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CONTENT

CIVIL–LEGAL SCIENCES

ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

CRIMINAL–LEGAL SCIENCES

ЗМІСТ

ЦИВІЛЬНО-ПРАВОВІ НАУКИ

ЕКОЛОГІЧНЕ, ГОСПОДАРСЬКЕ ТА АГРАРНЕ ПРАВО

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
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THEORY AND HISTORY OF STATE AND LAW

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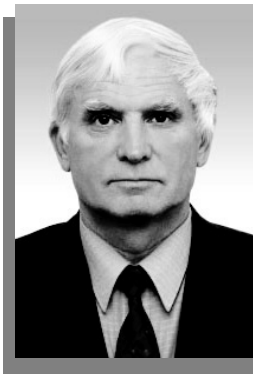

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CONSTITUTIONAL DEVELOPMENT IN UKRAINE DURING THE NEW ECONOMIC POLICY (1921-1929)

History of State and Law of Ukraine is rich in important events. An important place in it belongs to constitutional development. A unique document is the Pylyp Orlyk Constitution 1710 – an outstanding monument of Ukrainian political and legal thought of 18th century. Approved April 29, 1918 by Ukrainian Central Rada UNR Constitution included the introduction in Ukraine parliamentary republic. A huge experience was accumulated in Soviet times, the study of which allows to receive additional arguments in favor of the conclusion of the futility of the Soviet model of functioning government in the country.

In the history of Soviet Ukraine researchers isolated state and law in the days of the New Economic Policy (1921–1929) in independent period. Within this period, there have been many changes in regulation of law, state, economic, social and cultural development of the country. Quite active at this time was constitutional development in the UkrSSR.

At the beginning of the new economic policy in the republic acted Constitution of the UkrSSR 1919, which was adopted on March, 10 1919 at the Third All-Ukrainian Congress of Workers, Peasants and Red Army Deputies, held in Kharkiv. Finally, the first Constitution of the UkrSSR was approved at a meeting of Ukrainian CEC (VUTsVK) March 14, 1919. The basis of the UkrSSR Constitution 1919 Constitution of the RSFSR was signed in 1918, which was evi-

dence of a significant dependence of constitutional development in Ukraine of state processes in Bolshevik Russia. The Constitution of the UkrSSR 1919 «was based on program provisions of the Marxist-Leninist theory of socialist revolution and the dictatorship of the proletariat»[1]. Delusional ideas of socialism and the dictatorship of the proletariat had penetrated almost all articles of the Constitution. For example, the basis for building a new social order in Ukraine SSR Constitution laid the principle of the abolition of private ownership of land and the means of production, as emphasized in the first chapter of the Constitution «basic regulations». Owners such as capitalists and landlords in Article 1 of the Constitution called «age oppressors and exploiters» of the proletariat and poor peasantry[2]. The attitude of the Constitution and other wealthy classes of society was negative (Art. 2 of the Constitution). In the same article directly stated that the task of the proletarian dictatorship «is the transition from bourgeois society to socialism through socialist reforms and systematic pushing all counter-revolutionary intentions of the wealthy classes»[3]. Thus, the basis of social and political system in the USSR the first Soviet Constitution of Ukraine pinned class principle. It is appropriate to note that very different objectives set for the Ukrainian National Republic UPR Constitution adopted Ukrainian Central Council of 29 April 1918 Article 1 of the Constitution emphasized the following: «1 restored their state law as the Ukrainian People's Republic, Ukraine, for better defense of their land, to ensure more certain rights and liberties health, culture and welfare of its citizens, proclaimed itself and now is the sovereign state, independent and independent of anyone»[4].

At the beginning of a new economic policy norms of the Constitution of the UkrSSR 1919 showed its effect in various forms. Thus, according to the Constitution functioned central and local government authorities. All-Ukrainian Congress of Workers, Peasants and Red Army Deputies were convened regularly. But according to Article 10 of the Constitution of the UkrSSR 1919 Ukrainian Congress of Soviets was the highest authority in the UkrSSR. As predicted by the Constitution, the National Congress of Soviets elected Ukrainian Central Executive Committee, which is between the Ukrainian Congress of Soviets appeared higher authority in the country. In turn VUTsVK Ukraine elected members of the government – the Council of People's Commissars of the Ukrainian SSR. Functioned at the beginning of a new economic policy and local Soviet authorities, which were, under Article 18 of the Constitution of the UkrSSR 1919: a) of the Workers, Peasants and Red Army Deputies (urban and rural) and their elected Executive Committee (executive committees); b) Congress of So-

[1] Таранов А. П. Історія Конституції Української Радянської Соціалістичної Республіки / А. П. Таранов. – К.: Вид-во АН УРСР, 1957. – С. 52.

[2] Історія конституційного законодавства України: зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 60.

[3] Ibid (p. 60)

[4] Ibid (p. 44)

viets (provincial, county and township, as well as their elected Executive Committee (executive committees)[1]. These local governments were formed through elections. Namely norms of the Constitution of the Ukrainian SSR 1919 were involved, which defined the general principles of the election law in Ukraine. Thus in the electoral process considered of the norms of the Constitution, which entire layers of UkrSSR citizens deprived of voting rights[2]. In some way acted norms of section of the Constitution of the Ukrainian SSR 1919 «Declaration of the rights and duties of the Ukrainian people working and exploited», which gave workers «all the rights and opportunities in the field of civil and political life»[3]. Thus, Article 32 of the Constitution noted that «the Ukrainian SSR, recognizing equal rights for workers, regardless of their race and nationality – reveals contradictory basic laws of the Republic… which would not be oppression of national minorities or restriction of their equality»[4]. Thus, for the sake of objectivity, it should be noted that during the New Economic Policy in the UkrSSR much attention was paid to security of economic, political, cultural rights and interests of national minorities in the USSR paid much attention. This is no accident. As of 1920's in Ukraine from the population, which totaled 28,894,742 persons, ethnic minorities accounted for 5,741,431 people[5]. Thus, in the language of national minorities opened schools, theaters, seemed periodicals, books, art and other literature[6]. Was launched special national chamber of people's courts. Legal proceedings were carried out in the language of national minorities. This is supposed to Article 18 of the decree VUTsVK and RNA SSR from August 1, 1923 «On measures to ensure equality of languages and the promotion of Ukrainian language»[7]. Important among the measures to ensure the rights of national minorities occupied allocation of national administrative units (districts, village councils).

The development of the Constitution of the UkrSSR 1919 the system of government of the UkrSSR in the early years of the new economic policies were adopted regulations that detail regulate their activities. For example, the piece of legislation which concerned the fundamental points of the organization and activity of the All-Ukrainian Congress of Soviets, Ukrainian CEC Presidium VUTsVK was ruling the V All-Ukrainian Congress of Soviets (February 25 –

[1] Історія конституційного законодавства України: зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 63.

[2] See: Гончаренко В. Правовий статус населення України за Конституцією УСРР 1919 р. / В. Гончаренко // Вісник Акад. правов. наук України. – 2011. – №4. – С. 62–64.

[3] Історія конституційного законодавства України: зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 64.

[4] Ibid (p. 65)

[5] Стоян П. К. Адміністративно-територіальна реформа УСРР 1922–1925 рр. / П. К. Стоян // Проблеми правознавства. – 1967. – Вип. 7. – С. 59.

[6] Буценко А. І. Радянське будівництво серед нацменшостей УСРР / А. І. Буценко // Тези допов. на IV сесії ВУЦВК X скликання). – Х.: ВУЦВК, 1928. – С. 9, 10.

[7] СУ УССР. – 1923. – №29. – Ст. 435.

March 3, 1921) «On the Soviet construction». Standards resolution «On Soviet construction» in content were constitutional norms, thereby complementing the Constitution of the UkrSSR 1919 in the part of the central authorities concerned SSR. Due to the fact that the Constitution of the UkrSSR 1919 did not touch many, is to say, procedural points, because these issues are regulated by other regulations. Thus, the second session of the fifth convocation VUTsVK adopted May 8, 1921 «Regulations on Ukrainian Central Executive Committee»[1]. The resolution contained a number of innovations that complement the UkrSSR Constitution 1919 and thereby ensure the efficient operation VUTsVK sessions, members of Ukrainian CEC. The accumulated experience of the VUTsVK organization and VUTsVK Presidium and the first years of the NEP was enshrined in legislation adopted by the third session of the eighth convocation VUTsVK October 12, 1924 «Regulations on the Ukrainian Central Committee of Soviets of Workers, Peasants and Red Army Deputies (VUTsVK)». This legal act provisions of the Constitution of the UkrSSR 1919, concerning VUTsVK got its logical development. The rules said «Regulations» are constitutional in nature.

Thus, in the first years of the new economic policy acted as norms of the Constitution of the Ukrainian SSR 1919 and acts adopted on the basis of this Constitution. At the same time it should be noted that certain rules adopted during the so-called «war communism» Constitution of the UkrSSR 1919 by the NEP is somewhat at variance with the norms of certain regulations adopted for legal support new economic policy. As already noted, the Constitution declared the abolition of private property not only on land but also to «all other means of production» (Article 3 of the Constitution). Adopted in 1922 under the NEP Civil Code of the Ukrainian SSR, along with state and cooperative owned allow private ownership. Article 54 of the Civil Code of the Ukrainian SSR in 1922 stated that «the subject of private property can be: not nationalized buildings, retail, manufacturing, with employees no longer provided special laws quantity, means and instruments of production, money, securities and other valuables including gold and silver coin and foreign currency, domestic objects and personal items, goods which are not prohibited by the law to sell, and not removed from every turnover of private property»[2]. Regarding entrepreneurs quilted jacket in a summary NEP period was the term «Nepmen». But in general economic position Nepmen Soviet authorities through the use of various limitations as an economic and administrative nature were weak and hopeless under the domination of the Soviet regime in the Ukraine in the underlying period.

Thus, in the early years of the NEP was adopted a number of constitutional regulations that are supposed to reflect

[1] Отчет Второй сессии Всеукраинского Центрального Исполнительного Комитета 5-го созыва (5–8 мая 1921 г.). – Харьков: ВУЦИК, 1921. – С. 78, 79.

[2] СУ УССР. – 1922. – № 55. – Прилож. к ст. 780.

in the text of the Constitution. Besides major changes in the state building of the USSR occurred in connection with the formation in 1922 of the USSR and its constituent entering the Ukrainian SSR. This event is reflected in the Constitution of the USSR in 1924, the adoption of which had to be displayed in the Constitution of the USSR. Can not affect the constitutional development in the USSR and important events such as the creation in 1924 as a part of the Moldavian Autonomous SSR Soviet Socialist Republic (AMSRR) and holding at the beginning of 1920 territorial reform. That is the question of amending the Constitution of the Ukrainian SSR in 1919 matured. And so, guided by Article 6 of the Constitution of the USSR in 1919, the VIII All-Ukrainian Congress of Soviets, held in January 1924, instructed the CEC to revise the Constitution all-Ukrainian SSR in 1919 in accordance with the Constitution of the USSR and provide a draft revised Constitution for approval by IX Ukrainian Congress of Soviets[1]. This project was developed. 9 May 1925 at a meeting of the Presidium of the USSR VUTsVK and RNA was People's Commissar of Justice heard a report, while the public prosecutor M. O. Skrypnyka to amend the Constitution of the Ukrainian SSR in 1919 was decreed to adopt the draft resolution on amending the Constitution granted Constitutional Commission VUTsVK[2]. May 10 IX Ukrainian Congress of Soviets adopted a resolution «On the change of the Constitution of the Ukrainian Soviet Socialist Republic»[3].

In the said institution primarily stated that the Constitution of the USSR in 1919 «for over sexennial its force was so basic law, which it strengthened and developed state building worker-peasant power in Ukraine»[4]. And then in the order cited circumstances which require amendments to the Constitution of the Republic. Here is the text of this resolution: «With the formation of the Union of Soviet Socialist Republics, the Ukrainian Soviet Socialist Republic is the task given to article 5 of the Constitution of the USSR, do about changes in its constitution according to the Constitution of the Union of Soviet Socialist Republics.

Just range revolutionary solution of the tasks that were scheduled for the immediate implementation of the Constitution, with the installation of a number of basic laws of the UkrSSR in the sphere of the Soviet state building and national cultural life, to form a part of the Moldavian Autonomous SSR Soviet Socialist Republic and the transition to 3-stage management system ripened a need to do the appropriate changes to the current Constitution of the UkrSSR»[5]. Following indications IX Ukrainian Congress of Soviets decided to instruct the All-

[1] Съезды Советов союзных и автономных советских социалистических республик: сб. докум. 1923–1937 г. г. в 7-ми т. – М.: Изд-во «Юрид. лит.», 1964. – Т. V. – С. 140.

[2] ЦДАВОВУ. – Ф. 1. – Оп. 2. – Спр. 1746. – Арк. 165.

[3] ЗУ УСРР. – 1925. – №47. – Ст. 302.

[4] Історія конституційного законодавства України: зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 79.

[5] Історія конституційного законодавства України: зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 79.

Ukrainian CEC to prepare for the next X-Ukrainian Congress of Soviets draft new Constitution of the UkrSSR, the implementation of compliance objectives approved a number of amendments to the Constitution of the UkrSSR 1919.

First of all, Congress made significant changes to Article 6 of the Constitution to bring it to the Constitution of the USSR in 1924. Joining the UkrSSR to the USSR reflected in other articles of the Constitution of the UkrSSR. Thus, Article 8 now indicated that the relationship between the highest authorities of the UkrSSR and the Soviet Union, as well as the relationship between the central authorities of the UkrSSR and the UkrSSR central authorities established by the Constitution of the USSR. Article 14 of the Constitution of the UkrSSR in the new edition defines the structure and position of RNA SSR-Union Commissariats authorized under the government of the UkrSSR. Article 4 of the Constitution of the UkrSSR new version of solidified entry into the SSR AMSRR. Article 18 of the Constitution as amended in 1925 found its consolidation administrative-territorial reform carried out in the country, particularly in connection with the liquidation provinces and the transition to 3-stage management system.

The IX Ukrainian Congress of Soviets heard a report about the Constitution AMSRR, approval and All-Moldavian Congress of Soviets and decided to approve this Constitution[1].

Adding IX All-Ukrainian Congress of Soviets of the Constitution of the UkrSSR 1919 undoubtedly important and urgent changes are removed, however, from the agenda the question of the need to adopt a new Constitution SSR. Therefore IX Ukrainian Congress of Soviets, as already noted, found it necessary to completely rework the X All-Ukrainian Congress of Soviets of the Constitution of the Republic. This M. O. Skrypnyck in a report to Congress on the Constitution of the UkrSSR said that the new draft Constitution SSR should be required to submit to «a broad discussion of all our councils at all district and district conventions in all workers 'and peasants' organization». «This – continued the speaker – will make the Constitution a collaborative thoughts of our broad masses of workers and peasants»[2]. This approach to the discussion of the draft constitution has not lost relevance in our time.

However difficult and long work on the creation of the new Constitution of UkrSSR to the X All-Ukrainian Congress of Soviets, which was convened in May 1927, was never completed. Secretary VUTsVIK A. I. Butsenko explained by the fact that the Ukraine government found it necessary to conduct a broad discussion PCF Justice developed the new Constitution of the Ukrainian SSR SSR local authorities, but the opening of the All-Ukrainian Congress of Soviets X

[1] IX Всеукраїнський з'їзд Рад робітничих, селянських та червоноармійських депутатів (3–10 трав. 1925 р.). – Резолюції. – Х.: ВУЦВК, 1925. – С. 32.

[2] IX Всеукраїнський з'їзд Рад робітничих, селянських та червоноармійських депутатів (3–10 трав. 1925 р.): стенограф. звіт. – Х.: ВУЦВК, 1925. – С. 379.

«feedback and suggestions on places were not obtained in sufficient quantity»[1]. In addition, there is evidence that the draft new Constitution of UkrSSR following the district executive committees not be sent. As noted in the literature, «evidence that the draft Constitution wasn't discussed widely in enterprises and villages»[2]. Therefore, most comments on the draft Constitution of the UkrSSR, according to Yu. Mazurenka, «had the character of bureaucratic work», and the majority were editorial and not fundamental nature[3]. It is no accident X-Ukrainian Congress of Soviets, after hearing April 13, 1927 Secretary VUTsVK information about AI Butsenko draft Constitution of UkrSSR, decided to «authorize regular session of the All-Ukrainian Central Executive Committee approve the new version of the Constitution of the Ukrainian SSR and submit it for final approval XI Ukrainian Congress of Soviets»[4].

Pursuant to Resolution X All-Ukrainian Congress of Soviets VUTsVK Constitutional Commission established for the provisional draft a new Constitution of the UkrSSR sub-commission composed of the Chairman and subcommittee members – representatives of the CC CP (B) U VUTSVK, RNA SSR, the UkrSSR People's Commissariat of Justice[5]. March 23, 1929 an enlarged meeting of the Constitutional Commission VUTsVK, which thoroughly considered the draft Constitution of the USSR developed referred to the subcommittee. Constitutional Commission adopted the new Constitution of the UkrSSR and elected drafting committee so that and made the final editing of the draft Constitution SSR. The final draft of the new Constitution of USSR was approved by the Bureau before the opening of the next VUTsVK XI All-Ukrainian Congress of Soviets.

May 15, 1929 XI All-Ukrainian Congress of Soviets after a thorough discussion of the draft new Constitution of the UkrSSR and the commission to prepare a resolution on the Constitution of the Ukrainian SSR Constitution adopted in 1929 which consisted of five sections: 1) General Principles; 2) The Soviet authorities; 3) Voting rights; 4) On budget Ukrainian SSR 5) On the emblem, flag and capital of the Ukrainian SSR.

In the Constitution of the Ukrainian SSR in 1929, as the Constitution of the UkrSSR in 1919, the concept was utopian Marxist-Leninist dictatorship of the proletariat and the rejection of private ownership of the basic means of production and natural resources. At the beginning of the first chapter of the Constitution declared that «the Constitution defines the main objectives and forms of

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[1] Буценко А. Конституції СРСР і УСРР / А. Буценко // Рад. Україна. – 1927. – № 7–8. – С. 10.

[2] Мазуренко Ю. Кілька слів про проект Конституції УСРР / Ю Мазуренко // Рад. Україна. – 1919. – № 1–2. – С. 28.

[3] Ibid.

[4] Съезды Советов союзных и автономных советских социалистических республик: сб. докум. 1923–1937 г. г. в 7-ми т. – Т. V. – М.: Изд-во «Юрид. лит.», 1964. – С. 199.

[5] Таранов А. П. Історія Конституції Української Радянської Соціалістичної Республіки А. П./ Таранов. – К.: Вид-во АН УРСР, 1957. – С. 103.

the dictatorship of the proletariat, which set itself the goal to finally overcome the bourgeoisie, destroy the exploitation of man by man and to make communism, when there will be neither division into classes nor state power»[1]. And because Article 1 of the Constitution emphasized that «Ukrainian republic is a socialist state of workers and peasants. All power within the Ukrainian Socialist Soviet Republic belongs to the Soviets of Workers, Peasants and Red Army Deputies»[2]. Economic foundation of the State Constitution of the UkrSSR in 1929 defines in Article 4 as follows: «4. All land, minerals, forests and water, as well as factories, banks, rail, water and air transport and communications are a socialist state property on the grounds defined by the legislation of the Union of Soviet Socialist Republics and the Ukrainian Soviet Socialist Republic. Foreign trade recognized state monopoly»[3]. It should be noted that in the cited article in the first place is the legislation of the UkrSSR. It is not by chance. At the time of adoption of the new Constitution of the UkrSSR Ukrainian SSR was part of the UkrSSR – the Union State. This fact is reflected in the Constitution of the UkrSSR 1929 in Article 3. It noted that the Ukrainian SSR is part of the UkrSSR «as a sovereign state, and reserves the right freely to secede from the Union». In this regard appropriate to underline that while the mechanism of seceding from the UkrSSR did not exist in nature, and therefore the right to withdraw remained a fiction. In addition to in paragraph 2 of the article indicated that the sovereignty of the Ukrainian SSR is limited only within the limits specified in the Constitution of the UkrSSR and only items that they are within the jurisdiction of the UkrSSR and that «beyond these limits, Ukrainian Soviet Socialist Republic has its own state power»[4]. Given that the Constitution of the UkrSSR 1924 at the highest level, reinforcing the rule of union of government and administration and Union legislation in the main areas of law, then, as rightly observed O. M. Myronenko, all this turned proclaimed in the Constitution of the UkrSSR 1929 sovereignty «in a political myth»[5].

In the first chapter of the Constitution of the UkrSSR 1929 listed political rights for workers. At the same time, the Constitution deprived the right to elect and be elected to state authorities a range of categories of citizens of Ukraine, as mentioned in Article 67 of the Constitution. That class approach was inherent to the Constitution, which defined the legal status of the population. Given the fruitful experience of previous years to ensure the rights and interests of ethnic minorities who lived in the USSR, the Constitution insisted on the inadmissibility of suppression or restriction of the rights and freedoms of national minorities that lived here, gave them the opportunity to enjoy all their native lan-

[1] Історія конституційного законодавства України: зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 86.

[2] Ibid (p. 86)

[3] Ibid (p. 87)

[4] Ibid (p. 86)

[5] Мироненко О. М. Історія Конституції України / О. М. Мироненко. – К.: Ін. Юре, 1997. – С. 40.

guage, and to create national administrative-territorial unit. Other Law actually been implemented in practice. So, work on national zoning was completed in early 1931 at this time in the USSR, there were 25 national areas[1]. National, there were 995 village councils, national village councils – 89[2]. SSR Constitution 1929 also contained provisions on the entry to the village lay Moldavian SSR Autonomous Socialist Republic. The constitution carefully regulated the organization and legal status of the central and local authorities in governance. Constitution classified as the central authorities the All-Ukrainian Congress of Soviets, Ukrainian CEC Presidium and VUTsVK People's Commissars of the Ukrainian SSR. By local law SSR included the main circuit and district congresses of Soviets of Workers, Peasants and Red Army Deputies and their executive committees.

Ended Constitution by article 82, which stated that the capital of the Ukrainian SSR is the city of Kharkiv.

The Constitution of the UkrSSR 1929 ceased to have effect with the adoption in 1937 of the new Constitution of the USSR Extraordinary Congress of Soviets of UkrSSR XIV.

Thus, during the New Economic Policy in Ukraine there was an active process of constitutional development, during which gained a lot of experience in this field.

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[1] Болтенкова Л. Ф. Интернационализм в действии / Л. Ф. Болтенкова. – М.: Мысль, 1988. – С. 69.

[2] Скрипник М. О. Перебудовчими шляхами (Проблеми культурного будівництва нацменшин України) / М. О. Скрипник // І Всеукр. конф. культурно-освітніх робітників нацменшостей 20.05.1931 р. // Укр. істор. журнал. – 1989. – № 8. – С. 123.

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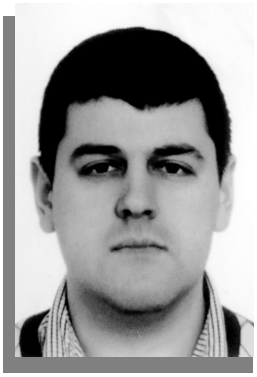

UDC 352 (477)

Constitutional and legal reform of local self-government in Ukraine: prospects and problems

The local government, fundamental institution of the state system of every democratic country, assumes particular significance in terms of political and economic crisis. Its operation testifies the democratic nature of public authorities, depending on the extent of its development, the extent of its impact on local politics, the extent of democracy of the modern system of power.

Self-government today is a stable institution of municipal power that is able to fulfill its obligations to the community without unnecessary political debate and bear responsibility for its actions, as the solution of the most important issues of the daily life is its prerogative. However, it is the social and economic crisis that clearly reflects the shortcomings of its development in the sphere of authority exercise, work organization, formation mechanism, thereby encouraging it to a comprehensive reform.

It should be stressed that historically self-dependence and certain insulation from the state have become fundamental characteristics of the local self-government. It has been determined that the municipal government of ancient city-

states was a kind of prototype that in the future led to many theories and concepts that are used now in developed democratic countries. In the ancient world city-states were quite common, some of them united in formal or informal unions, often under the command of one leader. Such unions in ancient Rome, for example, were united through the conquest of other states. Moreover, they united voluntarily in ancient Greece, the Peloponnese, for the purpose of common defense.

The next stage in the city self-government development, which has become a reference point of the local self-government theories formation in general, is Magdeburg Law. The appearance of Magdeburg Law is closely related to the state process in Europe in XIII. Thus, the burghers (city residents) considered the struggle for Magdeburg Law provision as a way of gaining certain autonomy from the state and the legal framework to protect against encroachment of large landowners who demanded natural duties, taxes and etc. from the cities.

It is also necessary to pay attention to the fact that the ideological source of the local self-government was the doctrine of natural law, the essence of which is expressed in the concepts of justice that are embodied in the universal principles of freedom and equality. It is the recognition of such categories as justice, freedom and equality by national laws of various countries, norms of international law that allowed legalizing universal right of suffrage, the possibility of citizens to participate in the management of local affairs.

It is known that the transformation of local power in the XVIII–XIX centuries in the states of Western Europe is primarily related to electoral reforms. Thus, at the stage of the birth the idea of local self-government was aimed to develop the community spirit of the citizens. However, it gradually began to be applied in relation to civil and political rights and freedoms of a man and a citizen.

Today, the existing situation does not contribute to the effective implementation by Ukraine of the European integration policy, development of cooperation with European institutions, especially the Council of Europe and the European Union. In particular, the constitutional and legal principles of local self-government and the principles of the European Charter of Local Self-Government contradict each other despite the fact that Ukraine has committed to implement the latter to the full extent[1].

In this regard special consideration shall be given to the issue of compliance of the Ukraine Constitution and legislation principles with the European principles and standards for the decentralized government enshrined in the European Charter of Local Self-Government as well as identification of key directions of the current system of local self-government improvement. It is an advanced system of statutory and regulatory enactments that in this area should be the basis for developing and implementing the

[1] Європейска хартія місцевого самоврядування [текст] // Місц. Та регіон. Самоврядування в Україні. – К., 1994. – Вип. 1/2 (6/7). – С. 71.

principles of the innovative model of social and state development, define a clear division of powers, which will provide the balance of power, protect Ukraine from conflict, authoritarianism and will be the next step towards the implementation of such program provisions as establishment of a democratic, social, law-bound state in Ukraine.

The indicated facts completely refer to the definition of local self-government bodies in shaping the national innovation policy and clarifying their role in the creation of preconditions for effective innovation development of regions, separate territories and settlements, that is determined primarily by the degree of their economic and financial viability, innovation potential, which depend, including, on the degree of autonomy and capacity of territorial communities, authorities and local government officials.

Today, implementation of a comprehensive reform of any fundamental institution of the state system in the most modern countries is not possible without making changes to the Basic Law, regardless of the level of its constitutional and legal confirmation. However, it is worth to mention that the level of such regulation is not always the determining factor in this process, because the European Charter of Local Self-Government admits the absence of a constitutional confirmation of the local self-government. The most important role, in our opinion, is still played by the quality and regularity in conducting of such a regulation.

For example, the Basic Law of Canada consists of the constitutional laws, the main of which are the Constitutional Acts of 1867 and 1982[1], does not directly regulate the organization and activities of the local self-governments but only states that these issues are regulated by the legislation of provinces. This approach makes possible the existence and functioning of a unique system of local self-government in each of the provinces as well as consideration of specific features of the particular area in the legislation. Such factors as the density and specific character of national composition of the province population, geographical location, economic and political situation in the region – they all collectively affect the definition of the structure, the order of formation and functioning of local self-government bodies in each province. In its turn, membership to a different legal family, a clear constitutional entrenchment of principles and substantive provisions of the local self-government of Germany does not prevent the functioning of a number of different models on the foundation of historical traditions and with regard to all modern reforms carried out by the EU member states.

Despite these differences, the local self-government of both countries although equally strong and capable, yet remains vulnerable to the problems and challenges of the similar nature. Therefore, we can conclude that a proper system of constitutional and legal regulation primarily involves finding a balance be-

[1] Consolidation of Constitution Acts, 1867 to 1982 [Електрон. ресурс]. – Режим доступу: http://laws. justice. gc. ca/eng/Const/index. html (дата звернення 05.07.2015)

tween the constitutional enshrinement of general principles and rules and their specific implementation through the adoption of appropriate laws and other legal acts. That is why before implementation of reforms it is necessary to form a clear vision of the problems to be solved, and ways to solve them. It is necessary to establish a required level of the constitutional entrenchment of the local self-government, which shall meet not only international standards, but also create a basis for further development of this institution. As the only way of the local self-government functioning is represented by its constant movement and development.

Support for the European integration course of our state is now impossible without a consistent implementation of provisions of all 11 Articles of the European Charter of Local Self-Government and contribution to their implementation by the government. Meanwhile the articles of the Charter governing: 1) financial resources; 2) administrative supervision; 3) competence of local authorities partially or completely contradict some norms of the Ukraine legislation.

At the same time, the list of basic articles promoted by the European Charter of Local Self-Government should not be taken as exhaustive. The local self-government is the right and the ability of local self-government bodies to regulate and manage within the law a substantial share of public affairs within their jurisdiction in the interest of the local population. It should be understood that any changes to organization and functioning of local self-government will be directly reflected on every inhabitant of each town, village, township, and the like.

Therefore, the capacity of the local self-government shall be primarily understood as the capacity of each particular individual. For example, the Act of 2011[1] that reformed the system of local self-government and administration in the UK, amended the powers of local self-governments, increased the number of elected positions and the possibility of holding referendums. But the key point of this Act was the thesis that: «Local self-government bodies are capable as much as every individual is capable», that is they have the same rights and opportunities and they can use them in such a manner as every single person can. The greatest legislator's attention in this Act was given exactly to this thesis in the context of its impact on the powers of local self-government bodies. These powers are considered to be wide and are limited only by the scope of the other legal acts.

The modern course of France in regard to the local self-government is now determined by a combination of acts under the common title The Third Act of Decentralization (Acte III de la décentralisation)[2]. This Act has been repeatedly criticized by numerous interregional and other non-governmental

[1] Localism Act 2011 [Електрон. ресурс]. – Режим доступу: http://www. legislation. gov. uk/ukpga/2011/20/contents/enacted (дата звернення 05.07.2015)

[2] Acte III de la decentralisation: la reforme pas a pas [Електрон. ресурс]. – Режим доступу: http://lagazettedescommunes. com/139360/acte-iii-de-la-decentralisation-la-reforme-pas-a-pas/ (дата звернення 05.07.2015)

organizations and regional associations of France. In particular, representatives of the local self-government said that the Act needed to be improved. After a series of complex negotiations which resulted in the stir among the public caused by the Act, it was decided to split the Act into three parts: 1) questions concerning cities and metropolitan areas; 2) questions relating to regions and regional development; 3) clarification of questions of annexed territories competence.

It is worth mentioning that the current trends to ensure the decentralization of power in our state through constitutional and legal reforms in its initial structure is very similar to the corresponding reforms in France. However, it should be noted that the development level of the civil society, provision of rights and freedoms of a man and a citizen as well as legal consciousness in our country at this stage, although, is increasing, but remains incomparably below. This can create additional challenges in carrying out of reforms.

The most modern act governing all issues of local self-government in Sweden is the Act on the local self-government of 1992 (Local Government Act)[1]. According to this Act, the local self-government bodies of a particular region and their members have the right to solve tasks and challenges within their own territory. It should also be noted that the biggest part of the tasks performed by these bodies is clearly regulated by corresponding acts of specific legislation such as the Act on local service (Social Services Act 2001: 453)[2], the Act on medical services and health care services (The Health and Medical Services Act, 1982, 763)[3], the Act on preschool education, education of the first and second stage (The Education Act 1985: 1100)[4]. It is reasonable to note that although local authorities have an opportunity to solve a range of issues relating to a particular region, their work is clearly regulated by relevant acts. Local self-governments bodies can also issue regulatory acts relating to the areas of public order, traffic rules and some other issues.

Now Sweden can be specified as an example of clarity and consistency in regard to the issues related to the legal regulation of local self-government, because the presence of a large number of regulatory legal acts in the area of public relations does not reduce its effectiveness. This example demonstrates in a better way the cooperation between state and non-state bodies representing various spheres of public relations, as this method of legal regulation can hypothetically lead to competencies competition which, by the way, does not happen in practice.

[1] Local Government in Sweden [Електрон. ресурс]. – Режим доступу: http://www. nordmaling. se/default. aspx?di=2056 (дата звернення 05.07.2015)

[2] Social Services Act 2001:453 [Електрон. ресурс]. – Режим доступу: http://www. regeringen. se/sb/d/15568 (дата звернення 05.07.2015)

[3] The Health and Medical Services Act 1982:763 [Електрон. ресурс]. – Режим доступу: www. discapnet. es/SiteCollectionDocuments/Discapnet/Documentos/Legislacion/en_0221. htm (дата звернення 05.07.2015)

[4] The Education Act 1985:1100 [Електрон. ресурс]. – Режим доступу: http://www. government. se/content/1/c6/02/15/38/1532b277. pdf (дата звернення 05.07.2015)

Marking the «epoch» of major reforms, the new Constitution[1] and the new Act on the local self-government[2] [10] has gained the force in Hungary since 2012. The above stated Act is primarily aimed at reforming the taxation system of the local self-government. According to the official information, the indebtedness of the local self-government in Hungary doubled and amounted to about 3.9% of GDP in 2006–2009. The new Act set a goal to reduce the scope of taxation and increase its effectiveness. It is expected to a large extent to implement it by simplifying and accelerating the procedures for taxation and creation of conditions under which law-abiding citizens will be interested in paying taxes on time and in full.

The Act fixes the policy for stabilization of the local government, withdrawal of the system from the debt, reducing the fragmentation of the system and strengthening of control on the part of public authorities. For example, under the new Law, local self-government bodies can take loans only after obtaining the consent of central government bodies (The Ministry of Economic Affairs). In addition, it is planned to hold a series of measures to reduce the participation of third parties in the execution of subcontracts of national significance, thus it is planned to reduce unnecessary costs and improve the stability of the budget. Such a comprehensive approach in the conduct of the constitutional and legal reform of the local self-government in Hungary in the part of its withdrawal from the crisis is of significant value for our state due to the similarity of problems and historical paths of its formation in the both states.

Proceeding from these examples, we can conclude that during the conduct of the constitutional and legal reform it is necessary to consider first of all that by regulating the local self-government we have a direct impact on the life of each person within the state. Ensuring the right to local self-government along with others is a key factor in establishment of the legal consciousness process, formation of legal behavior of a citizen and ensuring its participation in building a strong civil society, the creation and operation of which is impossible without the influence of the state. Therefore, it is clear that the direction of a modern democratic development of Ukraine as well as of most countries of the world requires transferring the emphasis on the self-government, and the principle of subsidiarity shall serve as a link between the power and the local government.

It is worth noting that a considerable part of the contemporary problems of the local self-government in our state originates from the time of the system reform following independence in 1991. Centrality of the system, competencies competition and actual delimitation of the local self-government both from the central executive authorities as well as from a particular individual – all are the consequences of the fact that the internal struc-

[1] Constitution of Hungary [Електрон. ресурс]. – Режим доступу: http://parlament. hu/irom39/02627/02627–0187. pdf (дата звернення 05.07.2015)

[2] Local cardinal Act on Local Government, 2011 [Електрон. ресурс]. – Режим доступу: http://goo. gl/Yryuq (дата звернення 05.07.2015)

ture of the local self-government system was formed as a kind of a copy of the state government system of that time. This is evidenced by a large number of conceptually similar items in the legal confirmation of the indicated systems. The local self-government is a modern European country shall not be formed as a kind of a quasi-state. So, the first Law of Ukraine On Service in Bodies of Local Self-Government was in fact a «tracing» of the Law of Ukraine On State Service with all its categories, grades and the like. In our opinion, it is necessary to abandon this approach in the conduct of any further reforms in this area.

A close and interesting example for Ukraine is represented by experience of a consistent conduct of similar reforms in Poland. Leading experts in the field of the local self-government faced the need to create the actually capable system of the local self-government. The public dialogue with participation of state power officials, leading academics, business representatives and citizens resulted in resolution of the issues of reorganization of the lowest level of the local self-government system (commune), creation of working groups to develop new acts regulating relations in the sphere of the local self-government as well as launch of preparation before the first free democratic elections to local councils. After all, every reform shall begin not only upon an initiative of the state but with the support and active participation of local population. The turning point of the local self-government reform in Poland, according to one of its founders, Jerzy Regulska, was the elimination of the so-called five key monopolies of the state: political, hierarchical, financial, administrative and monopoly of the ownership[1].

Taking into account the experience of Poland in settlement of many issues, current problems and possible solutions, it can be said that it is worth building effective local government only upon an initiative of the civil society. Therefore, each reform shall start not only upon the initiative of the state but also upon the initiative, support and active participation of the local population.

Summarizing all above-mentioned information, it seems obvious that ideal local self-government does not exist; all modern world systems have their advantages and disadvantages. The main factor of its ability is presented by constant movement and reforming. The modern pace of life constantly makes the state and its citizens meet new challenges such as the global economic crisis, the constant rise in energy prices and the search for more effective substitutes of energy products, the instability in the international relations of many states as well as other economic and social problems. It is a mobile and flexible local self-government that shall become a link between the citizen and the state to ensure both an adequate level of life of every person and a comprehensive development of the country as a whole in the modern world.

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[1] Regulsky, J. Local government reform in Poland: an insider's story / J. Regulsky // Local Government and Public Service Reform Initiative. – 2003. – 200 p.

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A JURY IN UKRAINE: HISTORICAL AND LEGAL ASPECTS (THE 150TH ANNIVERSARY OF THE JUDICIAL REFORM OF 1864)

On the basis of the constitutional provision that the bearer of sovereignty and the only source-governmental power in Ukraine is the people, h. 4 Art. 124 of the Constitution of Ukraine secures 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, regulation of their terms of reference and a half of activity, the definition of the category of unfinished cases in which they are involved, are defined by the Law of Ukraine «On the Judicial System and Status of Judges», as amended, and Procedure. Thus, the legislative consolidation of the resumption of the jury in Ukraine will contribute to solving one of the main objectives of the judicial reform – democratization of justice.

As you know, a jury trial is an integral part of the set-GIH States (UK, USA, Australia, Canada, Germany, Austria, Spain, the neighboring Russian Federation and others) in which the actions of its various models. Authors of scientific and practical commentary of the new Criminal Procedure Code of Ukraine noted that «the Ukrainian legislation to implement the European (continental-tal) model of the jury»[1], which, of course, led to the development of RHR-relevant provisions of the Constitution, and thus closer to the modern domestic legislation is generally accepted European and international democratic-sky values.

However, this has not yet exhausted all the discussion of issues related to the theory and prac-asymptotics-jury trial, introducing it in Ukraine, in particular, one of them, but enough has taken into account the legislator is an important condition as a clear understanding of the judges democra-tic traditions of justice? After all, the

[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. – Т. 1. – С. 168.

Basic Law obliges the State to promote the development of the Ukrainian nation, its historical consciousness, traditions and culture, the identity of 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, the research of historical and legal genesis of the institution of legal proceedings in Ukraine, the experience of its operation have small[1].

Therefore, the aim of this article is to define the basic traditions and stages sous-doproizvodstva in Ukraine with the participation of people's representatives in the early Middle Ages materials, historical and legal capacity of the judicial statutes in 1864, the Soviet Zuko-lation of the People's Court and the presentation of our point of view on the implement-tion of justice in the trial by jury in connection with the adoption of the Law of Ukraine «On the ship-device and the status of judges» and the new Procedural Code of Ukraine.

The history of civilization knows various forms of popular participation in the administration of the right-judge: Jury geliastov in ancient Greece, tidingi in the Nordic countries, accusing-tional jury in England, «the court of equals» in France, in Germany Sheff. On this basis, it developed a modern Anglo-American and Franco-German (continental) model of the jury. This legal institution in every nation had its own prehistory and evolution stages.

Features of the historical and legal genesis of the jury in Ukraine, in our opinion, allow to speak about the following main stages. The first relates to the BPE-Men Kievan Rus, when the system of the judicial system existed vervnye (community), the courts, the institution of «dispensations men», the procedure for consideration of civil and criminal cases with the participation of representatives of local communities, applied treatment oath, various IP-pytaniya (ordeal) at deciding on the guilt of the defendant. Such sudoproizvod-tion found its legislative basis in the norms Russian Pravda.

[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.

Another one of the oldest forms of popular participation in the administration of justice in Russia were Chamber. Although the management and the court belonged to the exclusive competence of the princes, the Chamber often violated their jurisdiction, and the rulers recognized that right Candlelight [1]. A kind of prototype of the jury can be considered and the supreme court of ancient Novgorod, where court cases have been governor of Prince Posadnik or Chiune together with representatives of «all» (street) city.

The second phase of the history of jury trials in Ukraine comes at a time Paul SKO-Lithuanian domination in the Ukrainian lands late XIV – first half of XVII century. The legal system of the Kingdom of Poland and the Grand Duchy of Lithuania sformi-ment based on the synthesis of local customary law and regulations: Code of Law, regulations, resolutions of the Seimas, privileges and other acts. Continues to operate and a significant number of rules of Russian Pravda. Widespread in the Ukrainian lands was the Magdeburg Law, gave the town the right to sue in accordance with its provisions, with the participation radtsev and shopkeepers. In Ukraine, a long time continued to be community-based, «mop» courts, which at the request of the victim, guided by custom to achieve justice together, «kopoy» independently carries out search of the accused considered the merits, handed down the sentence, which was final and enforced immediately. Despite the gradual restriction of the jurisdiction of courts in the shock of the Lithuanian statutes, on the Right Bank Ukraine, they continued to exist in the first half of the XVIII century.

A kind of democratic judicial system existed in Zaporozhye Casa Cove. Judicial functions are carried out by representatives of the Cossack. And in sa-Mykh complex cases as the court of first instance sometimes he spoke all Kosh, and the highest court – the military council.

Ukrainian national revolution in 1648, the steps for the construction of the state and the Republican state launched a new, third stage, when the process of creating a pro-statehood was founded by a private court system – the General Court, regiment, squadron and community (village) courts. The magistrates, Town Hall, cop-governmental courts will hold the previous legal proceedings to review the citizens-ing and criminal cases, which are fixed in regulations, and in the administra-tively-judicial practice. Court hearings are usually held in public at the Ak-active part of the public. Continues to exist two forms of the process – competing-tive and investigative (inquisitorial). The latter were to be the case for pre-heavy offenses.

In the context of Ukrainian autonomy under Russian protectorate since 1654 occurred sous-nificant changes in substantive and procedural law, although the contract of hetman Intercoms article with the Muscovite tsar secured the inviolability of «Little Russian rights». The great influence of customary law in the legal

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

proceedings Hetman showed cha-stye departing judges from the written procedural rules. Keeping wide-tion regimental competencies and hundreds of vessels that could bring the death penalty-free assertion of the General Court. Zaporozhye Cossacks were subject only to the jurisdiction of the court of Cossack, who acted on the principle that «where three Cossacks, there is a judge.» However, in Sloboda Ukraine actively introducing Russian law displaces the rules of customary law. From 1775 to Sloboda-Ukrainian, Kherson, Ekaterinoslav, Tauride province launched the Russian judicial system. On the Right Bank Ukraine continued to exist judiciary Rzeczpospolita. West-land in the second half of the XVIII century. were ruled by the Austrian monarchy, it began the process of replacing the Polish law Austrian.

Thus, the Ukrainian judicial process has long been characteristic features of de mokratichnosti. Vervnye courts princely courts or the courts posadniks, tiuns, «vessel mu-ments» shock of the courts considered the most important civil and criminal cases involving members of the public or local community. The process was transparent and had a state-optionally character. This type of proceedings has much in common with European, particularly French-CCA, model jury. On the judicial system and the administration of justice in Ukraine is largely influenced by the norms Russian Truth, Lithuanian statutes, self-organization of cities Magdeburg law, Cossack self-governance, customary law. Thus was born and developed judicial system Hetmanate with its essential attribute – representatives of the people: the Cossacks, peasants, commoners.

The fourth stage in the history of the jury in Ukraine connected with the conduct of the Russian Empire in the judicial reform of 1864, the implementation and functioning of this institution of legal proceedings in Ukrainian lands. An important role in the development of ideas of separation of judicial and administrative authorities, the creation of juries played reform projects of public and legal institutions MMS peranskii, Ukrainian-nezhintsa, the first doctor of law in Russia S. Yu. Desnitskogo, preparation of draft laws in the State Council under the Russian Commission Ukrainian chairmanship S. I. Zarudnogo who investigated the model of the judicial system with the participation of a jury in France, Belgium, Germany, Italy, and Britain and the United States [1].

Alexander II approved November 20, 1864 the four reform act: «The establishment of court of justice», the «Charter of Civil Procedure», the «Charter of criminal proceedings», the «Charter of the penalties imposed by magistrates», which amounted to a 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.

principles of separation of the judiciary from the legislative, executive and administrative, independence and immutability of the court, and the court introduced vsesoslovnogo Institute of jurors in the district courts. The District Court was a court of first instance in all criminal and civil cases, are beyond the jurisdiction of the Magistrates' Courts.

Highlighting the most important provisions of the laws on the status and competence of the court prisyazh-tion. The law «Establishment of court of justice,» the legislator has provided a place in-Institute of jurors in the court system: «In order to determine in criminal cases the guilt or innocence of the accused in the court in the case referred to in the Charter of the criminal proceedings are brought jurors» (№41475, Art. 7). Chapter II, Section II «On jurors» establishes their composition, the procedure of election and preparation of general and regular lists (Articles 81–109). It was pointed out that jurors are elected from the local 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 district, where the election of jurors. They can not be the person under investigation, who are excluded from the service, the debtors, who is under guardianship, the blind, deaf, dumb, «mindless» who do not know the Russian language.

In the first stage a general list of jurors drawn up temporary missions to each county, appointed by the county zemstvo assemblies. The law defines the range of persons entitled to be included in the lists of jurors, and those who shall be included on such lists: the clergy and religious, military chi-us, the teachers of public schools who serve private persons. Set deadlines for changes in the general list, then it until October 1, must be submitted to Mr. gubernato for examination and approval.

In the second stage time county commission makes another list prisyazh-tion of persons who meet the requirements and had to be called upon to participate in the Sioux-judicial meetings in the next year (no more than once a year). At the same time the queue nym list drawn up a list of replacement judges. The law regulated their quant-tion according to the population of the county or city. The lists have been made only by persons of the Orthodox faith. The order to attract the jury to participate in the court sessions and resolution of criminal cases was regulated by the Charter of the criminal proceedings (№4176).

The Charter defines the main principles of criminal justice, particularly in cases of crimes and wine, which are punishable by deprivation of civil rights or the loss of all or some of the special rights and privileges, the determination of guilt or innocence of the accused was charged with the jury. The Charter states that trials involving them occur in public, orally (Art. 624).

Three weeks before the opening of the courtroom with the jurors of the oche-list alternately toss-appointed 30 judges and 6 spare «to be present throughout the period of the meetings.» On the draw to draw up reports, and from abusive jurors invited to the court summons (Articles 550–553). List their

names heard the prosecution and the defense. Both parties have the right to unmotivated withdrawal of six jurors. A piece of paper with the names of 18 jurors selected so invested in the box for the draw, after which 12 people whose names are determined by lot, formed the jury box. We called and the names of two reserve jurors (Articles 654–658).

Open court jury began with Ob-effects of their composition and bringing it to the oath priest who proclaimed it a solemn meaning. Each juror kissed oath, cross and pronounced the word «swear.» The non-sworn in accordance with the rites of their faith. In the absence of a court session cleric non-Orthodox religious judges are sworn in president of the court (Articles 666–668). The jury foreman to choose among themselves for the organization of its meetings.

Further, the Charter defines the order of the chairman of the jury explaining their rights, duties and responsibilities. In the court proceedings, they have an equal right to judge both the examination of traces of the crime, physical evidence and the right to set up, it requests those questions. The jury also had the right to appeal to the president of the court for clarification of content read in court documents of the offense and other obscure matters for them. They were allowed during the trial de lat written notes. Jurors were not allowed to leave the hall, Pin-ted with outsiders without obtaining the permission of the court chairman. They over-prohibits collect any information on the case outside the court session, to divulge the secrets of the deliberation room. For violation of the rules Xia juror eliminated from further participation in the proceedings, and it imposed a fine (Articles 671–677).

