his/her country, directly or through representatives, chosen freely» (Art. 21)[2]. This formula indeed looks more complete.

And indeed, one might ask, where is then «participatory» component in Ukrainian democracy? Firstly, the legislator did not find it possible to give citizens the right to initiate consideration of draft laws in Parliament.

Secondly, legislator refused to establish a constitutional possibility to freely obtain information from the authorities about their activities (although eventually the Parliament had to restore that right as the result of the prolonged insistence of the Council of Europe by adopting the Law «About access to public information»). And without this information, even the citizens having the greatest interest in participating in formulation of government decisions have difficulties to act and analyze the situation correctly.

Thirdly, despite enshrining in the Constitution, the destiny of the right to participate in peaceful meetings turned out to be not an easy one. Today, only lazy person does not speak about the need to adopt the law, in which the mechanism to implement this right would be described in detail and appropriate guarantees would be established. European experts and human rights in-

[1] Конституційне право України. – К.: Укр. Центр правничих студій, – С. 150, 151.

[2] Конституція незалежної України. Книга третя. Частина третя. Документи. Стенограми. – К.: Право, 1999. – С. 245–249.

stitutions got tired to talk about it. It is sufficient to get back to the last «reminder» of the European Court for Human Rights in the case «Shmushkovych against Ukraine»: the Court once again emphasized the previously expressed position that the existing procedure of peaceful meetings is not clear, citizens wishing to hold peaceful meetings are unable to foresee the consequences of their behavior in terms of law and thus bringing them to responsibility for violation of peaceful meetings conduction procedure is difficult to be named the one that is carried out within the law.

It is pertinent to note that on the basis of these decisions of the European Court, the Supreme Court of Ukraine reviewed the local courts' decisions that were the basis for an appeal to the European human rights institution, and came to quite interesting conclusions. In particular, the Court noted «the actual availability of due process of law for holding peaceful demonstrations and facts of its violation ... would be the grounds for administrative responsibility according to part one of Article 185-1 of the Code of Administrative offences». «But the absence of definite law excludes the possibility of punishment for its violation, since there is no penalty for violation of non-existing order»[1]. Although the most prominent representatives of administrative justice assume that special provisions to consider disputes, existing in the Administrative Code of Ukraine (Articles 182-183) are the law mentioned in Article 39 of the Constitution of Ukraine as an act for a court to impose restrictions on the right to peaceful meetings[2].

So today we can state that on the agenda of constitutional reform next to the decentralization of power, judicial reform should be the question of fundamental rethinking of democratic institutions that should be enshrined in the Basic Law. Before that, we have to determine in concept what mechanisms of direct and participatory democracy will have the effect in the present conditions, taking into the account the mental, political and legal features (attention is focused to the fact that before the start of work on the final version of the Constitution, the Working subcommittee of Constitutional Commission determined that the articles of the draft of Constitution are to correspond with «the peculiarities and mentality of the Ukrainian people»[3]).

Of course, the presence of possibilities for citizens to have influence on making government decisions and to control their implementation should, first of all, be fixed. We do not tend to think it is possible to return to the already rudimentary forms of Soviet people's control. It is quite normal to borrow European experience of including such institutions to constitution. We should not

[1] Постанова Верховного Суду України від 3 березня 2014 року у справі № 5-49кс13: [Електронний ресурс] // Режим доступу: http://www.reyestr.court.gov.ua/Review/37908429

[2] Смокович М. І. Правове регулювання розгляду виборчих спорів: теоретичний і практичний аспекти. – К.: Юрінком Інтер, 2014. – С. 343.

[3] Конституція незалежної України. Книга третя. Частина третя. Документи. Стенограми. – К.: Право, 1999. – С. 6.

forget that effective political democracy, as interpreted by the European Court of Human Rights, cannot function without guaranteed freedom of speech, assembly and association. These three freedoms, more precisely to say their effective guarantee is of great importance for participatory democracy that has meaningful deliberative paint coating in developed democracies, that is it allows to create a real atmosphere of a broad social and political discourse when making any important government decision.

It is also necessary once again to draw attention to some unsolved functional components of institutions of direct democracy in the current Constitution. First of all, it is a question of «Arbitration» potential of all-Ukrainian referendum Institute which was categorically rejected during the development of the Constitution in the context of the argument that «officials of higher level should not play with referendum»[1]. One must also remember the cost estimate component of direct democracy, since the cost of holding referendum is quite consistent with the annual budget of the Parliament.

Finally, we would like to note that effective democracy is impossible without stable republican traditions in society. The development of such a «republican» society is determined by many factors, and the important one is enlightenment of population (in this context the points to ponder should be the examples of the voting of Romska community in Zakarpattya at the last presidential elections: by the testimony of the head of the Romska local authority M. Gorvat because of ignorance of many voters, who are members of this minority group; the first at voting place is the one who can read and then he/she goes out and tells the others what number in voting paper has this or that candidate)[2].

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[1] Конституція незалежної України. Книга третя. Частина третя. Документи. Стенограми. − К.: Право, 1999. − С. 443.

[2] Як на Закарпатті голосують мультиетнічні громади: [Електронний ресурс] // Режим доступу: https://www.youtube.com/watch?v=yBNb5vIOQ3A

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The idea of federalization in Ukraine in the context of national and ethnic factor: historical experience and current challenges

The issue of the transformation of Ukraine into a federation as a possible direction for further improvement of its territorial organization has repeatedly risen in the community. However, the essence of federalism, main features and peculiarities of its implementation in different countries were not commonly the subject of research. Behind the proposals and slogans on the federalization of Ukraine was hidden the rather simplistic view to the phenomenon of federalism and the process of federalization, as the possible transformation from unitary to a federal state kind of territorial organization. Ukrainian scientists and experts usually very cautiously and with restraint treated the idea of federalization of Ukraine because there are dominated the beliefs that the unitary state ideas must stay for a long-term period as a defining principle of Ukrainian state territorial organization. At the same time, the determination of certain aspects of federalism was the subject of research of some Ukrainian scientists. Thus the historical aspects of federalism is analyzed by M. Kostomarov, M. Drahomanov, A. Eyhelman, M. Hrushevsky, M. Palienko, A. Androschuk, A. Artemenko, Y. Artemenko, A. Kopylenko, G. Korolev, L. Krutova, K. Lemeschenko, O. Skakun, V. Rybalko, A. Rogozhin, V. Rumyantsev. Peculiar features of federalism in foreign countries is analyzed in the works of B. Bushansky, S. Grechannyi, S. Yesaulov, V. Kachur, B. Kliyanenko, V. Stepanov, A. Chernezhenko. Some scientists of our country note certain hazards that may arise because of conversion to federalism (M. Yizha., I. Koliushko, D. Osyechkov) the other up to now stand up for the transformation of Ukraine to federal state as a promising direction of the Ukrainian state's development (P. Ta-

lochka, V. Medvedchuk, D. Tabachnik). However, the role of ethnic factor as one of the criterions for construction of federal states and potential shortcomings of possible transformation unitary state into a federal are remain not researched.

The conception of federalism on a constitutional level first was carry out into practice and achieved logical perfection in the US Constitution. While analyzing US federal structure with territorial principle in its base Alexis de Tocqueville has shown convincingly some benefits of federalism in his famous work «Democracy in America»[1]. However, he said, «The federal structure system can't be implemented in all nations»[2]. In his opinion, «inhabitants of Mexico, intending to institute federalism, took as model the federal structure of their Anglo-American neighbors and almost completely copied it. However, having adopted letter of the law they could not adopt spirit of the law, which makes it alive, at the same time. As a result, we are seeing how they are confused without ceasing in their dual management mechanism. The supreme power of states and the supreme power of the Union, going beyond the boundaries established by their constitution, every day interpenetrate into one another. Mexico still constantly moving from anarchy to military despotism and of military despotism to anarchy»[3].

It is exactly under the influence of the experience of the US that the idea of federalism has spread worldwide, including in Ukraine. In particular, the members of Cyril and Methodius Society were adherents of federalization. According to the constitutional project by G. Andruzkii dated 1850 was proposed to establish Slavic federal state consisted of the seven states: 1) Ukraine with Chornomorya, Galicia and the Crimea; 2) Poland with Poznan, Lithuania and Zhmud; 3) Bessarabia with Moldavia and Wallachia; 4) Ostzeia; 5) Serbia; 6) Bulgaria; 7) Don[4]. The constitutional project by M. Dragomanov dated 1884 contained legal model of release and development of the Ukrainian people by transforming Russia into a democratic federal state. It was planned to recognize a wide range of civil and political rights, to establish the right to judicial protection and new (regional) territorial division with local government at all levels, to create the State Duma and the Federal Duma, etc.[5].

In 1905 M. Grushevskiy stated his vision of constitutional reforms while emphasizing: «Every nation and every region has its own needs, their customs, their business in the place and it is hard for the whole countries' government or the Duma adapt to them. It is hard at the same time to govern grain-growers lands and some northern lands near the White Sea or Pacific Ocean. Therefore, Ukrainians want main parliament and government manage only such matters, which

[1] Tocqueville A. Про демократію в Америці [Democracy in America], Kyiv, 1999, p. 139–143.

[2] Ibid (p.143)

[3] Ibid (p.144)

[4] Sliusarenko A. H., Tomenko M. V. Історія української конституції [History of Ukrainian Constitution], Kyiv, 1993, p. 45.

[5] Sliusarenko A. H., Tomenko M. V. Історія української конституції [History of Ukrainian Constitution], Kyiv, 1993, p. 52–60.

cannot hand over to local government. These are matters like conduct of war and peace, conclusion of agreements with other countries, direction of entire army of republic, establishment of single currency, measures and faith. All other matters is needed to hand over to elective dumas, seyms and elective ministries, elected by people»[1].

The idea of the transformation of the Russian Empire to the federal republic was also supported by some representatives of the Russian intelligentsia, particularly S. Fortunatov, M. Kovalevsky, P. Korf. The last wrote in 1917, that «naturally every nation, every nationality strive for the most complete independence; when several nations united into one (for example, the state of the old regime) each of them shows centrifugal or separatist ideals and inclinations, but as soon as they provided by internal autonomy, by lawmaking ability and guarantee of their own cultural development, centrifugal forces change to centripetal and begins the process of unification on the basis of federalism»[2].

However, in practice overreliance on ideas of federalism among Ukrainian politicians led to negative consequences, because it resulted in the emergence of certain illusions and substantiated expectations among the UPR leadership regarding the future prospects of Ukrainian statehood. Because of these baseless illusions the independence of Ukraine was declared with significant delay and even only under the pressure of external circumstances[3], and it finally has caused the loss of precious time, dynamics of state building, efficient troops, as well as Ukrainian statehood. Besides, it should be emphasized, that the links to famous historical figures – supporters of federalism in the context of modern substantiation of necessity of transformation from unitary to federal state is not quite correct and acceptable for two reasons. Firstly, in their works Ukraine is described as the subject of a new democratic federation, which has to arise from the former Russian Empire. That is the transformation of Ukraine from the actual colony to an equal part of democratic federation, replacement of colonial relations at an equal federal relation certainly was perceived by many as essential step forward, as significant progress that is able to provide further democratic development of Ukrainian society and able to release its powerful creative potential. For the beginning of the 20th century the idea of federalization in that context was quite attractive and definitely was a promising direction for further process of the Ukrainian state building. Secondly, in the base of the future federation was proposed to put the ethnic factor and that was the first and foremost main difference from the American model of federalism, which was based only

[1] Hrushevskyi M. Хто такі українці і чого вони хочуть? // Політологія. Кінець XIX – перша половина XX ст. Who are the Ukrainians and What Do They Want?] Politolohiia. Kinets XIX — persha polovyna XX st., Lviv, 1996, p. 185.

[2] Korf S. E pluribus unum! // Novoe vremya, 1992, no. 2, p. 59.

[3] Vynnychenko V. Відродження нації. (Історія української революції). Ч. II. (The History of the Ukrainian Revolution)], Kyiv, 1990, Part II, p. 243.

on territorial principle. However, it is well known, that almost all federation based on the use of ethnic factor or on taking it into account as the main criteria for the establishment of the federation, now have ceased to exist or still are continuing to face new challenges and threats while remain unstable states.

Ukrainian SSR as a kind of a quasi-state, remained formally independent not for a long time and at the end of 1922, in despite of the significant resistance of significant part of the Ukrainian political elite, it was involved by intrigues into the USSR[1], which under the Constitution was recognized as a federation. Nevertheless, in fact rigid centralization brought to nothing the relevant constitutional provisions, the principle of federalism and powerful economic potential. Almost immediately after the creation of the Soviet Union began phasing out the federal relations. M. Deev stresses that «Soviet national state structure for decades of domination of the administrative-command system actually was unitarism dressed in declarative federal constitutional and ideological forms»[2]. Moreover, the real costs of so-called «socialist experiment» in the form the Soviet federation look so deep, tragic and destructive that any their comparison with so-called «achievements» looks at least as profanity. Largely it is a result of massive social experiment, initiated by Union treaty in 1922, that most of the former Soviet Union nations were mostly exhausted and depleted (especially morally, demographically and economically), were on the verge of civilization processes and were helpless under the new conditions, linked to the challenges of globalization and stiff competition on world markets, international division of labor, goods and services markets.

The experience of use of ethnic factor for forming of federations had also accumulated in some foreign countries. According to the national and territorial principle was built Czechoslovak and Yugoslav federation, but they did not pass the test of time. Despite the rather detailed constitutional regulation, to overcome national grievances and to achieve the reconciliation and inter-ethnic harmony in the Yugoslav federation was not succeed. S. Zizek considers that «the disintegration of Yugoslavia was not caused by Slovenian «secession», which brought the domino effect (first Croatia, then Bosnia, after it Macedonia…) but by the Milosevic's constitutional reforms of 1987 that abolished the autonomy of Kosovo and Vojvodina. Since Yugoslavia existed only because it did not notice its own death»[3]. Czechoslovak federation also ceased to exist, and on its base was created two new unitary states – the Czech and Slovak Republic. V. Chirkin considers «that an

[1] Starovoitova H., Svoboda V. Остання імперія: народження і розпад // Літературна Україна [The Last Empire: Birth and Collapse], Literaturna Ukraina, 1991, 31 zhovtnia, no. 44.

[2] Deev N. N. К вопросу о путях возрождения советского федерализма [To the Ways for Revival of the Soviet Federalism], Politicheskaya reforma: tseli, protivorechiya, etapy, Moscow, 1990, p. 37.

[3] Zhyzhek S. Війна в Косово // Незалежний культурологічний часопис. [The War in Kosovo], I. Nezalezhnyi kulturolohichnyi chasopys, 1999, no. 15, p.9.

important factor in the disintegration of the majority of federations, based on the alliance of states, besides the totalitarian, undemocratic structure of such that states was the fact that they were created on the national (national and territorial) basis, so the nationalistic tendencies got the upper hand over the processes of integration and economic necessity. National factor acquired a centrifugal value, became the circumstance that caused the disintegration»[1].

Historically it happens, so that in the Canadian federation one of its present ten provinces (Quebec) was established in accordance with ethnic and linguistic factors. For nearly a hundred years, the French-speaking Canadians held only minor positions in the government, which perceived by many of them as direct discrimination. The crisis of federal relations of 60-70`s put the implementation of certain reforms to the agenda. At a time when P. Trudeau was a Prime Minister, French-speaking Canadians began more widely engage in public activities and much more often occupy important political and administrative positions. Ignorance of English language has ceased to be an obstacle to politician or civil servant career and both English and French languages have been recognized as official. The federal legislation cemented their equal status in the system of realization of state authority, armed forces, state entrepreneurship, school education. French language first became equal with English, and thereby, by legal means, were established «the preconditions for alignment of the actual inequality of French-speaking Canadians, which helped to preserve their national identity»[2]. However, the significant part of French-speaking Quebec citizens supports the idea of turning this province into an independent state and in referendums support secession from the federation. Therefore, in the 1992 referendum 40% of voters have voted for independence of Quebec, in 1992. – 45%, and in 1995. – 49%[3].

Also noteworthy is the experience of Belgium, which was a unitary state for a long time. Constitutional reforms of 1893 and 1921 related to the putting into operation of the system of proportional representation, in fact strengthened the role of the Flemish population in the political sphere. However, at the same time there have not been changes in the language and culture sphere, in which the Flemish population was somewhat limited. Socioeconomic development of Flanders was accompanied by a gradual increase of the Flemings' national consciousness. In 1898 Flemish language became the second official language of the state, but only in 1932 it became

[1] Chirkin V. E. Основы сравнительного правоведения [Foundations of Comparative Law], Moscow, 1997, p.140.

[2] Danilov S. Yu. Канадский вариант федерализма: опыт и перспективы [The Canadian Variant of Federalizm:Experience and Prospects], Federalizm: teoriya i istoriya razvitiya (sravnitel'no-pravovoy analiz), Moscow, 2000, p.95-96.

[3] Danilov S. Yu. Канадский вариант федерализма: опыт и перспективы [The Canadian Variant of Federalizm:Experience and Prospects], Federalizm: teoriya i istoriya razvitiya (sravnitel'no-pravovoy analiz), Moscow, 2000, p. 111–112.

compulsory in primary schools of the North Belgium. Such slow changes caused growth of discontent on the part of the Flemish population[1]. The constitutional reforms of 1970, 1980, 1988 and 1993, which defined a gradual transition of Belgium from the unitarism to a federation, became a legal basis for solving of international problems and example of use of ethnic factor in the territorial organization of the state at the present stage. Now the Belgian Federation consists of three communities: French, Flemish and German-speaking. It is divided into three regions: the Walloon, Flemish, Brussels and four linguistic regions: French, Dutch, bilingual region of Brussels and the German language region. Moreover, the changing or the refinement of the boundaries of this four linguistic regions is permitted by law, which shall be adopted by a majority vote in each linguistic group of each of the Houses of Parliament under the condition of presence of a majority of each group and provided that the total number of votes cast in both linguistic groups is not less than two-thirds of which who participate in voting[2].

The national and territorial criterion in addition to other has been laid on the basis of the building of a modern Russian Federation. In the opinion of E. Tadevosyan, in the development of Russian federalism «were dominated centralistic tendencies ... This tendency was mostly a reaction to the former real supercentralism of Soviet federalism»[3]. N. Varlamova believes that «the uncertainty and contradictoriness of the constitutional regulation of federal relations is deliberate...» The indefiniteness «of the constitutional provisions provides the legal space for further searches which continue today»[4]. Exactly therefore it can be considered that the formation of the Russian Federation is still continuing, its development takes place in different directions, and the search for optimal models of regulation of federative relations is also continuing, however the excessive and tough centralism as a defining tendency of the Russian contemporaneity again begins to prevail. Therefore, it is too early to talk about the effectiveness of modern Russian Federation, which is also based on the national and ethnic factor.

In modern Ukraine one of the main arguments in favor of the introduction of federal state and territorial structure, though somewhat veiled, is the national and ethnic factor, which is often directly or presented as the defining. At the same time, the emphasis usually is on the separateness and the essential specifics first of all of the southeastern regions. It is in

[1] Конституции государств Европейского Союза [Constitutions of the European Union Countries], Moscow, 1999, p. 103.

[2] Конституции государств Европейского Союза [Constitutions of the European Union Countries], Moscow, 1999, p.109.

[3] Tadevosyan E. V. К вопросу о характере государственной власти субъекта федерации [On the Nature of State Power of a Subject of Federation], Gosudarstvo i pravo, 2002, no. 3, p. 24.

[4] Varlamova N. Конституционная модель российского федерализма [Constitutional Model of Russian Federalizm], Rossiyskiy federalizm: konstitutsionnye predposylki i politicheskaya realnost, Moscow, 2000, p. 65.

fact an attempt to divide artificially, on the one hand, the predominantly Ukrainian- (or perhaps even largely bilingual) and, on the other hand, ostensibly predominantly Russian-speaking part of our country, although arises are a lot of political speculation and myths. For example, in Kharkov region according to official data there are 2 million and 48 thousand citizens who recognize themselves as Ukrainians and 742 thousand of Russians (while there are more than 800 000 Ukrainians and about 400 000 Russians in Kharkov). However, Kharkiv (and with it the entire Slobozhanschina) is often peremptorily called Russian-speaking and even «Russian» region, herewith forgetting about the numerous literally attempts to destroy the supporters of the preservation of the Ukrainian spirit in Kharkiv. Thus, in the 30s of XX century in Kharkiv region was a situation when it was no one to teach the Ukrainian language in schools since almost all the teachers of the Ukrainian language and literature have ranked to the mythical anti-Soviet terrorist organization and was sent to forced labor camps. A conspicuous is yet another fact: May 22, 1951 about 800 students of Kharkov University appealed to the rector with the statement to allow them to take exams in the Ukrainian language, but the next day 33 of them were arrested[1]. These and many other facts show convincingly that in Slobozhanschyna and in many other regions of Ukraine for a long time was such a strained social and political climate, when to communicate in the Ukrainian language was either not prestigious or unacceptable or even was dangerous. Such an atmosphere was created artificially exactly because of a long-term persecution. So, having forced the several generations of Ukrainians to refuse their native language and to switch to Russian language in order to survive (as, for example, during the Holodomor) the conductors of «imaginary internationalism» and their descendants are now trying to split Ukraine while using the national and ethnic factor, which is proposed to put on the basis of federalization. It is also noted the special mentality and the specific kinship of the population of Donbass, or even of all residents of the southeastern regions of Ukraine.

Nevertheless, the experience of federations based on national and ethnic factors, conclusively proves that they are nonviable and inefficient, and therefore are mainly ceased to exist. Exceptions as Belgium, Bosnia-Herzegovina and Russia only confirm general regularity, since the problems in mentioned federations continue to increase. Besides, Russia hardly can be considered as a real federation, because of strict centralization, the so-called «managed» democracy and the singular focus on the sole leader that actually have nullified all the advantages of classical federalism. That is why there is no need for the Ukrainian society to experiment with the construction of federation, the subjects of which will be to position themselves as the supporters of Ukrainian statehood or as the representatives of so-called «Russian world». Such veiled use of the national and ethnic fac-

[1] Голос України. Holos Ukrainy, 2014, no. 97, 22 travnia.

tor in the process of transformation to the federation can lay the foundation for the further destruction of Ukrainian statehood. Ukrainian society has already had the opportunity to see on examples of Slavyansk, Kramatorsk, Mariupol, Donetsk, Lugansk and other cities and towns of Donbass what results from the speculations about federalization. Some of them even went so far that their self-proclaimed leaders give an order to detain and «carefully examine» any person who communicates in Ukrainian. However, in Ukraine, some politicians and scientists continue to insist on the prospects of the federal structure and its benefits. So, V. Medvedchuk considers that the «administering of the federal foundations for organization and functioning» is promising for Ukraine, notes the potential benefits that «carries the idea of federalization and federal constitutional model of state and territorial structure»[1]. In this regard, it should be reminded that almost all modern democracies did not voluntary convert to federalism from unitarism. Those federations, which for today exist in the world, formed mainly by combining historically or politically independent states or public entities (like the US), or have had previous experience of such an association of state entities (for instance Germany). The only exception among the developed countries that can serve as an example is Belgium, which is only under the pressure of complicated circumstances primarily related to the long-ethnic tensions had very gradually and slowly move from unitary to the federative structure, but even this does not solve even the part of the problems that arose in the Belgian society and this state periodically is feverish. Similarly, under the pressure of complicated circumstances was imposed the federal structure in Bosnia and Herzegovina, but the problems in this state only deepened.

Secondly, it should be noted that the federation is a complicated, usually a united state, which includes public formations, that have a certain legally defined political independence and an individual features of statehood. For the federated state there are inherent the following features: 1) territory of a federation is made up of federation subjects' territories; 2) subjects of a federation have constitutive power and therefore have the right to its own constitution; 3) presence of a multi-level and especially complicated system of organization of public authority (state authorities, authorities of subjects of a federation, bodies of several levels of local government); 4) subjects of a federation have their own legislatures, and hence the right to make laws and other legislative acts (as opposed to administrative and territorial units); 5) subjects of a federation have their own system of law; 6) subjects of a federation have their own judicial system; 7) multilevel complicated tax system (state taxes, taxes of subjects of federation, local taxes);

[1] Medvedchuk V. Державотворчий потенціал федеративної трансформації України: конституційно-правові аспекти [State-Forming Potential of Ukrainian Federal Transformation: Constitutional and Legal Aspects], Visnyk Natsionalnoi Akademii pravovykh nauk Ukrainy, 2013, no. 2 (73), p.106.

8) multi-level budget system (national budget, regional budgets, local budgets of several levels) and others.

That is why a possible conversion to the federal structure raises the problem of determining of optimal amount of federation subjects' and their territorial boundaries. A number of extremely difficult issues is rises: for example how to define an optimal number of federal subjects and what criteria should form the basis for definition of their boundaries. The solution of this problem requires long and complex calculations. Theoretically, the federation' subjects could be either administrative and territorial units of higher level determined by part 2 of the article 133 of the Constitution of Ukraine (then could be 27 or 25 subjects of a possible Ukrainian federation), or the union of several of these administrative and territorial units of a higher level determined by the article 133, part 2 of the Constitution of Ukraine (then it could be, for example, sixteen, ten, nine, or seven federal subjects), or even three regions (the East, the West, the South). However, at that time surely will arise a substantial resistance of local elites, because it would mean the loss of their power and influence in the respective region. For example, if as one of the subjects of the future Ukrainian Federation will be recognized Slobozhanschyna, then it would be logical to include in it Kharkiv region, as well as part of the Sumy and Lugansk regions. It is clear that such logic may cause the intense opposition from Lugansk and Sumy regional elites. Moreover, according to expert estimates economically during the last years only three of 24 Ukrainian regions were self-sufficient and capable.

However, having assigned the federal subjects (even if it happens on the basis of political compromises and the general consensus of elites, which seems unlikely), Ukrainian society will not solve any problems and face a number of even more complex and intricate issues. Immediately it is raises the problem of the two levels of constitutional regulation. Numerous attempts to reform the Constitution of Ukraine have made repeatedly, but the excursion into the modern history of Ukrainian constitutional process demonstrates that Ukrainian society was not ready to find a political compromise and reach its legal confirmation in the form of renewed constitutional text despite the numerous threats facing it and despite the challenges and the danger hanging over the Ukraine because of profound political crisis and modern processes of globalization. It is clear that the development and adoption of federation' subjects individual constitutions as legal acts of constituent power, i.e. the creation of the second level of constitutional regulation, will require much more time and intellectual efforts than the development and adoption of renewed nationwide constitution. The problem of harmonization of two levels of constitutional regulation (high level – national, low – the constitutions of the federal subjects) looks quite complicated.

At once, also raises actually the most complicated problem of optimal correlation and distribution of authority of the federal (i.e. national) government bodies

and the authorities of the federal subjects. For many federations to the present day this issue remains urgent, as is often seems to the federal government bodies that subjects of the federation have too wide powers and they are continually interfering in the prerogatives of the federation and it is usually seems to the authorities of federal subjects that they have too little powers. In India, was made an attempt to delineate in detail the exclusive competence of the Federation (97 powers), the exclusive competence of the federal subjects (66 powers) and the joint competence (47 powers). Thereafter, however, even more problems have arisen in the relations between the authorities, in politics, in the economy, in society and in the daily practice of state building. Moreover, the problem of distribution of authority pursues almost every federation until the last day of its existence, including such generally successful, as the United States.

Besides at the same time arises the problem of ensuring compliance of legislation of federal subjects with both national law and constitution of federal subject. How do ensure under such conditions the proper quality of legislative regulation at the federal level, if now even at the national level, using the powerful potential of scientific institutions and of the Ukrainian leading higher educational institutions is rarely possible to reach the adequately balance in legislation and to establish the optimal model of legislative (and constitutional) regulation? Besides a significant part of the spheres of social life is still unregulated or contains the numerous gaps and contradictions. At the same time the problem of excessive legal regulation arises, that sometimes turns into a real brake on social and economic development of certain spheres and fields (such as tax laws, complicated statements, etc.). It turns out that having involving leading scientific institutions, famous professionals and experts, Ukrainian parliament has not yet succeeded to create an effective, efficient and harmonized system of laws even just on the basis of even the single Constitution. What we will get when in each subject of the federation will be created «own» parliament, «own» government, «own» ministries and «own» legislation? Perhaps one could argue that will significantly increase the bureaucratic apparatus and expenses for its maintenance. This is surely could unbalance the entire legal system of Ukraine. Will become much harder to defend one's own rights in the court or at another institution. That is the supporters of federalization actually are pushing Ukraine to a new wave of bureaucracy and the artificial widening of the scope of excessive administration and bureaucratic arbitrariness. The artificially imposed upon Bosnia Herzegovina federalization exactly have led to the same consequences.

In addition, in the case of attempt to set up federalism in Ukraine it will surely arise the problem of having to check a colossal array of federal subjects' bylaws for compliance with the laws of two different levels (both national laws and the laws of subjects of the federation). There is also the problem of achieving mutual correspondence between the constitutions of various levels, between the

constitution and the laws, the laws and bylaws of two levels – the national and the federal subjects', etc.

Thus, the launching of federalization, i.e. the transformation from unitary to a possible federative state and territorial structure in the best case will threat the Ukrainian state and our society by involvement into the abyss of endless and lengthy debates, discussions and approvals of legal acts. Thus, politicians, numerous experts and specialists will be distracting from the specific problems of our time in the fields of economics, politics, social and cultural life, while plunging into abstractions, outlining artificial problems and modeling mechanisms of their overcoming and increasingly sinking into the quagmire of the next average of bureaucracy and excessive administration. Most likely, not soon it will be possible to get out of these discussions, meetings, forums, symposiums, «round tables» which are designed to eliminate artificially created problems related to federalization. Especially given the massive mythologizing of consciousness and misconceptions about constitutionalism, constitutional values, democracy, and own history, that are present under the conditions of a total loss of public confidence in government institutions and the political elite and in the absence of the so-called «social capital» that F. Fukuyama binds primarily with mutual trust in society. It is therefore restoration of the unitarism based on broad decentralization looks much more productive and more promising than the so-called federalization. The examples of Italy and Poland confirm that the returning to the effective modern of unitarism is possible and realistic strategic direction of democratic development. The state could remain a unitary, but at the same time become a decentralized.

In such a way, the justification of federalization by referring to the famous Ukrainian thinkers and politicians of the second half of the XIX century beginning of the XX century is unacceptable, since their position was formed in other political circumstances and conditions and in entirely different historical era. The use of national and ethnic factor as the criteria for the formation of federation in view of negative experience of the majority of states, which are built on the national and ethnic or national and territorial basis, is dangerous. Nevertheless, the most important conclusion is that the process of transformation to federative state certainly will overly complicate and confuse the system of constitutional and the current legislative regulation, will cause excessive growth of lawmaking, significant expansion of amount of officials, intensification of bureaucracy and administration, and thus may increase the probability of expansion of corruption. Furthermore, immediately raises the problem of differentiation of powers of various subsystems of public authority (national level, the level of federal subjects and the level of local government), which many federations have failed to solve.

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CIVIL-LEGAL SCIENCES

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Civil society, state, private law: problems of correlation and interaction

World-shaking events in recent months in Ukraine convincingly demonstrated that the formation of civil society in our country has rapidly achieved the practical stage and with all urgency has set for scientists a number of problems that require not only a deep understanding, but also relevant conclusions and recommendations.

We note that the study of legal problems of civil society in legal doctrine of Ukraine is still at an early stage.

Ukrainian legal scholars continue to debate about the very concept of civil society[1].

Without a goal to delve into this discussion, we restrict ourselves to the statement that we agree with the definition of civil society as'union of free individuals and associations of citizens who voluntarily formed to provide freedom and initiative of personality, rights and duties of a person and citizen, other general interest settlements that due to private property in the economic sphere, democracy in political sphere, pluralism in the spiritual sphere, justice in the legal sphere causes the existence in the vast majority of so-called middle class that is able to subdue to civil society democratic, legal and social state».[2]

However, some individual researchers considering civil society as a set of non-governmental institutions capable of self-organization and working closely with each other and the state where the state is not opposed to the civil society, and creates for its normal functioning and development most favorable conditions,deduce the individual citizen

[1] Колодій А. М. Громадянське суспільство: доктрина і вітчизняна практика / А. М. Колодій // Правова доктрина України. – Х.: Право. – Т. 1. – С. 461-468.

[2] Ibid.: С. 466.

outside the civil society. The emphasis on the fact that civil society is a «social phenomenon, which consists of institutions i.e. public (non-governmental) organizations, but not individual citizens»[1], in our opinion, unreasonably hypertrophy the factor of institutional structures of civil society.

An individual, a person, a citizen is the core of civil society.There is nocivil society without personal origins. The person in civil society is initiative and purposeful.The person realizes that eventually his welfare depends only on himself. The person is civilized, tries knowing the laws of his country, fights for their performance at the same time opposes them if they do not meet his interests.The person in civil society should have citizenship and not be afraid to express them openly. The person should understand that no one is able to solve his vital problems except him.[2]

It is because of this understanding of civil society we can speak of «maturity» of social relations in it emerging both between individuals, and between them and numerous types of public associations that are formed on a voluntary basis and act as an independent non-governing self-ruling institutions.

One of the most difficult problems of formation and subsequent functioning of civil society is to determine the relation between civil society and the state.

There is no doubt that this issue appears only concerning the democratic legal state, as civil society may be associated only with such a state.

Analysis of the latter one as a social phenomenon that is beginning to emerge in the era of capitalist relations that give the individual a certain economic independence and freedom, gives grounds to assert that the state as a systemic organization of society is a certain instrument to ensure its integrity and consolidation of the population.

Unlike the state, civil society is characterized by basis of systemacity.[3]

At the same time the dynamic processes of social development, especially the development of civil society, are caused by including globalization and informatization of public life, form new social and in general public challenges to the state.

If politicians and scholars have long recognized the class nature of the state, then among the current trends of political science you cannot but notice the interest of researchers to the general and social purpose of the modern state.

This is primarily due to the fact that civil society, which consists of as a constant community of citizens on the basis of recognition of common values and provision of human rights, requires the state to be an effective mechanism that guarantees the inviolability of values and rights because only the state has a versatile tool that can provide such guaran-

[1] Мерник А. М. Інституції громадянського суспільства: поняття, особливості, види: автореф. дис. ... канд. юрид. наук : спец. 12.00.05 / А. М. Мерник. – Х., 2013. – С. 7.

[2] Философия права: курс лекц. / отв. ред. М. Н. Марченко. – М., 2011. – Т. 2. – С. 211.

[3] Мерник А. М. Інституції громадянського суспільства: поняття, особливості, види: автореф. дис. ... канд. юрид. наук : спец. 12.00.05 / А. М. Мерник. – Х., 2013. – С. 6.

tees i.e. legal regulation, enforcement means, the army and other armed forces.

«Society overcomes the difficulties and contradictions and tries to find solutions of new objectives in the political, economic, social and international spheres, – said Yu. O. Tyhomirov. – It inevitably brings for its self-preservation the conditions of life, which the state should provide through its system-oriented means of influencing social processes.Is gradually formed what can be conventionally called «public mandate» that society provides to the country to achieve national goals. This means firstly about life values of society and people, and secondly, about the most important areas in which it is necessary to ensure coherent regulation and management, thirdly, about taking care of people, their rights and freedom, quality of life, fourthly, about safety in the broad sense of the political, environmental and other fields. This determines the high social role of the state.

However, at the same time society limits the effect of «mandate» requiring from the state of legitimacy by controlling the activity of state institutions and civil servants, confering responsibility for the committed actions. These are the elements of «social mandate» of the state, which are mandatory for it».[1]

According to events of recent months in Ukraine, the state not only implicitly ignored elements of «public mandate» but cynically violated rights and freedom of Ukrainian citizens. That is what led to mass protests of Ukrainian citizens against arbitrariness of the state and its officials, total corruption that permeated all the mechanisms of state power, lawlessness and legal nihilism etc.

Analyzing the current situation as a result of the revolutionary resistance of civil society, we can say that the state over the past ten years, since the «Orange Revolution» failed to create conditions for provision of requirements that were put by society in November-December of 2004:decriminalization of power, transparency of the most important government decision-making, combating corruption and purification of state agencies from corrupt officials, the implementation of the Ukrainian national idea while ensuring the rights of national minorities to the preservation, development and popularization of their languages and traditions, the development of inter-regional, inter-ethnic and international cultural links.

Without exaggeration, it can be argued that the state during this period failed to provide also the development at the proper local government level, did not take into account regional characteristics and needs of individual areas, did not provide the unity of the Ukrainian nation, did not form modern Ukrainian national idea. With the rest, having captured the state power, Ukrainian authorities were responsible only for their own interests, violating all requests of civil society.

The absence of effective mechanisms of public control over the activities of the state made impossible the opposition of civil society to criminal instances of

[1] Тихомиров Ю. А. Государство / Ю. А. Тихомиров. – М. : «Инфра-М», «Норма», 2013. – С. 17.

violation of fundamental rights and freedoms of citizens by the state in general and its officials that eventually led to the mass public protest actions and numerous victims.

So far, legal science has not developed at the appropriate level functions, forms, tools and mechanisms of social control over the state from civil society.

Realizing that «civil society is organically linked to the state, it did not exist in the state and outside the state, at the same time civil society has relatively to the state the supreme sovereignty, the meaning of which is that it is the interests of civil society in the country are the priority concerning state interest , the structure of state apparatus, forms of state, state-legal regime and others»[1], it is necessary be determined, in the current development of Ukrainian society and the Ukrainian statehood the primary task is to provide actual interaction of civil society institutions and a legal democratic state.

Today first steps were made in this important area; there are established important institutions such as the Anti-Corruption Bureau Lustration Committee and others. It is extremely necessary to fill their work with real content, directing joint efforts of civil society and political influence to overcome the crisis in the political, socialand legal areas.

The right should play the special role in this process.

Not stopping on the problems of modern legal understanding, detection of its nature and characteristics, as it is a separate object of study and should be considered in detail in the legal, philosophical, political and sociological aspects, we will be restricted only to analysis of the role of right as a special phenomenon in the functioning of civil society, which belongs to its core values, because the right is considered as a measure of justice. At the same time, the right is a powerful regulator of social relations.

S. S. Alekseev considered the right as a tool (mechanism) of implementation and provision of the reproduction of the social system, its stable condition in a stable continuously functioning form, in time.»And due to the right which is dealt in the unity of the law, such a situation is achieved when this social system continuously without changing its characteristics and features, «spinning» and «spinning» in a given mode of its informational and organizational structure, and in such way (ideally) that its mission of «extraordinary freedom» and «permanent antagonism» focuses on defining and maintaining boundaries freedoms,- says S. S. Alekseyev. – Basically this mission of the right in society is unique, and – what is important – (again, basically) – does not have political and especially ideological content».[2]

[1] Колодій А. М. Громадянське суспільство: доктрина і вітчизняна практика / А. М. Колодій // Правова доктрина України. – Х.: Право. – Т. 1. – С. 470.

[2] Алексеев С. С. Самое святое, что есть у Бога на земле. Иммануил Кант и проблемы права в современную эпоху [2-е изд.] / С. С. Алексеев. – М., 2013. – С. 132.

It should be noted that traditionally value of the right for the functioning of civil society was considered primarily in terms of the formation of the legal state.

At the same time in modern researches it can be clearly traced the trend to a significant expansion and deepening of approaches to determine the functions of the right in modern social life.

A conceptual approach to the right as to an element of civilization and culture makes it possible to characterize the origins, significance and social value of right in broad, general and social terms. As a deep element of culture the right not only absorbs its values, but also implements fundamental requirements and achievements of civilization, thus ensuring the preservation and to some extent enhancement of the capacity of material, social and spiritual wealth of society.[1]

Considering that, the economic fundamental principle of civil society is private property, and therefore regulation of property relations have become extremely relevant, primarily private right mechanisms and in general, a private right become important among legal instruments.

S. S. Alekseyev noticed that for the right as a phenomenon of civilization the output original sphere is exactly the private right, that is a legal area that is not a product and an instrument of state power (and in this respect is not the «product derived from power», although it is with it in permanent connection), and comes spontaneously, due to the requirements of life, under its pressure in transition of society into the era of civilization, under the influence of its hard imperatives.It is quite revealing that the same factors related to the mind, mental creative activity of the individual, which determined the development of society during the transition to civilization (including private property, individual separation) led to the need of existence and intensive, largely predominant, development of «horizontal» legal relationship that would be based on many legal and sovereign «centers» independence of entities, to determine freely terms of their behavior.[2]

Modern civil right, which stands for the array core of private-legal norms, is intended to be a legal basis for civil society.

The Civil Code of Ukraine that not by chance was «named» as the Constitution of civil society, in art. 1 provides that civil law regulates the moral and property relationships based on legal equality, free will, property independence of their participants.This approach is harmoniously combined with the concept of civil society about the status of a person – a person in civil society presents itself as a sovereign and autonomous personality. He or she is equal among equals, as people joined together by their will in the community and it is logical to assume that they themselves

[1] Смоленский М. Б. Право и правовая культура как базовая ценность гражданского общества / М. Б. Смоленский // Журнал рос. права. – 2004. – № 11. – С. 73.

[2] Алексеев С. С. Восхождение к праву. Поиски и решения [2-е изд.] / С. С. Алексеев. М., 2002. – С. 127.

produce values, norms and rules that they intend to follow.[1]

The basic principles of civil law, enshrined in Art. 3 CC of Ukraine, recognized the following:

1) inadmissibility of arbitrary interference in the sphere of private life of a person;

2) the inadmissibility of deprivation of property, except the cases established by the Constitution of Ukraine;

3) Freedom of Agreement;

4) freedom of entrepreneurial activity that is not prohibited by law;

5) judicial protection of civil rights and interest;

6) justice, good faith, reasonableness.

These general principles are detailed and deepened in some legal rules governing property relations. Thus, according to Art. 321 of Civil Code of Ukraine ownership is inviolable. No person may be unlawfully deprived of that right or be restricted in its implementation. A person may be deprived of property rights or be restricted in its implementation only in cases and in the manner prescribed by law.Forced alienation of property rights may be used only as an exception to the public requirements on the basis of and in the manner prescribed by law and subject to advance and complete compensation of their value.By adopted in 2010 the Law of Ukraine «On the alienation of land and other immovable property located thereon, which are privately owned, for public purposes or for reasons of public necessity» there are defined the legal, organizational and financial principles of regulation of social relations,arising in the process of alienation of land and other real estate located thereon, which are owned by individuals or entities for public purposes or for reasons of public danger, and the principles of the exclusion and the procedure for determining the redemption price.

In the implementation of property rights each owner owns, uses, disposes of its property in its sole discretion, he is entitled to make in respect of his property any actions that are not contrary to the law.

At the same time in accordance with the general provisions regarding the exercise of civil rights enshrined in Art. 13 of Civil Code of Ukraine, in the exercise of own rights, including property right, a person is obliged to refrain from acts that could violate the rights of others, harm the environment or cultural heritage. There are not allowed actions of the person committed with the intent to do harm to another person and abuse of the right in other forms.

Art. 319 of CC of Ukraine also provides that the exercise of own rights and responsibilities the owner can not use the property right to detriment of the rights, freedoms, dignity of citizens, the interests of society, aggravate the ecological situation and the natural qualities of the land, and he is obliged to follow moral foundations of society. Settling the principles of autonomy of the individual in civil society (property, organization), the law provides that the state does not in-

[1] Гражданское общество. Истоки и современность [3-е изд.]. – СПб. – 2006. – С. 28.

terfere with the exercise of the right on property by the owner.

However, the Constitution of of Ukraine and the CC of Ukraine determine that the property not only creates numerous opportunities for a person to meet his needs, but at the same time, property obliges.By virtue of Art. 322 the CC of Ukraine owner is obliged to maintain the property that belongs to him, and then to pay on time and in full taxes and other fees and charges set by law, to provide property insurance, if it is defined by law as required, to carry the current and capital repairs to maintain property belonging to him in a suitable condition for use.

The state provides equal protection of rights of all subjects of property rights.

The owner, whose rights are violated, appealed or not recognized, has the right make a defence of them appealing to the court.

Civil Code of Ukraine establishes the possibility to protect ownership via claims for recovery of property from illegal possession (Art. Art. 387 – 390), on the protection against violations not related to deprivation of property (Art. 391), on recognition of ownership (Art. 392), on the recognition of the illegal act which violates the right of property (Art. 393), and with the rest on damages caused to the owner (Art. Art. 22, 23).

These legal requirements form a strong foundation for the establishment in civil society of the middle class – producers, owners, autonomous and independent in property and organizing relation individuals – subjects of public relations.

At the same time it is impossible to idealize the current situation as civil society reasonably requires radically restructure the court system and completely «reset» the judicial power as an extremely high level of corruption at all levels of the court system actually negates opportunities in established legal process to ensure protection of rights of ownership and other subjective civil rights.

It is a dangerous factor in view of the the fact that an extremely important role in civil society takes Institute of Fundamental Rights and Freedoms, which should be guaranteed and actually provided by the state using all the inherent mechanisms.

Fundamental rights and freedoms of individuals have constitutional status and are fixed in the Fundamental Law of Ukraine. Further, their detailed regulation is carried out in industrial legislation.

The Civil Code of Ukraine, along with property rights, regulates the moral rights of an individual, which take a prominent place in the Code (The second book is dedicated to them in full).

According to the Constitution of Ukraine and art. 270 of the CC of Ukraine an individual has the right to life, the right to health care, the right to a safe life and healthy environment, the right to freedom and personal inviolability, the right to inviolability of private and family life,the right to respect for the dignity and honor, the right to privacy of

correspondence, telephone conversations, telegraph and other correspondence, the right to inviolability of residence, the right to free choice of residence and freedom of movement, the right to freedom of literary, artistic, scientific and technical creativity.

In the Civil Code of Ukraine, moral rights are divided into two groups. The first group includes moral rights that provide natural existence of an individual; the second one includes rights that ensure his social life.

The state represented by state authorities, authorities of the Autonomous Republic of Crimea, local authorities within their powers must ensure the implementation of the moral rights by individuals.

The level of provision of fundamental rights and freedoms serves as a criterion of democratic state and indicates compliance of its needs and requirements of civil society.

It makes little sense to dwell on the numerous facts of violation as of property and the rights of individuals by criminal regime of former President of Ukraine V. Yanukovych. They are obvious and cynically took place by government officials, law enforcement officials and law enforcement agencies at all levels of implementation of governmental authority functions.

State unequivocally violated the right to life, personal integrity, freedom, respect for honor and dignity, the right to peaceful gatherings and others.

Without any exaggeration, it can be argued that Ukraine gained mass distribution during the presidency of V. Yanukovych political crimes, which, as noted in the legal literature, have a close relationship with political interests, and committed **in cases:**

1) when there is growing internal instability of society caused either by falling of the economy, or a decrease in living standards, or ethnic conflicts or other reasons, and the leader of the state is restricted by calming speeches rather than acting boldly and decisively;

2) when the President does not fulfill the constitution, penalize it and thus contributes to escalating of conflicts in society;

Under conditions of that his actions causes loss of life political crimes turning into criminal ones and the offender has to bear not only political, but also criminal liability;

3) when outside forces threaten the interests of the state, but the president does not take any steps to repel aggression or measures he applies are palliative in nature;

4) when the interests of the state are openly betrayed, which ultimately leads to its disintegration. In this case, political crimes also turning into criminal ones;

5) when a policy aimed at inciting of ethnic hatred, the physical destruction of other races and peoples.[1]

It is committing of political crimes, which turned into criminal ones, by former President of Ukraine V. Yanukovych and his inner circle, put Ukraine to the

[1] Алексеев С. С. Философия права / С. С. Алексеев. – М. : Изд-во НОРМА, 1998. – Т.2. – С. 220, 221.

brink of national tragedy, disturbed Ukrainian people to mass resistance, and undermined its confidence in all without exception state institutions.

However, the «revolution of dignity» at the end of 2013–2014's. has become a powerful impulse to move civil society in Ukraine to a qualitatively new stage of development, to restore and strengthen the patriotic spirit of the people, the awakening of social activity and initiative.

With the adoption in April 2014 of the Law of Ukraine «On Restoring the trust in the judiciary» there started a process of lustration of civil servants, cleaning all the mechanisms of state power from criminal corruption, the formation of the bodies of state authorities, which should actually provide and ensure all institutions of civil society.

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Civil code of ukraine: recognized achievements of codification

Introduction.

January 1, 2014 marked 10 yearssince the new Civil Code of Ukraine (hereinafter – the Civil Code of Ukraine) came into force. A long-awaited transition into the Law of well known project of the Civil Code of Ukraine dated August 25, 1996 took place (although tardily and slightly deformed) even earlier – on January 16, 2003. Under the conditions of political infighting in Ukraine at the turn of Millennium it was useless to hope that legal ideas of civil society, which includemarket economy, would be implemented in the new civil law codification. Despite that adoption of the new Civil Code of Ukraine, even in current, fairly defaced form compared to its projects after the first and second parliamentary hearings, and which is surrounded by non-market and counteracting Commercial Code of Ukraine (hereinafter – the Commercial Code of Ukraine) and similar legislation is undoubtedly the most essential step towards democratic reforms over the all years of reforms in independent Ukraine. Over a distance of years it becomes obvious.

Main achievements of civil reforms become more and more understandable and gradually recognized by society dur-

ing the last 10 years. Once certain scientist said at a scientific conference that the only record of principles of civil law in Art. 3 of Civil Code of Ukraine is an outstanding achievement of codification. Over the years of operation of the Civil Code of Ukraine theorists and practitioners of law point out among achievements the return to the legal system ofUkraine principles, concepts and categories which have run the gamut from the development of the private Roman to modern European law. Among the new elements and selected areas of private law system of Ukraine, which play a critical part in the new Civil Code of Ukraine, legal experts noted the rejection of «dualism» of private law, results of convergence, harmonization and unification of separate groups of standards with relevant rules of international conventions and universal character of EU law, expanding the content of private law through non-propertyrights of an individual etc.

This article offers to overview only a few achievements of codification.

The implementation of the rule of law in the Civil Code of Ukraine.

It is worth noting that at the last scientific conference organized by the Supreme Court of Ukraine in October 2013, judges and the head of the Court during their speeches repeatedly referred to the application of equity, good faith and reasonability in dealing with court proceedings. This once again confirms the key role of general principles of civil law in the modern system of private law, covering legal consciousness, lawmaking and enforcement.

Conceptually, the Civil Code of Ukraine had been developed on the basis of natural law theories, according to which state laws do not regulate the relations, but basically aim to come close (concur) with configuration of legal relation that comes from nature. In this aspect among many relevant provisions the most prominent is Art. 3 of the Civil Code of Ukraine, which says that the general principles of civil law are: the inadmissibility of self-willed interference in the sphere of private life of a human; inadmissibility of ownership deprivation, except as prescribed by the Constitution of Ukraine and the law; freedom of contract; freedom of entrepreneurial activity which is not prohibited by law; remedy of civil rights and interests; equity, reasonableness and good faith.

This article of the Civil Code of Ukraine for the first time in the history of national codification contains important components of the rule of law in the area of private law as well as construction principles of positive and private law. Fixing the general principles of civil law in the Civil Code of Ukraine shows first of all the legislator's confirmation of «source» of civil law, which is a natural right, arising from rationality and reasonableness. It consists of rules and principles governing the behavior of people in society regardless of positive law.

These principles are statutory and therefore their compliance and accounting in lawmaking and consideration of specific legal situations is a requirement of the law. The practical significance of

this condition is, inter alia, that the court must not only mechanically analyze specific material in the form of legal documents, but also understand the principles and objectives underlying their adoption.

The principles of good faith, reasonableness and equity have a great value for the entire system of private law[1]. Firstly, they comprised not only the abovementioned principles but other principles of civil law. Secondly, the application of all other principles of civil law should not lead to unfair, unreasonable and unfair result (e.g. Art. 627 Civil Code of Ukraine says about the limiting of principle of freedom of will by the means of requirements of reasonableness and equity). Thirdly, these principles are the essence of law and specify its natural origin.

The principle of good faith (or bona fides) is an internal criterion, while as reasonableness and equity–areexternal or objective. These principles also denote the triune essence of law: natural (divine) law; positive law; right inside the human is generally characterized as conscience. Abovementioned principles comply with these three components of law. The dominant of natural law is equity, dominant of positive law – reasonableness. Finally, good faith – direction of inner conscience to goodness, the service of God, not to the power of evil. It is important to emphasize that here we are talking about dominance since equity, good faith and reasonableness belong to all «floors» of law. And not only to natural laws or state laws, but also to transactions (e.gArt. 508 of the Civil Code of Ukraine stipulates grounding of commitment on the basis of good faith, reasonableness and equity).

From the standpoint of natural law equity – is the exercise of moral demands as to the legal requirements of civil law, the concept of reasonableness, which corresponds to the understanding of human nature and its rights. Often equity is thought of as equality of proportions or as the concept of proportionality or selected assets to the aim pursued. But to define the concept of equity and capture it in legislation is impossible. Equity is a category which can be adequately implemented through enforcement activities. It should be kept in mind that when injustice of law becomes unbearable, the court must defend equity.

As part of the new Civil Code of Ukraine was also the concept of good faith. As the same way as equity, the common concept of good faith cannot be put by the legislator in legal limits. In addition, good faith has its own peculiarities in different civil and legal institutions. In general terms good faith can be described as actual honesty and respect for reasonable standards of fair business. A person should be considered as good faith when it has no intention of harming to another person, and also does not allow levity (arrogance) and negligence as to possible damage.

The main idea of natural law is also reasonableness of positive laws. As for positive law, it means, for example, that

[1] Hartkamp A. Judicial Discretion under the New Civil Code of Netherlands // The American Journal of Comparative Law. – 1992. – Vol. XL. – № 3. – C. 554–557.

the rule of positive law is not valid if it is not clearly formulated, contains a contradiction or conflict with other rules or its requirements can not be performed.

The principles of equity, reasonableness and good faith (as well as other principles prescribed in Art. 3 of the Civil Code of Ukraine) serve interpretative, complementary and corrective functions as concerns private Ukrainian law, positive law, contracts, etc.

The right to respect for private life, the right to integrity, ownership, right to judicial protection belong to main natural rights. Only the rule of law can provide their real protection. The Civil Code of Ukraine contains relevant principles of natural law: the inadmissibility of self-willedinterference in the sphere of private life; inadmissibility of ownership deprivation, except as prescribed by the Constitution of Ukraine and the law; remedy of civil rights and interests. The rule of law also includes other principles that are enshrined in the Civil Code of Ukraine.

Definition of scope of the civil (private) law.

In addition to the provisions of Art. 3 of the Civil Code of Ukraine, in the Chapter 1 developers of codification project put other basic provisions of private law concerning, for example, the subject of private law regulation, subjects, sources, etc. Notwithstanding the fact that global history of the civil codes shows that in the acts of this sort similar issues usually have not been developed (answers to all such issues usually have been given by legal orders of relevant States), developers of the Civil Code of Ukraine, explaining their decision by the fact of transitional nature of the domestic legal system, resolved toinclude a number of provisions hereof to the Civil Code.

In particular, it is stipulated that civil (private) law regulates two groups of legal relations–personal property and non-property, traditionally called in the Civil Code of Ukraine as «civil relations». Positive private law historically began with regulation of tangible relations. However, today it is not possible to ask questions about what kind of relationship – property or non-property – is essential. Each of these groups plays an important role in the functioning of civil society. However, the new Civil Code of Ukraine puts above non-propertyrelations through their extraordinary importance and regulates them (regulation position is presented, not just protection) apart of property relations. The Civil Code of Ukraine for the first time in the world codification of civil law devotes a separate book to regulation of personal non-propertyrelations (as discussed herein).