Statutes govern the procedure for criminal proceedings and issuance of verdicts announced, with or without a jury (Art. 755). After the presentation of the Chairman of the fate-foot meeting foreman interrogation sheet, chairman declared Naputi-governmental word that explained to the jury the most important facts and laws relating to the definition of the category of the crime, general legal judgment on the evidence presented for and against the defendant. The presiding judge reminded the jury about the need to decide on the guilt or innocence of the defendant on their inner conviction after a joint discussion of all the circumstances of the case (Art. Art. 801–804).

Under the Charter of the order of the decision by the jury called for adoption of a single decision-vowel, or in case no unanimity – the majority of votes. When the votes are equally divided, the decision was made in favor of the accused. If you had worn-guilty verdict, the jury might be noted that the defendant is entitled to mitigation of punishment. In such a case, the court had to sentence lower than the pre-stares law. Jurors also endowed with the right to supplement your answer is «yes» or «no» by the presence or absence of intent, the circumstances of the crime and the like Answer jurors shall be signed by their elders, who is elected by a jury in a particular case. He announced their decision after the return of all members of the jury room, and their questionnaire handed to

the presiding judge for signature. The judges were not always agree with the decision of the jury that if they had been convicted by unanimous decision of the innocent, the case was transferred to the new composition of the jury, a decision which in all cases was final (Art. Art. 801–818).

Well-known Russian lawyer AF Koni in the article «Judicial reform and the court-at syazhnyh» noted that the jury «has combined both in the focus of all general principles, is hay-legal regulations in the administration of criminal justice»[1]. Thus, the legal forms of popular participation in the administration of justice, Global Developing were historically in Ukraine and Russia, and embodied in the classical model of a jury for judicial reform of 1864, to implement the idea of separation of administrative and judicial authorities, taking into account the achievements of legal science, and the best traditions of British The French model of the legal institution.

The first district courts as courts of first instance occurred in Slobozhanschyna in 1867. Thus, during 1867–1868. in the district of the Kharkov court chamber were liquidated, and verbal Rowan county courts and introduced new – district. The jurisdiction of the district court of Kharkiv spread to several provinces: Kharkov, Kursk, Oryol, Voronezh[2]. Jury trials were opened in Kharkiv, Izyum, Sumy courts. The courts of the Odessa Court of Justice were opened during the first third of 1869 in Kherson, Ekaterinoslav and Tauride province[3]. Thus, the territorial boundaries of the Chambers not only coincided with the district, but were much wider, which contributed to the independence of the judiciary from the administration.

The functioning of the jury, the competence and the basic indicators of its Dey-telnosti on the right bank of Ukraine on the Judicial statutes in 1864, as illustrated in labor-hole AI Pashuk, PF Shcherbina, OO SIDORCHUK and other scientists had common and special features. The introduction of jury trials has been delayed, and the first of them appeared here only in 1880. The district courts in right-bank provinces were created in Kyiv, Uman, Zhytomyr, Kamenetz-Podolsk and Lutsk, which belonged to the two judicial districts: Kiev and Odessa. Researchers led interesting information about the composition of the district courts, the composition of the jury, the dynamics of the annual number of unsolved criminal cases involving them and without it over the years 1880–1916., The data on indicators of the organization of meetings of the regional courts, the percentage made by juries of convictions, etc. d.

During the 70-90th. XIX century in Russia as a result of counter-reform established a system of general courts, democracy and the principles of justice and the judicial system has undergone serious limitations. It was narrowed the competence of the jury: the Act of June

[1] Кони А. Ф. Собр. соч. в 8 т. / А. Ф. Кони. – М., 1967. – Т. 4. – С. 201, 202.

[2] ПСЗРИ. – Т. 42. – Отд. 1: 1867. – СПб., 1871. № 44094, № 45104; ПСЗРИ. – Т. 43. – Отд. 1: 1868. –СПб., 1873. № 45490.

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

12, 1884 police officers were admitted to the formation of its composition, the Act of 28 up-relativistic 1887 doubles the property qualification of 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 representativesteley people in the judicial system of Ukraine related to the era of national liberation struggle of 1917–1920 years. After the collapse of the Russian Empire, the Ukrainian Central Rada began to reform the judicial system, trying to keep the well-established democratic forms of the judicial system-cal, «streamline proceedings and lead to agreement with the great-vovymi concepts of the people»[1]. However, the extremely difficult conditions of continuing world, the beginning of the civil war and the presence of foreign troops on Ukrainian-zem Lyakh caused incomplete judicial reform in the UPR, the creation of courts with special jurisdiction. The Ukrainian state hetman Skoropadsky act «mixed-valued» the judicial system – with the judicial institutions of the Russian Empire and the UCR, with the system of common courts and the military. In the days of the Directory of the UNR in practice continued, sting operate emergency judicial system, far from being declared by the Prince types: the separation of administration from the court, judicial independence, the rule of law, and others. In constitutional law the Central Rada, the Hetmanate, the director, in the project «Basic Law UPR «1920 restoration of the jury without providing elk, so consider an exaggeration conclusion of some researchers about the» further development of the jury in the judicial system of Ukraine for 1917–1920. "[2]. At the same time, the jury continued to operate in the Ukrainian lands that were part of the Austro-Hungarian Empire and Poland. The idea of popular participation in the administration of justice with the participation of lay judges or a jury in a consolidated constitutional draft «Constitution of the Western Ukrainian Republic» (1920), Doctor of Law S. Dnistryansky[3].

With the termination of the existence of a jury trial in Ukraine in Soviet times, the conditions-tions domination of the so-called dictatorship of the proletariat, the dictates of the Bolshevik Party, the class character of legislation declared in these people's participation 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 sudoproiz-production in the form of elected judges and lay judges. The first document of the new Co-viet court in Ukraine was the decision of the People's Secretariat on Janu-

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

[2] Тернавська В. М. Указ. робота. – С. 4, 10; Гринишин А. Б. Указ. Робота. – С. 4, 10, 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.

ary 4, 1918 «On the introduction of the people's court»[1]. According to the decree abolished the old, «the bourgeoisie-nye» 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 «war communism» and the Civil War, when a state of emergency and non-judicial system of revolutionary tribunals VUCHK, supervision of «revolutionary legality» was carried out, and the people's courts. People's Commissars of the Ukrainian SSR 26 October 1920 adopted the «Regulations on the people's courts»[2]. In accordance with the status of a national court acting as a part of a single judge, or as part of a judge and two lay judges of regular or regular judges and six lay judges (Art. 5). The last panel of judges handling criminal cases. The following articles provisions regulate the composition of the court with the participation of lay judges in civil, minor criminal 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 judicial process.

After the Civil War, the refusal of the ruling Bolshevik Party from the policy of «war communism» and transition to the NEP was carried out restructuring of the judicial system of Ukraine. December 16, 1922 VUTSIK adopted a resolution approving the «Regulations on the Ukrainian judicial system»[3]. In accordance with the Regulation introduces a single system of the judiciary – the people's court, which consisted of a permanent judge and two lay judges, 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 Union Republics» and the transition to a three-stage control system VUTSIK in 1925 approved the new «Regulations on the Ukrainian judicial system»[4]. Regulations define the basis of the judicial system of the USSR People's Court, which administers justice collectively as a part of national judges and two lay judges (Art. 3). Further development was the principle of the people's election of judges and lay judges, expanded the list of the latest for each area, fix the procedure 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, reproduces its substantive provisions, states that «the examination 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

[1] Вестн. УНР. – 1918, 10 січ.
[2] СУ УСРР. 1920. – №25. – Ст. 536.
[3] СУ УСРР – 1922. – №54. – Ст. 779.
[4] ЗУ УСРР. – 1925. – №92–93. – Ст. 522.

only by the court, the publicity of the trial, the legal status of lay judges, the independence of judges and their subordination only to the law in the face of massive repression had declarative character.

The constitutional position of the Soviet court have been 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, the involvement of the latter to review court cases, giving them rights of a judge, the order of payment for their work, recall the voters[1]. The repressive practices of extrajudicial enforcement, the dependence of courts by the party and Soviet authorities has led to the emergence of an unprecedented standards in the law, «in the event of the temporary absence of national judges (illness, vacation, and so on. D.) To perform judicial duties during his absence responsibility of the District Council of People's Deputies on of one of the lay judges "(v. 19). The law has a special role in the upbringing of the Court of Soviet citizens.

In the postwar period in the time of de-Stalinization been significant measurable-tion in the organization of the judiciary, strengthening of the democratic principles of their activity-telnosti. This was facilitated by the increase in the number of lay judges, empowerment of regional courts and the Supreme Court. Guided by the «Basic Law on the Judiciary of the USSR, union and autonomous republics» (1958), the Supreme Soviet adopted the «Law on the Judicial System of the RSFSR» (1960), by which establishes a unified people's courts at the district and the city, elected for 5 years[2]. The law increased the timing of people's assessors of their 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 workers, employees 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 people's assessors, increases their responsibility to the voters. Although the law requires systematic reporting only lay judges to the voters, was the rule of accountability and people's assessors, which was reinforced by the possibility of early withdrawal. For the first time in the history of the Soviet judicial guarantees were distributed to judges and lay judges of the Supreme Court of Ukraine. Lay judges of district and regional courts had no such guarantees. But their responsibilities are not confined to participation in the review and resolution of cases in court – they conducted explanatory work on judgment of a court in groups of workers with probation and parole, assisted friendly courts read as judges, lectures for the public. In 1957–1958. For the first time there was a form of a public meeting by amateur folk-teley as councils of people's assessors,

[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. – С. 176.

which are widely used in the Republic's. Through these trials to guide and coordinate the work of judges[1].

These important changes in the practice of Soviet justice, and participation of people's assessors were legislated by the Constitution of the USSR in 1978 According to the 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 and city people's courts shall be 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 – the corresponding Councils of People's Deputies. Judges and people's assessors are responsible to izbirat-lyami or bodies that elected them, are accountable to them and can be withdrawn. The democratic nature and have Art. Art. 152, 153 of the Constitution: the consideration of civil and criminal cases in all courts is collegial; in the first instance – with the participation of lay judges, who enjoy the rights of a judge; Judges and people's assessors are independent and subject only to the law. Last constitutional provision remained a purely declarative, because the Basic Law did not provide for the separation of powers 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 judicial important novel in the Constitution was the recognition of the rights of public organizations and labor groups to participate in legal proceedings in civil and criminal cases.

Extensive involvement of the public in the administration of justice reflected and crepe-procedural legislation. Thus, the Code of Criminal Procedure of the USSR, approved by the Supreme Council of the USSR December 28, 1960, provided for the transfer of ma-terials cases of petty crimes committed for the first time, to the comrades' court (Art. 8) or the Commission on Minors (Art. 9), the possibility of transferring the perpetrator on bail a public organization or collective Tiwa-workers for the rehabilitation and correction (Art. 10)[2]. PDAs for the participation of people's assessors and collegiality in the proceedings, their rights (Art. 1, 2, 3, Art. 17). As laws and regulations of the Supreme Court of Ukraine on 15 av-dense 1997 hours. 2 and 3 tbsp. 17 changes were made that narrowed the scope of participation of the people-governmental jurors in criminal proceedings: they are involved only in criminal cases involving crimes for which the law prescribes a penalty of death. Such cases are dealt with in the Court of First Instance composed of two judges and three lay judges that the administration of justice have all the rights of a judge.

History of domestic and foreign jury trial did not know of such publicity Sous-judicial process that involves the

[1] 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, 324.

[2] ВВР УРСР. – 1961. – № 3. – Ст. 15.

Criminal Procedure Code of the USSR: to improve the tutor-term role of the judicial process and the prevention of crime», where appropriate, co-communicated to workers at the place of work or residence of the accused about the trials» to be held, or their results. «The courts have widely practiced conducting trials directly at enterprises, construction sites, state and collective farms with the assistance, where necessary, public prosecutors and public defenders» (Art. 4, Art. 20). Code of Civil Procedure of the USSR in 1963 as at June 20, 1997 also fixed the «participation in government, trade unions, enterprises, institutions, organizations and individuals to protect the rights of others» (Ch. 14)[1]. The trial took place in the affairs of the court room, «and on the most important cases that have broad public interest, – By direct-tively enterprises, construction sites, in offices, state and collective farms» (Art. 1, Art. 159). This was the Soviet democracy of the proceedings – with wide attraction to it of liability through the general election of lay judges and lay judges, their accountability, that despite all the problems of the totalitarian regime in the Soviet Union, it also has positive aspects and deserves an objective study.

With the proclamation and development of an independent democratic state, stole us began a new, modern stage in the long history of the jury. Implementing provisions, of the direct participation of the people in the administration of justice through people's seeded-givers, and the jury, the legislator in the Law of Ukraine «On the Judicial System and Status of Judges» in 2010[2] and procedural codes has fixed this form of justice. Called the Law defined the place of the Institute of People's assessors and jurors in the organization of the judiciary, their status and powers (Art. 2, Art. 1 hr. 3 of Art. 5 hr. 1, Art. 15, h. 1, 2, Art. 57) procedure for drawing up the list of lay judges, jury and its approval (Articles 58, 58–1), the requirements for lay judges sworn (v. 59), the grounds and procedure for exemption from the duties of a lay judge, the jury (Art. 60), order to attract people's assessors, jurors his duties in court (c. 61), has defined the guarantee of their rights (Art. 62). The law was introduced significant amendments (the memory number 4652-VI of 13.04.2012 city, № 716-VI from 12.19.2013 city, № 769-VII from 23.2.2014, et al.) On the peer review of court Affairs, Status, list of jurors[3]. In our view, h. 1, Art. 57 of the Law «On the Judicial System and Status of Judges» requires a clear separation of the Institute of People's assessors and of the jury, and h. 1, Art. 58 h. 6 Art. 59 – conform with the provisions of the Law of Ukraine «On principles of state language policy.»

Categories of cases which involved consideration of the jury, but definedtion by the Criminal Procedure Code of Ukraine, the Verkhovna Rada of Ukraine on 13 April 2012 a jury found the citizens of Ukraine, which in the case of pre-sidered procedural law, are

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

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

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

brought to the administration of justice, obespe-chivaya according to the Constitution of Ukraine, the people directly involved in the administration of justice (art. 30 CCP)[1]. Commented Chapter 30 Code of Criminal Procedure «a special order of the court of first instance» for the first time the existence of Ukraine-ray identified the concept of criminal proceedings, particularly the formation and activity of the jury, securing mechanisms for implementing the citizens' right to participate in it. Co-publicly h. 3 tablespoons. 31 CPC of the criminal proceedings in the trial court for the offenses for which is provided for life imprisonment, carried count collegial tribunal of three professional judges, and at the request of the accused – by a jury consisting of two professional judges and three jury.

CPC of Ukraine and determined the order of the court jury (Art. 383). Such a court created at the local general court of first instance. The authors of the second-ma scientific and practical commentary of the CCP, «the ability 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»[2] This observation is contrary to the historical experience of a jury trial in Ukraine. As for the language of the criminal proceedings is carried out, then, in our opinion, it is advisable to bring the provisions of the new CPC set forth in para. 22 h. 1 and h. 2 tablespoons. 7 and Art. 29 In accordance with Art. 14 of the Law of Ukraine «On State Language Policy».

Civil Procedural Code of Ukraine also suggests a revival in-the Institute of People's assessors. In Sec. 2, Art. 18 GIC determined that in cases established by this Code, civil cases in courts of first instance considered Colle-ergy consisting of one judge and two lay judges, who in the exercise of great-vosudiya enjoy all the rights of a judge.[3] Law of Ukraine «On amendments to some legislative acts of Ukraine in connection with the adoption of the Criminal Procedure 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. Actually, as noted by several lawyers, to discuss the possibility for Ukrainian citizens to participate in the administration of justice in all types of courts of general jurisdiction, regardless of their specialization.[4]

Thus, the Ukrainian legislation – the Constitution of Ukraine, the Law of Ukraine «On the Judicial System and Status of Judges», 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 qualita-

[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. – Т. 1. – С. 96, 97.

[2] Ibid (p. 167, 168)

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

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

tively new, modern level of secured and developed the tradition and experience, domestic and foreign, this form of participation of the people in the right-Judge, made them an important part of the current judicial reform in Ukraine. Institutes of lay judges and jurors are able to positively influence 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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PROBLEMS OF THE INSTITUTIONAL INDEPENDENCE OF THE CONSTITUTIONAL COURT OF UKRAINE: LESSONS FROM THE EUROPEAN EXPERIENCE

Many post-totalitarian states have introduced the institute of constitutional law at the beginning of reforms (e. g. Poland). At some of them, where there was a process of state building, has been founded such institution from the first months of Independent State (e. g. Czech Republic). Restructuring of the constitutional order at Central Europe on the principles of constitutionalism has led to the growth of the role Constitution. Updated basic laws of states requested special protection. Therefore from the beginning of democratic reforms the establishment of constitutional courts took place as one of the key priorities of legal reform.

In Ukraine, by contrast, even after the constitutional statement on an independent state in 1991, the constitutional court has not been established. Having consolidated in 1991 at the Constitution of the USSR, and in 1992 – in a separate law, the court in fact has not really started to act. As it is known, the activity of the Constitutional Court of Ukraine started only in January 1997, and this was the first distinctive feature of the national body of constitutional control according to similar bodies in the states of Central Europe. Acknowledgement of this fact thus noted that the constitution of Ukraine as an independent state and the creation of legislative framework for the democratization of its political system were carried out in the early 1990s by the Verkhovna Rada of Ukraine – a representative body with weak legitimacy due to the nature of the political system of the USSR at the time of elections in 1990. The next is the absence of constitutional court resulted in a significant (sometimes inconsistent) dynamics of the constitutional system of Ukraine, continuing attempts to reform it in unconstitutional way. An example of such

attempts was the Constitutional Agreement of 8 June 1995 signed between the President of Ukraine and the majority of the Verkhovna Rada of Ukraine, which unconstitutionally suspended the majority of the provisions of the current Constitution of the USSR of 1978[1]. On the other hand, during political crises in 2000, 2004, 2007, related to the conflict on the authority of the President and Parliament of Ukraine, the Constitutional Court of Ukraine has never become a mechanism for resolving political conflict via transferring it to the constitutional plane.

More than 18 years of the Constitutional Court activity in Ukraine demonstrated both the importance of its experience for the development of Ukrainian constitutionalism and serious problems. The decision dated from September 30, 2010 should not be too single out from the general context of constitutional justice in Ukraine. Therefore attention should draw to the need of understanding (and salvation) the relationship between the features of its status and operating conditions, on the one hand, and the efficiency indicators – on the other.

Several aspects of the status of the Constitutional Court of Ukraine that considerably complicate its work.

There is no such mechanism of its formation that would ensure achievement of two objectives: a) The replenishment of it with entities – bearers of legal doctrine that is necessary for the implementation of specific powers of constitutional justice; b) prevention of the phenomenon of party identification of judges. For example, in the Slovak Republic 13 judges are nominated by the President on the proposal of the parliament that contains 26 people. Among the judges – and this is common practice in Europe – a significant part of authoritative scientists-jurists.

The scope of jurisdiction of the Constitutional Court of Ukraine is one of the smallest in comparison to the European constitutional courts. In fact, it is too restricted in view of two points: a) the subject of constitutionality control is de facto only the acts of higher authorities; b) to the powers of the Constitutional Court Ukraine are not include other issues that, as a general rule, were within the jurisdiction of this body in the European countries.

The Constitutional Court of Ukraine with such restricted authority protects only the Constitution of Ukraine (in the narrow sense) as the text of the main law, but it is often unable to protect the constitutional rule of law – that normally protect the constitutional courts of European countries.

On the way to the European Union it should be understood that the foundations of the rule of law in the states – members of the European Union are determined not only by their national constitutions, but also by international treaties. These treaties also are protected by constitutional courts from violations at the level of legislative activity. For

[1] Конституційний договір між Верховною Радою України та Президентом України про основні засади організації та функціонування державної влади і місцевого самоврядування в Україні на період до прийняття нової Конституції України // Відом. Верхов. Ради України. – 1995. – № 18. – Ст. 133

example, in the Slovak Republic according to § 14 of the law «On the organization of the Constitutional Court, the proceedings therein and the status of its judges» the judges at administration of justice are linked by the Constitution, constitutional laws and laws when examining cases on compliance of government regulations, regulations of ministries and other central bodies of government to Constitution, constitutional laws, international treaties that have been ratified by the National Council of the Slovak Republic and uttered in a way the prescribed by the laws»[1]. So we are talking about the Constitution, constitutional laws, ratified international treaties and laws but not just Constitution, as it occurs in Ukraine.

Despite the limited jurisdiction, the status of the Constitutional Court of Ukraine is characterized by next significant institutional defects that impede its work – it is deprived of sufficient guarantees of independence at the judicial authority level and at the level of its judges. The matter is that the Constitutional Court of Ukraine from the beginning did not get arsenal institutional and legal means generated via European experience to ensure its independence to exercise its proper role on ensuring constitutional legitimacy, participation in the mechanism of legal deterrence of political powers and especially – the excessive presidential powers stated in the Constitution of Ukraine in its initial wording.

In what turns out to the absence of such guarantees of independence of the Constitutional Court of Ukraine?

First of all, it is a basic guarantee about the status of judges that is significantly different from European standards. This conclusion applies primarily to volume of immunity law for judge determined in the Constitution of Ukraine. The current Constitution of Ukraine, Article 126 states that a judge can not be without the consent of the Verkhovna Rada of Ukraine detained or arrested for a conviction by a court. The procedure of bringing judges to criminal liability is a question. The fact of launching this procedure (criminal case, entering data into the register of criminal proceedings) is a way to influence the judge, and it should be special for judge. This procedure should be prescribed in the constitution that has been done in 28 countries of the European Union. The body that approves bringing judges to criminal liability, defined in different ways – it may be the parliament and the constitutional court itself. For example, in Poland this agreement provides the Constitutional Tribunal, in the Czech Republic – the Senate (upper house of parliament) in Slovakia – the Constitutional Court.

Exactly in this context the current Constitution of Ukraine and the Law of Ukraine «On the Constitutional Court of Ukraine» dated from 16 October 1996 demonstrated, in fact, a movement from the position of the first law on the Con-

[1] Predseda Narodnej rady Slovenskej republiky Vyhlasuje úplne znenie Ústavy Slovenskej republiky č. 460/1992 Zb., ako vyplýva zo zmien a doplneni vykonaných ústavným zákonom č. 244/1998 Z. z., ustavným zákonom č. 9/1999 Z. z. ústavným zákonom č. 90/2001 Z. z. // Sb. zákonov č. 135/2001. – S. 1538–1560

stitutional Court. We recall that fourth part of Article 30 of the Law of Ukraine «On the Constitutional Court of Ukraine» from 1992 provided (up to 1996): «The judges of the Constitutional Court of Ukraine can not be prosecuted, arrested or subjected to any other measures that restrict their rights and freedoms and to administrative punishment imposed by a court order, without the prior consent of the Verkhovna Rada of Ukraine»[1].

Secondly, the procedure for financing the Constitutional Court of Ukraine determined by law, can not assert about the sufficient guarantees of independence. Article 31 of the Law of Ukraine «On the Constitutional Court of Ukraine» determined only the fact that «financing of the Constitutional Court Ukraine is provided from the State Budget of Ukraine in separate line» and that «proposals for funding the Constitutional Court of Ukraine and draft estimates submitted by the Chairman of the Constitutional Court of Ukraine to the Cabinet of Ministers of Ukraine and the Verkhovna Rada of Ukraine in drawing up the draft State Budget of Ukraine for each year thereafter». Proposals of the Chairman of the Constitutional Court of Ukraine and guarantees for appropriate funding – are not identical issues. Especially when it comes to remuneration of judges and the procedure for accrual life maintenance for them, the stability of legal relations in this area is equally important as the size of these payments. Systematic demonstrations by branches of political power the discretion in these matters provides the opposite effect for the independence of courts and judges.

Thirdly, it is necessary to pay attention to the relationship between political power (government, parliament and the president) and the Constitutional Court of Ukraine in recent decades that threaten the independence of this institution. Such practices, along with the legal regulations that outline the model of relations, mostly evidence the misunderstanding on value of the Constitutional Court of Ukraine to the stability of the constitutional order. It should be admitted that such activity is outside the constitutional legal order and, that is especially dangerously, came out from latent forms. It is about methods of dismissal of judges by abolishing acts on their appointment, about the methods of their financial support, along with the methods of awarding – all that is unacceptable for European constitutionalism.

The status and functioning of the Constitutional Court of Ukraine influences the level of institutions' efficiency. By the way, indicators of Constitutional Court' activity on court proceedings and in other areas should be formalized in the documents emanating from Constitutional Court of Ukraine or its Chairman. Of course, the Constitutional Court of Ukraine as an independent authority is unaccountable to any other public authority.

However, such accountability should not mean ignoring responsibility to society. The reporting to the people can manifest itself, as illustrates the Euro-

[1] Про Конституційний Суд України: Закон України від 3 червня 1992 року №2400-XII // Відом. Верхов. Ради України. – 1992. – №33. – Ст. 471.

pean countries' experience, in form of the annual reports. It is analytical document that illustrates key indicators of the constitutional court' activity on administration of justice and the court staff' activity. For example, in Slovak Republic on April 2015 has been published a document entitled «Protection of constitutionality and the Constitution of the Slovak Republic» that lists the results of 2014[1]

By the way, from this document we know that in 2014 to the Constitutional Court of the Slovak Republic by different actors were submitted 17,889 petitions and complaints. Some of them were declined; some are combined into proceedings, but during 2014 examination of 248 petitions were completed via judgment or decision (including 57 – at plenary session and 291 – at collegia). The Constitutional Court of the Slovak Republic given broad jurisdiction that is not comparable to the Constitutional Court of Ukraine, but even if we take into account only one category of cases – on the constitutionality of regulations then throughout 2014 on this issue have been received 24 submission and completed proceedings in 29 cases (including petitions during last year) on corresponding decisions.

During the same period, the Constitutional Court of Ukraine issued only 7 decisions, including two relating to control the constitutionality of legal acts, 5 – the official interpretation of the Constitution and laws of Ukraine. Both decisions were concerning the constitutionality of resolutions issued by Verkhovna Rada of Crimea (concerning the Crimean referendum and declaration on independence of Crimea and Sevastopol). Two decisions in Ukraine and 29 in Slovakia (where the population is 8 times less) – and this despite the fact that the Constitutional Court of the Slovak Republic adopted more than 2,500 decisions on other issues of jurisdiction (except decisions on abandon).

Let us consider current 2015. The Constitutional Court of Ukraine issued just 5 decisions of which one concerns the question of control over constitutionality – in the case of the constitutional petition by Ombudsman on Human Rights of the Verkhovna Rada of Ukraine concerning the constitutionality of the provisions of Article 1712 of the Code of Administrative Justice of Ukraine from April 8, 2015 № 3-rp / 2015. This decision of the Constitutional Court of Ukraine ruled unconstitutional provisions of the law, which narrowed the right of citizens to access to justice. The system of argumentation in motivation part of decision draws attention, because in it for the first time is deployed Argumentation that is similar to those used by courts in European democracies.

Consequently, during the last eighteen months the Constitutional Court of Ukraine considered cases on compliance with the Constitution of Ukraine only three times, two of which – due to the

[1] Ochrana ústavnosti a ústavy slovenskej republiky. Prehľad rozhodovacej a ďalšej činnosti Ústavného súdu Slovenskej republiky za rok 2014. – Košice apríl 2015 [Електрон. ресурс]. Follow the: http://portal. concourt. sk/plugins/servlet/get/attachment/main/dokumenty_data/Ochrana+ustavnosti_final-1. pdf

annexation of the Crimea. Obviously, such figures can't prove that the Constitutional Court of Ukraine is an effective component of the mechanism on containment and balances.

We draw attention also to the fact that the limited capabilities of the Constitutional Court of Ukraine and insufficient guarantees of independence led to another indicator of the effectiveness – the low number of petitions and appeals to it. To the Constitutional Court of Ukraine in 2014 were submitted 37constitutional petitions and 412 constitutional appeals (please recall that in the Slovak Republic for the same period more than 17 000 documents).

It is important to emphasize that the resolution of the aforementioned problems of the Constitutional Court of Ukraine, including strengthening the guarantees of independence, requires appropriate amendments to the Constitution of Ukraine.

Published: Ochrana ústavnosti a ústavy slovenskej republiky. Prehľad rozhodovacej a ďalšej činnosti Ústavného súdu Slovenskej republiky za rok 2014. – Košice apríl 2015 [Електрон. ресурс]. – Режим доступу: http://portal. concourt. sk/plugins/servlet/get/attachment/main/dokumenty_data/Ochrana+ustavnosti_final-1. pdf

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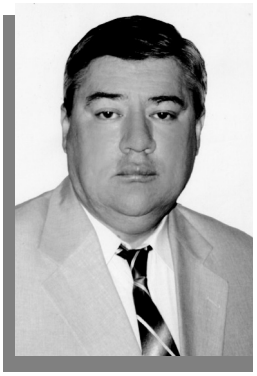

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UKRAINIAN IDEA OF NATION-STATE REVIVAL (END XVIII – BEGINNING OF XX CENTURY)

Ukrainian state based on a long history. The right of the Ukrainian people to self-determination has a strong theoretical base in the form of national-state revival, whose foundations were laid and developed from the XVIII to early XX century in the works of Ukrainian writers, public figures, scientists, lawyers and historians, policy positions of public organizations and political parties.

The elimination of the autonomy of Ukraine and the division of land between the Russian and Austro-Hungarian empires made it impossible to create a single national center state. Absolutist states hostile to any Ukrainian national aspirations and crushed them all by their administration. As this opposition in the 80-ies. XVIII century there is the idea of Ukrainian national-state revival. This process began, said D. Doroshenko, «as the antithesis to the grave political and socio-economic status and cultural decline, which was at that time the Ukrainian people»[1]. The basis of its revival was Hetman, and it is no coincidence, because this region until recently lived a life of their own state. Carriers idea of revival of Ukrainian statehood were nobles and Cossack officers. They motivated by class interests launched a worldview that relied on historical traditions, especially the Cossack period in an effort to prove their right to autonomy Hetman recovery[2].

Among the most patriotic members of the Ukrainian community then distinguished figure B. Kapnist.

A significant surge in efforts to collect, play, and soon – the Ukrainian national culture associated with historical and ethnographic folklore research D. Bantysh-Kamensky, J. Bodyanskiy, T. Kalinowski, J. Markovic, M. Maksimovic, V. Poletyka V. Ruban, O. Shafon-

[1] Дорошенко Д. І. Нарис історії України: в 2 т. / Д. І. Дорошенко. – К.: Либідь, 1992. – Т. 2. – С. 268.

[2] Крип'якевич І. П. Історія України / І. П. Крип'якевич. – Л.: Світ, 1990. – С. 259.

sky. A notable work of the period was «History of Rus».

This movement played an important role in the awakening of Ukrainian national consciousness, because it is widely unfolded concept of nation. Which was turned all the people, the concept of «homeland» a seized all the lands inhabited by these people.

Paying tribute to the specified figures should agree with the opinion of I. Krypyakevych that «it was the only exceptions». Overall nobility built their aspirations for good relations with Russia, not losing hope that their loyalty will get some progress»[1].

The idea of national-state revival continues its development in the minds of left-bank Ukrainian intelligentsia in the 20–30-ies. XIX century due mugs nobility autonomists united in Masonic lodges. Their most famous figures is I. Kotlyarevskiy, P. Kochubey, V. Lukashevich, M. Repnin, V. Tarnavskyi. Masonic lodges joined the Decembrists. However, recent opinion there was no unity on national rights Ukrainian state.

The program of the Northern Brotherhood does not recognize national rights by individual nations. Ideal P. Pestel was centralized republic and hence he concluded that «Malorossiya has never been and can not be independent. Therefore, it should cede its right to be a separate state»[2].

Instead, Southern Company set out the main goal of all Slavs dismissal of absolute power, destruction of national autonomy among some Slavic peoples and uniting them all in a federal union. The implication of all nations to introduce democratic parliamentary form of government, to make the Congress for the council works of a union. Each state had to be given complete freedom and independence in solving its internal affairs[3].

Speaking about Ukrainian national revival first quarter of the XIX century, must be borne in mind that the bearer of this movement was purely ideological nobility. In this movement the masses not to go for the simple reason that they were in bondage and serfdom were outside the influence of schools and education[4].

Important role in the rise of national consciousness Ukrainian people played writers of romance. Centre of contemporary literary life became Kharkiv, including Kharkiv University, rector of which have long been known Ukrainian poet P. Gulak-Artemovskij. In the literary life of the period took an active part G. Kvitka Osnovyanenko, N. Kostomarov, A. Metlynsky, I. Sreznevsky and others. Paying tribute to the romantic writers, M. Grushevsky noted that «the Ukrainian writers submit arm Slavic revival. But the broader setting of the Ukrainian national idea here yet»[5].

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[1] Ibid (p. 259)

[2] Історія української державності: моногр. / Я. Малик, Б. Вол, В. Чуприна. – Л.: Світ, 1994. – С. 56.

[3] Дорошенко Д. І. Нарис історії України: в 2 т. / Д. І. Дорошенко. – К.: Либідь, 1992. – Т. 2. – С. 277.

[4] Ibid (p. 274)

[5] Грушевский М. С. Очерк истории украинского народа / М. Грушевский. – К.: Наук. думка, 1991. – С. 315.

In 30-ies. XIX century. Ukraine begins to form a concept of the nation, which is based on a common language and culture[1]. Impact of a national consciousness is the problem of Ukrainian national-state revival.

In 40-ies XIX century center of political life in Ukraine became Kyiv. In 1843 there started its activities Archaeological Commission, thanks to research by a new generation of Ukrainian leaders (M. Kostomarov, P. Kulish, T. Shevchenko), which gives priority to historical problems have put the idea of independence of Ukraine as guarantor interests nation.

An attempt to convert these ideas into practice was the work Cyril and Methodius, which united Ukrainian blossom of thought, people who have had a huge impact on Ukrainian national revival. Its organizers were V. Belozersky, M. Gulak, M. Kostomarov. To fraternity belonged G. Andruzkyy, P. Kulish, O. Markovic, O. Navrotskyi, I. Posada, D. Pchelnikov, M. Savic, O. Trygub, T. Shevchenko[2].

Social structure Brotherhood differed on the composition of Masonic lodges and political circles of the first quarter of the nineteenth century. The members of the brotherhood came from the middle or the poorest among them was even a former serf. These layers have come to Ukraine to replace you with their noble ideological leadership in the field.

Software provision Cyril and Methodius Brotherhood were formulated in the works of M. Kostomarov «Act of God (Genesis Ukrainian people)» and appeals Cyril and Methodius. The national question they addressed as part of the future of the Slavic federation in which each nation had its republic to create and manage their own affairs independently. «Each nation had its own language, its literature and its own structure. Federal authorities should have the Sejm or Council Slavic. Each country had its own governor, elected for several years, and over all the Union would ruler chosen for several years. That each country had universal equality and freedom. To deputies and officials are not selectable in kind, not in wealth, and in mind and in education»[3].

Federalist concept inherent in the socio-political thought of Ukraine in previous years, Cyril and Methodians was elevated to a new level efforts M. Kostomarov, who is considered the founder of the «federalist school» in Russian history.

The members of the Cyril and Methodius Brotherhood tried to give their views of constitutional design. Thus, G. Andruzkyy developed the «Outline of the Constitution of the Republic». The views of the author of the document evolved from restricting monarchical form of government for a republic to replace.

Activities Cyril and Methodius Brotherhood was the culmination mile-

[1] Субтельний О. Україна: історія / О. Субтельний. – К.: Либідь, 1991. – С. 201.

[2] Копиленко О. Л. Політико-правові ідеї Т. Шевченка та І. Франка в сучасній ідеологічній боротьбі / О. Л. Копиленко. – К.: Либідь, 1990. – С. 23, 24.

[3] Дорошенко Д. І. Нарис історії України: в 2 т. / Д. І. Дорошенко. – К.: Либідь, 1992. – Т. 2. – С. 281.

stone Ukrainian national liberation movement of the 40's. XIX century[1] and, as noted D. Doroshenko, «his ideas and his program for a long time said the main guideline Ukrainian national revival»[2].

New Ukrainian Center represented the first Ukrainian magazine «Osnovy» joined forces leading Cyril and Methodius Brotherhood, but the further development of program ideas in the circle of St. Petersburg received. Probably experiences cooled youthful dreams and essential task for the Ukrainian people forced to give up dreams of far-reaching system of the Slavic world. Circle «Osnovy» leaving aside the broad political plans. At first appeared the protection of the identity and nationality of Ukrainian literature[3]. Combining conscious national elements Ukraine, he «bound Ukrainian movement with progressive and democratic currents of the Great Society»[4].

The Russian government saw in this activity a danger to the Empire, and the means of combating it – mass arrests and exile Ukrainian figures (O. Efimenko O. Konys'kyj, V. Loboda, P. Chubynsky). Completed the massacre in the 1863 circular interior minister P. Valuev, which banned print books in Ukrainian explaining that «was not, and there can be no Ukrainian language»[5].

Erected to the nature of literary, cultural trends, the Ukrainian movement 50–60's XIX century concealed in a huge potential, which soon turned.

In the early 70's XIX century Kiev Ukrainian focused considerable intellectual powers, and it became the main focus of the Ukrainian movement. Kyiv community brought together a number of brilliant talents: V. Antonovych, X. Wovk, M. Drahomanov, P. Zhytetsky, M. Lysenko, K. Mykhalchuk, I. Nechuy-Levitsky, O. Rusov, M. Starytsky, P. Chubynsky who managed to re-formulate the Ukrainian national program. Ways restructuring of government they saw the federal structure of broad autonomy for the Ukraine.

Failure to curb the Ukrainian national movement worried the Russian government. In May 1876 Emperor Alexander II signed a decree according to which it was forbidden to publish in Ukrainian literary works and even «texts printed on it to musical notes»[6].

Severe conditions in which Ukrainian political thought was, did not prevent the emergence of a new galaxy of Ukrainian leaders. Ideologist of Ukrainian statehood ideas became M. Drahomanov. He explained the absolute necessity of transition to constitutional order, originally proposed and solved the prob-

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[1] Сергієнко П. П. Соборна Україна: від ідеї до життя / П. П. Сергієнко. – К.: Либідь, 1993. – С. 26.

[2] Дорошенко Д. І. Нарис історії України: в 2 т. / Д. І. Дорошенко. – К.: Либідь, 1992. – Т. 2. С. 281.

[3] Крип'якевич І. П. Історія України / І. П. Крип'якевич. – Л.: Світ, 1990. – С. 267.

[4] Грушевский М. С. Очерк истории украинского народа / М. Грушевский. – К.: Наук. думка, 1991. – С. 318.

[5] Історія держави і права України: хрестоматія: у 2 т. / за ред. В. Д. Гончаренка. – К.: Ін Юре. 1997. – Т. 1. – С. 210.

[6] Історія держави і права України: хрестоматія: у 2 т. / за ред. В. Д. Гончаренка. – К.: Ін Юре. 1997. – Т. 1. С. 264.

lem of constitutionalism and federalism, political freedom, democracy, human rights, local self-government. «As no other of his contemporaries in the Ukraine, he helped eliminate progressive intellectuals of the ideological nihilism and despair on the path of conscious political activity in the case of state-legal ideology»[1].

M. Drahomanov advocated republican-democratic form of government of the state. The most important principle that is laid in its basis was the principle of constitutionalism, which included components such as political freedom and civil society that are implemented through national representation in central and local governments broad, broad rights and freedoms.

Republican form of government being offered M. Drahomanov on the principles of parliamentarism. Formation of the representative body had be by universal and equal suffrage.

Building a state mechanism should be based on the recognition and application of the theory of separation of powers, which M. Drahomanov understood not as the dispersal of power, but as the division of labor among the authorities, as the bearer of power to the people with him. Hence M. Drahomanov brought the principle of the primitive power of the people to the power of the state[2].

Important for M. Drahomanov was a problem of balance of federalism and decentralization are not considered thinker as opposites. His ideal was a federal democratic republic built on the principle of decentralization. M. Drahomanov was a supporter of the federation as a form of government and applied the concept of «federalism» for various forms of communication between the state and between regional and other public organizations that did not have public character [3].

M. Grushevskiy, describing federalism M. Drahomanov, emphasized that it was «Cyrill and Methodius transfer ideas from soil Slavophil (federation of Slavic peoples) on the real ground of modern relationships»[4].

These ideas in 1880 M. Drahomanov with M. Pavlik and S. Podolynsky published in the «Hromada» as a program that modeled future Ukrainian statehood. Its ideas greatly influenced the leadership of the Ukrainian national movement during the revolutionary events of 1917–1920 years, determined the form of government of Ukraine and its relations with Russia, defined the content of state building process in the Ukrainian People's Republic, have determined his success, but also caused its failure.

A significant contribution to the nation-state idea in Ukraine at the turn of XIX–XX centuries was the work of I. Franko. Analyzing the problems associated with the political system and form of state government, he sharply criticized the existence of the monarchy,

[1] Скакун О. Ф. М. П. Драгоманов как политический мислитель / О. Ф. Скакун. – Харьков: Основа, 1993. – С. 3.

[2] Скакун О. Ф. М. П. Драгоманов как политический мислитель / О. Ф. Скакун. – Харьков: Основа, 1993. – С. 59–60.

[3] Ibid (p. 82)

[4] Грушевский М. Освободжение России и украинский вопрос / М. Грушевский. – Спб, 1907. – С. 51.

where power and laws were based on the absolute will of the monarch. Political ideal of Ivan Franko was a democratic republic with supreme representative body established on the basis of the general election.

Formed in this period political parties Naddnipryanska Ukraine remained on federal positions until 1917 and their transition to a program of political independence took place only in times of revolution under the pressure of external circumstances – primarily due to the aggravation of Russian-Ukrainian conflict which make it impossible implementation of autonomy of Ukraine the Russian Soviet state.

Significant impact on program provisions of political parties at that time had views of M. Mikhnovsky of Ukraine as an independent state. The first program of the Revolutionary Ukrainian Party (RUP) was M. Mikhnovsky brochure «Independent Ukraine», which in the historical and legal context was based on the idea of independence of Ukraine. Using the method of excursion into the history, the author gave impeccable from the point of view of international law, analysis of Ukraine-Russia relations on the Pereyaslav agreement by 1654 as Confederate and later Russia violated. Therefore, M. Mikhnovsky upheld Ukraine's right to return to the status of a sovereign state[1].

But radicalism author of «Independent Ukraine», which sometimes bordered with chauvinism, hindered the popularity of his thoughts. A statement «Ukraine for Ukrainian and until at least one enemy-alien will remain on our territory, we can not put weapons»[2], repelled by the Ukrainian idea, as interpreted by M. Mikhnovsky other ethnic multi-ethnic population of Ukraine.

Revolutionary Ukrainian party gradually transformed into a party of social democratic that affected her attitude to Ukrainian statehood ideas. Since 1903 RUP refuses brochures M. Mikhnovsky as software. In «Essay Program Revolutionary Ukrainian Party» put forward the demand to transform Russia into a federal republic autonomous national historic areas with the right to state their complete separation by referendum. The supreme legislative and representative body of the political autonomy of Ukraine was to become the People's Council, which would be elected on the basis of universal suffrage[3].

In the minds of people, organized in RUP, combined national and socialist ideas, but gradually between its members intensified differentiation. Separated from the party group of nationalistic slogan «Ukraine for Ukrainian» headed by M. Mikhnovsky that the main purpose announced the formation of an independent Ukrainian state. Most of the members of the RUP in 1905 formed the Ukrainian Social-Democratic Labour

[1] Міхновський М. Самостійна Україна / М. Міхновський // Вивід прав України. – Л.: Світ, 1991. – С. 78–83.

[2] Українська суспільно-політична думка в 20 столітті. Документи і матеріали: у 3 т. / упоряд. Т. Гунчак, Р. Сольчак. – Нью-Йорк, 1983. – Т. 1. – С. 71.

[3] Українські політичні партії кінця XIX – першої половини XX століття: моногр. / В. І. Головченко, Г. Г. Демиденко, В. М. Єрмолаєв, В. Є. Рубаник; Юрид. акад. України. – Х., 1994. – С. 25.

Party, which was limited to the political sphere slogans of national territorial autonomy of Ukraine[1].

As noted by D. Doroshenko, at the turn of XIX–XX centuries in public and political life is entering a new generation of Ukrainian, «brought in concepts and views of hardline Ukrainian nationalist broad European basis, people are no longer content with just a cultural activity, and would like to obtain the Ukrainian people full national and political rights, going along with All-Russian liberation movement, but their separate ways, within their own organizations»[2].

Since the beginning of the revolution in 1905 the national movement in Ukraine intensified and became widespread. This was facilitated by the fact that at the time of the revolutionary explosion in the Ukrainian society has formed a range of political forces, representing the views of much of the intelligentsia. They sought to implement socialist ideals Ukrainization political life, and the most radical of them put forward the slogan Ukraine gained independence.

Following reflections share of some political forces in the Ukrainian provinces to the idea of national-state revival were the results of elections and the State Duma. Of the 102 deputies elected from ethnically Ukrainian provinces, 45 together in a faction called «Ukrainian parliamentary community», which had its organ «Ukrainian Journal». To this fraction collaborated prominent Ukrainian public figures M. Hrushevsky, O. Lototsky, O. Rusov, M. Tugan-Baranowski, I. Franko. The basis of the political platform of the faction was the autonomy of Ukraine.

Efforts Ukrainian leaders during the State Duma and, as the I. Krypiakevych were not in vain[3]. In the II State Duma parliamentary club was founded under the name «Ukrainian parliamentary community», which brought together 47 deputies and published the journal «Ridna sprava – visti z Dumy».

Defending the unity of the state, members of the Ukrainian provinces proceeded from the fact that it will be strong and unbreakable only «as nations that make up Russia are linked not by military force and centralization of government, but through genuine community of interest, which all will be accepted»[4]. By means of this has been the national and territorial autonomy for the borderlands of the Russian Empire[5]. Ukrainian parliamentary community to the Duma has made a proposal to introduce Ukrainian language education in schools and the establishment of departments of Ukrainian universities. Through the efforts of the community were prepared bills on Ukraine's autonomy of

[1] Касьянов Г. Український соціалізм: люди, партії, ідеї (початок XX сторіччя) / Г. Касьянов // Політологічні читання. – 1992. – №2. – С. 110.

[2] Дорошенко Д. І. Нарис історії України: в 2 т. / Д. І. Дорошенко. – К.: Либідь, 1992. – Т. 2. – С. 318.

[3] Крип'якевич І. Михайло Грушевський. Життя й діяльність / І. Крип'якевич // Великий українець: матеріали з життя та діяльності М. С. Грушевського. – К.: Наук. думка, 1992. – С. 467.

[4] Українська суспільно-політична думка в 20 столітті. Документи і матеріали: у 3 т. / упоряд. Т. Гунчак, Р. Сольчак. – Нью-Йорк, 1983. – Т. 1. – С. 161.

[5] Ibid (p. 161)

local government, the Ukrainian language in court, school, church, etc. But to put them into practice failed due to the dissolution of the II State Duma.

The existence of a part I and II State Duma Ukrainian parliamentary community and its struggle for autonomy Ukraine had great political importance: the whole world it was proof that exists in the Russian Empire Ukrainian people, and he achieves his natural rights.

Ukrainian question remained a major in the III and IV State Dumas, although due to changes in electoral law Ukrainian deputies did not create his faction.

Despite the defeat of the Revolution 1905–1907 years. And a significant reduction of political activity in the coming years, the consequence of the recognition of rights to Ukrainian printed word, national and local organizations, including political.

In the years between the First Russian Revolution and the First World War the idea of national-state revival promoted founded in 1908 Political Union Society of Ukrainian Progressives (SUP). At the head, as a recognized leader Ukrainians, was M. Grushevskiy. For almost a decade SUP defended the constitutional parliamentarism in Ukraine and autonomy[1].

«New Breath» in its development of Ukrainian national-state idea was during the First World War, the beginning of which it is hoped the collapse of two empires – the Russian and Austro-Hungarian, which was divided between Ukraine and create conditions for the practical implementation of the idea Unification life.