A new feature of codification was that the civil law regulation covers all civil relations regardless of life sphere in which they've arisen and exist.

Fundamental questions about the concept and range of civil (private) relations, their separation from public relations are resolved through the principles and numerous provisions of the Civil Code of Ukraine, its spirit and direction. In addition to Art.1, Art 9 also has a great meaningin this case. The latter recognizes that civil relations arisein all

spheres of life, including the area ofland, mountains, forests, minerals, rivers, seas, air and other natural resources use. Such use is also associated with environmental protection. According to the Civil Code of the Ukrainian SSR in 1963 (hereinafter – CC 1963) relations in this area were beyond civilian control. The new Civil Code of Ukraine changed the situation. Moreover, other regulations in this area as concern private law must comply with Civil Code of Ukraine. The practical significance of this approach is that in case of conflict of civil law rules, which are the part of any legal act (including Land, Water, Forest, Air Codes of merchant shipping, etc.) with articles of Civil Code of Ukraine, the latter one should be used. Therefore, specific legislation (in its private law part) in the sphere of use of natural resources and environmental protection may contain other than Civil Code of Ukraine rules only in cases when it regulates relations which not directly regulated by the Civil Code of Ukraine. In addition such regulation should be based on general principles of civil law. The possibility of deviation from the norms of the Civil Code of Ukraine can be prescribed by Code.

The above-mentioned approaches shallalso apply to the regulation of civil relations in the spheres of family law, labor and business activities. In addition, the Civil Code of Ukraine contains many provisions which consider the specific of civil relations arising primarily in the latter sphere. Some other peculiarities of the regulation can be prescribed by other laws (p.2, Art. 9 Civil Code of Ukraine).

But this refers to just peculiarities, not to the establishment of an entirely different legal mechanism of regulation of private relations in business sphere. While establishing these peculiarities general principles of civil law may not be violated andmain categories of private law may not be distorted. It should be noted once again that provisions of laws (including codes) shall not apply if they are contrary to the ideas and principles of the Civil Code of Ukraine.

For judicial practice the relationship between Civil Code and Commercial Code of Ukraine is of vital importance. The adoption of the latter (alongside with Civil Code of Ukraine) became a «unique» event in world history of parliamentary legislation. This uniqueness included, among other things, hundreds of private legal rules of Commercial Code of Ukraine which had had different from Civil Code content and legal terminology which had been constituted for similar situations. The courts tried to get out of this «stalemate» situation in different ways. In some cases, they were guided by the principle of correlation between general and special act. Civil Code of Ukraine was considered as common and Commercial Code Ukraine – as special act. In other cases, the «specialty» of Commercial Code of Ukraine was doubtful, the distinction between codes was proposed to be solved in plane of competition between particular provisions of these codes. The point is that both Civil Code and Commercial Code of Ukraine contain general and special rules. However, in our opinion, those

judges and researchers are in the right who, guided by the provisions of the Civil Code of Ukraine which constitute that Civil Code is a fundamental act of civil law, prefer the provisions ofCivil Code of Ukraine in generally all cases of conflicts with the norms of the Commercial Code of Ukraine.

Innovations regarding participants.

The main innovations regarding participants of civil relations were the introduction of the concepts of private person and legal entity of public law. Human as a participant of civil relations was recognized as private person. Civil Code of Ukraine determines legal entity as a duly established and registered organization under the statutory procedure, which is endowed with civil passive capacity and active capacity and maysue and be sued. Legal entities are divided into legal entitiesof private law and legal entities of public law. The latter participates in civil relations on general terms.

Over the years the abovementionedinnovations regarding participants of civil law were accepted by the majority of civil law lawyers. However, time has shown that certain provisions of the Civil Code of Ukraine are not fully understood by the legislature and society.

In particular, it concerns the classification of legal entities of private law. In such matters, the Civil Code of Ukraine returns to the criteria of types and forms which existed before October 1917 and now is accepted in Europe. Project developers of codification based on the doctrine that each legal entity should be established in accordance with the model which meets all criteria of an independent participant of civil relations and which is known to legislator and participants of civil law. Therefore, the Civil Code of Ukraine established an exhaustive list of forms of legal entities of private law. Legal entity can be created in the form of companies and institutions. Moreover, one more exhaustive list of its types and forms was created for business companies. Thus, and it is very important that the various persons of private law can exist within only two forms – companies and institutions. There are no any other forms in legal reality. However, over 10 years of the Civil Code's existence Ukrainian legal entities were not transferred to the coordinate system proposed by the Civil Code and the legislation is still based onthe unclearin the world private, municipal, state, federal and other companies and organizations. It serves as huge deterrent to the economic growth of Ukraine.

Legal community has not fully comprehended some innovations of the Civil Code of Ukraine as legal entity of public law. Thus, the Code states that the participants of civil relations are the state of Ukraine, the Autonomous Republic of Crimea (hereinafter – ARC), municipalities, foreign governments and other subjects of public law. These provisions (p. 2, Art. 2 Civil Code of Ukraine) sometimes are interpreted so that the Code qualifies state, ARC, etc. as independent, separate, third type of participants in civil relations. This interpretation does not comply with the concept of the Civil Code of Ukraine, civil society and private law doctrine. The world

practice does not know any other legal structures for legal recognition the center of interest as a subject of civil law other than the construction of a judicial person. Hencethe state of Ukraine, Crimea and local communities in public circulation should be characterized as legal entities of public law. The significance of this conclusion is difficult to overestimate. For example, international civil circulation would be simply impossible if state or international governmental organizations – participants of civil relations were implied as anything other than judicial persons of public law. Even some provisions of Ukrainian legislature point out the incorrectness of considering the state as *sui generis* (not as legal entity) in the terms of civil law[1].

A revolution in views of the source of civil law.

Project developers of the Civil Code of Ukraine have included to the Code a number of provisions concerning sources of private law. Seven of ten articles of Chapter 1 of the Civil Code are devoted to the abovementioned provisions (Articles 3-8, 10).

Based on the context of the Code from among sources of private law, civil law as the largest block of rules plays the particular significance. However, it should be borne in mind that the source of civil law is not limited to acts of civil law, as it was in Soviet times, when law was identified with legislature. Today sources of private law includelaws of natural law (Art. 3), civil law contract (Art. 6), custom (art. 7), international agreements of Ukraine (Art. 10), national and relevant international judicial practice and precedent (e.g, decisions of European Court of Human Rights).

In Ukraine, as elsewhere in the world, trend for increasing block of legal acts, particularly in the sphere of private law, is still exist. Historically true mystic of law (or written law) was a result of the French Revolution, which has put forward a new concept of law (law as a way to protect both freedom and equality): philosophical and political. According to this concept statutory law played a major role among sources of law. The revolution practically has eliminatedcustom and greatly limited the role of a judge[2].

Generally statutory law by the virtue of its nature in a broad sense entails complex problems [3][4][5]and has many defects, such as inevitable contradictions between the requirements of different acts, vagueness and ambiguity of certain rul-

[1] Див.наприклад, відповідністатті Закону України «Про міжнароднеприватне право», Закону України «Про зовнішньоекономічнудіяльність». У статті 3 останнього документа йдеться, щоУкраїнавособіїїорганів, а такожіншідержави, діють у комерційнійсфері як юридичні особи.

[2] ЛежеР. Великие правовые системы современности: сравнительно-правовой подход. – М., 2009. – 584 с.

[3] Косович В. До визначення поняття «нормативно-правовий акт»: практичнанеобхідність і теоретична можливість уточнення // Право України. – 2012. – №9. – С. 274–280.

[4] Майданик Р. А. Цивільне право: Загальна частина. – К., 2012. – Т. 1 : Вступ у цивільне право. – С. 336–351.

[5] Ромовська З.Українське цивільне право: Загальна частина., Академічний курс : підруч. – К., 2005.

ers, gaps in law, difficult rules of interpretation, long-time procedure of adoption and amending etc. But such defects of statutory law- nothing compared to what have happened to humanity as a result of hypertrophy of its role. Mankind has been captured by such positivism, when the statutory law began to be identified with the right. Most nations managed to escape (through wars and enormous amount of victims) from this captivity. If the right is not reduced to the law, other regulators naturally appear. Ukraine still did not escape from captivity of positivism. Not only among citizens but also among lawyers there is a prevailing opinion that law corresponds the right. Every present judge dreams such law that regulates everything to be created (fortunately it is just illusion)[1].

Project developers of the Civil Code of Ukraine realized that the act in the sphere of private law would not be able to deal with the regulation of civil relations «by itself» , and proposed other system of regulators: principles of natural law, civil contracts, international agreements, customs, judicial practice etc.

Today we are witnessing how the abovementioned sources begin to strengthen their positions in Ukraine. An increasing role of sources, other than acts of legislature, as regulators of civil relations is an objective process caused by the following reasons: a) the natural inability of laws to»cover» some individual life situations; b) as a type of source laws have many defects (inevitable conflicts between the requirements of different acts, vagueness and ambiguity of certain norms, gapes in law, difficult rules of interpretation, long-time procedure of adoption and amending etc.); c) establishment and development of civil society where the private centers of rulemaking appear.

Strengthening role of each of the so-called «non-traditional» sources also has its individual explanation. Thus, *the natural laws of private law* became a main source because of recognition in art. 8 of the Constitution of Ukraine the principle of rule of law, which among other things stipulates that positive law-should be based on natural (non-government) law. The role of an *international agreement* in regulation of civil relations is growing rapidly as a result of Ukraine's independence[2], globalization of all aspects of life, legal unification and harmonization. The new Civil Code of Ukraine was «legal rehabilitation» for custom as an independent source of law in the private sphere, which role is being increased during Ukraine's transition to a market economy and development of property turnover. Civil contracts, which prescribe obligatory rules for both parties, with increasing frequency are recognized as source of law. Another evi-

[1] Белов В. Выдающийся русский ученый юрист// Васьковский Е. В. Цивилистическая методология. Учение о толковании и применении гражданских законов. — М., 2002.

[2] Міжнародне приватне право. Міжнародні договори України : у 2 т. / відп. ред. та упоряд. А. Довгерт та В. Крохмаль. – К., 2000. – Т. 1. – 992 с.; Т.2. – 1312 с.

dence of democratization is breaking the prohibition of judicial law-making[1].

Strengthening role of so-called «new» sources for Ukraine raises the question of their conformity with law (internally as well). Developers of the Civil Code of Ukraine provided (directly or implicitly) answers to only some of these issues.

Thus, in the hierarchy of laws, natural laws are above all others. In case of any inconsistency natural laws shall apply. The Code sets out the priority of the international agreement with respect to civil law. According to p. 2, Art. 7 of the Civil Code of Ukraine contract and rules of civil law (to our opinion, just imperative provisions) shall prevail on custom because of its legal force, the provisions of the contract shall cancel dispositive rules of law,etc.

The new structure of the Civil Code of Ukraine as a codification of achievement.

The structure of the Civil Code of Ukraine can be ranked as achievements of the codification, which is built, on the first sight, on traditional for Ukraine Pandectists system. However, the presence of new elements at the level of books, sections, chapters, paragraphs allows to talk about the appearance of the new scientific systematization of normative material – syncretic system.

Thus, taking into account the concept of the Civil Code of Ukraine and the content of modern private law field, in addition to the usual Pandectists parts (except family law[2]), the Civil Code of Ukraine includes two more parts – personal non-property rights of individuals and intellectual property law[3]. Six books are placed in the following order: «General Provisions» (Book One); «Personal non-property rights of an individual» (Book Two); «Ownership and other property rights» (Book Three); «Intellectual Property Rights» (Book Four); «Law of Obligations» (Book Five); «Inheritance Law» (Book Six)[4].

As you can see, relatively independent and closely related components of the new Civil Code of Ukraine are «Books» in contrast to «Sections» in the Civil Code of 1963. This form of presentation reflects the new content of the Code, significantly expanded range of issues that it regulates, more primary structural units it contains – articles, objectively existing relationship and interdependence of civil relations, the codification technique of the vast majority of states.

Each book consists of Sections. The basic building blocks of Sections are Chapters, although in some cases they

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[1] *Шевчук С.* Судова правотворчість: світовий досвід і перспективи в Україні. — К., 2007. — 607 с.

[2] Кодифіковані норми сімейного права входили книгою шостою до проекту ЦК України. Але у 2001 р., попри заперечення розробників проекту, ця книга була вилучена Верховною Радою України зі структури цивільно-правової кодифікації та було прийнято окремий Сімейний кодекс України.

[3] Проект ЦК України містив ще одну книгу — «Міжнародне приватне право», яка також безпідставно не включена Верховною Радою України до ЦК України.

[4] *Довгерт А.* Система приватного права та структура проекту нового Цивільного кодексу України // Українське право. – 1997. – № 1 (6). — С. 18-29.

also group in Subsections. The Civil Code of Ukraine consists of 90 Chapters, which are sequentially numbered. Separate Chapters are divided into Paragraphs, and Paragraphs sometimes in Subparagraphs. This legal technique is used primarily to Chapters, which contain a large amount of legal material and, to some extent, devoted to independent questions.

The content of the Civil Code begins with the Book One «General Provisions», which contains the rules governing general questions of all or most of civil relations. The place of Book One in the structure of the Civil Code of Ukraine is explained by using the elements of Pandectists system to the codification of Civil law.

Book Two «Personal non-property rights of an individual» is devoted to the regulation of so-called personal non-property relations in pure form, i.e. outside the context of property (to be discussed below).

Book Three of the Civil Code of Ukraine is called «Ownership and other property rights»[1]. It focuses on rules, which govern the absolute ownership relations and use of one's property. A place the book holds in the overall structure of the Civil Code of Ukraine needs no further explanations. It is traditional for Ukraine to define static property relations first and only after that – to define their dynamics, i.e. law of obligations.

Book Four «Intellectual Property Rights» needs further explanations. The Civil Code of 1963 state that matters, arising in connection with the creation and use of creative works are subject to regulations of three Sections, which were placed after the law of obligations. These Sections contained rules governing the absolute relationships (the right for a name, the right for authorship, the right for inviolability of the work, etc.), as well as the relative relationships (various copyright and licensing agreements).

Today the role of spiritual production compared with the material significantly increased. Therefore, the regulation of absolute rights to these objects placed next to the regulation of the rights for things to the law of obligations, which already regulates the turnover of goods and exclusive intellectual property rights. To achieve greater uniformity standards institutes of intellectual property, rules, which govern contractual relationship with the creative use of objects, are moved to Book Five «Law of Obligations».

The location of Book Five «Law of Obligations» and Book Six «Inheritance Law» needs no special explanations.

Ten-year experience has shown that many of the stories of all of the Books of the Code are accepted by society. Due to their great number, consider only the achievements of the Books Two and Five.

Personal non-property rights.

Today the presence of second book «Non-property rights» in the Civil Code of Ukraine seems ordinary. Scientists are usually point out the innovative nature of this book, whereby the Civil Code of

[1] У проекті ЦК України ця книга називалася «Речові права».

Ukraine holds a special place in the history of world codification[1].

Even during the development of the draft of Civil Code of Ukraine some events happened and provided the basis for strengthening of developers positions as for operational concept of intangible property rights and made them more confident. Thus, in 1996 the new Constitution of Ukraine was adopted, which reflected the rights and freedoms of man and citizen, enshrined in international acts – Universal Declaration of Human Rights (1948), the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Covenant on Civil and political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1996). Another significant development was Ukraine's membership in the Council of Europe in 1995 as a result, Ukraine, among other things, undertook international commitments to adopt a new Civil Code. The next step was the ratification of the European Convention on Human Rights in 1950 and a number of Protocols, paving the way to the European Court of Human Rights and practices of its law enforcement.

The title «Non-property rights of an individual» stipulated the creation of a special article in the chapter on legal entities called «Non-property rights of legal entity», according to which personal non-property rights that may be owned by legal entity should be defined and protected in the same way as similar rights of individuals.

Second book consists of three chapters: «Terms of intangible property rights of individual» (Chapter 20); «Personal intangible rights which providing a natural existence of individual» (Chapter 21); «Personal intangible rights, providing social life of individual» (Chapter 22).

Formulation of general part of personal intangible rightswas an important achievement of codification. Notwithstanding thatin the text general provisions deal with only with intangible rights of individual, it should be considered as general provisions for of all intangible rights. Thus, a variety of personal rights contained in the various parts of the Civil Code of Ukraine and other laws have been brought to a single positive system. Prominent place among general provisions was heldby provisions on the protection of personal intangible rights. Besides the methods of protection that have been already known for domestic civil law (damages recovery, compensation), a number of new methods were added, including: court's power to forbid publishingnewspaper or book, containing incorrect information; remove book or newspaper copies and liquidate them[2].

In the next two chapters personal non-property relations were provided

[1] *Стефанчук Р. О.* Загальнотеоретичні проблеми поняття та системи особистих немайнових прав фізичних осіб у цивільному праві України. — Хмельницький, 2006. — 170 с.

[2] *Ромовсъка З. В.* Шляхи вирішення проблеми особистих немайнових прав особи // Кодифікація приватного (цивільного) права України / за ред. А. Довгерта. — К., 2000. — С. 154-166.

with normal legal regulation, i.e compared to the previous version their transition to direction of positive law occured. The first group of non-property rights includes the right to life, health, liberty and security, the right to family, the right to guardianship and trusteeship etc. Second group of non-property rights defines such rights as the right to a name, inviolability of dignity, honor and reputation, individuality, privacy and its secrecy, family, the right to inviolability of dwelling, information, personal papers, privacy of correspondence, freedom of creativity, freedom of association, the right to peaceful assembly, etc.

Potential capacity of the second book is not yet fully realized. However project developers of the Civil Code of Ukraine have rightly hoped that this book would help to achieve the humanization of relations between people, understanding that each person, its life, health, dignity are the highest values in the society[1].

In general, the second book has obtained scientific community's support. Only so-called «business executives» made a rooted objection. In particular, Professor G. Znamenskii believed that the provisions of this book are not jurisprudential but propaganda, and therefore do not deserve their selection into a separate book. Denying aspect of private rights, which have been proven long time ago by civil doctrine, the author considered that the issues of human rights belong to the sphere of constitutional and other areas of public law[2].

Over this period, some changes to the second book of the Civil Code of Ukraine, namely to its seven articles, have been made by several special laws[3]. Without getting into the content of these changes, it should be noted that in general they denoteone of the ways of modification of the system of non-property rights. This way of modification can be characterized as an improvement of existing articles of the second book because it is really hard to constitute a positive content of any non-property right at once due to the entanglement of social system, elements of which are also connected to a particular non-property right.

Another way of improvement of the second book in our opinion is a consolidation of the contents of other important non-property rights of both first (physical) and second (social) levels due to the ongoing development of any system, including the system of non-property rights.

From our point of view one more way of development of non-property rights is a gradual accumulation of law enforcement experience of existing provisions of the second book. In addition,

[1] *Головатий С., Довгерт А. Підопригора О.* та ін. Передмова до проекту Цивільного кодексу України // Українське право. – 1996. – №2. – С. 6–26.

[2] *Знаменський Г.* Хиби Книги другої проекту ЦК України // Тези доповідей учасників IV Всеукраїнської наук.-практ. конф. з питань кодифікації законодавства України (Київ, 18–20 червня 1997 р.). – К., 1997. – С. 48–50.

[3] *ДовгертА. С.* Втілення правових ідей у сфері особистого немайнового права в новий ЦК України // Приватне право і підприємництво : зб. наук. пр. – К., 2009. – Вип. 8. – С. 11–17.

law enforcement should be based, where appropriate, on the court practice of the European Court of Human Rights.

Special mention should be made of the question of non-property rights of a legal entity.

The right of obligation.

The new Civil Code of Ukraine provided a lot of novels and expanded the core of right of obligations which always serves as a kind of «working» part in the private law system. It is intended to regulate civilian property relations arising in connection with the transfer of property, works, services, committing unilateral positive or illegal actions etc.

The Civil Code of Ukraine Law of Obligations devotes more than half of its articles to right of obligation. These articles are structured into three sections: general provisions on obligation, general provisions on agreements and separate types of obligation.

New approaches to general issues of right of obligation became of a great importance. Those are: definition, principles and obligations of parties, implementation, security for fulfillment and termination of obligation. Among the novels it stands to mentionthat obligation should be based on the principles of good faith, reasonableness and equity (Art. 509), and should be duly executed under the terms of agreement and the requirements of civil law, if unavailable – according to business traditions and other requirements that are usually applied (Art. 526).

The Civil Code of Ukraine provides several new approaches regarding security for fulfillment of obligation. Firstly, the Code does not provide an exhaustive list of types of security for obligation fulfillment. The contract or the law may establish other types of security for obligation fulfillment (Art. 546). Secondly, the Civil Code of Ukraine provides new types of security for fulfillments such as retention and guarantee. The first type refers to proprietary legal ways of security, and the second – to the binding law. Guarantee is internationally recognized type of security.

The new Civil Code of Ukraine, in contrast to the Civil Code 1963, defines the «violation of obligation» as its nonfulfillment or fulfillment with breaking the provisions determined by the content of the obligation (Art. 610). Based on the necessity of the full responsibility of the parties for violation of an obligation, the Civil Code of Ukraine provides a new rule, according to which the violation of obligation shall be subject to forfeit to be seizure in full amount regardless of reimbursement for the losses (Art. 624). The Civil Code also provides new determination of guilt in civil law. It is not understood as «mental attitude of a person» but as failure to take all required measures for properly fulfillment of obligation (Art. 614).

The general principles of private law become of a great importance to the right of obligations. Such principles as freedom of agreement, freedom of entrepreneurial activity; remedy of civil rights and interests; equity, reasonableness and good faith etc.

New approach to contract law is that the general provisions of the contracts are separated from general provisions of

the obligation. These points to the factof increasing role of a contract as a universal and the most appropriate legal form of mediation of commodity-money and other property relations under the conditions of Ukraine's transition to market economy. It should be noted once again that the Civil Code of Ukraine is based on the fact that the subjects of relations who deal with goods exchange operations shall be able independently determine the content of contractual obligations based on their interests. The rules of contract law are largely dispositive. State's influence on property relations is largely limited and the principle of freedom of contract is filled with real content.

The general principles of contract law also give the definition to contract, introduce the categories of public, preliminary and adhesion contracts. Rules on the conclusion, alteration and termination of contracts are clearly defined.

In civil society the legal regulation of private relations can not be only external, i.e. governmental. In the area of contract law a legislature act ceases to be an «ultimate truth», the parties may deviate from its provisions according to their interests. Consolidation in the new Civil Code of Ukraine rules as to regulatory role of contract and custom as sources of law, the principle of freedom of contract, shall be grounds for recognition of existence of the second fundamental model of legal regulation of contract relations – internal control (self-regulation)[1].

The third part of right of obligation– separate types of obligation – consists of time-proved system of ordering separate types of contractual obligations depending on the major legal result, which is pursued by parties of a contract.The Civil Code of Ukraine stipulates provisions on a number of new contracts which stay in line with the needs of economic turnover (rent, leasing, property management, factoring, franchising, etc.), as well as agreements that were not covered by the Civil Code 1963, even if it had widespread use in practice (freight forwarding, etc.). All other referred contracts contained in the Civil Code 1963 had a lack of administrative and central planning and were transformed. The peculiarity of the Civil Code of Ukraine was that the presentation of the general provisions regarding contractual obligations such as group of agreements on the transfer of property ownership, temporary use and services agreements were prior to the presentation of separate types of contracts.

Non-contractual obligations system was updated by a number of novels.

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Ten years of application of the Civil Code of Ukraine shows that the vast majority of its novels: concept, structure and private law categories and institutions have beenaccepted by legal practice and society.

Over these years the Code has been altered mainly by clean-up changes. These Changes have been made mostly

[1] *Сібільов М.* Базові моделі регулювання майнових відносин за новим Цивільним кодексом України // Українське комерційне право. – 2003. – №4. – С. 17–20.

because of so-called «decodificated» provisions (paragraph 3 p.2, Art.4 Civil Code of Ukraine)[1].

Despite the alterations made during the last 10 years, we believe that it is time to create a special government commission on system upgrade of the Civil Code in view of modern times in all its aspects. Similar updates have been recently made in Germany, France and other countries.

The result of such commission's activity may be not only interrelated alterations and supplements but also including to Civil Code new books on family law, international private law, etc. It goes without saying the it is high time for drafting legislature that will cancel the Commercial Code of Ukraine, which from the date of entering into force has shocked not only entrepreneurs, local and foreign experts but even government. After the 2004 Ukrainian government have repeatedly tried to cancel the non-market act, but it still exists and creates more and more conflicts in business sphere. The last decade has also proved that the concept of business law becomes a legal instrument of neo-totalitarism.

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[1] Якщо суб'єкт права законодавчої ініціативи подав до Верховної Ради України проект закону, який регулює цивільні відносини інакше, ніж цей Кодекс, він зобов'язаний одночасно подати проект закону про внесення змін до ЦК України. Поданий законопроект розглядається Верховною Радою України одночасно з відповідним проектом закону про внесення змін до ЦК України.

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Civil liability in the context of economic analysis of ukrainian law

1. State and trends of the formation of theconcept of economic analysis of law of Ukraine

In the context of globalization economic approachcoversboth market and non-market processes through various social controls (rules of law, religion, etc.) on the basis of reasonableness, proportionality and legal security.

The resulting tendency for economic reasonability as the general effectiveness criteria testifies the gradual movement of Ukrainian society towards liberal model of thinking.

One of the types of liberal model of law, which is popular in American and European laws, is the concept of economic analysis of law (Law and Economics).Its basic idea is to receive new knowledge at the intersection of several spheres of human activity, primarily, economics and law.

Today in Ukraine this trend has not been developed systematically, which is associated with conservatism of domestic rule-making and academic spheres, and with language barriers preventingfrom the use of modern techniques in practicing this type of thinking.

For domestic lawyers it is difficult to explore this concept, because research on this subject is mostly common for countries with case law and only some countries of civil law. So, it requires creative and analytical approach to adapt this concept to the features of law in countries of codified law, including Ukraine.

The concept of economic analysis of law as a way to study rational choice in law in conditions of insufficient resources, when supply exceeds demand, is significant both theoretically and practically.

This concept can be used as a methodological device in the study of legal theory, analysis of legislation and judicial practice.

Advantages and spreadingof economic approach are causedby the universality of the method of economic theory: same analytical tools may be applied to various activities and relationships, which conditions efficiency both in the doctrine of civil law and jurisprudence in general.

On the basis of neoinstitutional economic theory the analysis of the efficacy of various legal doctrines is carried out. With that nobody claims that the efficacy has become or should become the criteria for evaluations of those doctrines[1].

The theory of economic analysis of law is based on the idea of efficient allocation of resources[2] by «reasonable» person through rational and cautious measures and compensation of reasonably expected benefits (losses) at the debtor's expense[3].

Introduction of conceptual provisions of economic analysis of law into Ukrainian law causes significant changes in traditional approaches regarding the understanding of concept, functions, ground and conditions of civil liability.

2. Ground of civilliability

Civil liability occurs in case of general legal and factual grounds and conditions of liability.

In modern domestic legal science a violation of legal rule is usually considered as a legal basis for all kinds of legal liability.

An offence as a legal fact is recognized as a factual ground for civil liability.

Recognition of an offense as a necessary and sufficient ground for civil liability is based on the doctrine of composition of a civil offense, which was formed in Soviet civil law in 60s of the last century[4].

It is significant that the concept of offense as a ground for liability was also adopted in the theory of law[5].

According to the latter concept the composition of civil offense, which refers to a set of objective and subjective conditions that are necessary to make a person liable under civil law, is a ground for civil liability.

Civil offense is a wrongful act or omission of a person who violates rules

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[1] Шмаков, А. В. Экономическийанализ права: учеб. пособие. Ч. 1 /А. В. Шмаков. – Новосибирск:Изд-во НГТУ, 2005. – С. 5.

[2] Posner R. A. Economic Analysis of Law. Boston: Little, Brown, 1972.

[3] See: Coleman J. Theoriesoftortlaw [Electronicresource] / J. Coleman, G. Mendlow // Stanfordencyclopediaofphilosophy. – Regimeofaccess : http://plato.stanford.edu/entries/tort-theories/; Lahe J. Subjectivefaultas a basisofdelictualliability // JuridicaInternational. – 2001. – №6. – P. 129; Wild C. SmithandKeenan'sEnglishlaw: textandcases / C. Wild, St. Weinstein. – 16th ed. – London ; NewYork : Longman, 2010; Карнаух Б. П. Вина як умова деліктної відповідальності в англо-американській правовій сім'ї / Б. П. Карнаух / Актуальні проблеми держави і права. – 2011. – С. 529–536 // [Electronic resource].– Access: http://dspace.nulau.edu.ua:8088/bitstream/123456789/1371/1/Karnaux_v_v.pdf

[4] See: Матвеев Г. К. Вина в советскомгражданском праве. – К., 1955. – 305 с.; Матвеев Г. К. Основания гражданско-правовой ответственности // Г. К Матвеев. – М. : Юрид. лит., 1970. – 311 с.

[5] Самощенко И. С. Понятие правонарушения по советскому законодательству. – М., 1963. – С. 7, 11.

of civil law or terms of an agreement, and this act or omission refers to civil liability by contract or by laws[1].

The doctrine of the composition of civil offense as a ground for civil liability has been included in all the textbooks of civil law and is a self-evident concept, which is familiar for judicial and law-enforcement authorities.

In this regard one should pay attention to another approach, which has been justified in the doctrine[2]and provides for the recognition of violation of both property and personal non-property civil rights as the one and only ground for civil liability.

Understanding the ground of civil liability as a single fact, rather than a set of facts, is universal in nature and applies to both contract and tort liability.

In this respect the idea that the commission of tort, namely non-contractual property or moral harm together with conditions for the emergence of tort obligation, entails civil tort liability of the tortfeaso[3].

Proponents of this approach criticized the concept of composition of offense as the one that brings in elements that are not common for civil law.

The concept of composition of civil offence does not fully reflect the features of civil liability, which is liability of one participant of civil turnover before another one, its main purpose is to restore violated right so as to correspond to the amount of harm or damages inflicted.

When civil liability is inflicted, the so-called «harmful consequences» do not matter from the viewpoint of negative influence of the violation of civil rights on public interests (by the way, public interests do not matter as well), «objective» and «subjective» aspects of civil offense.

Thereby, the violation of civil rights of the entity in civil legal relationships entails the necessity to restore the violated right, including the use of civil liability.

Consequently, the basis for this liability is the violation of subjective civil right.

With respect to particular kinds of violated subjective civil rights and entities who have committed these offences the legislator has formulated mandatory requirements that are necessary to comply with in order to implement civil liability.

These statutory requirements are conditions of civil liability.

These include: wrongfulness of violation of subjective civil rights; damages (harm); causal link between violation of

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[1] Цивільне право: підручник: в 2 Т. / В. І. Борисова (кер. авт. кол.), Л. М. Баранова, Т. В. Бєгова та ін.; за ред. В. І. Борисова, В. І. Борисової, І. В. Спасибо-Фатєєвої, В. Л. Яроцького. – Х.: Право, 2011. – Т. 1. – С. 371.

[2] See: Брагинский М. И., Витрянский В. В. Договорное право. Общие положения. – М., 1997. – (848 с.). – С. 569, 570; Хохлова Г. В. Понятие гражданско-правовой ответственности / Г. В. Хохлова // Актуальные проблемы гражданского права: сб. статей ; под ред. В. В. Витрянского. – М. : Статут, 2002. – Вып. 5. – С. 81.

[3] Отраднова О. О. Механізм цивільно-правового регулювання деліктних зобов'язань: дис. …д-ра юрид. наук. – К., 2014. – С. 255, 256.

subjective civil right and damages (harm); violator's fault[1].

This view is supported by G. V. Khokhlova who believes that wrongfulness, causal link and fault are no longer general conditions of civil liability[2].

The analysis of this concept shows the attempt of its supporters to separate one single ground for liability in the form of violation of subjective civil right from conditions of civil liability that are suggested to be considered as general requirements that have to be observed to apply civil liability.

Thereasonableness and suitability of this approach largely depends on the answer to the question of interconnection and differentiation between offense and violation of subjective civil rights of others.

In this regard the point of view of V. P. Gribanov is noteworthy. He indicated that the offense is always associated with failure to perform or improper performance of duties, but it is not always associated with the violation of subjective civil rights of others[3].

However, violations of duties in most circumstances are simultaneously associated with the violation of subjective rights of others.

According to N. S. Kuznetsova, this vision of grounds and conditions of liability does not differ considerably from the concept of composition of civil offense and its elements: wrongful conduct; inflicted harm; causal link between respective behavior, harm and violator's fault[4].

In any case, as of today the concept of violation of rights of the entity in civil legal relationship has not changed the overall assessment of the doctrine about the composition ofoffense, which is dominant in modern doctrine of law, and takes the leading place in all textbooks[5].

To a certain extent this situation in Ukrainian civil law is due to inertia in prevailing approaches of domestic legal science and unreadiness of public opinion to actively absorb and implement the most widely used theories from the Western legal systems, including concepts of economic analysis of law.

The theory of economic analysis of law based on the idea of rational and cautious measures taken by reasonable person and the compensation of reasonably expected benefits (losses) at the debtor's expense plays a decisive role in understanding ground, fault and amount of civil liability[6].

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[1] Брагинский М. И., Витрянский В. В. Op. cit. – P. 569, 570.

[2] Хохлова Г. В. – Op. cit. – P. 81.

[3] Грибанов В. П. Ответственность за нарушение гражданских прав и обязанностей / В. П. Грибанов // Осуществление и защита гражданских прав. – М. : Статут, 2000. – С. 319.

[4] Кузнецова Н. С. Гражданско-правовая ответственность: понятие, условия и механизм осуществления // Альманах цивилистики: Сборник статей. Вып. 3 / под ред. Р. А. Майданик. – К.: Алерта; КНТ; Центр учебной литературы, 2010. – С. 42, 43.

[5] See:Гражданское право: в 4 т. / гл. ред. Е. А. Суханов. Том 1. Общая часть. – М., 2006. – С. 597, 598; Цивільне право: підруч.: у 2 т. / В. І. Борисова (кер. авт. кол.), Л. М. Баранова, Т. І. Бєгова та ін.; За ред. В. І. Борисової, І. В. Спасибо-Фатєєвої, В. Л. Яроцького. – Х.: Право, 2011. – Т. 1. – С. 371.

[6] See: Coleman J. Theoriesoftortlaw [Electronic resource] / J. Coleman, G. Mendlow //

In the context of economic analysis of law the violation of subjective civil rights needs to be considered as the only general ground for civil liability, because it necessitates the restoration of civil rights, including through the use of civil liability.

Taking into account the circumstances, the understanding of the composition of civil offence consisting of such elements as wrongfulness, harm, fault, causal link between wrongful acts and inflicted harm, which prevails in modern Ukrainian doctrine and judicial practice, has to be recognized as outdated in modern reality.

The above stated opinion has originated from the times of Soviet public law, with its features of too much public nature in private relationships. It is based on mixing of notions «ground» and «conditions» of civil liability, and their artificial combination in a notion «composition of offense».

In this regard the idea of violation of subjective civil right as the only general ground for civil liability deserves support. In case with this concept civil liability occurs when all the sufficient conditions, i.e. general requirements for this liability, are in place.

The above indicated conditions of civil liability in general include wrongfulness, fault, harmful result of wrongful acts, causal link between fault and harm.

This approach makes it possible to separate one single general ground of liability in the form of violation of subjective civil rights from the conditions of civil liability as general requirements that need to be complied with to apply civil liability.

3. Conditions of civil liability

The general conditions for theemergence of civil liability shall include as follows:

(1) wrongfulness of conduct of the tortfeasor;

(2) harm;

(3) fault; and

(4) the necessary causal link between wrongful violation of subjective right of contractor and damage suffered[1].

The necessary conditions for all types of civil liability are usually the wrongful conduct of the debtor and the debtor's fault.

For liability in the form of damages the damages themselves are required, together with causal link between the wrongful conduct of the debtor and the damages inflicted.

Thereby, the composition of offense required to make good damages is the

Stanfordencyclopediaofphilosophy. – Regimeofaccess : http://plato.stanford.edu/entries/tort-theories/; Lahe J. Subjectivefaultas a basisofdelictualliability // JuridicaInternational. – 2001. – №6. – P. 129; Wild C. SmithandKeenan'sEnglishlaw: textandcases / C. Wild, St. Weinstein. – 16th ed. – London ; NewYork : Longman, 2010; Карнаух Б. П. Вина як умова деліктної відповідальності в англо-американській правовій сім'ї / В. Б. Карнаух // Актуальні проблеми держави і права. – 2011. – С. 529–536 // [Electronic resource].– Access: http://dspace.nulau.edu.ua:8088/bitstream/123456789/1371/1/Karnaux_v_v.pdf

[1] See, inparticular: Смотров О. И. Порушення виконавцем договору з надання оплатних медичних послуг як необхідна умова цивільно-правової відповідальності / Вісник Національного університету внутрішніх справ.– 2002. – Вип. 18. – С. 317.

most comprehensive one and covers the following elements: wrongful conduct of the debtor, harmful result of wrongful conduct, the causal link between wrongful conduct and damages occurred, the debtor's fault.

Harmful result (harm, damages), which emerged as a result of wrongful conduct, is usually an obligatory condition for civil liability.

In terms of civil liability harm is considered as various negative consequences of offense.

This negative result from the viewpoint of scientific thinking is regarded in three interconnected aspects – as social, legal and actual harm, which depends on specific object of violation.

The offense is capable to simultaneously influence social relationships governed by civil law (social object), rules of civil law, contract, subjective civil rights and the rule of law in general (legal object), and also specific property and non-property goods of participants of legal relationships (actual object)[1].

Property harm (damages) should be understood as material consequences of offense that are negative consequences, which have occurred in proprietary sphere of the victim as a result of civil offense against this individual.

Pecuniary form of proprietary harm is called damages in the literature. Damages consist of two parts – past and future reduction of the victim's property.

These constituents of damages are called actual damages and lost profit.

Actual damages include expenses that the person, whose rights have been violated, has born or will have to bear to restore the violated right, destroyed or damaged property.

Lost profit includes profit that the victim would receive under usual conditions of civil turnover if there was no violation.

Thus, if the leased house was burned down by the lessor's fault, the lessor's losses would consist of repair cost (actual damages) and rent amount, which was not received for the time of repair (lost profits).

The Civil Code of Ukraine determines losses as losses which the person has suffered due to destruction or damage of items and costs that person has spent or has to spend to restore the violated rights.

The losses may be compensated in kind or in cash.

Compensation in kind is not always possible in the circumstances of certain cases.

Here is why pecuniary compensation of inflicted damages is used more often and is about payment of damages.

Lost profit is a kind of proprietary harm.

According to Art. 22 of the Civil Code of Ukraine, lost profit is the income that a person could have really received under normal circumstances, if this right was not violated.

Moral harm is a type of harm that is essentially non-pecuniary and consti-

[1] Тархов В. А. Ответственность по советскому гражданскому праву / В. А. Тархов. – Саратов: Издательство Саратовского университета, 1973. – С. 279.

tutes consequences of offense that do not have economic nature and value.

Part 2, Art. 23 of the Civil Code of Ukraine stipulates that moral harm consists of: physical pain and suffering that the individual suffered due to injury or other impairment of health; in distress, where an individual has suffered due to the wrongful conduct on herself, her family members or close relatives; in distress, where an individual has suffered due to the destruction or damage of property; humiliation of honor and dignity of individual and business reputation of a person or entity.

One of the most important features of moral harm is that negative changes occur in the mind of a person and form of their expression largely depends on the characteristics of the victim's mentality.

Therefore, it is rather difficult to determine the fact of moral harm only by external evidence.

The problem of compensation of moral harm is to establish the boundaries between proper moral harm and proprietary harm.

The objective prerequisites of civil liability include wrongful conduct, which is a kind of behavior that violates the rule of law regardless of whether the violator knew about wrongfulness of conduct.

Thus, wrongful conduct is based on objective contradiction between the conduct of the participant of civil turnover and legislative requirements.

Requirements that apply to the recognition of wrongful conduct are contained both in law, other legal acts, customs of trade or other requirements that are usually imposed, and in most grounds of obligations.

Thus, conduct is considered wrongful if it violates the contract terms or does not correspond to the content of administrative act, which was the basis for the obligation.

Wrongful conduct can be expressed in wrongful act or in wrongful omission.

The debtor's act becomes wrongful in nature if it is either directly prohibited by law or other legal act, or contrary to law, contract or other grounds of obligation.

Omission becomes wrongful only if a person has a legal obligation to act in respective situation.

Thus, the seller's omission is wrongful if the seller has not transferred property disposed under the conditions, specified by the contract of sale.

So, wrongful conduct in specific circumstancesmay is either person's act, or omission, which is possible in case offailure to fulfil a duty that is expressly provided by law or by contract.

As G. K. Matveev has noted, act and omission are characterized by the same essence[1].

As wellas acts, omissions may lead to some harmful consequences, but from a legal point of view omission cannot be reduced to simple passivity of an entity.

In the legal sense, it is not about committing a specific action, i.e.the one the entity was forced to do as a duty[2].

[1] Матвеев Г. К. Основания гражданско-правовой ответственности / Г. К. Матвеев. – М. : Юрид. лит., 1970. – С. 22–24.

[2] Матвеев Г. К. Op. cit. – P. 22–24.

One would agree with the opinion of O. S. Joffe who considered the person's omission wrongful if the person should and could act: «should» is a legal criterion that provides a legal duty to take certain actions; «could»is a physical criterion that provides the actual possibility of actions[1].

Exploring omission as a form of wrongful conduct I. S. Kanzafarova defines it as «... a violation of the duty to perform certain actions.However, additionally, it would be necessary to establish the actual possibility to commit the above mentioned actions by a specific person in specific circumstances on whether a person was really able to commit certain actions.With that one should take into account not only physical and mental state of a person, but her personal qualities as well.To qualify omission as wrongful conduct one should receive a response to two questions: whether a person should act and whether a person could act.Only in the case, when both questions are answered positively, onemay talk about bringing a person to civil liability»[2].

Examples of omissions as a form of wrongful conduct by a person may include untimely complaint to the court by a lawyer, failure to notify the client or patient by pharmacist or doctor about side effects of drug ordered.

The condition of civil liability is a causal link between wrongful conduct and harmful effects of such behavior.

This means that between the wrongful conduct of the debtor and the creditor's losses a causal link has to exist.

Losses or another wrongful result in the creditor's spherehave to be causedby the wrongful conduct of the debtor, rather than the actions of third parties or events.

So, only damages caused by the debtor's wrongful conduct should be reimbursed.

In determining the causal link one should be guided by theories of causation developed by the science of civil law.

The most acceptable theory is the theory of direct and indirect causation.

This theory is based on general philosophical doctrine of causation, which refers to the objective link between phenomena that exist independently of our consciousness.

Therefore, when deciding onthe causal link it is incorrect to be guided by the ability or degree of prediction of harmful result by the offender.

The possibility of such prediction is subjective by nature and important in deciding only about thefault of the offender, but not about causal link.

In addition, cause and result are relevant only for a single case, and when going beyond its limits all the chain of interaction with the material world is involved.

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[1] Иоффе О. С. Избранные труды: В 4 т. Том 1 Правоотношение по советскому гражданскому праву. Ответственность по советскому гражданскому праву / О. С. Иоффе. – СПб. : Изд-во «Юридичекий центр Пресс», 2003. – С. 301–312.

[2] Канзафарова И. С. Теорія гражданско-правовой ответственности: моногр. / И. С. Канзафарова. – О. : Астропринт, 2006. – С. 187.

Therefore, to resolve the issue of liability it is incorrect to consider the most distant events.

It is necessary to restrict oneself to the identification of direct cause that is the closest phenomenon regarding damages.

Wrongful conduct of an individual is a cause of damages only when it is directly related to the damages.

The presence of indirect link between the wrongful conduct and damages means that this behavior is beyond the specific case and therefore is outside the legally significant causal link.

The offender's fault is a subjective condition of civil liability.

Two basic approaches have been formulated in legal science on how to understand the concept of fault –subjective and objective ones.

In the first case it is proposed to understand the offender's fault as a mental attitude towards the committed wrongful act (omission) and its possible consequences.

The concept of «objective fault», which is reflected in Art.614 of the CC of Ukraine, is based on the idea that fault depends on how a person takes measures within its discretion to fulfil duties properly.

This understanding of fault is devoid of subjective characteristics, it is based on external, objective criteriaof definition.

The use of all measures within person's discretion is a form of person's behavior, rather than a form of mental attitude.

In this connection attention is drawn to the fact that in civil law, unlike public areas of law, measures of liabilityeffect the offender's proprietary sphere, rather than the offender's personality, and thus determines its danger for society[1].

The objective nature of fault in civil law depends on the features of entities, which bear civil liability that «emerges for an offender before a victim and here is why for a person, whose rights have been violated, the offender's mental attitude towards the offender's behavior and its consequences does not matter»[2].

As a general rule liability in civil law is based on the principle of fault.

According to the Civil Code of Ukraine (Part 1, Art. 614 of the CC) a person who has failed to performan obligation or performed it improperly, is liable if it is his or her fault (intent or negligence), unless otherwise provided by contract or law.

In the subjective sensefault is a mental attitude of a person towards his or her own wrongful conduct, which appears to disregard the interests of society or individuals.

Fault may take the form of eitherintent, or negligence.

In turn, negligence may be in the form of either ordinary negligence, or gross negligence.

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[1] Примак В. Д. Визначення вини як умови цивільно-правової відповідальності // Право України. – 2002. – № 10. – С. 115.

[2] Цивільне право: підруч. у 2-х т. (В. І. Борисова (кер. авт. кол.), Л. М. Баранова, Т. І. Бєгова, та ін.; за ред. В. І. Борисової, І. В. Спасибо-Фатєєвої, В. Л. Яроцького). –Х. : Право, 2011. –Т. 1. – С. 381.

Fault is associated with mental processes that happen in person's mind.

These internal processes may be assessed only by human behavior, where they find their external expression.

Fault in the form of intent occurs when the person's behavior shows that it is deliberately directed at the offense.

Fault in the form of negligence does not contain any elements of intention in the offender's conduct.

This conduct is not deliberately directed at the offense, but there is no proper care and diligence in the behavior, which is common for gross and ordinary negligence.

In the case of gross negligence inperson's behavior there is no care and diligence.

Ordinary negligence is characterized by the fact that a person shows total care and diligence, but not enough to avoid the offense.

For example, moving on a yellow lightis ordinary negligence, because the offender shows certaincare and diligence when crossing the street.

Gross negligence is assumed if a citizen sleeps on tram tracks, because then basic requirements of care and diligence are disregarded.

Regulatory provision in the Civil Code of Ukraine (Art. 614) about the concept of «objective fault», which is based on the idea that fault depends on whether a person has taken all the measures within person's discretion to fulfil duties properly, gives more significance to the understanding of fault devoid of subjective characteristics and following the external, objective criteria of definition.

The use of all the measures within person's discretion is a form of person's behavior, rather than mental attitude.

In this regard one should draw attention to the concept of fault that is different from the traditional one, when debtor's individual qualities and, moreover, «emotional experience» in relation to the offense have no legal significance for the assessment of the debtor's fault.

The debtor's fault occurs when debtor fails to perform an obligation, although is able to perform it.

It is worthy to understand person's fault as the debtor's will expressed in its intentional or negligent acts (omission), which have led to the breach of contract.

With that fault should be understood as voluntary act, and when characterizing it (establishing its presence in certain specific violator's actions) the objective criterion has to be used – minimal efforts of care and diligence for the proper performance of obligation.

Under such circumstances the will during the violation of contract obligations is the debtor's will, which is expressed outwardly (it differs from the will stipulated by the contract), and has caused violation of contract obligation testifying that the person has not taken all the necessary measures regarding the proper performance of contract obligation[1].

In the Civil Code of Ukraine (Art. 614) a behavioral approach to the definition of fault is fixed, which means that fault is about the failure to take at least

[1] Бугера І. Ю. Підстави звільнення від відповідальності за порушення договірних зобовязань: магістерська робота // Київський національний університет імені Тараса Шевченка. – К., 2009. – С. 96.

one of measures within person's discretion regarding proper performance of obligation, and reflects current global trends in private law.

The behavioral approach to the understanding of fault is significantly different from thepsychological understanding of fault, which is common for criminal law and other areas of public law, when fault is a mental attitude of a person towards the committed wrongful conduct and its consequences.

Due to the lack of established tradition of behavioral understanding of fault in the application of Art. 614 of the CC of Ukraine problematic issues regarding the criterion of fault, i.e. what measures should be considered as within person's discretion and what measures are beyond its powers, and degrees of fault, i.e. how to determine the degree of fault if it is not mental attitude, have been formed.

In the behavioral concept the notion of fault is inextricably linked to the principle of reasonableness, which is about the duty to take measures a reasonable person would take under similar circumstances.

In this case fault as an element of civil offense is confined to the correlation between the defendant's conduct and certain proper standard.

Both in English and American law this standard is described as «conduct of a reasonable person» (behavior of a reasonable man).

This criterion is about replacing the defendant with a hypothetical reasonable person and simulating its behavior under such circumstances[1].

In other words, fault is regarded as a failure to takediligence measures a reasonable person would resort to under the same circumstances.

However, the definition of criteria of how a reasonable person would behave in any particular case is probably the most difficult issue of the whole theory of civil law.

The most consistent and logically perfect approach in solving this problem is proposed by the theory of economic analysis.

In the opinion of proponents of this theory, measures of care are reasonable if they are rational: measures of care are rational if they are justified by value;measures of care are justified by value if their value is lower than the value of possible damages reduced by multiplying the index of probability of their occurrence[2].

Qualification of fault or its absence is carried out as a result of comparison

[1] See: Lahe J. Subjectivefaultas a basisofdelictualliability // JuridicaInternational. – 2001. – №6. – P. 129; Wild C. SmithandKeenan'sEnglishlaw: textandcases / C. Wild, St. Weinstein. – 16th ed. – London ; NewYork : Longman, 2010. – P. 459; Карнаух Б. П. Вина як умова деліктної відповідальності в англо-американській правовій сім'ї / Б. П. Карнаух / Актуальні проблеми держави і права. – 2011. – С. 529-536 // [Electronic resource]. – Access: http://dspace.nulau.edu.ua:8088/bitstream/123456789/1371/1/Karnaux_v_v.pdf

[2] See: Coleman J. Theoriesoftortlaw [Electronicresource] / J. Coleman, G. Mendlow // Stanfordencyclopediaofphilosophy. — Regimeofaccess : http://plato.stanford.edu/entries/tort-theories/; Карнаух Б. П. Вина як умова деліктної відповідальності в англо-американській правовій сім'ї / Б. П. Карнаух / Актуальні проблеми держави і права.– 2011. – С. 529–536 // [Electronic resource].– Access: http://dspace.nulau.edu.ua:8088/bitstream/123456789/1371/1/Karnaux_v_v.pdf

of the defendant's behavior with an objective measure of proper diligence that is inherent for any «reasonable person».

Despite legislative provision of behavioral concept of fault in the Civil Code of Ukraine (Art. 614), doctrine and judicial practice have not formed a clear standard for «behavior of a reasonable person.

The above demonstrates the feasibility to implement the«conduct of a reasonable person» standardin the civil law of Ukraine, as this standard measures actions of a «reasonable» person and establishes the criterion to find fault in the actions of a person if such actions aremeasures of care justified by value, when their value is lower than the value of possible losses reduced by the factor of probability of their occurrence.

Legal importance of the «conduct of a reasonable person» standard means that the qualification of fault is carried out by comparing the defendant's behavior with an objective standard of proper diligence, which is common for any «reasonable person» according to the criteria determined by the standard.

In terms of the theory of economic analysis and behavioral concepts fault is a condition of liability, which provides for the transfer (redistribution) of losses of one person to another one in order to minimize the total amount of losses from the violations of subjective civil rights considering the cost of preventive measures, the amount of losses and the level of care of the offender[1].

Fault is usually a prerequisite for liability as a measure of repayment resulting in unequal deprivation of property for the party, which violated another party's right.

However, fault is considered one of the conditions of civil liability that taken together are called a composition of an offense or a system of conditions of certain sort of liability.

Composition of civil offense may be complete or incomplete (truncated).

Complete composition of civil offenseconstitutes such conditions of liability as wrongful conduct, harm, causal link, and fault.

Incomplete composition of the offense isconfined to one or more (two or three) conditions of liability that are recognized as sufficient to bring the offender to civil liability under law.

In terms of substantive law the formula for the composition of civil offense defines a set of conditions, whereby the victim has a right to demand redistribution of expenditures for an offender.

In terms of procedural law this formula describes how evidence is received in cases on taking civil liability measures.

Composition of civil offenseis modified depending on the nature of claims and features of specific offense.

Complete composition of civil offenseis used in repayment of contractual damages (unlawful conduct, harm, causal link, and fault).

In case of claims for the recovery of inflation losses and annual three per cent and for the recovery of punitive damages for the violation of pecuniary obli-

[1] Карнаух Б. П. Вина як умова цивільно-правової відповідальності: автореф. дис. … канд. юрид. наук / Б. П. Карнаух. – Х., 2013. – С. 9.

gations only the fact of violation of pecuniary obligation has to be proven[1].

In terms of behavioral concept fault is a condition of legal liability, because freedom is a condition of law; rules of liability are relevant for free individuals only.

Law dictates that a person's fault is only with those violations that were committed voluntarily having choice and personal freedom.

Therefore, it would be person's fault if a wrongful act was committed in a situation of free choice, where lawful option of conduct was objectively available and reasonably expected.

Objective availability is presumed, but may be denied by the inability to perform or other situations without options of lawful conduct.

Despite the fact that the concept of faultisthe only one for civil law, the content of the criterion of reasonable expectations in tort and contract law varies.

Thus, in tort law in accordance with the theory of economic analysis the criterion of reasonable expectationhas to be determined by the formula whereby it is person's fault if no protective measures have been taken in a situation, when the cost of protective measures is lower than the amount of losses determined using the index of probability of losses (formula of L. Hand)[2].

According to this formula, named so to honor the American judge who dealt with economic disputes, the person is liable only in case of ineffective actions and could not take economically justified measures of care.

This formula provides for reasonable care of uncontrolled parties and focuses on measures of care and on the fact that one of the parties could invest in resources to prevent harm[3].

Instead, in contract law the above indicated formula does not work: it is reasonable to expect from the debtorto fulfill obligations, despite the fact that for some reason the cost of performance has risen, and even in the case it has risen so considerably that the contract has ceased to be profitable.

The only exception to this rule is hardship or in the terminology of the Civil Code of Ukraine (Art. 652) – «a significant change in circumstances»[4].

The ideas of the theory of economic analysis on the degree of fault in civil law dividingfault into intent, gross and ordinary negligence, are also noteworthy.

Negligent conduct concerns a person who fails to take reasonably expected measures, provided that there is no reason to believe this person's acts or omissions are intentional.

The degree of negligence (ordinary or gross negligence) is suggested to be recognizedthrough the difference between measures the defendant has actually taken and those ones reasonably expected of him.

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[1] Карнаух Б. П. Op. cit. – P. 10, 11.

[2] Там само. – P. 12.