August 1, 1914 in Ukraine was established Main Ukrainian Council. It includes three representatives of the Ukrainian political parties: National Democratic, Social Democratic and Radical. Platforms these parties in the field of Ukrainian statehood were limited to the political independence of Ukraine. However, the Ukrainian Home Affairs Council revealed inconsistencies Ukrainian statehood following the unjustified old and pro- Austrian orientation.

Group Policy immigrants from Naddnipryanska Ukraine 4 August 1914 created the Union for the Liberation of Ukraine without party affiliation as a political organization to promote the idea of an independent Ukraine. In his program, compiled by D. Dontsov, stated: «The objective historical necessity requires that between Western Europe and Moscow faced the independent Ukrainian state».The form of government it had to be «constitutional monarchy with a democratic internal build political, unicameral system of law, civil, language and religious freedoms for all nationalities and religions, with independent Ukrainian church»[2].

Published: Проблеми законності. – 2015. – № 128. – С. 103–111.

[1] Історія української державності: моногр. / Я. Малик, Б. Вол, В. Чуприна. – Л.: Світ, 1994. – С. 73.

[2] Українська суспільно-політична думка в 20 столітті. Документи і матеріали: у 3 т. / упоряд. Т. Гунчак, Р. Сольчак. – Нью-Йорк, 1983. – Т. 1. – С. 216–217.

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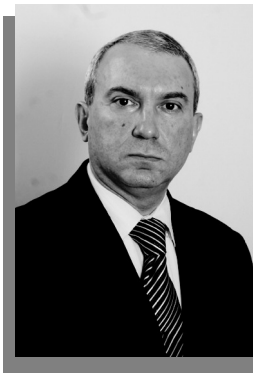

UDC 340.5 + 342.7

ROLE OF LOCAL AUTHORITIES AND BODIES OF LOCAL GOVERNMENT IN ENSURING THE RIGHTS AND FREEDOMS OF CITIZENS

Defined in the Constitution of Ukraine the task of creating a democratic, social state ruled by law can not be solved without the full recognition of fundamental human rights and freedoms and the establishment of an effective system of security. It is no accident that the idea of recognition unassailable unity of law, human rights and their support reflected in the outcome document of the «Conference on the Human Dimension of the CSCE» (Copenhagen, 1990), which reads: «The rule of law is not just a formal legality which ensures regularity and consistency in achieving and maintaining democratic order, and justice based on the recognition and full acceptance of the supreme value of human personality and guarantee of institutions that form the structure which ensures the fullest manifestation»[1]. Thus, we can conclude that the content ratio between the legal state and the individual in modern society is defined not only of rights and freedoms, but their level of security, which, in turn, is impossible without the successful coordination of actions between central and local authorities and local governments.

Hence follows the thesis of primary importance and practical need for scientific research on the role of local authorities and local governments on the level directly provided by the rights and freedoms.

The problem of protecting the rights and freedoms can not be attributed to insufficiently studied in legal science. Thus, the issue of human rights and revealed in the works of local researchers such as V. Isakov, V. Begun, S. Bodnar, V. Vasylchuk, N. Hayvoronyuk, D. Hudyma, P. Dobriansky, M. Koziubra, A. Kucuk, S. Maksimov, P. Rabinovich, Y. Razmyetayeva and others.

[1] Документ Копенгагенского совещания [Текст] // Международные акты о правах человека: сб. док. – М.: Юристъ, 2001. – С. 653.

Various aspects of human rights and their protection level dissertations were reviewed by D. Kutomanovym, O. Miroshnichenko, S. Moroz, O. Pushkinoy, O. Horny, O. Shilo and others.

A considerable attention to the issue of human rights and their protection by central and local government paid to scientists such as I. Voronov, A. Boryslavska, V. Gladkih, T. Zavorotchenko, Y. Kalinowski, A. Klymenova, S. Kuznetsov, S. Chickens, A. Lymar, I. Litvinenko A. Lukashenko, T. Okolit, K. Soh and others. However, there is a need for further theoretical and methodological research on the role of local authorities and local governments in ensuring human rights and freedoms, as outlined problem has not yet fully developed.

The article is to outline the role of local authorities and local governments in the context of fundamental rights and freedoms of citizens of Ukraine and determine the main directions of improvement of these institutions in respect of the considered issues.

At this stage of human development the problem of fundamental rights and freedoms of a man and a citizen gets global. It affects not only all levels of government and citizens' associations in the country, but also goes beyond them, spreading internationally, the planetary level. At the same time, the effective protection of rights and interests of citizen life is impossible provided it is only the responsibility of the state. Citizens also need to organize independently to protect existing laws and their rights. A typical example of such organizations is the national, regional and local NGOs and local authorities. However, their activities should not duplicate the actions of the government and serve as an additional mechanism which, on one hand, helps to implement regulatory enshrined rights and freedoms, on the other, it is a kind of counterbalance to the power mechanism, in this case self-organization of citizens should resist possible arbitrariness of by governmental entities and officials[1].

Exploring this perspective, it is necessary to examine separately the local authorities and local authorities, because these are the first independent, non-governmental, apolitical associations of citizens within a defined territory, to promote certain vital interests and needs of citizens living in the area. In turn, local authorities are certain structural elements of the administrative central (national) of legitimate state authorities, district police station is an element, which is a national system such as the Ministry of Interior.

Consideration of the issues should begin with places that take local authorities and local governments to protect individuals or other vital rights and freedoms. According to Article 27 of the Constitution of Ukraine «Everyone has the inherent right to life. No one shall be arbitrarily deprived of life. The duty of the state is to protect life».[2] This issue is multi-dimensional, it includes the right

[1] Гладких В. І. Соціальні права громадян України: Конституційно-правовий аспект [Текст]: моногр. / В. І. Гладких. – Х.: Факт, 2005 – С. 8, 9.

[2] Конституція України зі змінами. – Х.: Право, 2014. – С. 12.

to life as the state in which it is from the moment of birth to her biological death. When considering this dimension of the right to life is the greatest human benefit because the deprivation makes meaningless the existence of any other (social, economic or political) rights. It also includes aspects such as the right to be born, to demand removal of the danger that may occur due to the life of others, the right to protection of life and funeral to state, inter-state and international organizations, the right to dispose of their own lives. The activities of the competent authorities in this aspect relate primarily as law enforcement. If we consider the actions of local law enforcement departments, their activity is generally regulated by the relevant laws («On Police», «On the Security Service of Ukraine», etc.) and the department regulations. The activities of local structural units must meet the same general principles that determine the law enforcement system in general and compliance with the most important, basic human and civil rights. With that, it is not a declarative regulatory approval of certain principles in relevant specialized documents, and the existence of a real control of law enforcement, because they are public authorities that could significantly restrict human rights to achieve the public good. Here and there there is a need for independent and objective scrutiny on the part of non-state actors, but that may significantly affect the activities of these bodies.

Local government together with non-governmental public organizations must address those subjects that have the right to control policing and enforcement activity in the field. This approach aims to prevent possible abuses or violations on the part of government agencies. Also, in essence agencies that act directly on the city, can act more quickly and make decisions according to the situation. Central office departments such as the Ministry include a significant amount of structural units, officials, contributing some of their bureaucracy, resulting in numerous delays in making responsible decisions. In the absence of public control, the most important element of which should be the local government, law enforcement and law enforcement in its activities are detached from the realities of life, seeks only to achieve declarative principles that do not correspond to real life situations[1].

Another, equally important right of any person has the right to liberty and security of a person. This right is reflected in article 29 of the Constitution of Ukraine[2]. Renowned jurist S. Alekseev defines freedom as the ability of a man to be independent of other people freely exercising a statutory right to exercise their activity in the statements and actions[3]. However, it should be noted that the freedom to perform certain actions should not be unlimited, uncontrolled. It is the understanding of freedom that leads to anarchy and chaos. The most

[1] Рабінович П. М. Права людини і громадянина [Текст]: навч. посіб. / П. М. Рабінович, М. І. Хавранюк. – К.: Атіка, 2004. – С. 17–21.

[2] Конституція України зі змінами. – Х.: Право, 2014. – С. 12.

[3] Алексеев С. С. Философия права [Текст] / С. С. Алексеев. – М.: Норма, 1997. – С. 6.

important task of the government in general and its structures separately is to achieve an optimal balance between the interests of society and the state as its product interests and identity, an individual citizen.

Ensuring freedom and personal inviolability is one of the priorities of local authorities and local governments as a special subspecies of democratic governance, the subject of which is residents of the settlements and administrative areas and content – that serve as the problem of providing a normal life of people in places of their compact residence. The specifics of their activities in this field are that local authorities better acquainted with the problems of a particular region, administrative-territorial unit. In addition, local government bodies and local authorities can respond to the emergence of specific life problems more actively and efficiently than the central authorities, which must monitor much wider territory.

The right to a personal security, which has an identical content with the right to freedom, should be understood as a human right in her bodily, sexual and psychological security. The right to security of a person and suggests that human freedom no one shall arbitrarily limit. It should distinguish two possible options for such a restriction. Firstly, the restrictions on third parties that are not entitled to such an action. In this case we talk about countering this limitation of the structural units of local law enforcement agencies, the Interior Ministry, prosecutors, the Security Service of Ukraine, the authorities in charge of countering financial crime. Their reform, the active material and technical assistance and personnel support from the central agencies should be the factor that will lead to improvement of their activities at the local level and will minimize the violation of freedom and personal inviolability of citizens. Secondly, there are quite frequent violations of personal freedoms entities authorized to restrict this freedom in the interests of the whole society (law enforcement), here comes the need for effective human rights monitoring. It operates on many levels (global, international, national, regional, local). There are several possible subjects engaged in human rights activities (non-governmental and community organizations, the relevant officials of the central government, local governments).

The activities of local authorities in this aspect are decisive, as they are non-state structures that function not only for the interests of the citizens of a particular area, but also to achieve a certain dialogue between society, on the one hand, and the government, on the other.

Their activities in the field of protection of personal integrity should be based on principles of justice, rule of law, primacy of human rights and humanism. Local authorities in case of prosecution of a member of the respective communities should not only protect their interests, guided only by subjective factors, but help to establish the actual circumstances of a particular action or event. Of course it is not a duplication of local government functions of other state bodies, such as the bodies exercising pre-trial investigation or investigative op-

erations, and the presence of a certain control of access of local government to the established facts of the case for the purpose of public monitoring of the activities law enforcement and law enforcement[1].

Another important step in the rule of law, the rule of law is efficiency and fairness of decisions made by the judiciary in Ukraine. The Constitution of Ukraine, the Criminal Procedure Code and the Law of Ukraine «On the Judicial System and Status of Judges» to achieve their goals and to consolidate democracy in the judiciary introduces the jury and people's assessors acting in criminal and civil proceedings accordingly. Again, the main burden relatively ensures participation of the people in the trial lies with the local authorities and local governments. On them rests the task of drawing up and subsequent maintenance of the register of persons who may be involved as an assessor or juror. However, it is their partiality activity that enables ordinary citizens also to take part in the trial on the same level with the judges as representatives of the state judicial system.

The supervisory function of the public should also extend to control of the agencies conducting inquiry and investigation, carried out the detention or detention, arrest. This requires the actual state of affairs. After all, according to the Ukrainian legislation the person is held in custody to 18 months, which is a significant term. In addition, according to statistics, the number of defendants and suspects, who are used as a preventive measure of detention, is about 45% (for comparison, in Western European countries with developed democratic system, the figure is 5%). In this case there is a threat of significant violations and abuses by the relevant authorities.

It should be said that while in custody the person who is suspected but not convicted of a crime often does not receive adequate legal assistance work without losing alternative compensation has no actual connection with the family for a long time, in many cases, a torture and unlawful use of force by law enforcement agencies. In this regard, we can say that the involvement of local authorities is a must, one of the real guarantors of legal rights. This involvement should be made mandatory, as the community as a set of citizens is an additional independent guarantee, a kind of mediator between the government mechanism that is represented by the investigation, prosecution, operational and investigative units, on the one hand, and the citizen, his judicial proceedings representatives (advocate, guarantor, etc.), on the other.

The current list of fundamental rights and freedoms is impossible without the right to health protection, medical care and medical insurance. This right is enshrined primarily in Article 49 of the Constitution of our state.[2] According to these provisions, this right includes state

[1] Калініченко О. Генеза системи конституційного контролю за реалізацією прав, свобод людини і громадянина [Текст] / О. Калініченко // Дайджест. Конституционное правосудие в странах СНГ и Балтии. – 2003. – № 14, ч. 2. – С. 120–124.

[2] Конституція України зі змінами. – Х.: Право, 2014. – С. 19.

guarantees: to provide health care by funding social, economic, health and wellness and prevention programs, create conditions for effective and affordable health care for everyone, the presence of which does not depend on social status or material wealth individual. In Ukraine, the system of a free medical care in the state and municipal health care facilities. The tasks of state and local government are to provide everyone with a list of services that contribute to the preservation, restoration or maintenance of health as a state of complete physical, mental and social well-being. Thus, we can conclude that the meaning of the concept of «health» in this issue is much broader than the traditional sense.

Basing on advanced concepts, we can say that the main purpose of government agencies in this case is not just to ensure the functioning of the local health system, but also to help in the fields of citizens adequate standard of living, including food, clothing, housing, health and social security, healthcare environment, sanitary and qualified medical care and legal protection against any discrimination or violations of human rights related to the physical, moral or mental condition of a person. The specifics of such support from agencies acting on the ground, is that national programs developed and embodied by central government authorities in health care often do not take into account local specifics (the rapid spread of certain unfavorable sanitary and epidemiological situation in a particular area, the characteristics of the material wealth and security of citizens living in a particular area, the possible national and mental features. In addition local authorities is a way of self-organization of citizens, and thus more fully meet the real, practical interests of citizens[1].

In the context of the right to health should be considered extremely complex and multifaceted issue that today appeared before Ukrainian society. This is the problem of preserving the gene pool of the Ukrainian people, the solution of which under Article 16 of our Constitution belongs to the priorities of the state.[2] This issue received extremely significant weight in recent years due to the demographic crisis in Ukraine. The functions of local government and local government in this case were reduced to the following tasks: to monitor the quality of life of citizens, providing systematic recommendations central agencies and entities with respect to their potential measures to ensure financial, legal and medical assistance to the citizens that need it to power about 'of objective reasons. Priorities local government also includes the task of ensuring a safe living environment in the territory defined administrative unit. To do this, a clear and coherent cooperation between local and central authorities in combating deterioration and destruction of natural assets, opening hazardous industries is needed.

[1] Гладких В. І. Соціальні права громадян України: Конституційно-правовий аспект [Текст]: моногр. / В. І. Гладких. – Х.: Факт, 2005 – С. 62, 63.

[2] Конституція України зі змінами. – Х.: Право, 2014. – С. 9.

An integral part of human rights in modern developed democratic states face economic and social rights. Article 1 of the Constitution of Ukraine declares that Ukraine is a social state.[1] This provision means that despite the introduction of a market economy and capitalist relations, the state retains the duty to take care of strictly financial situation of its citizens, help individuals who are in need. This issue is multidimensional and includes the following obligations of the state: the creation of state insurance fund; providing one-off, pension and other benefits to certain categories of citizens; creating a network of state and municipal institutions of health and education, realizing the right of Ukrainian citizens to a free secondary education and health care, care for the steady growth of the welfare population, its purchasing power.

Defining the role of local authorities and local government in this aspect you should immediately isolate key problem of conflict between central and local authorities regarding the redistribution of taxes and social contributions in the field. The generally accepted world practice developed social welfare states is that it is the local authorities and local governments play a key role in the redistribution of assets allocated to local central bodies. This is because the local authorities are more aware of the problems that occur in a certain area, and if they occur can more quickly solve them. In addition, complex procedures reallocation of funds from the center to a significant slowing of circulation, there are prerequisites for the emergence of corruption schemes. Therefore, to achieve social justice more appropriate to entrust the disposal of local budget funds to local councils.

One of the most important components of socio-economic rights is the right to work. As in the previous question, the role of local public authority is primarily to ensure a strong mechanism for implementing legislation. Yes, local authorities can be relevant structural units engaged in employment of citizens and to monitor the proper conditions in relevant industrial or non-production facilities. Thus, the social security of citizens in the modern state with a market economy remains one of the priorities of the state. And local governments and local authorities are the structures that directly help citizens exercise their right to a dignified and prosperous life.

To sum it up, we can conclude that local government, in accordance with Articles 140–145 of the Constitution of Ukraine is a form of citizen participation in government – a form of local Territorial community (residents of a village, town or a voluntary association of residents of several villages items territorial administrative units)[2]. Local government can decide internal matters of local significance within the limits and in accordance with the Constitution and laws of Ukraine. Local government is the most effective mechanism for

[1] Ibid (p. 7)

[2] Конституція України зі змінами. – Х.: Право, 2014. – С. 54–57

curbing central government, a way of defending the interests of a particular territorial association. In this case, members of a community established on the territorial principle perceive themselves not only as a citizen of Ukraine, but also the inhabitants of a particular locality, district. Providing broad public authority to local governments is one of the key features of a democratic state with a right-developed civil society.

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LEGAL SYSTEM AS OBJECT OF COMPARATIVE LEGAL RESEARCHES: DESCRIPTION ACCORDING TO THE THEORY OF SYSTEMS

The concept of the legal system occupies a special place in comparative law and legal science in general. The statements that the comparative law is determined as a specific theory of legal systems of the world in their comparison are known[1]. Herewith the concept of legal system is not only the basic concept of comparative studies[2], but also acquires the characteristic of a complex category, which gives the opportunity to analyze all legal reality as a whole, rather than its separate components[3]. It is used intensively and versatily, while representing the ambiguous and multifunctional phenomenon, that is a difficult organised formation like other subsystems of the universal social system as a whole[4].

The interest of jurisprudence to the questions connected with revealing of

[1] Скакун О. Ф. Принцип единства логического и исторического методов в сравнительном правоведении: Открытая лекция / О. Ф. Скакун. – К., Симферополь: Ин-т госуд. и пр. им. В. М. Корецкого НАН Украины; Изд-во «Логос», 2007. – Серия науч.-метод. изд. «Акад. сравнит. правоведения». – Вып. 5. – С. 15.

[2] Скакун О. Ф. Метатеория общего сравнительного правоведения как научной и учебной дисциплины / О. Ф. Скакун // Порівняльне правознавство: досвід і проблеми викладання: Збірник наукових праць і навчально-методичних матеріалів / За ред. Ю. С. Шемшученка, І. С. Гриценка; упор. О. В. Кресін. – К.: ВДК Ун-ту «Україна», 2011. – С. 23.

[3] Оксамытный В. В. Правовые системы современного мира: проблемы идентификации: Открытая лекция / В. В. Оксамытный. – К., М., Симферополь: Ин-т госуд. и пр. им. В. М. Корецкого НАН Украины, Изд-во «Логос», 2008. – Серия науч.-метод. изд. «Акад. сравнит. правоведения». – Вып. 10. – С. 3.

[4] Оксамытный В. В. Правовые системы современного мира: проблемы идентификации: Открытая лекция / В. В. Оксамытный. – К., М., Симферополь: Ин-т госуд. и пр. им. В. М. Корецкого НАН Украины, Изд-во «Логос», 2008. – Серия науч.-метод. изд. «Акад. сравнит. правоведения». – Вып. 10. – С. 6.

regularities of forming, development and functioning of legal systems does not die away despite of considerable number of researches in this field of legal knowledge. To a large extent this is caused by dynamism of the legal system, and also extraordinary breadth of approaches to understanding this category. Besides, it's difficult to stand aside discussions about notion of the legal system, its signs and elements because «the law for a human society, in the spiritual sense, is almost the same as air for a person – in physical. As the person who has achieved a higher degree of consciousness aspires to get acquainted with the surrounding environment, features and conditions of the atmosphere in which he lives, so and the society cannot observe with indifference such phenomena and living conditions as the law»[1]. Therefore the most fundamental question of legal theory consists in what the legal system is[2].

The important contribution to the development of the general theory of systems and using of a system method in legal science made both domestic and foreign scientists, among whom should be especially noted scientific developments of S. Alekseev, V. Babkin, J.-L. Bergel, R. David, V. Guravsky, O. Zajchuk, A. Zaets, J. Carbonnier, M. Kozjubra, A. Kolodij, V. Kopejchikov, O. Kopylenko, H. Koetz, R. Legeais, L. 0Luts, S. Maksimov, M. Marchenko, N. Onishchenko, V. Opryshko, P. Rabinovich, V. Rechitskiy, A. Saidov, Yu. Tikhomirov, Yu. Shemshuchenko, K. Zweigert etc. Special attention is deserved by the fundamental 5-volume edition about the problems of the legal system for the general editorship of M. V. Zwik and A. V. Petrishin[3].

At the same time despite of attention paid to disclosing of the maintenance of notion «legal system» and density of its using in various scientific texts some question remains unanswered. Among them there is a question – subsystem of which more global system, the state or society, is the legal system? The main objective of this article is to answer this question.

We should notice that in the legal literature the legal system is basically determined through connection with the state[4], in particular, as a category that gives «multidimensional reflection of the legal reality of the concrete *state* at ideological, regulatory, institutional and social economic levels»[5]. The majority

[1] Кашницы І. О сущности права. Исследование / І. Кашницы. – Варшава: Типография Медицинской газеты, 1872. – С. 1.

[2] Summers Robert S. Form and Function in a Legal System: A General Study / Robert S. Summers. – New York: Cambridge University Press, 2006. – P. 3.

[3] Правова система України: історія, стан та перспективи: у 5-ти т. – Х.: Право, 2008. – Т. 1: Методологічні та історико-теоретичні проблеми формування і розвитку правової системи України / за ред. М. В. Цвіка, О. В. Петришина. – Х.: Право, 2008. – 728 с.

[4] Егоров А. В. Белорусская правовая система на современной юридической карте мира: Открытая лекция / А. В. Егоров. – К. – Л.: ЗУКЦ, 2012. – Серия науч.-метод. изд. «Акад. сравнит. правоведения». – Вып. 25. – С. 4.

[5] Проблемы общей теории права и государства: учебник для вузов / В. С. Нерсесянц [и др.]; под общ. ред. В. С. Нерсесянца. – М.: НОРМА, 2001. – С. 282.

of researchers adhere to the point of view that the legal system is set of legal means which used by the *state* as the basic carrier of public power, carrying out regulatory impact on public relations[1], even when formally the category «the legal system of society» is used[2], after all it is anyway underlined that there is a society organized by state[3]. The manifestation of this is, in particular, the fact that by end of XX century the concept «legal system» has been mainly used to characterize the legal phenomenas, means and processes which exist in a specific state or are characteristic for particular group of countries.

The basis of the characteristics of the legal system within this approach is a territorial sign, or, as noted by some authors, «territorial allocation of legal reality into different legal formations – legal systems that exist within separate states (national legal systems) and regions (integrational legal systems), and also in interstate scale (the international legal system)»[4].

However, it seems to be the point of view according to which the stipulation of the legal system's functioning by its functioning within the state system as its subsystems is far from being obvious. In turn, the answer to the pointed question is of crucial importance for understanding of the nature of the legal system, its structure and patterns of development. The finding of the response requires going beyond only legal knowledge and appeal to the theory of systems.

In our everyday life we are talking about systems in different contexts – solar system, system of complex numbers, computer systems, capitalist system, bureaucratic system, education system etc. «Interdependent groups that regularly interact and are the elements of a whole» are determining in notion «system». It is considered that the idea of systems occurs from thinkers of the Ancient Greece who considered that a whole (as an example, an organism) is something more than the simple sum of its parts. Comparison with an organism has become a widespread metaphor for social systems (it's known the church is calling «body of Christ», Thomas Hobbes used a metaphor in which the appropriate organism even got a name – Leviathan, etc.). The majority, but maybe even all early concepts considered the systems as self-sufficient and, accordingly, closed.

[1] Общая теория государства и права. Академический курс: в 2 т. / под ред. М. Н. Марченко. – М.: «Зерцало», 1998. – Т. 2: Теория права / В. В. Борисов [и др.]. – 1998. – С. 232.

[2] Скакун О. Ф. Правова система – держави, суспільства, регіону, світу? (щодо базових категорій порівняльного правознавства): Відкрита лекція / О. Ф. Скакун. – К., Х., Сімферополь: Ін-т держ. і пр. ім. В. М. Корецького НАН України; Вид-во «Логос», 2007. – Серія наук.-метод. видань «Академія порівняльного правознавства». – Вип. 12. – С. 3.

[3] Оксамытный В. В. Правовые системы современного мира: проблемы идентификации: Открытая лекция / В. В. Оксамытный. – К., М., Симферополь: Ин-т госуд. и пр. им. В. М. Корецкого НАН Украины, Изд-во «Логос», 2008. – Серия науч.-метод. изд. «Акад. сравнит. правоведения». – Вып. 10. – С. 9.

[4] Дамирли М. А. Сравнительное правоведение в поисках собственной идентичности: Открытая лекция / М. А. Дамирли. – К. – Л.: ЗУКЦ, 2012. – Серия науч.-метод. изд. «Акад. сравнит. правоведения». – Вып. 28. – С. 11.

The further development of the theory of systems was connected with convergence of ideas which occur from such sciences as biology, system engineering, cybernetics, sociology. The biology with its evolutionary accent promoted ideas of hierarchy among live systems and also in themselves. The system engineering gave to the mankind the concept of «hard systems» based on the experience of developing weapons and logistic systems during the Second World War. The idea of control in systems by obtaining the return information was introduced by the cybernetics. Names of the most known scientists who have contributed to the formation of the theory of systems are L. von Bertalanffy (biology), RAND Corporation («Research AND Development») – the American analytical centre founded in 1948 (system engineering), N. Weiner (cybernetics) and T. Parsons (sociology).

Overall, the «system approach is based on the fundamental principle according to which all manifestations of the human world should be connected with each other into the single big rational scheme»[1]. This in turn causes the characteristic of any system through such signs as: 1) the system consists of the basic, and also of changing elements, properties etc.; 2) such elements are connected by that acquires the name of connections, correlations, relationships, communication etc; 3) such connections usually have unaccidental, regular character providing the formation of certain structure with an appropriate subordination and certain degree of entropy, which is below the maximum possible level (or negentropy); 4) the system exists in physical space though borders of such space cannot be exactly defined; 5) all systems are ontologically open as there is no system that is completely closed outside and is not in a mutual exchange with the environment surrounding it. Systems are closed only in case when they are considered as logical units for the purpose of better understanding of their inner nature.

If we characterise the social system we have to add at least two more characteristics:

– the major operation determining the features of this system and provides its integrity is communication;

– availability of institutional manifestations thus ensuring stability of the relations in time and space[2].

At the present stage of development of the theory of social systems the special attention focuses on the disclosing of importance of complex communication between the actors of the system. As a result social systems have unique properties which other complex systems in nature don't have: 1) in the natural world complex systems are limited physical systems with a high degree of integration and visually (objectively, physically) linked elements. In the social world it is difficult to specify the border of the so-

[1] Kenneth C. Bausch. The Emerging Consensus in Social Systems / Kenneth C. Bausch. – Springer Science+Business Media, LLC, 2001. – P. 213.

[2] Giddens A. The Constitution of Society. Outline of the Theory of Structuration / Anthony Giddens. – Polity Press, Cambridge, 1986. – P. 112.

cial system. In this connection social systems are more open than other complex systems; 2) in social systems interaction (interrelation) between the elements of such system is not physically visible as is the case in natural systems. For example, the interaction between individuals accompanied by the transfer of certain information is much more complex than interaction operations in the natural world[1].

All social systems can be divided in two big groups – the unified systems and dispersed. Unified is a system where: 1) a single center of power that represents all other participants of relations within this system and performs dynamic management of the system is elected (or appointed); 2) the imperious powers of such center spread over all the objectives pursued by the system. Such systems are closed with an organizational point of view, their objectives are clearly defined. The basic advantage of such system is that membership in it gives comprehension of system's unitary and solidary character of the system, and consequently understanding the possibility to demand a part of those advantages offered by the system. In case of the contradiction between individual, regional or other type of identity, on the one hand, and solidarity of the system's members, on the other, as a rule the last one has a priority. Classic example of the unified system is the state.

Half unified systems include other sovereign systems with their own economic and cultural features which feel expediency of integration of interests at a higher level, that's why a necessity of development of joint unitary and countervailing institutes appears. An exampleof half unified system is the European Union.

Dispersed systems (sometimes they are named pseudo-systems) are systems, in which: 1) there is no single imperious subject who would be responsible for sovereign independence of the system; 2) accordingly, subsystem components are trying to develop their own advantages for their members[2].

As researchers consider, the planet Earth is a dispersive system in which in case of a conflict between identity and solidarity the preference will be given to the first one. It can explain the desire to autonomization and independence on the one hand, and a global tendency toward rapprochement which is supported at the international level on the other. The result is constantly present tension existing between two multidirectional forces – an integrated and disintegrated that may be present in any system[3].

It is necessary to stop on one more moment to characterize the legal system in terms of the theory of systems. The theory of systems especially underlines such an important characteristic of human consciousness as its ability to dis-

[1] Sawyer R. K. Social Emergence Societies as Complex Systems / R. Keith Sawyer. – Cambridge University Press, 2005. – P. 45.

[2] Giddens A. The Constitution of Society. Outline of the Theory of Structuration / Anthony Giddens. – Polity Press, Cambridge, 1986. – P. 114.

[3] The Performance of Social Systems. Perspectives and Problems / Edited by Francisco Parra-Luna. – Springer Science+Business Media, LLC 2000. – P. 67.

tinguish two kinds of reality. The first one is a reality of an everyday life. The second reality is symbolic[1]. In this connection sometimes people are called «animals creating symbols who perceive and comprehend reality by means of symbols that have been created by themselves»[2].

The symbolical reality has recently begun to be researched in domestic science. So, V. Rechitskiy defines it as a space of human consciousness in which all phenomena of the surrounding reality represent themselves as images, signs and symbols by which a person organises his activity and by means of which interaction with other people is realized[3].

S. I. Maximov perceived that the legal reality is not any substantial part of reality, but is just a method of organisation and interpretation of certain aspects of social human life[4].

The legal system is a symbolic system that corresponds to the reality of the appropriate society so close that is almost inseparable from it. While studying this symbolic system legal sciences can both have the thesis that legal system represents the life of the society or aspect of international relations as a starting basis, and consider the legal system as an independent symbolic system with its own logic in isolation from social phenomena which lie in its basis[5].

The legal system is a system that consists of legal notions and connections between them, in which certain aspects of the real world are reflected in abstract form. Legal notions reflect legal meaning of the facts of the real world, connections between legal notions – the legal significance of the relationships between these facts. The basic precondition for this is people's capability to abstraction. And these linguistic or other symbols that are used to mark facts of the real world are not defined absolutely unified, for ever and completely logical. Symbols depend on a consensus or a usual practice accepted among people or nations. Besides, they do not exist constantly and invariably. Symbols used to indicate a certain aspect of reality can differ during different historical periods or in various societies and they can change over time. Although the legal system is formed by abstracting of certain aspects of the real world being a sign system it exists independently of this world. In other words constantly ongoing dialogue between law and reality is the interaction of the legal system and society. The legal system is formed as a result of constant cumulative in-

[1] The Performance of Social Systems. Perspectives and Problems / Edited by Francisco Parra-Luna. – Springer Science+Business Media, LLC 2000. – P. 89.

[2] Kawaguchi K. R. A Social Theory of International Law International Relations as a Complex System / Kazuko R. Kawaguchi. – Springer-Science+Business Media. B. V., 2003. – P. 43.

[3] Речицкий В. В. Символическая реальность и право: моногр. / В. В. Речицкий. – Л.: ВНТЛ-Классика, 2007. – С. 71.

[4] Максимов С. И. Правовая реальность: опыс философского осмысления: моногр. / С. И. Максимов. – Х.: Право, 2002. – С. 148, 149.

[5] Tamanaha B. Z. Law and society / Brian Z. Tamanaha // Legal Studies Research Paper Series Paper. – 2009. – № 09–0167. – P. 12.

fluence of society on the law; and on the contrary, the legal system performs cumulative influence on society. The law can act as an expressive and effective mechanism of self-organization of society. Complex and diverse social reality is presented by corresponding relations in various processes which involved law, such as the processes of social change, maintaining social order, conflict resolution, within the legal system. People to whom they are addressed can be clearly conscious of them in such form. That is why the society creates such subsystem as the legal system that is a certain self-organized system[1].

All social systems are parts of society. In turn the society is a multisystem that includes economic, political, legal, cultural and other subsystems. Accordingly, the legal system is a part of a society and exists in a society. On B. Tamanaha's expression, «the law is a mirror of a society which functions for maintaining of social order»[2].

Thereby, the law is a reflection of society. Depending on a particular political system, on the country or even epoch the legal systems differ in their basic principles, notions and legal categories, in their structure, application and special-purpose designation of their rules[3]. Therefore such headings as «law and society» should not be perceived as those denoting two independent from one another objects. As we have already noted, the leagal system is a subsystem of social system. Accordingly, the society is not simply environment that is external to the legal system. The society is being something more in that includes operations of the legal system[4].

And one more remark that is important for understanding the legal system in terms of systems theory. The social system is always associated with a certain space, but this space does not necessarily mean a certain fixed territory. Awareness of actors of certain social system of their belonging to it, their identity becomes determining. In the social system there are the certain regulatory elements based on legitimate grounds of occupying certain social space (once again emphasize – such space does not necessarily have a territorial binding). Models and types of legitimation can be different. In turn, the feeling of such identity within a certain social system can find expression in practical and discursive consciousnesses, however it does not obligatory presumes

[1] Kawaguchi K. R. A Social Theory of International Law International Relations as a Complex System / Kazuko R. Kawaguchi. – Springer-Science+Business Media. B. V., 2003. – P. 73.

[2] Tamanaha B. Z. Law and society / Brian Z. Tamanaha // Legal Studies Research Paper Series Paper. – 2009. – № 09–0167. – P. 15.

[3] Сандевуар П. Структура правовой системы: Государственное право и частное право = Les divisions du droit droit public, droit prive / Посольство Франции в Москве. Министерство иностранных дел. Межведомственная комиссия по Странам Центральной и Восточной Европы. – М.: Французская Организация Технического Сотрудничества, 1994. – С. 11.

[4] Luhmann N. Law as a social system / Niklas Luhmann / Translated by Klaus A. Ziegert. Edited by Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert. – Oxford University Press, 2004. – P. 213.

«a valued consensus». A person can realise the accessory to certain social system, but don't consider this correct or desirable for him. That is why the tendency when the national state is considered as «the typical» form of a society, seriously impoverishes methodology of disclosing the nature of all subsystems that exist within such society, including the legal system[1].

The statement that the legal system is not adhered to the state is also confirmed by the fact of existence of legal systems both within separate states and those with supranational character. This fact have been acknowledged by R. David, who noted that both not state communities and the international community can have legal systems. This encourages scientists to understand the legal system as one that has objectively developed and is historically determined set of interconnected legal phenomena and institutions not only within the concrete state (or the society united in the state), but also other formations that are present in the modern world. YAlso it is necessary not to forget about existence of religious legal systems which have a supranational character and huge specificity that substantially remains a little researched in the domestic legal science.

Thus, in our opinion, in the most general view *the legal system can be defined as a set of all certain society's legal phenomena which are in stable connections among themselves and with other social systems and that has been formed under the influence of objective laws of this society's development.*

The theory of systems allows to reveal the following characteristics of the legal system: 1) the legal system is a complex social system; 2) conections between elements of the legal system are not accidental, they have regular nature providing the formation of certain structure with appropriate subordination, however does not exclude certain degree of entropy (uncertainty, disorder); 3) is ontologically open, that is in a constant mutual exchange with the environment surrounding it; 4) the basic operation that defines features of this system and provides its integrity is communication between the actors; 5) existence of institutional manifestations thus ensuring stability of relations in time and space; 6) is not unified, in the legal system unlike the state there is no single centre of the power representing all other participants of relations, carrying out dynamic management of the system with spreading such centre's imperious powers on all purposes pursued by such system; 7) is a symbolic system that corresponds to the reality of the appropriate society so close that is almost inseparable from it; 8) is always associated with certain space, but this space does not necessarily mean a certain fixed territory and is not necessarily supervised by the state. Awareness of actors of the certain social system of their belonging to it, their identity becomes determining.

[1] Giddens A. The Constitution of Society. Outline of the Theory of Structuration / Anthony Giddens. – Polity Press, Cambridge, 1986. – P. 164–165.

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REGULATION OF SOCIAL ACTIVITY BY LAW

Problems of normative regulation of social activity, the sense of law in it, determination of the content and definition of the limits of legal regulation, ensuring its effectiveness are of current importance and contain many *lacunas* in spite of numerous productive researches in this field. Their constant value is determined *inter alia* by instrumental importance of law as the mean of abstract of values and purposes of society's evolution *per* establishing common rules of conduct, coordination of human activities and a strong law and order[1].

The notion of legal regulation of social activity (legal regulation of public relations) is understood as its ordering by means of the system of legal facilities (provisions of law, regulatory legal acts, law enforcement acts etc.). The category of legal regulation takes an important place in jurisprudence, since it enables to examine law in dynamics and transcends the confines of purely legal dogmatics[2].

Social regulation (Latin *«regulo»* – a plank, a rule) is the ordering of human activity in society by means of handling and public approval of the rules of this conduct. Thereupon, the law can be defined as a system of obligatory rules of people's and their associations' conduct acknowledged by society, an official fixation of which is provided by public political authority, *prima facie* by the state.

The formation of this social regulator, i. e. the constitution of law, is a permanent process of making, legitimation and legalization of obligatory regulation rules of the most important social relations, which includes two phases. The first is beyond-the-state phase (natural, public), which consist in formation, adjustment and application by members of social relations – on the basis of their

[1] Тихомиров Ю. А. Правовое регулирование: теория и практика / Ю. А. Тихомиров. – М.: Формула права, 2010. – С. 7.

[2] Алексеев С. С. Восхождение к праву. Поиски и решения / С. С. Алексеев. – М.: Изд-во НОРМА, 2001. – С. 316–317.

ideas of justice, freedom, equality and reasonableness – the specific regulation rules of these relations, the rules of prevention and resolution of public conflicts. During accumulation of experience application of these rules it is segregated those, which have proven the greatest effectiveness, the accordance with the interests of society as a whole. Such rules are generalized, systematized for the purpose of their equal application to the same relations; the society legalizes these rules, that is, acknowledges, approves and extends as authoritative regulation rules.

In the second phase – law-making proper – the selection of the most important amongst social relations (above all, conflict, which are related to the sharing of limited resources), admission of present or making of original effective rules of their regulation, legalization of these rules, i. e., granting the status of provisions of law to them by means of fixation by authorized person in specific sources of law supported by state compulsion, are realized by public, primarily, by state authority.

In the view of legal positivism exactly the second phase is determinative, any of its results are the law, as far as in compliance with Hart's «rule of recognition» it comes out of the legal source and is established according to the legal procedure. From the natural law comprehension's point of view the rules can't be considered as law at all, if they don't correspond to the established ideas of morality, justice, freedom, equality, if breach or bound the natural human rights and contradict to the common morality. Such rules can't be recognized as the law, ratified and secured by state, but even if these rules will be legalized by state, they still wouldn't become the law («unjust law», «lawless legal system», by definitions of G. Radbruch).

The process of law's formation is a persistent process, a part of a social regulation's process, the subjects of which are members of the society, the state and the public on the whole. And in most cases the state doesn't initiate it, but join it and doesn't establish law solely, but takes part in its formalization by means of its recognition, fixation and protection of the rules, which have already arisen naturally. It is the legal nature of these rules, that is determined by: their legality, that is their fixing in formal sources of law by authorized persons in accordance with appropriate procedure with further provision of their effective action by corresponding types of state coercion; their legitimacy, i. e., their appreciation and acknowledgement by the majority of people or by the society in whole, as just, reasonable, as those, that ensure human rights and freedom, but not breach them, and these rules are not the arbitrary product of state arbitrariness, but the expression of fundamental human values.

The specific quality of such regulation, which emerged from the essence of the regulator itself – from the law, is its state provision. It is the state, which enables public authorities to make regulatory legal acts and other sources of law, to implement their permanent renovation and uniform application, to provide with coercive measures etc. A state is the

main (although, undoubtedly, not the only) subject of the legal regulation's system, it sets the majority of game's rules in this sphere on law-making and law enforcement's levels.

The object of legal regulation is the human and their associations' behavior in society, which by virtue of its social significance is the subject to the state regulation by fixing in legislation the rules of its regulation (provisions of law). At the same time, law not only organizes human behavior, but has an effect on the conscience and mentality of people (legal effect). The subject-matter of this regulation is such social relations, the ordering of which is possible and at the same time appropriate just using the proper legal means. After all, it should be borne in mind, that law is a universal social regulator, but not the only one and not all-embracing. There are certain objective feasibilities of law, which determine the limits of legal regulation; beyond of them it becomes ineffective, useless and even harmful. Evaluation of these limits is necessary for prevention of total state regulation of social life and of public authorities' interference in private life of the members of society. The law achieves its aims after all and really regulates social relations only so far as human behavior, which the law's rules demands, is objectively possible and corresponds to the social, particularly, the economic and political conditions.

Thus, not all kinds of human activity, not all social relations are regulated by law, but only those, that meet certain characteristics: they have social significance; affect the interests of other people or society in whole; leave room for social conflict in consequence of limited resources (public goods), on account of which they arise; are stable, constant, often repeated; permit a facility to external, in particular, legal control over them. This scope is not permanent and can change with changing of social needs.

From a long time of human civilization there are two fundamental principles of social relations' regulation – «everything is permitted, except that which is directly prohibited» and «everything is prohibited, except what is directly permitted». Exactly they define the ways, types and methods of legal regulation, that is general direction of the law's impact on the social relations.

The universal ways of human behavior's regulation, i. e., means of regulation of their behavior by providing them with subjective rights and/or by imposing legal duties on them, are permission, obligation and prohibition. They are the main ways of legal regulation, i. e., state regulation's means of human behavior by recognizing their subjective rights and/or by imposing legal duties on them[1].

The first and the main way is legal permission – a person recognition the subjective right to exercise certain legally significant acts or refrain from them, freely choose the variant of the own conduct. It is a key element of legal regulation, serves the security of social

[1] Кулапов В. Л. Способ правового регулирования / В. Л. Кулапов, И. С. Хохлова. – Саратов: Изд-во ГОУ ВПО «Саратовская гос. академия права», 2010. – С. 51–72.

freedom and the activity of people. A person selects one of the behavior's variants provided by the permission exclusively independently, without coercion by public authority.

Any permission has permitted limit, that is usually the rights of other persons, public safety etc. Intentional disregard of these limits in law realization process is illegal and must be qualified as abuse of rights (e. g. abuse of defendant in commercial litigation of the right to recusation against the court by numerous submission of corresponding amotivational allegations for the purpose of delaying the process, that *de facto* restrains the right of the complainant to effective consideration of his claim).

By generality's level and the legal form of expression all legal permissions divided into common, the expression's form of which is the recognition of human right (for example, the rights of married couples to conclude a marriage contract or abstain from its conclusion) and special, the expression's form of which is the permission (for instance, a license to practice medicine, which obtaining entitles, but not imposes the obligation on the person to exercise this practice).

Recognition of human right sets in both direct (e. g., state's recognition of the freedom of speech) and indirect (latent) forms – by means of restriction of other individuals' actions by obligations or prohibitions (for example, prohibition of state interference in the organizational activity of political parties).

Permission is usually fixed in a special official written document, which entitles the person to perform certain actions or execution of certain activities (for instance, the permission to extraction of natural resources to a certain extent, licenses, issued under the Law of Ukraine «On licensing of certain types of economic activity»).

Permission of a certain behavior becomes practically realized, when it is provided for the other ways of legal regulation – by the means of imposition on other persons obligations or prohibitions. Thus, the second fundamental way of legal regulation is legal obligation – imposition on a person legal obligation to fulfill certain actions, which are governed by legal rules.

The third basic way of legal regulation is legal prohibition, that is imposition on a person legal obligation to refrain from certain actions. Its essence lies in requirement of passive behavior of a person – to refrain from certain socially harmful behavior under threat of attachment of legal liability for every infringer of this prohibition. The relevant conduct *de facto* is possible, but *de jure* forbidden.

The dominance of one of the mentioned legal regulation's ways is defined by its basic types, that is description of the general direction of the law's impact on social relations, depending on which of the basic ways of regulation (permission or prohibition) is used by law to establish the common rule's regulation and which – the restrictions, exceptions to it. For instance, generally permissible type of legal regulation is based on the combination of a general legal permission and imposition of certain restric-

tions (exceptions) by means of legal prohibitions. This type is a reflection of the classical principle «everything is permitted, except that which is directly prohibited by law». Such regulation gives a person the right to choose any behavior, except which is prohibited by law. For example, a person has the right to perform any civil transactions, including those, which aren't prescribed by law, except those, for which there is a direct prohibition in the law (e. g., a person has the right to conclude Purchase and Sale Agreements of any things, except drugs, human organs etc.)

A permissible (or specially-permissible) type of legal regulation is based on the combination of a general legal prohibition and special legal permission (permit). In compliance with this regulation, a person is legally permitted to behave only in such a way, that is directly provided by legal rules and, thereafter, it is prohibited by law the behavior, which is not directly set by legal rules («everything is prohibited, except what is directly permitted by law»).

The main agent of the dominance of a particular legal regulation's type is the peculiarities of relations, which are subject to regulation. For example, for most private legal relations it is characteristic the priority of generally permissible regulation, whereas for the official relations – the permissible legal regulation. The latter applies, for example, to the activity of public authority, its agencies and officials (it is directly pointed in the second part of Article 19 of the Constitution of Ukraine, according to which public authorities and bodies of local self government, their officials are obliged to act only on the basis, *intra vires* and in a manner to be prescribed by the Constitution and by laws of Ukraine).

The diversity and specificity of human activity in society require the selection of a particular method of its legal regulation, that is, the instrumental approach, which characterizes the use of one or another complex of legal means in a specific public sphere of human activity.

Dispositive method of legal regulation provides for the implementation of subsidiary legal rules, i. e., which are applied if the subjects haven't determined other rules for regulation of their relationships (have failed, have not wanted or have forgotten to set them). The organizing of human activity (the behavior of legal relations' subjects) is carried out by setting three types of legal rules *per* this method.

First, there are rules, which set limits of permissible conduct of subjects. For instance, the Civil Code of Ukraine constitutes the essential conditions of civil agreements, about which the parties come to an understanding, that permits qualify these agreements as concluded. Herewith, it is defined only the list of such conditions by law, whereas, a specific definition of their content is carried out by the agreement of parties (e. g., according to Article 810–1 of the Civil Code of Ukraine the essential conditions of Lease Purchase Agreement (a lease-to-own house purchase, Rent to Own Home Contract) are, *inter alia*, the period, for which a contract is concluded, amounts and terms of the lease pay-

ments; therefore, the parties of this agreement are obliged to determine these terms in it, setting at the same time the quantitative expression to their own discretion, in other words by agreement).

The second type is subsidiary rules, that is, those which are applied only in case if subjects haven't determined other rules to regulate the relations among themselves on their own (have failed, have not wanted or have forgotten to set them). For example, in compliance with Article 632 of the Civil Code of Ukraine, if the price in the treaty is not established and can't be determined on the basis of its provisions, it is determined on the grounds of normal prices prevailing for similar goods, works or services at the time of concluding the treaty.

The third type includes rules, enshrining the general principles of legal regulation of a certain sphere of human activity in society. For instance, Article 3 of the Civil Code of Ukraine establishes the principles of fairness, good faith and reasonableness, which must consider all subjects of civil-legal relations and to which their behavior must conform.

Dispositive method causes for people unconstrained self-regulation of their conduct in society, only sets the limits and the procedures for such self-regulation. It is peculiar to a private law, since it provides independence of subjects in their choice behavior.

Imperative method of legal regulation provides for the establishment of mandatory subjects' rules of conduct by state, its categorical and detailed regulation, the impossibility of setting other rules by them. This method doesn't allow the unconstrained self-regulation of human activity, partial departure from the specific requirements of legal regulations. It is peculiar to a public law, as it is based on the submission of some subjects of relations to others, it doesn't allow no independence of subjects in their choice behavior, nor occasion for subjects to regulate the relations at their own discretion.