[3] Method of L. Hand [electronic resource]. – Access: http://gendocs.ru/v34267/лекции_-_государство_и_бизнес?page=8

[4] Карнаух Б. П. Op. Cit. – P. 12.

If the difference is insignificant or minimal – negligence is ordinary, and if the difference is significant or maximum – it is gross.

Intentional fault is regarded as a contradiction between individual arbitrariness and the existing legal order, when a person refuses to act in a reasonably expected manner, but realizes that it is possible[1].

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[1] Карнаух Б. П. Op. Cit. – P. 12, 13.

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Modern conceptual approaches to the nature of the social welfare state

Passing to the market relations and their development, that takes place in Ukraine, influences both on all legal system on the whole and on her separate industries and institutes. New economic processes and globalization of economy require native reformation of major public relations well-regulated a right. Not by chance the legislation of Ukraine as the democratic, legal and social state puts the most essential aim the protection of rights and interests of citizens. Thus during reformation of legislation the state forces, from one side, to go on the way of providing of accordance of him to the market conditions, and from other – actively to protect the citizens from those possible social confusions that arise up in the process of liberalization of civil, economic, labor legislation and functioning of market economy. This dual interaction caused task the state is called to decide mainly by modernization of norms of labor right, civil law and economic right.

The important feature of the modern stage of development of social legal reality is him transitional character. Rightly emphasize such lawyers as V. A. Bachynin, V. S. Zhuravskiy, M. L. Panov, which the out-of-date contradictions inherited from the past search the decision in the dramatic collisions of different public forces. At the same time new civilization bases are mortgaged for future transformations. Slowly, but unavoidable there is dismantling of relict bits and pieces of the totalitarian system. The former type of legal reality gradually changes on other[1]. This thesis reflects that difficult legal and political situation that was folded in the legal adjusting of social sphere in Ukraine fully.

[1] Бачинін В. А., Журавський В. С., Панов М. І. Філософія права: Підручник. – К.: Видавничий Дім «ІнЮре», 2003. − С. 3–5.

With proclamation of Declaration of State Sovereignty, in Ukraine conception of confession of priority of role and value of social factors got a display in activity of the state. After fixing in Constitution of Ukraine of concept «the social state» in the legislative acts of country up to a point the necessity of social orientation, social orientation began to be accented. Conception of the social state entered as component part to general Ukrainian state ideology, finding beating back in development of normatively-legal acts.

Such process is appropriate and predetermined by that exactly social aims swim out from a public ideal and the values of society are represented only in them. In legal reality a concept «the social state» appeared on a change to the concept «the socialistic state». And it is not simple replacement of the name, it is a change of essence of the state, including in a social sphere. These are reorientation and identify of new directions in social politics, development of the transparent and clear system of public welfare as one of basic constituents of social politics that would not depend on changing of power in a country, filling with new maintenance, in accordance with the requirements of time, right on public welfare in the system of socio-economic human, creation of a new pension system rights and others like that.

The aim of the article is finding out of essence of the social state and decision of role of right in the context of possibility of development of such state, and also innovative development and his influence on maintenance of social rights.

A concept «the social state» is widely used in legal and economic literature and understands as the state that envisages the social orientation of development of market economy with the aim of redistribution of profits in behalf on those, who needs providing and support from the side of the state and society, overcoming of social inequality and others like that.

A problem of decision of essence of the social state is the actual enough theme of scientific researches that predefined, first of all, by her novelty and complication of questions. This range of problems engaged in the dissertation researches of D. O. Ermolenko, S. O. Kirichenko, I. V. Yakovyuk, A. Kindratets and others. These questions were put in many articles, monographs, scientific lectures. At the same time attention not enough was spared to the social state as important soil of realization of right on public welfare.

Existence of the social state contacts with democracy, as it is considered that one of the most essential factors of her becoming there is pressure of civil society. O. Kindratets pays attention correctly, that in the conditions of undemocratic society this factor is quite absent[1].

The legislation of Ukraine as the social state puts the protection of rights and interests of citizens for a major aim. During reformation of legislation the state forces, from one side, to go on the way

[1] Кіндратець О. Сучасні ознаки соціальної держави // Людина і політика. – 2003. – №6. – С. 138– 144.

of providing of accordance to his terms of market, and from other – actively to protect the citizens from possible social risks. It double interpredefined task the state is called to decide main, by character, through modernization of right for public welfare. Being the independent field of the Ukrainian law, it becomes the effective means of updating of all social sphere in a country and mighty barrier on the way of development of negative consequences for the citizens caused by the terms of passing to the market economy.

For a system comprehension and understanding of processes that take place in a social sphere, and also development of strategic direction of perfection of the legal adjusting of public welfare, it is necessary to investigate a concept the «social state», which on the modern stage becomes a condition and legal soil of realization of constitutional right for public welfare.

The state plays an important role in human, especially in a social sphere that finds the display from person's birth (payment in the birth), in the process of life (for example, help in case of temporal inoperability, disability and others like that) and to death (payment of funeral).

The state accompanies person hole life, giving free education, organizing assignment of benefits in case of industrial accident or professional disease, that entailed the loss of capacity, marks the mechanisms of setting of pension on age (pension for retirement, disability pension, survivors), determines terms and sizes of the material providing and support in case of unemployment, temporal inoperability and another cases at the offensive of that a person gets providing and support from the state.

In democratic society a man feels caring and concern in a social sphere during all life. The state determines maintenance of fundamental human rights. Realization of social rights also takes place by means of the state by social and legal politics that is carried out by the state.

P. M. Rabinovich rightly identifies the welfare state as a state, performing a social function[1]. In turn, Y. Todyka rightly pointed out that social is the state, that assumes an obligation to worry about a social justice, prosperity of the citizens, them social security, and her basic task is an achievement of public progress, that is based on the principles of social equality, general solidarity and mutual responsibility envisaged by a right[2]. There is reason to assert that social state has become a reality, and the whole history of the state social recognition involves changing world society on the arrangement of his life, ensuring decent conditions for every citizen, protection of state financial and legal status of any person.

A term «social» characterizes essence of the state, testifies to deeper maintenance of connections of the state

[1] Рабинович П. М. Права людини і громадянина у Конституції України (до інтерпретації вихідних конституційних положень). – Х, 1997. – С. 378.

[2] Тодыка Ю. Н. Основи конституционного строя Украины: Учебноепособие. – Х.: Факт, 1999. – С. 42– 43.

and society, state and person, certifies the real and legal status of man and citizen.

V. V. Kapyltsova investigating the problem of providing of social guarantees during transformation of Ukraine on the social state of market type, expresses opinion, that social strategy called, firstly, to liquidate poverty and provide the dynamic increase of standard of living of population; secondly, to guarantee social stability and social safety in society; thirdly, to socialize the structural constituents of economic politics of the state[1].

O. F. Skakun and M. K. Pidberezkyy arguments and systematically prove that there is such a social state that takes care of the material welfare of citizens, fulfills the function of economic regulation of obligatory account of environmental requirements, protecting social and industrial interests, etc[2].

Should agree with I. V. Yakovyuk, that correctly marks the unity of legal, democratic and social categories in determining the nature of the state and human rights. As a democratic, it serves to freedom as higher value, assists its presentation to equal access to property, equal elections, equality of rights of participating in realization of political power, providing diversity of political and cultural life. As legal, it provides organization of public and state life on principles of right, a law and order guarantee, assists the achievement of independence and responsibility personality for the actions, rational validity of legal decisions, stability of the legal system. As social – recognizes the man as the highest social value, providing social assistance to disabled persons who are in difficult situations, to ensure that every decent standard of living, redistributes economic benefits in accordance with the principle of social justice and sees its mission in providing social peace and harmony in society. This researcher rightly defined the basic principles of the welfare state, namely: 1) the principle of human dignity; 2) social justice; 3) social partnership and solidarity; 4) autonomy social relations and processes; 5) subsidiarity; 6) social commitments[3]. Such a position is taken in the works B. P. Ganba[4], S. Kiritchenko[5], O. V. Skrypniuk[6] and some other researchers. This approach should be the

[1] Капильцова В. В. Соціальні гарантії в умовах становлення ринкових відносин в Україні: Автореф. дис... канд. екон. наук: 08.01.01 / Дон. нац. ун-т. – Донецьк, 2002. – С. 13–14.

[2] Скакун О. Ф., Подберезский Н. К Теория права и государства. -Х., 1997. – С. 399–400

[3] Яковюк І. В. Соціальна держава: питання теорії і шляхи її становлення: Дис... канд. юрид. наук -Х., 2000. – С. 98–99, 102–103.

[4] Ганьба Б. П. Системний підхід та його застосування в дослідженні України як демократичної, соціальної, правової держави: Автореф. дис... канд. юрид. наук: 12.00.01 / Нац. ун-т внутр. справ МВС України. – Х. – 2001. – 19с.

[5] Кириченко С. О. Співвідношення соціальної правової держави і громадянського суспільства в умовах сучасної України: Автореф. дис... канд. юрид. наук: 12.00.01 Ін–т міжнародних відносин Київського нац. ун–ту ім. Т. Шевченка.-К, 2001. – С. 14– 16.

[6] Скрипнюк О. В. Соціальна, правова держава в Україні: проблеми теорії і практики. -К: Ін– тут держави і права НАН України. 2000. – С. 9– 10,41– 42.

basis for determining the nature of the welfare state as a condition of exercising the constitutional right to social security.

A problem of building of the social state (and subsequently the realization of social rights) is priority for many countries that constitutionally chose such model for the development. In the constitutions of many countries a concept «the social state» began to appear after Second World War, in particular, in the Basic Law of German Federal Republic (in 1949), Constitution of France (in 1958), Constitution of Spain (in 1978). In the constitutions of the new independent states, that at one time entered in the complement of the USSR, and almost in all postsotsialiistic countries of Europe category the «social state» is envisaged as one of leading (for example, in the constitutions of Estonian Republic, Lithuanian Republic, Republic of Macedonia, Republic of Slovenia, Republic of Hungary, Czech Republic, Republic of Uzbekistan, Russian Federation etc.).

Statesmen and scholars task was to find the place and role of the social state in regulating the equitable distribution of income between labor and capital, operational and unable to work, the restoration of equality and freedom of citizens, irrespective of their ability in the social sphere, social justice, social solidarity society and concerns secured and working for unsecured and out-of-work.

Most convincing are an argumentation and scientific position of R. I. Kondratyeva, that marks the permanent increase of role of social function of the state, in particular, on that a social function is a function of the state, but not function of commercial establishments or benevolent funds. Within the framework of this internal function the state guards labor and health of people, the assured low-limit of remuneration of labor sets, carries out state support of family, maternity, childhood, disabled and the elderly. Exactly the state (if she on Constitution is social) develops the system of social services, sets pensions, help and other guarantees of social defense. It follows to underline importance of realization of this function from the point of view of implementation of economic and political tasks that stand before the legal state. Social support of certain layers of population is sent to softening and overcoming of such negative phenomena of transitional period, as of material scanty means, deepening of social inequality and high to the percent unemployment. State social payments stabilize the standard of living of population; assist more even distribution of load of economic difficulties between the different groups of population[1]. From that, how stably it will take place and become stronger realization of social rights, will develop and become stronger becoming of the social state.

Modern conception of the social state goes out from that it is such state, that puts the primary objective of achievement of welfare of all society and his members, provide citizens with decent living conditions and a free, comprehen-

[1] Кондратьев Р. І. Соціальна держава в теоретико-правових і філософських дослідженнях // Право України. – 2005. – № 2. – С. 81–84.

sive development, ensure social protection; promotes broad participation of people in social development and use of the results for human rights and fundamental freedoms. Functions of the social state are main directions of activity of the social state that express its essence.

Position is reasonably V. A. and V. S. Ivanenko, which defines the scientific content of the social state – is a state in which the economy, politics, ideology, law, law enforcement practices and other spheres of social life based on universal moral principles of social justice, equality and social solidarity and aimed at creating the conditions necessary for decent lives and the free development of each person, which constitutionally fixed and guaranteed, actually provided and performed basic economic and social rights and freedoms and social obligations of the state to society and human[1].

On the basis of resulted it is possible to do a next conclusion, that a primary purpose of the social state is maximal satisfaction of material and spiritual necessities of members societies in a social sphere, that grow constantly; successive increase of standard of living of population and decline of social inequality; providing of general availability of the basic social blessing, medical and social service, realization of right is on public welfare. The social state must cast aside any facilities gaining end that can violate rights for other citizens, communities and states.

In modern conditions the state is the main subject of social policy, and therefore, identifying areas of policy, it will: ensure the public's right to social security, to conduct a common policy in the social sphere; ensure the adoption of laws and other legal acts regulating social security: identify organizational and legal forms of social security and create conditions for the effective functioning of the social security system; to determine the conditions and procedure for pensions, allowances, benefits, social care and other social security in the legislative order; establish the size of mandatory insurance contributions allocated to the appropriate fund compulsory state social insurance; determine budgets mandatory insurance funds; establish mandatory requirements for the establishment of insurance reserves to ensure the timeliness and completeness of social benefits; view types and sizes of social benefits to improve the financial security of citizens; determine the conditions and provide appropriate subsidies Social Insurance Fund of the state budget; implement social security from the state budget to provide social support to certain categories of disabled people from the state and local budgets; implement basic types of social standards (minimum consumer budget, living wage, minimum pension, minimum social assistance, etc.); enforce the subjects of social security with the law, perform in the prescribed form supervision and control over the observance of social security legislation in Ukraine.

[1] Иваненко В. А., Иваненко В. С. Социальные права человека и социальныеобязанностигосударства: международные и конституционные аспекти. – СПб.: Юрид. центр Пресс, 2001. – С. 58.

The legal basis of the social state is not only the Ukrainian legislation, but also relevant international documents such as the Universal Declaration of Human Rights, the European Social Code, revised European Social Charter, the International Covenant on Economic, Social and Cultural Rights, etc.

Analysis of the position of scientists on the objectives and functions of the social state gives grounds to note that the creation of the social state is the precondition and guarantee the realization of the constitutional right to social security, and to identify the signs of the welfare state. The main ones that reflect the essence of the social state is the presence of: a) the implementation of social regulation, based on universal moral principles of social justice, equality and social solidarity and aims to create the conditions necessary for a decent life and free development of every person; b) The legal basis for providing independent workable person a decent life for themselves and their families; state mechanisms to support disabled persons and persons who for obvious reasons cannot provide themselves at the subsistence level; c) State guarantees a decent human subsistence minimum, social security, welfare and general improvement in other social and economic rights of citizens; operational acting transparent and clear mechanism for the implementation of social protection, providing comprehensive legal and economic guarantees of social rights: d) take measures to minimize the socio – economic differentiation among members of society, strengthen social harmony in society.

Thus, the social state based on a socially oriented market economy, creates the necessary conditions for the implementation of economic and social rights to ensure proper level of material welfare of person and family members, guarantees everyone subsistence minimum for a decent human being and promotes social harmony in society.

Considering the above, it may be noted that the social state is the democratic state, that carries out public welfare by realization of active social politics, that is component part of domestic policy of the state, incarnate in the effective social programs, conducts legal work in relation to adjusting of social relations in society in interests of all vulnerable task forces, on the basis of principles of justice, social partnership, solidarity of members of society. Thus, a construction of the social state is precondition and guarantee of realization of constitutional right for citizens on public welfare. Thus it should be noted that realization of any social rights is possible on condition of stable economic development.

Further development of doctrine of the legal social state and based on its law-making and law enforcement practice must go out interpretation of social rights not only as from general reference-points for a legislator and law enforcements, namely as fundamental rights which are equal significance for personal and political human and civil rights. Based on the principles of equity and social solidarity, these rights secured by the Constitution of Ukraine and international acts. Social rights provide

guidelines for social policy, require legislative and executive power to implement a social policy, and is the basis for the formation and development of the relevant area of law.

In modern conditions the strategy of Ukraine legislation increasingly associated with innovation component. The innovative potential of the state – is not only a set of scientific and technological, financial and economic, but also industrial, social, cultural and educational opportunities the country (industry, region, company, etc.), necessary for providing of innovative development of economy.

Universally recognized by world practice the criterion of decision of priorities of innovative development and the state support there is belonging to the technological modes. The last are totality of technologies characteristic for the certain level of development of production. And considerable basis for development is systematization of legislation that regulates the innovative system of the state.

So, for example, by means of legislation it is possible to direct development of economy of country mainly to the sixth technological mode, namely: biotechnology, including cell biology; Aerospace; nanotechnology; new materials; optoelectronics; artificial intelligence; microelectronics; photonics; Microsystems Engineering; information superhighway; software tools and simulation; Molecular electronics; system management; medical equipment industry. Material basis of post-industrial technological revolution is electronics, robotics, telecommunications, low-waste production, biotechnology. Priority is nanoelectronics, genetic engineering, alternative energy sources. The above will provide the opportunity to develop the economy, and eventually become the basis for realization social rights in Ukraine.

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Are there any prospects in the branch of labor law?

Labor law is looked again for the place in another field of law. Previously, scientists in the theory of civil law assigned it a place in the «cradle of civil rights»[1], but now this important and, of course, necessary for a society, in which more than 28 million people of a working age[2], with 20 million that are employed in economic activities[3], a field of Ukrainian law for some reasons became disgusting for Professor P. Pylypenko – well-known national expert in this field of law. In his view, the place and role of labor law as an independent field in the Ukrainian law should change in significant way. These changes «could be effective if only the rules that regulate labor relations of all workers will associate under the aegis of a single complex law formation – employment law»[4]. But not so long ago, he wrote that labor law as a field of law in the Ukrainian law is the most significant and has most objective nature[5]. So, and now he has to believe that the basis of the creation of a new complex formation and its provisions is the labor law.

Dangerous of this proposal we can see in the fact that its author came to doubt the truth of that: 1) labor law as an independent field of the Ukrainian law system which as natural regulates citi-

[1] Майданик Р. Цивільне і трудове право: порівняння методології і міжгалузевих відносин // Юридична Україна. – 2008. – № 6. – С. 36–41; Майданик Р. Недоговірні цивільно-трудові конструкції // Юридична Україна. – 2008. – № 7. – С. 40-44; Майданик Р. Договірні цивільно-трудові конструкції // Підприємництво, господарство і право. – 2008. – № 9. – С. 3–6.

[2] Вісник пенсійного фонду України. – 2014. – № 6. – С. 38

[3] Про схвалення прогнозу економічного і соціального розвитку України на 2015 рік та основних макропоказників економічного і соціального розвитку на 2016 і 2017 роки та визнання такими, що втратили чинність, деяких постанов Кабінету Міністрів України : постанова Кабінету Міністрів України від 27 серпня 2014 р. № 404 // Офіційний вісник України. – 2014. – № 72. – Ст. 2029.

[4] Пилипенко П. Право зайнятості, або нові контури трудового права // Право України. – 2014. – № 6. – С. 206

[5] Пилипенко П. Д. Проблеми теорії трудового права. – Л., 1999. – С. 14

zens' labor activity to create vital values, performs this function; 2) law regulation of labor activity actually achieves the goal of ensuring the existence of every person and the existence of whole society; 3) the working class fought for the presence of this field of law during the centuries. Quintessence of proposal is to conclude that the labor law social in its nature, which currently provides law regulation of the natural phenomenon that was and always will be labor, in the near future of Ukrainian law system will be gone, and its place will be occupied by «employment law»! «Employment law» will be embodied in the form of symbiosis that has to combine the norms of different fields of law.

In this regard, I would like to remind that the science of labor law formed the view according to which labor relations that appear on civil law contracts should be regulated by the labor law a long time ago. And this fact should be considered as differentiation of relations that form the subject of labor law[1]. The scientists of the law faculty of Omsk University notice specific examples, when the laws of the Russian Federation spread labor law norms of wage, vacation, the state social insurance, etc. for persons who work under the contract[2]. We make an accent that the conversation is not about of new field of law creating, but about of wide spreading of labor law.

Our own opinion on the proposal of Professor P. Pylypenko we will describe excluding instinct of self-preservation of labor law independence, but in terms of the objective nature of things. In other words, we make an attempt to investigate the objective basis for the conclusion, which achieved P. Pylypenko.

So what are the arguments underlying on the basis of the «revolutionary» conclusion about of senseless existence of independent Ukrainian labor law and what is their evidential value?

Unfortunately, on the first place is not situated a legal idea, the results of practical activities that could call into question the feasibility of existence of independent labor law, but the critiques of communist ideology, which, according to Professor P. Pylypenko still defines «socialist nature of the right to work», «socialist principles of regulation of social and labor relations» and so on. Other criteria of «employment law» («globalization of international relations and international economic integration»; «unemployment growth»; «other, except for the employment contract, the grounds of labor relations» and so on) we can't understand too. Even with these «sulky» reasons (some of them only indirectly related to labor law) it does not feel the seriousness and the need to avoid the «labor law» in favor of «employment law», and especially keeping in mind P. Pylypenko's unrealistic «dream» that the change of definitions of field of law can change the objective process of social development and, therefore, the subject of labor law.

We have to remember that labor law currently regulates labor relations and

[1] Трудовое право России / под ред. С. П. Маврина и Е. Б. Хохлова. – М., 2002. – С. 29

[2] Аленина И. А. О понятии «сфера действия трудового права». Проблемы правового трудового регулирования трудовых отношений. – Омск, 2004. – С. 13–14

relations that are preceded it, particularly in employment relations[1]; relations that are connected with labor, and relations that are replacing labor! This is the subject of labor law as a field of Ukrainian law in modern economic conditions.

If we focus these arguments in the legal area and make a glance at the past, we can notice that all of P. Pylypenko's proposals were described a long time ago. In theory of labor law of XX century this question has been repeated and were made conclusions about objective nature of independence of labor law with a gradual expansion of the area of the rules considering the results of objective social development. Only then the views of scientists focused on finding a way of decision scientific questions about subject of labor of law. Law idea twirled around the issue of wide and narrow area of labor law rules that regulate social and labor relations that are connected with human's ability to work. The scientific research of decision questions is about of subject of labor of law, but isn't about of changing the definitions.

By the way, almost all versions of Ukrainian Labor Code provide the wide area of labor law – regulation of all social relations, the object of which is a labor as a purposeful human activity to realize from the created of material and spiritual valuesfor himself and society, regardless of the sphere, but with a considering of field of economic. If we objectively mark the current Law of Ukraine «On Ukrainian Employment», it can be seen legislator view of the wide area of labor law rules. That's why we hope that soon the subject of labor law will be consisted in all labor relations that appear with the realization of right to work regardless of field of economic. But nowadays we have an objective necessity to involve the Civil Code of Ukraine and the Commercial Code of Ukraine for the regulation of labor relations that appears with the realization of right to work even which appeared on the basis of contacts that could be regulated by Civil Code of Ukraine and the Commercial Code of Ukraine. Therefore we must remind that the views of European scientists focused on a proposal which consists in the opinion that all of the labor relations, and it does not matter on which contracts they occur, should be regulated by the labor law[2].

We have to make question: whether «employment» is the category that objectively can absorb «labor»? Labor, work, as opposed to employment is a conscious and purposeful physical or intellectual human activity aimed at creating material and spiritual values, which ensures the existence of every person and a whole of society. We have note (and this fact, probably, must have been determinant in formation of labor law): the ability to work is most important quality of a person, through which a person physically and mentally develops and acquires the occupation and which later included in the working process.

[1] Про зайнятість населення України : Закон України від 5 липня 2012 р. № 5067-VII // Офіційний вісник України. – 2012. – № 63. – Ст. 2565.

[2] Киселев И. Я. Сравнительное и международное трудовое право. – М., 1999. – С. 91

Labor is the first basic condition of all human life. We can and must say that labor has created a person[1]. A person is just a cell in great body, which is called society. And among of the many factors that make an influence on human rights is situated factor that allows seeing the deep nature of human rights and freedoms in society – correlation between labor and property[2].

Trying to understand Professor P. Pylypenko's proposal we should turn over to description of place and role of labor in society, which the authors of Brockhaus and Efron encyclopedia gave in 1907, so far away of communistic ideology domination. In their view, labor, along with the nature and capital, is a factor of production. In the economic sense labor is systematic flow of muscle and nerve efforts that direct to adaptation of environment to human needs[3].

Employment is a state of the man who is constantly busy in some work. This man can be loaded, for example, for cooking, looking after pets, conversation etc. The man has no free time[4].

Employment is the using of labor or state of hired person[5]. In economic way definition «employment» belongs to the production factors, which, in addition to labor, land and capital include, for example, that land occupied by enterprise, capital engaged in production.

We have to make question: is it possible in objective, theoretical or practical way to create field of law, which would regulate all three production factors, all fact of employment? Our answer is «no». Even all production factors describe absolute impossibility of forming such field of law as «employment law» in the Ukrainian law system. Relations with using production factors in essence have a different nature and content.

So, indeed, international and European regulations, especially conventions of the International Labor Organization, hundreds of times using the term «employment» is trying to influence the level and conditions of employment in different countries, including Ukraine. But we cannot ignore that this task didn't aim only for law, but first of all government policies on employment, which is implemented through monetary, investment, fiscal, social, innovation policy etc. Can we mire all social relations of government policies on employment in the «employment law»? Is it possible to make an impossible thing?

The purpose of policies on employment is to ensure equal opportunities for persons with realization of right to work; widening the area of labor, providing full, productive, freely chosen employment, improving skills and competitive workforce. Because among the production factors only labor promotes the creation of material and spiritual values through the using of physical and mental

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[1] Маркс К., Энгельс Ф. Сочинения : в 50 т. – М., 1961. – Т. 20. – С. 486

[2] Воеводин Л. Д. Права человека, труд, собственность и государство // Вестник Московского университета. Серия: Право. – 1995. – №4. – С. 3–11.

[3] Брокгауз Ф. А., Ефром И. А. Энциклопедический словарь. – М., 2002. – С. 582–583

[4] Новий тлумачний словник української мови. – К., 2005. – Т. 1. – С. 699

[5] Оксфордская иллюстрированная энциклопедия. – М., 2002. – Т. 7. – С. 92

effort of person. Labor used in various types of work: physical and intellectual, differs in terms of skills, productivity etc. That's why labor law is to regulate relations that appear with the unique human's ability to work in different fields of economy. Law regulation of these relations results from regulation of grounds of their origin and their termination. In addition, labor law norms regulate relations that occur at the conclusion of a collective agreement, with the rights and obligations of the workforce, the primary elected trade union regarding labor relations. Labor law regulates the aspects of wage, working time and rest time, labor discipline, consideration and settlement of labor disputes, strikes etc. And there is no sense to deal with «employment law».

In economic encyclopedia the authors consider another definition of «employment for a will» as «a doctrine under which the employer could suspend the person hired at any time for any reason and circumstances»[1]. We don't want to think that it's a definition of employment inspired professor P. Pylypenko to the conclusion of a new form of complex law body «employment law». If so, then, unfortunately, the proposal of new form of complex law body «employment law» confirms the view of the scientist that labor (as a person. – OP) is goods, though specific, special but it's a fact[2].

It should be recalled another important opinion which, unfortunately, P. Pylypenko does not count: ability to work characterizes the natural quality of a human as a living being and it's an integral part of it. «Employment» as a category that lies beyond human nature, and therefore has a wide feature: the undeniable truth – there are people who are engaged in nonsense, doing nothing, for example, most of their life spend in the casino etc. But they are under employment! Also, definition «employment» is used in cases far from labor, such as employ in studying, every expression that we employ, employ metaphors or employ words and phrases and more.

We have to make question: how these and hundreds of other facts of «employment» with different nature and different consequences, would determine the proposed new field of law? Neither theory nor in practice it is impossible to predict.

Only positive people's activity in the form of labor, as they create the material and cultural values that are directed to satisfy their personal and social needs with the purpose to take wages, requires legal arrangement and regulation. Well-known expression of Friedrich Nietzsche reveals the essence of labor: «Not benefit, but labor gives a value: noble result of a long work»[3].

It's very different – the area of labor activity, the law nature of relations, the impact certain norms on these social relations to regulate. Of course, labor law is a people's creation and it distributes

[1] Завадський І. С., Осовська Т. В., Юшкевич О. О. Економічний словник. – К., 2006. – С. 96

[2] Пилипенко П. Д. Окремі зауваження до проекту Кодексу України про працю // Право України. – 1996. – № 9. – С. 63–65.

[3] Энциклопедия афоризмов. Мысль в слове. – М., 2001. – С. 582

only to people[1], but it objectively needs changes, modernization of even dogmas of labor law. It refers to new forms of the labor involvement, which in practice are called atypical employment. It's no doubt that modern process of reform of labor law is expected proceedings of innovative forms of the labor involvement, in addition to traditional labor contract, alternative grounds of appearing of labor relations.

These changes require scientific understanding of the realities that appear. It stipulates searching for new methods of labor relations and relations that are closely associated with these relations. Therefore, there is an urgent need to define the law nature and content of non-standard legal facts as the basis of the labor relations. And most importantly – it is necessary to determine the impact of non-standard contracts on the legal status of employee and employer. So, nowadays the role and essence of non-standard grounds of appearing of labor relations haven't been fully understood yet. By the way, O. Prilypko is dedicated her dissertation to the law regulation of non-standard employment and the content of non-standard grounds of the right to work[2]. In this work, scientist searches for grounds of decisions of problems of the labor law subject. O. Prilypko sees the problem in the improvement of labor legislation, such as in determining the legal status of labor contracts as the grounds of social and labor relations and expanding the law possibilities of their participants.

Are the international and European regulations, used by Professor P. Pylypenko, and practice of their realization basis to conclude that soon a new national comprehensive law body as a field of Ukrainian law system – «employment Law» will be formed?

The answer to this question is situated in international and European regulations which P. Pylypenko uses. Unfortunately, their content is provided as a tendentious. That's just one example: the European Social Charter[3] clearly states: «With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake: 1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; 2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon; 3) to establish or maintain free employment services for all workers; 4) to provide or promote appropriate vocational guidance, training and rehabilitation». (p. 1). So, this article obviously shows that parties of the European Social Charter obligate to achieve the highest possible stable level of employment in order to fix full employment.

[1] Ильин И. Общее учение о праве и государстве. – М., 2006. – С. 109

[2] Прилипко О. С. Юридична природа і зміст нестандартних трудових договорів : автореф. … дис. канд. юрид. наук. – К., 2014.

[3] Європейська соціальна хартія (переглянута) від 3 травня 1996 р., ратифікована Верховною Радою України Законом України від 14 вересня 2006 р. № 137-V // Офіційний вісник України. – 2006. – № 40. – Ст. 2660.

P. Pylypenko said: «For the international community (although Charter is European. – OP) the problem of social stability (although the European Social Charter refers to stable employment. – OP) is primarily a problem of employment»[1]. And further: «Method of a lawful manner of realization of the right to work is not important now. (?). The main condition is employing as many citizens as possible»[2].

Since the first session of the General Conference of the International Labor Organization in 1919[3] and finishing the 100th session of the International Labor Conference in 2011[4], policy on «employment» is viewed as a method of effective realization of the right to work. Comprehensive recognition of the right to work is linked with the implementation of economic and social policy, which promotes full, productive, freely chosen employment.

As for the national legislation of Ukraine, it defines the legal, economic and organizational principles of state policy in the field of employment and social protection against unemployment. So employment is considered in several aspects. So, the base employment is defined as legal people's activity that is connected with satisfaction of personal and social requirements and needs to produce wages in cash or other form, as well as members of one family activities, places of business or working in business entities of based on their property, including without wages. Freely chosen employment is the realization of right to freely choose legal activity (including work without wages) and professions and working place to their abilities and needs. This definition of «employment» actually points to ch. 2, art. 43 of the Constitution of Ukraine. Underemployment is employment on conditions of working hours that are less than the standard working time provided by law, that may be entered into agreement between the employer and employee with wages in proportion to the hours worked or depending on output. Actually, this rule contents art. 56 of the Labor Code of Ukraine. Full-time employment is employment on conditions of working hours provided by law, collective or labor contract. Productive employment is employment that allows providing effective social production and satisfying the needs at least that it's established by legislation guarantees. In fact, in this definition of employment we see the essence and meaning of art. 85, 88 and 94 of the Labor Code of Ukraine.

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[1] Пилипенко П. Право зайнятості, або нові контури трудового права // Право України. – 2014. – № 6. – С. 199

[2] Пилипенко П. Право зайнятості, або нові контури трудового права // Право України. – 2014. – № 6. – С. 199

[3] Конвенції та Рекомендації, ухвалені Міжнародною організацією праці. – К., 1999. – Т. 1 : 1919–1964 рр. – С. 26-27

[4] Глобальный доклад, представленный в соответствии с механизмом реализации Декларации Международной организации труда об основополагающих принципах и правах в сфере труда [Електронний ресурс]. – Режим доступу : http://www.ilo.org/declaration;Global; 26. Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 100th Session 2011, International Labour Office, Geneva [Електронний ресурс]. – Режим доступу: http://www.ilo.org/declaration/lang-en/index.htm.

With freely chosen employment we can notice its back side – voluntary unemployment without ability to punish person who refuses to work. Freely chosen employment with the nature and specific is situated opposite of voluntary unemployment. It shows, that definition «employment» as a category means the state of person with participation or not connection in public production; in terms of essence «employment» means working activity that is connected with satisfaction of personal and social requirements and needs to produce wages in cash or other form. The main essence of this category is labor, which is regulated by the labor law.

A systematic analysis of the using definition «employment» in international, European and national law leads to the conclusion that the main direction of this category is to define level of employed persons for implementation state policy on employment and social protection from unemployment. These economic and organizational grounds of government policy on employment directed to realization of the right to work and receiving a wage as a source of existence. So we're back to the right to work and guarantee of its realization, and of course, their characteristics. The right to work is the alpha and omega of labor law and in fact, every citizen. The right to work in the democratic state will always be the most important right of civil rights in the law system[1].

Therefore, the purpose of public policy in employment is creation conditions for realization of full-time, productive, freely chosen employment and social protection in the event of unemployment. That's why employment is ensured with realization of right to work and arising of labor relations, which are specified by labor contracts, enterprise activity and other legal activities, is regulated by Constitution of Ukraine, Law of Ukraine «On Ukrainian Employment», Labor Code of Ukraine, Civil Code of Ukraine and other legislative acts.

After the realization of right to work the legal regulation of appeared relations is exercised by norms of the origin field of law, but not only the norms of the labor law. Thus, it is desirable that all relation that arise in the implementation of the right to work, would be regulated by the labor law, because it guarantees workers the particular incentives and guarantees that are noticed in the labor legislation (art. 5 of the Labor Code of Ukraine). Nowadays we can't do it, but we believe that the current Law of Ukraine «On Ukrainian Employment» is trying to find ways to solve this problem. We can find the acknowledgement of this conclusion in the «Procedure for registration, re-registration and account of unemployed and persons that are seeking work», approved by Resolution of the Cabinet of Ministers of Ukraine dated March 20, 2013 p. №198[2]. In the draft

[1] Прилипко С. М., Ярошенко О. М. Право на працю в системі прав людини. Правова доктрина України : у 5 т. – Х., 2013. – Т. 3. Доктрина приватного права України / за заг. ред. Н. С. Кузнєцової. – С. 502-536

[2] Про затвердження Порядку реєстрації, переєстрації безробітних та ведення обліку осіб, які шукають роботу : постанова Кабінету Міністрів України від 20 березня 2013 р. № 198 // Офіційний вісник України. – 2013. – №26. – Ст. 859.

of Resolution of the Cabinet of Ministers of Ukraine of 27 August 2014 p. № 403[1], the Cabinet of Ministers of Ukraine marked an equal sign between employment and other types of employment, defining them as «periods of employment and insurance record» (pp. 6 p. 3). And there is no matter that the order focuses on the citizens of Ukraine who moved from temporary occupied territory. In this situation there is more important fact that indicates a tendency to spread norm of labor law on labor relations, established on the basis of other grounds, but not only at the conclusion of the labor contract. V. Lebedev assesses this situation as the application of labor law norms for the subsidiary principle, in which the area of labor law covers relations that are associated with labor, but have another legal origin. In such situation, in his view, talking is not about expanding the list of relations that are the subject of labor law, but about the broadening the area of the labor law [30, 23–24][2].

The actual appearing of labor relations suggests the meeting goal employment policy. Therefore, the complex of legal, economic and organizational measures aimed at ensuring the right to work, leads person to employment. It isn't coincidence the Law of Ukraine «On Ukrainian Employment» considers employment as human activities that are directed to the realization of ability to work, and appeared labor relations are regulated by the labor law.

From the analysis of the definitions of categories of «employment» containing the Law of Ukraine «On Ukrainian Employment», European and international acts we can formulate following conclusions: 1) the category «employment» primarily used for the people who are hired on conditions defined by the labor and other contracts as the result of realization of the right to work; 2) employed (hired persons who realized their right to work) are the persons who: a) serve on military or alternative (non-military) service; b) legally work abroad and have wage from such employment; c) self-employed; d) combine work with the education; 3) employed are the persons who perform legal work connected with satisfaction of personal and social requirements and needs to produce wages in cash or other form.

We should make a conclusion that international, European and national standards of labor law, especially after the adoption of the Law of Ukraine «On Employment of Ukraine» contains neither theoretical nor practical equitable criteria «to form in the nearest future new comprehensive law body – employment law instead of the labor law». In this way we should talk about the effectiveness of state employment policy, the creation of jobs for unemployed citizens, stimulation of employers to create new jobs, the social protection of unemployed persons. All these questions are situated in norm of labor law.

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[1] Про внесення змін до Порядку реєстрації, перереєстрації безробітних та ведення обліку осіб, які шукають роботу : постанова Кабінету Міністрів України від 27 серпня 2014 р. № 403 // Офіційний вісник України. – 2014. – № 72. – Ст. 2028.

[2] Лебедев В. М. Лекции по трудовому праву. – Томск, 2001. – Вып. 2. – С. 23–24

UDC 349.2: 342.2

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On the central place of the social welfare state in the system of labor law subjects of ukraine

The extremely complicated economic, political and social processes going on in the modern world demonstrate the pressing need to search for new approaches to solving many problems in nation and law building. N. M. Onischenko and N. M. Parkhomenko argue that the legal science is centered around the issues associated with the lack of systemic legal regulation, legal specification and implementation of the provisions of the social welfare, law-governed state, its provision not only of internal order and external safety, but also its responsibility for its citizens' welfare, granting real significance to the constitutional provision of the acknowledgement of Ukraine as a social welfare state[1]. The system of specific measures aimed at the sustainment of the population forms the social policy of the state. As B. V. Rakytskiy rightly points out, the latter includes: a) the assessment of the problematic situation in the social sphere; b) the general and interim objectives of social policy; c) the detection of the main favorable and unfavorable trends and their causes; d) the fixation of borderline social boundaries and social status parameters whose mass spread is indicative of a threat to national safety; e) the strategy of social policy; f) the justification of the social policy priorities; g) the understanding of the class balance in the near term due to social status problems and its dynamics; h) the understanding of the state's role in the conduct of social policy and the maintenance of social sustainability»[2].

[1] Оніщенко Н. М. Соціальний вимір правової системи: реалії та перспективи / Н. М. Оніщенко; відп. ред. Шемшученко Ю. С. – К. : Юрид. думка, 2011. – С. 5.

[2] Ракитский Б. В. Концепция социальной политики для современной России / Б. В. Ракитский. – М. : Ин-т перспектив и проблем страны, 2000. – С. 6.

Social policy is implemented in the following basic spheres of social relations: the labor market, employment and unemployment; labor compensation and safety; the regulation of income and mass market product consumption; retirement insurance; the provision of targeted social assistance; social insurance; social service; education, professional training, further training and skill upgrading; science; healthcare; culture; physical training, sports and tourism; demography, family, motherhood, fatherhood, childhood, youth; environmental safety, technological accident and disaster protection; the protection of the socioeconomic rights of all categories of citizens.

There are two main approaches to the role of the state in social policy.

The adherents of the first one see the state as the organizer of social policy that sets the order and procedures of social group relations and determines the place of each of the groups in the society. In this case, social policy loses its features of the interaction process of social groups as its subjects, turning further and further into a set of government measures to change the living conditions and social status parameters of specific social groups.

The second approach draws on the assumption that the state has the following role in social policy:

a) nationhood ensures the person's inclusion in the society. Socialization results in a nation-wide understanding of the normal living conditions in the society;

b) the state provides the best conditions for the development of its citizens' social activity possible in the class society. Such nationhood results not only in no one of the people being excluded from the society, but also in the discrimination of any part of the population not being allowed;

c) the state does not deprive its citizens and social groups of their societal subjectivity and thus does not cultivate paternalistic forms of state social policy. However, the state does not pose any barriers for any of the social groups to improve its social status. The only limit is the legality of the methods of such improvement;

d) the state forms a space for the social opportunities protected from the arbitrary influence of private power, from the detrimental effect of the situational preponderance of forces on the relations between social groups with opposite interests.

Based on the above, I believe that the following should become the main priorities of the social policy of Ukraine in the labor sphere: the improvement of labor law; the improvement of the labor market situation monitoring and prediction system; ensuring a balance between professional training and demand for workforce; encouraging the economic activity of the population; ample awareness-raising work with the population concerning labor rights and the ways to protect them, the advantages of legal employment; creating a Guarantee Fund to ensure the protection of the employees' monetary claims in case of the employer's bankruptcy; the development of workforce capacity; increasing the quality of workplaces; developing a mecha-

nism for the implementation of the international treaties on the mutual employment and social protection of migrant workers to which Ukraine is a party, creating practical income legitimization mechanisms for the citizens working abroad; increasing the effectiveness of the supervision and control over the observance of labor law.

In this case, the improvement of the law is nothing else but the implementation of the social function of the state, ensuring the right of each person for decent living standards. The further drafting of the social development regulatory framework should be performed on the basis of the following principles:

– social justice and, first of all, the equality of all citizens' social rights;

– individual social responsibility – the citizens' duty to use their best endeavors for self-dependence and self-help;

– social solidarity – forming a system of relations in which the whole society meets social difficulties as a unified, harmonious system;

– social partnership, the observance of the agreements reached by all parties;

– social remuneration – creating a system of remuneration for the limitations resulting from the citizens' social status;

– social guarantees implying the provision of citizens with the guaranteed minimum of social services;

– subsidiary support of civil initiatives in social development problem solving.

Although the necessity of social orientation of any state is acknowledged by the international community, not many countries can actually defend any and all socioeconomic rights under current conditions. The main reason is the state of the nation's economy. The social function can only be implemented to the full extent under the conditions of a high economic development level that allows for redistributing funds and resources reasonably while preserving the freedom of market relations.

And here is where an important problem arises: how to determine the limits of the state's intervention in the economy for them not to become a hindrance to its development on the one hand and to ensure a due level of the citizens' social protection on the other hand. According to O. A. Lukashova, the complexity of this issue is related to the fact that the solution of social issues requires production growth[1]. She is supported by P. I. Novgorodtsev, who writes: «The very idea of large-scale social reforms could only appear in connection with the accumulation of national wealth, and social conditions cannot develop successfully without its progressive growth»[2].

The effective interaction between the state and business with a view to solving socially significant tasks in the social and labor sphere on mutually beneficial

[1] Права человека и правовое социальное государство в России / отв. ред. Лукашева Е. А. – М. : НОРМА-ИНФРА*М, 2011. – С. 18.

[2] Новгородцев П. И. Кризис современного правосознания. Введение в философию права / П. И. Новгородцев. – М. : Типо-литография товарищества И. Н. Кушнерев и Ко, 1909. – С. 432.

terms is possible on the level of public-private partnership: the cooperation between Ukraine, the Autonomous Republic of Crimea, local communities represented by the respective governmental authorities and local government authorities and legal entities except for state enterprises and public utilities or individual entrepreneurs that is effected on a contract basis pursuant to the procedure established by the Law of Ukraine On Public-Private Partnership and other legislative acts.

V. V. Knaus points out that the basic, backbone element of such partnership is cooperation, in which state-run and private structures act as equal partners, complementing each other[1]. The aim is to unite the experience and skills of various public and private partners in order to guarantee the achievement of the best results. It is achieved through the concentration of material and financial resources, the involvement of non-budgetary sources for the implementation of public interest projects in the economic, social and innovation spheres.

It is of paramount importance that the effectiveness analysis of public-private partnership implementation and the detection of possible risks associated with its implementation are performed through the detailed justification of the socioeconomic and environmental consequences of public-private partnership implementation first and foremost. Such justification regarding socioeconomic consequences is effected based on the analysis results of the following: a) the economic and financial indicators of partnership implementation, including the comparison of the indicators of its implementation involving public-private partnership to the indicators of such activity under conditions other than those of public-private partnership; b) the social consequences of the partnership implementation including the improvement in service quality and the level of demand provision with goods (works and services); c) the risks associated with the implementation of the partnership in view of the various means of their allocation among public and private partners and the influence of such risk allocation on the financial obligations of the public partner. The social criteria of competitive bid assessment include: employing Ukrainian citizens while implementing the public-private partnership; the salary and social security level of the employees; the influence on the socio-economic development level of the administrative division and region.

Social partnership, which is inherent to the social state as a social institution and social process, is an important toolkit to reconcile the sometimes contradictory interests of the labor and the capital.

P. D. Pylypenko argues that the state is a party to the social partnership as the primary carrier of socioeconomic interests, while state authorities are merely the state's representatives created for the implementation of the tasks and objectives of social partnership[2]. Y. B. Khokh-

[1] Кнаус В. В. Государственно-частное партнерство в регионе / В. В. Кнаус. – М. : МАКС Пресс, 2008. – С. 63.

[2] Пилипенко П. Д. Проблеми регулювання соціального партнерства у проекті Трудового кодексу України / П. Д. Пилипенко // Коди-

lov believes that the state acts as the subject of public authority that, nevertheless, interacts with the subjects of other socially significant interests on equal terms within the mechanism of social partnership. According to the legal scholar, the organization of social partnership is the basic function of the state in the legal regulation mechanism[1]. However, the stance of V. Novikov, who argues that the state firstly performs the public authority functions and secondly acts as a social partner in the regulation of social and labor relations and social dialog, seems to be more apt. As a legislator, the state adopts regulatory legal acts, sets the rules and procedures of social partnership and determines the legal status of the negotiators, acts as an intermediary in the problem resolution between the partners and the representative and guarantor of the state's interests in the social partnership sphere. As an owner of production means, the state assumes the functions of the employer and becomes a party to the agreements of a certain level itself[2].

A. I. Kudriachenko calls social partnership a practical form of social and labor relation regulation that emerged as a result of the society's evolution and results in the fierce class confrontations transforming into contradictions and conflicts of a significantly lower level, that is, those solved by trade union organizations and employers' associations under the conditions of state control[3]. Thus, this category consists of the various connections formed by social partners with a view to regulating social and labor, economic and industrial relations in order to secure their rights and interests and ensure social harmony in the society.

The participation of the state as a social partner in the social partnership mechanism is manifested in three basic forms:

a) it participates in the compulsory state social insurance on a par with employers and employees.

For instance, the Unemployment Trust Fund of Ukraine is managed on a pari passu basis by the state and the representatives of the insured and the employees. The Board of the Fund consists of 15 representatives of the state, the insured and the employers respectively who perform their duties on a pro bono basis. The state's representatives are those of the central executive bodies, appointed by the Cabinet of Ministers of Ukraine. The representatives of the insured and the employers are delegated by trade unions, their associations and employers' associations. The delegation

фікація трудового законодавства України: стан та перспективи: матеріали наук.-практ. конф.; м. Запоріжжя, 25–26 червня 2004 р. / За заг. ред. В. С. Венедиктова. – Х.: Вид-во Нац. ун-ту внутр. справ, 2004. – С. 30.

[1] Курс российского трудового права: в 3-х т. – Т. 1: Общая часть / под ред. Хохлова Е. Б. – СПб. : Изд. СПб ун-та, 1996. – С. 499.

[2] Новіков В. Імперативи розвитку ефективного соціального партнерства / В. Новіков // Бюлетень Національної служби посередництва і примирення. – 2005. – № 3. – С. 38, 39.

[3] Кудряченко А. І. Соціальне партнерство: європейський досвід і Україна / А. І. Кудряченко // Стратегічні пріоритети. – 2008. – № 3(8). – С. 135, 136.

procedure of such representatives is determined by the parties on their own. The Fund Board is headed by the chairperson elected from the Fund Board members representing each party in turn for a period of two years. The Fund Board Chairperson has two deputies who, together with the Chairperson, represent the parties (Article 10, the Law of Ukraine On the Compulsory State Social Insurance against Unemployment).

The Pension Fund Board is formed from the representatives of the state, the insured and the employees on an equal basis. The Pension Fund Board consists of five representatives of the state, the insured and the employees respectively. The representatives of the state are appointed and revoked by the Cabinet of Ministers of Ukraine, while the representatives of the insured and the employees are elected (delegated) and revoked by the parties on their own. The Pension Fund Board members are appointed and elected (delegated) at least three months prior to the ending day of the office of the respective Board members. The Pension Fund Board Chairperson and his/her deputies are elected from the representatives of each party in turn for a period of two years. At the same time, the Board Chairperson and his/her deputies must represent three different parties (Articles 60, 62 of the Law of Ukraine on the Compulsory State Pension Insurance);

b) the state participates in the resolution of collective labor disputes: represented by the National Mediation and Conciliation Service, it organizes conciliation procedures. The NMCS is a continuing governmental body created by the President of Ukraine to facilitate the settlement of collective labor disputes. This governmental body is entitled to: participate in the resolution of a collective labor dispute at all its stages; coordinate the operation of labor arbitration, assign its specialists and experts to participate in the operation of conciliation bodies; receive the information, documents and materials necessary to perform the NMCS's functions under the law from governmental bodies, local government bodies, trade unions, employers and their associations and parties to collective labor disputes under the established procedure; warn the parties of their violations of the effective law while considering a collective labor dispute and the possible consequences of such violations. The basic tasks of the NMCS include: facilitating the interaction of the parties to social and labor relations while settling the collective labor disputes to have originated between them; predicting the origin of collective labor disputes and facilitating their timely resolution; mediating and conciliating while resolving collective labor disputes; ensuring social dialog and forming unified stances on the development of socioeconomic and labor relations in Ukraine; taking measures to avoid the origination of collective labor disputes; increasing the legal culture level of the participants of social and labor relations;

c) it is a subject of collective contract based regulation on the national level. In accordance with Section 2, Article 3 of the Law of Ukraine On Collective Con-

tracts and Agreements, parties to a general agreement include: the trade unions that have united for collective negotiations and to enter into the general agreement; the owners or the bodies authorized by them that have united for collective negotiations and to enter into the general agreement and in whose enterprises the majority of the state's employees are employed. However, I consider the stance being reflected every year in general agreements, whose texts not only contain the obligations of the employer party and the trade union party, but also establish the obligations of the Cabinet of Ministers of Ukraine, to be more correct.

The main objectives of social partnership are: a) the development and implementation of a socioeconomic policy meeting the interests of both social partners and the society in general; b) ensuring the sustainable development of the social and labor sphere; c) establishing social justice and harmony in the society; d) striking the balance of the interests of the employees, the employers and the state; e) preventing and resolving social and labor conflicts.

The forms of social partnership include:

– collective negotiations on drafting collective contracts, agreements and entering into them;

– joint consultations on the issues of the regulation of labor relations and other relations directly associated with them;

– the participation of employees and their representatives in the management of the enterprise;

– the participation of the representatives of the parties to social partnership in conciliation and mediation procedures to resolve collective labor disputes;

– the measures to control the fulfillment of their obligations by the parties to social partnership etc.[1]

Besides the term «social partnership», labor law also actively uses the term «social dialog». The latter is understood as the process of determining stances and rapprochement, achieving mutual agreements and making agreed decisions by the parties to the dialog who represent the interests of the employees, the employers and executive authorities and local government authorities concerning the issues of the formation and implementation of the state social and economic policy, the regulation of labor, social and economic relations. Thus, social partnership is nothing else but a result of social dialog.

Thus, the participation of the state in the regulation of labor relations and those associated with them on an equal and responsible basis along with other subjects of these relations leads to the limitation of the market power, while not allowing administrative command management methods to develop.

In this situation, the proposal to acknowledge the state represented by the Cabinet of Ministers of Ukraine as a party to the general agreement in legislation seems to be apt. Its powers as the

[1] Трунова Г. А. Правове регулювання соціального партнерства в Україні: дис. … канд. юрид. наук: 12.00.05 / Г. А. Трунова ;Чернівецький нац. ун-т імені Юрія Федьковича. – Чернівці, 2007. – С. 58.

state's representative while developing and entering into the general agreement should be defined in the Law of Ukraine On the Cabinet of Ministers of Ukraine. To strengthen the responsibility for the fulfillment of the obligations concerning the implementation of socioeconomic policy and labor relations assumed by the Government under the general agreement, the Law of Ukraine On the Cabinet of Ministers of Ukraine should be supplemented with an article that would regulate the issue of government resignation due to a no-confidence resolution adopted by the Verkhovna Rada of Ukraine provided that the conditions of the general agreement are not fulfilled.

A constant dialog of the person with the state in the sphere of politics, economy and culture is characteristic of the social state. The basis of its material support is formed by the innovative development of the information technologies that have originated as a result of the scientific and technological progress and are the means of the further development of the latter. Innovative development enriches the consciousness of the population, its social and political interests and demands, which facilitates change in the functioning of state institutions in various spheres.

However, the social state should not be idealized. For instance, it should be taken into account that the implementation of the corresponding idea is connected with certain negative things, particularly: the possible substitution of drastic decisions concerning certain social problems with temporary measures; the state's attempts to merely alleviate the social consequences of its own unsuccessful or unpopular reforms; disproportionately high social sphere costs may lead to crisis phenomena in the economy; there is always the possibility of excessive social claims of the population, which can weaken the implementation of the principle of the citizens' own responsibility; a state to have declared itself a social one adopts new, subtle forms of control over the society, strengthens the role of the state authority in people's lives; an economic dependence of the person on the state paralyzing and disorganizing the social process is observed [1].

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[1] For details see.: Держава та її органи як суб'єкти / за наук. ред. проф. Ярошенка О. М. – Х. : Право, 2014. – 288 с.

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Limits of court intervention in the work of the ICAC

The capacity of intervention of national courts into the activity of ICAC according to the global practice tends to reduction of respective cases. In Ukraine such tendency was enshrined in the provisions of Article 5 of The Law of Ukraine «On international commercial arbitration» (hereinafter- «the Law»)In accordance with the above mentioned rule concerning issues governed by the Law, any judicial intervention shall not take place, except as the Law provided. This rule is determinative in the correlations between national courts and ICAC and this rule in particular shall be the basis for the answer for question whether one or another of the manners of intervention into the activity of ICAC will be possible in the particular case.

In fact, the rules of the Law provide only a few cases of intervention into the activity of ICAC, including consideration of the issue of discharge of arbitral decision, consideration of the issue of recognition and enforcement of the arbitral judgment, making the decision concerning availability or lack of the jurisdiction of ICAC if the relevant resolution was adopted by arbitrator or arbitrators as on the issue of preceding manner. It is inappropriate to consider as the intervention into the activity of ICAC the possibility to collect evidences and make a decision on taking providing measures. It is rather a mechanism of contributing arbitration or parties in arbitral proceedings and providing of appropriate protection of violated rights and legitimate interests of the parties.

The possibility of discharge of arbitral decision or the decision on the rejecting to recognition and enforcement of the arbitral judgment is restricted by exclusive series of the grounds concerning, first of all, proceeding issues, and it has not to provide reconsideration of arbitral decision per se. Therewith, it should be acknowledged that these grounds are formulated in a quite abstractive way and give an opportunity for subjective interpretation of the term, as for instance, contradiction with the public order or making decision on the dispute not provided or being beyond the

arbitration agreement. In the cases mentioned above actual boundaries of intervention of the courts into the activity of arbitration court, in fact, depend on the discretions of the judges themselves.