Effectiveness and social significance of legal regulation primarily are defined of its efficiency – the ability to bring the best-possible positive results due to the justified, reasonable and advisable costs and restrictions. The definition of this value is the actual subject of study of modern jurisprudence. Significant results in this area have been achieved by scientists, in particular by using the method of economic analysis of law[1].

[1] Познер Р. А. Економічний аналіз права; пер. з англ. / Р. Познер. – Х.: Акта, 2003. – С. 41–46; Беккер Г. С. Преступление и наказание: экономический подход / Беккер Г. С. Человеческое поведение: экономический подход. Избранные труды по экономической теории; пер. с англ. / Г. С. Беккер. – М.: ГУ ВШЭ, 2003. – С. 282–352; Бреннан Дж., Бьюкенен Дж. Причина правил. Конституционная политическая экономия. Выпуск 9 серии «Этическая экономия: исследования по этике, культуре и философии хозяйства»; пер. с англ. / Дж. Бреннан, Дж. Бьюкенен. – СПб.; Экономическая школа, 2005. – С. 242–260; Хиллман А. Государство и экономическая политика: возможности и ограничения управления: учеб пособие; пер. с англ. / А. Л. Хиллман. – М.: Изд. Дом ГУ ВШЭ, 2009. – С. 44–47; Эффективность законодательства в экономической сфере: науч.-практ. исследование / отв. ред. Ю. А. Тихомиров. – М.: Волтерс Клувер, 2010. – С. 132–151.

The effectiveness of legal regulation is determined by various parameters. On the one hand, it is evaluated as a ratio between actual results of regulation and its goals[1], on the other – as a ratio between social result of regulation (level of ordering of some social relationships) to the costs and efforts directed at its achievement. Efficiency is a reflection of the impact of legal regulation, a singular analogue of the efficiency in mechanics.

Undoubtedly, the law is an effective social regulator, a rational instrument of organizing human activity in society. However, its regulatory properties and effectiveness should not be idealized and overestimated. Along with a large number of benefits, legal regulation has also some shortcomings, which are determined by a number of objective and subjective factors.

At first, the law can objectively fall behind the social wants. The relations in society develop and change very fast, actively, often unpredictably after all. Between their arising (changing) and the formation of legal rules, apart from their fixing in official sources, some time passes. Law-making process is complex and long. Thus, the real result of legal regulation is almost always slighter than expected, and the efficiency – to some extend is far from the absolute.

Secondly, the limited effectiveness of legal regulation is objectively determined by the complexity and multilevel system of law as a system of norms and settled principles («Law as integrity»)[2]. It raises the existence of legal collisions and gaps in the regulation. Their detection and removal takes a certain period of time and extra efforts that also reduces the overall effectiveness of regulation.

In the third place, the effectiveness of regulation of human activities by law depends on the level of development of society, its legal culture, available economic resources, and the state of legal consciousness of all members of this society.

Fourthly, the subjective factor of the level of effectiveness of legal regulation is the intellectual level of the subjects of law-making and enforcement, their professional skills, fairness, good conscience, willingness to accept civilizational, primarily European, values, the corruption objection etc.

The need to a reasonable restriction of the regulatory impact on society determines the system of legal regulation principles, a real adherence to which is an important factor for its effectiveness. Among them the most important are: appropriateness, that is a reasonable necessity for regulation of a certain kind of social relations with the purpose of their organizing; adequacy, i. e., the accordance of ways, methods and types of regulation, degree of fixity of legal regime with the demand for ordering and social requirements; balance, in other words, the ensuring balance between the interests of subjects in regulatory activ-

[1] Кулапов В. Л. Способ правового регулирования / В. Л. Кулапов, И. С. Хохлова. – Саратов: Изд-во ГОУ ВПО «Саратовская гос. академия права», 2010. – С. 48.

[2] Dworkin R. Law's Empire. – Cambridge, Massachusetts, 1986. – P. 95.

ity; predictability, that is to say the coherence of regulatory activities, allowing for the planning of human activity in society; transparency and consideration of public opinion – openness to natural and juridical persons the actions of public authority at all stages of regulatory activity, mandatory review by regulatory authorities the initiatives, comments and suggestions provided by the members of society, an obligation and timeliness of public information about realization of regulatory activity.

The effect of these principles is strikingly becomes apparent in the field of state regulatory policy, which aims to improve legal regulation in the economic sphere, particularly administrative relations between public authorities and entities management, reducing the interference of public authorities in the activities of these entities and the removal of obstacles for the progress of their activities (deregulation of entrepreneurial activity). The problem of state influence on the economy through law is the subject of constant debate not only in Ukraine, but also in developed countries in Europe). Deregulation is aimed at reducing and limiting the regulation (reducing the number of legal rules), at exclusion of anti-competitive government interventions in the market, but also suggests the formation of simple, accessible, clear and effective rules[1].

The most important result of the effectiveness of human activity regulation by law is its just ordering, taking into account the rights and interests of all members of society. After all, it is the task of law as a social regulator, meets the classic fundamental objectives of regulation, which are the institution of legal order, securing the rights and freedoms of the members of society.

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[1] Штобер Р. Хозяйственно-административное право. Основы и проблемы. Мировая экономика и внутренний рынок; пер. с нем. / Р. Штобер. – М.: Волтерс Клувер, 2008. – С. 38.

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MIXED ELECTORAL SYSTEM (EXPERIENCE OF ELECTIONS OF PEOPLE'S DEPUTIES OF UKRAINE IN 2002)

The way of election of people's deputies is one of the most important factors that affect the capacity and effectiveness of the Verkhovna Rada of Ukraine. National election legislation is constantly changing, especially in finding the most appropriate model of electoral system. Thus, since the time of independent Ukraine a majoritarian system of absolute majority, a mixed majoritarian-proportional and a proportional system has been tested. Discussions on the election of a model of elections continue as in the political and in the scientific communities.

Experience of using the proportional system for the election of people's deputies of Ukraine in 2006 and 2007, the results of these elections and deepening the political crisis intensified the problem of finding and implementing the most appropriate model of electoral system in Ukraine. In particular, implementing of the majoritarian electoral system was proposed. For the most part scientists were giving reasons for the expediency of the returning to the proven mixed majoritarian-proportional system of elections. According to Law of Ukraine «On Elections of People's Deputies of Ukraine» adopted in November 2011 a mixed (majoritarian-proportional) system was provided for. It was applied in parliamentary elections in 2012 and 2014.

Approaching of every parliamentary election intensifies public debates on the models of electoral system. So, the actual issues are the finding the most appropriate model, the improving the electoral system. Further transformation of the Ukrainian parliamentary election system should be scientifically substantiated, paying attention on gained experience of different electoral systems in Ukraine, particular qualities of the political and party systems, political and legal culture. So, actual is analysis of

historical experience of introduction and using of different electoral systems, in particular, mixed variant, for electing people's deputies of Ukraine to take account the positive results and avoid errors.

These issues have been widely discussed in the works of lawyers and political scientists, including N. V. Bogasheva, Y. B. Kliuchkovsii, L. V. Kolisetska, A. Z Gheorghitsa, N. G. Shuklina, V. M. Ermolaev, B. I. Olkhovsky, V. M. Campo, I. O. Kresina, E. V. Perehuda, O. V. Lavrynovych, D. V. Lukyanov, R. M. Pavlenko, M. I. Stavniychuk, S. O. Teleshun, Y. M. Todyka, O. Y. Todyka and others. However, this problem is not explored enough, requires additional reflection.

The purpose of the article is to analyze reasons for the using of a mixed majoritarian-proportional system for elections to the Verkhovna Rada of Ukraine in 2002, conditions and consequences of the application. It is also expedient to analyze certain provisions of the Law of Ukraine «On Elections of People's Deputies of Ukraine» adopted in October 18, 2001[1], which directly determine the features of the applied electoral model, the results and consequences of the parliamentary elections.

Basic parliamentary elections of 1998, and then repeated, and elections of deputies instead of eliminated in 1998–2000, detected as positive aspects of the mixed system, and a number of problems. In addition, certain important provisions of the Law «On elections of people's deputies of Ukraine» dated September 24, 1997, as the ability of the candidate to be included to the list of a party (bloc of parties) and at the same moment to be nominated in a single-mandate constituency (part 3 article 20), the skip of the candidates elected in single-mandate constituencies under a majoritarian system in the list of a political party (block of parties) while establishing the election results (part 11 article 42), etc., were recognized as unconstitutional by the Constitutional Court of Ukraine, since they break the principle of equal electoral right (equality).[2]

Thus, already in 1998, almost immediately after the next parliamentary elections, individual parliamentarians have begun their work on updating the legal base for the next elections. During one year people's deputies of Ukraine filed on four drafts laws «On elections of people's deputies of Ukraine». They all had a common idea – the introducing of a proportional electoral system. The difference was in the number of constituencies, in the size of the protective barrier, the subjects of nomination of candidates, requirements for political parties as election participants, the order

[1] Про вибори народних депутатів України: Закон України від 18 жовт. 2001 р. №2766-III // Відом. Верхов. Ради України. – 2001. – №51–52. – Ст. 265.

[2] Рішення Конституційного Суду України у справі за конституційними поданнями народних депутатів України щодо відповідності Конституції України (конституційності) Закону України «Про вибори народних депутатів України» (справа про вибори народних депутатів України) від 26 лют. 1998 р. // Віснику Конституційного Суду України. – 1998. – №2. – С. 4–19.

of forming of election commissions etc. So, it was offered and the single national constituency, and 26 multi-mandate constituencies, the lists of candidates were regional in all projects. Generally these lists have to be hard. Only one project provided for the opportunity of preferential voting: for a particular candidate in the list or for the list in general.[1] Only one bill did not provide for the protective barrier at all.[2] One of its authors V. S. Zhuravsky mentioned that such proportional electoral system was more promising, because in the case of its introduction any vote of the voter would not be lost, each vote would be counted, which would provide equality of elections for all electoral subjects.[3] Other draft laws offered the protective barrier at the level of 4%.

The proposed proportional electoral system, as the bills' initiators and authors considered, firstly, would give an opportunity to form a majority in the new parliament that would form the government and take full responsibility for the situation in the country, and, secondly, would contribute to further political structuring of society in general, especially Verkhovna Rada of Ukraine.

Assessing the balance of political forces in Parliament and the prospects of the passage of the proportional bill, it was predicted that it would be supported with a simple majority of votes. Pragmatic motivations of support of proportional law by all party fractions were quite evident.[4] Thus, there were opinions that proportional elections will help to minimize the effort and to inlarge the chances for passage in Parliament: the place in the passage part of the party list may be cheaper for the majority constituencies. This hinted on the prospect of a proportional election system. As for arguments like «promoting the political structuring of society», that is, to the most experts' opinions, was likely a «cover» for personal gain.

The new law provided the proportional electoral system with hard lists in the single national constituency, the 4-percent protective barrier. This and the following laws on elections of people's deputies, which provided for the proportional electoral system, were vetoed by the President of Ukraine L. D. Kuchma. Proportional law did not get the signature of the guarantor of the Constitution,

[1] Проект Закону про вибори народних депутатів України, внесений народним депутатом України А. О. Білоусом, № 2182–1 від 05.04.1999 р. // Законодавство: інформаційно-пошукова система [Електрон. ресурс] / Науково-дослідний центр правової інформатики АПрН України; станом на 19 серп. 2008 р. – К., 2008. – 1 електрон. опт. диск (DVD-ROM). – Назва з диску.

[2] Проект Закону про вибори народних депутатів України, внесений народними депутатами України В. С. Журавським і С. О. Кириченком, № 2182 від 21.10.1998 р. // Законодавство: інформаційно-пошукова система [Електрон. ресурс] / Науково-дослідний центр правової інформатики АПрН України; станом на 19 серп. 2008 р. – К., 2008. – 1 електрон. опт. диск (DVD-ROM). – Назва з диску.

[3] Стенограма пленарного засідання четвертої сесії Верховної Ради України // Бюлетень № 35. – 1999. – 18 листопада.

[4] Телешун, С. Нові перспективи Закону про вибори народних депутатів України: версії розвитку / С. Телешун // Право України. – 2001. – № 1. – С. 85–86.

«because its conceptual framework and many provisions do not correspond to the Constitution of Ukraine, restrict the constitutional rights of citizens, is inconsistent with other laws which are basic in the relevant areas». It was noted that the election procedure, provided for by this law, deprives the vast majority of people of the right to exercise power directly, as provided for by Article 5 of the Constitution of Ukraine, by the election of his representative to the Verkhovna Rada of Ukraine, and in fact provides only the opportunity to vote for one of the political parties, while focusing exclusively on the first five persons from its electoral list. Therefore, practically not people, but a small group of people sharing certain political views will decide who actually becomes members of the only legislative body in Ukraine. Implementation of such approach will lead to the substitution of real democracy to the rule of the representatives of certain ideologies. The President considered that «during the preparation and the adoption of this Law the public opinion about inadmissibility of introduction of a proportional system for people's deputies' elections in Ukraine should be observed».[1]

Twice failed attempts of people's deputies of Ukraine to overcome the presidential veto: 262 and 259 instead of the necessary 300 votes, even in the mode of secret voting. The evaluation of the people's deputy of Ukraine Yu. B. Kliuchkovskii, if all parties represented in the Parliament adhered their program, there would be 308 votes, that is enough to overcome veto of the President.[2]

So, the failure of the deputies to adopt the electoral law based on proportional system is the result, primarily, of the inconsequence of the political parties. Thus, the parties themselves have proven their weakness, and therefore the premature introduction of the proportional electoral system.

The position of the President of Ukraine, according to some estimates, in fact, was as follows: supporting for electoral bill on a proportional basis only in a case of implementing of the decision of the referendum about bicameral parliament[3].

Unsuccessful proportional scenario prompted to the search for other, more suitable variant. Few suggestions were submitted at the discretion of people's deputies: mixed majoritarian-proportional system, which significantly differed from the applied in 1998 (voting would be done by one bulletin in the 225 single-mandate constituencies, people's deputies would be elected by relative

[1] Пропозиції до Закону України «Про вибори народних депутатів України» від 20.02.2001 р. та від 19.04.2001 р. // Законодавство: інформаційно-пошукова система [Електрон. ресурс] / Науково-дослідний центр правової інформатики АПрН України; станом на 19 серп. 2008 р. – К., 2008. – 1 електрон. опт. диск (DVD-ROM). – Назва з диску.

[2] Вибір перед виборами: визначення правил гри: матеріали круглого столу, 12 бер. 2001 р. / Верховна Рада України // Парламент. – 2001. – № 3. – С. 53.

[3] Павленко, Р. Законодавство про вибори в системі заходів структурування українського парламенту / Ростислав Павленко // До питання реформування виборчого законодавства: Зб. аналіт. матер. / Комітет виборців України. – К.: Факт, 2001. – С. 30.

majority in majoritarian system, the remaining 225 mandates would be distributed among political parties proportionally to the number of votes, cast for the candidates of these parties in the single-mandate constituencies, 5% protective barrier across the country); mixed system with a ratio of majoritarian and proportional at the level of 135 (30%) and 315 (70%) people's deputies; majoritarian electoral system of absolute majority (after first unsuccessful attempt with mixed electoral system, as described below).

A compromise variant could be the adopted by the Parliament decision about introducing a mixed electoral system, in which about 25% of people's deputies (115 people) should be elected by the usual for Ukrainian voter, simple and personalized majoritarian system, the remaining 335 – by proportional. But and such decision of people's deputies of Ukraine was not supported by the President, who used his right of veto. Basically, the arguments and links to articles of the Constitution were the same as in the previous two presidential proposals. Simultaneously, on his opinion, the elections of people's deputies turn into the partial measure not entirely, but predominantly with this act, because the number of deputies by party lists would be almost more than three times exceed the number of deputies that elected by the majoritarian system. New in the proposals of the President has become the emergence of «wish» for the electoral system for the upcoming parliamentary elections: «only in case of maintaining the current electoral system… can be provided the fulfillment of constitutional requirements for the holding of elections to the Verkhovna Rada of Ukraine on the basis of general, equal and direct electoral right, following the constitutional rights of citizens and established enough conditions for the realization the opportunity to participate in elections by the political parties provided them by the Basic Law of Ukraine».[1]

In such conditions unclear from a legal point of view is the unconstitutionality of the principle of proportional elections in a mixed system with a ratio of majoritarian and proportional components in favor of proportional, and this principle's constitutionality with parity of these components. In fact the essence of this system does not change from a quantitative ratio. That is, such position and actions of the President are exclusively subjective. Thus political subjective factor of influence on the election of the type of electoral system has found its expression.

Attempts to overcome the veto of the President on the electoral law based on a mixed system of 75 ant 25% collected 252, and then 242 votes. The next absolutely compromise variant was the support of the presidential proposals about the preservation of the current model of the electoral system by all deputies. But

[1] Пропозиції до Закону України «Про вибори народних депутатів України» від 04.07.2001 р. та від 14.08.2001 р. // Законодавство: інформаційно-пошукова система [Електрон. ресурс] / Науково-дослідний центр правової інформатики АПрН України; станом на 19 серп. 2008 р. – К., 2008. – 1 електрон. опт. диск (DVD-ROM). – Назва з диску.

the President signed an electoral law that provided a mixed system of 50: 50, only at the second time. Discussing the next version of the Proposals of the President to the election law, parliamentarians took only those that were favorable for the largest and the most influential political parties, and unprofitable, such as granting the right to participate in proportional elections for all parties, the prohibition to withdraw candidates from its list after registration and the like were dismissed. Shortening the time of election campaign to 90 days, that was the principal demand of the President, was also more favorable to the big parties, because the possibility of not so influence political forces to get some serious support in such a short period of time was decreased. It should be mentioned that according to the vetoed law the election campaign should be started from the beginning of October 2001 and last for 180 days, but the law was adopted only on October 18. The Law of Ukraine «On elections of people's deputies of Ukraine» was voted by 234 people's deputies.

On December 30, 2001 the Central electoral commission announced the beginning of the election process of regular elections of people's deputies of Ukraine which would be held on 31 March 2002. The mixed electoral system with equal majoritarian and proportional components was still unchanged, as we have mentioned, after many attempts to introduce another version. But new was the fact that in 2002 a potential candidate should choose to run in multi-mandate or in single-mandate constituency. On the one hand, according to the legal position of the Constitutional Court of Ukraine, the struggle for the mandate of people's deputy of Ukraine in two constituencies at the same time is a violation of the constitutional principle of equal electoral right. On the other hand, some scholars hold entirely another view. So, it's mentioned that the mixed electoral system without such capability vastly lose its meaning. This radically distinguishes the legal approach to the application of this system in Ukraine from those approaches that are being implemented in Germany, Hungary, Lithuania, Russia etc. In the absence of constant traditions of the political life parties are usualy associated with specific persons – political leaders, who are forced to stop running in majoritarian constituencies in such legal conditions, because the parties' chances to electoral support are rapidly decrease without them in the party list. At the same time many qualified politicians will be outside of the Parliament because of such a forced refusal or the numerosity of their future parliamentary factions will be significantly decreased. Objectively it slows down the development of the political structure, so unlikely it is appropriate.

Disappeared such subjects of the election process as meetings of voters and working collectives. The right to nominate candidates was given to the political parties that had been registered in the legal procedure not less than a year before the elections, and electoral blocs of parties in a case they consisted of parties registered not less than a year before the election. In addition, a citizen could

become a candidate for people's deputies by self- nomination.

The participants of the parliamentary election campaign in 2002 were 33 subjects: 21 political parties and 12 electoral blocks of political parties.[1] Very often the basis for the blocking became a similar ideology, although, as the experience of the association in the election campaign 2002, it did not become the obligatory factor in the choice of «traveler» to the Parliament.[2] The total number of candidates in the party lists – 3762 (as of election day on 31 March 2002). Full list of 225 candidates was not registered from any political party.

In majoritarian elections 3084 candidates for people's deputies of Ukraine participated, in particular, by self-nomination 1537 persons (49,84%), nominated by political parties and blocks – 1547 (50,16%).

Among the party nominees in the nation-wide multi-mandate constituency there were 312 non-party (8,29%), other 91,71% of candidates were members of parties. Among majoritarian candidates there were only 1330 nonpartisan candidates (43,13%), other 56,87% – party members. Thus, the total number of candidates who were members of political parties was 5204 persons, that is 76% of the total number of candidates to people's deputies. Nonpartisan were 24% of candidates.

Political parties as the participants of elections in multi-mandate constituency have become the only subjects in formation of constituency election commissions and the main subjects in formation of precinct commissions. Practical realization of such a possibility by the parties, granted to them by the law, showed that the vast majority of them had no any organizational structures at the regional level, and therefore they were unable to ensure the requirements of the law regarding their participation in the formation of precinct and constituency election commissions. So, as of January 1, 2001, local offices in all regions of Ukraine had only 12 political parties (11% of all parties).[3]

31 March 2002 the regular parliamentary elections were held in Ukraine. The result was the election of full composition of the Verkhovna Rada of Ukraine IV (XV) convocation. In the multi-mandate constituency, as it was predicted, won 6 political parties (electoral blocs). The electoral quota was 87 229 votes, its size increased in comparison with 1998, when the quota had been 77 695 votes. The protective barrier of 4% was overcome by the electoral bloc «Our Ukraine» – 23,57% (70 mandates), the Communist party of Ukraine – 19,98% (59 mandates), the bloc «For United Ukraine!» – 11,77% (35 mandates), «Electoral bloc of Yulia Tymoshenko» – 7,26% (22 mandates), the Socialist party of Ukraine – 6,87% (20 mandates), Social democratic party of

[1] Вибори до Верховної Ради України 2002 року: Інформаційно-аналітичне видання / Голова редкол. М. М. Рябець. – К.: Центральна виборча комісія, 2002. – С. 71–76.

[2] Конончук, С. Технології партійних блокувань / Світлана Конончук // Вибори 2002: погляд молодих. – Вип. 3. – К.: Молодіжна Альтернатива, 2002. – С. 27–34.

[3] Політичні партії в Україні: Інформ.-довід. вид. / Гол. редкол. М. М. Рябець. – К: Центральна виборча комісія, 2001. – С. 178.

Ukraine (united) – 6,27% (19 mandates). Together the proportional election winners collected 19 626 668 votes (75,75%). This was more than the total of 8 parties and blocs in the elections in 1998, that received 17 481 593 votes together. Outside of the distribution of mandates by the proportional system were 27 political parties and electoral blocs. Only 2,45% of the voters (635 199 people) did not support any party.[1]

31 March 2002 people's deputies were elected in 222 majoritarian constituencies. When elections were declared as invalid in three constituencies, re-elections were held on 14 July 2002. After the election of the deputies in these constituencies the composition of the Verkhovna Rada of Ukraine IV convocation was formed completely.

One hundred twenty nine (57,33% of the total) of 225 elected majoritarian deputies were nominated by the political parties: 66 (29,33%) – by parties of the block «For United Ukraine!», 41 (18,22%) – by parties of «The bloc of Viktor Yushchenko «Our Ukraine»; other political parties that nominated candidates were behind those leaders of the election – 6 deputies from the Communist party, 5 from the SDPU (o) etc. The party members were 128 (56,89%) deputies. Seventy three of them (32,44%) represented electoral block «For United Ukraine!»: first of all, it was the Party of regions – 29 deputies (12,89%) and the Agrarian party of Ukraine – 19 deputies (8,44%). «The block of Viktor Yushchenko «Our Ukraine» collected 28 mandates (12,44%). Other parties had less mandates from majoritarian constituencies: the SDPU (o) – 9, CPU – 5, SPU – 1. The parties of «Electoral block of Yulia Tymoshenko» did not receive any mandates in the majoritarian constituencies. Nonpartisan were 97 people's deputies (43,11%).[2]

According to experts' opinions, the election results showed that connection between the money invested to the electoral campaign, the access to media and the support of a party (block) on the elections does not exist. The opposition parties, not only the «party of power», gained support. Ukrainian voter has proven his ability to make independent choose, choose those parties (blocks), where he knows at least something about the ideas and proposals or even trust their leaders. So, the voter has become more rational and reasonable[3]. He has already differentiated the «political twins»: CPU (renewed) gained 1,39%, the bloc «People's Rukh of Ukraine» – 0,16%, the All-Ukrainian party of workers headed by O. Moroz – 0,34%.[4]

Three hundred six of 450 people's deputies of the Verkhovna Rada of Ukraine IV convocation, that is 68%, were the party members. One hundred forty four elected delegates were nonpar-

[1] Вибори до Верховної Ради України 2002 року: Інформаційно-аналітичне видання / Голова редкол. М. М. Рябець. – К.: Центральна виборча комісія, 2002. – С. 171–176.

[2] Ibid (p. 173–175, 270–271)

[3] Вибори відбулися! Чи зміни почалися?: зб. матер. семінару Київського проекту Інституту Кеннана, 28 трав. 2002 р. – К.: Стилос, 2002. – С. 4–9.

[4] Вибори – 2002 в оцінках громадян та експертів. – К.: Стилос, 2002. – С. 12–14, 76–78.

tisan.[1] Almost unchanged remained the previous ratio of party and nonpartisan members – 69% to 31%. The general educational level of people's deputies raised, the representation of scientists and such professions as lawyers and economists significantly increased.

The political structuring of the newly elected Parliament had its expression in that fact that 10 parliamentary factions and 4 groups were formed: faction «United Ukraine» (175 people's deputies), faction «Our Ukraine» (119), of the Communistic party of Ukraine (63), of the Social democratic party of Ukraine (United) (31), the Yulia Tymoshenko's block (23), of the Socialist party of Ukraine (22 deputies).[2] That was 433 people's deputies of Ukraine (96,2%) joined in the factions which were formed by the people's deputies on the basis of political parties and blocks of political parties in quantity at least 14 people's deputies of Ukraine. Only 17 people's deputies were unaffiliated.

Therefore, assessing the structure of the Parliament as a result of the mixed electoral system, first of all, it's seen that the vast majority of people's deputies of Ukraine (96%) became a part of certain political faction. So, likely that there was a clear structuring as they had wished. But it was only on the one hand. On the other hand, look at the numerous faction. The ruling party «United Ukraine», gathering 11,77% votes (35 mandats) and finishing in 3rd place in the all-state constituency, receiving additional 73 mandates in majoritarian constituencies, in general – 108 members, formed the largest parliamentary faction – 175 deputies. On April – first half of May 2002 there were held accession of majoritarian deputies to one of the parliamentary political forces, that is, according to some estimates, in «brutal persecution of the elected self-nominants to mega-faction «United Ukraine».[3] So, without resorting to the analysis of methods of formation of such faction, should be mentioned that, obviously, the political factors, which were opposed to proportional electoral system, received the planned benefits from the mixed system, the presence of a majoritarian component.

At first glance, the configuration of the elected political forces in the Verkhovna Rada of Ukraine did not allow the existence of stable majority. At the same time through political agreements, the majority was created. Although its activity was not efficient yet, but its existence allowed to receive some political experience and to hope for its development to more advanced forms, improving the efficiency of legislative activity of the Parliament, improving its quality.

The situation after the elections of year 2002 in the Verkhovna Rada of

[1] Вибори до Верховної Ради України 2002 року: Інформаційно-аналітичне видання / Голова редкол. М. М. Рябець. – К.: Центральна виборча комісія, 2002. – С. 267–268, 270–271.

[2] Вибори – 2002 в оцінках громадян та експертів. – К.: Стилос, 2002. – С. 12–14, 76–78.

[3] Томенко, М. Законодавча, виконавча та судова влади України до і після виборів 2002 року [Електрон. ресурс] / Микола Томенко // Універсум. – 2002. – №9. – Режим доступу: http://www. universum. org. ua/ journal/2002/tomen_9. html

Ukraine, on the one hand, pointed on the need of the implementing of a proportional electoral system to ensure the realization of the political will of the citizens, the elimination the factor of «surprise», unpredictability, which a majoritarian election system in Ukraine is. And the immediate results of these parliamentary elections confirmed the positive impact of the proportional system, even in combination with the majoritarian, on the development of the system of parties and the political structuring of the Parliament. On the other hand, the parties demonstrated insufficient development and influence, especially in deciding questions about the future of the electoral system, as was documented in this article, and also organizational and structural imperfection, in particular on the stage of formation of election commissions.

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CRITERIA OF JUDICIARY SELECTION IN THE RUSSIAN EMPIRE: IDEALS AND FACTS (dedicated to the 150th anniversary of the judicial reform of 1864)

The aim of the judicial reform of 1864 was to regain public trust in judicial authority by reforming judicial system and legal proceedings on a democratic foundation recognized by legal sciences and the world practice. However, the new judicial system would remain unsustainable without authoritative judiciary which was highly needed.

Judges were in non-conformity with their high ranks according to their level of professional education and moral qualities. Smallholder noblemen who formed the basis of judiciary were known for their complete ignorance. They were usually characterized by haughtiness, luxurious landowner's mode of life and visibly expressed landlord's tastes and habits. They ignored justiceships held by people being in the same judicial panel but from other social categories. Moreover, homicide offenders and robbers became a part of court system as well[1]. In turn, the behaviour of elected peasants was determined by their serfdom. In district courts they were often admitted as watchmen as they were not allowed to attend meetings of the nobility without permission. Peasant-judges fulfilled the duties of deliverymen, sometimes cleaned premises and tend upon their privileged «colleagues»[2].

The absence of literacy and low level of professional education determined ignorance of judiciary, especially in the courts of first instance. Even in senate, as N. I. Stoyanovskiy emphasized, men of education remained in the minority – 6 people with a higher education in the whole institution as of 1841. Thereby, judges in the «old courts» were directly

[1] Бочкарев В. Дореформенный суд // Судебная реформа / под ред. Н. В. Давыдова и Н. Н. Полянского. – М.: Книгоизд. «Объединение», 1915. – С. 210–211.

[2] Ibid (p. 210–213).

influenced by secretaries. They were experienced scholars who knew legal proceedings perfectly. They skilfully used their knowledge during written proceedings and numerous bureaucratic forms[1].

Bribery was the main problem of judiciary. It had an old historic basis and thus judges perceived it as a usual behavioural pattern. V. Bochkarev explained that such a situation occurred as a result of low morality level of judicial establishment's officials and insufficient material security of judicial establishment[2]. For example, Chiefs of Judicial Chambers earned 1 thousand 143 karbovantsiv per year whereas Chiefs of Treasury Chambers earned 4 thousand 406 karbovantsiv[3].

The government consistently tried to regulate establishment of judiciary and to restore public respect towards it. As for judicial offices Legislative Committee of 1826 planned to establish irremovability of elected judges with the right of retirement after three years of their service. The Law of 1831 extended the term up to 6 years and thus made elective service equal to civil. These measures were aimed to encourage wealthy educated nobility for court service[4]. However, they failed to yield any positive results because of absence of judiciary selection criteria.

Only while drafting Judicial Statutes of 1864 the problem was tried to be resolved again because of the need in staff members for new judicial bodies: justices of the peace, district courts and judicial chambers; Senate being a Supreme Court of Cassation. The staff of new judicial bodies supposed to be divided into two office categories. The first one included offices connected with authority to consider and decide cases – justices of the peace; chiefs, their deputies, members of district courts and judicial chambers; the first sitter and senators of Departments of Cassation; jurors and class representatives. Chief procurators, procurators of chambers and district courts, their deputies and court investigators were equivalent to them. The second category included secondary staff – the office, court enforcement officers, barristers, candidates for the office in judicial establishment, notary officers.

The starting point in law-drafting activities was a view that the quality of administering justice depended more on dignity of judges, not on perfect laws. Dignity of judges, as the commission thought, meant not only their skills and legal education but the moral qualities: «neutrality, diligence, dedication»[5]. Thus, one of the main aims of lawmaking had to be finding ways to attract for servicing in judicial establishment and retain those people who deserved high justiceships and other judicial ranks[6].

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[1] Бочкарев В. Дореформенный суд // Судебная реформа / под ред. Н. В. Давыдова и Н. Н. Полянского. – М.: Книгоизд. «Объединение», 1915. – С. 211–213.

[2] Ibid (p. 216)

[3] Министерство за 100 лет (1802–1902). Исторический очерк. – Спб., 1902. – С. 74, 75.

[4] Бочкарев В. Дореформенный суд // Судебная реформа / под ред. Н. В. Давыдова и Н. Н. Полянского. – М.: Книгоизд. «Объединение», 1915. – С. 209.

[5] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. XXXIV.

[6] Ibid

During 1861–1864 at the official level and on the pages of periodicals there was a discussion concerning terms of holding the position of justices of the peace, judges of district courts and judicial chambers as well as obtaining ranks of jurors and class representatives. The fiercest disputes concerned literacy, office and property qualifications for judiciary. All the comments and suggestions for the common denominator were consolidated in Establishment of Judicial Settlements of 1864 (hereinafter the «Establishment»).

The «Establishment» provided a system of criteria for selection candidates for judges. They can be divided into two following groups: general and specific. The first ones were applied, without any exceptions, to all people who wanted to hold ranks in judicial establishment. The second ones concerned positions of justices of the peace; heads, their deputies, members of district courts and judicial chambers; senators of Departments of Cassation.

The main conditions for entering into judicial service were: 1) the Russian allegiance (article 200), 2) reaching the age of 25 (article 19), 3) moral qualities.

According to Judicial Statutes of 1864 judiciary was established from all the Russian Empire subjects as the public could trust only its citizens[1]. The Law did not impose any restrictions based on sex, nationality or religion. However, when electing justices of the peace in Kiev, Podolia and Volhynian Governorates there were considered politically reliable candidates among orthodox Christians and non-polonisated people[2]. Restriction on political rights of women did not allow them to hold judicial positions although the Law did not provide an express prohibition.

Establishment of age qualification lowest limit in 25 years guaranteed selection of candidates with a certain life experience and thus helped them to better understand circumstances of a case, motives and circumstances of committing particular acts by disputing parties. It was generally agreed that it was the age of 25 years when a person became sufficiently mature to exercise responsibilities of a judge[3]. However, many of legal science and practice representatives offered to extend the age qualification lowest limit up to 30 years[4]. E. Vaskovskiy stated that a judge had to have much life experience, to know daily life and a way people lived. In his opinion only a mature person was able to become a judge. On the other side, the scientist emphasised knowledge of law was complex that is why it was needed in inherently correct views, tact and sense of justice which could be obtained only with age and long termed experience[5]. M. Filippov suggested to adopt practices of Belgium and to permit judges to retire

[1] Филиппов М. А. Судебная реформа в России. – Т. 1. – Ч. 1. – СПб., 1871. – С. 268.

[2] Дело о судебных реформах в Юго-Западном крае. – ДЦІА. – ф. 442. – оп. 181 (1867-1868). – Спр. 425, ч. 1. – с. 102–103.

[3] Филиппов М. А. Судебная реформа в России. – Т. 1. – Ч. 1. – СПб., 1871. – С. 243–244.

[4] Ibid (p. 244).

[5] Василевский А. Отзывы русских газет и журналов о судебной реформе // Журнал министерства юстиции. – 1863. – Т. 16. – Ч. 2. – Кн. 4. – Отд. 1. – С. 49.

at the age of 75[1]. Jurors could become people not younger than 25 and not older than 70 (p. 2 art. 81). M. Galkin-Vraskoy made solid arguments concerning this issue. The age from 30 till 60 he thought to be the condition of improving juror's body structure as he believed that a person of 25 years was light-minded and having a lack of life experience, whilst a person of 70 years was physically weak and passive in the consultation room[2].

Candidates for judiciary offices required to be of high moral qualities and with a spotless reputation. Firstly, the following persons were deprived of a right to become judges: 1) who were under examination or on trial for crimes and minor offences; 2) who had served a sentence of deprivation of liberty or another harsher penalty; 3) who were not acquitted by court verdicts (p. 1 art. 201). Prior to adoption of Judicial Statutes of 1864 persons sentenced to punishments involving deprivation of liberty or deprivation of class rights, could not become judges. Commission drafting Judicial Statutes toughened the requirements in order to prevent establishment of judiciary from ex convicts[3]. It was determined by the fact that the judges who had criminal convictions were not respected and trusted by citizens. Secondly, judges could not become persons who were dismissed: 1) from the service by a court decision, 2) from department of religious affairs because of sins, 3) or from the community and nobility association by the decisions of classes to which they belonged (p. 2 art. 201). They were considered as those who had lost the public trust forever[4]. Thirdly, the persons who were in ward for spendthrift as well as persons recognized bad debtors were out of the «moral portrait» of a judge (p. 3 art. 201). Establishment of such prohibitions was fully justified for the aim of developing public trust and respect towards judges.

«Establishment» provided a special prohibition concerned selection of jurors among candidates with physical defects: deaf, mute and mentally ill. This condition was not provided for other judiciary offices thus raising many questions.

Specific criteria of judiciary selection included literacy, service and age qualifications. They had a differentiated character depending on the category of the vacant office.

Pre-reformed legislation was concerned only in a legal scholarship of secretaries who took responsibility for correct indication of laws for a court. Judicial reform of 1864 delegated the performance of judicial activities from the office to judges and thus the question concerning their legal education became of vital importance[5].

I. Foynytskiy thought that legal education was gained while practicing or in

[1] Филиппов М. А. Судебная реформа в России. – Т. 1. – Ч. 1. – СПб., 1871. – С. 248.

[2] Галкин-Враской Н. О. О суде присяжных // Журн. юридического общества. – Спб., 1895. – Кн. 10. – С. 78

[3] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. 132–133.

[4] Фойницкий И. Я. Курс уголовного судопроизводства. – Т. 1. – СПб.: Тип. Мин. пут. сооб., 1884. – С. 252.

[5] Фойницкий И. Я. Курс уголовного судопроизводства. – Т. 1. – СПб.: Тип. Мин. пут. сооб., 1884. – С. 228.

a scientific way. Studying laws in a learning-by-doing manner was possible by participating in activities connected to records of a court. However it had a number of gaps as to gaining skills in application of laws: firstly, casuistic character of knowledge, secondly a great loss of time. Therefore, scientific study offered comprehensive and systematic knowledge about law[1]. Nevertheless, practice activities should not be ignored as the school did give knowledge while practice made it possible to use[2]. Therefore, legal education and practice activities set up two closely connected conditions, or to be more exact, two sides of one condition for being allowed for court service[3]. E. Vaskovskiy reasonably noted that knowledge in science was not yet making a judge but the judge had to have a practical training as well[4]. Thus, judicial reform contemporaries understood «legal education» of court staff as the unity of two factors: 1) availability of theoretical knowledge in the field of law; 2) and practical skills in application of laws.

Such an approach was in favour of official circles as well. Judicial Statutes' editors thought that scholarship was the most effective in establishing moral qualities of judges[5]. However, during their discussions they came to the conclusion that it was unreasonable to set literacy qualification for all the court staff. For example, there was no need in special legal education and practice for jurors while making a decision about guilt or innocence of the defendant according to their conscience[6]. For this reason «Establishment» included only the condition concerning knowledge of Russian. From the other side, when judges determined penalties, they were required to know not only the literal meaning of laws (which was often unclear and incomprehensive), but also to understand their infer meaning. Particularly, when considering civil cases, judges could not do any procedural steps without special knowledge of laws and without deep knowledge of legal science. On these grounds, it was concluded that legal education was required when appointing chief magistrates, court members, procurators, their deputies and secretaries[7]. Justices of the peace were offered to have more flexible literacy qualification. As the cases were insignificant, with simplified procedure, they could be conducted by people without legal education who were respected and trusted by public. In this case it was simply required a general education in higher or secondary educational institutions[8]. However, because of the absence of a sufficient number of legal educated people at the moment of judicial reform[9], the editors forecasted a low percentage of candidates who would have a relevant certifi-

[1] Ibid (p. 228)
[2] Ibid (p. 229)
[3] Ibid (p. 229)
[4] Васьковский Е. В. Курс гражданского процесса. – Т. 1. – М.: изд. Бр. Башмаковых, 1913 р. – С. 48.
[5] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. XXXIV.
[6] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. XXXIV – XXXV.
[7] Ibid (p. XXXV)
[8] Ibid (p. XXXV)
[9] Ibid (p. 136)

cate. Therefore, they decided to search candidates among skilled workers and scientists. Candidates for judges of courts of general jurisdiction could prove their knowledge only in general as well as by servicing in judicial establishment or writing scientific works. Those who graduated from higher general institutions had to have priority among others[1]. Ministry of National Education refused the offer to allow candidates among university professors as it was afraid of scientific staff reduction[2]. Therefore, this provision was excluded from the judicial reform program document in 1862.

When preparing Judicial Statutes drafts in 1863, the members of drafting commission suggested differentiating demands to judicial establishment staff according to their responsibilities and authorities. Hence, the candidates for chief magistrates, their deputies and judges were required to have both, a legal education and a legal experience[3]. However, this offer was not supported by the majority because of the low educational level of the old judicial staff and the absence of professionally trained holders of a master's degree.

When pondered over ideals and facts of judiciary establishment, the editors fixed in the «Establishment» of 1864 the alternative conditions for appointing chief magistrates, their deputies, judges, court investigators, procurator's supervision staff, chief secretaries, secretaries and their assistants. Firstly, these conditions included a need in certificates from universities or other educational institutions, confirming completion of courses in legal sciences or passing an exam on these disciplines. Secondly, legal education was not required for persons who proved their judicial knowledge while servicing. The candidates for justices of the peace required to graduate from higher or secondary educational establishments or to serve in a court system for at least 3 years. As a result, in the early years of functioning of the court institutions, it was skilled workers who were generally appointed for judge offices[4].

The offered procedure had its followers and critics. F. Dmitriev thought that the condition concerning legal education as it was did not correspond the state of education and legal practices. On the one hand, at the moment of judicial reform legal education was not in the absolute need and the diploma as well as long-term service did not prove legal knowledge. The structure of old courts did not require knowledge of sciences during the service. On the other hand, it was difficult to gain science knowledge as legal thoughts could not develop with the routine. Therefore, according to F. Dmitriev, a fundamentally new judicial magistracy could be formed long after the judicial reform. That is why he suggested raising requirements towards judges gradually. Particularly, district judges were selected

[1] Ibid (p. XXXV)

[2] Фойницкий И. Я. Курс уголовного судопроизводства. – Т. 1. – СПб.: Тип. Мин. пут. сооб., 1884. – С. 231.

[3] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. 136.

[4] Фойницкий И. Я. Курс уголовного судопроизводства. – Т. 1. – СПб.: Тип. Мин. пут. сооб., 1884. – С. 230

among candidates who: 1) had served in Departments of Cassation of the Senate; 2) had the highest science degree: degree of doctor and master degree in law departments; 3) or held the position of district court members for several years running; 4) or among experienced lawyers[1].

In turn, G. Shuberskiy acknowledged practicability of the alternative way of determining literacy qualifications with the help of statistics data. Between the years of 1822 and 1862 legal education in all the Russian universities, lyceums and specialized schools was received by 9 thousand 184 people, education in other sciences was received by 5 thousand 750 people. Taking into account dead-rate, G. Shuberskiy had determined the number of probable candidates who could run for office in judicial establishment, 5 thousand 738. The author calculated the needed quantity of lawyers for new judicial establishments by taking into account their number and approximate staff. According to his calculations the required number of candidates equalled 2 thousand 500 people. Thereby, G. Shuberskiy came to conclusion that there were no obstacles for carrying out judicial reform on due to the lack of staff[2]. The judicial reform followers believed that no one of the educational institutions could prepare professionals as well as the future public court would be able to do it[3].

An interesting viewpoint concerning determining of professionalism of justices of the peace candidates belonged to a lawyer from Kyiv Criminal Chamber. He emphasised that in order to administer justice the future justices of the peace needed practical skills in deciding legal disputes. To certify these skills Yanovich suggested introducing a special exam in legal clinics at legal departments. Editorial office of «Narodnoe Bogatstvo» newspaper suggested selecting a district judge or a member of the judicial chamber as Head of the Magistrate Congress. In its view such a decision would provide a proper settlement of disputes and would connect courts of general jurisdiction with magistrate establishments[4].

Critics had a negative perception of establishing uniform requirements for judges of courts of general jurisdiction and for secretaries. They emphasized that requirements towards lawyers were harsher than towards judges. A post of barrister could be obtained by a person who had reached the age of 25 and had a certificate on successful completion of the course in sciences or on taking an exam in legal sciences issued by the university or by other educational establishments. Moreover, it was required at least 5 years of practical experience in judicial

[1] Василевский А. Отзывы русских газет и журналов о судебной реформе // Журнал министерства юстиции. – 1863. – Т. 16. – Ч. 2. – Кн. 5. – Отд. 1. – С. 423–425.

[2] Василевский А. Отзывы русских газет и журналов о судебной реформе // Журнал министерства юстиции. – 1863. – Т. 16. – Ч. 2. – Кн. 4. – Отд. 1. – С. 78–79.

[3] Достаточно ли у нас число образованных людей для осуществления судебной реформы // Журнал министерства юстиции. – 1863. – Т. 16. – Кн. 4. – Отд. 4. – С. 293.

[4] Василевский А. Отзывы русских газет и журналов о судебной реформе // Журнал министерства юстиции. – 1863. – Т. 16. – Ч. 2. – Кн. 5. – Отд. 1. – С. 431–432.

establishment or as a barrister's assistant. This collision, as they thought, undermined the court's authority. Because of the important role of judges, it was suggested selecting judges only among lawyers who earned honourable authority, trust and respect in society during their social legal activities[1].

All these viewpoints, M. Filippov emphasized, showed a shared desire of public authority and civil society for putting courts on a path toward sciences and understanding of the harm caused by uneducated judges[2].

The «Establishment» did not set any requirements concerning legal education of class representatives despite the fact they were included in the board of judicial chamber for trying state crime cases. Together with the members of the chamber they investigated the actual circumstances of cases and imposed punishments motivating their decisions. The absence of legal education requirements can be explained in the following way. Firstly, they were appointed among the selected representatives from all the Russian social classes (province marshal of nobility, district marshal of nobility, mayor, and head of a volost). Such ranks de facto confirmed their experience and authority. Secondly, legal illiteracy demonstrated by class representatives in a process was compensated by judges from the same judicial bench.

A level of professional training of judges was determined by a service qualification. In order to become a member of a district court it was needed at least 3 years of service with a rank of not lower than a secretary of a district court (article 203) or at least 10 years with a rank of a barrister (article 205). When appointing chiefs of district courts or their deputies, members of judicial chambers, the candidates needed at least 3 years of judicial service with a rank of not lower than members and procurators of district courts (article 204). A candidate for chief of judicial chamber could be a person who had served at least 3 years with a rank of not lower than a procurator or a chamber member, a chief of district court or its deputy (article 207). Senator of Department of Cassation was appointed among the candidates who had served at least 3 years with a rank of chief procurator, deputy of chief procurator, chief, member or procurator of judicial chamber (article 208). According to I. Foynytskiy, these provisions did not become mandatory. Because of the absence of well-organized examinations (common and competitive) in practice they had a recommendatory character[3].

On the type of their activity justices of the peace could not be selected among priests and candle lighters (article 22). This rule was set in order to prevent cases when candle lighters would try cases with participation of ministers of church with a higher rank[4]. There were

[1] Ibid (p. 421–422)

[2] Филиппов М. А. Судебная реформа в России. – Т. 1. – Ч. 1. – СПб., 1871. – С. 251–252.

[3] Фойницкий И. Я. Курс уголовного судопроизводства. – Т. 1. – СПб.: Тип. Мин. пут. сооб., 1884. – С. 231–232.

[4] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. 46.

no similar restrictions for judges of the courts of general jurisdiction.

Particularly, an interesting is a viewpoint of Judicial Statutes drafters concerning the possibility for judges of all the levels to be in trade even when performing duties according to their knowledge. They thought that there were no legal reasons for such a restriction. As the trade activities were possible for all the classes, they thought it should be available for judges as well[1]. This was the distinguishing characteristic of the Russian legislation.

Moreover, article 34 of the «Establishment» can be criticized as well. The law introduced the right of Zemsky sobors to select by a unanimous decision justices of the peace among its own members of town council who were not being in conformity with legal conditions for appointment but had retained public trust and respect by their achievements and useful activities. I. Y. Foynytskiy noted that such an extraordinary right to go beyond the law served as a symbol of trust in local court establishments[2].