In this part it is essential to understand the meaning of the term «public order», which is given by the Plenum of the Supreme Court of Ukraine in the Resolution № 12 dated 24 December 1999 «On the practice of the courts concerning consideration of the motions on recognition and enforcement of the judgments of foreign courts and arbitration on discharge of judgments made in the order of International Commercial Arbitration on the territory of Ukraine»[1].Subject to paragraph 12 of the Resolution referred to, public order must be understood as the legal order of the state, defining principles and grounds constituting the basis of existing order in it.(as to independence, integrity, independency and immunity, the main constitutional rights, freedoms, guarantees, etc.). However, given definition, as, probably, any other definition of public order, cannot (and doesn't have to!) define the cases of violating that order clearly and unambiguously. That is why it is crucial for the national courts to understand the exclusiveness of such a reason for discharge of arbitration judgment or the judgment of rejecting its recognition and enforcement as an inconformity to the bases of the public order to prevent willful and groundless intervention. On the other hand, it is worth admitting that the acknowledgment of such a generalization and detailing by higher judicial authorities, which would unify the practice and legal position of courts during consideration of these issues.

As to the negative practice of the courts, we can refer in this part to the legal position of the Appellate Court of Kyiv, expressed in the Resolution dated 18 March 2014 in the case № 761/30608/13[2]. In particular, Appellate Court agreed with the conclusion of the court of first instance regarding breaching public order of Ukraine by appealing the judgment of ICAC at the UCCI in connection with uncertainty of medical equipment, on which already delivered equipment has to be replaced to, according to delivery agreement, and also in connection with uncertainty concerning situation of already delivered medical equipment in case of its replacement, in connection with recovery of cost paid for already supplied equipment, which is subjected to replacement. Herewith the court correctly based its decision on the fact that disputable arbitration judgment directly contradicts the provisions of the Chapter 49 of the Civil Code of Ukraine, in particular Article 539 of the above-mentioned Code.

[1] Про практику розгляду судами клопотань про визнання й виконання рішень іноземних судів та арбітражів і про скасування рішень, постановлених у порядку міжнародного комерційного арбітражу на території України: Постанова Верховного Суду України від 24 грудня 1999 р. № 12 [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/v0012700-99.

[2] *Ухвала* апеляційного суду міста Києва у справі від 18 березня 2014 р. № 761/30608/13 [Електронний ресурс]. – Режим доступу: http://www.reyestr.court.gov.ua/Review/37967994.

At the same time, the rule of Article 539 of the Civil Code of Ukraine in regard to performance of alternative obligations is unlikely to be considered as determinative principle, which constitutes existing order in the state. In addition, the setting the term of «public order» equal to imperative rules also cannot be considered as indisputable.

Considering the cases, when the courts are allowed to intervene into the activity of the ICAC, have to be mentioned exactly in the Law of Ukraine «On International Commercial Arbitration», the judgments regarding extension of the enforcement action or suspension of the judgment of ICAC are considered as illegitimate on the basis of the rules of Civil Procedure Code of Ukraine or judicial consideration of particular case regarding interpretation of arbitration clause on the basis of the provisions of Civil Code of Ukraine on interpretation of the agreement with the aim of establishing for the party concerned artificial barriers to recourse to ICAC. In general, concerning the question of jurisdiction of ICAC, a distinct approach should be developed (and this is rather the task for the Higher Specialized Court of Ukraine), that is: if within the procedure of objection to the jurisdiction of ICAC, set forth in the Law of Ukraine and Rules of the ICAC, a party did not state about the lack of jurisdiction of the ICAC, and then after receiving arbitral judgment, the motion for judgment discharge on the grounds of lack of jurisdiction of the ICAC shall be passed by the court strictly with the formal approach.

It is impossible to admit the tendency observed over the last years at the national courts during resolving the question of interpretation of the agreement and the eligibility for interpretation at the ICAC as well-grounded.

For example, discharging the decision of ICAC by the Resolution dated 15 January 2013[1] of Shevchenko District Court of Kyiv, the Court based its decision on the following. Pursuant to Paragraph 9.1 Section 9 «Arbitration» of the Contract, all disputes which may arise in regard to that Contract or in connection with it, are subjected to proceeding in Arbitration Court of Ukraine at the Ukrainian Chamber of Commerce and Industry in Kyiv according to legislation and applying substantive law of Ukraine, judgment of which is considered as final and obligatory for both parties. As the parties didn't conclude in the Contract terms and order of judicial dispute resolution concerning interpretation of the Contract clauses and none of the parties didn't take a legal recourse with named claims arbitrators with their own initiative interpreted Section 9 «Arbitration» of the Contract. The judgment of the ICAC at the UCCI contains resolution on questions which are beyond the boundaries of arbitration agreement, so applicable reasons for discharge of disputed arbitration judgment are provided in paragraph 2 article 34 of the Law of Ukraine «On International Commercial Arbitration». According to paragraphs 1,

[1] *Ухвала* Шевченківського районного суду м. Києва від 15 січня 2013 р. [Електронний ресурс]. – Режим доступу: http://www.reyestr.court.gov.ua/Review/29425097.

2 article 213 of the Civil Code of Ukraine, only parties to the contract or the court are entitled to give an interpretation. By the way, it is worth pointing out that the right to give an interpretation of the contract provisions is a substantive right of the party, not a procedural one.

The same approach was demonstrated in the Resolution of Shevchenko District Court of Kyiv dated 19 November 2012[1].

However, the grounds for recognizing respective legal position of the courts as reasonable scarcely exist. It is unconditional that ICAC carries out enforcement activities. As a rule, commercial disputes, submitted to resolution by ICAC, arise from contracts. In connection with this, ICAC not only can, but must give an interpretation both provisions of a contract within the frames of which the dispute arose while conclusion, enforcement, alteration or termination, as well as the rules of substantive law. And there is no necessity for the party to submit an application for contract interpretation because the relevant consent was given by concluding arbitration agreement.

In context of limitation of the cases of intervention by the courts into activity of the ICAC, it is worth admitting propositions concerning the reduction of number of resorts, which resolve the dispute on discharge, recognition and enforcement of arbitration decision as suitable.

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[1] *Ухвала* Шевченківського районного суду м. Києва від 29 листопада 2012 р. у справі №2610/12466/2012 [Електронний ресурс]. – Режим доступу:http://reyestr.court.gov.ua/Review/28163097.

ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

UDC 349

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Legal liability in environmental law: problems of formation and development

Legal protection of the environment, ensuring rational environmental management and environmental security requires not only the proper implementation by the subject of environmental relations of his rights and duties, but also their protection from violations by other subjects, restoration of rights and legitimate interests of participants of these relationships, bringing the guilty persons to justice. It is the legal liability, which constitutes the institution of environmental legislation, which provides a mechanism for localization and blocking of illegal behavior and encourages socially useful human actions in the legal field, which is a measure of the protection of society and its members against offences, protects interests of individuals, society and the state, is a form of state response to violation of the established order of social relations[1].

Scientists, who research relevant theoretical and practical problems of implementation and the development of democratic grounds of public administration in Ukraine, believe that the progress of society and democracy is related with liability as a legal institution and responsible behavior of each participant of social relations. In strictly legal sense, it implies an increase in regulatory control for strengthening democratic principles of public administration[2].

In contrast to the Ukrainian environmental legal doctrine, problem of legal

[1] Nersesyants V. S. Obshchaya teoriya prava i literatury. Moscow, 1999. – p. 523 (in Russian); Obshchaya teoriya prava i gosudarstva / Edited by V. V. Lazarev. – Moscow, 1994. – p. 204 (in Russian); Teoriya gosudarstva i prava / Edited by O. V. Martyshin. – Moscow, 2007. – p. 398 (in Russian); Komarov S. A. Obshchaya teoriya gosudarstva i prava. – Moscow, St. Petrsburg. – 2004. – p. 388 (in Russian)

[2] Demokratychni zasady derzhavnogo upravlinnya ta administratyvne pravo / Edited by V. B. Averyanov. – Kyiv: Yurydychna dumka. – 2010. – p. 300. (in Ukrainian)

liability for environmental offenses in the Russian legal science is under the constant attention of scientists. As M. M. Brynchuk thinks with reference to the relevant bibliographic sources, issues of legal liability in environmental protection receive at least more attention than others institutions in the science of environmental law (meaning the science of environmental law of the Russian Federation) – a young, new, independent and alternative branch[1]. This is confirmed by a number of dissertation researches, which have been carried out in recent years on various aspects of legal liability for environmental offences. These are, specifically: «Legal liability for violation of rules for handling environmentally hazardous substances and wastes» [2], «Legal liability for pollution of the atmosphere»[3], «Legal liability for violation of legislation on environmental information»[4], «Legal liability for violations of the legislation on the protection and use of flora» [5], and also: «Compensation for environmental damage in the Russian law» and «Compensation for environmental damage: comparative legal analysis of European, German and Russian law» [6]. Additionally, several monographs and scientific and methodological researches were published, including: «The theory of legal liability for environmental offences and its practical application»[7], «The application of liability for environmental offenses» [8], «Legal liability for environmental offenses» [9], «Legal liability for environmental offenses. Commentary to legislation of the Russian Federation» [10].

[1] Brynchuk M. M. Ecologo-pravovaya otvetstvennost – samostayatelnyi vid yuridicheskoy otvetstvennosti // Gosudarstvo i pravo. – 2009. No 4. – p. 39. (in Russian)

[2] Radchik O. L. Yuridicheskaya otvetstvennost za narusheniye pravil obrashcheniya s ecologicheski opasnymi veshchestvami i othodami. Extended abstract of candidate of legal sciences dissertation. – Moscow, 2001. (in Russian)

[3] Kuznetsova O. N. Yuiridicheskaya otvetstvennost za zagryazneniye atmosphery. Extended abstract of candidate of legal sciences dissertation. – Moscow, 2003. (in Russian)

[4] Karkhu O. S. Yuridicheskaya otvetstvennost za narusheniye zakonodatelstva ob ekologicheskay informatsii. Extended abstract of candidate of legal sciences dissertation. – Moscow, 2004. (in Russian)

[5] Zhuravskiy I. M. Yuridiskaya otvetstvennost za narusheniye zakonodatelstava ob okhrane i ispolzovanii rastitelnogo mira Extended abstract of candidate of legal sciences dissertation. – Moscow, 2007. (in Russian)

[6] Misnik G. A. Vozmeshcheniye ekologicheskoga vreda v rossiyskom prave. Extended abstract of candidate of legal sciences dissertation. – Moscow, 2006 (in Russian); Ivanova A. L. Vozmeshcheniye ekologicheskogo vreda: sravnitelno-pravovoy analiz yevpoyskogo, nemetskogo i rossiyskogo prava. Extended abstract of candidate of legal sciences dissertation. – Moscow, 2006. (in Russian)

[7] Ivakin V. I. Teoriya yuridicheskoy otvetstvennosti za ekologicheskiye pravonarusheniya i praktika yeyo osushchestvleniya. – Moscow, Pravo i gosudarstvo. – 2004. – 257 p. (in Russian)

[8] Primeneniye otvetstvennosti za ekologicheskiye pravonarusheniya / Edited by O. L. Dubovik. – Moscow, Gorodets. – 2007. 544 p. (in Russian)

[9] Yuridicheskaya otvetstvennost za ekologicheskiye pravonarusheniya / Edited by A. I. Bobylyov, N. A. Dukhno. – Moscow, Law institute of MIIT. – 2001. – 158 p. (in Russian)

[10] Lapina M. A. Yuridicheskaya otvetstvennost za ekologicheskiye pravonarusheniya. – Moscow, Ekzamen. – 2003. – 288 p. (in Russian)

Instead, the following dissertations in Ukraine were devoted to issues of liability: in the field of land law – «Liability for pollution and contamination of soils in Ukraine» [1], «Land offense as the grounds for legal liability in Ukraine» [2], in the field of water law – «Problems of liability for violations of water legislation» [3], in the field of forestry legislation – «Liability for violation of forestry legislation» [4]. This is the end of the list of comprehensive scientific researches of the institute of legal liability in the field of environmental protection and natural resources management in the national legal school. Unfortunately, no attention is paid to the issues of legal liability for violation of legislation on natural reserve resources, environmental network, use and protection of flora and fauna, mineral resources, atmospheric air, natural resources of exclusive (maritime) environmental zone and continental shelf, environmental safety and many others. The mentioned issues are dealt with by the researchers in the plane of the relevant research topics only superficially, on the level of individual chapters, and even sections of dissertations and monographs, textbooks and manuals. In particular, it is «Legal liability for violation of the right to use natural resources of exclusive (maritime) economic zone»[5], «Legal liability in the field of mineral resources protection»[6], «Peculiarities of criminal-legal and administrative responsibility for violation of forestry legislation» [7], «Legal liability for violations of legislation on flora» [8], «Legal liability for violation of the legal regime of national natural parks» [9], «Legal liability for violations of water legislation on small rivers of Ukraine»[10], «Lia-

[1] Gavrysh N. S. Vidpovidalnist za zabrudnennya ta zasmichennya gruntiv v Ukrayini. Extended abstract of candidate of legal sciences dissertation. – Kyiv, 2001. (in Ukrainian)

[2] Sarkisova T. B. Zemelne pravoporushennya yak pidstava yurydychnoyi vidpovidalnosti v Ukrayini. Extended abstract of candidate of legal sciences dissertation. – Kyiv, 2012. (in Ukrainian)

[3] Shumilo O. M. Problemy vidpovidalnosti za porushennya vodnogo zakonodavstava. Extended abstract of candidate of legal sciences dissertation. – Kharkiv, 1993. (in Ukrainian)

[4] Mendyk L. V. Vidpovidalnist za porushennya lisovogo zakonodavstva. Extended abstract of candidate of legal sciences dissertation. – Kyiv, 2009. (in Ukrainian)

[5] Vitovska I. V. Pravove regulyuvannya vykorustannya pryrodnykh resursiv vuklyuchnoyi (morskoyi) ekonomichnoyi zony Ukrayiny. Extended abstract of candidate of legal sciences dissertation. – Kharkiv, 2004. – pp. 14-15. (in Ukrainian)

[6] Oliynyk O. M. Pravove regulyuvannya okhorony nadr za zakonodavstvom Ukrayiny. Extended abstract of candidate of legal sciences dissertation. – Kyiv, 2010. – pp. 10-11. (in Ukrainian)

[7] Melnyk P. V. Pravova okhorona lisiv Karpatskogo regionu. Extended abstract of candidate of legal sciences dissertation. – Kharkiv, 2002. – pp. 15-16. (in Ukrainian)

[8] Basay O. V. Pravovyy rezhym roslynnogo svitu Ukrayiny. Extended abstract of candidate of legal sciences dissertation. – Kharkiv, 2009. – p. 11. (in Ukrainian)

[9] Marych Kh. M. Pravovyy rezhym natsionalnykh pryrodnykh parkiv Ukrayiny (na materialakh Karpatskogo regionu Ukrayiny). Extended abstract of candidate of legal sciences dissertation. – Kharkiv, 2007. – p. 13. (in Ukrainian)

[10] Trufan I. V. Pravovyy rezhym malykh richok v Ukrayini. – Ivano-Frankivsk. – CIT publishing department. – 2006. – pp. 111-148

bility for violation of legislation in the field of protection, use and reproduction of water living resources» [1], «Problems of realization of legal responsibility for the violation of the private ownership right on fauna objects» [2], «Liability for violation of environmental legislation»[3].

The dissertation research by N. I. Tytova «Liability for violation of legislation on the protection of nature» [4] was dedicated to the issues of legal liability for the first time on the territory of Ukraine. According to the opinion of the author «...current system of different types of liability (administrative, pecuniary, criminal) for violations of the law protecting soils, mineral resources, waters, fish resources, forests, fauna and other natural objects is a reliable instrument of environmental protection. But nature protection legislation requires further improvement as well» [5].

Legal liability for violation of legislation on nature protection (nature protection legislation) is regarded in the mentioned scientific research taking into account scientific doctrines and practice of application of the law established at that time – the division of liability according to types, such as: administrative, pecuniary, criminal. These types of legal liability were regarded in the light of violations of the legislation on the protection of soil, mineral resources protection, protection of water resources, protection of fish stocks, for forestry violations, protection of fauna, parks and nature reserves and preserves, protection of other objects of nature (natural sanctuaries, green areas of the cities and villages, resorts, atmospheric air). This approach was traditional for scientific analysis of the issues of legal liability for breaches of environmental legislation and other types of legislation, because it reflected the scientific paradigm of its differentiation by types of offenses and the nature of sanctions applied (sanctions of administrative, pecuniary or property and criminal nature).

Collective monographic study of problematic issues of legal liability in the field of environmental protection was conducted in the framework of the national research school in the late 70's of the last century [6]. According to the authors of this study different types of legal liability are applied in the field of environmental protection. Each of them is characterized by specific features, but they are all part of the general concept of legal liability. Therefore, the study of problems of specific types of liability in

[1] Grygoryeva T. V. Pravovi zasady vykorystannya, okhorony ta vidtvorennya vodnykh zhyvykh resursiv. – Kharkiv, Pravo. – 2011. – pp. 137-149. (in Ukrainian)

[2] Shekhovtsev V. V. Pravove regulyuvannya prava pryvatnoyi vlasnosti na obyekty tvarynnogo svitu v Ukrayini. – Kharkiv, FINN. – 2010. – pp. 139-160. (in Ukrainian)

[3] Ekologichne pravo / Edited by A. P. Getman. – Kharkiv, Pravo. – 2013. – pp. 153-163. (in Ukrainian)

[4] Tytova N. I. Vidpovidalnist za porushennya zakonodavstva pro okhoronu pryrody. – Lviv, Lviv university publishing. 1973. – 218 p. (in Ukrainian)

[5] Tytova N. I. See above. – p. 6

[6] Shemshuchenko Yu. S., Muntyan V. L., Rozovska B. G. Yuridicheskaya otvetstvennost v oblasti okhrany okruzhayushchey sredy. – Kyiv, Naukova dumka. – 1978. – 280 p. (in Russian)

the relevant field of public relations is closely related to the explanation of the content and role of legal liability as a whole[1].

Doubts were expressed in the paper concerning possibility to distinguish nature protection responsibility as a separate type of legal responsibility, which included dangerous consequences, stipulated by law, which occur after violation of the requirements of legal norms on protection of natural objects and its complexes. The authors supposed that this type of liability cannot claim to be the independent and is nothing but a complex of measures that are largely used in the field of environmental protection among types of legal liability – administrative, pecuniary, disciplinary, and criminal. Suggestions of those scientists, who proposed to define «water-legal» and «land-legal» liability as independent types of liability were also criticized[2].

The issues of administrative liability for violations of nature protection legislation were analyzed in monographic study (grounds for application, administrative and legal responses, ways of improvement of effectiveness of application of administrative responsibility measures), liability of the enterprises that pollute the environment (the concept of payment for nature management and environmental pollution, regulation of emissions of harmful substances as a scientific basis for improvement of enterprises liability for environmental pollution, legal liability of the enterprises as an incentive for the rational nature management) and criminal liability for violations of legal norms on environmental protection (criminal and legal measures of liability for violations of nature protection legislation, some questions of the practice of application of criminal and legal measures of liability for violations of nature protection legislation).

Research of issues of legal liability in the system of environmental protection was extended by other Ukrainian scholars and lawyers. In particular, the book by S. M. Kravchenko «Pecuniary liability in the system of nature protection» [3] was published in 1981. Despite the fact that the title of the work was limited to only one type of legal liability – pecuniary, its content was broader and dealt with the issues of not only pecuniary, but also administrative, criminal and disciplinary liability in the field of environmental protection. According to the opinion of the author, legal liability is one of the most important legal instruments of solving environmental problems; it helps to strengthen the legality in this field of public relations.

The analysis of the concept and types of liability in the system of environmental protection allowed S. M. Kravchenko to reach the conclusion about inexpediency of unification of legal norms, which establish legal liability in this area, into a comprehensive, interdisciplinary institute of nature protection liability. According to the author's opinion, during classification of the types of legal liabil-

[1] See above. – p. 16.

[2] See above. – pp. 28-30.

[3] Kravchenko S. N. Materialnaya otvetstvennost v sisteme okhrany prirody. – Kyiv, Vyshcha shkola. – 1981. – 54 p. (in Russian)

ity according to criteria of belonging to a branch, one should define administrative, criminal, disciplinary, property (pecuniary) liability[1].

Research of conceptual foundations of certain types of legal liability for violations of nature protection legislation was conducted by B. G. Rozovskyy in his monograph «Legal stimulation of rational nature management» [2]. The author emphasized in the introduction to this work that he had made proposals concerning improvement of the regulation of nature protection legal relations, proved inadequacy of the proposed calls for strengthening of liability for environmental pollution, the full recovery of the damages by perpetrators without taking into account real technical and economic capacity of society to provide the desired level of anthropogenic impact on the biosphere[3].

The author studied the issues of civil and legal liability for causing environmental damage, promotion of rational nature management with the help of labor law norms, and also improvement of the efficiency of criminal liability for violations of nature protection legislation. According to his opinion, solving of the problems, which arise in the field of legal regulation of nature management relations, creates a strong base for further improvement of labor, administrative and other branches of law. At the present stage, B. G. Rozovskyy thought, the main obstacle for creation of flawless mechanism of legal liability for violations of nature protection legislation and legal stimulation of rational nature management is the backlog of means of technical control over the condition of the environment. The available control and test equipment do not always allow systematical and reliable identifying of sources of harmful emissions, entering the atmospheric air and water resources, carrying out their qualitative and quantitative assessment efficiently in order to apply appropriate sanctions to guilty persons[4].

Legal responsibility for offences in the field of nature management and the environmental protection is seen in scientific doctrine of modern environmental law of Ukraine through the prism of traditional types – disciplinary, administrative, civil and criminal, reflecting the Law of Ukraine «On Protection of the Environment», Land, Water, Forest Codes, Mineral Recourses Code, laws «On Flora», «On Fauna», «On Atmospheric Air Protection», «On Environmental Network», «On Environmental Expertise», «On Hunting Grounds and Hunt» and other environmental legal acts.

In particular, according to the Law of Ukraine «On Protection of the Environment» violation of the legislation of Ukraine on protection of the environment entails disciplinary, administrative, civil and criminal liability, established by this Law and other laws of Ukraine.

Together with the mentioned above, legal responsibility in the environmental

[1] See above. – pp. 35, 36.

[2] Rozovskyy B. G. Pravovoye stimulirovaniye ratsionalnogo prirodopolzovaniya. – Kyiv, Pravova dumka. – 1981. – 236 p. (in Russian)

[3] See above. – p. 6.

[4] See above. – pp. 232, 236.

field has its own specificity, caused by peculiarities of an environmental offense as a mandatory ground for application of a sanction against violators of environmental legislation. This is reflected in the sanctions, applied to violators of the rules of nature management and protection of the environment and provision of environmental safety. Sanctions, such as fines for violation of environmental legislation, which are provided not only by the Administrative Offences Code, but also by other legal acts on environmental issues, are traditional.

But specificity of legal liability in the environmental field is reflected not only in the traditional sanctions such as fines. Restriction or suspension of environmentally hazardous activity characterizes such liability.

Sanctions in the form of suspension of environmentally hazardous activity natural or legal persons, applied administratively or by court decision are also the specificity of legal liability for violation of environmental legislation.

Revocation of environmental permits, licenses, disqualification from special use of natural resources administratively or judicially should be also considered as a kind of penalty for violation of legislation in the environmental field.

Charges as a form of sanctions in the field of compensation for damage to the environment become widely used in the field of legal liability for violation of environmental legislation. Charges are a kind of design value, a tariff that is conditional and contains a predefined amount of damage assessment, and state expenditures, which arise in connection with the destruction of certain natural components. Charges take into account in terms of value, as it is noted in the literature, all of the negative property consequences, as well as cultural, scientific, historical value of natural objects, their prevalence in the region and other indicators. They contain an assessment of the environmental damage caused, calculated and recorded in advance, in form of multiplicity of a minimum wage or tax-free minimum incomes of citizens.

According to the conducted analysis, a complex interdisciplinary institute of legal liability for environmental offences has been formed in environmental legislation. But the mentioned institution is not perfect and cannot be considered complete, which causes the need for comprehensive scientific analysis and development of theoretically substantiated recommendations in the relevant field of public relations for law enforcement activity. In particular, it is necessary to continue research of scientific and theoretical substantiation of the concept of legal liability for environmental offences, as one of the most important institutions of environmental law, clarification is required for the concept of «legal liability in the environmental field» and its peculiarities, development of system of principles of legal liability for environmental offenses, determination of place of such liability in the system of general legal liability, doctrinal formulation of the concept, clarification of the essence, analysis of the composition and features of an environmental offense, which entail legal liability. De-

velopment of classification of environmental offenses, for which legal liability is applied, is relevant to the scientific aspect, survey of a system of bodies, which apply measures of legal liability in the environmental field, analysis of major sanctions of legal liability for environmental offences, determination of procedural peculiarities of application of legal liability sanctions to offenders, and finally, evaluation of condition of legislation in the field of protection of the environment, which affects the legal liability, finding out weaknesses and gaps in the legal regulation.

In conclusion, it should be noted that the legal responsibility in the environmental field is one of the varieties of the general legal liability. Its distinctive feature is the fact that it is applied for committing an environmental offense, i.e. an act, violating legal norms of environmental legislation. Legal liability for environmental offenses must be regarded as obligations of guilty persons to be punished in the form of deprivation of personal, organizational or material nature. The negative consequences, which are applied to offenders, should be provided by sanctions of the relevant legal norms. Legal liability in the environmental field is one of the forms of state coercion and therefore is used by state institutions (judicial bodies, central or local bodies of state executive power, bodies of local self-government) in the appropriate procedural form – criminal procedural, administrative procedural, civil procedural, environmental procedural.

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The legal regime of state and communal land ownership: the legislative novels and problems of their implementation in court practice

Since 1990 and till nowadays law making and law enforcement practices in the field of ownership relations have proceed from the fact that land and property ownership can be exercised only in 3 major economic ownership forms, have to be enshrined in the law and allow to exercise subjective land and property rights. Thus, for example, in Ukrainian laws «On Economic Independence», «On Property» the state, collective and individual land ownership were provided; the law «On Ownership Forms» (1992) and also the Land Code of Ukraine (1992) defined the state, collective and private land ownership; the Land Code of Ukraine (2001) and the Civil Code of Ukraine (2003) have enforced the private, the communal and the state forms of land and property ownership rights.

However, the forms of ownership rights in legislation have been changing from one into another without any scientific, theoretic or practical argumentation essential for the old ownership forms resignation and the implementation of the new ones, in particular, individual, private, collective, communal. The principle of equality of state, collective and private ownership forms, declared by the law «On Land Ownership Forms» in fact was a political slogan used only to protect political interests.

De facto, the ownership forms legal equality was not and would not exist, considering the fact that the state ownership form is of the top priority in effective law. To clarify, on the one hand Ukrainian legal system has inherited several ideological (and therefore legal) postulates from soviet laws in the sphere of land ownership forms, on the other hand, Ukraine has been implementing the elements of Anglo-Saxon, Continen-

tal and others law systems considering land ownership forms.

As a result, the majority of land ownership forms transformations and improvements do not have systemic and logical completeness. It is to be proved by the court practise generalisations and conclusions in the sphere; negative consequences of land convey into collective ownership; failed attempt of legal regulation of state and communal land delimitation; social conflicts on the basis of land distribution and redistribution, etc.

Speaking about the latest research of Land and Civil Law Doctrine, the studies on legal nature of land ownership realisation are still restricted by theoretical and practical analyses of the existed ownership forms. Furthermore, various views, thoughts, opinions, and proposals for the necessity of land and property ownership forms legislative formalisation have been expressed by legal scholars in the scientific literature. Such variety of ideas, views and opinions on the issue of the land ownership realisation via economic ownership forms legislative formalisation indicates the incompleteness of scientific debate on the issue and the need for in-depth study and further discussion of the problem under consideration in the context of constitutional provisions and imperatives that guarantee the right for ownership of lands to the Ukrainian people.

According to the Constitution of Ukraine, the land and other natural resources within the territory of Ukraine shall be the objects of property rights of the Ukrainian people, on behalf of whom State authorities and local self-government bodies shall exercise the ownership rights within the limits determined by the Constitution. Subsection 2 of Article 14 of the Constitution of Ukraine states that the property right for the land shall be guaranteed and shall be acquired and realised by citizens, legal persons, and the State exclusively in accordance with the law. In accordance with Article 142, personal and real estate, revenues of local budgets, other funds, land, natural resources owned by territorial communities of villages, settlements, cities, city districts, and objects of their common property managed by rayon and oblast councils shall be the material and financial basis for local self-government. As can be seen from the above the Constitution of Ukraine does not provide any obligatory land ownership forms.

At the same time, pursuant to the Land Code of Ukraine (hereinafter – LCU) the model of land relationship legal regulations is based on three mandatory forms of land ownership – private, communal and state, in the frame of which the subjective rights of ownership and use of land are carried.

Therefore, as consistent with LCU, one of the main consequences of the completion of land reform in Ukraine shall be a distribution and redistribution of lands by the ownership forms not only by the establishment of the private land ownership, but also the formation of the communal land ownership as an equal with the state land ownership under the Code. The existence of apparent conflicts between the Constitution of Ukraine and the Land Code of Ukraine

is considered to be one of the causes of unequal enforcement of the Land Code of Ukraine and other laws at the point of defining the legal regime of state and communal land ownership and of executing the subjective rights on land in the following ownership forms.

At the time the current LCU, dated 25 October 2001 was adopted, in the legal, economic and agricultural doctrine theories it was planed that to achieve positive results in the transformation of land ownership relations would be possible via the separation of state and communal property as it provided by the laws. However, practical problems of the necessity for distinction of state and communal property, as well as the possible negative consequences of such distinction have not been scientifically proven. But through it all, theoretical ideas of state and communal property distinction could be observed in the current LCU.

In particular, Article 83, 84 of LCU confirms the general principle of land ownership forms classification into state and communal, as well as certain basic principles of distinction of land according to the law. Furthermore, part 1 of Article 184 of LCU states that all lands of Ukraine, save those in communal and private ownership, are state-owned.

At the same time, Clause 12 of Section X «Transitional Provisions» (with subsequent amendments) determines the way how to exercise state-owned lands until the boundaries of state- and communally owned lands are not demarcated. In such a way, a transitional model of land relations legal regulation, which exclude application of the rules of Articles 17, 83, 84, 122, 123, 142, 149 of LCU regarding the implementation of state and communal land ownership and reinforcing the other criteria for legal regime of land determination based on whether within or outside the village the land is situated, and depending on whether the land are used by State enterprises or business partnerships with the State share in the authorised capital subjected to privatisation were introduced in Ukraine.

In order to implement the provisions of LCU in February 2004, the Law of Ukraine «On Delimitation of Lands of State and Communal Property» was adopted. The law defined the notion, objects, subjects and procedure of delimitation of lands between the state and local communities. Under this law, the main point of the delimitation was to take some organisational and legal measures regarding the delimitation of state-owned lands into communal-owned and state-owned by defining and setting land borders in nature (on ground).

Although this law came into force, but did not fulfilled its functional purpose for objective and subjective reasons, because did not provided land delimitation between the state and local communities and did not ensure proper conditions for the implementation of the subjective constitutional rights for land plots and did not establish an effective mechanism for land relations regulation on the basis of three forms of ownership enshrined by the law – private, state and communal. Hence, it was repealed by the Law of Ukraine «On Amendments to

Some Legislative Acts Concerning Delimitation of Lands of State and Communal Property» dated 6 September 2012, which came into force on 1 January 2013 and in a different way settled the relationship of determination of the legal regime of the lands of state and communal property securing a new legal model of the state and communal lands ownership right.

To summarise, the main aim of such legislative novels is: a) to repeal secured in legislation concept of «delimitation of state and communal land ownership» as a legal category; b) there is no need any more in conducting works on formation of land plots and determination of their boundaries in nature (on ground) between the state and local communities; c) to define criteria for inclusion of certain lands to communal or state property, namely: a) the boundaries of settlements; b) appurtenance of located on the land properties to the state or communal property; c) provided by the law grounds for state and communal land ownership; d) determined causes and conditions for the transfer of land from state ownership to communal and vice versa; e) established the mechanism of transfer of land rights; g) specified the system and powers of state and local authorities in the implementation of state and communal land ownership; g) provided the system of state registration of land and real estate rights on state- and communal-owned lands; c) the lands are considered to be demarcated from 1 January 2013.

Based on these and other legal novels in the legal regulation of land relations, three main periods of state-owned land legal regime determination, communal land ownership formation and legalisation, subjective rights to state- and communal-owned lands acquisition and implementation can be defined, namely: the first – from 18 December 1990 till 31 December 2001; the second – from 1 January 2002 till 31 December 2012; and the third has started on 1 January 2013 and continues today.

Thus, the legal regime of state and communal lands ownership and procedures for subjective rights to land should be defined in the judicial practice of land law implementation with the regard to the above mentioned periods of land legal regime determination. However, the term «disposition of state-owned lands» is to be understood as the realisation by the state and local government authorities of provided by the law functions and responsibilities aimed to ensure distribution and redistribution of state-owned lands, lawful acquisition of land ownership rights by individuals and legal persons, the use and protection of land, transfer and alienation of land, to protect subjective land rights, etc.

Analytical review of the case law on resolving land disputes shows that the judicial authorities in determining the legal regime of lands of certain categories or land plots often introduce legal mistakes, believing that before 1 January 2013 local authorities have exercised communal-owned lands administration, but in fact to that date village, town and city councils as provided by Article 13 of the Constitution of Ukraine should exercise the ownership rights on behalf of the Ukrainian people, and according

to LCU have regulated land relations on state-owned lands and disposal of such lands in accordance with the law, firstly in boundaries of settlements, and secondly outside the villages, towns and cities (of the land plots with located on it communal-owned property).

According to the above mentioned law dated 6 September 2012, the delimitation of lands is considered to be completed, from 1 January 2013 local authorities in defined by LCU legal framework on behalf of the territorial community must ensure, on the one hand, the implementation of such rights of the owner as possession, use and disposal as far as local community performs as a subject of communal ownership, on the other – to guarantee state and self-regulation of land relations on the territory of local community as a subject of delegated and their own powers under the Constitution of Ukraine to guarantee local self-government.

Implementation of such powers by village, town and city councils is fully consistent with Article 142 of the Constitution of Ukraine, LCU, the Law of Ukraine «On Local Self-Government in Ukraine» and other laws. The Constitution of Ukraine recognises the right of a territorial community and local authorities to independently resolve local issues within the Constitution and laws of Ukraine, which is consistent with the provisions of §2 of Article 4 of European Local Government Charter, under which local authorities within the law has full power to resolve any issues which are not excluded from their scope and their solutions are not assigned to any other authority {Official interpretation of Article 142 see. in the Decision of the Constitutional Court number 11-рп / 2001 of 13.07.2001} (case of administrative divisions).

Based on a dual legal status of local authorities as subjects of communal land ownership rights and subjects of local self-government and delegated powers and their decisions, jurisdiction of judicial authorities in resolving land disputes with regard to the private and public nature of land relations should be defined.

Setting a valid legal regime of land in dispute resolution should be based also on the provisions and rules of current land and other laws concerning the composition of lands, their division into categories based on the main purpose of usage, land and property ownership forms and rights, location of a land plot – within or outside of the settlement, the legal consequences of establishing of the boundaries of settlements on the land for owners and land users, state and local authorities, regarding disposal of lands within and outside of the settlements, the grounds, conditions, methods and procedure for termination of ownership and use of land plots, etc.

Declaration in LCU that lands are objects of communal property, because without objects one cannot talk about the subjects, content and occurrence of land relations is thought to be one of the key legislative novels. According to Subsection 2 of Article 83 of LCU, in communal ownership are: 1) the lands within the boundaries of settled areas, except for lands held in private or state ownership, 2) land plots outside their bounda-

ries on which communally owned objects are located, 3) the lands which are in constant use by local governments, communal companies, institutions and organisations (Subsection 3 Section II «Transitional Provisions» of the Law of Ukraine dated 6 September 2012).

Scientific analysis of the content of the article shows that establishing of legal fact whether or not the settlement has boundaries is one of the key factors of classifying lands into communal- or state-owned. After all, according to Article 46 of the Law of Ukraine «On Land Management», a list of state-owned lands (indicating their cadastral number, location, area and purpose), moving to communal property of a local community is considered to be a part of a land management project on establishing and changing boundaries of the settlement. The procedure for determining and establishing the boundaries of settlements provided by LCU and other laws on territorial planning and regulation of urban development on the basis of the developed and approved General Plan of the Settlement.

However, boundaries of the majority of villages, towns and cities in Ukraine still have not been set yet that negatively affects the exercise of municipal, public and private property and complicates the resolution of land disputes by courts. Taking into account such legal and factual circumstances, the law dated 6 September 2012 sets forth that if the boundaries of villages, towns, cities have not been established in accordance with Articles 174, 175 and 176 of the LCU, the defining of the boundaries of state and communal property shall be based on data about the boundaries of the item listed in the State Land Cadastre. Analysis of the content of this provision in comparison with the Law of Ukraine «On Regulation of City Planning Activity» shows two ways to determine the boundaries of settlements have been provided, namely: on the basis of planning documentation and according to the data of State Land Cadastre.

As stipulated in Article 83 of LCU, in communal ownership are the lands within the boundaries of settled areas. This code does not reveal the concept of «the lands». In terms of defining the legal regime of communal lands and other forms of ownership this concept should include first of all lands according to their, based on the main purpose of use, division into categories, as well as the functional purpose of each of these categories of land. This means that a priori within settled areas in a communal property of territorial community can be all 9 categories of land enshrined in Article 19 LCU.

According to Subsection 3 of Article 173 of the LCU, the inclusion of land plots into the boundaries of a rayon, village, settlement, city or district of a city does not lead to the termination of the right of ownership and the right of use of those plots except for the lands specified in part four of this Article. In particular, state-owned lands and land plots included in the boundaries of the settled area (except for the lands that cannot be transferred to communal property) become the property of the local community. The decision on establishing the

boundaries of settled area and abstracts from the State Land Cadastre on the boundaries of a particular administrative unit and the relevant land plots, ownership on which transfers to the local community, are the grounds for state registration of communal land ownership right for these land plots.

From a literal interpretation of the rules of Article 83 of the Land Code of Ukraine, namely «all lands, except for lands held in private or state ownership» it could be understood, that within the settlements the exercise of the land communal ownership right is combined with the exercise of state and private ownership rights, which significantly complicates the determination of the legal regime of land and land plots in case of application of land legislation in judicial practice at the current stage of formation of communal and state ownership rights on the new legal basis.

In fact, after the Law of Ukraine dated 6 September 2012 comes into force from 1 January 2013, state-owned still are located within the boundaries of settled areas land plots on which buildings, structures and other public real estate properties are situated; which are in constant use of public authorities, public enterprises, institutions and organisations, National Academy of Sciences of Ukraine, state specialised academies of sciences; belongs to defence lands. Herein, the state land ownership right arises and exercises through the state executive bodies in accordance with the powers defined by the LCU. In particular, the right to dispose such state-owned land within the boundaries of the settlements should be carried out in a compliance with Articles 117, 122 and other articles of the LCU.

It appears that such legal construction of the right of state ownership exercising within the boundaries of settled areas by various executive bodies cannot be effective because it involves a conflict of state, public and private interests concerning lands, resulting in the emergence of various types of land disputes regarding acquisition of land rights, payment of land tax, territorial planning, control over land use and protection, and so on. Therefore, resolving land disputes within the boundaries of the settlements, courts should primarily adjust whether the land belong to the state, communal or private ownership forms that is not so easy to do due to enshrined in laws two different ways of defining of the boundaries of settlements – on the basis of planning documentation or materials from State Land Cadastre.

To summarise, the drawn theoretical analysis of some legislative novels implementation concerning communal and state land ownership rights in judicial practice one cannot but agree that the changes made to the Land Code of Ukraine – amendments on the legal grounds of coming into existence and realization of the communal and state ownership of land rights determination, after an unsuccessful attempt to settle these issues by delimitation of lands between the state and local communities founds the legal bases of new model of legal regulation of land relations in Ukraine on the basis of formation of communal, state and private land owner-

ship and realisation of subjective land rights and their jurisdictional protection in judicial bodies. Meanwhile, enshrined in the norms of land legislation mechanism of legal regulation of land relations in the framework of specific forms of land ownership could not be considered perfect due to the presence of legal defects such as gaps or conflicts of certain norms within the LCU, LCU and other legislative acts, the presence of significant number of public authorities that have the power to state-owned lands of different categories and functional use. As set forth in the Land Code of Ukraine, legal model of land ownership rights realisation on the basis of three mandatory forms of land ownership is inconsistent with the Constitution of Ukraine, namely, with the norms about land ownership of Ukrainian people. It seems appropriate to develop and adopt, in accordance with the Constitution of Ukraine, not codified law act, but constitutional laws on ownership of land, land use, protection of land as the main national wealth, as well as laws on institutional and functional regulation of land relations in Ukraine.

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Legal principles of modern agrarian reform in Ukraine and the role of the farmer in its carrying out

The current land reform in Ukraine involves transforming, changing and improving agrarian relations in order to create competitive agricultural manufacture both at the national and international markets of the agricultural sector of Ukrainian economics, which would be sufficient to ensure food security as part of the national security, and adequate social standard of living.

Principles, or components, of the agrarian reform are: firstly, the transformation of land relations. Changes in this area aim at improving both economic and social situation of rural regions. It is supposed to bring the farmer closer both to land ownership and to making land market.

At the legislative level, the agrarian reform was initiated by the Resolution of the Verkhovna Rada of Ukraine «On the land reform» of December 18, 1990[1]. Due to it, all lands of the Ukrainian SSR were declared the object of the land reform. The task of the stated reform is: redistribution of lands while giving them to citizens for lifetime ownership with hereditary succession and to collective and state farms, other enterprises, institutions and organizations for permanent possession and use, in order to create the conditions for equal development of various land management patterns, forming mixed economy, rational use and protection of land. These changes are primarily concerned with the land ownership relations, possession, use and disposal of land plots as the main means of manufacture in agriculture. Thus, the land reform in Ukraine, as the part of agrarian reform, has the distinct agrarian, agricultural nature, as it concerns particularly with relations on agricultural land use.

[1] Про земельну реформу: Закон України від 18 грудня 1990 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/563-12

Reforming the land relations should resolve the issue on bringing the farmer closer to land ownership and other means of manufacture, which should be considered as one of the most important tasks of the land reform. This problem was solved through the use of mechanisms for sharing of lands, which belong to agricultural enterprises.

The legal principles of land sharing were provided by the Decrees of the President of Ukraine: of November 10, 1994 «On urgent measures to accelerate the land reform in agricultural manufacture area»[1]; of August 8, 1995 «On the procedure of sharing lands transferred to collective ownership for agricultural enterprises and organizations»[2]; of December 3, 1999 «On urgent measures to accelerate the agricultural sector reform»[3] and others.

Sharing was done for agricultural lands transferred to collective ownership for collective agricultural enterprises, agricultural cooperative societies, agricultural companies, including those established on the basis of state owned farm (sovkhoz) and other state owned agricultural enterprises. Land sharing provided for determining the amount of land (share) in the collective land ownership on each member of the agricultural enterprise. In case the person left the agricultural enterprise, he filed the application on land allotment in kind in the prescribed manner, and the state act of land ownership was issued.

The important task of the land reform is creating and functioning of the land market. Because of the lack of the legitimate, transparent land market, the transformation of land relations cannot be considered logically completed. The transformations of land relations in our country have become gradual and long lasting. Today the critical issue is the urgent adoption of the law «On the purchase and sale of land».

Secondly, the important component of the agrarian reform is to change the ownership relations to the property as agricultural manufacture facilities, i.e. to transform property relations in agriculture. The Decree of the President of Ukraine «On measures to protect the property rights of farmers in the process of reforming the agricultural sector of economy» of January 29, 2001[4] provided that the complete reform of the agricultural sector of the economy based on

[1] Про невідкладні заходи щодо прискорення земельної реформи у сфері сільськогосподарського виробництва: Указ Президента України від 10 листопада 1994 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/666/94.

[2] Про порядок паювання земель переданих у колективну власність сільськогосподарським підприємствам і організаціями: Указ Президента України від 8 серпня 1995 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/720/95.

[3] Про невідкладні заходи щодо прискорення реформування аграрного сектора економіки: Указ Президента України від 3 грудня 1999р.: [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/1529/99.

[4] Про заходи щодо забезпечення захисту майнових прав селян у процесі реформування аграрного сектора економіки: Указ Президента України від 29 січня 2001 р.: [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/62/2001.

the private property is the urgent task of executive power authorities. To execute the Decree of the President, on February 28, 2001, the Resolution of the Cabinet of Ministers of Ukraine «On the regulation of issues to protect the property rights of farmers in the process of reforming the agricultural sector of economy»[1] approved: «Methods to detail composition and value of share property funds of the members of collective agricultural enterprises, including reorganized ones»; «Procedure to determine the property shares size of the members of collective agricultural enterprises and their documentary certification»; «Standard provisions of the committee on property issues that arise in the process of reforming the agricultural sector» and others. These regulations have basically provided the process of sharing property of the agricultural enterprises, and to a certain extent the process of allotting the relevant property to the ex-members of collective agricultural enterprises.

Thirdly, the direction of the agrarian reform is restructuring agricultural manufacture connected with the emergence of new subjects of agrarian business, its organizational and legal forms. The legal principles of these transformations are provided by the Decree of the President of Ukraine «On urgent measures to accelerate the agricultural sector reform» of December 3, 1999[2], according to which the collective agricultural enterprises have been restructured into the agricultural enterprises of private ownership to land and property, into agricultural companies, agricultural cooperative societies, farm enterprises etc. These subjects of agrarian business act under the provisions of the Civil and Business Codes of Ukraine, Laws of Ukraine «On business companies» of September 19, 1991; «On joint stock companies» of 17 September 2008; «On farm enterprises» of June 19, 2003; «On agricultural cooperation» of November 20, 2012[3] etc., and provide agricultural manufacture along with state and public enterprises.

Attention is drawn to the Decree of the President of Ukraine of April 12, 2000 «On ensuring economic interests and social protection of the rural social workers and resolving certain issues that arose during the land reform», which

[1] Про врегулювання питань щодо забезпечення захисту майнових прав селян у процесі реформування аграрного сектору економіки: Постанова Кабінету Міністрів України від 28 лютого 2001 р.: [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/177-2001-%D0%BF.

[2] Про невідкладні заходи щодо прискорення реформування аграрного сектору економіки: Указ Президента України від 3 грудня 1999 р.: [Електронний ресурс]. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/1529/99.

[3] Про господарські товариства: Закон України від 19 вересня 1991 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/1576-12; Про акціонерні товариства: Закон України від 17 вересня 2008 р.:[Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/514-17; Про фермерське господарство: Закон України від 19 червня 2003 р.: [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/973-15; Про сільськогосподарську кооперацію: Закон України від 20 листопада 2012 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/5495-17.

created the legal principles for private and leased agricultural enterprises[1]. The Cabinet of Ministers of Ukraine was instructed to determine the organizational and property principles for private and leased agricultural enterprise, provided that the said enterprise is founded on the property of a natural person, and the activity of this enterprise is carried out on the basis of lease of land shares, property, using labor of the natural persons under the employment contracts. Until now this order is not executed, and the Decree of the President was abolished.

The agrarian reform and well-directed agricultural policy for denationalization and privatization of agricultural sector property, realizing the right of private land ownership, cause the processes of reorientation, finding new forms of business management. This resulted in big organizational forms – agriholdings. The latter function under the Law of Ukraine «On holding companies in Ukraine» of March 15, 2006[2].

Restructuring agricultural manufacture allowed for creating new, previously unknown, agricultural manufacturers, namely personal farm households. The Law of Ukraine «On personal farm households» of May 15, 2003[3] defines the legal, organizational, economic and social principles of these farm households.

Fourthly, forming the agricultural market infrastructure is an integral part of the agrarian reform. Creating proper agricultural market infrastructure is a condition for developing market relations. Thus, the agricultural market infrastructure should be developed taking into account the features of agricultural manufacture, including increased manufacturing risk, seasonality, remoteness of processing, storage and marketing, servicing and other facilities. The required agricultural market infrastructure should be formed taking into account the needs of agricultural manufacturers, and therefore it was provided for establishing and functioning of wholesale markets of agricultural products agricultural stocks, auctions, fairs, agricultural and trade houses, procurement cooperatives etc. Their task was to store, to sell tradable agricultural products, to supply materials and equipment, and to maintain the service of agricultural manufacturers.

The legal principles for the functioning of wholesale markets of agricultural products are posed by a number of regulations. For example, the above mentioned Decree of the President of Ukraine «On urgent measures to accelerate the agricultural sector reform» of December 3, 1999 provide for establishing agricultural stocks, wholesale markets of agri-

[1] Про забезпечення економічних інтересів і соціального захисту працівників соціальної сфери села та вирішення окремих питань, що виникли в процесі проведення земельної реформи: Указ Президента України від 12 квітня 2000 р.(втратив чинність): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/584/2000.

[2] Про холдингові компанії в Україні: Закон України від 15 березня 2006 р.: [Електронний ресурс]. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/3528-15.

[3] Про особисте селянське господарство: Закон України від 15 травня 2003 р.: [Електронний ресурс]. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/742-15.

cultural products, agricultural and trade houses, auctions, fairs, procurement cooperatives. The establishment of the marketable agricultural market is also provided by the Decrees of the President: «On measures to ensure forming and functioning of the agricultural market» of June 6, 2000[1]; «On measures to accelerate the development of the agricultural market» of August 8, 2002[2]; «On measures to develop the agricultural market» of August 30, 2004[3] and others.

The Resolution of the Cabinet of Ministers of Ukraine «On measures to establish wholesale food markets, procurement of agricultural products at the farms of the private sector, reforming consumer cooperative system» of March 19, 1997[4] approved the measures to establish wholesale food markets, procurement of agricultural products at the farms of the private sector, reforming consumer cooperative system. The government provided, in particular, for the development and approval of the Regulation on the wholesale food market. The Resolution of the Cabinet of Ministers of Ukraine «On the concept for developing the exchange market of agricultural products» of August 5, 1997 approved the Concept for developing the exchange market of agricultural products[5]. The Resolution of the Cabinet of Ministers of Ukraine «On the wholesale food markets» of June 9, 1999 set more specific measures for the establishing and functioning of the wholesale market[6]. The Resolution of the Cabinet of Ministers of Ukraine «On enhancing activity of the stock market of agricultural products and materials and equipment necessary for its needs» of October 19, 1999 fixed the provision for the purchase of agricultural products and food for public use, their sale from the state resources and state reserve, as well as the supply of enterprises with materials and equipment[7]. Of great importance for the de-

[1] Про заходи щодо забезпечення формування та функціонування аграрного ринку: Указ Президента України від 6 червня 2000 р.: [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/laws/show/767/2000.

[2] Про заходи щодо прискорення розвитку аграрного ринку: Указ Президента України від 8 серпня 2002 р.: [Електронний ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/694/2002.

[3] Про заходи щодо розвитку аграрного ринку: Указ Президента України від 30 серпня 2004 р.: [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/1021/2004.

[4] Про заходи щодо створення оптово-продовольчих ринків, організації закупівель сільськогосподарської продукції в господарствах приватного сектору, реформування системи споживчої кооперації: Постанова Кабінету Міністрів України від 19 березня 1997 р. : [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/246-97-п

[5] Про концепцію розвитку біржового ринку сільськогосподарської продукції: Постанова Кабінету Міністрів України від 5 серпня 1997р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/848-97-%D0%BF.

[6] Про оптові продовольчі ринки: Постановою Кабінету Міністрів України від 9 червня 1999 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/997-99-%D0%BF.

[7] Про активізацію діяльності біржового ринку продукції агропромислового комплексу та необхідних для його потреб матеріально-технічних ресурсів: Постановою Кабінету Міністрів України від 19 жовтня 1999р.:

velopment of the wholesale market of agricultural products is the Resolution of the Cabinet of Ministers of Ukraine «On establishing the agricultural stock» of December 26, 2005[1] and others. At the level of law, establishing and functioning of wholesale markets has been regulated by the Law of Ukraine «On the wholesale markets of agricultural products» of June 25, 2009[2]. This law establishes the legal principles of wholesale agricultural markets activity in the country. It regulates relations in this area and is aimed at protecting the rights and interests of agricultural manufacturers engaged in wholesale homegrown products. However, this Law does not regulate a number of issues, and therefore other delegated legislation referring to this area is adopted.

Fifthly, the essential direction in the agrarian reform is to strengthen the protection of agriculture. In a competitive environment, the latter cannot function without specific measures of its state support. Such support lies in using government pledged grain purchases, credit subsidies, specific insurance features, donations etc.

The Law of Ukraine «On stimulating agricultural development in 2001-2004» of January 18, 2001[3] is important for state support of the agricultural sector and its central link – agriculture. This Law defines specific features of tax and budget policy in agriculture, credit support of agricultural producers, insurance against risks in agricultural manufacture. The system of state protection measures of agricultural producers is fixed in the Laws of Ukraine «On state support of agriculture of Ukraine» of June 24, 2004[4]; «On the main principles of the state agricultural policy until 2015» of October 18, 2005[5] etc.

It should be noted, that even partial list and shallow analysis of just stated laws and legal acts, which form the legal principles of the agrarian reforms, developing agricultural relations, can be the evidence of its permanent status, constant content, corresponding to the market conditions.

The practical application analysis of the recently adopted laws and delegated legislation somehow related to the agrarian reform indicates the lack of attention to the role and importance of the farmer

[Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/laws/show/1928-99-%D0%BF.

[1] Про створення аграрної біржі: Постанова Міністрів України від 26 грудня 2005р.: [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/laws/show/1285-2005-%D0%BF.

[2] Про оптові ринки сільськогосподарської продукції: Закон України від 25 червня 2009р.: [Електронний ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/1561-17.

[3] Про стимулювання розвитку сільського господарства на період 2001-2004 років: Закон України від 18 січня 2001 р.: [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/2238-14

[4] Про державну підтримку сільського господарства України: Закон України від 24 червня 2004 р.: [Електронний ресурс]. – Режим доступу: http://zakon1.rada.gov.ua/laws/show/1877-15.

[5] Про основні засади державної аграрної політики на період до 2015 року: Закон України від 18 жовтня 2005 р.: [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/2982-15.

in the transformations of agriculture, on the one hand, and the contradiction of conceptual approaches to covering such role of the agricultural people as a whole – on the other. Since this issue is not given due attention, this affects the total level of theoretical justifications, conclusions, complicates their specification, and as a result, adversely affects the process of solving important issues of effective social and economic development of agriculture and the entire agricultural sector of economy.

Therefore, the task of agro-legal science reflecting the higher study level of the objective development processes of agrarian relations is to explore important aspects of the farmers' role in the agrarian reform. It is obvious, that agrarian relations are the subject of the relevant theoretical justification of productive and social relations to be applied in agriculture. However, it is also the feedback to test the quality of scientific character and further development of agro-legal science. Here agro-legal science, along with others, has contributed and will contribute to the development and implementation of one of the main issues on establishing democratic system of agrarian relations in the agrarian area, forming in the present conditions on this basis effective farming owners as business people having the ownership right to land, and other means of manufacture. This does not exclude their collective use, but only on a voluntary basis.