Service qualification for jurors had some peculiarities. On the one hand, there was established a number of requirements following which a person could receive a right to be appointed, on the other hand, a number of prohibitions which deprived of this right. Jurors were selected among officials being in a public service (posts of the fifth or a lower level), local department on election of noble and local communities (except of mayors), peasants selected as duty judges of volost courts or as «conscientious» judges of volost and peasant rasprava and equal to them peasant courts as well as those who at least for three years irreproachably held positions of heads of volost, chiefs, village chiefs or other relevant posts in public administration of rural people including ex churchwardens (subparagraphs 2–4 article 84). Moreover, due to the type of their service jurors could not be appointed among: members of courts, district justices of the peace, chief secretaries and secretaries of courts, court enforcement officers, notary officers, prosecutor's supervision staff, vice governors, police officials, treasurers, forest guards of publicly owned forests and mayors; priests and monks; military servants and the civil staff of military departments; folk school teachers; people who were in the service of private citizens (articles 84–86). The reasons of such a restriction varied. Judiciary and law enforcement workers had a legal knowledge and would have authority over jurors who were ignorant in this field. Therefore, such a prohibition was set in order to ensure their neutral verdict. Military servants, some officials and teachers were relieved of the jurors' duties because it was impractical to distract them of their direct duties[3].

Property qualification was set for selection of justices of the peace and jurors

[1] Филиппов М. А. Судебная реформа в России. – Т. 1. – Ч. 1. – СПб., 1871. – С. 267.

[2] Фойницкий И. Я. Курс уголовного судопроизводства. – Т. 1. – СПб.: Тип. Мин. пут. сооб., 1884. – С. 331.

[3] Учреждение судебных установлений / сост. Н. Товстолес. – Петроград, 1916. – С. 200, 201.

electorate. According to Judicial Statutes drafters, material frame-indifference of candidates for justices of the peace was reasonable because of the following. Firstly, district judges' salary was considerably lower than the salary of crown judges whilst honourable judges carried out their duties free of charge. Secondly, crown judges had the irremovability guarantee whilst justices of the peace were subject to periodic re-election. Thirdly, because of a wide range of duties and heavy workload, justices of the peace could find themselves in a condition similar to poverty (article 19, 38). The candidates for the position had to own a land with total area twice as much than it was established for direct participation in selecting members of the town council to Zemskoye Uezdnoe Sobranye. Hence, the size of a land plot was measured according to provisions of articles 6, 7, 9 of General Regulations Concerning Peasants and ranged from 400 to 1600 dessiatinas depending on the location. Moreover, a candidate could be selected if he owned immovable property at the cost of not lower than 15 thousand karbovantsiv and not lower than 3 thousand karbovantsiv in the cities (article 19).

Property qualification served for candidates for jurors as a guarantee that among jurors there would not be poor people, people without proper education and those who were not literate enough. Jurors could be appointed among candidates who owned 100 dessiatinas of land (article 84); or immovable property at the cost of: not lower than 2 thousand karbovantsiv in capital cities; not lower than 1 thousand karbovantsiv in principal towns of a province and city municipalities; 500 karbovantsiv in other cities, or earned an income or a profit from capital, activities or business in the amount of 200 karbovantsiv per year (paragraph 5 article 84).

An exceptional condition for justices of the peace and jurors was a residence qualification. Justices of the peace and jurors could be only local people of districts. At that, location of their property and their place of service were not taken into account. Residence qualification was set for justices of the peace in order to create an authoritative local government which was familiar with customs and traditions. The condition concerning residence of jurors ensured involving those people who while judging actions of defendants according to their conscience were familiar with the customs and social life of the territory where the crime had been committed[1]. Residence qualification of justices of the peace was comparatively more developed by legislators, as in order to determine whether a candidate had it, the law did not require his permanent residence during the appointment or during some period before the appointment not only in that district but also in that governorate where he stood for a post[2]. Compared to them, the candidates for jurors required to reside in a district at least for two years (p. 3 art. 81). If the candidates for jurors leave their

[1] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. 79.

[2] Судебные уставы 20 ноября 1864 года. – Ч. 3. – СПб, 1867. – С. 40.

place of permanent residence and transferred to another post in the other territory they were to be excluded from the lists as they were not local residents anymore.

Judicial reform of 1864 was the first to create a platform for establishing an authoritative judiciary by setting a system of criteria for selecting candidates. The legislators paid special attention to requirements concerning candidates for elective posts of justices of the peace and jurors. In order to control the staff there was established an enhanced property qualification as well as a special service qualification for jurors. Criterion for selection of class representatives was restricted only with a condition of their conscientious service in the ranks of province and district marshal of nobility, mayor, head of a volost and chief of a volost.

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STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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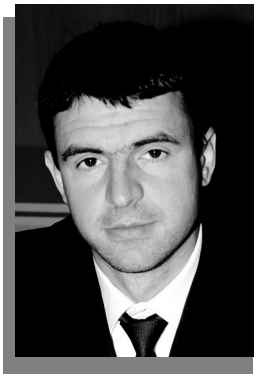

UDC 342.9

PRINCIPAL ADMINISTRATIVE ENFORCEMENT MEASURES to combat drug trafficking in UKRAINE: THE PRIORITIES use of resources in today's reform process LEGISLATION OF UKRAINE

At the official level, namely in the Strategy of state policy on drugs for the period until 2020, approved by the Cabinet of Ministers ofUkraine 28 August, 2013 № 735-R (hereinafter – the Strategy), it is recognized that the spread of drug addiction and drug crime in Ukraine over the last ten years has become one of the most acute social problems, not solving of which leads to the infliction of harm to human health, the negative impact on the social sphere

and is also a threat to the national security of the state[1].

Unfortunately, this situation is confirmed by the extremely negative statistical information. Thus, in particular, general situation in Ukraine is characterized by overall high level of drug use by persons not for medical purpose, to be exact we have – 33 persons 10 thousand population in the state (in comparison with 21 person in 2003), and according to sociological research, 35% of first year students of vocational schools and 25% of university students have experience of drug use[2].Thus, the scope of drug trafficking and the constant increase of crimes in this area has all hallmarks of a complex problem, the solution of which has strategic importance for the state. Today, state coercion to persons, who break relations in this sphere, is carried out in three stages: the first – by means of administrative and civil law, whichconfine the possibility of committing offences and crimes in the sphere of turnover of narcotic drugs and psychotropic substances; the second – by means of administrative and criminal procedure law (by the operational-search activity), which stopcommitted drug crimes, and only in the third stage –by means of criminal law, which determines criminal liability for committing them[3]. However, unfortunately, we should state the fact of rather low efficiency level of such impact.

This situation, in fact, has actualized investigations and scientific search on relevant problems, which are realized by the representatives of the science of administrative law, criminal law and criminology in recent years. In particular, theoretical and practical problems of counteraction, prevention, combating with illicit trafficking of narcotic drugs and psychotropic substances, in different years were investigated by many scientists-lawyers, such as: D. Adylov, A. Habiani, E. Hasanov, E. Gerasimenko, V. Glushkov, S. Didkivska, M. Ikramova, C. Karpovich, O. Kovalkin, V. Kolpakov, K. Kurmanov, M. Lehetskyy, V. Malinin, A. Mayorov, E. Martynchyk, D. Metreveli, N. Miroshnichenko, A. Muzyka, A. Naden, I. Nykyforchyn, M. Prokhorova, S. Roganov, L. Soroka, V. Smitiyenko, Y. Tkachevskyy, V. Tymoshenko, E. Fesenko, D. Shtan'ko, M. Hruppa and others. However, taking into consideration the negative progressive statistics, the raised problem requires further study and research. Besides that, a number

[1] Стратегія державної політики щодо наркотиків на період до 2020 р.: Розпорядження Кабінету Міністрів України від 28.08.2013 р. [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/735–2013-%D1%80? nreg=735–2013.

[2] Стратегія державної політики щодо наркотиків на період до 2020 р.: Розпорядження Кабінету Міністрів України від 28.08.2013 р. [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/735–2013-%D1%80? nreg=735–2013.

[3] Наден О. Спеціальні види звільнення від кримінальної відповідальності за злочини в сфері обігу наркотичних засобів, психотропних речовин, їх аналогів або прекурсорів: автореф. дис. … канд. юрид. наук: спец. 12.00.08 «Кримінальне право та кримінологія; кримінально-виконавче право» / О. Наден. – Х., 2003. – С. 6.

of issues in the application of administrative coercive measures in the sphere of drug trafficking still needs thorough investigation.

L. Soroka rightly indicates, that the current Ukrainian antidrug legislationis to a certain extent oriented on fixation of the need for action only in the field of tertiary prevention, namely, focusing on the fight against criminal organizations or involuntary treatment of persons with drug problems, this approach, as is by the scientist, convincingly emphasizes contradicts to the documents of the UN Commission on narcotic drugs. In addition, the changes by the criminal lawrelated to the strengthening of the fight against the illicit trafficking of narcotic drugs and psychotropic substances do not result in of illegal actions in this sphere[1].

Therefore, it appears that an inefficient use of the potential of administrative and coercive measures as a preventive nature, as well as administrative penalties should be considereone of the causes of low efficiency of state coercion in this sphere. In our view, taking into account the recent trends of the humanization of law, the decriminalization of certain criminal acts, in addition to punitive and coercive measures, the state, represented by the appropriate authorities, should focus its efforts on the prevention of such phenomena as drug addiction and illegal turnover of narcotic drugs.

Moreover, the above – mentioned Strategy, emphasizes that one of the preconditions for a substantial increase in the number of crimes and offenses related to drug trafficking is a low level of effectiveness and lack of scientific validity of preventive, socio-medical, law enforcement measures for counteraction to drug addiction and drug crime. That is why the strategic paradigm of state drug policy comes as the need for a comprehensive transition from the punitive, criminal law oriented anti-drug measures to the therapeutic and preventive ones as the most effective in fighting againstdrugs addiction[2].

At the same time the specifics of prevention in this area should cover not only drug trafficking and be concernedwith offenders or potential offenders, which, for example, may be manifested in such the most common measures of administrative coercive measures as: the demand of cessation of separate actions; checking of documents; inspection of things and personal inspection; the realization of administrative supervision of the persons on whom it is installed, as well as control over persons, sentenced to criminal punishment other than deprivation of liberty; registration and official warning of persons; medical examination of the condition of persons etc. It is seen that the prevention must lies in the promotion of healthy

[1] Сорока Л. Адміністративна відповідальність за незаконний обіг наркотичних засобів і психотропних речовин: дис. … канд. юрид. наук: спец. 12.00.07 / Л. Сорока. – К., 2005. – С. 5

[2] Стратегія державної політики щодо наркотиків на період до 2020 р.: Розпорядження Кабінету Міністрів України від 28.08.2013 р. [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/735–2013-%D1%80? nreg=735–2013.

lifestyle, creating steady rejection of the consumption of any narcotic drugs and psychotropic substances by people, profound work with potential drug users (persons who, due to biological, psychological or social reasons, are in circumstances which make them use alcoholic beverages or drugs), the elimination of recurrence of drug dependence etc. (so-called universal, selective and indicative prevention).

First of all, these forms of prevention should be applied to minors and young persons, among whom, according to official data, there is an increasing number of drugs users ant those, who commit crimes and administrative offenses in this area. Therefore, prophylactic measures of drug use by children and youth are the priority of social policy, prevention of negative manifestations in the behavior of juveniles and should aimed at the prevention of the abuse of alcohol, tobacco and other substances, including the combined use of drugs in both legal and illicit trafficking[1].In this context, there is an absolutely fair thesis of M. Lehetskyy, which states that the analysis of practice in the fight against juvenile delinquency in this area suggests a lack of purposeful work of the authorized bodies and officials to prevent this category of offenses. According to the scientist, this situation is largely explained by a weak theoretical development of problems of administrative responsibility ofminors for offences in the sphere of illegal turnover of drugs, psychotropic substances and precursors, the lack of scientifically based recommendations for the proper organization of prevention and mechanism for enforcement of antidrug legislation[2].

According to the Strategy, drug prevention in Ukraine today is performed by:

– implementing preventative strategies for forming life skills, which are proven by the best international and domestic practice, developing new and improving existing programs and methods of solving the problems of drugs and alcohol according to the requirements of MES to scientific, methodical and educational publications;

– ensuring state support for the developmentextracurricular education;

– development and introduction of mechanisms for coordination of the activity of state institutions and public organizations in the sphere of prevention of using psychoactive substance for non-medical purposes;

– implementation of strategies for reducing the level of demand for illicit drugs among young people, formation of life skills, abilities to cope with the risks and threats related to drugs;

– preparing and implementing of a set of preventive measures aimed at improving the psychological and pedagogical parents'competence etc.;

– providing educational institutions at the expense of budgetary funds with

[1] Ibid.

[2] Легецький М. Адміністративно-правові заходи протидії правопорушенням, вчиненим неповнолітніми, у сфері незаконного обігу наркотичних засобів, психотропних речовин і прекурсорів: автореф. дис. … канд. юрид. наук: спец. 12.00.07 «Адміністративне право і процес; фінансове право; інформаційне право» / М. Легецький. – К., 2004. – С. 3–4

a sufficient number of informational and instructional materials for preventive work with pupils, parents and teaching staff;

– providing development of infrastructure for comprehensive social and educational, medical and psychological assistance to children and their parents;

– implementation of modern methods of preventive work to the training programsfor pedagogical staff and general practitioners which will help overcome the negative effects among children, pupils and students;

– establishment and implementation of methods for early detection of children who are at risk because of their exposure and other factors, which could lead to early drug use (children whose parents are in the labor emigration abroad, children from families with problems of addiction; children who received psychological trauma as a result of abuse or sexual violence, homeless children);

– profound and systematic monitoring and evaluation of the efficiency of drug prevention and introduction of appropriate adjustments in its organization and content based on the data available[1].

It should be noted, that these measures, unfortunately, are somewhat abstract and more similar to the goals and prospects of further government influence on these negative factors. It is fair to say, that despite the existinse system of preventive measures, it is not effective enough. In our opinion, it can be explained by the insufficient level of their financial and logistical support. In the short term, taking into consideration the poor state of the economy, a variant of the quickest solutions to this problem, of course, is the attraction of funds of individuals – citizens, natural individual-entrepreneurs, public associations, private companies, international non-governmental organizations. Various kinds of charity events, such as concerts, sports events, initiated by the state, may be the forms such cooperation.

Another component of administrative coercive impact on drug trafficking in Ukraine is administrative penalties, which according to art. 23 of the Code of Ukraine on Administrative Offences (hereinafter – the CUAO), is the measure of liability that applies to individuals who commit administrative violations[2]. Within the limits of CUAO, in article 44 there is a composition of offence «Illegal manufacturing, purchase, storage, transport, transfer of narcotic drugs or psychotropic substances without intent to sell in small amounts».

According to the Unified state register of court decisions for the period from 01.01.2009 to 01.01.2014 under art. 44of CUAO 3 717 are rendered Regulations. The analysis of judicial practice on bringing to administrative responsibility ac-

[1] Стратегія державної політики щодо наркотиків на період до 2020 р.: Розпорядження Кабінету Міністрів України від 28.08.2013 р. [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/735–2013-%D1%80? nreg=735–2013.

[2] Кодекс України про адміністративні правопорушення від 07.12.1984 р. (з наступними змінами й доповненнями) [Електрон. ресурс]. – Режим доступу: http://zakon1. rada. gov. ua/laws/show/80731–10.

cording to this article, including accumulated in the Resolution of the Supreme Court of Ukraine «On judicial practice in cases of crimes related to narcotic drugs, psychotropic substances, their analogues or precursors»of 26.04.2002 p. №4[1]suggests that the offense is confirmed by the protocol on administrative offense; protocol of inspection of the scene, experts opinion, resolution to close criminal proceedings under art. 309 of the Criminal Code of Ukraine.

The direct object of this offence is public relations in the sphere of turnover of narcotic drugs and psychotropic substances and generic object is the population health. Such relations are governed by the Law of Ukraine «On narcotic drugs, psychotropic substances and precursors»on 15.02.1995[2], the Law of Ukraine»On measures against illicit trafficking of narcotic drugs, psychotropic substances and precursors and abuse of its» on 15.02.1995[3] and other relevant legal acts. The objective side of the offense involves the illegal production; illegal acquisition; illegal possession, illegal transportation, transfer of narcotic drugs or psychotropic substances without intent to sell in small amount. These actions entail administrative liability in the case when they are carried out illegally, in violation of the requirements established by law. An important conditions of qualification of mentioned actions isto establish the absence of intent to sell narcotics in the implementation of these actions, and the amount of narcotic drugs and psychotropic substances, which should be small. The subject of the offense is a sane person who has reached 16 years. The subjective aspect lies in the direct intent.

Moving to the penalties for this offense, it should be noted, that the sanction of this article is an alternative, that provides an imposition of a fine ranging from twenty-five to fifty non-taxable minimum income of citizens or community service for a term of twenty to sixty hours or administrative arrest up to fifteen days.

According to practitioners, including law enforcement officers and judges, individuals who commit such acts are often drug addicts, minors, and sometimes infants, with average age from 12 to 14 years. So, in practice, quite often there are cases when the person who committed the act under art. 44 of CUAO, avoids liability on the grounds of insanity or insufficient age for administrative responsibility and continues his illegal behavior. Moreover, law enforcement officers recognized, that they don't

[1] Про судову практику в справах про злочини у сфері обігу наркотичних засобів, психотропних речовин, їх аналогів або прекурсорів: Постанова Пленуму Верховного Суду України від 26.04.2002 р. №4 [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/v0004700–02.

[2] Про наркотичні засоби, психотропні речовини і прекурсори: Закон України від 15.02.1995 р. (з наступними змінами й доповненнями) [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/60/95-%D0%B2%D1%80.

[3] Про заходи протидії незаконному обігу наркотичних засобів, психотропних речовин і прекурсорів та зловживанню ними: Закон України від 15.02.1995 р. (з наступними змінами й доповненнями) [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/62/95-%D0%B2%D1%80.

even make up protocols on administrative offences in respect of those individuals who systematically carried out, for example, illegal production, acquisition or storage of narcotic drugs or psychotropic substances, if such people are drug addicts, applying to them measures of administrative suspension (administrative detention, personal inspection and inspection of things, seizure of narcotic or psychotropic substances, etc.), without resorting to preventive conversations and other actions.

In other words, the question of the effectiveness and adequacy of administrative penalties (fines, community service, administrative detention) for illegal manufacturing, purchase, storage, transport, transfer of narcotic drugs or psychotropic substances without intent to sell in small amount arises. In our opinion, the solution tothis problems lies in the general modification of penalties for administrative offences and searching for alternatives in the application of measures to drug addicts and minors under the age of administrative responsibility. Firstly, a compulsory treatment along with the penalties it should be provided (in particular, by analogy with that, enshrined within the Criminal code of Ukraine) to the persons who at the time of the offence or after it being in a state of chronic mental illness, temporary disorder of mental activities, dementia or other painful conditions. In particular, in the case of committing the offense provided in art. 44 of CUAO by a drug addict, which is confirmed by the results of the medical examination, it would be logical to apply the offender measures of compulsory treatment of drug addiction, alcoholism, etc., followed by resocialization of the individual. At least, compulsory treatment will help the violator to get rid of the negative influence of drug addiction, give a chance to «return to society» and to put an end to systematic violations of the relevant norms, which sometimes lead to the committing of crimes or HIV/AIDS diseases or even fatalities. It is seen, that this approach can actually provide at least for this kind of administrative offences the adequacy of the applied sanctions and measures and, most importantly, makes possible to achieve the purpose of an administrative penalty which is the education of persons who have committed administrative offence, in the spirit of observance to laws of Ukraine, respect for the rules of cohabitation, and prevention of committing further offences by the offender and other persons.

Of course, in practice there will be many questions about the mechanism of coercive measures, implementation sources of its financing etc. However, at this moment it is important to draw public attention to the search for, alternative instruments to influence drug addicts who systematically commit administrative violations praided in art. 44 of CUAO, and attract a great circle of scholars and practitioners to the discussion. Today, it is important at least to offer a possible model of sanctions to this kind of subjects of administrative liability, which may be the topic of discussion and constructive criticism, and in perspective, may be the basis of the system of administrative penalties for

the future codified administrative-tort act. There is a similar situation related to the problem of measures applicable to minors, such as the improvement of the system, increasing their efficiency etc. In this context it should be noted that any of currently known drafts of codes concerning administrative offences in this area unfortunately does not contain such innovations[12].

It should be noted that the problem raised on in this article might be solved by the introduction of the institute of criminal offense, since those administrative offenses which are tried in court (including the ones provided in art. 44 of CUAO) will come under the «jurisdiction» of criminal offenses. As its know, the only legal act, which establishes the mechanism for the implementation of the institute of criminal offenses, is the Concept of reforming the criminal justice of Ukraine, approved by the Decree of the President of Ukraine on 08.04.2008 № 311/2008 (hereinafter – the Concept). According to its statements the category of criminal offenses should include: a) the separate actsare minor offensesthat under the current Criminal Code of Ukraine and which will be recognized by the legislator as not having a significant degree of public dangeraccording to the policy of humanization of criminal law; b) acts that have judicial jurisdiction and are not managerial (administrative) in its natureprovided by CUAO[3]. Supporters of the inclusion of administrative offences in the category of criminal offenses note that this will result in the «criminalization» only in form or name, but not in substance, as the conviction in cases of criminal offences will not affect the realization of individual rights in the future (on for public service, etc.) because of the absence conviction; unfinished criminal offense will not lead to criminal liability; instead of a short term of imprisonment (administrative arrest) offense preventive measure of detention will not be applied; will be applied to a perpetrator of criminal[4 5].

[1] Проект Кодексу України про адміністративні проступки від 26.05.2004 р. № 5558 [Електрон. ресурс]. – Режим доступу: http://gska2. rada. gov. ua/pls/zweb_n/webproc4_1? id=&pf3511=18191.

[2] Кодекс України про адміністративні проступки та стягнення: проект // Реформування процедур накладення адміністративних стягнень і застосування заходів адміністративного примусу: матер. міжнар. конф. (м. Київ, 30–31 жовтня 2008 р.). – К., 2008. – С. 3–119.

[3] Концепція реформування кримінальної юстиції України: Указ Президента України від 08.04.2008 р. [Електрон. ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/311/2008.

[4] Коліушко І. Запровадження інституту кримінального проступку як необхідна складова реформи кримінальної юстиції в Україні / І. Коліушко, О. Банчук // Кримінальний кодекс України 2001 року: проблеми застосування і перспективи удосконалення: матер. міжнар. наук.-практ. конф. (м. Львів, 13–15 квітня 2007 р.): в 2 ч. – Львів: Львівський держ. ун-т внутр. справ, 2007. – Ч. 1. – С. 189–194.

[5] Гладун О. Інститут кримінальних проступків: елемент гуманізації законодавства України про кримінальну відповідальність чи шлях до криміналізації суспільства / О. Гладун // Наукові записки Інституту законодавства Верховної Ради України. – 2013. – № 6. – С. 91–95.

O. Gladun notes on this occasion that the situation does not deny the fact that a significant portion of individuals who previously would have been considered to be subjects to administrative penalty, will have the status of prosecuted or released from criminal liability. The fact that they will not be exposed to such stringent restrictions and deprivation compared to those people who have committed crimes, only shows compliance of measures of legal reaction to the degree of public danger (harm) of the criminal offense. Even the fact of conviction itself is enough to determine the fate of such person for years. The existence of the institute of conviction without punishmentin criminal law suggests that the state recognizes sufficient condemnation expressed in the judgment for proper educational and preventive effects on individual convicts. In addition, information about the individuals who has committed a criminal offense will be displayed in the criminal justice statistics (special records) and this information will accompany them throughout their lives[1]. However now it is too early to talk about the introduction of institute of criminal offenses in the legislation of Ukraine.

So, in conclusion, it should be emphasized that the problem of illicit trafficking of narcotic and psychotropic substances, the constant growth of drug-dependent persons will not fade away until its solution becomes a real (not paper) strategic task of the state, the realization of which will be carried out not only by means of criminal repressive tools, but also with systemic and systematic application of a combination of preventive and other administrative coercive measures, whose resource is currently practically not realized.

[1] Ibid

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PREAMBLE AS AN ELEMENT OF TAX–CODIFICATION TECHNIQUE

In modern legal literature codification istraditionally regarded as one of the most important forms of systematization of legislation. It organizes the existing regulatory material by radically processing the content and form of legal acts, creates on its basis a new consolidated and logically whole document. Codification is the most difficult form of systematization in organizational and intellectual aspects, because it also acts as a form oflawmaking. The principle of technical excellence of codification acts should be recognized as one of the main principles of codification. Instead, much of codified acts in our country can hardly be considered as perfect from the standpoint of legal technique. In turn, the technical imperfection of law is an imperfection of all law, a shortcoming that hinders and harms it in all its purposes and objectives[1]. Therefore currently existing problems of legal technique as a whole and codification technique in particular, need urgent solution.

The separationof codification technique from the lawmakingtechnique is justified in light of the characteristics of this activity and taking into account the specificity of codification instruments. Quite rightly it is treated as the most perfect type of rulemaking technique, which can act as alegislative technique, and as a subordinate rulemaking, since its result are regulations that can have not only legislative, but also subordinate nature[2]. It includes methods, means and techniquesused by the competent state authority, all aimed at streamlining the regulatory mass and unification of legal regulations into one codified document.

The 'quality' of the legal act depends not only on its content but also on its

[1] Иеринг ф. Р. Избранные труды: в 2-х т. / Иеринг ф. Р. – СПб.: Изд-во Р. Асланова «Юрид. центр Пресс», 2006. – Т. II. – С. 332.

[2] Гетьман Є. А. Кодифікація законодавства України: поняття, особливості, види: автореф. дис. … канд. юрид. наук: спец. 12.00.01 / Є. А. Гетьман. – Х., 2010. – С. 3.

form. It is no accident that lawmaking rules in its structural aspect include a proper structure of the text of the law and its details. The structure of the law is determined while taking into account the following elements: the name of the body that passed the law, the title of said law, introductory part (preamble), the normative content, an indication of failure to comply with the law and the responsibility for it, an indication of the abolition of other acts, the time of publication and enter into force, signatures of the responsible officials [1]. This list is not exhaustive, it can be supplemented with other components such as transitional and final provisions, addendums etc.

The preamble of the codified act (from the Latin *preambulus* – the one ahead) has a special place among the elements of the codification technique. Introduction (preamble) is an independent organic part of the law, which serves as an important addition to its core, normative part [2]. There is no unity of views among scientists on the legal nature of the preamble, its definition, structure, value and logical-epistemological possibilities. The question of whether it's mandatory in the body of codified acts also remains open. All of the above questions are not purely of theoretical significance, they also have a direct role to playin legislative and law enforcement practices.

It should be noted that of the 22 codes, existing at this moment in our state, preamble is used by the legislator in only 6 of them, namely: the Air Code of Ukraine, the Budget Code of Ukraine, the Commercial Code of Ukraine, the Water Code of Ukraine, the Housing Code of the Ukrainian SSR, the Labor Code of Ukraine. It is interesting to note that two of the codified acts serve as a kind of legacy that our country has received from the Soviet Union (the Labor Code of Ukraine was adopted in 1971, the Housing Code of the Ukrainian SSR – in 1983, and by the way, we can observe quite a rare phenomenon – the name of a state non-existent at this time has remained in its title). The last case of introduction of the preamble to the codified text datesthe 19th of May 2011 (the Air Code of Ukraine). We have only one case of the adoption of amendments to the preamble (the Labor Code of Ukraine in 1991). Most likely this was related to the declaration of independence of our state. Overall, the preamble (along with the title of the act) is basically the most stable part of the modern codes in Ukraine.

It is clear that the preamble has not yet acquired the status of a mandatory element. This attitude of national lawmakers is, apparently, caused by several

[1] Каратеев П. Ю. Техника законотворчества: проблемы совершенствования и развития на современном этапе (по материалам законотворчества Сахалинской области): автореф. дис. … канд. юрид. наук: спец. 12.00.01 / П. Ю. Каратеев. – СПб., 2007. – С. 22.

[2] Нормография: теория и методология нормотворчества: уч.-метод. пособ. / А. И. Абрамов, Ю. Г. Арзамасов, В. И. Маньковская и др.; под ред. Ю. Г. Арзамасова. – М.: Акад. проект; Триста, 2007. – С. 222.

factors. First of all, this situation is due to the lack of a sustainable tradition of its inclusion into the texts of legal acts, and to the lack of a clear understanding of the importance of the preamble, and, respectively, the demands for its use.

In the scientific community opinions about the preamble range from refusing it the right to exist[1] to making itmandatory[2] (specifying this approach lawyers note that the presence of the preamble in the code is political expediency and at the same time a legal necessity[3]). Within these polar positions we can single out the following, that: a) suggest the possibility of introducing a preamble to the structure of the statute as an optional component[4]; b) consider it appropriate to include it in the structure of the act[5] or desirable[6]; c) agree with using it if necessary[7] and where necessary[8]. In the context of the legislative techniques outlined above we find interesting the view of I. Tabarin. In short, the scholar believes that preamble is a dogmatic nonsense, an unnecessary text, which clogs the document [9]. A very emotional assessment, but, as it often happens in such cases, it is hardly objective.

Despite the importance of the preamble, in our opinion, it should be recognized asan optional element of the legislative technique. The issue of its inclusioninto the text of the legal act

[1] Бержерон Роберт К. Правила нормо проектування / Бержерон Роберт К. – Без місця вид., 1999. – С. 7.

[2] Лутова Л. К. Преамбула нормативного правового акта (проблемы теории и практики): автореф. дис. … канд. юрид. наук: спец. 12.00.01 / Л. К. Лутова. – Нижний Новгород, 2011. – С. 7.

[3] Лучихина И. Ф. Преамбула кодекса: юридическая необходимость или политическая целесообразность? / И. Ф. Лучихина, Л. К. Хачатурова // Матер. междунар. научн.-практ. конф. – Н. Новгород: Нижегород. акад. МВД России, Торгово-промышленная палата Нижегородской области, 2009. – С. 380; Лутова Л. К. Преамбула нормативного правового акта (проблемы теории и практики): автореф. дис. … канд. юрид. наук: спец. 12.00.01 / Л. К. Лутова. – Нижний Новгород, 2011. – С. 8.

[4] Болдырев С. Н. Юридическая техника: теоретико-правовой анализ: дис. … д-ра юрид. наук: спец. 12.00.01 / С. Н. Болдырев. – Ростов-на-Дону, 2014. – С. 374; Гранкин И. В. Парламентское право Российской Федерации: курс лекц. / И. В. Гранки. – М.: Норма: ИНФРА-М, 2010. – С. 216–217.

[5] Дзейко Ж. О. Назва та преамбула закону як елементи його структури / Ж. О. Дзейко // Бюлетень М-ва юстиції України. – № 1. – 2014. – С. 60; Чернобель Г. Т. Заголовок и преамбула закона / Г. Т Чернобель // Законодательная техника: науч.-практ. пособ. / Л. Ф. Апт, Н. А. Власенко, В. Б. Исаков и др.; под ред. Ю. А. Тихомирова. – М.: Городец, 2000. – С. 124–129.

[6] Кашанина Т. В. Юридическая техника. – 2-е изд., пересмотр. / Т. В. Кашанина. – М.: Норма; ИНФРА-М, 2011. – С. 128.

[7] Ткачук А. Законодавча техніка. Практичний посібник. Як готувати проекти законів / А. Ткачук. – К.: Ін-т громадянського суспільства, 2004. – С. 75; Скакун О. Ф. Теорія права і держави: підруч. – 2-ге вид. / О. Ф. Скакун. – К.: Алерта; КНТ; ЦУЛ, 2010. – С. 355.

[8] Биля І. О. Теоретичні основи використання нормотворчої техніки: автореф. дис. … канд. юрид. наук: спец. 12.00.01 / І. О. Биля. – Х., 2004. – С. 12; Загальна теорія держави і права: підруч. / М. В. Цвік, О. В. Петришин, Л. В. Авраменко та ін.; за ред. М. В. Цвіка, О. В. Петришина. – Х.: Право, 2009. – С. 304.

[9] Табарин И. В. Современная теория права: новый научный курс / И. В. Табарин. – М.: Изд. Табарина И. В., 2008. – С. 275.

largely depends on the kind of document you are dealing with. Thus, we believe that we cannot determine the true nature of the preamble without considering this moment. Preamble in legal acts is a real expression of a 'value pack', it's a 'channel'of fixing state policy, its subjects and other participants of the lawmaking process. Preamble of the legal document actsas away of legal education, as a method of raising the legal culture [1]. Preamble is not only placed at the beginning of the text. It sets the «tone», determines the overall focus of the content of the act. In it the main goal, objectives, motivation of the decision to adopt a legal act are fixed. It is logical that creative work on the design of a future code should begin with formulation of ideas inthe preamble, which will serve as its foundation. Obviously, outside the legislative technique preamble generally is an «extravagant» item. The decisionon its usage in the structure of a specific law act naturally belongs to the lawmakers.

This problem should be solved differently regarding the issue of codification. In our view, the determining factor in this is the kind of codificationthat is being used. The preamble probablyshould be excluded duringthe codification at the regional (local) level and the codification of bylaws. Instead, the preamble should be a mandatory element of the codification technique during systematization of codes. It, however, is clear that this position requires legislative fixation. In such a case both the specificity and importance of the code (that, on the one hand, is usually the result of sectoral (subsectoral) codification, on the other hand – a nationwide act that governs the relevant public relations) and the features of the preamble will be properly taken into account.

Another factor in favor of using the preamble in codes is that it can serve a function of harmonization. For example, in the absence of a single financial code, at present there are two separate codes: the Budget Code of Ukraine and the Tax Code of Ukraine. However, among them there are some fundamental differences. The preambles of these codified laws could contribute to the harmonization of financial regulation. In turn, in case of further specialization expansion of codification acts, for example the adoption in addition to the Tax Code of Ukraine also the Code of Tax Procedure of Ukraine, their preambles can serve as a 'compensating' and 'matching' instrument for the removal (smoothing) of differences and contradictions. Firstly, they will contribute to the objective delimitation of legislative regulation, and secondly – they will harmonize their positions as 'family' codes.

Generally, it should be noted that unlike the Budget Code of Ukraine, the Tax Code of Ukraine does not contain such an element of tax-codification technique as preamble. This approach to the formation of the structure of the codified act, apparently, is not accidental. Perhaps it can be justified by retrospective «succession.»

[1] Лутова Л. К. Преамбула нормативного правового акта (проблемы теории и практики): автореф. дис. … канд. юрид. наук: спец. 12.00.01 / Л. К. Лутова. – Н. Новгород, 2011. – С. 3.

For example, decrees of the Cabinet of Ministers of Ukraine on taxation that were adopted in the 'special period ''On income tax'[1],'On state customs'[2],'On the recovery of tax and non-tax paymentsnot made within the required period'[3], 'On tax on profits of enterprises and organizations'[4],'On value-added tax'[5], 'On excise tax'[6] did not contain the preamble.

Along with this, the Law 'On the Taxation System of Ukraine', which long served as a kind of substitute for the General partof the Tax Code, contained the introductory part in its structure. It fixed, that this law defines principles of tax system in Ukraine, taxes and mandatory payments to budgets and state funds, and the rights, duties and responsibilities of taxpayers[7]. Among the most significant codification acts in the field of taxation prior to the adoptionof the Tax Code of Ukraine and the text of which included preamble is a Decree of the Cabinet of Ministers of Ukraine 'On Local Taxes'[8]: 'This decree defines the types of local taxes, their size and procedure of calculation, and aims to strengthen local budgets'.

A special place in this line holds the Law of Ukraine 'On the order of repayment obligations' commitments taxpayers to budgets and state trust funds' [9]. On the one hand, it may eventually become a prototype of the Code of Tax Procedure of Ukraine or the kind of procedural part of the new edition of the Tax Code of Ukraine, on the other hand – its preamble was very largein size and had an unusual structure (containing three paragraphs). Moreover, if the first paragraph was 'positive' in its content (it defined relations regulated by the act), the second and third paragraphs were 'negative' (they established a list of relations that are not subject to regulation by this act).

Thus we can say that national legislators held an inconsistent positionon the issue ofusing the preamble as part of tax-codification technique, which led to the disparity in its inclusion in the codified acts. It can be assumed, in particular, that when assessing the effects of the preamble in the tax laws of our country lawmakers go from negative understanding of the results, because it is not included in the Tax Code of Ukraine.

However, it should be noted that Ukraine is not unique in terms of the absence of a preamble in the Tax Code. In most of the former Soviet republics in which tax codes were adopted (Azerbaijan, Kyrgyzstan, Belarus, Kazakhstan, Tajikistan, Uzbekistan, Russia, etc.), the situation is similar to ours.

It is important to emphasize that if you try to predict the prospect of the preamble as part of the tax-codification technique, its application is not only desirable in domestic realities. In our view,

[1] Голос України від 9 серпня 1991 р.
[2] Урядовий кур'єр від 5 червня 1993 р.
[3] Офіц. вісник України. – 2001. – № 7. – Ст. 259.
[4] Відом. Верхов. Ради України. – 1993. – № 10. – Ст. 77.
[5] Уряд. кур'єр від 11 лютого 1993 р.
[6] Відом. Верхов. Ради України. – 1993. – № 13. – Ст. 114.
[7] Відом. Верхов. Ради України. – 1993. – № 10. – Ст. 76.
[8] Ibid. (Ст. 78)
[9] Ibid. (Ст. 82)

the introduction of the preamble is necessary, because in order to ensure the effectiveness of legislative regulation of relations in the field of taxation we should involve all of the tools available. And the value of the preamble as a concentrated expression of the «spirit» of codified act, its core, is difficult to overestimate. The development of any codifiedtax act must begin with the definition of its concepts and the wording of its preamble. And it's not just a matter of legislative technique. Construction of the preamble simultaneously serves, on the one hand, to harmonize all of the parts of the act (the internal aspect), and on the other hand, creates a balance of regulatory mass (external aspect). Overall, the use of the preamble will help minimize the differences of the domestic tax laws.

In conclusion of our study, we must note that the issues of the scope and structure of the preamble in codified acts, as they are now and how we see them in the future, deserve a special discussion. At present most of the preambles are limited to one sentence. Moreover, the ircontent is often too 'general'. It is unlikely that in this case the preamble adds something significant to the code. It is important to achieve a harmonious combination of form and content of the outlined element. In the context of the Tax Code of Ukraine, the preamble, in case of its inclusion to the structure of the act, should be concise in nature, vested with special legal force and must include: a) the reasons for itsadoption; b) main objectives of the document; c) 'features' that allow the code to be distinguished from other legal acts.

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THE DEVELOPMENT OF SOCIAL EUROPE IN THE 20TH – 21ST CENTURY: PROBLEMS AND PROSPECTS

The most revolutionary changes in the legal and socio-economic development of European countries took place in the second half of the 20th century. They are associated primarily with the creation of the European Communities which economically transformed into a powerful supranational European Union. Although the 21st century has just begun, it already introduces significant amendments and qualitative changes in global processes that are inevitably absorbed by the European countries. Despite the fact that these processes are typically caused by political and economic factors, and primarily affect business environment and political spheres in a particular country, region or the world in general, their social consequences currently play an important role. This means that it is not accidental that according to scientific predictionssocial problems will determine the specificity of a new century. If the following conclusion regarding certain regions or the whole world still looks debatable, at the national level this statement seems quite reasonable as evidenced by the supplementation of traditional principles of constitutional order with the principle of social statehood[1].

After the Second World War in many Western European countries the legal regulation of social policy was carried out, but the disadvantage was that it provided only a minimal social assistance

[1] Яковюк І. В. Реалізація соціальної функції держави в умовах європейської інтеграції / І. В. Яковюк // Державне будівництво та місцеве самоврядування: зб. наук. пр. – 2004. – № 7. – С. 40–48; Яковюк І. В. Проблеми становлення й розвитку соціального права в Європі: історико-правовий аналіз / І. В. Яковюк // Юридичний науковий електронний журнал. – 2014. – № 5. – С. 164–167; Головащенко О. С., Окладна М. Г. Європейський соціальний простір: проблеми формування / О. С. Головащенко, М. Г. Окладна // Юридичний науковий електронний журнал. – 2015. – №3. – С. 12–14.

and required adjustments in accordance to socio-economic needs of society which was a subject to constant changes. It should be noted that from the very beginning every country was forming the system of social protection, based on the specific national circumstances and in accordance with the ruling ideology, disposal of political forces and in accordance with the requirements of time. The existence of several quite different models of social statein Europewhich variously interact with civil society and market economy – made the task regarding the harmonization of social policy of EU Member States extremely difficult to achieve.

However, the fact is being gradually realized at the level of national governments and institutions of the European Communities that the formation of social spacewithin which equal opportunities are provided for everyone who live within its limits – will prevent uneven socio-economic and legal development of the Member States, the appearance of Europe of «different speeds», which would lead to recreation of existing in the social sphere differences on communitarian level.

The social policy of united Europe has gone through several stages during its development. The improvement of the mechanisms of its functioning, the expansion of competence of supranational institutions, the creation of a new organs that can cooperate with national governments with regards to the issue on implementation of social functions – have always been caused by the requirements of economic and only in the late 20th century political integration. Therefore, V. I. Salo states that disputes regarding the correlation of national and supranational levels of government has never stopped and depending on the specific historical conditions and needs touched certain areas of regulation of social sphere. Thus the expansion of the powers of the EU institutions in the social sector was extremely slow[1].

The renewal of the paradigm of social development and social policy in the EU was very consistent and gradual, taking into account the previous achievements of Member States and the community as a whole, existing national traditions based on an in-depth analysis of current status and perspectives of its development on the basis of politically productive, and responsible principles of the social balance (social justice, social solidarity, social cohesion and social integration) and the dialog[2]. As a result, the level of centralization of social policy on the supranational level was largely determined by the natureof the problems which were set for an integration union –peculiarities of the corresponding stage of development.

Despite the fact that EU Members had differences in their vision of the purpose of social policy[3], as well as its content, the majority of them (except for UK

[1] Сало В. І. Внутрішні функції держави в умовах членства в Європейському Союзі: дис…. канд. юрид. наук: 12.00.01 / Володимир Ігорович Сало. – Х., 2008. – С. 161.

[2] Люблинский, В. В. Социальная политика в условиях трансформации общества в странах Запада: вторая половина XX – начало XXI в.: дис…. д-ра полит. наук: 23.00.02 / Виктор Викторович Люблинский. – М., 2005. – С. 299.

[3] Вітте Л. Європейська соціальна модель і соціальна згуртованість: яку роль відіграє ЄС? / Л. Вітте. – К.: Заповіт, 2006. – С. 7–8.

and Ireland) declared their desire to bring national social models in line with the model, which was called the European Social Model (hereinafter – ESM). Thus they once again confirmedtheir commitment to European humanitarian values, common interests and human rights, and also an intention to achieve a balance between economic growthand social justice. Hence, by introducing ESM, European governments aimed to achieve a substantial improvement of well-being and to increase the level of economic development of the Union in general and each Member State respectively, to ensure the effective functioning of the economy and a fair distribution of social wealth.

The construction of a single social space in Europe intensified in the second half of the 1980s and was associated with the need to obtain broad social support for the integration process which had reached the level of transformation of the European Communities to the European Union. The EU social policy recognized as one of the principal tools of integration after the adoption of a Single European Act (hereinafter – the SEA). During this period the positioning of the community started, which was formed within the European Communities as a socio-political civilization of a new type – based on the democracies of European type, socially oriented market economy, legal and social state. The SEA introduced to the agenda such a difficult task as the formation of a single social space within the Community. It slightly extended the competence of a supranational institutions in the social sphere (in compliance with the principle of subsidiarity[1], but it managed to break the unanimity principle when resolving issues related to the safety and health of workers. Another innovation introduced by the SEA was a recognition of the role of social partners as essential participants in the implementation of the communitarian social policy.

The implementation of an objective of the development of social community demanded the changes in the existing approaches and those changes took place. The EEC Treaty was supplemented with the Chapter «Economic and Social Connection», Article 118a, which determined the responsibility of Member States for resolution of social problems; Article 22, which put on the Commission a duty to promote a dialogue between the social partners. However, the most essential innovation was a breach of the principle of unanimous voting – it was envisaged that the issues related to safety and health of workers are passed by a qualified majority of votes.

A further substantial step on the way of formation of the European social model was the adoption of the Community Charter of Fundamental Social Rights of Workers in 1989 which secured 12 basic rights: the right to work in any Member State; the right to a fair remuneration for work; the right to improvement of living and working conditions; the right to social protection ac-

[1] Яковюк І. В. Субсидіарність як принцип взаємовідносин національних держав і Європейського Союзу / І. В. Яковюк // Вісн. Акад. прав. наук України. – 2004. – №4. – С. 22–30.

cording to the rules of the EU Member States; etc. The Charter, which had a political rather than a legal nature, did not extend the competence of the Community in the social sphere. However, it can be considered as an attempt to clarify the content of the European social model.

The expansion of the legal framework of social policy was made as a result of signing of the Maastricht Treaty establishing the European Union, that supplemented the Treaty establishing the EEC with the Chapters VIII «Social policy, education, vocational training and youth» and XIV «Economic and social connections.»In turn the Amsterdam Treaty envisaged the activation of social policy and harmonization of national social legislation. The social policy of the EU is currently understood as firstly, the development of the concept of the EU activities in the social sphere; secondly, the identification of determinants, which guarantee the quality of life, steady growth, competitiveness and other key indicators of the thorough growth of the EU potential; thirdly, the creation of a comprehensive system of measures and programs, social techniques whichens ure the social stability, overcoming of internal contradictions and the struggle between different social forces; fourthly, the formation of the mechanism that will guarantee the interests of the EU and the resolution of corresponding tasks in the social sphere; fifthly,'forecasting' of social future of the EU, ways of social development of a new society that integrates and possible consequences of this complex and largely contradictory process[1]. This means that the present policy of the EU became more interesting than during previous stages of integration when its job was limited to resolution of the issues of payment and labor conditions, training, pensions and social assistance.

Among all the documents that were adopted, a particularly interesting one is the Protocol, whichconsolidated the EU right of implementation of social policy and defined the limits of its interference. Nowadays these agreements with annexes and «Program of social actions» determine the legal basis of social policy of the Union and provide legal conditions for the implementation of the rights proclaimed in the Charter. Adopted documents showed the awareness of the Europeans of a need to pay attention to the problems that define the concept of «social dimension».

The term «social dimension» focuses the social consequences of each direction of the EU policy and activities of the Union is seen through the prism of its existing framework of social problems. The introduction of the concept of «social dimension» should be interpreted as the intention of the European Union «to face the man» and build all its activities in accordance with social norms, preventing the development of such a problem as»social dumping». In the geographical borders of the EU social dimension is expressed through the

[1] Каргалова, М. В. Социальная политика Европейского Союза. Концептуальные аспекты и тенденции развития в 80–90-е годы: дис.… д-ра истор. наук: 07.00.03 / Марина Викторовна Каргалова. – М., 1999. – С. 12.

creation of a single social space – a category that means a space within which under the EU law social policies of the Union are implemented[1].

In the early 1990s united Europe faced a number of problems in the social sphere, the most important of them are the following two: firstly, the expansion of the powers of the EU organs and institutions that would allow them to implement measures in the framework of national governments' social functions of the state quickly and effectively; and, secondly, the implementation of the principles of convergence (economic and social cohesion of the Member States of the EU) and the harmonization of national social security systems. These problems have become especially important given the growing negative attitude of Europeans to the problem of social inequality.

It is not the first time when theunited Europe faced the need to implement policies of economic and social cohesion. When Great Britain, Ireland and Denmark entered the integration Union in 1973, the European Community for the first time faced the objectives regarding joint actions which were different from those that the social and economic development partners had. The answer to the following challenge was the establishment in 1975 of the European Regional Development Fund, whose activities were concentrated on supporting regional development programs. The acquisition of the EU membership by Greece, Spain and Portugal further exacerbated the problem of existing imbalances within the Community. However, the EEC had to deal with much more important problems as a result of integration of CEE countries which weresignificantlybehind the social standards of the EU. In this regard, there was an increase in the threat of social dumping in the EU. The conflict of «old» and «new» Europe lies in the fact that workers of «old» Member States faced with a competition in the labor market from «new» Union members' workers who gave their consent to work for smaller salary. This situation created clear advantages for businesses of «old» Member States who got cheap labor, but it led to a devastating impact on trade union movement of the same countries. The social dumping of legal migrants from CEE countries has caused a disquietude not only of trade unions, but also of local population which felt a threat to their high standard of living.

To solve the problem by introducing restrictions on migration of labor within the European Union is unacceptable as it violates one of four freedoms on which a single domestic market is formed – the freedom of free movement of persons. One of the ways of problem resolution is the implementation of the EU phased measures of the integration of labor markets of a new EU Member States to the all-European labor market. Such measures that are imperative in nature are traditionally listed in the protocols to the

[1] Каргалова, М. В. Социальная политика Европейского Союза. Концептуальные аспекты и тенденции развития в 80–90-е годы: дис…. д-ра истор. наук: 07.00.03 / Марина Викторовна Каргалова. – М., 1999. – С. 7–9.

agreements on accession. However, this way has certain drawbacks, since the protocols contain a limited list of requirements in the field of social and labor relations which must be complied with by a new Member States. As a result, in respect of a considerable number of relations within the scope of social and labor law of the EU, the requirements for their adaptation to the relevant all-European standards are not established.

The contraposition of economic and social rights, and the erosion of social standards between «old» and «new» EU Membersthreatens the EU with the process of disintegration that induces the institutions of the Union to respond to the problem. The European Parliament passed a special Resolution in 2008 (European Parliament resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085) INI)), in which it emphasized that it is inadmissible to give preference to economic rights over social. The Parliament also invoked national governments to develop measures jointly which would limit a social dumping between the EU Member States.

The Head of the European Commission J. M. Barroso demonstrated a commitment to the idea of the provision of social rights in his message to the European Parliament (2009), in which he noted that social rights, including the right to strike and to unite are fundamental to the European model of society. During his speech at the plenary session of the European Parliament (15 September 2009), he emphasized on several fundamental positions for the Commission: a) the financial crisis requires constant attention to the social dimension of all levels of government where decisions are made; b) the priority of the European Commission will still remain the provision of a high level of employment and a social unity; c) it is inadmissible to oppose the freedom of movement and social rights; d) the Commission will vigorously fight social dumping regardless of the forms of its manifestation; d) the European Parliament together with the Council should develop legislation that will regulate issues which have arisen in connection with the dumping of labor[1].

The expansion of functions of communitarian institutions of the EC indicates that their role in the sphere of implementation of social policy is intensified. Nowadays they are involved in the following: development of a strategy of social evolution of the EU, framework programs of social actions and general guidelines; conduction of numerous researches on promotion of social dialogue; analysis of the situation and monitoring of the agreed course and implementation of the decisions within the Member States, and where necessary – development of recommendations for national governments; coordination of Member States'

[1] Position Paper from the European Federation of Building and Woodworkers on fundamental social rights in the European Union [Електронний ресурс]. – Режим доступу: http://www. efbww. org/pdfs/FSR%20GB%20new. pdf.

actions; development of supranational legislation on social issues and controlof its implementation into national law; development and execution of their own initiative programs which are financed by the EU budget through loans of the European Investment Bank and other sources[1].

The history of European integration proves that the processes of economic and political integration are largely determined by the degree of compatibility of social space of the countries that take part in it, so far as the formation of an integral social organism implies a certain compulsory outgoing level of qualitative compatibility of its components on the basic parameters including social. However, not all countries adhere to a unified view of social policy in the EU and, therefore, there are a lot of significant differences between Member States in the degree of socio-economic development, and each stage of the expansion of the Union only emphasizes the existing differentiation.

The analysis of the implementation of social protection policies attests that in the EU there is a significant number of differences between Member States in terms of spending on social protection[2]. However, they are only partly connected with the difference in well-being and prices. They reflect more the existing differences in national systems of social protection, regarding the unification of which there is a clear ban in the Union – in demographic trends, unemployment rates, as well as other social institutional and economic factors. Thus the indicators of social spending in Spain, Portugal and Ireland prove that the EU membership does not automatically lead to a rapid levelling of existing differences in standards of social security between new and old Members of the Union. Besidesthere are countries outside the EU that with regards to social expenditure are practically at the same level with the EU states that are leaders in conduction of social policy. Therefore, the level of social protection depends not so much on the EU membership, as the effective social policy of national governments, as well as the activities of the institutions of the European Union which can have an influence on social policies of Member States with the help of EU Structural funds.

In March 2010 the European Union has developed and adopted a new strategy of economic evolution for the next ten years «Europe 2020: A strategy for smart, sustainable and inclusive growth»[3]. One of the objectives of the Strategy is to ensure a comprehensive growth, which should provide people with new opportunities through the high

[1] Савич М. Особенности функционирования механизма социальной политики Европейского Союза на современном этапе / М. Савич // Белорус. журнал междунар. права и междунар. отношений. – 2003. – №2.

[2] Яковюк І. В. Правові основи європейської інтеграції: загальнотеоретичний аналіз / І. В. Яковюк. – Х.: Право, 2013. – С. 601–602.

[3] Europe 2020: A European strategy for smart, sustainable and inclusive growth [Електронний ресурс]. Режим доступу: http:// ec. europa. eu/eu2020/pdf/ COMPLET%20 EN%20BARROSO%20%20%20007%20-%20 Europe%202020% 20-%20EN%20version. pdf.

level of employment, investments in the knowledge and skills, by fighting poverty and improving labor market, education and social security – which all together contribute to construction of the united and more socially homogeneous society. To sum up, the European Union determines the success of the economic integration of actual achievements in social policy, emphasizing the role of the latter in the priorities of the EU for now and for next ten years.

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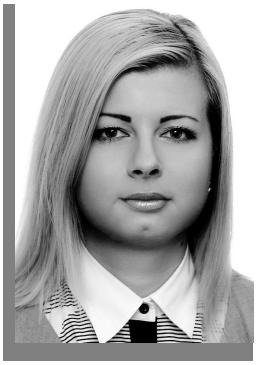

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LEGAL REGULATION OF RIGHTS OF SOME VULNERABLE GROUPS UNDER THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: EXPERIENCE FOR UKRAINE

The Basic Law of Ukraine solemnly proclaims, that «the human being, his or her life and health, honour and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State» (art. 3). This provision defines the philosophy of the state in the field of human rights and determines general social vector in relations between the state and a person. Though the Constitution of Ukraine is nearly 20-years in force, numerous drawbacks in insuring of rights and freedoms became brightly visible and in many cases got the form of system violations[1]. One of the reasons of non-fulfillment or improper fulfillment of the constitutional obligation of the state to insure human rights and freedoms is connected with legal gaps in the Basic Law of the state. We reckon, in the process of constitutional reform, which is necessary for the European integration of Ukraine, it is extremely important to take into consideration particularities of legal regulation of human rights and freedoms in the European Union, as its membership is the core priority of foreign policy of our state[2].

[1] Щорічна доповідь Уповноваженого Верховної Ради України з прав людини про стан додержання та захисту прав і свобод людини і громадянина в Україні. – К.: Права людини, 2015. – 552 с.

[2] Про засади внутрішньої і зовнішньої політики України: Закон України від 01.07.2010 № 2411-VI // Відом. Верхов. Ради України. – 2010. – № 40. – Ст. 527.

The Charter of the Fundamental Rights of the European Union of 07.12.2000[1] (hereinafter – the Charter) is the basic and the key legal act dealing with ensuring human rights and freedoms. Since the Lisbon Treaty came into force, the Charter became legally binding as the part of the EU primary law, being at the same level with the founding treaties. It systematize all the rights and freedoms on the EU level which are binding for all «institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers (part 1 of art. 51 of the Charter).

Furthermore, being the unique legal act as for the mode of systematization of rights and freedoms (they are divided into groups not by the generation of human rights as it relevant to international treaties, but the values of the EU), the Charter provides the highest standards of these rights. For instance, article 35 guaranties «a high level of human health protection», article 37 – «a high level of environmental protection», article 38 – «a high level of consumer protection». It is absolutely clear, Ukraine should implement these standards in the future. But taking into consideration modern political events, their reception should not give a desirable effect in the nearest future. At the same time we may guess, that in the absence of proper economic support of the state these legal provisions should remain no more than declarative (as numerous provisions of the Ukrainian Constitution (especially in art. 47 (right to housing), art. 48 (right to a standard of living sufficient for oneself) etc.).

At the same time, there are several articles in the Charter important to be provided and guaranteed even in the current situation. Thus, a strong emphasis in the specified EU Founding Act made towards ensuring the rights of vulnerable groups who need extra protection for various reasons. The philosophy of the Union is quite simple: the level of society should be determined because of the attitude of the society towards people who need special protection, not to be discriminated within the society. In most EU Member States (Austria, Estonia, Lithuania, Poland, Romania, Slovenia, Croatia etc.) the rights of vulnerable people also got a special attachment at the highest constitutional level, often reproducing the relevant provisions of the Charter or developing its standards.

The essence of these special rights is not to grant additional rights to certain individuals and legal means to ensure the conditions in which all would equally enjoy universal rights and freedoms. The concept of «positive discrimination» is related to the special human rights, which is used as a temporary legal measure aimed at accelerating the achieve-

[1] Charter of Fundamental Rights of the European Union of 07.12.2000 [Електронний ресурс]. – Режим доступу: http://europa. eu/eu-law/decision-making/treaties/pdf/consolidated_versions_of_the_treaty_on_european_union_2012/consolidated_versions_of_the_treaty_on_european_union_2012_en. pdf

ment of equality of people in society *de facto*. With these conditions, it is considered justified and appears to be legally established temporary, unequal, differentiated standards and privileges to protect those who are discriminated[1].

International law traditionally recognizes as vulnerable people children, women, the elderly, the sick, including those with long-term physical or mental disability (disabled), representatives of various kinds of minorities, refugees, foreigners and other persons who temporarily need extra protection. Of course, it is impossible to fully consider the particular protection of all these groups for the EU Charter of Fundamental Rights in the same article, so we will focus on the study of the regulation of the rights of children, the elderly and people with long-term physical or mental disabilities that are most numerous in society. Unfortunately, the Fundamental Law of Ukraine 1996, which is the legal basis for the rights and freedoms of human and citizen in our country, does not contain adequate legal provisions to safeguard the rights of such persons. Thus, the study of specific legal regulation of rights of groups of persons defined by EU Charter in the context of constitutional reform in Ukraine is the purpose of this article.

It is important to note that currently the domestic doctrine of International law virtually has no comprehensive works devoted to the outlined problems. At the EU level the rights of vulnerable groups of persons considered mainly within the general research of legal status of a person or certain aspects of functioning of the EU. This is the work of N. Vasylieva, A. Holovko, M. Gnatovskyi, S. Dobrianskyi, M. Mykiievych, V. Muraviov, O. Tragniuk etc. At the same time, the issue of protecting the rights of certain vulnerable groups in the International law have become more careful in securing scientific research M. Buromenskyi, O. Vinhlovska, A. Honcharenko, D. Kytsenko, A. Kotliar, V. Mytsyk, N. Plakhotniuk, A. Poiedynok, K. Chykhmar and others.

Let us study the regulation on the rights of each of these groups in the EU Charter compared to the Fundamental Law of Ukraine. It is well known that the EU set pretty high standards for the protection of children's rights. Expressing the general approach of the European Union to ensure the rights of children at the event dedicated to the 20th anniversary of the UN Convention on the Rights of the Child 1989[2] the EU Commissioner for Justice, Freedom and Security Jacques Barrot emphasized that the EU was not only trying to adhere strictly to the provisions of the said international contract, but also to develop policies and legislation «to protect children and allow them to develop their full potential so that they become a force to be counted with in the future»[3].

[1] Міжнародне право: навч. посіб. / за ред. М. В. Буроменського. – К.: Юрінком Інтер, 2005. – С. 192–193.

[2] Конвенція ООН про права людини від 20.11.1989 р. // Зібрання чинних міжнародних договорів України. – 1990 р. – № 1. – Ст. 205.

[3] ЄС відзначає 20-ту річницю захисту прав дитини та дивиться у майбутнє (20/11/2009) [Електронний ресурс]. – Режим доступу: http://eeas. europa. eu/delegations/ukraine/press_corner/all_news/news/2009/2009_11_25_1_uk. htm

Article 52 of the Constitution of Ukraine, which is directly devoted to children's rights, establish only the principle of equality of children regardless of origin or birth, prohibition of child abuse or exploitation, and defines the obligations of the state to ensure the protection of orphans and support charities for children. From the other hand, the Charter contains wider obligations to the child displaying these provisions. Thus, in its art. 24 states that "(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration…». As seen, the EU Charter establishes a number of obligations, which is very important to ensure adequate protection of children's rights in society for their harmonious development, so they should be fixed in the Constitution of our country. It is important to note that at the constitutional level of some EU member states the right of children received more guarantees that are substantial. Thus pt. 1 of art. XVI of the Constitution of Hungary 18.04.2011[1] states, that «every child shall have the right to the protection and care required for his or her proper physical, mental and moral development». There is a provision at art. 72 of the Constitution of the Republic of Poland 20.04.1997[2] that says "(1) The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense… (3) Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child». The pt. 5a of art. 14 of the Constitution of the Federal Republic of Austria of 1930 (amended 2014)[3] states that children and youth should be provided with «intellectual, mental and physical development to let them become healthy, self-confident, happy, performance-oriented, dutiful, talented and creative humans capable to take over responsibility for themselves, fellow human beings, environment and following generations, oriented in social, religious and moral values». Consequently, these rules are quite progressive and appropriate to modern development of guaranteeing of children's rights in the EU, while, that is quite interesting, a special component of this right is highlighted – the right to moral development and education in the spirit of social, religious and

[1] Constitution of Hungary of 18.04.2011 [Електронний ресурс]. – Режим доступу: https://www. constituteproject. org/constitution/ Hungary_2011. pdf

[2] Constitution of the Republic of Poland of 02.04.1997 [Електронний ресурс]. – Режим доступу: http://www. sejm. gov. pl/prawo/konst/ angielski/kon1. htm

[3] Federal Constitutional Law of Austria of 1930 (amended 2014) [Електронний ресурс]. – Режим доступу: http://www. legislationline. org/documents/section/constitutions

moral values. In our view, such a legal status should be taken into account in the process of modernization of Ukraine's Constitution.

The rights of the elderly and people with long-term physical/mental disability (disabled) are also not regulated by the Basic Law. In particular, art. 46 of the Constitution of Ukraine guarantees only the right to social protection, while the Charter contains a broader commitment of the EU and its Member States to ensure a significant range of rights of such persons. In particular, art. 25 of the Charter guaranteed that «The Union recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life». Article 26 of the Charter directly dedicated to the integration of physically or mentally disabled people: «The Union recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community». These rules actually reflected in the Constitutions of many Member States. Thus the art. 52 of the Constitution of the Republic of Slovenia 23.11.1991 (amended 2013)[1] proclaims «physically or mentally handicapped children and other severely disabled persons have the right to education and training for an active life in society».

An important guarantee of the rights of vulnerable people is the norm of the art. 21 of the Charter, under which «any discrimination based on any ground such as… disability, age…». There is the relevant discrimination grounds at the art. 24 of the Constitution of Ukraine not explicitly mentioned in view of the fact that it contains a non-exhaustive list of grounds. However, we believe that there would be necessary to supplement this list with the above-mentioned provisions of the Charter. In addition, the rule that in order to achieve actual equality in society for vulnerable persons may be granted additional protection that is not a manifestation of violation of the right to equality should be to fixed in the art. 24 of the Basic Law of Ukraine. In this regard, it is appropriate to give examples of the EU Member States. In particular, at the art. 7 of the Constitution of the Federal Republic of Austria of 1930 (amended 2014), devoted to the provisions on discrimination, emphasizes that «no one shall be discriminated against because of his disability. The Republic (Federation, provinces and municipalities) commits itself to ensuring the equal treatment of disabled and non-disabled persons in all spheres of everyday life». There is a provision at the art. XV of the Constitution of Hungary 18.04.2011 which is also dedicated to the general principles of non-discrimination, given that the state «shall adopt special measures to protect children, women, the elderly and persons living with disabilities». Interesting is also the fact that almost simultaneously with the accession to the EU (15.06.2004) because of the provisions of the Charter art. 14 of the Constitution of the Republic of Slovenia

[1] Constitution of Slovenia of 23.11.1991 (amended 2013) [Електронний ресурс]. – Режим доступу: http://www. us-rs. si/media/constitution. pdf

11.23.1991 («equality before the law») was amended with rule on non-discrimination because of physical or mental incapacity. This approach to protection of the rights of the elderly and the disabled from discrimination and their maximum integration into the social life is reflected in international instruments. In particular, according to the United Nations Principles for Older Persons, defined in General Assembly Resolution № 46/91 of 16.12.1991[1] and the Proclamation on Ageing № 47/5, adopted by the UN General Assembly on 16.10.1992[2], the global goal is proclaimed the need to make a full life of older people. According to the art. 4 of the UN Convention on the Rights of Persons with Disabilities of 13.12.2006[3], which was entered into force for Ukraine 06.03.2010, our state has taken an obligation «to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability». However, we can state with regret that these international commitments practically not properly implemented in our country.

An important part of the mechanism of protection of rights and freedoms of persons, including those belonging to vulnerable groups, is the right to judicial protection. The first two parts of the art. 55 of the Constitution of Ukraine determined that "(1) humans' and citizens' rights and freedoms are protected by the court. (2) Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers». In many international regulations on human rights, the right to judicial protection is formulated more broadly and defined by specific criteria and standards. It is based on two fundamental principles: the rule of law and administration of justice, which guarantee the right to a fair trial[4]. In primary EU law, these principles has found clear regulatory fixation. Thus, under the art. 2 of of the Treaty on the European Union 1992[5] the rule of law is proclaimed as one of the fundamental values, and the art. 47 of the Charter guarantee the right to an effective remedy and a fair trial. In particular, the Charter states that «everyone whose rights and freedoms guaranteed by the law of the Union are violated has the

[1] Принципи ООН стосовно літніх людей: Резолюція Генеральної Асамблеї ООН № 46/91 від 16.12.1991 р. [Електронний ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/995_314

[2] Декларація з проблем старіння № 47/5: прийнята Генеральною Асамблеєю ООН 16.10.1992 р. [Електронний ресурс]. – Режим доступу: http://zakon. rada. gov. ua/laws/show/995_510

[3] Конвенція ООН про права інвалідів від 13.12.2006 р. // Офіц. вісн. України. – 2010. – № 17. – Ст. 3496.

[4] Конституція України. Науково-практичний коментар / редкол.: В. Я. Тацій (голова редкол.), О. В. Петришин (відп. секретар), Ю. Г. Барабаш та ін.; Нац. акад. прав. Наук України. – 2-е вид., переробл. і допов. – Х.: Право, 2012. – С. 410.

[5] Treaty on the European Union on 07.02.1992 [Електронний ресурс]. – Режим доступу: http://europa. eu/eu-law/decision-making/treaties/pdf/consolidated_versions_of_the_treaty_on_european_union_2012/consolidated_versions_of_the_treaty_on_european_union_2012_en. pdf

right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented…».

It is important to note that this approach is expressed in the practice of the European Court of Human Rights on the basis of art. 6 of the European Convention on Human Rights in 1950[1] (hereinafter – the ECHR), which in its turn is the basis of interpretation of the relevant rights under the EU Charter (pt. 3, art. 52 of the Charter). Moreover, the European Court of Human Rights in its case-law on art. 6 of the ECHR specifically states that the right to a fair trial also includes the right to proper execution of the judgment within a reasonable time (Buchholz v. Germany 1981, Baraona v. Portugal 1987[2] etc.). The above-mentioned legal position is crucial for a proper understanding of the right to a fair trial in Ukraine, because according to the statistics given by an authoritative international body, it is failure or improper execution of judgments is subject to the most frequent violations by the State (about 33% of decisions taken against Ukraine[3]).

Thus, the formation of the current wording of art. 55 of the Constitution of Ukraine may lead to the restrictive interpretation of the meaning of the right to judicial protection that fully does not meet international legal acts on human rights and legal regulation of this right in the EU Charter of 2000. To avoid this in the process of modernization of the Constitution of Ukraine it is important to change the wording of the said article of the Basic Law subject to the provisions of art. 47 of the Charter, and the legal position of the European Court of Human Rights at the part of the proper implementation of the judgment within a reasonable time.

To summarize, we note that in the process of constitutional reform in the conditions of Ukraine's European integration it is important to take into account the peculiarities of the legal regulation of the rights and freedoms of vulnerable persons, especially children, the elderly and people with long-term physical and mental disabilities, as they defined in the Charter of Fundamental Rights of the European Union 2000, and in the Constitutions of the Member states. Particularly striking in this case is the approach of the Constitution of the Republic of Croatia 06.07.2010[4] where

[1] Конвенція про захист прав людини і основоположних свобод від 04.11.1950 р. // Офіц. вісн. України. – 1998. – № 13. – Ст. 270.

[2] Де Сальвиа, М. Прецеденты Европейского суда по правам человека. Руководящие принципы судебной практики, относящейся к Европейской конвенции о защите прав человека и основных свобод: Судебная практика с 1960 по 2002 гг. / Де Сальвиа М. – Юрид. центр Пресс, 2004. – 1240 с.

[3] Violations by Article and by State 1959–2014 [Електронний ресурс]. – Режим доступу: http://echr. coe. int/Documents/Stats_violation_1959_2014_ENG. pdf

[4] Constitution of the Republic of Croatia of 06.07.2010 [Електронний ресурс]. – Режим доступу: http://www. legislationline. org/documents/section/constitutions

in the art. 65 is said, that «everyone shall have the duty to protect children and infirm persons». In our opinion, such an approach should be realized at the level of the Basic Law of Ukraine, which should reflect the major areas of constitutional human rights and freedoms, but today guarantees the rights of such persons improperly. Fixing the corresponding rights in Chapter II of the Basic Law of our country would be very desirable, because its rules are the basis of the current legislation and are binding in the process of enforcement. In addition, in view of the pt. 3, art. 8 of the Constitution of Ukraine these rules should be regarded as having direct effect, which in its turn would provide right to judicial protection of their constitutional rights and freedoms to the relevant categories of persons directly under the Basic Law.

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UDC 341.231.14

APPLICATION OF SOME CONCEPTUAL BASES OF FEDERALISM IN LEGAL DETEMINATION OF COMPETENCE OF THE EUROPEAN UNION (TO STATEMENT OF A PROBLEM)

The European dimension of foreign policy of Ukraine, joining our state into the European legal space, signing and ratification of the Association Agreement between the European Union and its Member States, on the one side, and Ukraine, on the other side, and the European Atomic Energy Community (further the Association Agreement) of 16.09.2014[1] put before modern science and practice an important goals of comprehensive study of the nature and functioning of integration formation, legal system of which has considerable impact on improvement of national law[2].

Determination of the particularities of the political and legal nature of the European Union is in the focus of almost all researches, which anyway concern activity of this complicated structure. Concentration of attention on different elements of its nature, allows to distinguish special features of legal regulation of various social processes in which participants are the various legal subjects of the EU, and to establish specifics of relationship of the Union and the states cooperating with it.

Federalistic grounds in the governing system within the EU and fixed at the legal level mechanisms of realization of

[1] Угода про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони// Офіційний вісник України від 26.09.2014. – 2014 р., № 75, том 1, стор. 83, стаття 2125

[2] Костюченко Я. М. Правове регулювання співробітництва України і Європейського Союзу: автореф. дис. … канд. юрид. наук: 12.00.11 / Я. М. Костюченко. – К., 2010. – С. 9.

competence of the Union form a major base of modern European integration. Using the conceptual principles of such governance from practice of democratic federal states and combination of them with forms of cooperation, traditional for international law, gives the opportunity to develop and apply effective methods of achievement of the all-union goals, for which the pivots are the values of the European Union (Art. 2 Treaty of the European Union). This also gives an opportunity to apply the much more effective mechanisms of protection of the Member States sovereignty.

Therefore, the appeal to the analysis of such principles does not lose the relevance. At the same time, it should be noted that the European integration, and in particular, the cooperation of the states within the EU is not a certain set of the verified templates, founder of which was Western Europe, but alive movable substance which develops and improves constantly. That in turn creates a basis for further researches in this area.

The problem of the legal nature of the European communities, and then the European Union was an object of research of numerous foreign and domestic scientists: L. Azoulai, M. Arah, M. M. Biryukov, N. Bloker, J. Buchanan, P. Bumont, C. Wizerill, I. A. Gritsyak, V. Della Sal, A. Deshwood, D. Elazar, M. L. Entina, I. Zaydl-Hokhenveldern, J. Zimmerman, N. Katalano, P. King, V. S. Koval, B. M. Lazarev, S. Leykoff, P. F. Martynenko, V. I. Muravyev, M. M. Mykiyevich, D. Sidzhanski, K. V. Smirnova, R. Stevens, A. E. Tolstukhin, D. Wayatt, P. Hay, T. Hyueglin, A. A. Chetverikov, G. Shermers, J. Steiner, R. Watts, M. A. Ushakov, H. S. Yakimenko, I. V. Yakovyuk, etc. The variety of the reserchers approaches to the definition of the legal nature of the EU (confederation, federation, the international organization, the sui generis organization, etc.) is extrimly considerable. At the same time a question which somehow concerns the legal nature of the Union is also can be regarded of a great importance: this is a coordination of national interests of the EU Member State, preservation of its sovereignty, with simultaneous attraction it into a network of interactions, interdependences and interpenetrations of a regional supranational integration in the way that these factors don't disserve the state, other participants of integration.

Of course, in this context, with regard to the EU, the most widespread is the appeal to the principle of power confering (which is typical both for the international organizations, and for federal model of management), and also to the principles of subsidiarity and proportionality (Art. 5 of the Treaty on the EU)[1].

It is necessary to notice that, the federal concept, particular principles of which are applied within control system of the EU, traditionally finds support among the Western researchers, politicians, public figures[2]. Significant contri-

[1] Основи права Європейського Союзу. Нормативні матеріали (із змінами, внесеними Лісабонським Договором) / за ред. М. В. Буроменського. – Х.: Фінн, 2010. – 392 с.

[2] The general conclusion, which is observed in these studies, is a statement of fact that in the

bution to its evolution was provided by K. Beyme[1], A. Bogdandy[2], J. Buchanan[3], M. Burgess[4], V. Della Sala[5], A. Dashwood[6], D. Elazar[7], J. Zimmerman[8], L. Cortou[9], N. Katalano[10], P. King[11], S. Leykoff[12], V. Ostr[13], D. Sidzhanski[14], R. Stevens[15], R. Watts[16], C. Friedrich[17], T. Hugheglin[18] and many others lawyers and political scientists who tried to reconsider the settled views of federalism in compliance with modern conditions[19],

twentieth century «f ederalism» is transformed from an abstract generalized category under which researchers previously understood not ojust the federation itself, but a confederation, an associate state, confederal state and condominium, to the concept of well-defined meaning, that allows to separate it from other concepts.

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[2] Bogdandy, A. Von. The European Union as a Supranational Federation: a Conceptual Attempt in the Light of the Amsterdam Treaty [Text] / A. von Bogdandy // Columbia Journal of European Law. Winter. – L., 2006. – P. 127–159; Богданди, А. Конституционализм в международном праве: комментарии к предложению из Германии [Текст] / А. фон Богданди // Право и политика. – 2008. – № 1. – С. 50–63.

[3] Buchanan, J. M. Federalism as an ideal political order and an objective for constitutional reform [Text] / J. M. Buchanan // The Journal of Federalism. –1995. – № 25 (2). – P. 19–27.

[4] Burgess, M. Federalism and Federation, in European Union Politics. Ed. M. Cini [Text] / M. Burgess. – Oxford and New York: Oxford University Press, 2003. – P. 65–79.

[5] Делла Сала В. Проблемы федерализма в эпоху глобализма [Текст] / В. Делла Сала // Полития. – 2002–03. – № 4. – С. 49–56.

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[8] Zimmerman, J. F. National-State Relations: Cooperative Federalism in the Twentieth Century [Text] / J. F. Zimmerman // The Journal of Federalism. – 2001. – № 31 (2). – P. 15–30.

[9] Cartou, L. Le Marche commun et le droit public [Text] / L. Cartou. – Paris: Sirey, 1959. – P. 34.

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[12] Лейкофф, С. Оппозиция «суверенитет-автономия» в условиях федерализма: выбор между «или-или» и «больше-меньше» [Текст] / С. Лейкофф // Полис. – 1995. – № 1. – С. 177–190.

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[14] Сиджански, Д. Федералистское будущее Европы: от Европейского сообщества до Европейского Союза [Текст] / Д. Сиджански. – М.: Рос. гос. гуманитар. ун-т, 1998. – С. 164.

[15] Stevens, R. M. Asymmetrical Federalism [Text] / R. M. Stevens. – New-York: PubUcus, 1989.

[16] Watts, R. L. Federalism, federal political systems, and federations [Text] / R. L. Watts // Annual Review of Political Science. – 1998. – Vol. 1, Issue 1. – P. 117–137.

[17] Friedrich C. J. Trends of Federalism in Theory and Practice [Text] / C. J. Friedrich. – New York: Praeger,1968. – 193 p.

[18] Хьюеглин, Т. Федерализм, субсидиарность и европейская традиция [Текст] / Т. Хьюеглин // Казанский федералист. – 2002. – № 4. – С. 79–91.

[19] Комлева, Ю. Е. Государственно-политическая организация Священной Римской

I. V. Ranzhina[1], V. I. Salo[2], M. V. Stolyarov[3], M. H. Farukshin[4], etc.

As Yakovyuk I. V. notes., the analysis of the legislation of the EU and the practice of its realization allows to make a conclusion, according to which, in organization and functioning of the European Union the manifestation of the main signs of a federal state is rather accurately traced. However, at the same time, of course, the European Union is not a federation.

For theoretical understanding of processes of integration within the European communities, and thus within the European Union and an explanation of the practical moments of further development of different types of competence (exclusive (Art. 4 Treaty on Functioning of the EU (TFEU), shared with Member States (Art. 5TFEU), supporting (Art. 6TFEU), special (Art. 5 TFEU, Art. 24 TEU) upon which the EU is conferred by Founding Treaties, the terms «federal political system» and «federal legal order» (federal legal order) sometimes are used. This term seems to be better adapted for demonstration of certain features of legal regulation of variety of public interests and creation of constructive interaction of different levels of the power in the integration union. At the same time the reservation is made, that such terminology concerns an explanation of some aspects of functioning and the legal nature, in general, of «hybrid» federal systems to which carry also the European Union[5].

The particular aspects of federal management are quite often used for the characteristic of competence of the EU and the mechanism of distribution of powers between the EU and member states, the final purposes of which are, on the one hand, the achievements of the aims of integration union, and on the other – the protection of sovereign rights of member states.

Exhaustiveness of the provisions on the limits of the EU competence is one of the most indicative characteristics of the Treaty of Lisbon of 2007. In p. 2 Art. 5 of the Treaty on the EU (TEU) it is

империи германской нации в новое время: феномен «имперского федерализма» [Текст]: дис…. канд. истор. наук: 07.00.03 / Юлия Евгеньевна Комлева. – Екатеринбург, 2005. – 287 с.

[1] Раньжина, И. В. Современная федерация: принципы формирования, структура и тенденции развития [Текст]: дис…. канд. полит. наук: 23.00.02 / Ирина Владимировна Раньжина. – Волгоград, 2006. – 194 с.

[2] Сало В. І. Внутрішні функції держави в умовах членства в Європейському Союзі [Текст]: дис…. канд. юрид. наук: 12.00.01 / Володимир Ігорович Сало. – Х., 2008. – С. 53–57.

[3] Столяров, М. В. Международная деятельность субъектов федерации: интересы, права, возможности [Текст] / М. В. Столяров // Панорама-форум. – 1997. – № 16. – С. 63–80.; Столяров, М. В. Россия в пути. Новая федерация и Западная Европа: сравнительное исследование по проблемам федерализма и регионализма в России и странах Западной Европы [Текст] / М. В. Столяров. – Казань: Изд-во ФЭН, 1998. – 304 с.

[4] Фарукшин, М. Х. сравнительный федерализм [Текст]: учеб. по спецкурсу / М. Х. Фарукшин. – Казань: Изд-во Казан. ун-та, 2003. – С. 157.

[5] Watts, R. L. Federalism, federal political systems, and federations [Text] / R. L. Watts // Annual Review of Political Science. – 1998. – Vol. 1, Issue 1. – P. 120.

accurately specified that «Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out there in» further it is established, that «Competences not conferred upon the Union in the Treaties remain with the Member States». That actually repeats the formulation of Art. 4 (1) of the TEU where it is mentioned that «In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States». At the same time, the Treaty provides the norm that proposals on modification to the Treaty «may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties.» (p. 2 Art. 48 of TEU). It has to be mentioned, that installation of the catalog of competences Founding Treaties (Art. 2–6 Treaty on Functioning of the European Union (TFEU)) and their clear division into exclusive, shared, supporting, it is possible to consider them at the same time as «control» and rationalization of powers of the EU. It is clear that member states during the work on revision of Founding Treaties were unambiguously concerned about the question of establishment of borders of activity of the Union. It is brightly traced in a question of a possible universalization of basic rights in the EU (p. 2 Art. of 51 Charter of fundamental rights of the European Union contains such formulation «This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties».) Thus, it is apparently important that the competence of the EU has immanent restrictions and scope of the application of the EU law to be corresponded to them. Generally, such situation also can be equally referred to traditional international intergovernmental organizations, the sphere of powers of which is limited to provisions of their constituent treaties and the aims of establishment. However such statement can seem rather simple and unambiguous if not to take certain nuances into account. For example, Art. 114 of TFEU which conferred the Union with large legislative powers in the sphere of harmonization of the national legislation of member states (article is placed in Chapter 3 «Approximation of laws», the section VII «Common rules on competition taxation and approximation of laws» of TFEU) didn't change during the process of the Lisbon reforms. It can seem strange, considering that Laeken declaration of December 15, 2001[1] [6] raised a question of possibility of revision of former article 95[2] of the Treaty on the European Community (nowadays Art.

[1] Laeken Declaration on the future of the European Union (15 December 2001)// Bulletin of the European Union. 2001, No 12. Luxembourg: Office for Official Publications of the European Communities. «Presidency Conclusions of the Laeken European Council (14 and 15 December 2001)», p. 19–23.

[2] This is about the articles the Treaty of European Communities, which allowed European Parliament along with the Council (Art. 95) or Council (Art. 308) to adopt the legislation and other measures on the questions, were not directly within the jurisdiction of the Community, that went beyond its competence.

114 of TFEU) [7][1], and such opportunity accurately contacted to the need «providing that new revision of competence won't lead to unjustified expansion of powers of the EU or to its infringement of spheres of exclusive competence of member states»[2]. In this sense, it is also can be regarded as important the reference of some reserchers to the provisions of Art. 19 of TEU, which obliges Member States to provide the judicial remedies sufficient to support effective legal protection in the spheres covered by the legislation of the Union [3][9]. Such situation probably contradicts with the doctrine of the procedural autonomies of member states, to some extent. But at the same time it is connected with a case law of the Court of the EU which usually provides a priority to judicial protection of the rights in the EU (case of Unibet)[4]. Thus, undoubtedly there is a fact that the changes provided by the Treaty of Lisbon, contain a direct challenge to functional and constitutional concepts of the EU legal order advantage to which was given during last 50 years. The best characteristic of this situation provided in Art. 3 (6) TEU where enshrined that «The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties». As specifies L. Azoulai, such situation accurately reflects change of an initial position. The aims are not the main source of powers and the main instument of the Union any more[5]. In turn, the aims are subordinated to the competence specified in the Treaty. It is traced in the course of functioning of internal market the competence concerning regulation of it is shared between the EU and Member States (joint competence). Therefore, this competence is usually limited.

Concerning a konstitutsionalization of the rights of individuals in the EU, a certain distinction from a former situation it is traced in the text of Art. 4 of TEU. Member States continue to adhere to their rights for ensuring achievement of the EU goals. However, on the other hand, the Union has to respect the national identity of Member State peculiar to their main political and constitutional structures and the main functions of the state. It is interesting that functions of the state are not considered in the context of institutional functions (legislative, executive, judicial), and are understood as the independent, such, concerning «ensuring the territorial integrity of the State, maintaining law and order and safeguarding national secu-

[1] Основи права Європейського Союзу. Нормативні матеріали (із змінами, внесеними Лісабонським Договором) / за ред. М. В. Буроменського. – Х.: Фінн, 2010. – 392 с.

[2] Citing after: Azoulai Loïc. The question of competence in the European Union. – Oxford: Oxford University Press, 2014. – p. 11 [8]

[3] Halberstam D. Comperative federalism and the role of the judiciary. In The Oxford Handbook of Law and Politics, edited by K. Whittington, D. Keleman, and G. Caldeira, p. p. 142–64. Oxford: Oxford Univ. Press, 2008.

[4] Case 432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern. Judgment of the Court 13 March 2007// ECR 2007 I-02271.

[5] Azoulai Loïc. The question of competence in the European Union. – Oxford: Oxford University Press, 2014. – P. 11

rity». The Treaty recognizes that Member States have primary competence on the organization of certain areas of jurisdiction, which are concerned to be a vital for social integration in Europe. The state competence isn't reduced any more to powers which can potentially damage the creation of internal market and protection of the rights of individuals. On the contrary, the states admit political actors, providing unity in society.

Such state of relations can bring to new legitimate restrictions in implementation of the main legal norms of the EU or to appearance of new obligations for the defined categories of individuals who traditionally were considered as carriers of the rights by the EU law.

Considering already mentioned, use of the term «federal order of competence» for the characteristic of dimension and realization of competence of the EU rather favorable from the theoretical point of view. In this regard, we again can remind the proposed and detailed in the Founding Treaties the typology of EU competence which is necessary in order to ensure the distribution of powers between the Member States and the Union. In turn the Court of the EU also repeatedly in the decisions addresses to the need of providing «a competence order», established in the Founding Treaties, in particular in those cases which concern the determination of compliance of international treaties to the primary EU law by the Court of Justice (associated cases of Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of 03.09. 2008)[1]. At the same time, there is a large number of arguments which prove that use of definition of the European Union as a federal order of competence, insufficiently convincing. Practice of functioning of the EU shows a deep interlacing of powers of the EU and Member States in all fields of activity of the Union and at all levels – legislative, executive and judicial. Therefore, use of purely constitutional methods directed on establishment of accurate classification of the types of powers of the EU, which are already mentioned above, is not reasonable. Also, it is actually difficult to define the nature of competence of the EU in concrete spheres, only on the basis of Articles 2–6 of the Treaty on Functioning of the EU. And not only because that in many spheres of policy, exists a complex of relations in areas which are regulated by the legislation of Member States and which are settled by the EU law. But at first, it is because that the dimension of EU competence is actually a zone where powers of the Union and its member states interact. And, as Boukun writes in the research, realization of competence of the EU happens through some kind of «resolutions of mutual adjustments» by means of what borders of activity of member states and the Union are constantly reconsidered[2]. Besides, it is necessary to notice that in

[1] Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, Judgment of 3 September 2008 // [2008] ECR I–6351 para 282.

[2] Цитую за Azoulai Loïc. The question of competence in the European Union. – Oxford: Oxford University Press, 2014. – p. 12 [8]

general, despite quite accurate formulations of Founding Treaties on distribution of competence by different types, there are certain disagreements between the formal provisions reflected in documents and practice of activity of Community and national institutes. Moreover, there are distinctions in distribution of competence between the EU and member states at the legislative level and a certain duplication of their powers on implementation level. Also, the problem which concerns existence of a certain difference between limited will of member states and the competence of the European Union fixed in Founding Treaties and application of the EU law, rather often goes beyond these limits, demands careful studying in the future.

Quite problematic for today is the question that connected, on the one hand, with increase of individual or joint activity of Member States in those spheres which it is traditionally are transferred to the jurisdiction of the European Union (it is about introduction of a certain flexibility in those questions, which, as a rule, reqiere the centralized decision at the level of the EU, considering requirements of integration). On the other hand intervention of the European Union in those spheres, regulation of which is referred to the competence of Member States (such as centralization or voluntary accepted or entered, powerful supranational intervention are observed in those spheres where the national autonomy is supposed) is often occurs. Such state of athings is most accurately seen in the field of economic policy and in connection with the current economic crisis.

Thus, it is obvious that a question which was brought up in Leaken Declaration, of how to integrate the content of restriction of a law and order of the EU and at the same time to keep «the European dynamics», without undermining institutional balance which developed within 10 years, didn't receive a definite answer.

In end it is possible to draw a conclusion that purely federal model of determination of competence of integration union is insufficient in modern terms of development of the European Union, though efficiency of the separate mechanisms inherent to a federal law and order is universally recognized.

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UDC 347.73

EUROPEAN EXPERIENCE IN COMBATING WITH AGGRESSIVETAX PLANNING

Formulation of the problem. Towards integration of the Ukrainian tax system to European standards of taxation arises the need for systematic study of European tax legislation. Issues related to aggressive tax planning than ever require basic research not only for suggested categories but also to related legal concepts. This study contributes to the understanding of generalization legal entities owe tax legal proceeding is in terms of their own activities to minimize the tax burden and, therefore, the development of approaches to ensure balance private and public interests that exist in the field of taxation.

Condition of research. The article reveals the approach of the European legislator for resolving the problems associated with aggressive tax planning using in the course of such planning hybrid financial instruments and hybrid circuits tax planning. We try to diverse approaches of the Member States of the European Union in the fight against these phenomena. At the same time, stressed the consistency and effectiveness of the measures conducted by the Organization for Economic Cooperation and Development in connection with the spread of negative practice of hybrid schemes of tax planning.

However, it should be noted that aggressive tax planning schemes were investigated by such scholars and practitioners, as Y. Krutiy, S. Kalinin, F. Eder. In domestic legal science research and study of this category under consideration did not occur at all. Therefore, **the purpose** of this article is to carry through an depth study and analysis of the nature, essence and characteristics of the process of development and formation of hybrid financial instruments and hybrid aggressive tax planning schemes in the European Union. The aim of this article is to develop recommendations which have the task to improve the functioning mechanisms of domestic tax laws.

Basic research material. The pursuit of savings and excess profits – this is probably the first thing any manager thinks about, no matter where he was: in Ukraine, America or Russia. European companies is not exception. Skillful manager can also save and earn on tax payment. Definitely, in terms of taxation, something that is well planned could be minimized as much as possible.

The process of tax planning in Europe is at a level within the EU when it is possible to double «allowance» of income-related companies using common financial instruments. Such tax planning is generally carried out using synthesized, hybrid financial instruments within the same group of companies. Council Directive «On parent companies and subsidiaries» (Council Directive 2011/96/EU) is a normative basis for the existence and development of hybrid financial instruments in European tax planning.

This Directive was designed to eliminate the complexity in taxation of profit distributed between parent and subsidiary companies, which are geographically located in different EU member states. According to Directive subsidiaries are exempt from paying taxes on dividends and other taxes on distributed profits, payable by parent companies. This provision is directed to avoid the risk of double taxation (where the revenue of parent company and subsidiary, which are located in different European countries, are taxed both). In the past few years the OECD is concern about the issues of double «allowance» and aggressive income tax optimization, conducted by European companies. We find out that along with the concept of «hybrid financial instruments» there is the concept of «hybrid tax planning.» In this regard, at first, we should to determine the content of the analyzed terms.

We should say at once that the domestic law don't know the concept of a hybrid financial instrument. It can be found in separate documents OECD. Thus, in the OECD report, dedicated to the use of hybrid instruments, in different jurisdictions such instruments are classified differently depending on tax purposes: one – as the debt, and the other – as equity[1]. For example, in the country of the payer of income such instrument qualifies as debt, and payments on it – as interest rates, while income recipient country, such an instrument is seen as part in equity and as dividends, accordingly.

The use of such financial instruments in the cross-border transactions seems attractive because the debtor may reduce his taxable income by the amount of interests he paid on debt, and the creditor – to exercise the right for exemption of interests he received, qualifying them as dividends from participation in the authorized capital of the debtor (participation exemption). Also, because relatively interest on debt majority of agreements to avoid double taxation provided for exemption or reduced rate of tax levied at source, this income is not tax-

[1] Report by OECD «Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues» – [Electronic resources]. – Access mode: http://www. oecd. org/tax/aggressive/HYBRIDS_ENG_Final_October2012. pdf.

able either in a country that is a source of income, either in the country of residence of the recipient[1].

As for the hybrid tax planning schemes, under such schemes are understood by them, leading to benefits at the same time in several countries due to the divergence of classification tools companies or tax status that allows the deduction of the same costs in several countries or lead to the «disappearance» of income. Analysis of the above mentioned definitions let as to say that the hybrid tax planning content is a broader concept and includes the concept of hybrid financial instruments. The hybrid financial planning, just done by the use of such instruments, and also by involvement of hybrid companies.

OECD report «Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues», published in March 2012, contains detailed comments on the components and results of using classical hybrid schemes. The objective of this report – to advise the tax and legislative bodies how they can develop preventing measures, including specific rules for prevention tax evasion, which would reduce to zero the benefits of usage of the hybrid schemes of tax planning.

Plan BEPS (Base Erosion and Profit Shifting) was another step of the OECD to combat tax planning hybrid and hybrid financial instruments. The above mentioned plan is the OECD list of actions to combat the erosion of the tax base and the withdrawal of income from the tax. The plan provides 15 specific actions needed for resolving this issue. Implementation of the plan involves three stages, and it's completion is scheduled for December 2015. The second action in this plan, is the elimination of differences in taxation of hybrid instruments. Such actions include developing the provisions of the OECD Model Convention and the recommendations to change provisions of national law to eliminate the consequences of the use of hybrid instruments. The measures that aimed to eliminate the differences in taxation hybrid instruments include: changes in the OECD Model Convention to limit the use of benefits agreements on avoidance of double taxation in situations that lead to abuse; development provisions of national law opposing the complete liberation of the recipient's income level on which party pays the tax deduction applies; development of the provisions of national law which would restrict the application of the tax deduction on payments that are not subject to tax at the recipient's income or deductible under the tax rules of controlled foreign companies; development provisions governing the situation where more than one country claims the use of measures referred to above, to any agreement or company[2].

[1] Крутий Ю. Что такое BEPS и его влияние на международный бизнес / Ю. Крутий // [Электрон. ресурс]. – Режим доступа: http://www. smartsolutions. ua/chto-takoe-beps-i-ego-vliyanie-na-mezhdunarodnyij-biznes/.

[2] Калинин С., Эдер Ф. Использование гибридных финансовых инструментов в налоговом планировании / С. Калинин, Ф. Эдер // [Электрон. ресурс]. – Режим доступа: http://www. lp. ru/files/filemanager/file/li_08_2013_kalinin_cut. pdf.

Schemes of hybrid financial instruments can be a part of tax planning, by which the provisions of the EU Directive «On the parent and subsidiaries» can be used to their advantage in order to minimize taxes or even for tax evasion. As noted earlier, hybrid financial instruments – are financial instruments which have mixed characteristics of debt and equity. The legal form of such instruments could be the equity capital and various types of debt and it's combinations. The purpose of hybrid financial instruments is to obtain a tax deduction subsidiary, with the simultaneous release income of the main (parent) company from taxation.

At the same time, EU member states can define different hybrid financial instruments, from the perspective of a member country – this is the usual borrowing, from the point of view of other member country – this is securities. As a result, the hybrid instrument could be considered as expenditure (percentage), which is deducted from the amount of taxable income in the member country, where taxpayer is located – subsidiary and dividend free of tax in another member state, where the parent company is located. Thus, in one country may be a party contribution, while in another – exemption from taxation. In practice, this situation leads to double «allowance».

Certainly, the OECD report «Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues» is a fundamental document that defines the structure and components of the hybrid tax planning schemes. At the same time, such scheme was adequately described by Ernst & Young Company. As already mentioned, Council Directive «On the parent and subsidiary companies» was originally designed to prevent double taxation of companies from the same group located in different member states, providing tax exemption on dividends and other distribution income paid by a subsidiary of the parent company. However, some companies have used loopholes in the Directive to avoid paying any taxes in general. In this regard, the European Commission together with the OECD proposed a number of changes to be made to the Directive with the aim to streamline the interaction between parent and subsidiary companies.