Thus, there is a need to analyze some aspects of the farmer's ownership right to land, which is the foundation for the whole system of agrarian relations he takes part in, as the agricultural product manufacturer, in terms of his value orientation.

The land reform, as part of the agrarian reform, provides for the use of the thesis «lands to the farmers», which is the basis for the theoretical analysis of the problems, hiding the principle of social justice. In addition, another thesis «the land belongs to those who cultivate it», which is derived from the first one, should specify it. But it does not reveal the nature of the farmers through differentiating them as agricultural product manufacturers, including their professional skills, diligence, skills to work as landowners, land users or hired farm managers etc.

It should be noted, that no matter how socio-economic elements of the agrarian relations changed in the life of the farmers, the essence of the farmer, specific features of his work, life, customs, mentality etc. are set in stone. However, one should keep in mind the important attribute of the farmer – the special type of activity. The farmer, as is evident from reference books, is a person who cultivates land[1]. Representatives of the modern agro-legal science, exploring the concept «farmer», identify farmer with the country dweller, who is also engaged in cultivating land[2].

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[1] Даль, В. И. Толковый словарь живого великорусского языка [Текст] / В. Даль. – М.: Рус. яз. Т. 3. П. – 1981. – 555 с.

[2] Єрмоленко В. М. Походження поняття «селянин» як основоположної категорії аграрного права [Текст] / В. М. Єрмоленко // Матеріали круглого столу (Харків, 6 грудня 2013р.): зб. тез наук. док. (за заг. ред. А. П. Гетьмана; Нац. ун-т «Юрид. акад. України ім.

Therefore, the social role of the farmer is to use their labor in cultivating land. In this context, the question arises: how the agrarian reform affects the increase of the farmer's social role? Clarification of this issue allows determining his social status in the land relations, which are the central ones but present only the part of the agrarian relations. Therefore, it is advisable to stop upon some aspects of this issue.

We have mentioned above the land sharing mechanism. The latter involved determining the land share in the collective ownership land of each member of the agricultural enterprise. In case the person left the agricultural enterprise, he filed the application on land allotment in kind in the prescribed manner, and the state act of land ownership was issued. It should be noted that the above legislative provisions allowed more than 6 million farmers to become agricultural land owners. The question arises, whether the state act of agricultural land ownership, received in the result of sharing, makes the farmer an effective owner or increases his role as a farmer, whose work lies in growing agricultural products on this land plot?

It is necessary to bear in mind that our country has on average 4.1 ha of the shared land for each farmer. This contributed to creating nearly 500 thousand private agricultural enterprises. The latter allow meeting personal needs through manufacturing, processing and consumption of agricultural products, selling its surplus and providing services using property of such agricultural enterprises, including agricultural tourism. The rest of the farmers, most of them, have rented out the land plots owned by them. The stated above suggests, firstly, that the state act of land ownership limits to some extent the right of the land share owner. In most cases, the farmer, due to the lack of proper materials and equipment, is actually forced to bring the share in the authorized capital of some agricultural enterprises, and, often fraudulently, to conclude agreements on land lease, depriving himself of free disposal of land ownership. Professor V. I. Semchyk notes: «If someone thinks that citizens who have the state acts of land ownership are the rightful owners, he is wrong, because they do not know the location of their areas. Besides, all state acts are kept in the safe boxes of the private enterprise managers. Farmers cannot take them back, as the lease agreements are usually concluded for the long term»[1].

When the farmer concludes the lease agreement with an agricultural enterprise, such as farm household, agricultural limited liability company, etc., this deprives him not only of land cultivating, but also of controlling the land use. Such farmer is usually not a founder or member of a particular company, and has

Ярослава Мудрого». – Х.: Право 2013. – 336 с.; Багай Н. О. Селянство: проблеми законодавчого визначення поняття // Проблеми розвитку аграрного та земельного права України: матеріали Міжнародної науково-практичної конференції (м. Київ, 25 травня 2011 р.). – К.: Видавництво географічної літератури <Обрії>, 2011. – С.64–66.

[1] Карпенко, О. Кому заважає аграрне право [Текст] / О. Карпенко // – Сільські вісті. – 2012. – 19 червня. – С. 1–2.

often no labor relations with it. In this case, the farmer is given the «passive» role of the observer in accumulating the capital by the private enterprise founders. The lease of land by the farmer to a natural person or legal entity under various circumstances as a means of manufacture does not create conditions for him to cultivate land and to be engaged in labor activity.

Here the ratio of lease relations to the farmer's land is the opposite of the principle launched by the agrarian reform: the land belongs to those who cultivate it. This results in the loss of the social purpose of the farmer as agriculturalist being the moral value of the society.

Secondly, the narrowing of the farmer's social function as the main productive force in agriculture happens due to the processes associated with the optimization of land use by the private households and consolidation of the agricultural land plots and the more efficient landownership for agricultural manufacturers, the influence mechanism on creating and developing subjects performing large commodity agricultural manufacture, which inevitably affects its efficiency. Thus, improving the efficiency of the agricultural manufacture, sustainable development, is associated with large and extra-large agricultural business, which is now represented by agriholdings. The latter attempt to monopolize the relations in land use.

Professor M. V. Shulga notes that in this case agriholdings occupy the dominant position in the market as manufacturers and exporters of agricultural products, having access to relatively cheap foreign bank loans. Manufacturing cheaper agricultural products, all mentioned subjects almost drive small-scale and medium-sized agricultural manufacturers out of the food market. Satisfying their private interests, agriholding leave aside social aspects of agricultural manufacture[1]. It should be added that agriholdings are the «oligarchs-latifundists if they do not have their own subsidiary personal plots, they are not farmers, not direct agricultural manufacturers, but large entrepreneurs, latifundists of agribusiness, a peculiar kind of landowners».

Thus, it is clear that the land reform in Ukraine has minimized the social role of the farmer. Since it was initiated «from above», it forgot about the farmer as the main subject of the agrarian transformations in agriculture, the person with the special agricultural way of life. Formally, the farmer's part in agrarian transformations is provided on the legal level, but his status as a major acting person in them deserves the non-priority enhancing of his social role and economic freedom under market conditions. The private land ownership, which the farmer received after the agrarian reform, should give him confidence that the product of his work will not be taken from him, peace, and the desire for a

[1] Шульга М. В. До питання про перспективи сталого розвитку сільських територій [Текст] / М. В. Шульга // Актуальні проблеми юридичної науки: зб. тез міжнар. наук.-практ. конф. «Дванадцяті осінні юридичні читання» (м. Хмельницький, 8-9 лист. 2013 р. / Хмельницький ун-т упр. та права. – Хмельницький : Хмельниц. ун-т управ. та права, 2013. - Ч. 1. – с. 180.

constant hard work, transforming his work into material, moral, spiritual and other things.

Thus, the private land ownership, fair mechanism for its economic and legal implementation, is a factor of the efficient farmer's activity regardless of the form of business management. The condition describing who owns and manages the land, what is the role and place of the farmer in land ownership, establishes rational socio-economic structure of the agricultural system, and provides activity, efficient incentives for economic use of the land by the farmer. In this context, the opinion of Professor V. V. Nosik is considered quite reasonable that the landowner and the corn grower should be combined in one person, manufactured agricultural products should belong to its manufacturer and can be easily sold it in national and foreign markets[1].

This creates the proper socio-economic environment which enables interesting life and work for the farmer as the main production force in agriculture, on which the welfare of the population depends. Farmers working on the land «deserve universal respect as those who preserve national traditions, high civil morality and consciousness»[2].

In this approach, the social role of the farmer is significant, actually not exaggerated; and in case this approach is absent, the social role is only the declared.

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[1] Носік В. В. Юридична природа принципів земельного права [Текст] / В. В. Носік // Актуальні проблеми юридичної науки: зб. тез міжнар. наук.-практ. конф. «Дванадцяті осінні юридичні читання» (м. Хмельницький, 8-9 листопада 2013 р.) / Хмельницький ун-т упр. та права. – Хмельницький: Хмельницький ун-т упр. та права, 2013. – Ч. 1. – С. 148.

[2] Землі сільськогосподарського призначення: права громадян України. [Текст] / за ред. Н. І. Титова. – Л. : ПАІС, 2005. – с. 275

UDC 349

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Responsibility in land law

Legal responsibility – is one of the most important guarantees of constitutionality, legal order and implementation of rights and freedoms of citizens, including in the sphere of land legal relationship. Research of actual problems of the essence and characteristics of legal liability for violations in land relationship is important and essential not only for law science, law-making, but also for the application of law. They acquire particular significance in modern conditions when, on one hand, rights on land, guaranteed by Constitution of Ukraine, legality and legal order are violated, on the other hand – there is total responsibility for violations of land legislation. Necessities of analysis of problems of legal liability in the land law are conditioned by current and future requirements development of land law science. Theoretical aspects of legal liability in the land law repeatedly studied in monographs scientific articles, dissertations, as in the Soviet[1], so in the modern times[2]. They also set out in textbooks and handbooks land law[3].

[1] See. : Право землепользования и его виды. – М.: Юрид. лит., 1964; Правовое обеспечение рационального использования земли в СССР. – М.: Наука. – 1969; Ерофеев Б. В. Основы земельного права (теоретические вопросы). – М.: Юрид. лит. – 1971; Казанцев Н. Д. Законодательные основы советского земельного строя в СССР. – М.: Юрид. лит. – 1971; Осипов Н. Т. Теоретические проблемы советского земельного права. – Л.: Изд-во ЛГУ. – 1972; Титова Н. И. Ответственность за нарушение законодательства об охране природы. – Львов. – 1973; Рябов А. А. Охрана права государственной собственности на землю и права землепользования. – Казань. – 1976; Измайлов О. В. Ответственность за нарушение земельного законодательства: автореф. дис. … канд. юрид. наук. – М., 1973; Шемшученко Ю. С., Мунтян В. Л., Розовский Б. Г. Юридическая ответственность в области охраны окружающей среды. – К., 1978; Общая теория советского земельного права / отв. ред. Г. А. Аксенёнок, И. А. Иконицкая, Н. И. Краснов. – М.: Наука. – 1983. – С. 301-319.

[2] Саркісова Т. Б. Земельне правопорушення як підстава юридичної відповідальності в Україні: автореф. дис. … канд. юрид. наук. – Київ, 2012. – 17 с.

[3] See .: Земельное право. – М.: Юрид. лит. – 1969; Земельное право. – М.: Юрид. лит. – 1971; Советское земельное право. – М.: Юрид. лит. – 1977; Советское земельное пра-

As a result of scientific research produced almost universally accepted representations about the essence of legal liability in land law, the concept of species and land violations as grounds for liability, the features of applying of certain measures of responsibility.

As an achievement of theoretical thought in this area should be considered justification of autonomy land-legal sanctions or legal land liability, the essence of which is in compulsory termination or limitation of land rights of violator. However, further development of the land – legal theory conditioned by the current and perspective necessities of application of law, should be directed primarily toward elaborating of legal measures to ensure strict fulfilment of requirements of land law and increase of the efficiency of legal responsibility in this area.

Art. 92 of the Constitution of Ukraine established that only by laws of Ukraine, are defined including principles of legal civil liability; acts that are crimes, administrative or disciplinary offenses, and liability for them. The foregoing fundamental constitutional provisions form the basis of the traditional allocation of these major sectional types of legal responsibility: civil, criminal, administrative and disciplinary. In addition, in view of the various characteristics and aspects of the offense as the basis of legal liability, and sectional affiliation of norm for the violation of which a person must comply, subjects who carry it in a certain way, distinguish also constitutional and material liability. Sectional kinds of legal responsibility are a necessary condition for strengthening of law and legal order. Legal responsibility for the offense of land relationship in modern legal literature is defined as a special kind of guarding relationship type, which appears from the combination of legal norms with legal liability for the offense in land relationship as a legal fact, in which implemented the right of the state to protect the respective values, on which infringes land offense, to restore the violated right or claim a compensation for damages, that is to punish the guilty person, and require the offender to suffer from some deprivations of personal, property or organizational character[1].

Authors of scientific and practical commentary to the Land Code of Ukraine A. M. Miroshnichenko and R. I. Marusenko rightly point out that the legal responsibility can be defined as the relationship with the forced imposition of additional duties with negative nature on the offender or deprivation of rights in connection with the commission of the offense[2].

во / под. ред. проф. В. С. Шелестова. – Харьков: Вища школа, изд-во при Харьк. ин-те, 1981; Земельне право України: підручник / М. В. Шульга (кер. авт. кол.), Г. В. Анісімова, Н. О. Багай, А. П. Гетьман та ін. – К.: Юрінком Інтер. – 2004; Земельне право України: підруч. / Г. І. Балюк, Т. О. Коваленко, В. В. Носік та ін.; за ред. В. В. Носіка. – К.: Видавничо-поліграфічний центр «Київський університет», 2008; Земельне право: підручник / М. В. Шульга, Н. О. Багай, В. І. Гордєєв та ін.; за ред. М. В. Шульги. – Х.: Право, 2014. – 520 с. та ін.

[1] Саркісова Т. Б. Земельне правопорушення як підстава юридичної відповідальності в Україні: автореф. дис. … канд. юрид. наук. – Київ, 2012. – С. 19.

[2] Ерофеев Б. В. Земельное право: учебн. – 1999. – С. 506.

In the conditions of development of legal state one of the most important guarantees of the rights and freedoms of land relations traditionally recognized their legal protection. In the process of protecting the violated rights of subjects of land relationships is inextricably linked to the question of bringing legal responsibility of specific offenders. Today the problem of ensuring proper compliance with land legislation through the full range of potential measures of legal liability for violations of land legislation substantially actualized. This especially concerns the specific application such liability and its grounds and kinds.

Peculiarity of legal responsibility in Ukraine land law is primarily that the Land Code of Ukraine uses dualistic approach to determine its legal nature. First, the Land Code of Ukraine regards it as a guarantee of protection of land ownership. Thus, articles 154; 155 Land Code establishes liability of executive power and local authorities for violation of land ownership and for the publication of acts that violate the rights of land owners. Secondly, it also serves as an independent legal remedy forced to respond by government influence against those who violate the law of the land.

In addition, the specific features that characterize this responsibility should include blanketnist of the legal norms that create legal institution of legal liability in the land law, and insufficient systematization of legal rules governing relations in the field of legal liability for land offense.

Thus, current version of art. 211 LC of Ukraine, entitled «Responsibility for violations of land legislation» provides that citizens and legal entities bear civil, administrative or criminal liability under the law for violations inexhaustible list of which contained in this article. So the norm is actually limiting the range of possible subjects by citizens and legal entities, has no regulatory or security value. This is the archaism in a system of land regulation, which is still, unfortunately, not overcome, as rightly noted at the parliamentary hearings[1]. This «remnant of the Soviet passed» was assigned at the time in Art. 170 Land Code of the USSR (1970), under which officials and citizens, guilty in carrying out violations of land legislation, bear criminal or administrative liability in accordance with the legislation of the USSR and the Ukrainian SSR.

A separate norm of the Code (Art. 173) regulated relations for the damages caused by a breach of the land legislation. In particular, it assumes that companies, organizations, institutions and citizens must compensate for damage caused by them as a result of violations of land legislation. As we see, in this case it also dealt with the limited number of people who could be as potential violators of land legislation.

In connection with the plausible and reasonable issued a proposal to the new wording of Article 211 LC of Ukraine: «Persons, including local authorities and executive authorities and their officials are guilty for violating the rules of land

[1] Мірошниченко А. М., Марусенко Р. І. Науково-практичний коментар до Земельного кодексу України, 5-е видання, змінене і доповнене. – К.: Алерта, 2013. – С. 506.

law, shall be liable under law»[1]. Significantly, the Land Code, such as the Republic of Kazakhstan (art. 168) establishes the position that violations of land legislation of the Republic of Kazakhstan are responsible according to the laws of the Republic of Kazakhstan.

Code of Belarus about the land (Art. 96) provides that those who break the law on the protection and use of land are responsible by legislative acts.

Chapter XIII «Responsibility for violations in the field of guard and use of land» Land Code of the Russian Federation contains three separate articles with the name «Administrative and criminal penalties for violations of land», «Disciplinary liability offense for land» and «Compensation for damage caused by land offenses». The following variants are solutions to the issue of legal liability and in the land law of foreign countries they are more attractive than in the law of Ukraine.

Land legislation of Ukraine provides civil, administrative or criminal responsibility for individuals and legal entities for a number of violations set forth in ch. 1, Art. 211 Land Code. However, as noted in ch. 2, Art. 211 of the Land Code, the law may establish responsibility for other violations of land legislation. So the list of grounds for prosecution is open and can accordingly be supplemented. A systematic analysis of the content of art. 211 LC of Ukraine contains referential regulations and special law, including the Criminal Code of Ukraine and the Code of Ukraine about Administrative Offences, indicates that, for example, administrative and criminal responsibility has not yet been established for certain violations of land legislation including: conclusion of agreements with violation of land legislation, avoidance from the state land registration of land plots and submission of false information on them; violation of terms of consideration of applications for the allocation of land plots. However, as follows from the content, we can say, the Criminal Code of Ukraine provides criminal penalties for such violations of land legislation which are not mentioned in Article 211 LC of Ukraine, namely: illegal acquisition of surface soil (surface layer) land (Art. 239 -1 Criminal Code of Ukraine); wasteful use of lands that caused a lasting reduction or loss of fertility, exclusion of land from agricultural use, washing the soil layer, soil structure violation (Art. 254 of the Criminal Code of Ukraine).

Availability legally enforceable violations of land legislation determines necessitates of the establishment of law and relevant, adequate offense penalties. The lack of such sanctions demonstrates the shortcomings in the legal regulation of a particular kind of social relations.

In literature is suggested a sensible and reasonable proposal for the establishment of administrative responsibility for these land offenses: «Avoidance of state registration of rights on land»; «Violation of terms of consideration of applications for land allocation of land plots, acquisition and sale of land rights»;

[1] Саркісова Т. Б. Земельне правопорушення як підстава юридичної відповідальності в Україні: автореф. дис. … канд. юрид. наук. – Київ, 2012. – С. 5.

«legal changing topography of land;» Violation of the regime for the use of land on which is situated the cultural heritage».

An important and fully justified also is a proposal to supplement the Criminal Code of Ukraine with new compositions land crimes. In particular, on: 1) knowingly illegal transfer of state and municipal property land, distortion of the information for the State Land Cadastre or intentionally understating of the size of payments for the land, if they are committed by an ax to grind or other personal interest of official person using his official position and 2) violation of the legal regime of forest land, recreational, health, medical, historical and cultural significance and other land that makes impossible to use them by the intended purpose. Especially should pay attention to the proposal to amend the current art. 239-2 of the Criminal Code of Ukraine. Based on content analysis of the disposition of the norm the author rightly says that its generic object essentially acts the ownership of land and water fund. He makes a reasoned conclusion that specified norm has to find its place in Section 6 of the Criminal Code of Ukraine «Crimes against property». As an alternative, the author proposes that the current edition of Article disposition. 239-2, stating it as: «Actions that violate the regime targeted land use and protection of water fund, including carrying out any work on changing the topography of coastal protection bands except shore, causing or may cause significant damage ...»[1].

The expressed proposals to improve the appropriate legal regulations governing relations in the field of legal responsibility merit and can be successfully used by the legislator of Ukraine.

Lately prevalent approach according to which self-importance also provides that kind of responsibility, financial and legal, environmental law, land law and others. Lately the spread of gaining position, according to which self-importance also provide that kind of responsibility, financial and legal, environmental law, land law and others.

Recently, becomes to be widespread the proposal according to which independent significance is also provided to such kinds of responsibility as financial-legal, environmental-legal, land-legal and some others.

With the adoption of the Commercial Code of Ukraine, as rightly noted by A. M. Miroshnichenko, appeared grounds to combine «new» types of responsibilities that have recently been allocated, called economic and legal responsibility[2].

In sectional legal literature the essence, for example, of financial responsibility sometimes perceive not in punishing the offender, but in the recovery of financial losses to the state. Compensation for damage realizes by the usage of special financial and legal sanctions under budget and tax laws. Thus the

[1] Саркісова Т. Б. Земельне правопорушення як підстава юридичної відповідальності в Україні: автореф. дис. … канд. юрид. наук. – Київ, 2012. – С. 8.

[2] Мірошниченко А. М. Земельне право України: підручник. – К.: Алерта; КНТ; ЦУЛ, 2009. – С. 435.

supporters of the existence of such liability believe that it can be implemented through civil liability, that is, without the use of coercive measures, such as through voluntary compliance obligation to pay a penalty. An excellent feature of financial responsibility is in the universality of application specific sanctions depending on the protected financial relationship and goals of punishment for violations[1].

In modern land law doctrine there is no unanimity in understanding of the legal nature of the land and legal liability, and its signs and forms the outer manifestation. It almost creates the basis for the formation of different approaches to understanding and scientific definition of this type of responsibility.

In the literature there is no unity to determine the name of this type of responsibility. So, B. V. Erofeeva calls it as special kind of responsibility[2] and I. Pankratov – legal- land[3].

Supporters of the special legal-land liability for offenses substantiate its existence by follow way: firstly, the earth being the object of nature has certain characteristics, different from other objects of the material world, so the usage of general civil liability is insufficient to provide adequate legal regime of use and protection; secondly, the main purpose of legislative provisions and the practical application of the special land-legal measures is to restore the previous state in land relations; thirdly, special measures of responsibility manifested not only in the occurrence of adverse material consequences as reimbursement of expenses incurred by illegal use of land.

In modern conditions the legal basis for determining the liability of land-legal offences as a separate type of legal liability for violation of land laws rules consider the provisions of Articles 141; 143; 152; 212 Land Code of Ukraine, according to which land liability applies sanctions such as: the forced termination of land use; return squatted land, removing any violations of the rights of the owner of the land; restoration of land that existed before the violation of rights[4].

Lively debate is ongoing, particularly regarding the allocation of specific sanctions that act as a form of external manifestation. Representatives of legal-land science to specific penalties inherent in land -legal responsibility, frequently offer to attribute forced termination or limitation of rights of violator to land usage. It seems that the problem of the existence of land- legal

[1] Шайдуллин Р. О. О сущности финансово-правовой ответственности и её месте в системе юридической ответственности / Р. О. Шайдуллин // Современное право. – 2013. – № 1. – С 64-66.

[2] Ерофеев Б. В. Земельное право: учебн. – 1999. – С. 362.

[3] Земельное право: учебн. для вузов / авт. ред. С. А. Боголюбов. – М., 1999. – С. 188.

[4] Балюк Г. І., Лисенко Я. О. Земельно-правова відповідальність: поняття, підстави, порядок притягнення / Земельне право України: підруч. / Г. І. Балюк, Т. О. Коваленко, В. В. Носік та ін.; за ред. В. В. Носіка. – К.: Видавничо-поліграфічний центр «Київський університет», 2008. – С. 312-316.

responsibility to a certain extent is contrived. Forced termination of land rights, depriving them or limit cannot be equated with responsibility. These are independent incentives that ensure the proper conduct of subjects of land rights and represent a specific type of influence on these subjects, but not a specific liability.

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CRIMINAL-LEGAL SCIENCES

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Other criminal-legal consequences of committing a socially dangerous act

Part 3, Article 3, Criminal Code of Ukraine tells that criminal nature of a deed as well as its «punishability» and other criminal legal consequences are specified only in the present Code. At the same time the legislator has not defined the concept of «other criminal legal consequences» and has not listed such consequences in the law. The only conclusion that may be understood from legal formulation «punishability and other criminal legal consequences» is the character of relation between designated concepts. If the first one includes indications of a general meaning as applicable to the consequences of committed crime, then the last one refers to some special sense. By «punishability» the legislator evaluates a menace of criminal deed to society and threatens eventual imposition of punishment to the person pleaded guilty in committing this crime. However, whereas Ukrainian legislation of criminal punishment worked out a certain «tradition» to accumulate clauses of a given criminal legal consequence by emphasizing this in a special manner in particular sections of Criminal Code, which specify the concept of punishment, its purposes and types, norms of prescription, etc., regarding «other criminal legal consequences» we only may come to a certain assumption of the types of such consequences by systemic interpretation

of regulatory norms. In this connection we must agree that lack of necessary strictness in application of this or that concept which may be to a certain agree acceptable for theoretical research, is hardly permissible for application of legislative provisions[1], moreover, those meant to signify phenomena of the same order than «punishability».

At the same time, such approach of the legislator to definition of the set of components falling under the concept of «criminal legal consequences» – by usage of phrase «punishability and other criminal legal consequences» – is an obvious evidence of mixed nature of some institutes of criminal legal regulation caused by necessity to call forth a respective society response to socially dangerous deeds or acts of similar form of manifestation, by «acquisition» of some steps and means inherent in phenomena of other areas of social life (medicine, psychiatry, education, psychology, other branches of law etc.) In turn, this causes a necessity of profound analysis of the concept «other criminal legal consequences». Besides, research in such a complicated subject is also necessitated by urgency of strict observance of constitutional rights and liberties of persons to whom those «other criminal legal consequences» may be applied.

In spite of substantial doctrinal developments in this area and legislative fixation of both the idea itself and various components of complex institute «other criminal legal consequences», the problems of its definition, determination of components, their contents and purposes, grounds, terms and application procedure of particular sub-institutes, etc. have not been finalized up to this day. This is confirmed by a number of debatable items in criminal law theory, lacunae in legislative regulation of numerous application aspects of this institute and substantial difficulties emerging in this connection in law enforcement practice.

One of such problems has become, first of all, determination of list of eventual types of legal responses belonging to the concept of «other criminal legal consequences» to committing certain socially dangerous deeds. In fact, this would determine further chain of reasoning in definition of essential character and properties of this institute of criminal law as a whole. In trying to compose this list we must admit as certain guidelines of search in methodological aspect: first, the history of legislative solution of this problem in the past; second, attempt to research legislative approach to this problem in Criminal Code of Russian Federation and some other post-Soviet states as well as in criminal legislation of Western Europe and North America[2];

[1] Звечаровский И. Меры уголовно-правового характера: понятие, система, виды / И. Звечаровский // Законность. – 1999. – № 1. – С. 36.

[2] Chankseliani M. Punishment and Other Penal Measures / M. Chankseliani // European Special Journal. – 2013. – Vol. 8. – № 2. – P. 98–108; Langsted L. B. Criminal Law in Denmark / L. B. Langsted, P. Garde,V. Greve. – 3d rev. ed. – Great Britain : Kluwer Law International, 2011. – 246 p.; Monterosso S. Punitive Criminal Justice and Policy in Contemporary Society / S. Monterosso // Queensland Univer-

third, review of basic attitudes on this problem in criminal law theory; fourth, analysis of recent innovations in criminal law of Ukraine.

A study of Soviet period of criminal legislation enables us to note that *coercive steps of re-educatory and medical character* have existed in law field for quite a long time. In Criminal Codes of Ukrainian SSR 1922 and 1927 and even earlier, in Criminal Law Guidelines of Russian SFSR 1919[1], such steps together with repressive measures formed the notorious triad of «social protection steps», though the latter term as generalizing for all those steps was fixed only in 1927. Thus, in Article 5, Criminal Code of Ukrainian SSR 1927 (where, by the way, legislator omitted the concept of punishment up to 1934) it was clearly stated that social protection steps include: 1) judicial and penitentiary steps; 2) medical steps and 3) medical-pedagogical steps. Social protection steps of medical character were compulsory treatment and placement of persons to medical isolation institutions, whereas social protection steps of medical-pedagogical character were putting into ward, putting of juveniles into charge of parents, relatives, institutions and organizations as well as putting into special institutions – reformatories (Articles 23 and 24, Criminal Code of Ukrainian SSR 1927). Later on those steps, in their incumbent terminological definition, were apprehended in Criminal Code of Ukrainian SSR 1960 (Article 11 «Coercive Steps of Re-educatory Character»; Article 13 «Coercive Steps of Medical Character»). But before adoption of the new Criminal Code of Ukraine in 2001 for the period of 40 years a paradoxical situation existed: on which grounds those steps belonged to the subject of criminal law regulation? In fact, the past Code, as distinct from incumbent one, in regulation of the problem of deed criminality and punishability never mentioned any other criminal legal consequences of committing a socially dangerous deed which traditionally include, first of all, coercive steps of medical and re-educatory character.

Criminal Code of Ukraine 2001 treats application of coercive steps of medical character in more detail than its predecessor. The concept and purpose of such steps, their types, circle of persons to whom they may be applied, as well as general procedure of their prescription, prolongation, amendment or termination are specified in Section XIV of Criminal Code. Coercive steps of re-educatory character are treated in Section XV «Peculiarities of Criminal Responsibility

sity of Technology Law Review. – 2009. – Vol. 9. – № 1. – С. 13–25; Stojanovski V. Criminal Liabilty of Legal Persons in the Republic of Macedonia [Электронный ресурс] / V. Stojanovski. – Режим доступа : http://www.law.muni.cz/sborniky/dp08/files/pdf/trest/stojanowski.pdf. – Загл. с экрана; Jakulin V. The Liabilty of Legal persons for Criminal Offences in French and Slovene Criminal Law / V. Jakulin // Slovenian Law Review. – 2009. – Vol. 6. – Iss. 1/2. – P. 35–42.

[1] *Remarks*. Guidelines on Criminal Law, Russian Soviet Federal Socialist Republic, of 1919 specified both re-educatory (adaptation) steps and steps of medical (treatment and preemptive) character (more details see: Руководящие начала по уголовному праву РСФСР 1919 г. // СУ РСФСР. – 1919. – № 66. – Ст. 506).

and Punishment of Juveniles». As compared to Criminal Code 1960 this section expands possibilities of application of such steps. Thus, juveniles may be exempted from criminal responsibility not only for committed minor offense (crimes of minor social danger in terms of Criminal Code 1960), but also for first committed careless crime of medium severity. If a juvenile is exempted from punishment and sentenced to coercive steps of re-educatory character, the law even does not require that the crime was first committed. The court having ascertained heartfelt repentance and subsequent irreproachable behavior of a person by the moment of sentence, must not prove that the juvenile exempted from punishment may reform by application of re-educatory coercive steps as it is required when a juvenile is exempted from criminal responsibility.

Looking at Criminal Code of Russian Federation 1996, we can see that their legislator trying to make more definite and clear the legal regulation of institute «other criminal legal consequences», in other section of the same title includes coercive steps of medical character and confiscation of property[1], whereas coercive steps of re-educatory effect, seemingly factitiously, by subjective reasons of feasible and convenient presentation of legal norms, or maybe by accident (?) in Criminal Code of Russian Federation 1996 are carried out of this section (though coercive steps of re-educatory effect are intrinsically closer to the above institute than particular cases of medical-type coercive steps). By the way, in Criminal Code of Estonia medical and re-educatory steps are united in common Section 6 «Medical and Re-educatory Effect Steps».

Certainly, such legislative approach resulted on treatment of this problem in criminal law theory of Russian Federation. Thus, if before amendments brought into Section VI, Criminal Code of Russian Federation 1996, by Federal Act of July 27, 1996 # 153-FZ, some authors even stated that medical coercive steps and re-educatory coercive steps might not be treated as criminal legal steps because their nature was not criminal legal[2], then, after this event the authors of, say, textbook «Criminal Law of Russia. General Part» (2012) urged to keep strictly to the letter of law and related to criminal legal steps only ones directly specified in Section VI, Criminal Code of Russian Federation[3]. At the same time other scholars state that legislator deliberately joined in one section two quite distinct criminal law institutions: coercive treatment institute and confiscation institute[4]. Some authors also opined that

[1] *Remarks.* In Ukraine similar institute has another description – «other criminal legal consequences» – which enables its stricter interpretation; in particular, it is treated also as an additional means for solution of criminal law problems.

[2] Звечаровский И. Меры уголовно-правового характера: понятие, система, виды / И. Звечаровский // Законность. – 1999. – № 1. – С. 37.

[3] Уголовное право России: Часть Общая : учебник / Р. Р. Галиакбаров, И. Я. Козаченко, Л. Л. Кругликов и др. ; отв. ред. Л. Л. Кругликов. – 3-е изд. – М. : Проспект, 2012. – С. 553-557.

[4] Назаренко Г. В. Конфискация имущества как мера уголовно-правового характера / Г. В. Назаренко // Противодействие преступ-

criminal legal steps should be supplemented with coercive re-educatory steps[1] and proposed to move those steps to section «Other Criminal Legal Steps», Criminal Code of Russian Federation, and separate there a chapter of the same name «Coercive Re-educatory Steps»[2].

If we look at Part 2, Article 2, Articles 3, 6 and 7, Criminal Code of Russian Federation, it is obvious that «other criminal legal steps» are introduced for committing a *crime*. In such situation a number of cases of applying medical coercive steps (such as to those of diminished responsibility, to those who were of sound mind when committing crime, but later had a mental disease) by logic of legislator may not be regulated by criminal law provisions and, thus, they do not refer to the area of criminal law enforcement. Really, some scholars who emphasize this fact note that other criminal legal steps should include those which are criminal legal by themselves, i.e. steps whose application results in change of criminal legal status of person. I. E. Zvecharovskiy supposes that criminal legal steps should not include medical coercive steps as well as re-educatory steps applied to juveniles[3]. In the past some authors even offered to relocate the provisions of criminal legislation relating to medical coercive steps into respective sections of civil, civil procedural legislation and health protection legislation[4]. However, at the present stage of criminal legislation development S. I. Kurganov (Obviously under effect of legislative approach to solution of the problem of other criminal legal steps) concludes just opposite: from the fact that Part 2, Article 2, Criminal Code of Russian Federation tells of criminal legal steps for committed crime, it does not follow that all steps of criminal legal character shall be applied only for committing crime[5].

By trying to find a way out from situation of misfit between legislative approach to understanding of other criminal legal steps and some cases of application of medical coercive steps as

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ности: уголовно-правовые, криминологические и уголовно-исполнительные аспекты : материалы 3-го Рос. конгр. уголов. права, 29–30 мая 2008 г. – М. : Проспект, 2008. – С. 83–84.

[1] Батанов А. Н. Понятие и виды иных мер уголовно-правового характера / А. Н. Батанов, М. Ф. Костюк, В. А. Посохова, Т. М. Калинина. – М. : Проспект, 2011. – 320 с.; Калинина Т. М. Иные меры уголовно-правового характера : науч.-практ. коммент. / Т. М. Калинина, В. В. Палий. – М. : Проспект, 2011. – 150 с.

[2] Коновалова И. Принудительные меры воспитательного воздействия как инструмент предупреждения корыстных преступлений несовершеннолетних [Электронный ресурс] / И. Коновалова // Право и жизнь. – 2008. – № 125 (8). – Режим доступа : http://www.law-n-life.ru/arch/n125.aspx. – Загл. с экрана.

[3] Звечаровский И. Меры уголовно-правового характера: понятие, система, виды / И. Звечаровский // Законность. – 1999. – № 1. – С. 37.

[4] Беляев В. Г. Уголовное право и невменяемость / В. Г. Беляев // Вопросы профилактики общественно опасных действий, совершаемых психически больными / отв. ред. Г. А. Макеев ; редкол.: Н. М. Ахмедов, В. Г. Беляев и др. – Волгоград : Изд-во Волгогр. мед. ин-та, 1981. – С. 14–15.

[5] Курганов С. Меры уголовно-правового характера / С. Курганов // Уголовное право. – 2007. – № 2. – С. 59.

well as cases of confiscation of property and re-educatory coercive steps, V. D. Filimonov proposed, in particular, such a compromise: medical coercive steps and confiscation of property are assigned *not for committing crime, but in connection with committing crimes or other socially dangerous deeds*. This scholar reasons that those steps should be regarded as security measures, as criminal legal steps by themselves may not exist outside the area of criminal legal relations. In turn, coercive re-educatory steps should refer to administrative responsibility steps assigned by court[1]. At the same time the scholar emphasizes that, though all the above steps may not be treated as criminal legal measures, it is quite reasonable to refer them to measures of criminal legal substance, and, therefore, it is quite substantiated to include them to the text of criminal legislative act (for instance, medical coercive steps define the grounds for application of criminal responsibility and punishment; norms relating to confiscation of property permit to find difference between confiscation as a measure of criminal punishment and acts aimed to withdraw means of committing crime from criminal as well as property acquired as a result or committing crime or intended for committing crime; possibility of juvenile reformation by application of coercive re-education steps to him serves as a ground for his liberation from criminal responsibility and punishment)[2].

In any case, a reasonable question arises: what namely must be referred to other criminal legal steps which are directly specified in criminal law, and is this list exhaustive? «If we exclude medical coercive steps, re-educatory coercive steps and confiscation of property from «other criminal legal steps», then which «other criminal legal steps for committing crime» are specified in Part 2, Article 2, Criminal Code of Russian Federation?»[3] – fairly asks S. I. Kurganov.

[1] Филимонов В. Понятие и классификация мер уголовно-правового характера / В. Филимонов // Уголовное право. – 2012. – № 4. – С. 37. *Remarks.* A similar attitude as regards treatment of coercive medical steps as safety measures is inherent in a number of other scholars, in particular, G. V. Nazarenko, A. B. Medzhidova, R. I. Mikheev, S. V. Polubinskaya etc. (more details see: Энциклопедия уголовного права. – Т. 12 : Иные меры уголовно-правового характера. – СПб. : Изд. проф. Малинина ; СПб ГКА, 2009. – С. 42; Меджидова А. Б. Принудительные меры медицинского характера / А. Б. Меджидова // Российская юстиция. – 2007. – № 1. – С. 38; Российское уголовное право : курс лекцій : в 2 т. – Т. 2 : Наказание / под ред. А. И. Коробеева. – Владивосток : Изд-во Дальневост. ун-та, 1999. – С. 413-414; Курс российского уголовного права. Общая часть / С. В. Бородин, С. Г. Келина, Г. Л. Кригер, В. Н. Кудрявцев и др. ; под ред. В. Н. Кудрявцева, А. В. Наумов. – М. : Спарк, 2001. – С. 729 etc.]) By the way, criminal law of many countries also contains the concept of «safety measures», including «medical safety measures». This term is used, in particular, in legislation of USA, France, Spain, Bulgaria, Republic of Belarus. In some works of legal scholars such steps are called «social protection measures».

[2] Филимонов В. Понятие и классификация мер уголовно-правового характера / В. Филимонов // Уголовное право. – 2012. – № 4. – С. 37–38.

[3] Курганов С. Меры уголовно-правового характера / С. Курганов // Уголовное право. – 2007. – № 2. – С. 62.

As we see, in today's Russian criminal law science the constant point of discussion in our subject topic is the problem of contents of the concept «other criminal legal steps», of the list of its components. Analysis of opinions on those components brings us to the conclusion that not only substantially different interpretations of this concept exist based on different understanding of nature and grounds for application of these or those steps, but different combinations of these steps are proposed which call forth respectively the contents of this concept. Such fact may serve as a certain line of division in the diversity of proposed positions: whether a scholar keeps to, so to say, traditional view of the problem formed under the influence of solution of this problem by legislator, or the researcher supports a wider approach to definition of types of other criminal legal steps, manifested, in particular, in expansion of the list of such steps by adding therein such steps which fully belong to punishability.

An example of traditional approach (with due consideration of recent legislative innovations) is the position of Russian researchers S. I. Kurganov and F. B. Grebenkin who express solidarity with legislative approach to definition of the circle of other criminal legal steps and suppose that such steps include medical coercive steps and confiscation of property[1].

A representative of broad approach may be above-cited V. D. Filimonov who noted that other criminal legal steps may be only measures of criminal responsibility applicable for committing crime as well as punishments. Issuing from this, he proposes to treat suspended sentence and deferred imprisonment as of other criminal legal steps in the sense of Part 2, Article 2 and Article 6, Criminal Code of Russian Federation[2]. From speculation of I. E. Zvecharovskiy we may conclude that other criminal legal steps embrace all forms of liberation from criminal responsibility and punishment such as suspended sentence, substitution of unserved prison term for a milder (stricter) punishment, expungement of conviction[3]. At the same time some authors express an opinion that other criminal legal steps include coercive re-educatory steps and coercive medical steps[4], extradition of a person accused of committing

[1] Курганов С. Меры уголовно-правового характера / С. Курганов // Уголовное право. – 2007. – № 2. – С. 59; Гребенкин Ф. Б. Меры уголовно-правового характера и их применение / Ф. Б. Гребенкин. – М. : Юрлитинформ, 2013. – С. 219-287.

[2] Филимонов В. Понятие и классификация мер уголовно-правового характера / В. Филимонов // Уголовное право. – 2012. – № 4. – С. 40.

[3] Жук І. В. Примусові заходи медичного характеру та примусове лікування у кримінальному праві України : автореф. дис. … канд. юрид. наук / І. В. Жук ; Київ. нац. ун-т внутр. справ МВС України. – Київ, 2009. – С. 36-37.

[4] Колмаков П. Понятие и сущность принудительных мер медицинского характера / П. Колмаков // Уголовное право. – 2003. – № 3. – С. 28; Российское уголовное право : учебник : в 2 т. – Т. 1 : Общая часть / Г. Н. Борзенков и др. ; под ред. Л. В. Иногамова-Хегай, В. С. Комиссарова, А. И. Рарога. – М. : ТК Велби ; Проспект, 2006. – С. 14.

crime to foreign state[1] as well as suspended sentence and deferred imprisonment for pregnant women and mothers of minor children[2].

As we see, in almost any attempt to fix the list of criminal legal steps including those with pronoun «other», the representatives of broad approach on a par with problem of their definition dwell on the topic of eventual correlation of those steps with forms of criminal responsibility execution. Thus, for instance, they state that other criminal legal steps are applied, as a rule, instead of criminal responsibility; coercive medical steps, confiscation of property, re-educative steps applied to juveniles, suspended sentence, deferred imprisonment for pregnant women and mothers of minor children, parole, certain additional punishments and conviction may be treated as a peculiar form of criminal responsibility execution; only coercive steps applied to mentally ill persons are not a form of criminal responsibility execution[3]. From the last sentence it seems quite logical to refer all other criminal legal steps to forms of criminal responsibility execution.

Many scholars treat such way to fixation of the list of all other criminal legal steps (by finding their eventual correlation with forms of criminal responsibility execution) as methodologically correct and logically substantiated (K. A. Buzanov, I. E. Zvecharovskiy, S. V. Zemliukov, T. M. Kalinina, I. F. Konovalova, S. I. Kurganov, V. V. Paliy etc.)

Many Ukrainian scholars performed and still continue studies of particular components which Ukrainian legal doctrine refers to criminal legal consequences (Yu. V. Baulin, V. N. Burdin, N. A. Gutorova, A. A. Zhitnyi, I. V. Zhuk, M. M. Knyha, L. N. Krivochenko, V. V. Len', A. A. Muzyka, V. A. Navrotskiy, N. I. Panov, Yu. A. Ponomarenko, A. M. Sobko, E. V. Fesenko, N. I. Khavroniuk, P. V. Khriapinskiy, O. A. Yamkova, S. S. Yatsenko, A. N. Yashchenko etc.) The analysis of Ukrainian scholarly sources witnesses that the problem of other criminal legal consequences is still far from its final solution, to say nothing of domination of this or that formed position, at least, relative the list of such consequences. *In this plane in Ukrainian criminal law science a more narrowly pragmatic approach is inherent aimed at discernment, though comprehensive, of only one type of other criminal legal consequences*.

Only a few studies of Ukrainian authors may be treated as those attempting

[1] Кримінальне право України : Загальна частина: підручник / Ю. В. Александров, В. І. Антипов, М. В. Володько та ін. ; відп. ред. Я. Ю. Кондратьєв ; наук. ред. В. А. Клименко, М. І. Мельник. – Київ : Правові джерела, 2002. – С. 10.

[2] Гришко А. Я. Российское уголовно-исполнительное право : курс лекций / А. Я. Гришко, А. А. Захаров, В. Д. Иванов, А. И. Шилов ; под ред. О. В. Филимонова. – М. : Юрид. ин-т МВД России, 2000. – С. 16.

[3] Багрий-Шахматов Л. В. Уголовная ответственность и наказание / Л. В. Багрий-Шахматов. – Минск : Вышэйш. шк., 1976. – С. 142; Келина С. Г. «Иные меры уголовно-правового характера» как институт уголовного права / С. Г. Келина // Уголовное право: стратегия развития в XXI веке : материалы 4-й Междунар. науч.-практ. конф. – М. : ТК Велби ; Проспект, 2007. – С. 287.

to submit a more or less systemic list of other criminal legal consequences. Among recent works we may discern a scientific publication by N. I. Khavroniuk named «Criminal Legal Effect Steps: What They Are». In this publication the author notes, in particular, that to such steps belong: conviction, coercive re-educatory steps, except cases when they are applied to a person who committed socially dangerous deed before attainment of criminal responsibility age; medical coercive steps; compulsory treatment; confiscation (exemption) and destruction of certain objects, tools, raw and auxiliary materials for their preparation[1].

If we look at Ukrainian literature on criminal law published within recent time and also possessing a certain systemic approach to the problem discussed herein, we may conclude that other criminal legal consequences may include at least medical coercive steps, compulsory treatment and coercive re-educatory steps. For example, V. M. Trubnikov and A. A. Yarovyi clearly emphasized that such consequences are first of all medical coercive steps, compulsory treatment and coercive re-educatory steps[2]. I. V. Zhuk specially noted that in criminal legal aspect medical coercive steps and compulsory treatment are not punishments; they refer to other criminal legal consequences of a socially dangerous deed[3]. We must note that a peculiarity of Ukrainian legislation approach to definition of other criminal legal consequences is compulsory treatment as a separate form of such consequences. By the way, compulsory treatment steps are specified in Criminal Code of Republic of Belarus, but from legislative clauses of this Code it follows that compulsory safety and treatment steps are a comprehensive indivisible set of steps applied to mentally ill people who committed socially dangerous deeds, persons of diminished responsibility as well to persons suffering chronic alcoholism, drug addiction or addiction to inhalants. Actually Criminal Code of Belarus treats as safety steps what under Ukrainian legislation is called medical coercive steps. In turn, in Criminal Code of Armenia coercive medical steps and compulsory treatment are used as synonyms.

In relating medical and re-educatory coercive steps to other criminal legal consequences we must note that such steps are applied not only in connection with committing crime, but in cases of committing socially dangerous deeds specified in Criminal Code by such persons as mentally ill or minors under criminal responsibility age. This means, as we see, that this institute is connected not only with crime abut also with so-

[1] Хавронюк М. І. Заходи кримінально-правового впливу: які вони бувають / М. І. Хавронюк // Юрид. вісн. України. – 2013. – №21 (934). – С. 6.

[2] Трубников В. М. Принудительные меры медицинского характера и принудительное лечение: проблемы, поиски, решения / В. М. Трубников, А. А. Яровой // Право і безпека. – 2003. – №2’3. – С. 138.

[3] Жук І. В. Примусові заходи медичного характеру та примусове лікування у кримінальному праві України : автореф. дис. … канд. юрид. наук / І. В. Жук ; Київ. нац. ун-т внутр. справ МВС України. – Київ, 2009. – С. 6.

cially dangerous deeds which are not treated as crimes under criminal law but have indications specified in Special Part of Criminal Code[1]. In such cases an impression may emerge that criminal law encroaches its own «competence». In spite of quite possible similar conclusion we must emphasize once again that application of such steps is connected with committing socially dangerous deeds whose evaluation is just inherent in criminal law. *This fact witnesses in favor of legitimate «build-in» of norms of criminal legal consequences, some of them not belong by nature to criminal law, into the matter of Ukrainian legislation of criminal responsibility.*

As regards *confiscation of property*, within the time period under study (from establishment of Soviet power in most part of Ukraine and up to this day) it was first referred to system of punishments, later on to reformatory type social protection measures and then again to system of punishments. In doing this Soviet criminal law provided so called special confiscation of property, its nature and place in the system of judicial institutes being an object of argument up to this day. In Scientific Practical Comments to Criminal Code of Ukraine (2013) it is noted that special confiscation as a special coercive step embraces objects recognized as material evidence in case (Article 98, Criminal Procedural Code) and applied on the grounds of Part 9, Article 100, Criminal Procedural Code. At the same time this type of confiscation is specified in criminal law (in more than 60 sanctions of articles in Special Part of Criminal Code)[2].

If we turn to criminal legislation of countries of the former USSR, in Criminal Code of Russian Federation confiscation of property («special confiscation») refers to other criminal legal steps, and in 2006 Section VI, Criminal Code of Russian Federation was supplemented with Chapter 15[1] of the same name «Confiscation of Property». As noted above, confiscation of property was exempted from the list of punishments. In Criminal Code of Moldova special confiscation is treated just as safety measure, but cases of its application often coincide with those specified in Criminal Code of Russian Federation. Article 106, Criminal Code of Moldova, «Special Confiscation» contains both definition of such confiscation and exhaustive list of property liable to special confiscation. By the way, such legislative solution has long existed in theory. In special literature long time ago opinions were expressed that general confiscation of all or a part of property from guilty person was inexpedient and should be substituted for special confiscation (of tools and objects of crime), because general confiscation often violates property interests of innocent persons as it exempts objects and things acquired in legal

[1] Скрипченко Н. Ю. К вопросу о понятии мер уголовно-правового характера / Н. Ю. Скрипченко // Ежегодник уголовного права. – 2012. – №6. – С. 296–301.

[2] Кримінальний кодекс України. Науково-практичний коментар : у 2 т. / за заг. ред. В. Я. Тація, В. П. Пшонки, В. І. Борисова, В. І. Тютюгіна. – 5-е вид., допов. – Х.: Право, 2013. – Т. 1. – С. 235.

way[1]. As we see, «general» and «special» confiscation, their legal nature, correlation, etc. form a variegated problem whose solution requires systemic approach to such questions as contents of confiscation, its types, definition of belonging to a certain branch, etc. In any case, in trying to find the truth in exclusive circle, as it may seem at first glance, we see a methodologically correct way in separation of possible types of confiscation in legislation. This is just the way Ukrainian legislator took, as we shall show below. The criminal responsibility legislation of Ukraine, first, directly fixed confiscation of property as a type of punishment. Second, gave a definition and a list of the cases of confiscation of property which, not being punishment, refer to other criminal legal consequences and termed as «special confiscation». At the same time the provisions of criminal procedural legislation actually provide for special confiscation. Thus, issuing from practice of recognition as material evidence of this or that exempted property on the grounds of Article 100, Criminal Procedural Code of Ukraine, in criminal process, special confiscation refers to cases of exemption: 1) of money, valuables and other property which belong to the accused and were found, produced, adapted or used as means or tools of committing a criminal deed; 2) of money, valuables and other property which were earmarked to persuade a person to committing a criminal deed, finance and/or ensure material support of criminal deeds or reward for committing same; 3) of property exempted from circulation with the purpose of subsequent transmission to respective institutions or destruction; 4) of money, valuables and other property which were objects of criminal offence or other socially dangerous deed, with the purpose to return them to legitimate owners or, if the latter could not be found, to transfer them to government revenue; 5) of money, valuables and other property which were acquired due to committing crime as well as incomes from them in order to transfer them to government revenue.

By the way, in some time an opinion was expressed in legal literature that the incumbent criminal legislation of Russia and Ukraine contains several distinct types of confiscation of property. The first of them is so called confiscation of property beyond the limits of criminal law (special confiscation); the second is confiscation of property within the limits of criminal law as «other criminal legal step», namely, as protection measure against abuse by defendant of his right of property on certain items; the third one (only in Criminal Code of Ukraine) criminal legal confiscation as a form of punishment[2]. Under such approach to the

[1] Иванов К. Н. Должна ли сохраняться конфискация имущества как вид уголовного наказания / К. Н. Иванов // Советское государство и право. – 1958. – №9. – С. 100–101; Цветанович А. Л. Дополнительные наказания в советском уголовном праве / А. Л. Цветанович. – Калининград : КГУ, 1980. – С. 41–43.

[2] Пономаренко Ю. А. Конфискация имущества в уголовном праве и законодательстве / Ю. А. Пономаренко // Противодействие преступности: уголовно-правовые, криминологические и уголовно-исполнительные аспекты : материалы 3-го Рос. конгр. уголов.

nature of confiscation the problem of referring special confiscation to other criminal legal consequences would be totally eliminated, as confiscation related to the second of the above categories is manifested in exemption of means and tools of committing crime that are legitimate property of a person. Simultaneously it is noted that special confiscation is a case of a norm beyond the limits of criminal law being fixed in criminal law.

Certain clarity in finding legal nature of special confiscation was brought by Ukrainian legislator. In April 2013 Supreme Rada of Ukraine adopted Law of Ukraine «On Bringing Amendments to Criminal and Criminal Procedural Codes of Ukraine (relating to Execution of Action Plan on Liberalization of European Union Visa Regulations for Ukraine)»[12]. As specified in Explanatory Note to draft of said Law, the necessity of its adoption was caused by necessity of bringing Ukrainian legislation norms into conformity with provisions of Anti-corruption Criminal Convention by introduction of special confiscation procedure for property and incomes obtained from corrupt deeds.

In order to attain this purpose, first, the name of Section XIV, Criminal Code, «Medical Coercive Steps and Compulsory Treatment» was substituted for «Other Criminal Legal Steps», the section was supplemented with new Articles 96^1 «Special Confiscation» and 96^2 «Cases of Special Confiscation Application» which define the concept of special confiscation, its object and application procedure; second, sanctions of some articles in Special Part, Criminal Code of Ukraine (names of some articles were amended with exclusion of term «bribe») were supplemented with provisions of special confiscation (Article 364 «Power or Service Position Abuse», Article 366 «Service Forgery», Article 368 «Acceptance of Offer, Promise or Obtaining of Illegal Profit by Civil Servant», 368^2 «Illegal Enrichment», 369 «Offer or Granting of Illegal Precedence to Civil Servant». 369^2 «Abuse of Influence»); third, the new edition contains respective articles of Criminal Procedural Code of Ukraine which regulate application of special confiscation of particular property, such as procedural mechanism of its support. Adoption of this document brought to introduction of an effective mechanism for confiscation of property and income obtained from corruption deeds which must in general positively affect the decrease of corruption level in the state, favor overcoming of negative consequences from corruption deeds, and minimizes damage to state as caused by corruption deeds of government and local self-administration officials[2].

права, 29–30 мая 2008 г. – М. : Проспект, 2008. – С. 651.

[1] Про внесення змін до Кримінального та Кримінального процесуального кодексів України (стосовно виконання Плану дій щодо лібералізації Європейським Союзом візового режиму для України) : Закон України від 18 квітня 2013 р. № 222-VII // Офіц. вісн. України. – 2013. – № 46. – Ст. 1629.

[2] *Remarks*. We turn your attention to terminology used in this Law. The new section is called «Other Criminal Legal Steps», though Part 3, Article 3, Criminal Code of Ukraine specifies «other criminal legal *consequences» (italicized by us).* Obviously such approach is caused by certain influence of Russian legislative practice.