First, the changes will affect hybrid financial instruments. Second, the rules against tax evasion will be updated. Member states will be required to adopt a common mechanism to detect artificial scheme used for tax evasion in the distribution of dividends. Thus, the distribution of dividends will be taxed on the basis of real economic content of operations. In particular, the international group that uses the hybrid instruments of credit will be denied with exemption from taxation in the State where the parent company is resident if payments are negative costs in another Member State in which the subsidiary is resident.

In other words, if the payment of the hybrid financial instrument classified as expenses in the country where subsidiary is located, so it should be taxed in the State of the parent company. This proposal is aimed at a group of companies

that place the intermediate holding company in the EU, which has no real presence in a country[1]. The process of reforming the tax planning using hybrid financial instruments in the EU, primarily aimed to exclude the possibility of tax evasion parent and subsidiary companies located in different EU member states. In fact, the right decision was taken at the meeting of ECOFIN («20» June 2014) where were politically endorsed these changes, and pointed that member states must adopted their national legislation according to mentioned amendments until 31.12.2015 (similar to the position expressed by OECD in the Plan BEPS).

Conclusions. We can say that combating considered types of tax planning will be driven by the OECD and the European Commission on all fronts throughout 2015. These trends partly supported in Ukraine, where a part of ongoing tax reform.

[1] Изменения относительно решения проблемы уклонение от уплаты налогов, предложенные к директиве ЕС о материнских и дочерних компаниях – [Электрон. ресурс]. – Режим доступа: http://www. bakertilly. ua/ru/news/id431??? history=0&sample=13&ref=0.

CIVIL–LEGAL SCIENCES

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FORMATION AND STRENGTHENING OF PRIVAT LAW FUNDAMENTALS OF CIVIL SOCIETY IN UKRAINE

Problems of civil society for several decades are the subject of ananimated discussion of political scientists, philosophers, economists and lawyers. Together with this, in the modern period and, especially, in the post-Soviet Union region the ideas of civil society have gained special significance. The reason for that is served by the necessity at times of «great changes» that coincided for the countries of former USSR with the millenniums' change to find social guides that allow to maintain the succession of historical development, to definegoalslinking fundamentals of the universe social advancement with national features, to make life of the society humane and a manitself – social.

It should be noticed that the research of legal problems in civil society in legal doctrine of Ukraine is still at the beginning phase.

Ukrainian legal scholars continue to discuss questions concerning the very notion of the term «civil society»[1].

In the doctrine there is no uniform understanding of what civil society corresponds to. Furthermore, the word combination «civil society» is quiet conditional considering that there is just no «non-civil», much less «anti-civil» society.

Virtually, the term «civil society» has gained in the scientific literature its special content and in the current interpretation represents a definite type (condition, character) of society, its social and eco-

[1] Колодій А. М. Громадянське суспільство: доктрина і вітчизняна практика / А. М. Колодій // Правова доктрина України в 5-ти т. – Х.: Право, 2013. – Т. 1. – С. 461–468.

nomic, political and legal nature, the level of maturity, sophistication. In other words, civil society is the highest level of social community development and meets a range of criteria established by historical experience.

In the modern understanding and meaning civil society is «a society able to resist a state, control over its activities, able to point out its place, to keep in tight reins». That is to say that civil society is a society able to make its state a rule-of-law state. However it does not mean that the only activity of civil society is to struggle against the state. Within the frames of sociality principle, i. e. social state, civil society allows the state to actively interfere in social and economic processes. Another thing is that it does not allow the state to concentrate its power over itself, make social system totalitarian»[1].

It is possible to agree with the opinion set forth in the literature that civil society arises only there and only at the time where state institution is not able to exercise its functions of a regulator of social relations; where there was an arrangement of prerequisites for civil compromise and worldview pluralism; where an aggregate of social institutions with their own status and being able to equal dialogue with state institution, able to resist political expansion of the state, to be its counterbalance, to restrain its strive for monopoly, transforming from the system of providing advancement of the society into the system of self-sustainment; where the authority of the state is substantially adjusted by the condition of civil society[2].

Without detailing the very notion of civil society, it should be noted that regardless national characteristics, regional features etc, we can talk about the presence of common grounds (principles) of the civil societyfunctioning. They are economic freedom, poliform of property, market-based economic development, absolute recognition and protection of natural rights of a man and a citizen; legitimacy and democratic nature of the authority; equality before the law and justice, reliable legal protection of the individual; legal state built on the principle of separation of powers and interaction of its separate branches; political and ideological pluralism, the existence of legal opposition; freedom of speech, of thought, independence of the media, non-interference of the state into the private lives of citizens, their mutual rights, obligations and responsibilities; class harmony, partnership and a national consensus; effective social policy ensuring an adequate level of life.

Of course, the given list of basic principles is not exhaustive and can be extended and detailed.

Without intending to delve into this discussion, we restrict ourselves to stating that we agree with the definition of civil society as «association of free individuals and citizens' community formed voluntarily to assure liberty and initiatives of the individual, the rights and duties of a man and a citizen, serve oth-

[1] Протасов В. Н. Лекции по общейтеориигосударства и права / В. Н. Протасов, Н. В. Протасова. – М., 2010. – С. 535.

[2] Гражданскоеобщество и современность. – 3-е изд. – СПб., 2006. – С. 31.

er common interests, which due to private ownership in economic sphere, democratic in the political, pluralism in the spiritual, justice in the legal spheres that causes existence the vast majority of the so-called middle class that is able to subjugate democratic, legal, social state to the civil society»[1].

However, some researchers considering civil society as a number of non-governmental institutions that are capable of self-organization and cooperation closely with each other and the state, where the state is not opposed to civil society, and creates for its normal functioning and development the most favorable conditions, derive an individual citizen beyond the limits of the civil society. The stress is on the fact that the civil society is «a social phenomenon that consists of the institutions that are public (non-governmental) association, but not of separate persons»[2], in our view, unreasonably hypertrophies factor of institutional structure of civil society.

The individual, personality, citizen is a core of the civil society. There is no civil society without roots of personality. A human being in the civil society is ambitious and goal-seeking. He or she understands his welfare depends only on him/her. He/she is civilized, tries to know the laws of its state, fights for their implementation and at the same time opposes them if they do not meet his/her interests. A man in a civil society must have a civic positions and not afraid to show them openly. He must understand that no one in his place is not able to solve his life's problems[3].

Just being based on such understanding of the civil society we can talk about «maturity» of public relations establishing both between individuals and between them and the numerous kinds of public associations formed on the principles of voluntariness and functioning as independent self-governing institutions.

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

Undoubtedly, this question isof present interest only in relation to the democratic rule-of-law state, since only such a state can be associated with civil society.

The analysis of recent social phenomenon that is beginning to emerge in the era of capitalist relations, providing the individual a certain economic independence and freedom, gives grounds to affirm that the state as a systemic organization of society is a specific instrument to ensure its integrity and consolidation of the population.

Unlike the state, the civil society does not have a feature of systematicity[4].

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[1] Колодій А. М. Громадянське суспільство: доктрина і вітчизняна практика / А. М. Колодій // Правова доктрина України в 5-ти т. – Х.: Право, 2013. – Т. 1. – С. 466.

[2] Мерник А. М. Інституції громадянського суспільства: поняття, особливості, види: автореф…. канд. юрид. наук: спец. 12.00.01 / А. М. Мерник. – Х., 2013. – С. 7.

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

[4] Мерник А. М. Інституції громадянського суспільства: поняття, особливості, види: автореф…. канд. юрид. наук: спец. 12.00.01 / А. М. Мерник. – Х., 2013. – С. 6.

However, the dynamic processes of social development, first of all the development of civil society, including due to globalization and informatization of public life, form a new social and community challengesof the state as a whole.

If the class nature of the state hasbeen recognized for a long time by politicians, scholars, then among the modern tendencies ofstate studies it should be notedthe interest of the researchers to the general social purpose of the modern state.

This is caused primarily by the fact that the civil society, which is formed as a stable community of citizens on the basis of the recognition of common values and the safeguards for the rights, requires the state to be an effective mechanism to ensure the inviolability of property and rights, since only the state hasuniversal instrument that can be to provide such guarantees – legal regulation, the coercive means, army and other armed groups.

«The society overcomes the difficulties and contradictions and seeks ways of solution of new tasks in the political, economic, social and international spheres, – said Yu. A. Tikhomirov. – It inevitably puts that conditions of life for its self-preservation, which should ensure that the state, through its system-oriented means of influencing public processes. Gradually forms the substance that may be called «public mandate» that society gives to the state in order to achieve national goals. These are, firstly, the life values of society and the people, secondly, on the most important spheres in which you want to provide a holistic regulation and management, thirdly, about taking care of people, their rights and freedoms insurance, the level of life, fourthly security in the broadest sense in the political, ecological and other spheres. This determines the high social role of the state.

But at the same time the society limits the operation of the «mandate» requiring from the state legitimacy, controlling the activity of national institutions and public officials, making responsible for the acts done. These are elements of «public mandate» of the state that are obligatory for it»[1].

As it is evidenced by the events of recent months in Ukraine, the state has not only recklessly ignored the elements of «public mandate» but cynically has been violated the rights and freedoms of Ukrainian citizens. That is what led to the mass protests of the Ukrainian citizens against the tyranny of the state and its officials, total corruption, riddled with all the mechanisms of state power, lawlessness and legal nihilism.

Analyzing the situation as a result of the revolutionary resistance of civil society, we can state that the state over the past ten years since the «Orange Revolution» failed to create the conditions to meet the requirements set by the community in November-December 2004: decriminalization of power, providingthe transparency of the making-decision process concerning the most important government decisions, fighting corruption and lustration of state bodies from corrupt officials, the implementation of

[1] Тихомиров Ю. А. Государство / Ю. А. Тихомиров. – М., 2013. – С. 17.

the Ukrainian national idea simultaneously with ensuring the rights of national minorities to self-preservation, to develop and promote their languages and traditions, the development of inter-regional, inter-ethnic and international cultural relations.

Without exaggeration, we can say that the state during this period didnot provide the developmenton the appropriate level of local government, didnot take into account regional features and needs of separate territories, did not ensure the unity of the Ukrainian nation, and did not formulate the modern Ukrainian national idea. As a result, having seizuredstate power, Ukrainian officials were engaged exclusively in their own interests, violating the interests of civil society.

The lack of the effective mechanisms of public control over the activity of the state made it impossiblefor opposition of civil society manifestations of criminal violations of fundamental rights and freedoms of citizens by the state as a whole and by its officials, that eventually led to massive public protests and numerous victims.

Even now, we cannot find the developed at the appropriate level functions, forms, tools, and mechanisms of public control over the state of civil society in the legal science.

Realizing that «civil society is organically linked with the state, it did not exist before the state and outside the state, and at the same time civil society has supreme sovereignty over the state, the meaning of which is that it is the interests of civil society are the country's priority over the public interest, the structure of the state apparatus, the forms of the state, state and legal regime and others.»[1], should be determined at the current stage of development of the Ukrainian society and the Ukrainian state priority is to ensure real interaction between civil society and a democratic state.

Today, first steps were made in this important area: to create important institutions such as the Anti-Corruption Bureau, lustration committee, and others. It is necessary to fill their job with content, directing the joint efforts of civil society and state influence on overcoming the crisis in the political, social and legal spheres.

Law is to play a crucial role in these processes.

Without pointingon the problems of modern legal thinking, to identify its nature and characteristics, as it is a separate object of study and deserves a detailed consideration of the legal, philosophical, political and sociological aspects, and it would be preferable to fix on the analysis of the role of law as a special phenomenon in the functioning of civil society, which refers to the key values, because that law is regarded as a measure of justice. At the same time the law is a powerful regulator of social relations.

S. S. Alekseyev considered law as an instrument (mechanism) of implementation and ensuring the reproduction of the

[1] Колодій А. М. Громадянське суспільство: доктрина і вітчизняна практика / А. М. Колодій // Правова доктрина України в 5-ти т. – Х.: Право, 2013. – Т. 1. – С. 470.

social system, its permanence in a stable, contiguousfunctioning through time. «And thanks exactly to law being regarded as in the unity of the law, such kind ofstate of affairs achieves when this social system, continuously and without changing its qualities and features, «rolls» and «rolls»in a given mode of its informational and organizational structure, and (theoretically) so that its mission of «extreme freedom» and «permanent antagonism» focuses on defining and maintaining the boundaries of freedom of people. In principle this mission of law in society is unique, and – what is crucial – (and again, in principle) – have no political and moreover ideological content»[1].

It should be mentioned that traditionally the importance of law for the civil society functioning was seen primarily through the prism of formation of a rule-of-law state.

However, in modern researches we can be clearly seen the tendency to seriousextension and detailing the approaches to the definition of the functions of law in modern public life.

The conceptual approach to understanding law as an element of civilization and culture allows tocharacterize the origins, importance and social value of law in a broad, generally social terms. As a profound element of culture law not only absorbs its values, but also implies fundamental requirements and achievements of civilization, thus ensuring the preservation and to some extent the augmentation of the potential ofmaterial, social and spiritual wealth of society[2].

Considering that fundamental economic principle of civil society includes private property, and, therefore, the regulation of property relations becomes extremely urgentand, first of all, private law mechanisms and in general private law become more important among the legal instruments.

The original sphere for the law as a phenomenon of civilization is exactly private law, i. e. the legal sphere that is not a product and an instrument of public authorities (and in this respect is not a «product derived from the authorities», though it is permanent connection with it), and is created spontaneously, due to the requirements of life itself, under the pressure in the transition of society in the era of civilization, under the influence of her strict imperatives. It is quite revealing that the same factors associated with the mind, mental and creative activity of the individual that determined the development of society during the transition to civilization (including private property, individualization), predicated the existence and intensity, largely predominant, the development of «horizontal» legal relations, which were based on many legal sovereign «centers», independence of the subjects, the free determination of the terms of its behavior [3].

[1] Алексеев С. С. Самоесвятое, чтоесть у Бога на земле. Иммануил Кант и проблемы права в современнуюэпоху / С. С. Алексеев. – 2-е изд. – М., 2013. – С. 132.

[2] See. Смоленский М. Б. Право и правовая культура какбазоваяценностьгражданского-общества / М. Б. Смоленский // Журн. рос. права. – 2004. – № 11. – С. 73.

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

Modern civil law, acting as core of the array of privatelaw norms is intended to be a legal basis for civil society.

Law as a unique social phenomenon belongs to the fundamental values of the world culture created by mankind during its development. Defining social value of civil law, S. S. Alekseyev paid attention to such circumstances. Firstly, starting with the ancient works onlaw common trend was determined that manifested in the legal establishment, called over time as «civil law», not only began to cover the main elements of the practical life of people – property, employment, acquisition and transition of property, their protection, family etc. – but also in this context gained the role of the sourceof initially legal characteristics and mechanisms of social regulation.

Civil law establishment (ascustoms, precedents, and then the laws) began to form and put into practice all that original, unique, socially profound and regulatory elegant, it is typical for law as the highest form of social regulation of public relations in a civilization»[1].

Secondly, through the sphere of the civil (private) law back in ancient times there was a considerable intellectual enrichment of law, when mind has rushed into the sphere of social regulation, and in connection with the needs of business life and legal practice has shown its power in the creation of legal mechanisms, structures and categories of high intellectual order.

And third, the most important factor – exactly the civil law as a system of laws (codes) laid down the foundations of a modern civil society.

First of all, using the system of civil laws the culture of private law has realized, the essence and historic destination formulated by S. S. Alekseyev, paying attention to two basic principles. «Firstly, as the starting point *(«spirit»), free democratic society – the place and the source of true and ensuredfreedom of the person, legal autonomy*, dispositivity, legal sources, without which no real democracy and no civilized market cannot be done in principle, by its very nature. And, secondly, private law, expressed in the civil codes, due to normative generalizations opened its nature and purpose also as the intellectual mechanisms and structures of high order (even higher than, for example, it was typical of the Roman private law)»[2].

At the present stage of renovation of civil law both in Western Europe and in the countries of the former USSR manifested all the signs of a new civil law, emphasizing its close connection with civil society and giving to every reason the groundsto conclude that it is the private law, the core of which is civil law, and acts as tool and most important instrument of civil society.

The vast majority of the characteristic features of civil society is reflected in the Civil Code of Ukraine (hereinafter – the Civil Code), designed to ensure the normal functioning and develop-

[1] Алексеев С. С. Гражданское право в современную эпоху / С. С. Алексеев. – М., 1999. – С. 3.

[2] Алексеев С. С. Гражданское право в современную эпоху / С. С. Алексеев. – М., 1999. – С. 6, 7.

ment of civil society, that is, autonomous substance, independent from the state. Autonomy, independence, initiative of individuals can be ensured only if of natural, objective (overnormative) character of civil rights as those are recognized and determined by practice itself. That is why property and non-property relations based on legal equality, free will, property independence of participants who are the subject of civil law regulation and the basis of civil society, should be regulated by the Civil Code in accordance with its fundamental principles.

The fundamental principles of civil law, enshrined in Article 3 of the Civil Code of Ukraine, are: the inadmissibility of arbitrary interference with the private life of persons, the inadmissibility of the deprivation of property rights, except in cases provided by law; freedom of contract, freedom of enterprise, securing legal protection in case of violation of the rights, bono fides, reasonability, justice.

Thus, the conceptual feature of the new Civil Code of Ukraine is that it is a code of private law. It is through the institutions, structures and mechanisms of civil law as a private law society realized the principles, ideas and principles which make it a civil society.

As a certain state, civil society is characterized by the interaction of three principles:

1) generallyrecognized egalitarian law implying a certain minimum of freedoms for each person that is enshrined by the law of equal rights, duties and responsibilities of citizens (legal sphere);

2) private property (economic sphere);

3) publicly recognized the inner freedom of man (the sphere of personal, spiritual entity).

Namelysuch institutions of civil society as family, church, school and other communities, various voluntary organizations and unions, have the means of influence on the individual to comply by this individual generally accepted moral norms.

Civil society does not refer to state-political, and mainly to the economic and personal, private sphere of human life and activities; relations arising between the two of them. This is free, democratic, legal, civilized society, and there is no place for the regime of personal power, voluntarist methods of government, class hatred, totalitarianism, violence against human beings; where there is a respect for the law and morals, principles of humanity and justice. This is a market multistructurecompetitive society with a mixed economy, a societyinitiative entrepreneurship, a reasonable balance between the interests of different social strata.

As it was already noted, the dialectic of relation between civil society and the state is complex and contradictory. Civil society representing a self-developing system is constantly under the pressure from the government. However, the state is interested in the free development of civil society as a prerequisite for its own development. The maturity of civil society is one of the main conditions for the stability of

the democratic regime. Civil society controls the action of a political authority. The weakness of the civil society makes the state to usurp its rights, resulting in the inversion of functions of the state and civil society. In this case, the state assigns the function of civil society, forcing it to perform only decisions on the national level. Then the relations between the state and society may be characterized as relations of constant interaction and mutual contradictory and influence, and nature and direction of the latter to a large extent depend on the degree of development of civil society and its institutions. Civil society harmoniously coexists with the state in a democratic regime; it is in opposition to it under totalitarianism and constructive confrontation with the authoritarianism[1].

Civil society is open, democratic, anti-totalitarian society, capable of self-developmentand where the central place is occupied by a person, a citizen, and an individual. It is incompatible with the directive and distributive economy. Free individuals-owners amalgamate to collectivelymeet their interests and serve the common good.

However, the evolution of approaches concerning human rights in the system of social values during the period of XXth century shows that dramatic events that accompany mankind in the edge of the third millennium created certain prerequisites for formation of the new legal consciousness.

«Revolutions and wars that were constantly taking place throughout the century, put the groundwhereintolerance and violence were established and flourished, that in turn served as the basis for the creation of new political regimes and specified corresponding the legal order, as said Professor M. De Salvia, famous researcher of European law. When such political system, totalitarian political system, law was so alienated from a man, instead of to guarantee freedom, as it was almost always stated in the fundamental laws of these states, often turned into an instrument of oppression; the individual was not recognized as value in himself/herself, and was only the amorphous part of the collective expression will. That meant that the fundamental rights of a citizen in such cases almost systematically subordinated to the interests of the state. Often enough freedoms were and to this day remain the prerogative of a small group of officials that used them to their advantage, while the vast majority of the population was almost depraved of these freedoms. In this case, it is noted fairly that freedom granted to the citizens subjects and the law argues that the freedom provided by a group of citizens, subjects, and the law – the expression of public interest – releases. Then it is necessary to reconcile freedom and law. Such reconciliation can only happen if we put a human being onthe proper place, because it is the highest value and the bearer of values at the same time»[2].

[1] Пушкін О. Концепція нового Цивільного кодексу України / О. Пушкін, О. Скакун // Укр. право. – 1997. – № 1. – С. 8.

[2] Микеле де Сальвиа. Европейскаяконвенция по правам человека / Микеле де Сальвиа. – СПб., 2004. С. 23, 24.

This profound by its content and meaning conclusion explains the attention that is given to the individual development, securing human rights in the modern society.

Our state receivedcertain additional impetus in this direction with the accession to the European Convention on Human Rights.

Of course, the Constitution of Ukraine particularly plays an important role in the realization of human rights, formation of the modern legal status of the citizen. However, not only constitutional law, but also other sectors of the national legal system must ensure implementation and enforcement, in particular the preservation and protection of individual human rights.

Civil law is the main regulator of social relations with private nature. Exactly the rules of it accompany the person from birth to death, and sometimes even longer (inheritance law, copyright). The Civil Code is not only a major act of civil law, but also the basis for the whole system of private law, the code of life for the whole civil society.

The Civil Code of Ukraine whichnot coincidentally was namedas the constitution of civil society, inart. 1 provides that the rules of civil law govern moral and economic relations based on legal equality, free will, property independence of their participants. This approach is in harmony with the concept of civil society regarding the status of the person – the person in a civil society is emerging as an autonomous and sovereign identity. It is equal among equals, as people will have united in their community, and it is logical to assume that they themselves produce values, norms and rules that are going to follow[1].

The Civil Code of any country reflects the values of a particular society, makes it possible to determine the ideological foundation and property on which it plans to build its development and its future.

The new Civil Code of Ukraine became the legal foundation of civil society, an important tool for its construction. It should be seen as a social contract of the members of the Ukrainian community that accompanies their privacy and regulates all activities.

As already noted, private property constitutesownership basis and the market economyfor civil society, since they are the main tool of the autonomy and independence of the individual.

It is to be recalled that with the reformation of property relations, the revival of private property and the «equation»of its rights to other forms (mainly public), recovery of the market infrastructure of the economic sector the process of transition from a totalitarian regime to democracy, which was the prerequisite for the formation of civil society and the rule-of-lawstate.

Property category occupies a special place in the public mind and in the whole social life. As a multidimensional phenomenon, it has been and remains the subject of thorough historical, philosophical, economic and legal studies,

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

and, consequently, the scientific debate, the severity of which is not reduced over time.

But today no one doubts the thesis that only in the country where the inviolability of property, not only declared, but also guaranteed, the citizencan be provided free personal development, prosperity and peace.

The state is obliged to provide the rule of law by establishing an effective regulatory framework (including, and, perhaps, above all – civil law one) of relations of the property.

That relationship of private property and the market economy as a whole constitute a material foundation of civil society, as they are the main tool of the autonomy and independence of the individual.

Recall that it was a reformation of property relations, reviving private property, «the restoration of its rights» in relation to other forms (mainly public), recovery of the market infrastructure of the economic sector began the process of transition from a totalitarian regime to a democratic, which created prerequisites for the formation on the territory of the former Soviet Union, including Ukraine, of the civil society and the rule-of-lawstate. This does not happen accidently.

From the 20-30s of the last century, the rule of law within the Soviet state unequivocallymonopoly (and subsequently – nation-wide) property entrenched, which is recognized as a socialist in nature. At the same time private property was seen as a derivative of the socialist one, and its existence was aimed solely at providing the consumer needs of the citizen[1].

Soviet legislation contained numerous restrictions to exercise by citizens of Ukraine, at the same time citizens of the USSR, the rights of private property. First of all, these restrictions related to the group and the number of objects that can be owned by citizens.

Fundamentals of Civil Legislation of the USSR and the union republics, being adopted in 1960 have fixed some of the most fundamental provisions which in view of their obligation had to be taken into account in the Civil Union Republics. In particular, art. 25 provided thatproperty designated to satisfy their material and cultural needsmay be in private ownership. Every citizen can have incomes and savings, a house (or part of it), a subsidiary household, household items, personal consumption and comfort in personal property.

It was particularly noted that property that is owned by citizens according to the right of private property, cannot be used for unearned income.

While in the law itself contained no direct prohibition on the acquisition of property of citizens in particular the number and size of the property, or the accumulation of earned income and savings, but still appropriate limits have been set. It is sufficient to recall the «norm» in the number of cattle deter-

[1] Ерошенко А. А. Личная собственность в гражданском праве / А. А. Ерошенко. – М., 1973. – С. 7, 8; Советское гражданское право / под ред. О. А. Красавчикова. – М., 1972. – Т. 1. – С. 295; Советское гражданское право / под ред. В. А. Рясенцева. – М., 1975. – Т. 1. – С. 363–366.

mined by the Decree of the Presidium of the Supreme Soviet of the RSFSR of 11.13.1964, at which effectively negated the possibility of an individual farm and for decades have closed the prospects for the development of not only livestock, but also in the whole of the agricultural sector[1].

In the midst of serious regulatory restrictions it was also a house, which at the time belonged to the most important objects of personal property rights. In the 60-san individual housing construction in large cities actually been terminated due to the decision of the CPSU Central Committee and Council of MinistersUSSR dated 31 July 1957 it was encouraged in the cities to develop the joint construction of the citizens'multi-apartment houses on standard projects[2].

Articles 100–107 of the Civil Code of the Ukrainian SSR of 1963 consolidated restrictions that 30 years has been accompanying the right of property of citizens in the apartment building in Ukraine. For example, one residential building (or part of it) could be only in the personal property of a citizen. Cohabiting spouses and their minor children have the right to own only one residential house (or part of it), which was owned due to the right of personal property, or one of them is in their joint property (Art. 100 of the Civil Code of the Ukrainian SSR).

Analysis of the provisions of Art. 103 of the Civil Code of Ukraine is interesting from the standpoint of the general characteristics of the right to personal property in the Soviet period. According to this article, it was assumed that if the personal property of a citizen or a cohabiting couple would, on grounds permitted by law (emphasis added – NK), more than one residential house, the owner has a right to keep in hisproperty in any of these houses. The other house (houses) must be sold within one year, presented or alienated in any other way. If within one year the owner does not exercise the right of alienation of the house in any form, by a decision of the executive committee of the local Council of People's Deputies, in whose territory it is located, the house is subject to a forced sale in the manner prescribed for the execution of court decisions (i. e., using the procedure public auction). If the sale of the house by force will not take place due to lack of buyers, the decision of the executive committee of the Council of People's Deputies of the house free of charge transferred it to the ownership of the state.

The legislation has determined also maximum size of the house – 60 m^2 (and from 1985–80 m^2). Only a citizen who has a large family or the right to additional living space, with the permission of the executive committee of the local Council of People's Deputies have the right to build or buy a house a larger area.

Other restrictions has been established as well on the rights of private ownership of the house[3].

[1] See: Маслов В. Ф. Основные проблемы права личной собственности в период строительства коммунизма в СССР / В. Ф. Маслов. – Харьков, 1968. – С. 179–186.

[2] See: СП СССР. –1957. – №9. – Ст. 102.

[3] Дульнева Л. А. Право собственности на жилой дом / Л. А. Дульнева. – М., 1974. – С. 56.

In addition, the law defined the list of property that could be subject to the right of personal property. For example, the land on the basis of Articles 10, 11 of the Constitution of the USSR was the subject of exclusive property of the Soviet state as the basic means of production and other property that could be used for profit.

Although the citizenformally owned, used and disposed of property belonging to him at his discretion, taking into account the nature of the personal property of the consumer, these features were also largely limited.

First of all, it was not allowed the industrial use of property, as it was interpreted as unearned income. Commercial mediation, private-business activitywere considered as the criminal offenses[1].

Analysis of the facts mentioned clearly indicates that with the strengthening of socialism the escalation of restrictions on the right of personal property took the place. And, as a consequence, the ordinary citizen of the USSR (and Ukraine in particular) the sense of ownership was virtually «driven away».

It is in these circumstances and assumptions, restructuring and transformation of property relations in independent Ukraine began by the reform of property relations. And from this point of view, the Law of Ukraine «On Property», adopted 7 February 1991, with no doubt, can be considered as the first and very important step to recovery (or rather, revival) of the institution of property in general, and the institution of private property in particular.

In alllegislative instrumentsof 1991–1993 the legislator has enshrined the novels, which adequately has responded to the significant limitations of property rights contained in the previous legislation, and at the extent of his vision tried to eliminate them.

At the political level, the Constitution of Ukraine, adopted in 1996, entrenched the right of citizens to own property as an important attribute of the rule-of-law state and democratic society.

In particular, the Article 41 of the Constitution of Ukraine stipulates that everyone has the right to possess, use and dispose their property, the results of his intellectual and creative activity. No one can be unlawfully deprived of property rights. The right to private property is inviolable. The expropriation of private property may be applied only as an exception for reasons of social necessity on the ground and in the manner prescribed by law and subject to advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency. Confiscation of property may be applied only by a court decision in the cases, amount and procedure that are established by law. The use of property shallbe without prejudice to the rights, freedoms and dignity of citizens, the interests of society, shall not aggravate the ecological situation and the natural qualities of land.

[1] See: Маслов В. Ф. Указан. Труд. – С. 204–223.

At the same time, describing the fullness and depth of securing constitutional institution of property, it can be critical to note that not all of the fundamental principles of the right of ownership found in the immediate consolidation of constitutional provisions.

This statement is very important, taking into account its dominance in literature of the opinion that ownership is a complex legal institution, as there is a single right of ownership, which in turn implies that all subjects of law, which are determined by the owners have the same powers and the state should provide equal protection to all owners[1].

Being based primarily on the general principles of the legal system in the Commonwealth of Independent States, that by its roots is dating back to the tradition of Soviet law, a basic framework, basic principles of the single concept that is property rights, make constitutional norms.

Along with this, as content of the above art. 41 of the Constitution of Ukraine evidences, it has quite fragmentary nature.

In support of the integrated nature of the institute of property rights it may be noted that the criminal and administrative legislation contains rules which will determine the responsibility for violation of property rights in connection with the commission of a crime or administrative offence.

However, it is possible to say without any exaggeration that namely a civil law fills the institute of property rights with its «regulatory» content.

One can hardly agree with the expressed view that by virtue of their nature the fundamental rules of law refer to a special kind of out-of-the-branch (fiducial) rules. This vision leads to the conclusion that an individual civil law or any other branch concept of property rights (for example, tax, administrative, criminal) does not exist. The law provides only one concept of public-private property rights, based on the norms of the Constitution and its accompanying norms of civil and other branches of law that define the individual elements of this concept[2].

No denying the complex nature of the institute of property rights as a single legal formation, we still believe that there are insufficient grounds for concluding that the law rules which established proprietary rights to own, use, dispose of the property, including the conditions of the general property (shared or joint) or providedpeculiarities of real-legal methods to protect the violated rights etc., from the civil law are «transformed» into out-of-the-branch (fiducial) rules taking any new, additional qualitieswhich change their legal nature.

Governing the relations of property and constituting one of the most important segments of the subject of civil law as a branch of the law, legal rulesare aimed at establishing the legal regime of

[1] See: Право собственности: актуальные проблемы. – М., 2008. – С. 14.

[2] See: Мозолин В. П. Модернизация права собственности в экономическом измерении / В. П. Мозолин // Журнал рос. права. – 2011. – № 1. – С. 27.

the right of ownership realization by implementing the possession, use and disposition of property, the grounds of acquisition and termination of property rights, as well as ways to protect it in the event of violations. These legal provisions are, first of all, in close unity with the whole array of civil law, concentrating in it the features and trends of the development of civil law at the current stage.

Similarly, the rules providing the criminal and administrative responsibility for violation of property rights (for examples, for theft, robbery, plunderetc.), do not lose the attributes of criminal and administrative rules and do not «leave» criminal or administrative law. At the same time, of course, regulating the property relations in society, they complement each other and create a complete legal regulation of all aspects of public relations of the property, creating an interdisciplinary (complex) institute of ownership.

By analysing the relevant articles of the Third Book of the Civil Code of Ukraine «The right of ownership and other proprietary rights,» one can effortlessly draw the conclusion that the legislator establishes the basic norms, aimed at ensuring the economic freedom of each individual, the economic independence of the personality, based primarily on private property. Thus, Art. 319 of the Civil Code of Ukraineprovides that the owner shall possess, use and dispose of property belonging to himat his own discretion. All owners are provided with equal opportunities to exercise their rights. The proprietor shall be entitled to make in respect of his property any actions not contradictory to the law.

Of course, the discretion of the owner in the implementation of his right to property belonging cannot be limitless – its limits are determined by the general rules established by Art. 13 of the Civil Code of Ukraine for the implementation of the subjective civil rights, in particular, the person is obliged to refrain from acts that could violate the rights of others, harm the environment or cultural heritage. The person is not allowed to perform acts with intent to cause harm to another person, as well as to abuse the right in other forms. Art. 319 of the Civil Code, as well as art. 13 of the Civil Code provide that in exercising his rights and performing his duties, the owner is obliged to observe moral principles of society.

Guaranteeing the principles of the inviolability of property rights, Art. 321 of the Civil Code provides that no one may be unlawfully deprived of the right or restricted in its implementation. Cases of exception of property or restrictions on the implementation of property rights, as the order of exception (restrictions), may be established only by law. Such cases generally have the character of exceptions and can only be justified by reasons of social necessity. In case of violation of property rights, illegal encroachments on the property or creation of illegal barriers to the implementation of this law, the owner has an opportunity to use the full potential of civil protection methods, which have both a general nature and are provided in Art. 16 of the Civil Code, and are specially fitted

for the recovery of violated property rights (Articles 386–394 of the Civil Code).

A. I. Solzhenitsyn, an outstanding writer and public figure of our time quite clearly defined the relationship between private property and civil society: private property creates independent citizens. Independent citizens create a civil society, and civil society, which is formed, in its turn, leads to the state governed by the rule of law[1].

Indeed, civil society «implies the existence of autonomous, sovereign, free individuals who are equal and endowed with private ownership for the conditions of their lives. It is private ownership for the living conditions that makes the human person really economically independent and free[2].

Analysing the Ukrainian legislation reownership on its compliance with European standards, primarily with European Convention on Human Rights (hereinafter – European Convention), in particular, with Article 1 of Protocol 1, we should focus on some important aspects.

Article 1 of Protocol 1 to the European Convention, signed in Paris in 1952, provides that «every natural or legal person is entitled to own their property peacefully. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law.

However, the previousnorms in no way detract from the right of the state to enact such laws, which, in its opinion, are necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties».

The above mentioned article is the only norm of the European Convention relating to economic rights. At the same time, as noted by the researchers of the Convention, when drafting the text of this article, participating states reserved the considerable freedom of choice of standards to be applied to determine the scope of the law and the possible and permissible limits of its application.

The analysis of the content of Article 1 of Protocol 1 confirms the presence of its three distinct but interrelated standards:

1) the first general rule, which establishes the principle of peaceful possession and use of property;

2) the second rule pertaining the deprivation of property and connecting it with special conditions;

3) the third rule recognizing that state has the right to control the use of property in accordance with the general interests[3].

In the decision of «Sovtransavto Holding against Ukraine» the European Court of Human Rights noted that these rules are organically linked. The second and third provisions of Article 1 are spe-

[1] See: Гражданское общество: истоки и современность. – 3-е изд. – СПб., 2006. – С. 104.

[2] Ibid (p. 104)

[3] Донна Гомьен. Европейская Конвенция о правах человека и Европейская социальная хартия: право и практика / Донна Гомьен, Дэвид Харрис, Лео Зваак. – М., 1998. – С. 406, 407.

cial cases of «interference with the right of ownership», and that is why they must be construed in the light of the principle set out in the first provision.

As a side note, jurisdiction of the European Courtplays an important role in solving specific issues related to the application of the provisions of the European Convention. A long-standing doctrinal debate about whether court practice is the source of law or not, and according to the practice of the European Court of Human Rights, is unambiguously positive, its law-making role is not denied, noted V. A. Tumanov[1].

Thanks to it the catalog of rights, protected by Court, was consistently detailed and expanded, concise messages were filled with a wide content, rules not being not expressed «explicite» but in fact being hidden therein, were formed[2].

The comparative analysis of the property contained in the Ukrainian legislation on the property and the European Convention is significant in the context of a broad application of Article 1 of Protocol 1 and the practice of the European Court on this issue.

If in Ukraine traditionally both legislator and civil law doctrine consider ownership as property law, the object of which is, first of all, the objects of the material world, the European Convention considers property much broader, and uses the term as identic to property.

As the analysis of the European Court jurisdiction, the following relates to property in the context of the European Convention, except movables and immovable as:

– corporate securities;

– decision of the arbitration body in a dispute;

– claimson compensation for damages under local law;

– legitimate expectations that there is a certain provision;

– economic interests related to business management, and management of clientele (business reputation, intangible assets, etc.);

– right to pension (if, within a certain period particularcontributions were made).

The Court independently assesses the definition of «property», and this evaluation may diverge from the definitions and evaluations commonly used in the domestic (national) law. This method of «autonomous» interpretation is widely used by the European Court.

Thus, the literature indicates that in one of its decisions (in the case of «Beeler against Italy» on January 5, 2000), the Court noted that the concept of «property» in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited by ownership of physical things. It is independent from the formal classification in domestic law: certain other rights and interests constituting assets can be regarded as the right of ownership, and thus as «possession» for the purposes of this provision[3].

[1] Туманов В. А. Европейский Суд по правам человека / В. А. Туманов. – М., 2001. – С. 89.

[2] Ibid (p. 89, 90)

[3] Старженецкий В. В. Россия и Совет Европы: право собственности / В. В. Старженецкий. – М., 2004. – С. 50.

The criteria for assessing are economic value of a property as defining, that is, its monetary assessment on the basis of objective factors, as well as an attribute of real property, that is the property should be available. The European Convention does not protect the future rights[1].

In connection with the above provisions of Article 1 of Protocol 1 and appears crucialthe second question exceptionally crucial for the analysis: what are the limits of permitted (reasonable) state intervention in the affairs of the owner?

Referring again to the Ukrainian legislation, the right of property is determined by the classic formula: the owner may possess, use and dispose of property within the limits prescribed by law.

And because the law is a product primarily of state activity we can interpret this principle as the possibility to use the property at one's discretion, within the limits ***prescribed by law, defined by the state***, or to the extent ***provided by the State and entrenched in the law.***

As Article 319 of the Civil Code of Ukraine provides that the owner cannot use the right of ownership to the detriment of the rights, freedoms and dignity of citizens and the interests of society, etc., and Article 1 of Protocol 1 states that the restriction or deprivation of property rights may be carried out only in the public interest and subject to the conditions provided for by law and by the general principles of international law, in this regard there is quite a fair question.

Firstly, how to interpret the concept of «public interest» in the context of the Ukrainian legislation concerning property, and Article 1 of Protocol 1 to the European Convention?

Secondly, are there such restrictions in the Ukrainian legislation?

Thirdly, are these restrictions within the frameworks of «public interest»?

These questions can be viewed as a set of interrelated, and exactly the nature of the response to them will provide us with an opportunity to clarify the issue: whether Ukrainian legislation on property meets the standards of the European Convention in the broad meaning.

The analysis of the mentioned above norms of the Ukrainian legislation on the property hardly gives a rise to doubts about their inconsistency with the interests of the owner.

Getting acquainted with these rules, we face virtually perennial problem of our legislation – lack of reliable mechanisms of relevant rules. Ukrainian legislation is»oversaturated» with rules-principles, rules-declarations. The lack of a stable legal framework of citizens' interests protection often negates their effectiveness.

That sense of security and protection of subjective rights (including property rights) forms a human perception of the usefulness of its legal status and, consequently, the existence of the prerequisites for social activity.

Analyzing the meaning of property in these important social processes, S. S. Alekseyevfairly pointed out: "… in

[1] Донна Гомьен. Европейская Конвенция о правах человека и Европейская социальная хартия: право и практика / Донна Гомьен, Дэвид Харрис, Лео Зваак. – М., 1998. – С. 409.

civil society an individual must be the bearer of property – such that givessupport in life to the individual, provides him an independent existence and which therefore gives an individual the status of a person, independent of government and, moreover, capable with the presence of other prerequisites to obtain the mandatory public authority in relation to the government»[1].

The method of civil law regulation which defines the methods and techniques of the impact of civil law to the appropriate public relations initially requires as an obligatory condition the legal equality of all participants, their economic and organizational autonomy, freedom of expression in the exercise of any legal actions. This method is organically combined with the main basis and principles of civil society functioning. It can therefore be saidwithoutany exaggeration that if the property basis of civil society is private ownership and the market economy, the legal regulation of this basis is provided primarily by civil law.

Not only the mentionednorms relating to regulation of property relations and constituting the statics of civil regulation, but also civil rules governing the whole civil turnover (the dynamics of civil regulation), associated primarily with the various civil contracts bothdefined and non-defined, provide to each citizen and society as a whole an opportunity to realize the vital needs, interests, desires, aspirations.

Following the Constitution, the Civil Code provides that an individual is able to have all the property rights established by both the Code and other laws. All individuals are equal in the ability to have civil rights and duties (art. 26 of the Civil Code of Ukraine).

Civil legislation provides a wide range of subjective civil rights. Besides considered property right, the participants of civillaw relations (individuals and legal persons) may have other property rights: ownership, servitudes, emphyteusis, superficies; enter into civil transactions (in particular, into agreements) both provided and not provided by the law, but not contradictory to him, to carry out business activities not prohibited by law.

Exactly the civil law provided a special structure of a legal entity, able to extend significantly the possibility of legal regulation, first of all, property relations involving collective entities.

In modern conditions the use of the structure of the legal entity makes it possible to ensure the proper functioning of not only the entire production infrastructure of civil society (joint stock companies, limited liability companies, production cooperatives etc.), but also a plenty of non-productive (non-profit) organizations.

Overcoming the border of the third millennium, humanity has entered a new era, which must be marked not only with the strengthening of human values, but also with the steady development of the human intellect. After all, the success of the solution to many political, economic and social problems depends on how

[1] Алексеев С. С. Право: опыт комплексного исследования / С. С. Алексеев. – М., 1999. – С. 650.

significant the intellectual potential of civil society and its level of cultural development will be.

Now, no one would deny that the intellectual activity and its results acquire priority in today's world.

Human creativity is his deeply aware need for self-expression, self-assertion, the addition of deep spiritual experiences in the search for harmony and self-improvement into the world. The ability for creative and intellectual activity distinguishes man from other living beings and does not depend on age, health status, abilities and talents.

Enhancing the role of intellectual activity and intellectual property predetermines the need to strengthen the effectiveness of their legal protection.

Legislativerulesregulating the use and protection of intellectual property rights (as well as the rules that make up institute of property rights) belong to different branches of law: constitutional, administrative, criminal, procedural etc. However, a special place among them belongs to the civil law.

Civil Code of Ukraine for the first time combined the rules relating to the protection of the results of creative intellectual activity in the separatefourth book «Intellectual property rights».

Despite the long discussions that accompanied the process of codification of civil law in the CIS countries, in general, we managed to defend the position of a civil nature and, accordingly, the sectoral affiliation of these rules.

A proactive position on this issue has been taken by the World Intellectual Property Organization (WIPO) in cooperation with the WTO. Experts of these influential international organizations were strongly opposed to the concept of universal regulation of intellectual property rights namely in the Civil Code. In their opinion, the basic regulation of corresponding relations should be carried out with the rules of special laws that at the time of the Civil Code adoption were in almost all CIS countries. As for the Civil Code of Ukraine, it has been suggested that it is enough to make a few general norms of a purely declaratory nature.

Such approach in no way did not respond the conceptual basis of civil law codification and caused fierce opposition on the part of the drafters of the Civil Code in all CIS countries. In general terms, this position was formulated by well-known Russian civilist V. Dozortsev[1].

Institute of Intellectual Property is one of the most important civil and legal institutions, which is why its rules are organically linked with the other institutions of civil law – a legal entity, contracts, methods of protection, responsibility, etc.

In our opinion, the need for sufficiently detailed regulation of relations connected with the implementation of intellectual property does not exclude, but rather involves the deepening of the fundamental general principles of intellectual property rights in special legislation, most of which at the time of the Civil Code of Ukraine has acted and the

[1] Дозорцев В. А. Интеллектуальные права. Понятие. Система. Задачи кодификации / В. А. Дозорцев. – М., 2005. – С. 25–28.

content of these laws (their civil law component) was taken into account in the formation of the provisions of the Civil Code of Ukraine.

Thus, it was possible to ensure a reasonable balance between regulation on the codification level and at the level of specific intellectual property laws.

General provisions on intellectual property rights, entrenched in Section 35 of the Civil Code of Ukraine, one way or another relate to all intellectual property rights, mentioned in Art. 420 of the Civil Code of Ukraine. An important principle of the regulation of intellectual property rights provided for Art. 419 Civil Code of Ukraine: the right of intellectual property and ownership of the thing does not depend on each other, and the transfer of the object of intellectual property rights does not mean the transfer of ownership of a thing, and vice versa.

In this connection it is appropriate to quote a prominent scientist in the field of intellectual property rights A. Pylenko, who in the early twentieth century argued that any invention "… has only abstract and ideological content and its real substrate can be identified only in the undeveloped thinking… the essence of the invention is not limited to those material objects in which it is embodied, the invention is always… is an intangible,… the object of a patent right is always an intangible… "[1].

The Civil Code of Ukraine has entrenched intellectual property rights to literary, artistic and other works (copyright), the right to perform, sound recording, video program and the program (transfer) of broadcasting organizations (related rights); the right to scientific discovery; the right to an invention, utility model, industrial design; the right to the layout of integrated circuits; the right to innovation; rights to plant varieties, animal breeds; the right to a commercial name, a geographical indication. Also, the Code provides for the rights to a trade secret.

Thus, civillaw regulation covers the whole spectrum of intellectual property rights and includes them organically in a system of protection by civil law means.

Civil Code Ukraine secured as the basic principles of modern civil law principle of fairness, good faith and reasonableness. This approach of Ukrainian lawmakers, who took common humanistic concept of the drafters of the Civil Code, is quite symptomatic of trends of development of modern Ukrainian society.

In addition, it should be noted that a decade of experience in the application of Civil Code has confirmed the viability of this principle, and its being in demand by the judicial practice is the undisputed evidence of the deepening and further development of the private law fundamentalsof civil society in our country.

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[1] Пиленко А. А. Право изобретателя / А. А. Пиленко. – М., 2001. – С. 9.

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PERIODS AND DATES IN CIVIL CONTRACTS: PARTICULAR ASPECTS

An important role in realization and protection of subjective civil rights and exercising of subjective civil obligations belongs to the application of such time (temporal) categories as periods and dates. The regulation of operation (validity) throughout the time of subjective rights and obligations is an important mean of the legal influence on the conduct of the participants of civil relations.

The points concerning periods and dates mainly are accessorily considered in the works of civil lawyers when analyzing concrete legal relations in the structure of this or that institute of law. Concerning contractual legal relations the research of the role of temporal terms is conducted in particular in candidate dissertations of D. O. Marits[1], M. D. Plenyuk[2], N. V. Khaschivska[3]. However, the point concerning the definition and legal substance of periods and dates, their classification, role of periods in particular institutions of civil law and consequences of their non-compliance stays discussion in domestic legal science. Sometimes disputes concerning the interpretation and application of provisions on periods are decided ambiguously by some judicial instances. Ambiguous application of the rules of law in the similar legal relations is often conditioned in judicial practice by non-agreement of the rules of the Civil and Commercial Codes and other normative-legal acts with each other.

Z. V. Romanovska paid attention on a great variety of terms in civil law, which concern the determination of the time bound of legal relations[4]. However,

[1] Маріц Д. О. Правове регулювання строків у договорах про оплатну реалізацію майна: Дис. … канд.. юрид. наук / Д. О. Маріц. – К., 2011

[2] Пленюк М. Д. Цивільно-правове регулювання строків (термінів) у договорах про виконання робіт: Дис. … канд.. юрид. наук: 12.00.03 / М. Д. Пленюк. – К., 2011.