In May 2014 some amendments were brought to this legislative act by Law of Ukraine «On Bringing Amendments to Certain Legislative Acts of Ukraine in the Field of Anti-Corruption Policy in Connection with Execution of Action Plan on Liberalization of European Union Visa Regulations for Ukraine»[1]. First, a circle of criminal deeds involving eventual application of special confiscation was extended (Articles 354 «Subornation of Employee of Enterprise, Institution or Organization», 364[1] «Abuse of Power by Official of Private Legal Person Irrespective of Organizational Legal Form», 365[2] «Abuse of Power by Persons Rendering Public Services»); second, application of special confiscation was excluded for committing service forgery; third, special confiscation may be applied not only under the proviso of committing crimes specified in Article 354 and Articles 364. 364[1], 365[2], 368-369[2], Section XVII, Special Part, Criminal Code of Ukraine, but also in case of committing a socially dangerous deed falling under indication of deeds specified in the above articles, as well as in cases when a person is exempted from criminal responsibility due to minor age of criminal responsibility or mental disease, or is liberated from criminal responsibility or punishment on the grounds specified in this code, except cases of liberation from criminal responsibility due to expiry of prescription term.

Something should be told about certain innovations in criminal codes of the republics of former USSR as regards the steps which relate to other criminal legal consequences specified in their criminal legislation. Among such innovations we may name obligatory chemical castration of persons who rape minor age children according to Criminal Code of Moldova. Noteworthy to say than such step was later admitted unconstitutional by Constitutional Court of Moldova[2]. It is interesting that among other criminal legal consequences (safety measures in Moldovan Criminal Code terminology) a special chapter specifies coercive medical and re-educatory steps, banishment and special confiscation. Special Chapter VIII[1] which supplemented Criminal Code of Latvia in 2005 specifies coercive steps applied to legal persons, such as liquidation of legal person, limitation of rights, confiscation of property and monetary penalty.

In May 2013 Supreme Rada of Ukraine adopted another regulatory act directly connected to the problem of other criminal legal consequences. We mean Law of Ukraine «On Bringing Amendments to Criminal and Criminal Procedural Codes of Ukraine (relating to Execution of Action Plan on Liberalization of European Union Visa Regulations for Ukraine as regards Responsibility of Legal Persons)»[3] aimed at introduction

[1] Про внесення змін до деяких законодавчих актів України у сфері державної антикорупційної політики у зв'язку з виконанням Плану дій щодо лібералізації Європейським Союзом візового режиму для України : Закон України від 13 травня 2014 р. № 1261-VII // Офіц. вісн. України. – 2014. – № 45. – Ст. 1182.

[2] Конституційний суд проти хімії // Юрид. вісн. України. – 2013. – № 28. – 13–19 лип. – С. 9.

[3] Про внесення змін до деяких законодавчих актів України щодо виконання Плану дій щодо лібералізації Європейським Союзом візового режиму для України стосовно

of possibility to *apply criminal legal steps to legal persons* in connection with committing by their authorized persons on behalf and in the interests of legal persons of any of crimes specified in Articles 209, 306, Parts 1 and 2 of Article 368^2, Parts 1 and 2 of Article 368^4, Articles 369, 369^2, Criminal Code, as well as Articles 109, 110, 113, 146, 147, 160, 260, 262, 436, 437. 438, 442, 444, 447, or committing by their authorized persons on behalf of legal persons of any of crimes specified in Articles 258-258^5. The above Law supplemented Criminal Code of Ukraine with new Section XIV-1 «Criminal Legal Steps Applicable to Legal Persons» as well as specifies definitions and general rules for application to legal persons of such criminal legal steps as penalty, confiscation of property, and liquidation of legal person. Law of Ukraine of May 23, 2013 # 314-VII had to come into force from September 1, 2014. But a year later (May 2014) this document was supplemented by some new provisions by the above-mentioned Law of Ukraine «On Bringing Amendments to Certain Legislative Acts of Ukraine in the Field of Anti-Corruption Policy in Connection with Execution of Action Plan on Liberalization of European Union Visa Regulations for Ukraine». In particular, it specifies that grounds for application of criminal legal steps to legal persons may be negligence in execution of obligations entrusted by law or statutory documents of legal person to its authorized person as regards taking steps to prevent corruption which brought to committing any of crimes specified in Articles 209, 306, Parts 1 and 2 of Article 368^2, Parts 1 and 2 of Article 368^4, Articles 369, 369^2, Criminal Code. This Law supplementing in essence the provisions of Law of Ukraine «On Bringing Amendments to Criminal and Criminal Procedural Codes of Ukraine (relating to Execution of Action Plan on Liberalization of European Union Visa Regulations for Ukraine as regards Responsibility of Legal Persons)»of May 23, 2013 came into force on May 14, 2014.

We suppose that those regulatory acts witness a compromise approach to the problem of establishment of legal person responsibility by application of criminal responsibility legislation. One side of this compromise is formed by a group of scholars who express radical position in criminal law doctrine which comes to teaching that limiting of circle of crimes to only natural persons does not reveal the totality of causes of actual socially dangerous consequences containing not only in behavior of accused person, but in activity of the whole organization which he represents[1]. Therefore, establishment of *criminal* responsibility of legal persons will enable prompt and inevitable responsibility, in particular, for environmental, some commercial, IT and other crimes[2] (*italicized*

відповідальності юридичних осіб : Закон України від 23 травня 2013 р. № 314-VII // Відом. Верхов. Ради України. – 2014. – № 12. – Ст. 183.

[1] Тер-Акопов А. А. Преступление и проблемы нефизической причинности в уголовном праве / А. А. Тер-Акопов. – М. : Юркнига, 2003. – С. 467.

[2] Антонова Е. Ю. К вопросу о целесообразности уголовной ответственности юридических лиц / Е. Ю. Антонова // Уголовное

by us). Adepts of this approach in Ukraine are, in particular, B. M. Hrek, V. K. Hryshchuk, V. N. Kuts, L. I. Shekhovtsova etc. Another side of this compromise is a numerous group of those scholars who explicitly oppose the establishment of criminal responsibility for legal persons. Obviously the legislator many times came across the question of establishment of criminal legal coercive steps in relation to legal persons in somewhat alleviated form; in fact, the text of the above Law does not contain the term «criminal responsibility of legal persons» which actually was a stumbling stone. Instead of this the legislator uses term «steps of criminal legal character». Such a solution may be an attempt of authors of this Law to ensure loyal approach of their opponents to those innovations which, as we must note, correspond to the provisions of international legal documents. If we turn to the texts of such international documents ratified by Ukraine as Corruption Struggle Criminal Convention of January 27, 1999, UN Convention against Transnational Organized Crime of November 15, 2000 and UN Convention against Corruption of October 31, 2003, we shall see that they do not demand establishment of direct *criminal* responsibility for legal persons. Therefore, we may conclude that the above-mentioned conventions do not oblige Ukraine to establish direct *criminal* responsibility of legal persons for committing criminal offences, they only advise to select the most efficient type of responsibility of legal persons do discretion of particular states.

By the way, scientific discussions on this problem affect legislative practice. Thus, not once (and not only at legislative level) national legislators hesitated in search of the best solution of this situation so that legal persons might be called to responsibility. As an example we may name Law of Ukraine «On Responsibility of Legal Persons for Committing Corrupt Offences» of June 11, 2009 # 1507-VI which lost validity four years later: it specified direct criminal responsibility of legal persons.

And the last question: is it necessary to «gather» all other criminal legal consequences within one section of criminal responsibility law, as it is done in criminal codes of a number of countries? Obviously, the problem of arrangement of regulatory norms in Criminal Code must be solved in accordance with national legal traditions of a given country. In Ukraine criminal legal consequences of committing a socially dangerous deed have never been placed to a separate section (chapter). Those consequences, as we mentioned not once, are quite variegated as regards their nature, purpose, grounds of application, etc. Therefore, deliberate establishment of another special section in Criminal Code will look too artificial. Excluding superficial, quite mechanistic combination of provisions, it would be quite difficult to find any logic in necessity of such step.

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право: стратегия развития в XXI веке : материалы 4-й Междунар. науч.-практ. конф. – М. : ТК Велби ; Проспект, 2007. – С. 154.

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Modernization of the doctrine of contemporary criminology in the paradigm of social naturalism

An amount of criminality in modern Ukraine and counteracting practice is in urgent need for adequate criminological doctrine. Without this doctrine practice is «blind». State policy in the sphere of combating crime may be adequate only if it is based on the adequate criminological doctrine. A historical example that confirms this one is the reform of state policy counteracting criminality in Europe under criminological doctrine formulated C. Beccaria based on the ideology of natural law of the Enlightenment XVII – XVIII centuries. Therefore, searching adequate criminological doctrine for Ukraine is a requirement of the time. In our view, the basis of the doctrine should be sought in the ideological context. Here is why!

Being endowed with will and consciousness, people have the ability to do both good and evil. Those manifestations of the will and consciousness, which provide a normal (that is, correspond to the nature of social life) existence of society is good and those that destroy it, is evil. And the most dangerous form of evil is criminality, including different types of genocide, terrorism, organized criminality, corruption, various disasters of criminogenic character (criminogenic accidents) etc. Criminality – are manifestations of such will and consciousness in man in the form of evil that society recognized as the most dangerous and, therefore, counteracting punishments governed by the special type of legislation – law on criminal responsibility.

Social life occurs as a struggle between good and evil. To the extent to which good wins to such the extent the society are progressing and, conversely, to the extent to which evil wins to such the extent the society are regressing.

This implies, in particular, the following conclusion: social progress in Ukraine is possible only in the case of successful counteracting criminality, which is the basis of criminological security as a component of national security.

The general feature of today's criminality in Ukraine is that, this is criminality of crisis type. What does this mean? This means that the modern criminality in Ukraine is generated by the social crisis and therefore gets worse it. The criminality of crisis type has the ability to stultify any reforms which would ensure social progress in Ukraine. Thus, there will be no progress in Ukraine until we have criminality in the form of crisis type. Therefore, the existence of criminality of crisis type is the political problem №1 in our country. Only such political force which can eliminate this crisis inducing influence of its criminality on public life may direct Ukraine on the way of social progress. It can be done only in the case of existing a subsequent criminological doctrine that shall provide a proper understanding of causes and conditions that give rise to criminality of crisis type. As Heinrich Heine once said: «New ideas give us new eyes». In our view, the absence of new ideas that should be raised from the worldview context not enough in national criminology. Therefore, it does not adequately respond to the time challenges. This, in particular, led to that the practice counteraction criminality is not scientific in Ukraine and therefore is doomed to be ineffective. Thus, the doctrine of national criminology should be upgraded to ensure effective response to criminality in modern conditions.

How can this be achieved? First of all, it is necessary to establish the correct diagnosis of the «disease», by which the modern Ukrainian criminology was affected. It seems to be «positivism» is the diagnosis of the «disease» which affected Ukrainian criminology. Generally, it should be noted that «positivism» may be defined as the worldview ideology that represents visibility for reality. Positivism may take place in any science: physical, biological or social. The example of physical positivism may be, in particular, the geocentric scientific ideology which existed before the development of the Copernican heliocentric scientific ideology. Biological positivism was widespread in biological science before Darwin. A manifestation of social positivism was, for example, the idea that capitalism (due to its attributes – private property, market, and competition) generates the crime by itself (so-called «criminological fault» by Karl Marx, which was used for an apology of proletarian revolution.

In the history of criminological doctrine there also took place physical, biological and social positivism in the conceptions of causes and conditions have led to criminality. In particular, it was shown in the concepts presented by C. Montesquieu (as to criminogenic role of geographical factors), C. Lombroso (as to criminogenic role of biological factors), E. Ferri (as to criminogenic role of economic factors).

In the modern national criminology a great value acquired so-called eclectic

positivism, in the view of the «theory of factors» and does not distinguish causes and conditions have led to criminality. In other words, there is a condition in criminology when researchers «Can not see the forest for the trees». This positivist doctrine leads to voluntarism and utopianism in counteracting criminality, in practice and in particular, manifests in inadequate usage of means of criminal justice and ignoring non-repressive means in counteracting criminality. This happens in Ukraine now.

In view of the foregoing, one may be concluded: positivism, which affected the Ukrainian criminology leads to the fact that reforms in the sphere of counteracting criminality is a manifestation of a complex of willfulness and illusions of reformers who does not follow by the progressive criminological doctrine because they are in the captivity of positivism, that is, represents visibility for reality. A reformer without progressive doctrine being affected by positivism takes visibility for reality and looks like «Headless Horseman». It is possible to cure from the «diseases» of positivism only by the doctrines, which behind visibility may open reality. As, in particular, the experience of Enlightenment XVII – XVIII Centuries has shown, that such doctrine is the doctrine based on the naturalistic worldview, according to which criterion by which reality is to be distinguished from visibility are the laws of nature: real is only what consistent with the laws of nature, but what is not consistent is only visibility. This criterion at one time used C. Beccaria, having formulated new criminological ideas on the basis of naturalistic ideology of the Enlightenment. Under influence of these ideas the new «naturalistic» doctrine of counteracting criminality was developed, according to which, in particular, criminal justice in Europe has been reformed.

In our opinion, taking into account this ideological context, we should proceed in searching anti-positivistic doctrine to improve our national criminology. This modernization leads to the new criminological doctrine that gives a new view for an answer on the fundamental problems of criminology: a) what are causes and conditions give rise to criminality; b) what criteria belong to criminal; c) how to counter criminality. It seems that the «chain» of these three issues is that the second «link» should be taken into account in order to find the solution of the two others. Therefore, over the issue of «what criteria belong to criminal» searching the new criminological doctrine should be started.

Mankind has long been looking for an answer to the question whether there is any criterion, by possessing of which he or she commits a crime? It is believed in the Middle Ages, for example, that man is not possess by such characteristics and committing a crime by the person is a manifestation of the devil, that possessed him or her. That was a point of view on counteracting criminality in the middle Ages. C. Beccaria in opposing to this approach presented the doctrine according to which man by himself commits a crime and is its author, not the

devil possessed him or her. It was a progressive idea in criminology, which led to a revolution in the field of combating crime, particularly in criminal justice.

However, C. Beccaria, pointed out that criminal behavior – is displaying of criminogenic features belonging to the man himself, had not disclosed the substance of these features. An attempt to define these features was made by C. Lombroso. His researching work led him to the conclusion that these are the qualities that a person received under the birthing (the theory of born criminals «criminals born criminals»).And if the birthing of man is a biological act, this means, that criminogenic features a man receives at birth are biological. And only the one, who received them at birth, commits a crime.

The theory of born criminals was not confirmed, and the questions on the criminogenic features that affected (generated, gave rise to his criminal behavior) his criminal had been unanswered. However, rejecting the theory of born criminals has a great scientific importance because it excludes the hypothesis on biological characteristics of human nature that give rise to crime. As results there is only the one hypothesis on the social essence of criminogenic features of man that give rise to committing a crime. And this is the only direction by the way of which scientific research in criminology is carried out.

It is known that the results of any scientific investigation are determined by the methodological tool that is used by the researcher.

The criminology today has already accumulated the problems solution of which is only possible with using the new methodological tools. In our view, this should be done with the assistance of the so-called principle of social naturalism[1]. Using this principle in our criminological studies from 1990 facilitated to solve problems of criminology. According to the principle, social phenomena, including human behavior, should be overviewed as those that exist under the laws of nature. For everything material nature is the Supreme Legislator. This arises from the idea of the natural integrity of the world, according to which everything material in the world should exist according to the laws of nature. The aforesaid closely belongs to physical, biological and social phenomena. In the light of foregoing idea, the basic question of modern worldview should be solved, which may be formulated as follows: «Whether social is natural? ». On the basis of the right deci-

[1] For details on the principle of social naturalism, see O. M. Kostenko «Культура і закон – у протидії злу» [Culture and Law in Combatting Evil] (Kyiv, 2008), p. 352; Kostenko O. M. Основне питанняправознавства і кримінології з позиціїсоціальногонатуралізму [The main question of Law and Criminology From the View of Social Naturalism]in Антологія українськоїюридичної думки : В 10 т. [Antology of Ukrainian Legal Thought] – Том 10: Юридична думка незалежноїУкраїни [Legat Thought of Independent Uktaine: Vol.10] (Kyiv, 2005), pp. 658–675; Kostenko O. M. Принцип натуралізму в юридичнійнауці і кримінології [ThePrincipleofNaturalisminLegalSciencesandCriminology] in Правова система України: теорія і практика [LegalSystemofUkraine: TheoryandPractice], (Kyiv, 1993), pp. 390–392

sion of this worldview issue any doctrine in the social sciences, including law and criminology shall be grounded[1].

In the history of jurisprudence the examples of solution this question «Whether social is natural? » can particularly be found in the works of H. Grotius. It is obviously that H. H. Grotius solved this problem as follows: supposed social as natural. This conclusion follows from his thesis: ««Many people had tried to give this area (jurisprudence. –O. K.) scientific form, but nobody could do it, and, in truth, it is impossible to make otherwise as...to separate all that was resulted from the establishment, the fact that is originated from the natu[2].Researching of the context from which this thesis appeared suggests that H. Grotius, in this case, used the term «nature» in the meaning of «social nature».

The naturalness of social and, in particular, the existence of laws of social nature, admits and John. Locke comes to this conclusion: «The obligation of natural law do not cease to exist in society, they are only in many cases more clearly defined, and according to human laws are accompanied by well-known punishments in order to make them. Thus, the law of nature stands as an eternal guide to all men, legislators as much as for others. Those laws that they create for directing the actions of others have as well as their own actions and the actions of others, comply with the law of nature ...»[3].

Thus, in the views of both H. Grotius and J. Locke we can be found supporting the hypothesis of the existence of a social nature that exists by its own laws – the laws of social nature. The idea of the existence of laws of social nature is extremely productive and progressive. It is a tool to counter the positivist worldview, which opens the way to various manifestations of social willfulness and social illusions. There is well-known aphorism by Fyodor Dostoevsky that he stated in the novel «The Brothers Karamazov» as follows: «**If God** does **not** exist, **everything is permitted**! ». According to the social naturalism it can be paraphrased as follows: «If the law of social nature does not exist, people can do what they like».

Permissiveness – the basis of all social deviations in people behavior. The laws of social nature is not just give people the so-called «natural law», but

[1] As to the problem «Weather social is natural?»see., e.g.: Kostenko O. M. Соціальнийнатуралізм – світоглядмайбутнього [Social Naturalism – Worldview of the Future] in Вісн. Нац. акад. наукУкраїни [Herald of the National Academy of Ukraine], no. 10 (Kyiv, 2006), pp. 33–38; Kostenko O. M. Універсальнийнатуралізм – підґрунтянауковоїкультуриновоготипу [Universal naturalism – the Basis of the Scientific Culture of a New Type] in Вісн. Нац. акад. наукУкраїни [Herald of the National Academy of Ukraine], no. 10 (Kyiv, 2007), pp. 37–43; Kostenko O. M. Яквийтинашляхсоціальногопрогресу. 10 тездодискусіїщодоантикризовоїреформисоціальнихнаук [The way to Social Progress. 10 Thesises as to Discussion on Anti-crisisReform of Social Sciences] in Вісн. Нац. акад. наукУкраїни [Herald of the National Academy of Ukraine], no. 1 (Kyiv, 2009), pp. 78–86

[2] H. Grotius, On the Rights of War and Peace, (Moscow, 1956), p. 52

[3] John Locke, The Works of John Locke in 3 Volumes, (Moscow, 1988), p. 341

also to impose on him or her «natural duties», thus rejecting positivist «ground» for permissiveness.

Based on the idea of existing «social laws of nature», including, in particular, the laws of natural law, there should resolved the fundamental issues of jurisprudence and criminology, for example: «Why theft is a crime – because it is derived from the wishes and ideas of people, or because it violates the laws of social nature and people, regardless from their wishes and ideas, is made to be recognized a theft by the laws of nature as a crime? ». According to the social naturalism, which is based on the recognition of the existence of laws of social nature, theft violates a law of social nature, and people by the way of knowing this law should reflect it in the legislation that would provide by appropriate means to perform the law by the people in their social life. This concerns not only theft, but of any other crime as well.

The opposite position is a sign of positivism, which removes the idea of crime as a «product» will and consciousness, thus ignoring the existence the laws of social nature.

The dualist formula «Nature and Society» is a positivist mistake because deduces society beyond the «nature» and thus denies that society – is also a «nature», however a different from physical and biological. If we assume that society –«not the nature», in this case there only remains to be the product of human tyranny and illusions. However, the society is the highest form of «nature» that imposes on the physical and biological forms of «nature», but does not belong to any of them. Human society is different from the physical and biological «nature» but not that it is not «natural», society is the highest form of «nature» that arises as a result of physical and biological forms of «nature» and thus is in the genetic linkage with them.

Social naturalism makes it possible to see that there exist, so speaking, not two «natures» – physical and biological – but three – physical, biological, and social. And this «third nature» (that is, social) does not sink below the first two but, on the contrary, rises above them as the highest and exists according to its own natural laws inherent to it.

By forming hierarchical layer between physical nature – biological nature – social nature, these three «nature» are genetically linked between each other, because biological is the result of physical, and social – is the result of biological. Thus, according to the principle of social naturalism social phenomena are not beyond the scopes of nature – they are natural, like any others in the world. But the recognition of their naturalness does not mean that they are thus «fallen» to the physical or biological nature. Therefore, social naturalism is not «physicogization» or «biologization» of social phenomena as it may seem at first glance, that it does not lead to reductionism.

Based on the doctrine of social naturalism, man is – «three-dimensional» creature: it is formed of three layers – 1) a layer of «physical thing»; 2) a layer of «biological creature»; 3) a layer of «social person». This conclusion is important for understanding the mechanism

of human behavior. Human behavior involves all of these three layers. But criminal (that is, socially significant) character of human behavior can be defined only by the layer that is called «social person». In other words, criminal character of human behavior is determined by the characteristics of the «social person» (not physical or biological characteristics of human). The essence of the «social person» consist in his human will and consciousness, they form a layer in man «social person». Thus, we can conclude: what are will and mind in man – the same are his social behavior as a manifestation of his will and consciousness.

This finding, in turn, suggests that criminal behavior – is a manifestation of certain characteristics of «social person», that are characteristics of his will and consciousness, influencing on the person behavior criminal character. We believe that «social identity», which has the following properties, will and consciousness, which may provide on the behavior of the human nature of social pathology, should be called «sociopathic person». From the other hand, if these characteristics in will and consciousness are absent then we may say in opposition to «sociopation» that there is «socionomion», that is, social norm.

A notion of «sociopathic personality» directs the researcher to the knowledge of the characteristics of persons which may appear in the future in the form of crime committed by a person. This opens up opportunities for crime prophylaxis. A notion of «criminal» restricts the researcher by the knowledge of personal characteristics of a person, which has become a criminal (who committed a crime), and notion of «criminogenic person» implies the existence special characteristics in the person that can generate no other then criminal conduct but it is not comply with reality .

What should be the characteristics of will and consciousness that may clearly create a sociopathic person and are able under certain conditions manifest in a form of committing an act that is a social pathology? The answer to this question is also, in our view, should be found by using methodological tools based on the principle of social naturalism. However, the answer to this question depends on solving by using the principle of social naturalism so-called «Basic question of criminology», which can be represented as follows: «The crime – is a violation of the laws of social nature or criminal legislation formulated by the people, or both? ».

According to the principle of social naturalism this problem has a solution: «A crime – is a guilty violation of the laws of social nature, known and embodied by the people in the law on criminal responsibility». If a crime – is a guilty violation of the laws of social nature, it means that the will and consciousness that are manifested in the form of crime have the abilities that oppose them to the laws of social nature. Such characteristics have the will which is in a state of willfulness and consciousness in a state of illusion, forming a single complex, which may be called as the «complex of

willfulness and illusions»[1] . The complex that is formed in the structure of «social person» is «embryo» of behavior that violates the laws of nature and therefore determines as a violation of social norms (religious, moral, legal, etc.). According to the socio-naturalistic doctrines a person of criminal defines as a person who has a set of tyranny and illusions, which he has shown in the form of a crime, and according to the positivist doctrine, a criminal – is a person who committed an act which violates existing legislation on criminal responsibility. In other words, according to the socio-naturalistic doctrine, a crime – is a manifestation of sociopation (complex of willfulness and illusions) of a person in the form of committing an act under the law on criminal responsibility and, according to the positivist doctrine of crime – is a manifestation of «free will» of a person committing the act, provided by the existing legislation on criminal responsibility. This is the difference between positivist and socio-naturalistic concepts of «criminal».

By the way, according to the concept of «complex of willfulness and illusions» the problem of «free will» of a criminal should be addressed in criminology as follows: any crime should be overviewed as a manifestation of free will, which is in a condition of willfulness. Otherwise – there is no guilt of a person in a crime committing. Guilt in a crime – this is always a manifestation of the complex of willfulness and illusions in the form of committing crime.

If human security in society means the ability to live in harmony with the laws of Nature, antisocial personality disorder (when people affected by the complex of willfulness and illusions) should be recognized as the major criminological threat to criminological security, which is a component of national security. Criminological security, in our opinion, may be defined as a state of order of human relations, based on the laws of social nature (including the law of natural rights) against encroachment stipulated in the law on criminal responsibility. Peoples affected by the set of willfulness and illusions – sociopathic individuals – are a social source of all threats to the individual and society as a whole. Any social evil is a manifestation of antisocial personality disorders.

Thus, according to the principle of social naturalism the antisocial personality disorders – is a discrepancy will and consciousness with the natural laws of social life of people (including the laws of natural law, represented in the form of law on criminal responsibility). This inconsistency leads will to a state of willfulness, and consciousness – to a state of illusion creating so-called «complex of willfulness and illusions». This

[1] A notion of the «Complex of Willfulness and Illusions» was formuleted, particular, in the book.:Kostenko A. N. Криминальныйпроизвол (социопсихологияволиисознанияпреступника) [Criminal Willfulness (Socio-Psychology of Will and Consciousness of a Criminal], (Kyiv, 1990), p. 147; Kostenko O. M. Культураізакон – упротидіїзлу [Culture and Law in Combatting Evil], (Kyiv, 2008), 352 p.; Kostenko A. N. Социопатия личности как криминогенный фактор [Sociopathion of Personality as the Crimenological Factor] in Наукаіправоохорона [Sciense and Law Enforcement] no. 1 (2008), pp. 70–75

complex makes to be the human person as a «sociopathic personality». In other words, «sociopathic personality» – is a «person with a set of willfulness and illusions». This complex is a common «embryo» for all forms of social pathology, and only one of which is a crime. It would be a methodological mistake to find any specific «criminogenic» characteristics of the person who is the «embryo» only of criminality. This means that the person does not have any «criminogenic» characteristics before the crime committing, but there are «sociopathic» characteristics, which under certain conditions may manifest as a crime or an immoral act. Correction of these «sociopathic» characteristics provides for the prevention of all forms of antisocial personality disorders, including immoral and criminal.

For a proper understanding of the crime in the light of the concept of complex of arbitrariness and illusions that creates a sociopathic personality should, however, bear in mind the following: 1) Not everyone who has a set of willfulness and illusions, that is a sociopathic individuals commit crimes: people can show this complex and other forms of social pathology, have never committed any crime in their life, since there were not conditions to criminal manifestation of willfulness and complex illusions; 2) A crime may be not only a manifestation of willfulness and complex of illusions that is antisocial personality disorder but, as a manifestation of the excess of the person who is in a sociopathic condition.

In our opinion, the problem of a crime as excess is very actual today. Without its solution criminal activities cannot be adequately explained. Therefore, the pressing issue is to develop the concept of excess in criminology. However, criminological science does not investigate this phenomenon. Excess in the social human behavior – is an entrance of behavior beyond the scopes defined by his will and consciousness, although it is a manifestation of his will and consciousness. In other words, the excess – is a strong-willed and conscious act of a person who is a «stranger» to him because it is not consistent with the state of will and mind. For example, the excess in the behavior of a person who has a set of willfulness and illusions, which is sociopathic person, is committing an act of good. And conversely, committing a crime by the person who has will and consciousness which complies with the laws of social nature, i.e. socionomics person is also excess of the person. Excesses are especially inherent to children as a factor of their social development. Excesses are normal factors that inherent to the process of progress or regress of a person, that is, the processes of forming social status of will and consciousness of a person. Having done excess in the form of offense (crime), a normal person knows himself and uses that experience of knowledge in order to develop his own social (including legal) culture.

Excesses are inherent to any person. Neither progress nor regress of person is possible without them. In particular, if excesses (that is unethical or illegal behavior) are committed by the respectable man, they do not destroy respectability

of the person, and promote to its strengthening, when it finds appropriate reaction of the human conscience. Conscience in the honest man in response is a factor of reaction at committing excesses, which is an unnatural (unethical and illegal) action.

So-called «pangs of conscience» that person is going through in response to excess committed, is a factor that establishes the decency of the person. The same role has religious faith regarding to such excesses in religious man which are called sins.

The concept of the complex of willfulness and illusions does not exclude the fact that law-abiding person can commit a crime (including crimes) or unethical actions, but they should be overviewed as excesses for him, as well as the acts of kindness are the excesses for the person affected by a set of willfulness and illusions. Thus, excess in the form of unethical act or offense (crime) inherent to any respectable person, but it should be distinguished from the crime as a manifestation of the complex of willfulness and illusions, which is not excess for the criminal. It has practical value in combating criminality. Therefore, a pressing issue for Criminology is a special kind of crime, so-called extensive criminality, which today is a «white spot» in criminology. There should be differences in countering extensive criminality and combating crimes, which is a manifestation of the complex of willfulness and illusions.

The complex of willfulness and illusions manifested as «unnatural» (sociopathic) behavior only under influence of certain circumstances for this, but not in any way, during commission of any act by the person affected by this complex. A person who has a set of willfulness and illusions may, for example, if it does not come appropriate conditions to live a lifetime without commission a crime, but commit other sociopathic actions. Such complex may be manifested in the person in the form of unnatural (that is, those that violate the laws of social nature) phenomena as sin, violation norms of morality, non-criminal offenses, voluntarism, utopianism, mysticism, extremism, etc.

The term complex of «willfulness and illusions» allows a new approach to understanding the role of the causes and conditions of the mechanism of criminal behavior that is considered only as one of the manifestations of sociopathic individual characteristics. All the things leads to the formation of complex of human tyranny and illusions should be determined as the causes of crime, and all that contributes to the manifestation of the complex, which are formed in humans in the form of the crime – are the conditions of criminality.

This is the «formula causes and conditions in criminology», which derives from the concept of «complex of willfulness and illusions», developed in the light of social naturalism. In our opinion, incorrect distinction (separations) of causes and conditions that leads to criminality or its mixing is a manifestation of criminological positivism that prevents adequate countering criminality in practice.

Based on the foregoing the «mechanism» of criminal behavior, that is, the

process of generating the offense may be represented as follows:

Stage I – under the influence of the causes of crime in the person forms the complex of willfulness and illusions.

Stage II – under the complex of willfulness and illusions person chooses a criminal way to meet their own needs, and as a result arises a motive that leads to the criminal activity (criminal motive).

Stage III – under the complex of willfulness and illusions a person sets the goal – create by criminal way such a state of things that requires meeting their own needs (criminal purpose).

Stage IV – under the criminal motive and criminal aim people and under certain circumstances that assist to manifest the complex of willfulness and illusions, commits a crime.

As can be seen, the criminogenic reason in the «mechanism» of committing a crime is realized through a set of tyranny and illusions, and other factors may only play a role conditions leading to the manifestation of the complex of willfulness and illusions in the form of crime. On the basis of above mentioned, the new conception of combating crime should be based, which consists in the application of appropriate «technologies» to eliminate both the causes and conditions that give rise to crime.

According to this «mechanism» of criminal behavior in the light of social naturalism there may be solved the problem of social and biological in criminology, which may be important for the development of the adequate concept combating crime. The *causes* of the crimes are always the factors that form in the person the complex of willfulness and illusions, that is, makes person to be sociopathic, and all the other factors involved in the generation of crime plays the role of *conditions*, contributing criminal manifestations of the complex of willfulness and illusions. Conditions may be both social and biological factors.

It follows that, according to the social naturalism the problem of social and biological in the «mechanism» of criminal behavior should be addressed as follows: causes of any crime is always social and are the factors that form in person the complex of willfulness and illusions (that is, makes the person to be sociopathic) and biological factors may play a role only conditions contributing manifestations of the complex of tyranny and illusions in a crime. So, for example, finding the biological causes of crime is contrary to social and naturalistic doctrine in criminology, and in particular the concept of crime as a manifestation of antisocial personality disorder personality (sociopathic behavior).

The notion of «sociopathic personality» as a «person with a set of willfulness and illusions» has not only theoretical but also practical importance. It directs the practice on the radical way of combating crime, namely, to eliminate the complex of willfulness and illusions which affects social personality as a root of any social pathology, including criminal behavior. To eliminate the root (in accordance with the principle of social naturalism) may only be provided under forming in people the state of coherence

of the will and consciousness of the laws of social nature. This state is called social culture of people. Anything that promotes social human culture contributes thereby creating her immunity against the complex of the willfulness and illusions- the root of all evil, including a crime. Therefore, famous aphorism by C. Beccaria «It is better to prevent crimes than to punish them» may be paraphrased: «It is better by the way of forming in people social culture people remove the complex of willfulness and illusions than punish a manifestation of this complex in the form of a crime». Of course, forming of social culture, being a radical means of combating crime, does not preclude the use of punishment (repression) for crimes committed as a palliative.

In our view, fight against criminality should be as follows: «formation of a social culture in people plus repression for committing crimes». The same applies to counteracting the excesses that have the appearance of offenses (including criminal offenses). The formula is the basis for the so-called cultural and repressive concept combating crime, developed using the principle of social naturalism in criminology (at the Institute of State and Law of the National Academy of Sciences of Ukraine and in accordance with the program requirements regarding research within National Academy of Legal Sciences of Ukraine). It should be the basis for a new interpretation of the famous formula «shield and sword» in fighting crime, «shield» should be considered as the «social culture of the people», which creates immunity against affect them sociopathic (criminogenic) set of willfulness and illusions, and the «sword» is «repression» as a natural reaction on the crime that has already been committed. According to this concept of social progress is provided when society develops social (anticriminogenic) culture that is the basis of criminological security as a component of national security. Otherwise, in combating crime is hypertrophied role of punishments that hinder social progress (this is what has a place in combating criminality, for example, totalitarianism).

Based on the foregoing, we concluded that the principle of social naturalism may be suitable for both overcoming the «disease» of positivism, which affected the national criminology, and for the development of a new doctrine in criminology – so-called «socio-naturalistic» doctrine, which can be the basis for the modernization of combating crime, which may contribute to ensuring social progress in Ukraine. This doctrine has particular potential to overcome positivism in public policy to combat criminality and increased to minimum any manipulation by means of criminal justice.

The mission of criminology, based on the socio-naturalistic doctrine is to overcome the criminological positivism, generating voluntarism and utopianism in combating crime. The practical significance of the «social-naturalistic» Criminology lies in the fact that it is, based on the principle of social naturalism promotes the development of concepts, practices be directed towards combating crime in coordination behavior

with the laws of social nature (including the laws of natural law).For this purposes, with its using there may be developed, in particular, the concepts of «criminological security», «criminological globalization», «criminological futurology», «a combination of repressive and non-repressive tools in combating criminality», «moral means of combating crime», «anti-criminal culture», «the role of criminal justice in combating crime», «the legal criteria for criminalization and decriminalization of actions» etc[1].

Thus, the new criminology of XXI century shall, in our opinion, be based on the «social-naturalistic» doctrine, which direct finding of means of solving fundamental problems of combating crime in the area of knowledge of the laws of social nature to harmonization with them will and minds of as many people , that is the formation of their social (anti-criminal) culture, that is radical mean in combating criminality, without which their own repressive means cannot be effective by having only palliative character.

Based on the fact that the sociopathion is the source of all threats for the man and society, and social culture –is a tool that creates immunity against their sociopathization, in our view, it should be noted to the Constitution of Ukraine a rule: «The government prevents formation of antisocial personality disorder in citizens and contributes to form their social culture». The implementation of this rule would ensure social order favorable to social progress in Ukraine.

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[1] For details see., in particular: Kostenko O. M. Проблема № 1 – злочинність [Problem Number One – Criminality]in День [Day], no. 62(2009); Kostenko O. M. Корупція як проблема політичної кримінології [Coruption as the Problem of Politic Criminology] in Правова держава [Legal State], Vol. 14 (2003), pp. 386–390; Kostenko O. M. Проблеми кримінального права, кримінології та кримінально їюстиції [Issues of Criminal Law, Criminology and Criminal Justice] in Правовадержава [Legal State], Special edition(2004), pp. 135–168; Kostenko A. N. Терроризм как нарушение природного права человека на безопасность [Terrorism as a Violationof Natural Human Right to Security in Проблеми безпеки особистості, суспільства, держави. Інформаційно-аналітичний бюлетень [Problems ofsecurityof the individual, society and state. Information and Analytical Bulletin], no. 1 (2007), pp. 131–136; KostenkoA.N. О криминологических основаниях реформы уголовной юстиции в Украине[On Criminological Grounds Criminal Justice Reform in Ukraine] in Кримінологія в Україні та протидія злочинності: Зб. наук. статей [Criminology in Ukraine and counteracting criminality: Collected scientific works], (Odesa, 2008), pp. 20–26; Kostenko A. N. Об основах «натуралистической» криминологии (концепция модернизации криминологии в свете социального натурализма) [On the basis of the «naturalistic» criminology (conception of modernization of criminology in the light of social naturalism)] inРос. криминолог. взгляд. [Russian Criminological Overview], no. 4 On the basis of the «naturalistic» criminology (conception of modernization of criminology in the light of social naturalism) (2009), pp. 272–280.

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Criminalistics in the system of legal sciences and its role in the global world

Annotation

The article investigates general theoretical and methodological problems of criminalistics, its trends and the role in the system of other sciences in the context of globalization. In today's world changed the paradigm of criminalistics, is expanding its object and sphere of influence. Preservation and development of criminalistical knowledge is dependent on the level of «scientific elite» traditions of scientific schools in the community. Criminalistics as a complete system of scientific knowledge performs security functions in establishing the truth in the proceedings. It criminalistics worldwide designed to provide scientific knowledge practices of combating crime.

Formation and accumulation of knowledge is due to criminalistical scientific and technical progress of modern society. In the new conditions, the so-called «technologization» criminalistics concerning its various sections (criminalistics technology, tactics and methods). Established criminalistical methods do not satisfy in full. Recently criminalistics are increasingly offered for the usage of information technology (IT), which can be considered as a new category of criminalistics.

Nature of criminalistics defines its place in the «legal framework», the influence of the phenomenon of law on criminalistics knowledge and practical component. Changes in the legal sphere, «revision» of traditional institutions of criminal law and procedure, and also upgrade system techniques, methods and tools for forensics. Legal regulation determines the ratio of «freedom and security», provides real protection of the rights of man and citizen in the exercise of legal procedures.

In a global world becomes important scientific prediction, forecast the devel-

opment of science. In this regard, expressed the author's position on the strategy of criminalistics.

Tendencies of criminalistics in the conditions of globalization

Modern stage of development of civilization time of informative society, in which science can be presented as mironom informative process, conditioned the epoch of globalization. There is the grounded opinion, that one of main world tendencies of the newest time was become by the process of globalization – historical wedge, cutting usual temporality of political, economic, cultural and informative space. The processes of globalization set a border between leaving and by imminent epochs... Globalization is inalienable part of modern scientific and social and political discourse[1]. In the etymologic understanding the «global» means: 1) wrap-round all earth; world; 2) all-round, complete, universal, universal[2].

To criminalistics as sciences in the conditions of globalization are inherent some most general tendencies. It is related to that science is the special type of cognitive activity, aimed at making of objective, system organized and reasonable knowledge about the world. The permanent aspiring of science to expansion of the field of the studied objects, irrespective of today's possibilities of their mass practical mastering, comes forward a that system-making sign, that grounds other descriptions sciences distinguishing it from ordinary cognition[3].

Criminalistics occupies the special place in the system of other sciences. In the different countries of the world this science is named: «Forensic Sciences» (judicial sciences) in the USA, Great Britain, Canada, and Australia; «Kriminalistik» (criminalistics) in Germany, Austria, «Police Scientifique» (scientific police) in France, Switzerland. In the English-language countries along with the term of «Forensic Sciences» used also others: «Criminalistics» (as part of judicial science), «Criminal Investigation» (criminal investigation), «Criminology» (criminology). The same situation is traced and in some other countries of the world. Distinctions consist of breadth or tightness of going near the volume of the conformities to law, related to criminalistics knowledge and subject of criminalistics. Becoming and development of criminalistics in the different countries of the world traced in its separate directions or in forming of independent scientific disciplines – judicial toxicology, judicial chemistry, judicial medicine, judicial examination, judicial (criminal) psychology, judicial pharmacology[4].

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[1] Блинов А. С. Национальное государство в условиях глобализации: контуры построения политико-правовой модели формирующегося глобального порядка. – М.: МАКС Пресс, 2003. – С. 34.

[2] Большой энциклопедический словарь. М.: Науч. изд-во «Большая Российская энциклопедия»; СПб: «Норинт», 1998. – С. 286.

[3] Энциклопедия эпистимологии и философии науки. – М.: «Канон+» РООИ «Реабилитация», 2009.-С. 560, 561.

[4] History of criminalistics is distinctly traced in personalities (in activity of scientists and practical workers) devoting to this science. In more details: Энциклопедия криминалистики в лицах / под ред. В. Ю. Шепитько. – Харьков: Апостиль, 2014. – 400 с.

About development of criminalistics, specified its dynamics yet H. Gross that and marked the time, that «criminalistics, yet so young science, yet cannot predict now, what eventual results it certainly must lead to, but it knows that some time in a criminal law associations and distinctions will be set differently, than in our time, and further, that these future changes will not remain permanent also, that constancy in general will never be attained, that only eternal will be the state of continuous motion»[1]. In any case in a modern kind criminalistics is the integral system of scientific knowledge, called to target opening and investigation of crimes, performs the guaranteeing duty in establishment of truth in a criminal trial. The accumulation of scientific knowledge resulted in that criminalistics outgrew the potential and went out outside «constabulary science» dealing with or «science dealing with investigation of crimes». Facilities, devices and methods of criminalistics, are successfully used in another spheres (executive and research, judicial, public prosecutor's, expert, advocate activity) or allow to set facts lying out of the criminal and legal phenomena (the use of criminalistics knowledge is in civil, arbitrage (economic) or administrative processes).

Thus the highly sought of criminalistics, use of its data is in another spheres, the certain processes of integration and differentiation of scientific knowledge were not able to cause the substantial change of the subject of criminalistics, that still remains science dealing with conformities to law of criminal activity and its reflection in information generators, servings as basis for development of facilities, receptions and methods of collecting, research, estimation and use of proofs with the purpose of opening, investigation, judicial trial and warning of crimes. The question is actually about the wearing-out of stereotypes, reflection of hard scientific traditions. On the other hand, some criminal scientists-lawyers mark justly, that the system of criminalistics must not be reserved, closed. Reserve eliminates possibility of development of the system, does impossible addition to the system new structural elements, concepts and categories[2].

Criminalistics is on its nature associate with natural and technical sciences. Its origin is conditioned by introduction of achievements of naturally-technical sciences in practice of fighting against criminality. The methods of physics, chemistry, biology, psychology, medicine, mathematics and other industries of knowledge adapted to the exposure of tracks of crime and to the receipt of information and aims of criminal trial. H. Gross underlined that the successes attained by a criminal law, deserving surprises scientific constructions of this discipline, a process and ground of them get such estimation nowhere, as exactly in criminalistics. But, being put as aux-

[1] Гросс Г. Руководство для судебных следователей как система криминалистики. – Новое изд., перепеч. с изд. 1908 г. – М.: ЛексЭст, 2002. – С. X.

[2] Яблоков Н. П.. Головин А. Ю. Криминалистика: природа, система, методологические основы. – 2-е изд. доп. и перераб. – М.: Норма, 2009. С. 6.

iliary science for a criminal law, criminalistics, however, reserves a right on independence: actually in fact its existed always and before[1].

The paradigm of criminalistics changes, its maintenance does not remain unchanging. In the special literature it registers justly, that maintenance of paradigm depends on character of scientific discipline, degree of its maturity, structure of fundamental scientific theory, worked out of mathematical vehicle, methodological equipment, experimental technique, and also from obvious and non-obvious traditions of research work, transferrable from a generation to the generation of scientists. This maintenance is shown in labors of «scientific elite» (confessed leaders of scientific directions and schools, generating basic ideas and methods in one or another area of science) and fastened in textbooks, methodical guidance, programs of training of scientific personals[2]. Development of science, and that number and criminalistics (accumulation of scientific knowledge) «takes place on the basis of initial for this cycle paradigm and until this paradigm does not conflict with the acquired knowledge»[3]. H. Malewsky writes justly, that in a modern global rotation the tendencies of rapprochement and even unitizations of most processes and procedures increase in the different spheres of activity, including in area of social sciences. However these process hardly pushes through in criminalistics and right, where not only national schools but also withstand institutional structures the representatives of that do not see requirements in substantial reformation of the looks are. It is special noted in large countries, possessing considerable scientific potential, that it is constrained, first of all, with «intellectual all-sufficientness» allowing satisfying with the scientific and practical necessities of law enforcement authorities a «national product»[4]. What be more, the change of maintenance of criminalistics can fall short of highly sought of knowledge. In modern terms a certain misbalance registers between scientific developments and necessities of practice, and also by their real introduction in practical activity and educational process at preparation of future specialists. At the same time, exactly criminalistics is in the whole world called to provide scientific knowledge practice of counteraction of criminality.

Criminalistics occupies an important place among another sciences, executes peculiar to its functions. Criminalistics behaves to the number of dynamically developing sciences of criminal and le-

[1] Гросс Г. Руководство для судебных следователей как система криминалистики. – Новое изд., перепеч. с изд. 1908 І: – М.: ЛексЭсг, 2002. – С. IX.

[2] Энциклопедия эпистемологии и философии науки. – М.: «Канон+» РООИ «Реабилитация», 2009. – С. 684.

[3] Белкин Р. С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики. – М.: Изд-во НОРМА (Изд. группа НОРМА-ИНФРА-М), 2001. – С. 14.

[4] Малевски Г. Специальные знания – краеугольный постулат концепции криминалистики Ганса Гросса и их современная интерпретация // Криминалист первопечатный. – 2012. – № 5. – С. 115.

gal cycle. In different historical periods criminalistics was examined as naturally-technical science, science of ambivalent nature or legal science. Appeared also and new looks to nature of criminalistics. This consideration of criminalistics as sciences of integral or synthetic nature. In that behalf R. S. Belkin writes justly, that «its nature is a not complex of some components, not mechanical association of these different sciences, and deep synthesis, alloy of knowledge within the framework of object and maintenance of criminalistics, and herein essence of answer for a question about nature of criminalistics: criminalistics – science is synthetic»[1]. N. P. Yablokov underlines that «if science will not have a basic constituent, then, appears, this will be not science, and some amorphous, unsystematic education, consisting of these different sciences, not falling under none of the sciences (natural, technical and public) folded in research-on-research of divisions, incapable to come forward as integral education in relation to another areas of scientific knowledge»[2]. In addition, understanding of criminalistics as legal science does not prevent to the further processes of integration criminalistics of achievements of another sciences and to adaptation of them to the decision of standing before its tasks[3].

Development of science can be related not only to differentiation of knowledge but also wasp by integration, origin of single alloy of the knowledge sent to permission of certain tasks. It is difficult to agree with position of separate scientists humiliating the role of criminalistics technique and elevating criminalistics (judicial) examination on the that founding, that in criminalistics to the technique out-of-date methods (drawn conclusion on the basis of analysis of textbooks on criminalistics) are examined, and in judicial examination front-rank H. R. Rossinskaya marks that criminalistics (criminalistics technique) and modern terms already is not only base science for traditional criminalistics examinations. But, at the same time, it becomes one of base sciences in general for all judicial examinations[4]. Thus, it is needed to mark that a criminalistics technique is a division of science of criminalistics; criminalistics examination is a type of activity.

New electronic facilities of communication convert the world into similarity of global village[5]

Development and forming of criminalistics knowledge are conditioned by

[1] Белкин Р. С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики. – М.: Изд-во НОРМА (Издат. группа НОРМА-ИНФРА-М). 2001. – С. 43.

[2] Яблоков Н. П. Юридическая природа криминалистики – важный фактор сохранения ее целостности как науки, общепрофессиональной учебной дисциплины подготовки юристов // Криминалист первопечатный. – 2011. – №2. – С. 19.

[3] Яблоков н. П., Головин А. Ю. Криминалистика: природа, система, методологические основы. – 2-е изд., доп. и перераб. – М. Норма. 200У. – С. 22.

[4] Россинская Е. Р. Криминалистика и судебная экспертиза: взаимосвязи и разграничения // Криминалист первопечатный. – 2011. -№2. – С. 89.

[5] Душенко К. В. Словарь современных цитат. – М .: Изд-во Эксмо, 2005. – С. 277.

scientific and technical progress of modern society. Informatization of social environment resulted in «technolization» of criminalistics, development and introduction informative, digital, telecommunication and other technologies. Information technologies are a new category of criminalistics, applying to take the proper place in its structure. A. M. Ishin specifies that at the present rapid rates of development of scientific and technical progress «informative IT» applied today after a while will leave off to be such, as the yet more new will appear, more modern, that is why information technologies (IT) can be examined as the generalized concept on the modern stage of development of society[1]. H. Malewsky writes, that due to rapid development of information technologies the processes of globalization have a tendency on the unitization of technological processes, including related to the criminalistics technique and expert researches[2]. А. Н. Григорьев names informative NT «motive force of globalization of the modern world»[3].

Lately the use of technological approach comes true not only in a criminalistics technique or judicial examination but also in criminalistics tactics and methodology of investigation of crimes (suggestion of inquisitional or criminalistics technologies, technologies of production of separate inquisitional actions). «Informatization» of criminalistics stipulates the use of new scientific categories and concepts also. A wide use in a scientific turn is acquired by such terms, as «informative field», «informative cooperation», «informative influence», «infomedia», «informative track» of and other. All anymore the question is about the necessity of realization of the special inspections of the newest technique – different sort of smartphones (iPhone 4s, iPhone 5s, iPhone 6), internet-plane-tables (iPad 4, iPad 5, iPad mini of 2 and other), notebooks and subnotebooks (netbooks, smartbooks, ultrabooks) and others, and also corresponding software. Computer technique, services of global network the Internet, mobile communication networks, the systems of video supervision became the inalienable components of everyday life of man[4]. The problem of the use of information technologies and newest tech-

[1] Ишин А. М. Некоторые аспекты использования информационных технологий а ходе предварительного следствия // Информационные технологии в обществе и правовой сфере: сб. науч. статей. – Калининград: Калининград, филиал СПбУ МВД России, 2013. Вып. 1. – С. 66.

[2] Малевски Г. В поисках собственной модели обучения – метаморфозы криминалистической дидактики в Литве // Модели преподавания криминалистики: история и современность: сб. науч. тр. / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2014. – С. 57, 58.

[3] Григорьев А. Н, Проблемы противодействия терроризму и экстремизму в сети Интернет // Информационные технологии в обществе и правовой сфере: сб. науч. сг. – Калининград: Калининград, филиал С116У МВД России, 2013. – С. 46.

[4] Кукурникова Т. Э., Яковлев А. Н. Возможности непроцессуального отождествления личности средствами новых информационных технологий / ‘ Воронежские криминалистические чтения: сб. науч. тр. под ред. О. Я. Баева. – Воронеж: Изд. дом ВГУ, 2014. – Вып. 16. – С. 111.

nical «product» in criminalistics aims can be considered as global, but not having national character[1].

In new terms criminalistics is from the study of the traditional materially-fixed tracks – force to pass to research of voice (acoustic), electronic or genome tracks. Means, devices and methods of work, change also with such tracks, order of their exposure, collecting and fixing.

There are revolutionary transformations also and in the field of research of documents. Along with traditional writing documents, an all greater value is acquired by electronic documents and their essential elements (electronic digital signature or its analogues). The newest criminalistics recommendations, Means, devices and methods of work with electronic documents, are therefore needed.

In modern terms scientific and technical transformations result in that withstand criminalistics methods already dissatisfy in full. Objective reasons of development of science and technique result in forming of new industries of criminalistics technique: criminalistics flame technique, judicial acoustics or criminalistics phonoscopy, odorology, polygraphology criminalistics to engramology and other.

Criminalistics in the «legal field», correlation of criminalistics facilities and condition of safety

Changes what be going on in the legal field, «revision» of traditional institutes of criminal law and process, have influence on criminalistics. This problem acquires the special actuality in connection with the necessity of harmonization of criminal and procedural mechanism as it applies to international and European standards, introduction of principle of contentionness of parties, providing of the proper balance of public and private interests. In the special literary sources the problems of «judicial criminalistics», «criminalistics of judicial activity», «tactics and methodology of judicial investigation» come into question all more active. Exactly in this period sharp scientific discussions pass about «criminalistics advocatology», «criminalistics providing of activity of public prosecutor», «criminalistics constituent of court».

Changes in a legal sphere substantially influence and on criminalistics. First of all the question is about the global problem of correlation of «freedom and safety», about legal regulation in a criminal law and process, and also the real facilities of realization of defense disposition of man and citizen, about prevention of danger and repressive criminal proceeding with the use of all arsenal of criminalistics. P.-A. Albrecht specifies that liquidation of legal norms is the sign of modern criminal law on the whole... The criminal system of justice must react on a material overload through the mechanisms of material

[1] В настоящее время удивляют некоторые предложения о необходимости создания «внутрироссийской коммуникационной сети» или «собственного Интернета «Чебурашка»» для России, что указывает на идею отказа от глобальных сетей и замену их на внутренние национальные. См.: www. Korrespondent. net/world/russia/3355699-v-rossyy-predlahauil.

limitation. Expediency and agreements in criminal procedure are facilities of this material limitation[1]. V. N Terecovich. and E. V. Nimande underline that criminal law applying with a necessity must be built only on the basis of modern achievements of science. This circumstance is determined not only by the state of scientific thought in this area of legal knowledge, but by the real public policy, exclusive hazardous activity in area of criminal law application. Any innovation must be in the field of criminal law application, foremost, by the achievement of scientific thought...[2]

Criminalistics executes, in certain sense, обеспечительную function criminal or another legal process. In particular, realization of criminal and procedural norms comes true due to the use of tactical and criminalistical, scientific and technical facilities in different situations. The most effective realization of inquisitional actions depends on that behaves to them, which their system is. On the inquisitional actions set in a law the formed facilities of criminalistics tactics depend: tactical devices, tactical recommendations, their systems, model tactical operations.

Development and realization of criminalistics facilities are depending on their certain consumer (investigator, inquisitional judge, public prosecutor, judge of and other), form of criminal procedure, and set order of realization of inquisitional (search) actions. In that behalf it is necessary to pay attention to the tendency related to so-called «policeman» of criminal procedure. P.-A. Albrecht writes that the process of «policeman» is begun not only with abolition of principle of legality, and begins already at borders a constabulary right for the legal state... Not opening of separate action, and an exposure of dangerous structures is the aim of constabulary work[3].

The tasks of criminalistics in the modern global world are conditioned by the necessity of the system criminalistics providing of corresponding organs of law application, operating in different countries and sent to optimization processes of exposure, opening, investigation and warning of crimes, and assisting establishment of truth in business. The tasks of criminalistics must be differentiated on two basic levels: a 1) task, theories of criminalistics sent to perfection; 2) tasks sent to perfection of law application practice.

Strategy of criminalistics

Lately in criminalistics attempts to enter terms in a scientific turn were undertaken: «strategy», «criminalistics strategy», «strategy in criminalistics», «tactics and strategy». A word «strategy» is meant by «science of war»; studies about the best location and use of all soldiery forces and facilities[4]. Strategy

[1] Альбрехт П.-А. Забытая свобода. Принципы уголовного права в европейской дискуссии о безопасности / перевод с нем. Г. Г. Мошака. – Одесса: «Астропринт». 2006. – С. 80.

[2] Терехович В. Н., Инман де Э. В. Ценностные ориентации основ современного уголовного правоприменения Латвии // Криминалист первопечатный. – 2012. – Ли 5. – С. 66.

[3] Альбрехт П.-А. Забытая свобода. Принципы уголовного права в европейской дискуссии о безопасности перевод с нем. Г. Г. Мошака. – Одесса: «Астропринт», 2006. – С. 81.

[4] Даль В. Толковый словарь живого великорусского языка. Т. IV. – М.: Госиздат Ино-

is science dealing with prosecution of war, art of prosecution of war [1]. H. Malewsky marks that term «strategy» is widely used in criminalistics Thus, one authors present criminalistics strategy as certain instrument, showing tendencies and directions of development of science, other – consider its independent part sciences third – it is talked about it, as about an original model or program of investigation of certain crime. There are opinions, according to that criminalistics strategy it is the category related to the process of development of corresponding criminalistics establishments or even it is possible to talk about strategy of criminalistics politics[2]. There are persuasions on our, strategic as such is always directed in the future wrap-round scale plans or global problems. To such in criminalistics the prognoses of her development can be taken in the future, scientific programs on a very remote prospect. Naturally, that this problem (criminalistics strategy) is related to criminal politics of the state and society, development of science of criminalistics in the world, by separate directions of criminalistics prognostication, development of modern scientific and technical facilities and information technologies and introduction of them in practice of counteraction of criminality.

In the global world criminalistics strategy as prognoses on the future, certain scientific prospects and possibilities of criminalistics shows itself through forming and activity of different criminalistics organizations, establishments and scientific associations (European Network of Forensic Science Institutes – ENFSI, Fingerprint Society – FPS, International Association for Identification – IAI), Lithuanian society of criminalists, Polish criminalistics society, International Congress of criminalists and other), the realization of world and international scientific events (conferences, congresses, symposiums). It touches joint international scientific program development on criminalistics and it separate directions. In modern world certain geography of criminalistics and expert scientific schools is traced, the attempts of their scientific cooperation and collaboration take place. It is justly marked in that behalf, that international cooperation of criminal lawyers must lean not only against»mechanical» exchange information but also joint researches, «international division pile» in criminalistics researches, processes of rapprochement and integration of scientific theories, conceptions, concepts[3].

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странных н национальных словарей, 1956. – С. 336.

[1] Ожегов С. И. Словарь русского языка / под ред. Н. Ю. Шведовой. – 16-е изд., испр. – М.: Рус. яз., 1984.-С. 671.

[2] Малевски Г. Криминалистическая стратегия, стратегия в криминалистике или стратегия криминалистической политики? // Криминалистика и судебная экспертиза: наука, обучение, практика IX: сб. науч. статей. Часть II. – Вильнюс, Харьков, 2013. – С. 31.

[3] Малевски Г. В поисках собственной модели обучения – метаморфозы криминалистической дидактики в Литве // Модели преподавания криминалистики: история и современность: сб. науч. тр./ Под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2014. – С. 62, 63.

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Secret investigation (search) actions as the most important means of the strategic objectives of pre-trial investigation

A qualificatory modern progress of criminalistics and practice of pre-trial investigation of crimes trend is application of not only tactical but also strategic going near the decision of inquisitional tasks. Strategic approach in organization of pre-trial investigation, unlike free improvisation, intuition, hope on luck, has a row of advantages: concentrate an investigator on the achievement of ultimate, basic goal, compels constantly to search new possibilities, in good time to expose threats to investigation, assists continuous development and maintenance of optimal model of activity, gives to the investigators clear criteria for the faithful estimation of development of inquisitional situations, compilable plans; optimizes a management resources that support strategy of activity and guarantee the achievement of the put aims. The use of bases of strategy quite often becomes the key to application of innovational facilities and methods to the steady improvement of activity, to maintenance of optimal quality of pre-trial investigation of criminal offences not only in a present but also in the future.

The characteristic feature of the state of investigation of modern crimes is that inquisitional activity comes true in the conditions of the increasing organized counteraction from the side of the criminal world.

Modern criminality constantly changes and is characterized a high criminal resource, stability of criminal connections, self-finance, conspiratorial actions. The special danger is presented by the militarized criminal forming, escalation of terrorism, separatist motions, resulting in crimes with the invisible before amount of victims, walking over a

thousandth border a long ago. Criminals all more often engage minor in criminal activity, use a shooting-iron, explosives, and apply new methods and facilities of preparation, committing, concealment of crimes and active counteraction to investigation.

Modern group criminality are characterized the presence of the specially created criminal infrastructure, strict hierarchy, distribution of roles and functions between accessories. Unfortunately, distribution of corruption takes place in law enforcement, judicial and executive authorities of power that not only counteracts to the criminal production but also results in the regeneration of certain part of these organs in a criminal layer and forms disbelief of population in the public organs of power, unwillingness to cooperate in the process of pretrial investigation. Potential of the organized crime is such, that structures, that long time carry on security service' activity with the use of modern computer technologies, facilities of track, are created by her and financed, listening etc. There is also a tendency to confluence of the organized crime with economic patterns with the purpose of legalization of the criminally obtained facilities and continuation of criminal activity under a protection economic. Overgrowing financial potential of the organized crime results in strengthening of influence on the criminal world, on politics; to expansion of connections with transnational criminality that next to a military and ecological threat creates not only in separate countries but also for humanity global danger. Already is not rareness, when in counteraction to the exposure, opening and investigation of crimes modern criminality uses facilities and methods of not only tactical but also strategic character that is counted on many years forward, on a prospect. All these factors both individually and in totality are counteractive to pre-trial investigation.

Besides an investigator has to operate in the conditions of quiescent growing load, when the amount of criminal productions grew in ten of one times, and the middle loading on one investigator in 2013 made more than 117 criminal productions and process of height of loading proceeds[1].

Success of investigation of modern crimes already cannot be provided without the increase of existent potential of investigator. And in this direction substantial changes happened in a legislation, in particular, Criminal Procedural Code of Ukraine 2014 year provided with an investigator new plenary powers – by a right for realization of secret inquisitional (search) actions (further – SI(I)A).

In this connection the problem of more effective use of new functions of investigator came to a head during pretrial investigation, related to the substantial changes in its capacity, that in turn needs strengthening of the measures sent to research of influence of SI (I) A on the decision of inquisitional tasks of pretrial investigation not only in tactical but also in strategic aspects.

[1] Цуцкірідзе М. Практичні проблеми застосування норм чинного КПК України // Право України. – 2013. – Вип. 11. – С. 88.

The separate aspects of the use of secret inquisitional (search) actions at investigation of crimes were examined in works of M. V. Bagriy, B. I. Baanenko, N. P. Vodko, I. I. Mousienko, N. A. Pogoretskogo, E. D. Skulish, I. V. Servetskogo, V. I. Farinnik[1], legal bases, essence, concept, classification, are exposed in that, correlation of SI (I) A with operatively-search events, genesis of this legal institute of and other.

At the same time, not belittling dignities of the executed researches, problem of secret inquisitional (search) actions as major means of decision of strategic tasks of pre-trial investigation did not find the reflection in legal literature.

Practice of investigation of crimes testifies that the most effective investigators, inquisitional-operative groups usually operate not standard, but as earliest explorers and leaders, not limited to the return measures and passive protecting from criminal counteraction. They forestall counteractions of criminal structures, carry out the strategic treading on them and provide to itself steady advantage, and equally excellent results. Only energetic realization of creative, eccentric strategy with the use of complex of inquisitional (search) and especially secret inquisitional (search) actions can provide quality and timely investigation of crimes. The strategic value of secret of inquisitional (search) actions it is difficult to over-estimate. After data of N. A. Pogoretskogo in our state of «due to such actions over 85% grave and especially heavy crimes open up and investigated, and committed in the conditions of unprovability, by the organized criminal groups, against bases of national safety – 100%[2].

And such position not by chance, exactly secret methods and facilities are most effective in the arsenal of investigator in the decision of tactical and especially strategic tasks at investigation of severe and especially severe crimes of unobvious character, that is arrived at not at all as a result of happy chance or protracted luck, and by the systematic, ac-

[1] Багрій М. В. Негласні слідчі(розшукові) дії у кримінальному провадженні: монографія. – Тернопіль, 2013. – 308с.; Водько Н. П. О соотношении негласных следственных (розыскных) действий и оперативно-розыскных мероприятий в Украине // Оперативник (сыщик). – 2013. – № 1(34). – С. 6-12; Мусієнко І. І. Особливості правової регламентації оперативно-розшукової діяльності та негласних слідчих (розшукових) дій у новому кримінально- процесуальному законодавстві // Досудове розслідування: актуальні проблеми та шляхи їх вирішення : матеріали постійно діючого наук.-практ. семінару (Харків, 19 жовт. 2012 р.). — Х. : Оберіг, 2012. — Вип. 4. – С. 223-230; Сервецький І. В. Спеціальна діяльність правоохоронних органів, що здійснюється під час проведення гласних, негласних слідчих (розшукових) дій // Часопис Академії адвокатури України. – № 15 (2'2012). – С. 1-7; Скулиш Є. Д. Негласні слідчі (розшукові) дії за кримінально-процесуальним законодавством України / Є. Д. Скулиш // Вісник Національної академії прокуратури України. – 2012. – № 2 (26). – С. 15-23; Фаринник В. І. Розвиток правового регулювання збирання доказів за новим Кримінальним процесуальним кодексом України // Митна справа. – № 4. – (82). – 2012, Ч. 2, Кн. 2. – С. 3-12.

[2] Погорецький М. А. Негласні слідчі (розшукові) дії: проблеми провадження та використання результатів у доказуванні // Юридичний часопис Нац. академії внутрішніх справ, № 1, 2013. – С . 270.

tive design of possible counteraction of suspected and its connections not only during current investigation but also in the near future, with the timely foresight of necessity of the use of the adequate secret inquisitional (search) actions sent to overcoming of such counteraction and establishment of circumstances subject to proving on a criminal production.

A tactical arsenal for investigation of severe and especially severe crimes is not enough, the strategic going is needed near organization, planning, forming of tasks; in determination of faithful direction and ways of necessary information retrieval, in the choice of facilities and methods for their decision, and also most optimal in this situation, secret inquisitional (search) actions and forming of future model of their realization with the purpose of optimal, effective pre-trial investigation of crimes. Strategy as well as strategic thinking, a strategic management gives an opportunity to «break» through a curtain hiding the future from us, form him in necessary direction[1]. Strategy it maybe to interpret as activity, authorized by the law of public servants, qualificatory the choice of faithful direction and ways of investigation, providing the optimal current and perspective proving on a criminal production, and also application of modern, priority, adequate facilities and methods, necessary for overcoming of counteraction from the side of subjects of crime and their connections with the purpose of forming and successful realization of the real model of preparation and realization inquisitional (search) and secret inquisitional (search) and another actions influencing on the judicial prospect of criminal case[2].

In other words, than not only tactics but also strategy of organization of investigation of crime are more careful thought out and than more professional it will be realized with the use of complex of facilities of investigator, including secret, the more chances to attain set current and perspective aims and to occupy leading positions in regard to suspected. Successful strategy and its able realization are the most faithful signs of improvement of quality of opening and investigation of crimes.

Invaluable value for the criminal production have SI(I)A as major facilities of decision of strategic tasks of pre-trial investigation. This problem acquires the special actuality in connection with introduction to the action of new Criminal Procedural Code (CCP) of Ukraine, with the origin of new professional functions and not simple practice of their application by an investigator. The Division 21 CCP of Ukraine provides with an investigator such plenary powers that he did not possess before, giving a right to conduct the row of secret inquisitional (search) actions to him, in particular: audio, video inspection of person; imposition of arrest on correspondence; ex-

[1] Почепцов Г. Г. Стратегический анализ: Стратегический анализ для политики, бизнеса и военного дела. – К. : Дзвін, 2004. – С. 177.

[2] Берназ В. Д. Криминалистическая стратегия в расследовании преступлений / Криміналістика XXI століття: матеріали міжнар. наук.-практ. конф., 25–26 листоп. 2010 р. – Х. : Право, 2010. – С. 206.

amination and coulisse of correspondence; removal of information from transport TCNS; removal of information from the electronic informative systems; inspection publicly of inaccessible places, accommodation or another possession of person; establishment of place of being of radio electronic means; watching a person, thing or place; audio, video inspection of place; control after the commission of crime (controlled delivery, controlled and operative purchase, special inquisitional experiment, imitation of situation of crime); performance of the special objective on opening of criminal activity of the organized group or criminal organization; creation and use of the specially created enterprises, establishments and organizations; secret receipt of standards necessary for comparative research; use of confidential collaboration. Secret inquisitional (search) actions are conducted by an investigator that carries out pre-trial investigation or on his errand the authorized operatively-search subdivision[1].

Strategic character of secret inquisitional (search) actions is determined by Item 2 Article 246 CCP of Ukraine, where envisaged, that they are «conducted in exceptional cases, when fact sheets about a crime and subject that accomplished him, it is impossible to get by other method». These actions in the process of pre-trial investigation are determined a law, figuratively speaking, by *strategic reserve* of investigator, public prosecutor and they play a major decision role at investigation of unobvious severe and especially severe crimes.

Disclosure and investigation of crimes it maybe to imagine as a continuous informative process that is not possible without the proper organization and management. And the strategic aspects of activity are most actively developed exactly in science of management.

Traditionally examine the complex of tasks of strategic side of activity, among them name: forming of strategic vision for the future; raising of aims; development of strategy; realization of strategy; estimation of results and adjustment of strategic vision, global aims, strategy and its realization taking into account the purchased experience, changing terms, appearance of new ideas and possibilities[2].

We will consider the most essential tasks as it applies to the process of preparation and realization of SI (I) A. *Strategic vision for the future* allows to take into account all factors that will influence on activity of investigator from the beginning to completion of pre-trial investigation, and especially to foresee possible methods, counter-weapons from the side of suspected and its connections, that will allow more faithful to define proactive and most optimal SI (I)A in the folded situation.

Forming of strategic vision at preparation and realization of SI (I)A, in our view, must pass in a few stages. On the

[1] Кримінальний процесуальний кодекс України : наук.-практ. коментар / відп. ред. : С. В. Ківалов, С. М. Міщенко, В. Ю. Захарченко. – Х. : Одіссей, 2013. – С. 508–543.

[2] Томпсон–мл., Артур А., Стрикленд Ш, А., Джордж. Стратегический менеджмент: концепции и ситуации для анализа, 12 изд.: Перевод с англ. – М.: Вильямс, 2009. – С. 35.

first – with the purpose of forming of logical parcels for strategic vision and decision of question about legal based realization of SI (I)A all necessary vowels are conducted inquisitional (search) actions, a search, comprehension, systematization and concentration, is conducted, information proofs attributed to the investigated event. On the second – in the conditions of counteraction to investigation, hard temporal scopes, the accumulated fact sheets are analyzed, worked out the intermediate totals, what information is determined purchased status of proofs, directions and ways of receipt of new proofs are forecast in the future and finally, part out those factual data that yet must be extracted. Facilities, methods, are designed; technologies of further investigation and only on condition of absence of another way to get new necessary on criminal production information an investigator can direct the thoughts to the variant of realization of SI (I) A. On the third – with the use of results of intermediate investigation, informatively-statistical data, achievements of science the current are determined and in accordance with a strategic foresight, prognosis of perspective aim, and also tasks that had to decide at preparation and realization of this secret action.

Rising of aims has an important strategic value. Aims – that expected result to that must aim investigator, public prosecutor at a decision-making about realization of SI (I) A. Raising of aims, as strategic element of activity, comes true in accordance with circumstances that is not yet well-proven on a criminal production with determination of tasks and design of ways of their permission with the subsequent planning of certain actions, in particular realizations of SI (I) A, what translated theoretical reflection in the plane of practical application. Thus aims of SI (I) A not walked around to divide into tactical and strategic. *Tactical* or short-term aims – those that is arrived at by means of decision of intermediate tasks. Thus and they must be built in a logical successive chain concerted with strategic aims, conducing to the final result on a criminal production, qualificatory its judicial prospect. *Strategic* – those that is sent to the decision of more scale tasks within the limits of all criminal production, on the rapid opening of crimes, on exposing of guilty. For example, realization of the controlled delivery at investigation of crimes, tied with transporting of narcotic facilities, has a strategic goal to get proofs that can decide the end of investigation. It is such aims that it not maybe to attain only tactical facilities and methods. As underlined already, to the strategic aims of SI (I) A belong and those that is sent to passing of counteraction to investigation from the side of criminogenic persons and their connections. They realized, as a rule, through a complex SI (I) A, and if necessary and the inquisitional (search) actions, sent to establishment of majority or all circumstances, subject to proving.

Development of strategy of realization of SI (I) A. Making sure in what only by means of SI (I) A it maybe to attain further results on a criminal production and putting before itself corresponding

to the folded inquisitional situation aims an investigator thinks over the possible variants of their achievement, and also ways of decision of those tasks that stand before pre-trial investigation, including what SI (I) A determines will for this purpose be conducted. The important strategic aspect of this side of activity of investigator is a necessity of development foresight of consequences on a criminal production in connection with made decision to conduct SI (I) A. On this stage a not unimportant value has an account of different internal and external factors that will influence on realization of SI (I) A, that will allow to model, first of all, possible tactics and strategy of counteractions to investigation from the side of criminality and their connections, and also to work out the adequate in the folded situation complex of operating under their neutralization and overcoming. Thus study of practice investigation testifies that if the tactical aspects of counteraction are yet taken into account by investigators, in particular, at preparation and to realization of separate inquisitional actions and accepted measures on their overcoming, then strategic, sent to all process investigations on a certain criminal production – rarely come to light and neutralized. It is separately necessary to take into account other possible difficulties that can arise up during realization of SI (I) A and think over variants of their overcoming. The possible degree of influence is beforehand determined, expected results of conducted SI (I) A on forming of proofs on each of the intermediate stages of investigation and on the whole on all criminal production and think over variants of their judicial fixing, use. Optimal allocation of resources (technical, skilled, material etc.) is needed also on episodes, on persons, on directions of investigation, as necessary pre-condition of steady strategic motion to the aim. Designed also degree of influence of conducted SI (I) A on development of inquisitional situations and way of their permission, and if necessary the correcting operating of investigator (operative authorized agent) is envisaged on motion of SI (I) A, forecast degree of influence of future result of realization of SI (I) A on motion of pre-trial investigation, and also corresponding methods, ways of decision of tasks of pre-trial investigation, and if necessary and changes of directions of investigation.

In the process of development of strategy of realization of SI (I) A the selection of facilities comes true also, a choice of receptions is realizations of SI (I) A, that must correspond to the successful decision of tasks of this action and be sent to establishment of circumstances that is not yet set and subject to proving on a criminal production. For this purpose, taking into account available information, versions are pulled out and the plan of realization of secret inquisitional (search) action is made, that is collated with the plan of investigation on all criminal production. The successive complex of measures is planned, directed on the achievement of those tasks that before was not able to decide and in accordance with it the according algorithm of actions is developed. For realization of select strategic direction, applying creative approach, it is neces-

sary to decide what forces, when, that we will do, by what facilities and methods we will operate etc.

In criminalistics literature offer an opinion that «criminalistics strategy in practice just is a modern idea about organization and planning of investigation»[1]. However, if to take the primordial concept of strategy as «art of preparation and prosecution of war and large soldiery operations»[2], and for inquisitional activity such is process of pre-trial investigation and to carry on activity on preparation and realization of SI (I) A, as facilities of decision of strategic tasks of pre-trial investigation, then becomes obvious, that organization and planning undoubtedly are the basis of such activity including strategic character, but not at all taken to it. Strategic activity – a concept supposes not only organization and planning but also realization of pre-arranged considerably wider, and in subsequent and comprehension that how to draw on the attained successes, purchased experience in further activity and not only this investigator but also his colleagues on other investigated crimes, that is the major line of strategic hike to perfection of pretrial investigation. Probably it is here necessary to talk about planning of strategy of prosecuting an inquiry of crime or group of crimes, but not about all strategy.

The central element of strategic side of activity of investigator is *practical realization* of the put aims. Using strategic vision and defining the prospect of realization of SI (I) A, the algorithm of activity of investigator consists in formulation of legal grounds of future action and drafting of solicitor about his realization with a subsequent concordance with a public prosecutor. It is necessary also to take into account what only a public prosecutor has a right to make decision about realization of such secret inquisitional action as control after the commission of crime. After a concordance a solicitor is given to the inquisitional judge, investigator or public prosecutor take participating in consideration of this solicitor with the further receipt of determination of inquisitional judge about permission of realization of corresponding SI (I) A. In future decides question about the subject of realization SI (I) A, if necessary a writing commission to the authorized operative subdivision is made about his realization. As a result of realization of SI (I) A drawn up a report to that additional material are added if necessary.

During realization of SI (I) A permanent collation of the decided intermediate tasks has an important strategic value with the general aim of both secret action and all pre-trial investigation. If necessary adjustment of motion of realization of secret action comes true in the direction of establishment not proved yet circumstances on a criminal production. On occasion for the indispensable

[1] Белкин Р. С. Криминалистика: проблемы сегоднешнего дня. Злободневные вопросы российской криминалистики. – М. : НОРМА-М. – 2001. – С. 80.

[2] Новий тлумачний словник української мови. У трьох томах. Том 3. – Видання друге, виправлене / укладачі : Василь Яременко, Оксана Сліпушко. – К .: АКОНІТ, 2001. – С. 449.

achievement of aims of investigation strategic approach requires to think over possibility of revision of tactics of realization of SI (I) A, and sometimes realizations of another judicial action or radical changing of course, direction of investigation.

Strategic value has a risk factor. If at preparation, and especially in the process of realization of SI (I) A there is the real probability: encroachment on life or causing of bodily harms to the persons that conduct him; escape of persons accomplishing a severe or especially severe crime; distributions of substances of dangerous for life and health people; origins of ecological or technogenic catastrophe or substantial material causing damage; exposures of vowels, secret of regular or supernumerary employees, a public servant is under an obligation to take measure to the change of facilities, methods, tactics of his realization, and on occasion and to give up realization of this SI (I) A, replacing him other.

Strategic character has and situation when as a result of realization of SI (I) A the signs of crime that is not investigated in this criminal production are educed, permission of that is in a prospect and after his limits. In this situation material is directed to the public prosecutor, that in accordance with the Article 257 CCP of Ukraine prepares a solicitor, directs to his inquisitional judge and only on the basis of determination last they got information can be used on other criminal production. In our view, the unjustified bulkiness of legal construction of judicial motion of the information about a crime, got as a result of realization of SI (I) A, testifies that substantial perfections of these positions of new CCP of Ukraine are required.

Thus, strategic approach in organization of preparation and realization of SI (I) A has a row of advantages: concentrate an investigator on the achievement of ultimate, basic goal, compels to search new possibilities, in good time to expose counteraction to investigation and apply adequate measures on his overcoming, assists continuous development and maintenance of optimal model of activity, gives to the investigators clear criteria for the faithful estimation of inquisitional situations, compilable plans; optimizes a management resources that support strategy of activity and guarantees the achievement of ultimate goals. The use of bases of strategy quite often becomes the key to application of innovative facilities and methods to the steady improvement of activity, to maintenance of optimal quality at preparation and realization of SI (I) A. An investigator must at the decision of intermediate tasks always to remember about an ultimate strategic goal on a criminal production, his current activity must correspond to strategy of investigation, constantly to be directed on verification of present and receipt of new proofs.

Prohibition in a criminal procedural law on exposition of methods of realization of SI (I) A in the open printing does not give an opportunity more in detail in this publication to expose the put problem, however and the stated allows to assert that development of problems of the use of SI (I) A in realization of strategic tasks of pre-trial investigation is at

the beginning of research. SI (I) A has the advantages and defects and can result in success or the failure of plan. Here a great deal depends on professional, strategic preparation of investigator, in particular from abilities: to determine and adhere to optimal direction of investigation with the purpose of providing of quality of realization of strategic plan of investigation on a criminal production; to hold in sight in the folded inquisitional situation during realization of SI (I) A both tactical and strategic aspects of the activity; in good time and qualitatively to conduct SI (I) A with the purpose of decision of tactical and strategic tasks of pre-trial investigation; organizations of realization of SI (I) A on all stages (preparation, realization, drawing on the results of SI (I) A in proving); to provide permanent collation of results of realization of SI (I) A with picked direction of investigation; in good time and with the use of modern facilities, methods, and if necessary and technologies, it is adequate to react on counteraction to investigation both at preparation and during realization of SI (I) A; to draw on the results of conducted SI (I) A not only on the investigated event but also on other criminal productions; to accumulate positive experience of preparation and realization of SI (I) A, constantly him to perfect and to be ready to apply him in the future. We will underline that it is rarely succeeded to attain success in the process of pre-trial investigation if to be oriented only on short-term, intermediate results also.

Listed above, far not all, aspects of preparation and realizations of SI (I) A, that substantially influence on the strategic side of activity of investigator, however and the stated testifies that in legal literature this problem did not yet find the proper reflection and subject to further research.

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Contemporary possibilities of state impact on crime: some reflections

We believe that the opinion of the well-known **French writer Anatole France** is relevant to all specialists that research the processes of state administration, which are traditionally understood as any targeted organizing impact on any social processes, carried out in order to bring them into compliance with certain regularities and to achieve certain goals. At the same time, legal provision is one of the major tools in the state administration. Of course, first of all, we are expecting such regulation from law, that will order social processes in the state, protect the values enshrined in the society[1]. Therefore, legal regulation, which does not have proper quality, will not only be ineffective, it may negatively affect the realization of many of the necessary social processes. This is also relevant for organizational-legal measures related to the impact on crime, one of the essential directions of state administration[2]. If the aggregate of such measures has the character of an inseparable, uniquely defined sequence of interaction of specific processes and techniques, leading to the achievement of set goals, such measures should be considered a method. In this case, it is important to consider, that impact, as a method, can have various gen-

[1] Таций В. Десять лет Уголовному кодексу Украины: достижения и проблемы применения. Ежегодник украинского права: сб. науч. тр. / отв. за вып. А. В. Петришин. – Харьков: Право, 2012. – №4. – С. 487.

[2] Ківалов С. Нова редакція ст.10 Кримінального кодексу України: до питання про узгодженість із кримінальним процесуальним кодексом України // Актуальні проблеми кримінальної відповідальності: матеріали міжнар. наук.-практ. конф., 10–11 жовт. 2013 р. / редкол.: В. Я. Тацій (голов. ред.), В. І. Борисов (заст. голов. ред.) та ін. – Х.: Право, 2013 – С. 28.

eral and specific forms of its substantial existence and expression.

Form and substance – are interrelated aspects, the form acts as an external expression of certain substance or, as was perceived by the German philosopher Hegel, the substance is formed, and form substantial. Therefore, here, at a more sectored level, inaccuracies in determining the necessary forms and their substance can have a real negative impact on all the processes of state building. In any case, if citing a quote of the author of «The Capital», a part of which is put in the title of this article, in its entirety, it reads: «The form is devoid of any value if it is not a form of substance»[1] which means that between form and substance in the impact on crime, there should be an organic relationship.

It would seem that all is clear, however, just here is where the known discussion starts. Most commonly defining impact as a method of influence on crime, the following forms are identified: fight against crime, counteracting crime, crime control, crime prevention, etc. Of course, there may be some clarifications and variations. For example, a more active form of impact on crime than fighting is allocated – war against crime. Or a need to distinguish between the concepts of «crime prevention», «crime prophylactic» or «crime averting» is underlined[2].

A view was also expressed, according to which, counteraction is essentially equalized with control. Activity of a state in the development of goals and objectives, production of tools and methods of influencing crime may also, subject to certain aspects, be referred to as criminal policy. Criminal policy can have different directions and levels, may have different goals, among which are both strategic and tactical. But this also has its difficulties. First, this concept is interpreted differently, or polysemantic[33]. In addition, difficulties arise when trying to relate to each other, for example, the fight against crime and criminal policy. Is it possible to compare these concepts, which is broader, deeper, and so on?

In this regard, a more general question is legit: why such a necessary for society state activity does not always have the necessarily productive character. Different answers are possible, however most probably it is due to a number of interrelated circumstances. For example, in terms of substantive features, it is likely that the state does not know, or cannot, or if considered only as a scientific proposal, does not want to establish the causes and conditions of the emergence and existence of certain types of crime. This leads not only to future virtuality of counter-criminal measures, but also to progressive generation of crime, which, in turn, «allows» crime to significantly disturb the social processes that are called upon to ensure a decent

[1] Маркс К., Энгельс Ф. Сочинения. – Издание второе. – Т.1. – М., 1955. – С. 159.

[2] Курс кримінології: Загальна частина: підручник: у 2 кн. / О. М. Джужа, П. П. Михайленко, О. Г. Кулик та ін.; за заг. ред. О. М. Джужи. – К.: Юрінком Інтер, 2001. – С. 139.

[3] Российская криминологическая энциклопедия / под общ. ред. А. И. Долговой. – М.: НОРМА, 2000. – С. 732–733.

existence of human civilization, and are viewed by the societal legal consciousness as an inevitable reality.

Speaking in general terms, for many centuries humanity has been developing programs of impact on crime that contain different in substance general ideas and practical measures of influence on this negative social phenomenon. The score of such «fight» is well known. Therefore, domestic and foreign experts continue their, to some extent, «Sisyphean work» and are constantly searching for the most productive capabilities of such impact, which is to develop tools and techniques that contribute to the achievement of one main goal – impact on crime in its general or species forms. All this confirms the idea that, in such circumstances, it is essential to understand the sequence of the final determination of the form and substance of the impact on crime or, in other words, to answer the question of what should be primary in this definition: the substance, which determines the form, or the form, which determines the substance? Or should they be interrelated processes? Let us try to answer this question without utopia, scientism and unnecessary rhetoric.

Firstly, it should be noted that the impact on crime consists of several necessary elements. The criminal law component is, in our opinion, one of the main «precursors» for this. After all, it is the criminalization of specific socially dangerous acts that transfers them to a different social category, and those who have committed them – to a different social group. This in turn creates a necessary object of regulation, both for all the areas covered by the so-called criminal law sphere (criminal law, criminal procedure, criminalistics, criminology, penal law, etc.) and for other areas (e.g. Administrative Law); initiates the activity of government and social institutions and organizations, etc. At the same time, for many years, we have been insisting on the fact that since ancient times experts reasonably believe that criminal law is the «*ultima ratio*», that is «the last resort», which a state has at its disposal to overcome the most socially dangerous acts. Such a definition does not diminish the role of criminal law in state building, the legal provisions of which may be effective to the extent necessary, if certain social values, the protection of which is assigned to said provisions are declared in the society and the state. However «hard», and in some countries «irreversible» possibilities of application of criminal law provisions, in the event of their unreasonable use, can go far beyond the execution of the protective functions of this law[1].

In this regard, it should be clearly established that criminal law should not be seen as a kind of universal social «medicine». After all, in the concept of «last resort», in our opinion, a thesis is laid, which states that to eliminate or reduce the volume and number of socially negative defined acts, it is necessary to primarily develop a number, and possibly a complex of relevant social

[1] Стрельцов Є. Деякі роздуми про правову сутність та соціальні завдання кримінального права // Право України. – 2010. – № 9. – С. 103-104.

measures to influence this. Unconditionally, in order to develop and implement such measures, initially, as already mentioned, one should understand the meaning of events, to determine which attributes are key for them, which are the prerequisites for their emergence, what are their possible consequences, etc. Only then a reasonable plan to overcome these acts should be developed, the provisions of this plan should be implemented, and if necessary, systematic and permanent nature should be given to them, which, in general will determine the productivity of the state influence. Perhaps some of the planned measures will turn out to be insufficiently effective, and then they need to be clarified, modified. Perhaps some should be excluded. And this again requires certain «financial-brain effort» to be taken. Also, without accurate confidence in their perspective effectiveness. There are many questions, but this is exactly how it is necessary to begin to impact emerging negative acts. It must be thoughtful complex of challenging actions but it should be carried out before we want to «punish». Put yourself in a place of reasonable parent. What does such a parent need to punish their child? First – to «exhaust» all the preliminary educational complex, and only then, realizing that everything was done, and the child continues to seriously «act naughty», to apply the punishment. Criminal law is essentially the same «belt» in the hands of a «reasonable» state.

If we try to compare criminal law, as a branch of law with the branches of medicine, and it is reasonable since medics deal with physical human illnesses, and lawyers – with social «illnesses», we can come to a conclusion that the analyzed law is closest to surgery. According to the view of the well-known Ukrainian surgeon Prof. S. A. Geshelin: «with the knife to the body – only as a last resort». Criminal law is not just a social «belt», but also a social «knife» in the hands of the state, which further enhances its social possibilities.

It is important to note that over time the term «*ultima ratio*» because of its figurativeness, from being purely legal, started to be used in socio-political life. For the first time it happened during the Thirty Years War, when Cardinal Richelieu ordered to cast the words «*Ultima ratio regum*» (Latin: the last argument of kings) on all cannon barrels. Since 1742 by order of King Frederick II of Prussia such an inscription was also inflicted on all army cannons. At the same time, and this should be emphasized, in this case it meant not as much the last resort, as the most decisive means that should finally resolve an existing conflict. However, in this sense too, criminal law attains an added social value.

Therefore the process of criminalizing in its entirety, as a necessary social prerequisite in the organization of the subsequent impact on crime, requires its own separate analysis. However, let us try to identify a slightly different aspect: how, in which way is the possible impact on crime stated in the provisions of the legislation of the criminal law sphere.

A study of the provisions of this legislation shows that in the norms that stipulate their goals, purpose, functions,

etc. (for example, Art. 1 of the Criminal Code, Art. 2 of the Code of Criminal Procedure, the provisions of the Law «On the Forensic Review», etc.), the questions of liability of a specific person for the commission of a crime are personified to a greater extent and the general directions of impact on crime are not highlighted. Thus, the legislation which creates a legal basis for impact on crime, the procedure of implementation of relevant legislation, forensic activities and technical-criminalistic provision for different categories of cases, etc., does not specify the forms and substance of possible state influence on crime, which requires the continuation of such analysis.

Concluding the research of the complex processes of creation of necessary legislation for impacting crime, we believe it necessary to underline two important points. First, speaking of criminalization as a necessary component of the impact on crime, we must at the same time note, that not only the criminal law provides the necessary legal prerequisites for this. Overall policy direction of such impact, its substance and form can greatly, so to speak, in reverse order, determine the nature and directions of the process of criminalization. Secondly – if the impact on crime, as one of the areas of functioning of the state, is not enshrined in the relevant legislation of the criminal law field, then consequently such impact is largely determined by the socio-political activities of the state, which, in turn, provides a certain «freedom» in the elaboration and justification of the substance and forms of impact on crime, including such activity through research

A systematic approach to the definition of the initial steps in the organization of impact on crime, a detailed analysis of the manifold of processes of criminalization can offer a solution, not only in the «formal» use of the concepts of «fight», «counteraction», «control», «prophylactics» and others, but also in filling each of them with specific substance, which in turn should allow their more substantive use while impacting on crime. In our view, while separating these concepts one should not so much focus on the dynamics of their impact on negative processes (for instance, some more harsh, others – more lenient) as on their internal substance, as outside activity may not always correspond with the impact on specifically the fundamental provisions that characterize crime. We have some experience for this approach, as in the early 90-ies of the last century, when the topic was still «not trendy», we already spoke about the need for more precise reasoning in the use of these concepts[1].

Of course, all is not that simple. It is known, that the acts included in the total array of crime are quite «unsimilar». For example, different social values on which they impinge, different nature of the acts, community members, different in their social characteristics who commit them, etc. Therefore, the modern character of the research of this problem

[1] Стрельцов Е. Л. К вопросу о родовом объекте хозяйственных преступлений // Актуальные проблемы государства и права : сб. научн. тр. – Вып.1. – Одесса, 1994. – С. 28.

requires, in our opinion, a more detailed use of the inductive method of conducting such a study, which, as should be recalled, was proposed by the founder of English materialism, philosopher Francis Bacon, and this method receives its implementation in law due to the fact that in the study of events and processes of a lesser scale, by systemizing the established generalities and systemizing certain generalizing theoretical provisions, the extraction of more general characteristics that are inherent to this phenomenon as a whole is carried out. We need to begin such a study not from a search of the forms and substance of the overall impact on the «whole» of the crime, but from attempts to determine the specific characteristics of substance and forms of impact on certain groups of crimes.

In order that further study would receive the necessary substance-methodological character, let us try to analyze from these positions, one of the main forms that is used in the organization of the impact on crime. Thus, the fight against crime, which is defined as a certain active social confrontation, should logically assume the victory of «good» side and, in the long term, lead to the elimination of the «defeated» social phenomenon. But the aim of eradication can only be achieved where there is an interrelated set of circumstances: a) criminal acts are alien to moral-ethical values enshrined in a particular society, and contradict the socio-legal foundations laid down in this state; b) the causes that produce them, are uncharacteristic to the given society, for example, are the «birthmarks of capitalism.» Precisely then can a social fight against certain events and acts lead to their elimination, what was still very recently proclaimed by us at all levels, including the reasoning of this idea in many scientific studies. However, even today a number of acts, such as criminal infringements against life and health, violent criminal attempts at seizure other people's property, sexual offenses, including rape, pedophilia, etc., which are rejected by the morality of any civilized society exist, and the need for active dynamic fight with them stays relevant.

However not all such acts have such clearly negative characteristics, which are negatively perceived by the society for obvious principal reasons. There are whole groups of human actions deemed today by the legislator as criminal, but which not only «escort» ongoing social processes, and to a certain extent, are produced by them. Consequently, the analysis of the essence of such groups should be carried out on a different level, with a focus on other aspects, including the attempt to answer the following questions: 1) should in such a situation, the criminal law be seen as the main state tools of impact on these negative phenomena and 2) keeping the criminal law prohibition on a certain type of such behavior, which state-legal form of impact should be identified as the most effective.

Such an approach can be used in the evaluation of many individual groups in the general array of modern crime. Let's start with economic crime. The first question that needs its own assessment

is: what are the social determinants? International lawyers have long «known» the answer to this fundamental question. For instance, in January 1996, in a private discussion in Canada in the prosecution's office of Montreal, the prosecutor in criminal cases, Ms. Jennifer Briscoe, speaking about the nature of economic crime, aptly said that «coming into this world (*of market economy – E. S.*), we enter the world of money. And where there is money, there are always economic crimes. Economic crimes are the «cost» we pay for living in such a society[1]. We also understand it already. Thus, speaking in October of 2012 in Odessa on a representative international criminological symposium, the President of the Criminological Association of Ukraine A. M. Bandurka noted that economic crimes are part of the existing system. But getting back to economic crimes, if this is so, then the phrases, which indicate that such acts «impinge on national security,» or «undermine the socio-economic development,» or «contradict the fundamental interests», etc., should be considered at best, as «unconscious.»

Therefore, in order to impact on the negative phenomena that are an «organic» part of the existing system of the functioning of the economy, other approaches are needed, since the eradication as the end point of impact, in this case would be, in our opinion, utopic. Of course, this statement should not be regarded as «all forgiving», one which, to some extent, confirms the «objectification» of such acts in the current system, «allows» the possibility of unpunished commission of economic crimes. It is not. But if such acts in one way or another are «derivative» of the existing economic system, then setting the task of «burning them out with a hot iron» should be considered, at best, as an attempt to pursue desired goals without consideration of objective circumstances and possible consequences, or what has been traditionally named voluntarism. But then which ways of impact should be formalized?

Of course, despite the fact that for the separation of this group of offenses, almost only one approach exists, within the group, such crimes have different characteristics. One of their main characteristics, which largely determine the social danger, is the consequences of such acts, and, above all, the damage they inflict. In this regard, let us consider those social acts that cause damage primarily to the state, for example, evasion of taxes and duties (other mandatory payments). Taxes, as we know, are mandatory, compulsory, gratuitous payments that should be carried out by individuals and legal entities to the state income. Taxes, especially in a market economy model, are more than necessary, because it is through these payments that the state impacts on many important social processes. The social purpose of taxes is manifested in their functions: fiscal and economic. The fiscal function consists in forming the monetary income of the state, which are nec-

[1] Стрельцов Е. Л. Экономическая преступность в Украине / предисловие проф. Мартина Финке (университет г. Пассау, ФРГ). Курс лекций. – Одесса: АО Бахва, 1997. – С. 8.

essary for the maintenance of the state apparatus, the military, development of science and technology, healthcare, the implementation of various social programs, etc.

However, it is well understood that between the amount of the volume of the monetary mass to be received, that is planned by the state and the actual size of the funds received, always, in all countries, there is a certain gap, thus the budget deficit, which is largely dependent on these factors, is initially established as permissible and the tax «shortage» is transferred to the so called category of «natural loss». But under certain conditions, this «loss» may entail criminal liability under Art. 212 of the Criminal Code of Ukraine.

But how should in this case, the government impact on tax crime, what form to choose to for this, which substance to fill this form with? In our opinion, in such cases one should speak of control over the level of this crime. Moreover, and this should be emphasized, control over the level of tax evasion should be treated as secondary, as the primary control should be that of the level of cash inflows. For well-known reasons, and it is understood not only by professionals, tax evasion – is a phenomenon that is not contrary to the market model of the economy, is not incompatible with the mentality of many social groups, which have to pay taxes, and is, to some extent, an «accompanying» phenomenon, therefore counteracting it, and all the more so, fighting with the given act, it is impossible, as it is an integral part of this system. Still, understanding the importance of this type of payment, especially for «itself», the state should control the level of tax inflow, monitor and ensure that their nonpayment does not go beyond a certain critical threshold, applying for this measures, including those of criminal law compulsion. So in this case a different substantial tactic and methodic of impact on crime, which most likely implies, as mentioned, a socio-controlling form of impact should exist.

It is worth to note that this evaluation is not only relative to economic crimes, which are enshrined in the Ukrainian Criminal Code. For example, the President of the International Olympic Committee, Jacques Rogge directly stated in August of this year [2012] that doping, the responsibility for the use of which is provided for in the Criminal Code of Ukraine, it is impossible to defeat. «You can never solve the problem of doping completely. Doping – he believes – is a form of crime in sport. *And you do understand that society cannot get rid of crime*» (emphasis added – ES). And further: «And sport also cannot exist without doping control» – he believes (rus.DELFI.ee). In early November of 2012 year at the press conference dedicated to the doping scandal that is associated with the famous cyclist Lance Armstrong, the head of the World Anti-Doping Agency, John Fahey, incidentally, the former finance minister of Australia, stated that «*the war against doping cannot be won*» (emphasis added – ES). However, such a seemingly «decadent recognition» did not prevent this agency to make a decision not only to deprive Armstrong medals

for seven victories in the prestigious Tour de France, but to oblige the cyclist to return 3 million euros he received in prize money. If in this regard, we again recall Hegel, he thought that if a problem is unsolvable, it is not a problem, but regularity. This again implies that the understanding of the nature and the «origin» of negative phenomena in no way removes the need to impact on them. Simply, when carrying out such acts it is necessary to correctly choose the form of such impact and fill it with specific substance.

In our opinion, this also applies to a number of other groups of crimes, such as crimes committed by minors, a part of acts in the field of new technologies that are already considered criminal, etc., where government impact should carry a different character than when impacting the «traditionally-dangerous» group of crimes.

However, there are acts, the difficulties in assessment of which do not allow not only for an equal and often even coordinated assessment in different countries.

As an example, let us consider the processes of euthanasia («easy», «decent» death). Only within the boundaries of regulation of the European region in terms of legal regulation of euthanasia, three groups of countries can be distinguished. The first group includes countries that allow both active and passive euthanasia (such as the Netherlands, Belgium, and Sweden). The second group consists of countries in only passive euthanasia is allowed (e.g., Austria, Spain, France, and Luxembourg). And finally, there is a group of countries in which any form of euthanasia is criminalized (e.g., Greece, Poland, Russia, Serbia, Ukraine, Croatia, Czech Republic). There are interesting historical facts here. For example, in Finland, where passive euthanasia not that long ago ceased to be considered illegal, the first indications about suicide appeared in the General Statute of Laws of 1442 (!), where such acts were referred to as offenses against the state, which in the Middle Ages still made it possible to consider them criminal and not church crimes.

In general, however a more or less paradoxical situation is taking place. Countries of one continent, with practically the same model of economic development, with similar societal values and principles of state building establish different legal attitudes to euthanasia: from its full allowance (active and passive forms) to the criminal prohibition of it in any form. How to determine the substance of the impact on the processes of euthanasia such conditions in countries where it is prohibited, what form to choose for this?

Perhaps, in the base of such a ban there are some other arguments that will allow to more clearly defining the substance of the impact. For example, at the «equality» of the other arguments, the main role in these cases may be taken by religious postulates that dominate in a given society.

At first glance, this option seems quite acceptable. For example, in Greece, Russia, Serbia and Ukraine, where Orthodoxy is dominant, according to the

doctrine of which, our life is the highest gift of God, the beginning and end of which are found only in His hands (*Job 12:10*), any human intervention in this process is unacceptable, and the criminalization of such acts seems quite justified.

But after a more detailed analysis it becomes clear that such arguments tend to faint, if not to disappear. For instance, in Belgium, where 76% of the population consider themselves Catholic, and the Catholic Church actively protested against allowing euthanasia, in 2001 both forms of euthanasia were officially allowed. In France, where 62% of the population consider themselves to be Catholics, in Luxembourg – 76% Catholics, i.e. almost the same percentage of Catholics as in Belgium, only passive euthanasia is allowed. However in Poland, where from 70 to 90% of the population considers themselves to be Catholics, in Croatia, where there are 85% Catholics, i.e. the percentage of adherents of the Catholic faith is slightly larger, but still practically at the same level as stated above, any euthanasia is prohibited. What is it that lies in the basis of making legal decisions regarding euthanasia in these states, including its prohibition? Therefore we repeat, the question of effective impact on this type of acts in the countries where they are recognized as criminal has all the chances to move into the category of «eternal.» And, maybe, figuratively speaking, everything is simpler, and we again have to think about the social «boundaries» of criminal law impact? For example, in England, suicide was in general considered an illegal until the 1960s. But in 1961 a law on suicide was adopted, which largely expressed disapproval of it, but at the same time, it was recognized that «*the severity of the problem cannot be solved it by legal prohibition*» (emphasis added – E. S.) This is to some extent, if you desire, a reason for further reflections on the choice of forms of impact on crime.

The dynamic development of the world, processes of globalization, which nowadays attained irreversible character, objectively formulate new challenges for the legal regulation of such processes. In this regard, there are increasing discussions about the prospects of the development of criminal law. Such development may relate to both the general provisions connected to the processes of criminalization and decriminalization, penalization and depenalization, further categorization of socially dangerous acts, problems of improvement on the level of legislative techniques, etc. This can include changes that will apply to the institutions and norms of the Special Section. Possible changes in the system and the types of penalties are being increasingly discussed, giving this type of government impact the character «adequate» to the committed act. Such changes may occur at both the international and national levels.

Nevertheless, these processes should not acquire the character of «bravura demonstrations» and mechanical copying. In this paper we have attempted to demonstrate how thoughtful and reasonable, even «socially cautious» should be any decisions related to the criminaliza-

tion of certain acts, transfer, in this context, of «normal» people to a different social category, starting thus, the entire mechanism of criminal justice, but in essence – the search for new, or modified, or other methods of impact on crime, which we «ourselves» create with the processes of criminalization. Consequently, all of these processes must be thoughtful, interconnected, interdependent, mutually submitted or, speaking more figuratively, sufficient and necessary. Only such an attitude to the initial processes of criminalization and the subsequent impact on the «created» crime is able to display the effectiveness of state building, the general level of the functioning of the state mechanism, and the proclaimed form of impact will receive the necessary substantial filling. Still there are more questions than answers…

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Realization of principles of the status of judges in the context of a new stage of judicial reform

By entering the Council of Europe Ukraine committed to provide introduction of reforms of the national legislation by adjusting it in accordance with European standards. Ukraine is obliged to adhere to requires of the European Convention of human rights and fundamental freedoms, ratified in 1997 (hereinafter the ECHR) and to the European Court of human rights (hereinafter the European Court) the practices which constitute an essential part of this international agreement.

Judicial reform in Ukraine lasts more than 20 years. Over these years MPs, judges and researchers have drafted dozens laws, some of them have become a basis for the substantial changes in judicial system and legal regulation of status of judges. Among the most significant stages of the judicial reform should be mentioned the following: the so-called «small judicial reform» of 2001, which altered decision reversal system, the Law of Ukraine «On judicial system» of February 7, 2002[1], which simplified the structure of the judicial system, the Law of Ukraine «On access to judicial decisions» from December 22, 2005[2], which established the official procedure of publication of all the judicial acts on the special Internet-portal opened for a public access, the Law of Ukraine «On enforcement of the decisions and implementing practices of the European Court of human rights» from February 23, 2006[3], which regulated relations, which arose from the responsibility of a state to enforce decisions of the European Court of human rights in cases against

[1] Про судоустрій України: Закон України від 07.02.2002 р., № 3018-III // Офіц. вісн. України. – 2002. – № 10. – Ст. 441.

[2] Про доступ до судових рішень: Закон України від 22 грудня 2002 р. № 3262-IV // Відом. Верховн. Ради України. – 2006 р. – № 15. – Ст. 128.

[3] Про виконання рішень та застосування практики Європейськогосуду з прав людини: Закон України від 23.02.2006 р., № 3477 // Офіц. вісн. України. – 2006. – № 12. – Ст. 792.

Ukraine, the Law of Ukraine «On judicial system and status of judges»[1] from 7 July 2010, which initiated consistent changes of the system of judiciary as a whole. Among the positive innovations, provided by this law, should be named the introduction of:

a) automated system of distribution of cases among judges in general jurisdiction courts;

b) compulsory special training of candidates for positions of judges and periodic in-service training of professional judges;

c) competitive principles of selection of candidates for position of judges (initially appointed or transferred to another court according to promotion procedure);

d) unification of procedural standards and legal criteria of imposing sanctions on judges of local and appellate courts by means of concentration of disciplinary powers in the unified permanent body within judicial system – the High Qualification Commission of Judges;

e) fair principles of determining and payment of the judges' wages;

f) limiting of powers of the presidents of the courts by means of avoiding possible ways of their undue influence on judges while performing administration of justice;

g) new status of the State Judicial Administration as a body, accountable and controlled by the supreme self-governance judicial bodies.

Obviously, all the indicated innovations aimed at completing the only task – guaranteeing of judicial independence and improving the level of their personal accountability for rendered decisions. However, inconsistency of legislators resulted in number of practical difficulties while implementing the positive novels.

On 9 January 2013 the European Court rendered a decision in the case of the ex-judge of the Supreme Court of Ukraine O. Volkov, in which was stated a number of systematic shortcomings of legislation regulating imposition of disciplinary measures procedure on judges (violation of principle of legal definiteness in formulation of components of disciplinary offense, non-compliance with standards of proper legal procedure of dismissal of judges for breach of oath, undifferentiation of disciplinary measures). The European Court stated to reinstate O. Volkov in a position of a judge of the Supreme Court of Ukraine, – this individual measure of restoration of the position of Applicant which existed prior to violation of the ECHR is applied by the European Court as an exceptional measure[2].

On 27 October 2014 the President of Ukraine established a new central body responsible for formulation the future configuration of judicial reform – the Council for the judicial reform, composed of the best national legal professionals. In our opinion, reframing the status of judges should be a foreground

[1] Про судоустрій і статус суддів: Закон України від 07.07.2010 р., № 2453–VI // Офіц. вісн. України. – 2010 р.– № 55/1/. – Ст. 1900.

[2] Волков О. проти України: рішення Європ. суду з прав людини від 9 січня 2013 р. / Інформаційний портал ХПГ [Електрон. ресурс]. – Режим доступу: http://khpg.org/index.php?id=1359450183. – Заголовок з екрана.

task for the new stage of judicial reform. In academic legal literature addressed to specified problems (I. E. Marochkin[1], L. M. Moskvich, S. V. Pryluckyj, S. V. Podkopaev[2], O. M. Ovcharenko[3]), exists a prevailing assumption that independence of a judge should naturally be combined with his\her accountability before the state and society. Events of recent years have proved existence of a considerable public demand of a fair justice. Thus, *the task of our investigation is to outline theoretical background of reforming the status of judges in modern context aiming to form a high-qualified judicial corpus, known for integrity and accountability before the civil society*. To determine fundamental principles as a base for the status of judges regulations we draw upon the provisions envisaged by Chapter VIII of the Constitution of Ukraine «Justice», current law «On judicial system and status of judges», international legal standards and best practices of the European countries.

Independence of judges is a prime, fundamental principle on which structure of judicial system and administration of justice is based. Independence of judges is one of the best and significant achievements of a democratic society, which should never be regarded as a privilege given to satisfy own needs in court. This is a safeguard established to provide functioning of the judicial system and realization of the fundamental principles of justice.

The content of the principle of independence of judges is revealed by provisions of the Constitutional Court's of Ukraine Decision of December 1, 2004, rendered in case concerning independence of judges as a component of their status, the operative part of which held that provision of the para 1 Article 126 of the Constitution of Ukraine «independence and immunity of judges are guaranteed by the Constitution and laws of Ukraine» in conjunction with other provisions of the Chapter VIII of the Main Law should be understood as followed: «Independence of judges is an integral component of their status. It is a constitutional principle concerning composing and functioning of courts, and concerning professional performance of judges, who are bound only by law while performing administration of justice. … Lowering the guarantee levels of independence and immunity of judges at no time should be provided by new laws or by amendments to the current laws»[4].

An important component of the judicial independence is a special procedure of bringing a judge to responsibility, specifically, to criminal responsibility. According to the par. 3 of the Article 126

[1] Марочкин И. Е. Легитимность судебной власти / И. Е. Марочкин // Ежегодник украинского права. – 2013. – № 5. – С. 571-578.

[2] Москвич Л. М. Подкопаєв С. В., Прилуцький С. В. .Статус судді: питання теорії та практики: моногр. – Х.: Вид.дім «ІНЖЕК». – 2004. –327 с.

[3] Овчаренко О. М. Юридична відповідальність судду: теоретико-прикладне дослідження: моногр. / Овчаренко О. М. – Х.: Право, 2014. – 576 с.

[4] Рішення Конституційного Суду України від 01.12.2004 р., № 19-рп/2004 у справі про незалежність суддів як складову їхнього статусу // Офіц. вісн. України. – 2004. – № 49. – Ст. 3220.

of the Constitution of Ukraine a judge should not be detained or arrested without the consent of the Verkhovna Rada of Ukraine before a guilty verdict is rendered by a court. Criminal procedural legislation extends guarantees for the immunity of a judge. At this rate, according to the article 482 of the Criminal procedural code of Ukraine a judge should not be detained or be subject to an imposed measure of restraint in the form of arrest or house arrest without consent of the Verkhovna Rada of Ukraine. As it stipulated by par 3 of the Article 154 of the Criminal Procedural Code of Ukraine suspension of a judge from his office should be carried out by the High Qualification Commission of Judges of Ukraine following a reasoned motion of the Prosecutor General of Ukraine. As to the article 48 of the Law of Ukraine «On judicial system and status of judges» only Prosecutor General of Ukraine or his deputy should serve a notice of suspicion in committing a criminal offense to a judge. The court, in which a judge is holding or held the office, should not try a criminal case against this judge.[1]

In the meantime, we believe that existing guarantees of the independence of judges are insufficient. Thus, after simplifying initiation of criminal proceedings procedure according to the CPC 2012 incidents of influence judges by entering unconfirmed statements on miscarriage of justice or other cases of power abuse to the Unified Register of the Pre-trial Proceedings has become frequent. In most cases such statements remain unconfirmed, though it negatively influences maintaining the principle of judicial independence. We consider that this issue may be resolved by introduction of such provision, which would stipulate that a statement of committing a criminal offense by a judge should be entered to the Unified Register of Pre-Trial investigations following only grounded motion of the Prosecutor General of Ukraine agreed upon with a body vested with disciplinary powers.

However, special procedure of bringing judges to responsibility should be applied only in respect of committing criminal offenses in the field of administration of justice. These practices will comply with European standards as many countries of the European Union provide functional immunity, which is not applied in respect of offenses committed behind the field of performance of professional duties. It is proposed to fix this approach in new legislation on judiciary.

Engaging judicial bodies in the procedure of bringing a judge to criminal responsibility has become one of the significant achievements of the judicial reform. It is an independent, impartial body composed by the majority of judges which should consider issues concerning removing or limiting immunity of a judge. Concerning this matter national legislation provides even more guarantees to judges than European legislation. Thus, it is considered that the Verkhovna

[1] Кримінальний процесуальний кодекс України від 13 квіт. 2012 р., №4651-VI // Голос України. – 2012. – №90 – 91.

Rada should not be able to give its consent on detention or arrest of a judge. Following the European traditions these issues are a subject of consideration by a disciplinary body formed within the judiciary. Introduced in 2010 practices of the High Qualification Commission of Judges in removal judges from the office proved effective.

Independence of judges should be provided with procedural safeguards. First, a judge should have a right on a good faith error determined by different factors (complexity of legislation, changes in case law, possible alternative in applying provision of direct action). Judicial error comprises of guilt of a judge and consequently – his accountability. The mechanism provided to correct judicial errors involves an appellate, cassation or other forms of reviewing judgments established by the law. Secondly, interpretation of laws, assessing of the facts and evidences in case should not be a ground for disciplinary, civil, administrative or criminal responsibility, except for the case when an intent to exercise an unlawful action by a judge is proved. It is allowed by international standards that criminal negligence may be a ground for disciplinary or civil responsibility of a judge. In order to implement envisaged guarantees of judicial independence legislation provides a special procedure of imposing disciplinary sanctions which should correspond the criteria of a proper legal procedure (independence, reasonable timing, a right of a judge to be heard by the body responsible for rendering decision of bringing to responsibility, a right of a judge to legal assistance, a possibility to challenge the decision on imposing a sanction)[1]. Third, according to the international standards and Constitution of Ukraine (art.56) a state is fully responsible for damage caused by unlawful actions of a judge while performing his professional duties. The state has a right to demand compensation as regress from a judge only in exceptional circumstances.

Irremovability of judges. Institution of initial appointment by the President followed by further election of a judge on a permanent position is a subject to constant critics by researches along with foreign experts. The Venice Commission in its opinions has repeatedly laid emphasis that the Verkhovna Rada of Ukraine should not be able to play role in the election and dismissal of judges' process, whereas it would determine undue politicization of this process. In relation with European standards, selection and career of judges should be based upon their personal achievements, consistent with their competence, abilities and results of their professional performance.

As indicated by the Opinion 1(2001) of the Consultative Council of European Judges «On standards concerning the independence of the judiciary and the irremovability of judges» European practice is generally to make full-time appointments until the legal retirement

[1] Городовенко В. В. Принципи судової влади: моногр. / В. В. Городовенко. – Х.: Право, 2012. – 448 с. – С. 42-45.

age. This is the approach least problematic from the viewpoint of independence of judges (par 48)[1].

The draft law on introducing amendments the Constitution of Ukraine on strengthening guarantees of judges' independence of July 4, 2013 (register №2522a) stipulated permanent appointment, dismissal from the office and transfer to another court executed by the President of Ukraine[2]. This draft was recognized as confirming to the Constitution of Ukraine (Opinion of the Constitutional Court of Ukraine № 1-v/2012 of July 10, 2012[3]). So, there are good reasons to believe that this approach is appropriate and corresponds to European standards and it should be fixed at the constitutional and legislative levels while introducing a new stage of the judicial reform.

At the same time, renouncing the system of permanent election of judges should be accompanied with development of efficient mechanisms of disclosure and eliminating offenses within the judiciary. Independence of judges does not mean total lack of control. Current legislation lack instruments of any accountability of judges before court senior officers or before any judicial bodies. President of the court also has no means of educational or disciplinary influence on a judge. However, legislation of the EU countries provides specific procedures of the evaluation of judicial work.

The Consultative Council of European judges recommends all the member-states to use both formal and informal procedures of evaluation that help to improve the skills of judges, and, thereby, the overall quality of justice. Such means include assisting judges by giving them an opportunity for self-assessment, providing feedback and informal peer-review. The basic elements for formal evaluation (where it exists) should be set out clearly and exhaustively in primary legislation (its grounds and the procedure). Evaluation must be based on objective criteria. Such criteria should principally consist of qualitative indicators but, in addition, may consist of quantitative indicators. In every case, the indicators used must enable those evaluating to consider all aspects that constitute good judicial performance. Evaluation should not be based on quantitative criteria alone. In order to safeguard judicial independence, individual evaluations should be undertaken primarily by judges. Councils for the Judiciary may play a role in the process. Evaluations by the Ministry of Justice or other external bodies should be avoided

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[1] Висновок № 1(2001) Консультативної ради європейських суддів «Про стандарти незалежності судових органів та незмінюваність суддів // Міжнародні стандарти незалежності суддів: Збірка документів. – К.: Поліграф-Експрес, 2008. – С. 107-125.

[2] Проект Закону від 04.07.2013 №2522a про внесення змін до Конституції України щодо посилення гарантій незалежності суддів [Електрон. ресурс]. – Режим доступу: http://zib.com.ua/ua/print/34236-proekt_zakonu_vid_04072013_2522a_pro_vnesennya_zmin_do_konst.html. – Заголовок з екрана.

[3] Висновок Конституційного Суду України у справі про внесення змін до статей 80, 105, 126, 149 Конституції України від 10 липня 2012 р. № 1-в/2012 // Офіц. вісн. України. – 2012. – № 55. – Ст. 2214.

(par. 49 of the Opinion #17(2014) CCJE of October 24, 2014 «On the evaluation of judges' work, the quality of justice and respect for judicial independence»).

Thereby, national legislators should give a thought on reinforcement of organizational legal measures regulating monitoring of judges' work results. To that extend, it could be performed by a judge's duty to draw and submit an individual annual report which would be a subject to discussion at the meetings of regional judicial self-government bodies (specifically, at the gatherings of judges of the relevant court). On one hand, submission of the annual report can strengthen the level of personal responsibility of a judge; on the other hand, it would allow discovering judges, who make a lot of mistakes, systematically violate reasonable time frames for consideration a case, breach internal regulations of the court.

Accountability of judges to society. The idea of mutual accountability of a judge to society constitutes a part of conception of an accountability of a state to nation. Responsibility of a judge should be considered in two aspects: positive and negative. As to the first aspect, accountability of a judge is a willful maintaining the principles of law and current legislation while considering cases, which lies in his scope of duties. Positive accountability of a judge is a basic model of a lawful behavior of a judicial power holder based upon profound knowledge of his professional duties and legislation, and upon the respect of ethical, moral values recognized by society. Under conditions of mutual integration between states a judge should focus on recognized by international community, specifically, legal reasoning of the European Court.

Negative accountability of a judge features all the negative legal, organizational or material consequences as a result of implementing a sanction of a legal norm. Negative responsibility shall apply after a judge implemented procedural or material law, which is proved by a judicial or law enforcement authorities' act (for example, by a disciplinary body), adopted through the proper legal procedure. Imposing disciplinary or administrative sanction on a judge, criminal sentencing or incurrence of liability to cover damages according to civil law appears to be consequences of negative accountability of a judge.

The idea of accountability of a judge to society has become of a special concern nowadays. Two laws on lustration of judges have been adopted due to influence of the society – «On restoration of trust in judiciary of Ukraine» of April 8, 2014[1] and «On purification of government» of September 16, 2014[2]. In our opinion, question of lustration should be carefully considered.

First of all, drawing on lustration experience of the EU countries it is clear that this type of accountability is inseparable from its political background. If

[1] Про відновлення довіри до судової влади в Україні: Закон України від 08.04.2014 р., № 1188-VII// Офіц. вісн. України. – 2014. – № 31.

[2] Про очищення влади: Закон України від 16 вересня 2014 р. № 1682-VII // Офіц. вісник України. – 2014. – № 82. – Ст. 2317.

lustration, established by law, appears to be the legal accountability following the procedure, then its backgrounds have pronounced political coloring, as for the assessment criteria of a certain action of a judge lies in a period of judicial performance, when the position of the President of Ukraine obtained a concrete person. But in the meantime, legislation regulating reasons and procedure of rendering court decisions, which are subject to lustration, hasn't changed. Judges according to their legal status are put aside political process and cannot be participants of it, and, therefore, cannot be subjects to political accountability. Experts of Council of Europe, who provided an analysis of the draft law «On restoration of judiciary in Ukraine» in opinion of March 24, 2014 emphasize that lustration provides a stable post-conflict situation, but in Ukraine continuation of political tension is felt and therefore it is necessary to consider risk of a prevalence of elements of political character of the law over the legal[1].

Second, if the Law of Ukraine «On restoration of trust in judiciary of Ukraine» envisages procedure of special vetting of a judge according to his/her commission and omission with respect to maintenance of proper procedural safeguards as those, provided for disciplinary procedure, than the Law of Ukraine «On purification of government» determines accountability of a judge by the sole fact of rendering decisions of a special category, it barely contains safeguards of the proper procedure for a person who is a subject to lustration. This Law contravenes a number of essential principles – presumption of innocence, a right of a person to private life (lustration may de-credit reputation of a person), principle of fairness and individualization of penalties. Meanwhile, the second stage of lustration provides some procedures with very serious consequences – dismissal from the office followed by a ban for occupation of similar position during the period of 5 or 10 years. Thus, provisions of the Law of Ukraine «On purification of government» may challenged both in the Constitutional Court of Ukraine and in the European Court of Human Rights.

According to the Resolution 1096 (1996) PACE «On measures to dismantle the heritage of former communist totalitarian systems», lustration should be undertaken with respect to certain criteria. Moreover, this procedure would comply with the principle of the rule law if it aims to avoiding infringements of fundamental freedoms and rights and of democratization. Revenge cannot be the lustration purpose. Political or social abuses as a result of lustration are also inadmissible.

One of the grounds for conducting lustration, not connected to with political factors, is delivery by the judge of the decision, which is a subject to consideration by the Court. Thus, according to the par. 2 of the Article 3 of the Law «On

[1] Експертний висновок до проекту Закону України «Про відновлення довіри до судової системи України»: / Г. Рейснер, Л. Винтер, Дж. Мердок [Електронний ресурс]. – Режим доступу: http://zib.com.ua/ru/print/78632-ekspertnoe_zaklyuchenie_k_proektu_zakona_o_lyustracii_sudey_.html. – Заголовок з екрана.

restoration of trust in judiciary» vetting shall be also conducted with regard to judges, who as a single judge or as a member of a panel of judges, considered a case or rendered a decision with violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, established in a decision of the European Court of Human Rights. Upon the results of vetting of judges the Interim Special Commission shall adopt the opinion which may be forwarded to the High Council of Justice – on purpose to dismiss a judge for breaching an oath, to the High Qualification Commission of Judges – on purpose to impose disciplinary sanctions on a judge, to the General Prosecutor's Office of Ukraine – for reviewing whether judge's action really have signs of criminal offence (Article 7 of the specified Law). Following the par. 5 par. 7 of the Article 3 of the Law of Ukraine «On purification of government» a judge should be dismissed from the position and banned to occupy the similar position for the period of 5 years if his/her illegal decisions, commission or omission, led to violation of human rights and fundamental freedoms established by the decision of the European Court of Human Rights. This fact has to be established by court in its decision which has come into effect.

There is a severe problem with decisions of the European Court against Ukraine inasmuch as our state traditionally takes leadership in a number of applications alleging the violations of human rights and in a number of decisions where the European Court found violations of the European Convention of Human Rights. However, in our opinion, the sole fact that a judge was engaged in rendering a decision, which was challenged in the European Court, cannot be a ground for accountability of a judge. First of all, behavior of other bodies and officials involved in a contentious case should be assessed, since the court may not be the only one engaged. The judge could participate in trial and consideration of a case, but he cannot be accessorial to circumstances, which eventually led to violation of the ECHR. Second, the guilt of the judge in commission of illegal actions which led to that the citizen challenged the decision of national court in the international has to be ascertained. Third, according to the international law responsibility for violation of the European Convention of Human Rights rests with a state. A judge, as we believe, may be responsible for engaging in violation of the rights and freedoms established by the ECHR, only in case of committing a criminal offence as established by a guilty verdict which has come into legal effect. Otherwise, it would contradict current legislation and international standards on immunity of a judge.

The idea of electivity of judges is closely connected with the principle of the accountability of judges to society. Recently this idea became especially current central, suggestions to enshrine in the legislation on judicial system the right of a local community to elect judges arose. Authors of this idea consider that responsibility of the judge before a community to which judge will be accountant would be guaranteed by these

means. In our opinion, it is necessary to approach the expressed suggestions carefully. First, the legislation of EU countries doesn't provide such model of appointment of professional judges. Secondly, if the community elects the judge, the judge will have moral obligations to his voters, and respectively voters – the right to demand from the judge delivery of necessary (from the point of view of voters) decision. It contradicts fundamental principles of judiciary, in particular, independence of judges. Besides, elections of judges – rather expensive process which won't be able to provide selection of judges on criteria of their competence, high personal and moral qualities. Elections always appear to be a political process and it contradicts the legal nature of a judicial branch of the power. In case of elections of judges it also appears unclear who will bring them to responsibility – a community itself or the special body within the judicial system allocated with disciplinary powers. Thus, in modern national conditions the idea of electivity of judges is inadmissible.

Competence is one of basic requirements to the professional judge and emerges in qualification requirements to him/her. On the one hand, the high level of proficiency, personal and moral qualities is the prerequisite for obtaining the status of a judge. On the other hand – maintenance of the competence at the appropriate level is a duty of the judge which needs to be carried out throughout all term of tenure. Verification of professional eligibility of the judge at all stages of his career belongs to powers of judicial authorities.

In compliance with European standards judges have to be provided theoretical, practical initial and in-service trainings.

In Ukraine this provision is duly observed, functions of providing judges with trainings are executed by National school of judges of Ukraine and higher educational law institutions which carry out training of candidates for positions of judges according to special programs.

For the purposes of increase of level of competence of judges the suggestions of the Supreme Court of Ukraine stated in the resolution of its Plenum No. 1 of April 11, 2014 concerning increase in age from which a person can shall be appointed to the judge's position (from 25 to 30 years), and increasing this length of work experience in the field of law (from 3 to 5 years)[1] [18]. Such changes will give the chance to recommend for positions of judges persons who have extended life experience and weightier professional achievements. At the same time revealing by the disciplinary body of discrepancy of level of competence of the judge to the position held

[1] Пропозиції Верховного Суду України Тимчасовій спеціальній комісії Верховної Ради України з питань підготовки законопроекту про внесення змін до Конституції України: пост. № 1 Пленуму Верховного Суду України від 11 квітня 2014 р. [Електронний ресурс]. – Режим доступу: http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/184A16A3C18F026DC2257CBB00394174?OpenDocument&year=2014&month=04&– Заголовок з екрана.

has to be the ground for imposing disciplinary penalties (training assignment to the National school of judges of Ukraine or dismissal from a position).

To summarize, it is necessary to emphasize the following. Further judicial reform has to be directed on maintenance of the fundamental principles of independence of judges and their accountability to society. Independence of judges designates freedom concerning impartial consideration of cases according to the legislation and freedom at an assessment of the actual facts of the case. Procedural safeguards include a right of a judge on a good faith error responsibility for which bears the state, and a special procedure of bringing judges to responsibility.

Responsibility of the judge in its positive aspect is a basic model of lawful behavior of the judicial power holder based on profound knowledge of functions a judge, and provisions of regulations, and also on respect to ethical, moral values, recognized in society. Responsibility of the judge in its negative aspect appears to be those negative consequences of legal, organizational or material nature following violation of procedural and (or) substantive law regulations by a judge and is based on implementation a sanction of a legal norm.

Grounds and procedures of bringing a judge to responsibility have to be based on standards of due legal process, namely, observance of requirements of fairness, impartiality, reasonable terms for consideration of cases, proportionality and individualization of legal responsibility sanctions, ensuring procedural safeguards of judge when considering his/her case.

Legal status of the judge and his legal responsibility have to be completely excluded from political process as it required by the status of judicial power as an impartial arbitrator in settling the issues of law. A judge can't be the subject to political and legal responsibility as it will contravene the fundamental principle of independence of the judiciary.

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Regarding the systematic measures of judicial reform

The main objective of the judicial and legal reform underway in Ukraine is establishment of comprehensive, independent and autonomous judicial system based on the rule of law in accordance with European standards of justice, which would be able to ensure the best standards of justice, effective proceedings in all legal cases with important legal implications and produce a fair judgment.

When evaluating the measures to improve effectiveness of the judicial system scholars and practitioners traditionally asses the work of judicial institutions only. Meanwhile, the judicial system is an open system (as defined by the systems theory), its main activity is closely associated with both persons that go to court and take part in the trial and the bodies that monitor the enforcement of judicial acts, thus ensuring practicability of restoration of and protection of infringed rights. «Openness» of the judicial system implies that it subject to mutual influence on the part of other social systems. Society as a whole (or the state), as a metasystem for the judicial system, is comprised of separate elements (subsystems) operating in accordance with established values and regulatory practice. Should these elements deviate from this established order, the function of the court in this mechanism is to bring them back in line with the established practice by protecting the rights and freedoms of the human and the citizen. In this way the judicial system contributes to the stability of society as a social system. At the same time, society, as an external environment in respect to the judiciary system, provides it with balanced resources (information, human, and material) required completing this task. Moreover, when elaborating its optimum model, in addition to external relationships, the quality of the functioning of the systems being considered is affected by the internal factors – the structure, the nature of re-

lationships among the elements of the system as well as its control mechanism. In this context of particular importance is the system of judicial self-governance, i.e. the possibility to influence its self-organization, to improve its form, control its adequate resource provision, etc.

In addition to the structure of the «ideal» model of the mechanism of interaction of the judicial system with other elements (other subsystems) of the general metasystem and the mechanism of interaction among the elements (courts) within the judicial system itself, when regards to the efficiency matters the system analysis theory singles out the *operation algorithm*. This concept reveals the mechanism of manifestation of intrinsic properties of the system that define its behavior according to the law of functioning. This law can be put to practice in different ways depending on different operation algorithms, with the system's different functioning quality and efficiency as a result[1]. In reference to the judiciary system this means that its efficiency is a function of the quality of judicial procedure. Finding the most appropriate forms of trial for each particular environment is an important element in optimization of the functioning of the judicial system.

At the same time, the number and complexity of cases to be heard by courts must correspond to the resources, i.e. information, human, financial, resources, etc., consumed by the judiciary system from the external environment. If the system's tasks at hand are beyond the required amount of resources, it impacts the efficiency of the system itself in a way that it shows maximum quality of performance of its functions with minimum resources consumed. In this situation, the quality should be monitored both using internal and external mechanisms, both public and social.

Unfortunately, there has not been any systematic scientific analysis of the effectiveness of the judicial system in Ukraine until now, though this issue has already been highlighted in research by international organizations and national sociological services. Nevertheless, their opinions have no binding effect for adoption of adequate management solutions. Thus, the European Commission for the Efficiency of Justice (CEPEJ) carried out a large-scale project to assess the efficiency of the judicial systems of the Council of Europe member states. As noted by the authors of this project, the data received should help national authorities «to identify shortcomings in the functioning of the national judicial system and encourage judicial reform»[2].

In our view, one can distinguish 4 main areas for improvement of the national judicial system: (a) adoption of the

[1] Шило, О. Г. Теоретико-прикладні основи реалізації конституційного права людини і громадянина на судовий захист у досудовому провадженні в кримінальному процесі України [Текст]: монографія / О. Г. Шило. – Х.: Право, 2011. – 472 с. – С. 37.

[2] Evaluation report of European judicial systems/European Commission for the Efficiency of Justice (CEPEJ) – Edition 2014 (2010 data): Efficiency and quality of justice [Електронний ресурс]. – Режим доступу: https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CEPEJ(2010)Evaluation&Language. – Заголовок з екрана

judiciary model optimal for Ukraine; (b) improvement of judicial procedure currently in effect; (c) optimization of the personnel policy of the judicial power; (d) solution of a number of problems regarding administration of the judicial system. Consistency of reform measures must ensure that the judicial reform yields the expected effect.

As far as the optimum Ukrainian judiciary model is concerned, each new «wave» of the judicial reform began exactly exactly with the structural reorganization of the judicial system. The search for the «optimum» model of the judicial system in most cases was reduced to addressing two main issues: (a) centralization / decentralization of the judicial system, and (b) scope of jurisdiction of courts. Thus, in 1996 the Constitutional Court of Ukraine was established; in 2001 all general jurisdiction courts were moved under the control of the single highest court – the Supreme Court of Ukraine; in 2002 they created a separate branch of the judicial system – the courts of administrative jurisdiction; in 2010 they set up the High Specialized Court of Ukraine for Civil and Criminal Cases, eliminated the subsystem of military courts, altered functions of the Supreme Court of Ukraine. Obviously, the search for the best judiciary model for Ukraine is still underway. In particular, today there is an ongoing debate on elimination of high specialized courts, merger of general and economic courts, etc. There are several thoughts we would like to share in this respect.

Note that under the currently effective Ukrainian Constitution of 1996 it is not possible to return to the tree-level court system by eliminating high specialized courts, since Ch. 3 Art. 125 provides for their a priori existence. However, we should probably have a closer look into the reasons why the issue of elimination of high specialized courts emerged on the agenda at all. We believe there are two reasons to this: Firstly, under the present system and procedure of court proceedings, the Supreme Court of Ukraine has limited powers to perform its basic function – to ensure integrity of judicial practice and exercise direct influence thereon. We believe that this problem can be resolved by amendments to the procedural law, while these amendments should (a) provide for the right of citizens to file appeals directly with the Supreme Court of Ukraine regarding rulings of high specialized courts, whereby the case is denied admission to review by the Supreme Court of Ukraine; and (b) to provide for incompliance with the legal opinion of the Supreme Court of Ukraine as an independent ground for cancellation of the judgment. The second reason to raise the issue of the elimination of high specialized courts is the actual practice of jurisdiction disputes, non-uniformity of practice of administration of law in such legal relations, which generally violates the international standard of justice – predictability of judicial decisions. In our view, this problem can also be solved by changes in substantive law, which, in particular, will grant the Supreme Court Plenum the right to resolve conflicts of jurisdiction between jurisdictions as well as to revoke the Resolution of high spe-

cialized courts if they lack unity as to interpretation of the rules of administration of law in such legal relations. Should such approach be acceptable, it would be appropriate to provide for the composition of the Plenum of the Supreme Court to consist of representatives of three jurisdictions. Finally, it should be added that exceptional powers vested onto the supreme court of a country is a common practice in Europe, therefore, the general idea of the drafters of the Law of Ukraine «On the Judicial System and Status of Judges» regarding the status of the Supreme Court should be supported, while legislative flaws found in actual practice can be eliminated as shown above, i.e. only by changes in procedural and substantive law with no need to initiate major reconstruction of the judicial system.

As regards abolishment of specialized economic (and, perhaps, administrative?) jurisdiction, it should be noted that the poly-system approach as a method to organize the judicial power is one of the world trends for development of modern judicial systems. It allows increasing specialization of judges and thus improving the quality of judicial decisions, which is an additional guarantee of efficiency of the judicial system. Therefore, we believe that in this respect, the problem of ever more distinct legislative division of powers among the judicial subsystems, development of methods of cooperation and coordination among them, proposition of a mechanism to resolve potential disputes is more important than reorganization of specialized jurisdiction. For that reason, as we already mentioned above, we suggest that the authority to resolve conflicts of jurisdiction and other contentious issues be vested to the Supreme Court of Ukraine, which would allow maintaining the integrity of the Ukrainian judicial system.

As far as the areas for improvement of judicial procedure are concerned, studies by scholars from different countries show that among the priority measures to improve judicial procedures the most prominent are 2 major problems: high cost and long time of litigation. As opinion polls show, these flaws are relevant for the national court system as well[1]. So, obviously, the optimization of judicial procedure, too, should focus on these two components.

As to the first component, i.e. cutting the costs of trial, we think that, firstly, it is important to develop institutions of legal aid to facilitate out-of-court settlement of legal disputes; secondly, it is reasonable to set up «appeal filters» and material sanctions for abuse of procedural rights to delay the process; thirdly, one should evaluate the positive effects of implementation of international practices with regard to the functioning of the system of private judgment enforcement agents.

As far as the second aspect, i.e. reduction of time of proceedings, one should bear in mind that the European Court of Human Rights considers dura-

[1] Стан корупції в Україні. Порівняльний аналіз загальнонаціональних досліджень: 2007–2009, 2011. Звіт за результатами соціологічних досліджень. [Текст] – Київ, 2011. – 47с.

tion of the trial beyond reasonable time a violation of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and many European countries, such as: Belgium, Great Britain, Austria, Czech Republic, Denmark, Italy, Slovakia, Switzerland, Croatia, Bosnia and Herzegovina, France, Luxembourg, Norway, Spain, Sweden and others even legislated that unreasonable delay of the trial shall constitute grounds for the interested parties to initiate procedures to get financial compensation from the state. Most of Western countries have established practices to evaluate reasonable time for conduct of proceedings in different categories of cases– criminal, civil, administrative. In their report members of the working group of the European Commission for the Efficiency of Justice (CEPEJ) stated that the time of trial is one of the main indicators of the efficiency of courts. A prompt trial suggests that the courts made best use of available resources and is an evidence of efficient judicial procedures. Conversely, prolonged court hearings may signal existing problems and inefficiency of the judicial system[1].

Under the management theory, the common factors that lead to increased time needed to complete any activity are: (a) unjustified increased complexity of a job, (b) redundant work, and (c) inefficient methods used to complete it. In our view, better efficiency of judicial procedure with regard to its promptness can be achieved by complex measures in several areas, such as: organizational improvement of the judicial mechanism; development of institutions of out-of-court and pre-trial settlement of disputes; further development of the institutions of arbitration courts and similar institutions for other types of cases (so-called bodies of alternative justice); establishment of «filters» for review of cases in order to eliminate abuse of the law and deliberate delays in enforcement of the judgment; development of mechanisms of scientific organization of labor for judges, procedures for their professional development; introduction of a single form of filing petitions with the court, etc.

Regarding optimization of judicial personnel policy, its importance was emphasized still a while ago by a known lawyer of the past A. F. Koni, who noted: «no matter how good are the rules to govern any activity, they may lose their power and importance in inexperienced, rude and unscrupulous hands.» These are judges, real people with specific backgrounds, levels of socialization and sense of justice, rather than the court in general, who represent goals, means and cultural values of the society and act on behalf of the court as a social and legal institution, establish objective truth in a particular case heard in court, impose penalty or punishment and acquit thereof, make mistakes and correct them.

[1] Evaluation report of European judicial systems/European Commission for the Efficiency of Justice (CEPEJ) – Edition 2014 (2010 data): Efficiency and quality of justice [Електронний ресурс]. – Режим доступу: https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CEPEJ(2010)Evaluation&Language. – Заголовок з екрана

However, in our view, the most important problem of the modern judicial system is the low level of social respect for the judge, and, hence, tools of the judicial power as a part of comprehensive personnel policy effort should include not only measures of material and legal protection of judges, but also «social rehabilitation» of the trade to enhance the court's authority, respect and credit in the eyes of the citizens, among other things, due to positive model of a judge as a first-class expert. Therefore, the main areas for improvement of the professional quality of the judiciary, in our opinion, are: (a) development of the Standards of compliance with judicial profession, (b) optimization of the procedure for the choice of judicial candidates, and (c) establishment an effective mechanism to monitor their professional competence. As far as the first area is concerned, today we see a separate branch conventionally called «judicial anthropology» to originate and take shape in the framework of the current theory of the judicature. It is a system of ideas about a «human judge» – a person involved in judicial administration of law, the specifics of its influence on the social environment, about his or her spiritual sphere and the formation of the legal system. Although the judicial procedure is highly formalized, yet, legal provisions are interpreted by a human, that is a person endowed with consciousness and will. This allows us to suggest a direct relationship between personal qualities of the judge and efficiency of the judicial system since the entire process of applying a provision of law to legal relations in dispute is conscious and purposeful. In other words, one should admit that the procedural law itself cannot guarantee quality of justice to the society because it can be subject to personal qualities of the judge. An argument to support this conclusion is the practice of reversal (change) of court decisions by another competent judge (as by revision of a case in accordance with the law). If personal qualities of the judge had no impact on the process of examination of the evidence, choice of appropriate regulation and its application to the particular case, judgments by the first instance court would hardly be ever changed by the court of higher jurisdiction. As was justly noted by Yu. M. Groshevyi, the personality of the judge takes shape and develops in judicial activity under directed influence of not only the society and the state that defines the goals, objectives and methods of administration of justice and ensures normal conditions for successful performance of judicial functions, but also the higher courts, which ensure consistent application of law in court practice. Hence, the problem of studying the personality of the judge and evaluation of the effect of personal qualities on the discharge of his functions involves identification, based on the sociological concept of personality, of those qualities of a person, which are appropriate for such a career and facilitate duties of office[1]. The foregoing

[1] Грошевой, Ю. М. Проблемы формирования судейского убеждения в уголовном судопроизводстве [Текст] / Ю. М. Грошевой. – Харьков: Высш. шк., 1975. – 144 с. – С. 35.

highlights the importance of ensuring that the judicial system is staffed with professionals that best fit the requirements to the judicial profession. The study of personal characteristics of the judge is of a great practical value since it provides the theoretical foundation for legislative effort to enshrine qualification requirements set for both judicial candidates and serving judges. For a person already conferred the status of a judge should keep on professional development and must work towards self-improvement, master his or her skills, promptly adapt to changes and keep up with the requirements of the time. So, the objective of judicial anthropology should be the study of the personality of the judge combined with the analysis of the content of his professional activity in order to identify those of his qualities that benefit his profession in terms of efficiency and successful performance. This analysis should result in the elaboration of Standards of compliance with judicial profession that can serve as objective criteria to evaluate the proficiency of candidates for judicial, administrative positions, serving judges when making decisions regarding their transfer to the higher court, etc.

From our point of view, the structure of the Standards of compliance with judicial profession should feature requirements as to: (a) personal level of intellectual development, (b) personal social and psychological qualities and abilities, and (c) level of legal culture. The Standards should be set based on the activity and personality method, while their content should embody professionally important qualities of the judge. The Standards of compliance with the position of judge of the court of appeal, the highest specialized court or the Supreme Court of Ukraine as well as the Standards of compliance to administrative position in court should form a part of the general standards.[1]

As far as improvement of the procedure of selection of judicial personnel is concerned, we believe that the main problem here is the actual steps to implement proclaimed intention to ensure the functioning of the system of judicial selection based on professional qualities and objectivity. A comprehensive research is required to identify acceptable methods of evaluation of qualities and skills of the judge crucial for his office, outline the range of entities that may conveniently handle the task as well as to set the selection stage, where such evaluation must be applied.

As regards improvement of control of the competency of judges, after abolishment of the concept of judges competency evaluation the mechanism to control due qualification of judges is primarily based on the concept of advanced training, with the concept of disciplinary action serving this purpose in extraordinary cases. Under effective Ukrainian

[1] Наприклад, у США існує Перелік критеріїв якостей, за якими оцінюється відповідність кандидата судовій посаді, на яку він претендує. Визначено перелік якостей загальних, а також додаткових якостей окремо для суддів першої інстанції, апеляційних судів та наглядових суддів. – Див.: Критерії оцінки [Текст] // Інформ. вісн. Вищої кваліфікац. коміс. суддів України. – 2008. – № 1. – С. 15–23.

laws advanced training is a *right* of the judge that can be exercised by way of either participation in associations of judges or relevant training (Ch. 2 and 3 Art. 54 of the Law «On Judicial System and Status of Judges»). Peculiarly enough, the Georgian legislation, for example, provides that «failure to complete the special training course stipulated by law within the specified dates and without any good reason shall constitute grounds for dismissal of the judge.» However, in its Opinion No. 4 (2003) on appropriate initial and in-service training for judges at national and European levels dd. November 27, 2003 the CCJE emphasized that «it is unrealistic to make in-service training mandatory in every case, since, from its point of view, «the fear is that it would then become bureaucratic and simply a matter of form» (Cl. 34). The CCJE stressed that it is necessary to disseminate a culture of continuous training in the judiciary (Cl. 33)[1]. With due respect to this comment, we would rather believe that the said *culture* should be *instilled*, which is only possible under conditions of training, either continuous or recurrent. We suggest that the right of the judge for further training be substituted for his or her ethical duty, which will contribute to the establishment of the institution of further training as an element of monitoring of competence of judges. In addition, to ensure a uniform policy in respect of professional level of judges the Concept of further training of judges should be developed. It should provide for its goals, forms of implementation, timing, recurrence, form of monitoring if the course was successfully completed, and most importantly – the consequences should the results prove unsatisfactory.

Effective national legislation, unfortunately, does not provide grounds for dismissal of a person as a judge for the reason of his or her professional incompetence. We believe that failure to pass the test at the end of the training program must be an indicator of professional incompetence of a judge. If it is to be enshrined in law by legislative amendment that further training is nothing but *ethical duty* of the judge, this may offer a good reason for dismissal of the incompetent judge on the grounds stipulated in Par. 5 Ch. 5 Art. 126 of the Constitution of Ukraine – violation of the judge's oath of office. This Article implies that a judge must exercise his or her duties honestly and in good faith (Ch. 1 Art. 55 of the Law of Ukraine «On the Judicial System and Status of Judges»). For these reasons further training will become an effective mechanism to monitor competency of judges and compliance of their qualification to requirements of the profession.

As regards judicial discipline as a mechanism to monitor competency of judges, according to Cl. 18 of the Basic Principles on the Independence of the Judiciary, judges shall be subject to suspension or removal only for reasons of

[1] . Висновок №4 (2003) Консультативної ради європейських суддів до уваги Комітету Міністрів Ради Європи щодо належної підготовки та підвищення кваліфікації суддів на національному та європейському рівнях [Текст]: Страсбург, 27.11.2003 р. // Міжнародні стандарти в сфері судочинства. – К.: Істина, 2010. – С. 115–120.

incapacity or behavior that renders them unfit to discharge their duties. In our opinion, inappropriate level of qualification of a judge forms a reason that implies undermining the credibility of justice, the judicial power as a whole. However, inappropriate level of qualification of a judge must be proven. The status of judges guarantees application of objective criteria to evaluate his or her professional competence to hold the office. In our view, the only possible mechanism for such evaluation available within the existing legal framework is final testing of judges upon completion of the advanced training course. Only negative result of the test can be an objective evidence of his or her professional incompetence. Unfortunately however, the legislation does not contain a provision that would allow the High Qualification Commission of Judges may adopt a decision to send a judge into a further training program based on the results of disciplinary proceedings. The feasibility of amendment of the Law of Ukraine «On the Judicial System and Status of Judges» by adding such a provision is justified by the following: (a) it will facilitate the introduction of objective criteria for evaluation of conduct of judges; (b) it will help to increase proficiency (qualification level) of judges; (c) it will not violate guarantees of autonomy and independence of judges; (d) it will create conditions for application of disciplinary procedure as an additional tool to control the level of competence of the judiciary. So, in general, these measures will contribute to higher professional level of judges and, hence, better efficiency of the justice system.

And finally, here are some considerations concerning improvements of the mechanism of judicial administration. The judicial system as an integral and self-sufficient organization cannot be considered truly effective, if it has no powers or possibility to independently run its activities (exercise administration). Provision of resources for administration is the timely provision of courts with the necessary resources of adequate quality and quantity («adequate resources «), establishment of effective procedures for their distribution, accounting and control. One can envisage several variants of judicial administration: In the first variant, the system may encompass several «structural units», with competence to manage resources distributed among them (for example, when courts are in charge of financial, material and technical resources, the High Qualifications Commission of Judges is responsible for human resources, and the highest judicial agencies – for the information). However, in order to ensure the integrity of such system of judicial administration, the integrity of the judicial system administration policy, one should assign a single coordinating body of the judicial administration system (to ensure the principle of effective management – unity of direction) to be endowed with powers to coordinate, control, development of a concerned strategy for resources management, prompt operational managerial decision-making and so on. We believe that this task can be imposed

on the Council of Judges of Ukraine and the council of judges of specialized jurisdiction, which is hierarchically subordinate to it. This model can be quite feasible, provided minor changes and additions to the Law of Ukraine «On the Judicial System and Status of Judges».

Another option, and a more radical one, is to create within the structure of the Supreme Court of Ukraine a separate unit to be conferred the power of judicial administration. This model, in our view, has several advantages over the previous one: Firstly, it will strengthen the position of the Supreme Court of Ukraine as the highest judicial institution in the system of courts of general jurisdiction; secondly, it will allow to focus exclusively on management activities, which will contribute significantly to increase its professionalism, quality of management decisions; thirdly, it will allow to focus handling of all issues of organizational support of the judicial system in a single center, thus creating conditions for an effective, consolidated strategy of development for the judicial system; fourthly, it will allow to save financial resources, which under the first model are needed to maintain all structural units of the system of judicial administration; fifthly, for more effective implementation of managerial decisions of this body and establishment of feedback with individual elements of the judiciary, the lower courts will also have separate divisions formed in them, with their duties to include operational management of distribution, coordination, accounting and control of organizational provision of the courts with the necessary resources. However, the implementation of this variant of organization of the system of judicial administration requires substantial changes in legislation and is to be preceded by creation of a new concept of judicial administration.

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Analysis of the legal framework for the process of optimization of execution of punishments

In recent years, a certain regression and return to the provisions subjected to withering criticism in the past can be noticed in the rulemaking activity in the scope of penal enforcement. In Soviet times, the criticism of the bourgeois penal enforcement system basic concept was a separate area of research in the field of corrective labor law. The researchers of these aspects noted that the main trend of bourgeois penal policy was its inconsequence: the attempts to unite and combine the strengthening of the repression with seeking for the «progressive» systems of the corrections regime, which aim to influence prisoners through a variety of benefits. At the same time, the «readiness of the bourgeois penitentiary science to justify any form of deterioration of the prison regime» has been noted[1]; as B. S. Utevskiy wrote in this connection, «theoreticians-jailers relentlessly followed the practitioners-jailers»[2].

Recently, the above-mentioned approach actually became a feature of national penal enforcement practice and reveals in the permanent reduction of prisoners' rights and strengthening the penal side of penitentiary regime, thus also it often happens under the slogan of penal enforcement conditions «humanization».

[1] Криминология. Исправительно-трудовое право. История юридической науки : монография /отв. ред. В. Н. Кудрявцев. – М. : Наука, 1977. – С 169.

[2] Утевский Б. С. Тюремная политика фашизма / Тюрьма капиталистических стран : сб. статей / под. ред. А. Я. Вышинского. – М .: Сов. законодательство, 1937. – С. 193.

This circumstance has repeatedly drawn attention of such authors as A. P. Gel, T. A. Denisova, O. G. Kolb, O. V. Lysodyed, A. H. Stepanyuk and others, however, the continuous legislative changes of dubious quality require turning to this question once again, for the aim of separating the questionable legal norms and trying to find out the reasons for their adoption.

In 2010, the Law of Ukraine «On the Amendments to the Criminal Executive Code of Ukraine for the rights of convicts in penal institutions» was adopted. This act has somehow reduced some prisoners' rights and imposed additional duties on them, simultaneously expanding the rights of administration.

The most controversial point of the amendments was the update of article 121 part 3 CEC of Ukraine. Before adopting the law, this rule provided that «the cost of food, clothing, shoes, clothes, public and other services provided to the prisoners who persistently evade from work is seized from their personal accounts. In case of empty balance on the convict's account, the correctional institution has the right to appeal to the court». Obviously, this provision refers only to those prisoners who «maliciously persistently evade from work» and, of course, in case when it was where to work and what to do. Under these conditions, the cost of their staying in prison in case of lacking funds on personal accounts could be seized by court from the income they receive at liberty. The new edition gave the administration the right to charge through a lawsuit the cost of keeping in the colony of all prisoners who don't work. And it does not already matter, whether the institution (state) provides an opportunity to the convict to earn money or not, whether a person wants to work – everyone has to pay for the staying in colony.

The role of public in the penal institutions and authorities practice used to be much limited. For instance, the new edition of article 25 CEC of Ukraine says: «the associations of citizens, religious and charity organizations, individuals in order prescribed by this Code and the laws of Ukraine, can assist penal institutions and authorities in re-educating the convicts and providing social and educational work». The opportunity of possible direct participation in re-educating and re-socialization the convict were removed. Moreover, the new edition of paragraph 2 part 6 article 59 CEC of Ukraine provides an opportunity for the administration of the correctional center to visit the premises where the convict and his family members live without any sentence. In this connection there emerges an issue concerning the respect for the right of prisoners' family members to inviolability of the home. The mentioned law contains a wide range of such «improvements». Furthermore, the attraction to unjustified restrictions only strengthens: for example, the Ministry of Justice of Ukraine on March 18, 2013 by Order № 460/5 had adopted Detention Centre Internal Regulations of the State Penitentiary Service of Ukraine. We can state that adopting this legal act, of course, was crucial to ensure the pretrial detention centers unanimous practice and manage the various aspects of

personal treatment in these institutions. Recently, the practice of detention centers in Ukraine has been constantly criticized, and numerous cases of gross violating prisoners' detention conditions, human rights and cruel treatment came public[1]. Their existence is directly defined in the acts of the President of Ukraine, particularly, in his Decree of 8 November 2012 «On the Concept of State Policy in the State Penitentiary Service of Ukraine Reform». The discrepancy of prisoners and persons taken into custody detention conditions with the national legal norms and European standards was repeatedly noted in the reports of the Ukrainian Parliament Commissioner for Human Rights and authoritative international organizations – the UN Committee against Torture, the UN Human Rights Committee, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

In our opinion, the removal of these exactly shortcomings should had been chosen as the aim of recently adopted Internal Regulation. This is particularly important for implementing of strategic constitutional principles of the rule of law and the rule of legality, which in turn, directly refers to the necessity of strict ensuring and reliable protection of citizen's rights and freedoms. However, a more detailed review of this document reveals not the attempts of the Ministry of Justice of Ukraine and the State Penitentiary Service of Ukraine to implement the necessary guarantees for maintaining human rights and international standards in this area, but, on the contrary, a «return» of detention centers at the times of Gulag, totalitarianism and illegality.

The Rules limit the right to receive legal aid and personal protection. One of the forms of obtaining such an aid is meeting a defender. Law of Ukraine «On Preliminary Detention» clearly and unambiguously states: «a person taken into custody is entitled to meet the defender alone, without limiting the number of visits and their duration in the time free of conducting investigative actions» (article 12). That is the legislation provides only one restriction on a date with a defender – carrying out investigative actions. The adopted Rules limit significantly the time of meeting the defender, by stating that they are held not only in time free of conducting investigative actions, but only during the hours fixed in the schedule. A Typical Daily Schedule is given in Annex 6 to the Rules. The latter assumes that the investigative actions and meetings are held from 9.00 to 18.00. Besides, Section 4.2 of the Rules prohibits the withdrawal of prisoners for meeting the visitors during lunch from 12.30 to 14.00. Thus, if investigative actions drag or a prisoner is involved in other social and educational activities in

[1] Країна за колючим дротом // http://archive.wz.lviv.ua/articles/100000; СІЗО. Роздуми над побаченим й почутим // http://nbnews.com.ua/blogs/75327/; Сумні «рекорди» України в Євросуді з прав людини // http://www.bbc.co.uk/ukrainian/mobile/politics/2013/01/130110_european_court_judgment_ukraine_sd.shtml; Українські СІЗО: залиш надію кожен, хто сюди потрапляє // http://humanrights.com.ua/130. – Заголовок з екрана.

the prison, including meals, he is unable to communicate with a defender. Rules also impose on prisoners duties not provided by law. E.g., article 10 of the Law of Ukraine «On Preliminary Detention» determines the exhaustive duties of prisoners, but the Rules require fulfilling the following additional requirements which are no way related to the purpose of the detention center functioning and custody (paragraph 4.2): to get out of beds, to rank and greet the detention center staff at their entrance to the cell; to share last name, first name and patronymic at the request of detention center staff; to give written explanations; to observe silence; to maintain the rules of conduct; to keep the walking yards clean; to keep hands behind the back while moving outside the camera in and outside the prison; to make beds after getting up according to sample set by the detention center administration; to make wet cleaning etc. These responsibilities are not only inconsistent with the obligations outlaid in the law, but also, in some cases, are degrading because of the foreseen disproportionate subordination to the prison staff eradicate any personality.

And the stated is not the full given the deterioration of convicts and prisoners legal status. Perhaps, the new changes to the CEC of Ukraine of September, 2013, which are also positioned as an expression of further humanization, have been made not only for the purpose of these regulations development and their covering the preventive measure of custody but also for the procedure of penal enforcement.

Anyhow, in fact the improvement of prisoners' status did not occur. Thus, the aforementioned Act introduced changes to the article 95 CEC of Ukraine concerning restrictions on visits (excluding meeting the lawyer) for prisoners during their detention in the quarantine, diagnostic and distribution premises; as well as their right to obtain and use a range of things, including watches. In our opinion, the ban on smoking in security, safety and protection (single) cells is extremely punitive. It is unclear, how exactly the ban on hanging photos, pictures, cards, clippings from newspapers and magazines on the walls, lockers, beds and jobs; keeping animals or gardening can improve the condition of prison regime or educational work with prisoners. The bans to «cook and eat food in unexpected places» seem to be quite ridiculous as penal institutions do not provide any places for cooking at all.

The changes introduced in the article 111 of the Code, which have been supposedly designed to organize short trips outside the penal and correctional facilities. In fact, this rule actually involves deprivation of permission for short trips outside the penitentiary institution due to exceptional circumstances for those who serve punishment in correctional facilities with a minimum level of safety with common conditions. That is a significant restraint of prisoners' legal status. The practice of giving short-term trips for this category of prisoners originates from the Soviet times and has already proved its positivity. We failed to find information about a single case

when a person who has been permitted to go outside the minimum security level colony with common conditions for a short time and didn't return to the place of serving punishment during Ukrainian independence, although, for example, at the time of natural disasters in the Carpathians, this practice was rather widespread. Besides, it is necessary to note that in accordance with part 1 article 111 CEC of Ukraine, this permission is given individually, taking into account the identity and behavior of each particular prisoner. This legal provision exactly excludes the possibility of permitting a trip to insufficiently examined or dangerous person. Therefore, the statement about the supposedly increased danger, as well as inadequate study of prisoners' personalities in colonies with minimum security level with common conditions is not based on facts. However, this did not change the attitude to the mentioned rule and it was accepted.

The rule of giving the prisoners who serve punishment by being placed in a security, safety or protection (single) cell telephone conversations exceptionally for the purpose of educational impact or due to unique personal circumstances seems to be unfounded and inappropriate. Under this approach, in case of penitentiary administration unreasonable actions, a prisoner is in fact deprived of the opportunity to inform the others and use the right for legal aid. In addition, in a range of cases, he cannot even warn relatives about staying in complete insulation and causes of failure to appear, for example, on a date. This creates unnecessary complications for the relatives of the convict, who in any case cannot be punished for the offense committed by the violator. At the same time, giving to the administration a right to decide whether to give a convict phone call or not, provides a solid foundation for staff manipulations. A certain real attempt to improve the situation of prisoners is adopting the new Amendments to the CEC of Ukraine of April 8, 2014. The relevant Law is dedicated to a wide range of issues governed by different chapters of the CEC of Ukraine, and occurs to be an attempt of its large-scale revision. Although implementing the majority of proposals really contributes to the future improving penal enforcement conditions, it should still be stated that numerous controversial issues prescribed in the law draft.

In particular, the text of part 6 article 8 CEC of Ukraine establishes the following: «The head of penal facility administration is personally responsible for hosting the convicts who have arrived at the institution. At the same time it is prohibited to host such persons with those who have two or more convictions, as well as those that may adversely affect them due to the latters' psychological qualities». However, the implementation of such a provision is related to a number of issues: how can the head of the institution define a group of prisoners who can set adversely affect others due to the latters' psychological qualities just on their arrival. Besides, how to act, if there's only one free room for prisoners' reception and among them there are both previously convicted twice and more times and sentenced for the first time.

How to distribute a group of prisoners that includes a single convict who has two or more convictions, e.g., keep him in a separate room?

Also the CEC of Ukraine phrase «to fulfill legitimate requirements of penal institutions administration» throughout the text is changed to the phrase «to fulfill requirements of penal institutions administration established by law». The feasibility of the change also raises certain doubts as the legislation is incapable to contain a list of all possible administration requirements. The previous edition regulated this issue more carefully, as it did not require mandatory fixing the list of requirements by law, but merely established criteria for their legality. The updated edition of article 11 CEC of Ukraine in a number of cases defines the pretrial detention facilities as a penal institution. However, this change requires further amendments to other legal acts as well, including the Law of Ukraine «On the State Penitentiary Service», and the accompanying law draft papers state that the adoption of this bill would not require any amendments to other legal acts. In addition, the recognition of a detention center as a type of penal enforcement institution requires creating all the elements of penitentiary regime and other requirements provided by law for penal enforcement institutions in detention centers.

Part 8 article 11 CEC of Ukraine establishes that military units, guardhouses and disciplinary battalions are organized and removed by the Ministry of Defense of Ukraine, by the consent of the State Penitentiary Service of Ukraine. However, there arises a question concerning the appropriateness of extending State Penitentiary Service of Ukraine powers on the order and functioning of such purely military formations, as military units, guardhouses and disciplinary battalions. Legal regulation of these institutions practice should be within the Ministry of Defense of Ukraine competence. It also causes concern as to whether «prisoners» was an appropriate concept to use in article 21 CEC of Ukraine, as it would be correct to point on the convicts who serve the sentence, not only indicating persons in custody, literally prisoners under national law and legislation.

The changes have establish the range of rights for those who visit penal enforcement institutions without special permission, particularly, they have right to examine personal records of prisoners and other documents, to communicate with any penitentiary staff and prisoners (under the condition of anonymity). However, under this wording of visitors right actually imposes a duty for all workers and prisoners to communicate with visitors. It is therefore necessary to fix along with anonymity the «voluntariness» of such communication. The substantial violation of prisoners and their family members' right for privacy should be specifically noted because of the possibility of unauthorized people's access to the personal records. The issue of medical confidentiality is a sensitive question as well due to the access to medical cards.

Indicating the mass media as an entity that can assist penal institutions in

re-educating convicts and providing social and educational work appears inappropriate. The aim of mass media is to collect and highlight information, not to make the re-educational impact influence. This norm can lead to trespasses on practice.

The procedure of fine enforcement undergoes conceptual changes according to the analyzed Law. It has been actually proposed to divide this punishment into two types: the recovery of fine as the main form of punishment or as an additional punishment. However, the proposed changes to the existing procedure do not solve a number of questions, including the forced recovery of fine in case of its imposture as the main form of punishment, because article 27 CEC is proposed to edit as follows: «if a convict evades paying the fine as the main punishment, he should be liable to criminal responsibility under the Article 389 of the Criminal Code of Ukraine». In addition, the following changes to the CEC of Ukraine for their proper implementation require appropriate amendments to article 389 of the Criminal Code. Otherwise, the amendment of the CEC of Ukraine will contribute to an additional source of conflicts between the specified Codes. The difference in the terminology used in the article 26 CEC of Ukraine is also worth noting. Thus, the first parts are about the «fine imposed as the main punishment» so it is about the sentenced criminal punishment. While part 5 contains the phrase «fine prescribed under the sanction of the Criminal Code of Ukraine as an additional punishment» that is about quite a different stage of the criminal procedure and our legislator refers not to the actual sentence, but only to the wording of the Criminal Code sanction. And due to this the question arises – how to act if the article provides fine as an additional punishment, but it was for some reason appointed as the main punishment. Obviously, the legislator should use unanimous terminology.

It was offered to fix the following in article 84 CEC of Ukraine: «the convicted militaries that are undergoing treatment are guaranteed with legal aid and telephone calls in accordance with the provisions of this Code». But how is it possible to «guarantee» phone calls to individuals who have no family or relatives, and have nowhere to call? Only the *right* for phone calls should be guaranteed!

Certain provisions of the law openly degrade the legal status of persons sentenced to imprisonment. Thus, offenders, convicted for the first time for committing grave crimes earlier could stay in detention center, regardless of their fault, whereas now only those who have offended through negligence are enabled of it. Next, article 93 is revised to read as follows: «the sentenced for imprisonment serve all the term of punishment in a single correctional or educational colony, usually within the location according to his residence or the place of his relatives». However, it is not clear who exactly should choose where the convict serves the punishment: within his residence or the one of his relatives. This uncertainty will provoke corruption.

Article 116 establishes: «the force-feeding may be carried out only in cases

when, in doctor's opinion, the convict's condition worsens much because of refusing the food». Using the concept «in opinion» should be admitted unacceptable as the question of applying such an extreme means of their response should be resolved through considering and fixing concrete facts.

Indisputably, we should recognize the further improvement of the penal enforcement conditions and detailing the legal regulation of this issue appropriate; but, however, the approved changes will not solve all the problem points, and in some cases will create the basis for their increase. Speaking of rulemaking in the field of penal enforcement, the attention should still be paid to the following fact: the main role in changing both the current legislation and the practice of penal enforcement belongs to the authority, which ensures directly provides the existing penal enforcement procedure – the State Penitentiary Service of Ukraine. It is fixed as well on the level of normative documents: under the Regulation of State Penitentiary Service of Ukraine, this service exactly is the initiator of legislative and strategic changes in the sphere of criminal penalties execution[1]. The law draft is necessarily agreed with all the concerned Departments, legal service and the First Vice-Chairman of the State Penitentiary Service of Ukraine before submission to the Head of State Penitentiary Service of Ukraine. In other words, the changes are developed those who carry them out in the future.

Under this approach the rulemaking of State Penitentiary Service of Ukraine will always have a bias towards reducing their workload and reducing responsibility that doesn't allow optimizing this procedure. According to our definition, optimization is the procedure of selecting the best option of improving the penal enforcement from the existing, what requires a maximum number of proposals for the directions of further changes in the scope of penal enforcement. Imposing this task on one authority, which is the direct executor of innovations, will not allow ensuring this condition. So, it should be stated that recent attempts to improve the legal status of prisoners and conditions of serving the particular punishments were carried out with numerous mistakes caused both by small drawbacks and fundamental problems in the law-making area.

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[1] Регламент ДПтСУ // http://www.kvs.gov.ua/peniten/control/main/uk/publish/article/636414.

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