[3] Хащівська Н. В. Цивільно-правове регулювання строків у договорах про передання майна в тимчасове користування: Дис. … канд.. юрид. наук: 12.00.03 / Н. В. Хащівська. – К., 2011.

[4] Ромовська З. Українське цивільне право: Загальна частина. Академічний курс. Підручник / З. Ромовська. – К.: Атіка, 2005. – С. 467.

in most cases they result from such basic legal categories as a period and date.

Notwithstanding the close relation between them, their definition is given in the Articles 251 and 252 of the Civil Code of Ukraine (hereinafter CC). According to the named Articles a period shall mean a certain period of time to which expiration an action or an event of legal significance is linked. In this case a period is defined by years, months, week, days or hours. A date shall mean a certain moment in time to which occurrence of which an action or an event of legal significance is linked. The date is defined by the calendar date or notion on the event, which has inevitably come.

Till now the discussions between civil scientists are not subsided in the question on the legal nature of periods and their correlation with other categories of civil law in particular legal facts.

Legal periods are as usual considered as events, meaning the flow of time (period). So, O. O. Krasavchykov separated the flow of time in a particular group of absolute legal events, emergence and action of which are not caused by the volitional activity of persons [1].

The given opinion of O. O. Krasavchykov concerning the legal nature of periods is supported in the contemporary Russian scientific researches. So, M. Ya. Kyryllova and P. V. Krachenynnykov suppose that a period in the system of legal facts refers to events, because it occurs (expires), regardless of the will of persons as well as the flow of time in general[2]. A legal period gets the same legal appraisal.

V. P. Grybanov correctly admitted that a person realizing his/her activity actively uses the time. Thus, he objected the idea of O. O. Krasavchykov who affirms that a person cannot oppose by his/her activity to the flow of time because a person lives in time. People can time the realization of this or that activity to some moment in time or to some length of time. People can set some limits for these or those actions. That's why a period as a legal fact in its beginning has a volitional nature. In his opinion the will of persons essentially influences not only on the length of a determined period, not only on the beginning of its expiration, but the expiration of this period itself, which can be stopped by the will of persons, discontinue or continue. At the same time the end of some period cannot be referred to legal acts, because its expiration is a separate case of the flow of time, which flows regardless of the will and activity of a person. Accounting the role of periods in the establishment, change, fulfillment and protection of civil rights V. P. Grybanov concluded that legal periods in the system of legal facts of civil law occupy an independent place side by side with legal events and legal actions and by their nature they are middle between them[3].

In our opinion, civil legal periods are to be considered as a partial form of the

[1] *Красавчиков О. А.* Юридические факты в советском гражданском праве / О. А. Красавчиков. – М., 1958. – С. 166–168.

[2] *Кириллова М. М., Крашенинников П. В.* Сроки в гражданском праве. Исковая давность / М. Я. Кириллова, П. В. Крашенинников. – М.: Статут, 2006. – С. 6.

[3] *Грибанов В. П.* Сроки в гражданском праве / В. П. Грибанов. – М.: 1967. – С. 8–10.

development of civil relations, as the form of existence and fulfillment (performance) of subjective legal right and obligations, which constitute the content of legal relations. A subjective right and an obligation are the possibility or necessity of performance of them by the carriers of some actions or the restriction from their performance. The content of a period is an action or an event (events can also occur in time, have their length). The set and existence of periods out of these facts loses its sense. That's why the occurrence or end of a period does not acquire the meaning on their own, but they acquire their meaning in combination with events or those actions, for performing or restricting from which this period is established.

From the stated above it is possible to conclude that periods do not occupy an independent place in the general system of legal facts side by side with legal acts and legal events. Time as form is peculiar to the first and the second. That's why periods generate legal consequences only in connection with actions and events, appearing as the time form in which events occur and actions are performed. Accounting this a period was determined by us as a period of time or moment of time, with occurrence or end of which an action (omission) or an event of legal significance is linked[1]. Such definition of a period was fixed in the Articles 251 and 252 CC of 2003. According to the Part 3 of the Article 251 CC a period and date can be defined by the acts of civil legislation, transaction or decision of a court.

The condition on the period is the element of contract content. The content of a contract as a joint legal volition act of parties constitute, firstly, the conditions which the parties agreed, secondly, those conditions which are accepted by them as obligatory in the result of the current legislation (Part 1 of the Article 628 CC, Part 1of the Article 180 of the Commercial Code). In other words the content of a contract – is those conditions on which a respective agreement is concluded. If a contract is legalized in writing in the form of one instrument, signed by parties, or by the way of changing the letters, then respective conditions are fixed in the clauses of a contract, in which the references to the rule of the current legislation in this sphere may be contained. So far as a contract is the ground for the emergence of civil legal obligation, the content of this obligation is exposed through the rights and duties of its participants defined by contract clauses.

First of all the definition of the period of a contract validity is important. The period (term) of a contract is the time of its validity (obligatoriness) (Part 1of the Article 631 CC, Part 7 of the Article 180 of the Commercial Code). During this term parties can realize their rights and fulfill their obligations according to a contract. The term of the operation of a contract is defined at the discretion of parties, if only the period of its validity is not limited in the law or another act of the state body, obligatory to the parties. For example, the period of a

[1] *Луць В. В.* Строки в цивільних правовідносинах / В. В. Луць. – Львів: 1992. – С. 20–21.

contract concluded on the basis of the state order to supply goods, is limited by the period of the state order.

Touching the correlation of contract conditions defined at the discretion of parties (so called «initiative» conditions) and conditions which are obligatory pursuant to the acts of civil legislation, general provisions on the correlation of acts of the civil legislation and a contract, fixed in the Article 6 CC, should be addresses to. Pursuant to the Parts 2 and 3 of this Article the parties are entitled to regulate their relations not regulated by the civil legislation acts in the contract thereby. Parties to a contract can deviate from the provisions of civil legislation acts and regulate their relations at their own discretion. But parties to a contract cannot deviate from the provisions of civil legislation acts unless expressly specified in these acts as well as in the event that mandatory nature of the provisions of the civil legislation acts results from their subject matter or the substance of relations between the parties.

Considering the correlation of an individual (inner or self-regulation) and state (external, imperative) regulation of contractual obligations in the broader sense S. O. Pogribny admits that the autonomy and self-sufficiency (independence of a country) of a civil society, its participants and relations, which are formed between them have given the ground to the conclusion that these participants themselves have to be the main subjects of the legal regulation of such relations. The legal regulation of contractual relation from the side of a state is possible and necessary only there and where and when the subjects of the regulation cannot or do not want to regulate their relations themselves or when their independent regulation of their relations does not coincide with the interests, which the public power has to protect[1].

The content of a contract, that is, the combination of its stipulated conditions, is always defined by the parties' agreement. However, the will and expression of the will of contract participants first of all is formed under the influence of prescriptions of the rules of the civil law which contain an abstract model of the participants' interrelation. A contract is an individual legal act, in which the abstract model of persons' relations, traced in general features in the law, is filled with a concrete content and takes its own «flesh and blood». That's why there is no necessity to duplicate provisions in a contract, which are ordinary and stipulated in corresponding normative acts (for example, on the responsibility for the violation of contract conditions) so far as the parties shall follow them irrespective of their inclusion in a contract.

By the general rule a contract enters into force from the moment of its conclusion, but parties can define that conditions of a contract are also applied to the relations between them which appeared before its conclusion.

The period of contract validity stipulates the period of the validity of the obligation which arose from this contract

[1] *Погрібний С.* Регулювання договірних відносин у цивільному праві: співвідношення їх внутрішнього (саморегулювання) і зовнішнього (державного) регулювання / С. Погрібний // Право України. – 2012. – № 9.

(Part 7 of the Article 180 the Commercial Code). If an obligation is fulfilled by parties earlier, the contract force ends. But contract validity does not end until an obligation is performed by parties or one of the parties refuses from a contract in the order stipulated for the change or repudiation of a contract (Articles 651–654 CC).

The issue on application of sanctions is connected with the period of contract validity in particular civil responsibility for a wrong which took place during the operation of this contract. The end of the contract period does not release parties from the responsibility for a contract breach committed during the operation of this contract. When committing a wrong beyond the period of contract validity, persons can be hold legally responsible under the rules stipulated for obligations which result in harm or other out of contract obligations.

Concerning the conditions on the periods of the contract operation CC (Article 631) and the Commercial Code of Ukraine (Part 7 of the Article 180) in principle contain the same provisions, however, in CC the general indication on the period as one of the essential terms of any contract, including the one that is applied in the sphere of entrepreneurship, is absent.

Thus, the operation period of a commercial contract, which is the period of performance (operation) of an obligation, can be referred to essential terms if this is stipulated by the law for a concrete kind of a contract or results from the nature of the parties' relations.

The Civil Code of Ukraine uses the term «reasonable period» in the number of the Articles – 680, 688, 843,938. For example, according to the Part 1 of the Article 688 CC a buyer is be obliged to inform the seller on violation of the sales contract provisions on the quantity, range, quality, completeness, container and (or) package of goods within the period established by a contract or by the civil law acts and if this term is not established – within a reasonable period after detection of the violation pursuant to the nature and purpose of goods.

In case the buyer fails to fulfill this obligation, the seller shall be entitled to partially or fully refuse from satisfying the respective claims of the buyer (including payment of forfeit, damages), if the seller proves that this caused impossibility for the seller to satisfy the buyer's claims or results in the seller's expenses that will exceed the expenses in the event of timely notification on violation of the sales contract provisions.

Thus, there was the case tried in the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry on the claim of the English firm to the Ukrainian Partnership on the seizure of the cost of supplied medical goods, penalty and annual percents. One of the arguments for the sustenance of the claim against the buyer was the failure of the notification of a seller in a specified by a contract period (30 days) about proper quality of his supplying of goods.

As the Arbitration Court adjudicated on 15 November 2004 a sales contract of medical goods was concluded on the sum total 500 000 $ between the Belarusian Limited Liability Company (seller)

and Ukrainian Limited Liability Company (purchaser). A purchaser was obliged to pay the cost of goods during 85 calendar days from the unloading date from the seller' storage (from the registering date of the expert loading customs declaration) and in case of delay of the payment – paying the penalty in the amount of 2% from the unpaid production's cost for each day of the delay, but not more than 100% from the sum of unpaid goods.

In the period from 18 November to 22 March 2005 Belarusian Limited Liability Company unloaded the corresponding medical production for the performance of this contract according to the attached to the contract specifications on the sum total accounting the financial discount 202912,11$.

Having taken the production the defendant did not pay its cost. On 14 June 2005 the Belarusian Limited Liability Company concluded the contact on the recession of the right of a claim, under which all rights by the contract were transferred to an English firm, including the right to right of a claim of the main debt on the sum 202912,11$, payment of forfeit (penalty), percentage for the usage of another's money and damages.

Having analyzed the materials of the case given by parties, the Arbitration Court admitted among the grounds for the sustenance of the claim in the part of payment of the medicines' costs, that according to the Part 1 of the Article 39 of the United Nations Convention on Contracts for the Sale of Goods a buyer loses the right to rely on a lack of conformity of goods if he does not give notice to a seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. The analogical rule is contained in the Part 1 of the Article 688 CC of Ukraine, which obliges a purchaser to notify a seller about the breach of the sales contract conditions concerning the quantity, assortment, completeness, containers, packing in the time, stated in a contract or the acts of the civil legislation. The contract conditions defined that the claims concerning quantity and quality can be put in by the purchaser during the 30 days from the moment of getting the production. As it follows from the case materials and is not contested by the defendant's representatives the claim on the improper quality of supplied medicines as well as the acts of the internal control drafted by representatives of the purchaser were not sent by the defendant[1].

The phrase «reasonable period» means the necessity to account all concrete circumstances in which the participants act.

As R. B. Shyshka admits the «reasonable period» should be deemed as the period during which a person with the normal, ordinary level of intellect, knowledge and life experience can adequately evaluate a situation, modulate the necessary legally significant conduct in it[2].

The CC of Ukraine operates the term «reasonable period», however does not

[1] *Практика* Международного коммерческого арбитража. – 2006. – Вып. 12. – С. 68–90.

[2] *Цивільне* право України: У двох частинах: Ч. 1. – Харків, 2008. – С. 336.

contain the general rule, in which the content of this term would be exposed. It is mentioned only concerning the contractor's contract in the Part 2 of the Article 846 CC that if the period for the work performance is not established in the contractor's contract, the contractor is obliged to perform the work, and a client shall have right to claim its performance within a reasonable term pursuant to the substance of the obligation, the nature and scope of work and common practice of businesses.

It is pointed out in the paragraph 2 of the Article 314 of the Civil Code of the Russian Federation that in cases when an obligation does not stipulate the period of its performance and does not contain the conditions which would allow to define this period, it shall be performed in the reasonable period after the arising of an obligation. However, the expression «reasonable period» in this general rule is not exposed. The offer of T. V. Bodnar does little in the sense of clarifying the specified concept. She offers to add the Part 2 of the Article 530 CC with the first indent of such content: «If an obligation does not stipulate the period of its performance and does not contain conditions that permit to define this period it shall be performed in the reasonable period after arising of an obligation»[1].

The Russian researcher S. V. Sarbash does not offer his definition of this term, but subscribes to the opinion of G. D. Otnyukova, critically evaluating different approaches to the clarification of the concept of a reasonable period, its correlation with a favorable period and other time categories. According to her opinion a court shall approach to the evaluation of a reasonable period accounting the nature of an obligation, parties' relations and conditions of performance, which influence on the possibility of timely performance.

A reasonable period is associated in common-law countries (in particular USA, England) with the assessment of actions and circumstances under which they are performed. So, by the paragraph 2 of the Article 1–204 of the Uniform Commercial Code which period is reasonable for performing this or that action depends on the nature and aim of such an action and connected with it circumstances[2]. The performance during the reasonable period is considered in English law as such that is performed with taking into account the nature of a contract and circumstances of a given case. What is a reasonable period – is a question of a fact in each concrete case[3].

Thus, the clarification in theory and practical activity of the subjects of civil law the substance and role of dates and periods which are determined in contractual obligations will promote accuracy and definiteness in the rights and obligations of parties in the process of their performance of obligations.

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[1] *Боднар Т. В.* Виконання договірних зобов'язань у цивільному праві: Монографія / Т. В. Боднар. – К.: Юрінком Інтер, 2005. – С. 106.

[2] *Единообразный* торговый кодекс США / Пер. с англ. – М.: 1996. – С. 54.

[3] *Халфина Р. О.* Договор в английском гражданском праве. – М.: 1959. – С. 294.

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JUSTICEMENT NATIONAL STANDARDS ARISING IN THE CONTEXT OF THE RIGHT TO A FAIR TRIAL

Ukraine has chosen the strategic direction of integration to the world community, the introduction of human values, enforcement of rights and freedoms of man and citizen. By the European standards, the state should provide the mechanism of implementation the citizens' rights and interests enforcement, and the court plays a major role in this process.

The constitutional declaration of human rights and freedoms as the supreme value, the proclamation of Ukraine as the legal and social state makes special demands to the legal regulation in the rights enforcement field, its quality and efficiency. Especially it concerns the judicial protection of the rights and freedoms of man and citizen. The art. 1 of the Law of Ukraine «On the Judicial System and Judges' Status» establishes that the judicial power realizes by judges on the basis of justice administration through the appropriate legal procedures. In turn, art. 2 of this Law regulates that the court administers justice based on the rule of law, ensures everyone the right to a fair trial and the respect for other rights and freedoms guaranteed by the Constitution and laws of Ukraine and international treaties ratified by the Verkhovna Rada of Ukraine.

There is no doubt that human rights enforcement – the main purpose of the legal systems of modern democracy state. The nature and level of rights security could be the basis for the conclusion about the real situation of the state legal system. The effectiveness of the public authorities and the democratic degree of the state in general evaluates through the level of human rights and citizens enforcement. The establishment and operation of a comprehensive system of mans' and citizens' rights and freedoms security is an important legal guarantee of its enforcement. And this guarantee should

be provided by professional and competent judge.

The right to judicial protection is one of the fundamental human rights; it has an extremely important sense for the rule of justice in the state. Also it restoring the confidence to the state institutions, promotes the well-being of individuals and society in general. This right occupies an important place among other human rights and it is one of the means of society harmony achieving, it contributes to social peace and to participation of all social groups in social life. It is an inherent part of the state, President and government policies and it plays a significant role in prevention of human rights violations and living standards decreasing. In democratic societies with socially oriented economy, the public policy based on priority of human values defining through the concept of «well-being», through the possibility of judicial protection of violated rights, through the right to fight against the lawlessness of officials, bureaucratic of officials and others. In the present circumstances of market economy it is necessary to introduce new approaches to legal regulation of relationship between man and the state, using of certain mechanisms and means provided by law to ensure the rights and duties.

The law enforcement and the modern theory of law recognizes that problems related to the legal regulation of public relations, in particular, the problem of efficiency interaction between lawmaking and law enforcement processes that are important for any community. The understanding of these problems determines not only the knowledge of law as an objective, complex, multidimensional and social phenomenon, or a special form of regulation of social relations, but also the understanding of the law idea, ways and forms of its realization in being of concrete historical society, not only in the form of certain system of concepts, definitions, principles, norms and institutions, but in the real operation of the system.

One of the important goals of law is the promotion of the realization of the dialectical interaction of objectively caused social interests (private and public) in the process of its implementation in any form of social interaction, including in the state organized society. In fact, it suggests the universality legal impact on every public entityof legal relationship that is an important prerequisite for the process of creation and functioning of the national legal system. That is the process of disclosure of objective laws of social development and conscious introduction of them into legal reality. The judiciary power, its transparent and fair administration of justice, plays an important role in this impact. The development of society and of legal and democratic state is impossible without such power.

The protection of rights, freedoms and interests within a reasonable time by an independent, impartial and fair court is guaranteed to every citizen, and judicial system provides the access to justice. It should be emphasized that the legislator is constantly seeking for improving and increasing the national standards and judicial proceedings and fro

ensuring the citizens' right to a fair trial (for example, the Law of Ukraine «On ensuring the right to a fair trial»).

The special procedure for judge's appointment, election, prosecution and dismissal is a guarantee for his independent. The Higher Qualification Commission of Judges of Ukraine (The HQCJ of Ukraine) takes a lot of work in this process: qualifying exam passing, determining the ranking position of the judge, holding the competition to occupy the vacant post of judge, consideration of elected judges for an unlimited term, raising of qualification of the judge, conducting the qualification evaluation, holding judges disciplining liable and others. In its activity the HQCJ of Ukraine based on Ukrainian legislation and international standards in judiciary, namely the Basic Principles on the Independence of judgment / approved by the resolutions 40/32 and 40/146 of the UN General Assembly on November 29 and December 13, 1985 /; Conclusion № 1 / 2001 of Consultative Council of European Judges to the attention of the Committee of Ministers on standards of judicial independence and irremovability of judges; Conclusion № 3 / 2002 / Consultative Council of European Judges to the attention of the Committee of Ministers on the principles and rules governing the judges' professional conduct, in particular, ethics issues, the issues of incompatible behavior and impartiality and others.

Society raises the problem of updating the judicial power, of implementation of legal and transparent mechanism on the ability of judges to administer justice, of confirming the professional level of judges and so on. In a short time the HQCJ of Ukraine made a huge work in this direction: developed a methodology and procedure for qualification assessment of the judge (developed the relevant regulation); developed the regulation on the examination procedure of a judge; outlined the areas of testing and fulfillment of practical tasks taking into account the principles of instance and specialization; approved the procedure of judicial dossier studying; identified a mechanism for interviews conducting and more. Unfortunately, it should be noted that not all institutions and agencies carry out the instructions on updating the legislation of the judiciary branch of power and on the ability of judges to administrate the justice in the court of the appropriate level. In some cases the HQCJ of Ukraine faces to the delay elements and the reluctance to upgrade the judiciary branch, to fulfill the requirements of legislation and meet the expectations and hopes for the reform of the judicial system of Ukraine.

The HQCJ of Ukraine brings judges to disciplinary responsibility ensuring the independence of them. It should be noted that the HQCJ of Ukraine receives a large number of complaints from citizens, from individuals and legal entities, officials of various levels. The HQCJ of Ukraine ensures an effectiveness of legal structure of disciplinary responsibility of judges. The main idea is the effective legal impact on the judge in response to the proper guarantee level of the bringing to disciplinary responsibility. A judge who does not feel the proper impact of disciplinary responsibility will perceive

it in the future as the suggestion, not as the legal compulsion of the state and society. It is extremely important to understand that we couldn't establish the measures of responsibility of judges in subordinate legislation, and especially in local regulations, especially on the basis of the views and wishes of individual politicians or political preferences, that ultimately could lead to legal harassment.

During the disciplinary proceedings the HQCJ of Ukraine has set itself two main tasks. Firstly, to promote the citizens' rights to a fair trial exercising in accordance with the legislation of Ukraine; to prevent the court cases delaying; the transparency and openness principles violation; judicial ethics violation; to prevent the violation of human rights and fundamental freedoms by judges, etc. Secondly, to protect the judge in the case of illegal and groundless complaints in the case of rights abuse by the complainant and so on.

The essence of HQCJ's of Ukraine work suggests that it performs its tasks and goals. Good and logically combined choice in issues solving, the reasonable balance between theory and practice, the clarity of the disciplinary proceedings materials, the argumentativeness of the conclusions and generalizations show the significant professional level of the HQCJ of Ukraine that allows to evaluate its work positively.

The transition to a market economy relations and its development i in Ukraine influences at the legal system in general, and at certain fields and institutions. New political, economic processes and economic globalization require fundamental reform of major public relations regulated by the law. The protection of the rights and interests of citizens became the most important goal for the legislation of Ukraine as democratic, legal and social state. In the course of laws reforming the state should ensure the correspondence of legislation to market conditions and should actively protect citizens from the possible social problems that arise in the process of legislation liberalization and market economy functioning. These double interdependent tasks could be solving through modernization of the law, through improvement of the judiciary branch. Courting becomes an effective means of development of modern conceptual theoretical propositions concerning the relationship between the subjects of law, and means of updating of the full range of standards in the judicial protection field in accordance with the international and European standards and constitutional provisions that man is the highest social value.

The HQCJ of Ukraine in its activity based on the legislation, paid attention to the formation of the judicial staff, disciplinary proceedings and systemic approach to bringing judges to disciplinary responsibility. It should be noted that in the disciplinary proceedings and the functions fulfillment by the HQCJ of Ukraine uses modern new approaches in the law, such as the concept of legal autopoiesis, from the standpoint of what the law is functionally independent system that arise from its

own specific operation. The society functioning (the development and functioning of law) − is his constant self-renewal, sustained process of the revival of basic elements, structures, functional relationships that determine the qualitative determination of the social system. Autopoiesis system – are the systems that have the ability to reconstruct its key components and to ensure their coherence, orderliness, thereby maintaining its own identity. However, it does not preclude the changes within the system, the new items appearing, new relationships and connections, etc. On this basis the legal reforms on the functioning of the judiciary branch should be carried out.

The HQCJ of Ukraine also working productively in the matters of staffing policies and staffing providing of courts, that includes the process of training, retraining, further training persons applying for appointment or election as a judge and the, the procedure for the adoption of oath by the judge and appoint persons to the administrative positions, the effective human resource management and more. The HQCJ of Ukraine is constantly working on the implementation in practice the generally recognized principles and provisions of international law, international standards of the Council of Europe and the European Union aimed at improving the national system of justice, enhance its efficiency, transparency and accessibility.

The HQCJ of Ukraine carries out an extensive work on the removal of judges from their offices in connection with bringing the judges to criminal responsibility. It should be noted that the present legislation or case law generally have not developed the concept of «dismissal from work». There are no unities of views on this issue in the legal literature either. So it oftenleads to mistakes in understanding of this issue by individual politicians and officials. As a result – the provisions that determine the cases and the procedure for dismissal from work, interpreted broadly, and the dismissal often identified as «transfer» or «removal».

The HQCJ of Ukraine in the issue of judges' removal acting within the current legislation and specific procedures and on the basis of certain principles, among them: the convergence of interests of the citizen and the state; the differentiation of the grounds of this procedure; the preventive character of dismissal from work; full-scale legal protection of dismissal judge. The abovementioned principles should be enshrine in legislation, it will help to improve the quality of law-making in this area, to prevent the possible errors of law enforcement, to increase the responsibility of the HQCJ of Ukraine and will strengthen the legal protection of judges.

The problem of legal responsibility is one of the central problems in jurisprudence, because the law becomes meaningless without a proper mechanism of its implementation, where the legal responsibility is one of the main links. Legal responsibility, regardless of its species, implemented in strict accordance with established principles.

The principles of legal regulation of disciplinary responsibility give the opportunity to aware the impact of these provisions on the public relations and the basic directions of its development in modern conditions. Principles can fulfill its role only with the help of specific rules of law. The generally recognized principles include: legitimacy, fairness, inevitability, feasibility, individualization of punishment.

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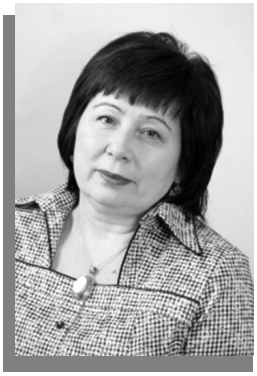

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INSTITUTION AS A SPECIAL LEGAL ORGANIZATIONAL FORM OF NON-COMMERCIAL LEGAL ENTITIES

Institution is one of the legal organizational forms in which a legal entity under private law can be established. The Civil Code of Ukraine provides the division between commercial and non-commercial legal entities only with regard to companies. Nevertheless the interpretation of the para. 1 art. 86 of Ukrainian Civil Code (that envisages the right of the institutions to provide entrepreneurial activity) makes it possible to consider institutions as non-commercial legal entities. It should be reminded that unlike the commercial legal entities, the main goal of which is to gain profit with the view of further distributing that profit between the partners, the non-commercial legal entities cannot pursue gaining profit for its subsequent distribution between the partners as a major goal. Thus the non-commercial legal entities should conduct their activities with the purpose of satisfying different needs of their destinators or for meeting the spiritual or other needs of the members of such legal entities.

It is worth noticing that Ukrainian Civil Code do not divide the institutions depending on the purpose of their establishment onto those which are beneficial to the society as a whole and those which are beneficial only to their participants. Conversely such a division would place in question the practicability of establishing many useful institutions, because in any case every destinator is a member of society[1].

[1] But the idea of such a division is inherent for current scientific literature. In particular, V. V. Kochyn suggests that the system of non-commercial partnerships consists of: privately useful partnerships (associations; condominiums; funds; non-business cooperatives) and publicly useful partnerships (civil society organizations; self-regulatory organizations; community groups etc.) provided that the direction of their activity must be recorded in a separate document that will point to their common usefulness [1, p. 7, 51 and further]. Objections here are the same as have been pointed out in the main text above.

Nevertheless it should be noted that Ukrainian Civil Code regulates the operation of institutions in a very general manner i. e. fragmentarily. In particular, the Code provides a legal definition of the institution as a legal organizational form, states that institutions have a right to provide business activity (para. 1 art. 86); envisages the procedure of establishing an institution and provides the requirements for basic instrument, name, administration, transfer of property procedure, change of purpose and structure (para. 3 art. 87; para. 3 art. 88; para. 1 art. 90; art. 101–103). Hence, according to the functional criteria of division of institutions, we should acknowledge that there is a need for the regulation of institutions' activities by the means of special legislation. But the analysis of the provisions of certain acts, designated to normalize the activity of the institutions (such an acts are all have the same structure) allows to assert that special legislation does not eliminate the gaps in the regulation of the legal status of institutions, and perhaps such a legislation was not even intended to reach such a result. Besides it appears that the status of public authorities (established in the form of institutions) and other institutions under public law is much better regulated than the status of institutions under private law.

The analysis of the current Ukrainian legislation allows reaching a conclusion that in some areas there is an unjustified extension of the use of such a legal organizational form as institution, notwithstanding the changes that have taken place in the classification of legal organizational forms of legal entities in the course of transition to the market economy. First of all this is the case of financial and lending institutions. Bearing in mind that a legal entity can exist either as a company or as an institution it is quite doubtable that credit unions, pawnshops, leasing enterprises, trust enterprises, insurance enterprises, retirement insurance funds, investment funds and other legal entities, whose sole activity is the provision of financial services, – should be established in such a legal organizational form as institution. That is why the concept «institution» gets unjustifiably broad content, although the activities of organizations in the financial sector can be carried out (and in fact is carried out) through the other more suitable organizational legal forms of legal entity.

In summary, it can be argued that insufficient regulation of legal status of institutions (as compared with the regulation of commercial legal entities) by the means of current Ukrainian legislation, the lack of an integrated system of normative legal acts regulating the legal status of institutions in different areas of operation, lack of coordination of these acts together, give rise to a number of problems that need to be further addressed. Suffice to say that ten years have already passed since the adoption of the Ukrainian Civil Code, and in this period no changes were made with regard to regulation of institutions, although such proposals had been made by scientists, especially by I. M. Kucher-

enko[1], D. S. Leshchenko[2], I. P. Zhyhalkin[3], V. V. Kochyn[4] and others.

In this regard we agree with D. I. Stepanov who believes that above mentioned approach of the legislator is some kind of indulgence or, in other words, retribution granted by the state to a specific type of legal entities as a payment for conducting some functions, which otherwise should be conducted by the state itself [5].

As well as any other legal entities, institutions can be divided on two types: institutions under private law and institutions under public law, depending on the way of their establishing. So if the institution is established by physical persons or legal entities it is an institution under private law (private institution); if the institution is established by public authorities, it is an institution under public law (public institution: governmental or municipal).

The law prohibits neither to public institutions nor to private institutions conducting their activity in the same realms provided that the certain activity does not contradict their essence. Along with public institutions which operate in the realms of education, science, culture, health care etc there are analogous private institutions in those realms. However, the institutions of private law cannot be established in order to fulfill the functions of public authorities through which public formations (state, Autonomous Republic of Crimea, local communities, etc.) acquire and exercise their rights and duties in civil relations on an equal basis with others.

The institution of public law is created in the administrative manner, which means that the decision (to establish the institution) is taken by one or more authorized bodies which approve the statute of the institution and appeal to the state registrar to obtain the status of legal entity. The decision to create institution is an administrative act, but in substance it does not differ from the decision of individuals or entities to create a private institution. Once again this point is affirmed by the rule that demands for state registration of public institutions.

The inclusion of public formations into the circle of participants in civil relations is explained by the fact that along with national and local tasks, public bodies should also complete some additional tasks. In order for them to complete those additional tasks they should have the legal capacity. The status of public authorities comprises both coercive powers and general legal capacity. And that is why the public authorities are very special participants in civil rela-

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[1] Кучеренко І. М. Організаційно-правові форми юридичних осіб приватного права: моногр. / І. М. Кучеренко. – К.: Юрид. видво «Аста», 2004.

[2] Лещенко Д. С. Установи як учасники цивільних відносин: монограф. / Д. С. Лещенко. – Д.: Дніпропетр. держ. ун-т внутр. справ, 2007.

[3] Жигалкін І. П. Установи як юридичні особи: моногр. / І. П. Жигалкін. – Х.: Право, 2010.

[4] Кочин В. В. Непідприємницькі товариства як юридичні особи приватного права: дис.…канд. юрид. наук: 12.00.03 / В. В. Кочин. – К., 2012.

[5] Степанов Д. И. В поисках критерия разграничения юридических лиц на два типа и принципа обособления некоммерческих организаций / Д. И. Степанов // Вестн. гражд. права. – 2007. – №3, т. 7. С. 19.

tions. In order not to violate the basic principle of civil law regulation of relations involving public formations (at any rate coercive power remains to be the main feature of such formations) the legislator replaces them by using the well-known concept of representation.

Bearing in mind that under the civil law doctrine in order to participate in the civil-law transactions an organization should have the status of legal entity, the legislator granted the public authorities with the status of legal entities in such a legal organizational form as institution. Those bodies (state organs, organs of Autonomous Republic of Crimea, municipal organs) are the subjects of civil relations. However, as correctly noted by V. E. Chirkyn, the terms «public institution» and «institution of public authority» may be different in content[1].

Although the general provisions relating the legal entities under private law apply as well to legal entities under public law (in the absence of special provisions to the contrary) (see, Art. 82 Ukrainian Civil Code) the civil-law component of their status is of ancillary significance in the view of the fact that public institutions pursue public purposes that lay beyond the civil circulation. Public institutions enter only into those civil relations, which are connected with the fulfillment of certain tasks significant for the state or society as a whole. Thus, the goals and objectives of public institutions, working methods, and liability forms differ from goals and objectives, working methods and liability forms of the institutions of private law. For example, the main activity of the public institutions in the sociocultural sphere consists in guaranteeing the fulfillment by the state of its social functions promulgated in Constitution. In that context the institution is perhaps the most suitable legal organizational form, because it provides not only the concentration of efforts and resources for their implementation, but also makes it possible to preserve the property of the founder (public formation) which is transferred to the institution via the right of operative administration. The public formation as a founder of institution remains to be the owner of the institutions assets and that is why one of the distinctive features of institutions under public law is the fact that the founder of those institutions bears subsidiary liability for the debts of the institution.

It remains debatable whether the institutions under public law can carry out activities that would give them income; and if so, whether such activities would constitute commerce and what kind of legal rights institutions would have on the gained profit. Analysis of the current legislation allows to conclude that the institution under public law have the right to operate activities that give income, provided that such activities are consistent with the main purpose of the institution and promote its achievement. In the same time, the above mentioned profitable activities of the public institutions cannot be qualified as commerce for the following reasons. In all cases such an activity must be in congruence

[1] Чиркин В. Е. Юридическое лицо публичного права / В. Е. Чиркин. – М.: Норма, 2007, – С. 245.

with the main purpose for which the institution was established, that is why the activity should not be risky; also it should not be the dominant activity of the institution; the exact kinds of the profitable activity must be envisaged in the statute of the institution; the gained profit may not be distributed between the founders. Thus such activities may be qualified as the activities aimed at obtaining additional revenue for the financial and material promotion of the main purposes.

So the second question is: what is the status of the profit and assets obtained as a result of the above mentioned activities? As concerns private institutions, this question is directly addressed by the law: the profit gained constitutes the property of the institution. But as concerns public institutions the law keeps silence. In our opinion it is reasonable to think that in civil relations public institutions should be empowered not only to operative administration but also those institutions should be able to dispose of their property[1]. This means that a public institution is entitled to operational management of the property assigned to it by the owner, as well as the products and incomes from the use of such property. However, we should not forget that according to art. 329 of Ukrainian Civil Code a public institution can acquire title to the property if such property is transferred to its ownership and also if it is acquired on the grounds not prohibited by law. The income and the assets received from activities aimed at obtaining additional revenue shall be deemed to come into institutions own order, but only to the extent that such income and assets promote the achievement of the main goals set forth in the statute of the institution, because these activities constitute only an additional source of financing.

An institution under private law is an organizational legal form of non-commercial legal entities, which is established by physical persons and (or) legal entities on the basis of their voluntary property contributions; and aims to provide services in education, health, culture, science, law, physical culture, sports and other services; and has no membership.

Assets transferred to the institution by its founders constitute the property of the institution and founders keep no rights to those assets; the founders are not liable for the debts of the institution and institution is not liable for the obligations of its founders.

The institution under private law operates on the basis of principles that differ significantly from those inherent in the operation mechanism of the companies (even if we consider the non-commercial ones), because the institution is not intended to gain profit at the first place. Instead the institutions main purpose is to provide services in order to satisfy different non-pecuniary interests of its destinators.

As a separate legal organizational form institution has the following features: the public character of its estab-

[1] Сорокина С. Я. Участие учреждений в гражданском обороте. Государство и право на рубеже веков //Матер. Всерос. конф.. М.: Изд-во ИГП РАН. – 2001. – С. 59

lishment and dissolution; the organizational unity; property autonomy; the ability to participate in civil transactions in its own name; procedural capacity; independent liability[1] (those are general features of all legal entities); the purpose of its very existence is prescribed by the founders and consists in satisfying different social needs; targeted legal capacity; establishing without the view of receiving profit; specific basic instrument, namely constitutive act; absence of membership (as far as the relations between the institution and its founders have purely organizational character); specific mode of acquiring assets (the list of the items that constitute the assets of the institution should be envisaged in the institutions constitutive act; the transfer of the assets from the founders to the institution takes place after the official registration of institution); purposive appointment of the assets; founders are prohibited from administrating the institution; the profit gained may not be distributed; special procedure of changing the purpose and the structure of administrative organs (those are the special features inherent to institutions only). At the same time, there are some features which are inherent only to some institutions operating specific activities and those features should not be disregarded as well.

Institution under private law is established in a so-called «normative» manner. In order to establish an institution there should be the expression of will of one or more persons (its founders) and that will must be embodied in a constitutive act; also the institution must be registered in way envisaged by law. The official registration agency legitimizes the establishment of the institution which, as a rule, should operate with no fixed term.

The establishing of private institution can take place only at the discretion of person (s) which stands behind the established entity or even has ceased to exist, (because constitutive act can be put in a will).

It follows from the legal definition of institution that the establishing of the institution can be initiated by one person or by several persons that consolidate their assets to reach some goal (art. 83 Civil Code of Ukraine). Despite the above mentioned article does not provide directly that the institution may be established only by founders-owners, the comprehensive analysis of Ukrainian Civil Code allows concluding that only the persons who own their assets can establish the institution. Inasmuch as private legal entities are the owners of their assets there can be no doubt that private legal entities may be the founders of an institution. As concerns the physical persons, the answer contains in art. 102 of Ukrainian Civil Code. According to the provision of this article if a constitutive act designates the assets that have to be transferred to the institution, than the founder (in the event of his

[1] We cannot agree with the scholars (in particular with I. M. Kucherenko who suggest considering personal responsibility of the founder for the obligations of the founded institution to be the distinctive feature of institutions, including private ones [5], because private institution is an owner of its assets and thus it is liable for its own obligations.

death – another obliged person) has to transfer those assets to the institution after its official registration. Notwithstanding that the article does not mention physical persons directly it is obvious that only physical persons can die. «The another obliged person» (a heir or a testamentary executor) can administrate only the mass of the succession, i. e. the rights and duties, that belonged to the deceased person at the moment of opening the inheritance and did not ceased due to death. Thus if the institution is established by the physical person, the latter should be the owner of assets transferred to institution.

However, analysis of art. 102 Civil Code of Ukraine allows to reach one more conclusion: legislator restricted the circle of persons who can establish institution as a private legal entity only to physical persons, because a founder who is a legal entity certainly cannot die. But this is contrary to art. 83 Civil Code of Ukraine, which doesn't restrict the circle of founders only to physical persons. Therefore it is necessary to deem art. 102 Civil Code of Ukraine as a special provision, which regulates relations on the transfer of property to institution by founders-physical persons, or supplement its text to avoid this misunderstanding.

For private law institutions the basic instrument is constitutive act, which can be individual (when an institution is established by one persons) or collective (when an institution is established by more than one person). The individual constitutive act is a unilateral juridical act, and the collective constitutive act is a bilateral juridical act, which aims to create a legal entity. The goal of the institution is specified in the constitutive act. Also the property, which a founder (and in case of his death – an obliged person) transmits to institution after its state registration and which is necessary to achieve such goal, and the structure of institution administration should be determined in it.

The constitutive act can be canceled by the founder (founders) only before establishment of the institution. If some of such provisions are absent in constitutive act, which is contained in a will, the registration agency should define them (par. 3 art. 88 Civil Code of Ukraine).

There are two stages in establishing an institution: 1) the stage before registration and 2) the stage after registration. It is connected with the fact that the property of a private institution at the time of recognition of its legal entity exists in constitutive act only hypothetically, because it is transmitted to institution only after its state registration (art. 102 Civil Code of Ukraine). Hence, it should be noted that such a feature of institution as property autonomy comes true beyond the process of creation of the institution. But given that the essence of the institution as a legal entity is a separation of property, which is necessary to achieve a predetermined goal of founders (par. 3 art. 83 of Civil Code of Ukraine), and this property separation is one of the constitutive attributes of a legal entity, we consider that a founder should transfer the property before the state registration of institution. This rule should be implemented in law. The prop-

erty of institution has an intended purpose and should be used for the socially-meaningful goal which is defined by its founder. Proper use of property affects its transferability.

One of the problems which appear when an institution takes part in civil-law transactions is a problem of its legal capacity. In our opinion, although the Civil Code of Ukraine admits a general legal capacity of all legal entities of private law, institutions not only dispense with such legal capacity, but also they couldn't be vested it, because they should achieve intended goal engaging not in any activity, but engaging only in the activity, which was determined by founder.

We cannot agree with opinion that recognition of comprehensive legal capacity for all legal entities, including the institutions, is caused by requirements of real dynamic life, which demands maximum freedom in property relations for legal entities to better meet individual interests and needs of stream of commerce [1].

In our opinion, this applies only to commercial companies, but some restrictions can be there too. The institution should have goal-oriented legal capacity. This means: first, the ability to have only those civil rights that correspond to goals of its activity and carry duties in connection with this activity; second, the ability to engage in entrepreneurial activity (income generation activities) (par. 1 art. 86 Civil Code of Ukraine), if otherwise wasn't provided by law and if such activity relevant to the purpose for which they were created or facilitate its achievement obeying the core goal of its functioning. Herewith the income which institution receives from such activity can not belong to the founder or divided between its founders, but it should be aimed to achieve the goal determined by its founder (founders).

Based on the fact that the legal entities can be administrated either by its structured organs or by granting to its members the right to acquire certain rights and obligations in the name of institution, the legislator chooses the first path and sets that such administrative organ as regency should be established at any institution. Rules of Art. 99 of Civil Code about an executive organ of a company apply to this organ, although a constitutive act can provide the establishment of other administrative organs determining the order of their formation and its composition, for example, Supervisory Board.

The legal status of the institution is affected by the objective, envisaged by founder (founders). However, the Civil Code of Ukraine has provided the opportunity to change this objective. The change takes place in court at the request of a public register, agreed with the institution governing bodies. There is an exhaustive list of reasons which allow to change the institutions objective: accomplishment of the objective has become impossible or the accomplishment of the objective threatens the public interest (para. 1 art. 103). The court in such cas-

[1] Кодифікація приватного (цивільного) права України /За ред. А. Довгерта. – К.: Укр. центр правн. Студій, 2000. – С. 133.

es must take into account the intentions of the founder and make sure that profits from the assets transferred to institution will be acquired by destinators.

If the change of the objective affects the administrative structure, that is not the problem for the court. By the way the court can change the structure of the institution for other good reasons too.

The institution can cease its activity in the following cases: expiration of the term for which it was established; due to the decision of the founder (founders); due to the decision of public authority that carries out state registration in cases established by law (inability to achieve socially meaningful goals set before the agency, in particular because of insufficiency of assets, or when achieving this goal threatens the public interest); evasion of achieving significant goals set forth by the founder (founders); systematic violation of legislation regulating the conducting of business; systematic conducting activities contrary to the socially significant purpose defined in constitutive act defined, the distribution of profits earned from business activities between the founders etc.

The institution can be dissolved at the request of the public authority conducting state registration, as well as at the founders request or due to the court's decision which invalidates the state registration of the institution because of the violations that cannot be eliminated.

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THE CONCEPT AND FEATURES OF SECURITY FUNCTION IN LABOR LAW

Human labor activity provides our daily existence and further development of society, and that attracts the attention of lawmaker and forces him to detailed regulation of working sphere. First of all it concerns the creation of necessary conditions for safe and productive work. Thus, one of the principles of the Constitution of Ukraine is everyone's determined right to proper, safe and healthy working conditions, which is also preceded with recognition of human, his life and health, honor and dignity, integrity and security as the highest social values in Ukraine[1]. Taking this into consideration we cannot but mention that in addition to direct regulation of the relationship between employer and employee in the sphere of professional activity, the task of labor law is also a protection (security) of life, health, honor and dignity, legitimate rights and interests, security of the person. Availability of codified normative act in the field of labor law plays its role in the protection of these rights guaranteed by the Basic Law. On the basis of this thesis we should think about what is directly protective function of labor law and what its features are. No doubt that in the normative documents, which are adopted in order to regulate all aspects of labor relations, or directly are aimed to regulate the issues of life and health safety (protection) during the working activity, it is not specifically defined, what these mentioned concepts are. And this in its turn highlights the great urgency of the matter. In this connection it is worth analyzing the works of outstanding scientists and little known authors who have studied labor law sphere and achieved some success in the study of its functions. Among them, M. G. Aleksandrov, V. S. Venedyktov, L. D. Voyevdyn, V. V. Zhernakov, S. A. Ivanov, T. I. Ilarionova, I. Y. Kiselov, L. O. Krasavchikova, V. V. Lebedev, R. Z. Lifshyts, O. I. Nalivayko, V. Y. Ni-

[1] Конституція України // Відом. Верхов. Ради України. – 1996. – №30. – Ст. 141.

kiforov, P. M. Rabynovych, Z. V. Romovska, V. G. Rotan, I. A. Serdyuk, B. Y. Tykhonova, Y. M. Shevchenko, V. I. Shcherbyna are worth mentioning.

Target of the article is to describe the general theoretical features of the security function of labor law.

First of all while conducting our research, let's study different views of scientists on the concept of the security function of labor law. For the beginning, we emphasize that in the context of this work, supporting the view of P. M. Rabynovych, functions should be understood as the basic directions of impact on people and society[1]. Regarding the concept of security function of labor law itself we give formulated one by I. Y. Kiselov among the first. The researcher reflects in his definition that the security function of labor law is limited to the proclamation of the fundamental rights of workers and obligations of employers in the codified legal act and their concretization to a large number of specific rules[2]. We believe that the scientist has quite erroneous view of the specified term. Much of the opposite opinion in this context has S. P. Mavryn and the supporters of his school, who notes that firstly the protective function of labor law has to be realized by fixing of the fundamental rights of workers, their protection mechanisms and the establishment of sufficient effective forms, methods of control and supervision over their observance on the legislative level[3]. In our opinion, the second definition is more appropriate and logical, as it is revealed not only by means of fixing of rights, but also by means of their realization. Excellent opinion about the correct formulation of mentioned concept has V. I. Shcherbyna, who thinks that it is «… the activity of labor law for effective regulation and normalization of relations which constitute its subject through the establishment and implementation on basic (main) areas of special rules that provide strong obligation, compelling and effectiveness of this area of law…»[4]. Similarly to this one is the interpretation proposed by V. S. Venedyktov, who believes that the protective function of labor law is the type of legal effect, aimed at protecting the legitimate interests and rights of workers in labor relations, protection of dignity and honor during implementation of the right to work[5]. The latter definition in our opinion is quite correct and concise. Note also the position of N. V. Urhanova, who emphasizes that the labor protection is a part of social function because of its nature, since «… ensure the protection of interests of citizens during the working process is one of the main social objectives of the

[1] Рабінович П. М. Основи загальної теорії права та держави: навч. посіб. – вид. 6-е / П. М. Рабінович. – Х.; Консум, 2002. – С. 84.

[2] Киселев И. Я. Трудовое право России и зарубежных стран. Международные нормы труда. / И. Я. Киселёв. – М.: Изд-во Эксмо, 2005. – С. 165.

[3] Маврина С. П. Курс российского трудового права: в 3-х т. / под ред. С. П. Маврина, А. С. Пашкова, Е. Б. Хохлова. – СПб., 1996. – Т. 1 Общ. ч. – С. 225.

[4] Щербина В. І. Функції трудового права: моногр. / В. І. Щербина. – Дніпропетровськ: Акад. митної служби України, 2007. – С. 126.

[5] Венедиктов В. С. Конспект лекций по трудовому праву Украины: учебн. пособ. / В. С. Венедиктов – Харьков: Консум, 1998. – Ч. 1–140 с.

state…»[1]. We also take into consideration the opinions of scientists who individually distinguish a security function from the protection function in this sphere. For example, in particular according to V. V. Zhernakov, protective and security functions in mentioned branch of law should be distinguished. Proponents of this theory believe that the protective function operates when a violation of law has already occurred, and security – when the measures to prevent such are taken[2]. We cannot ignore the opinion of V. E. Telipko, O. H. Dutova and several other scientists who believe that the protective function of labor law is to protect the interests of workers only in the course of employment[3]. In our opinion such a distinction is not logical, because according to the «New interpretative Dictionary of Ukrainian language» term «protection» should be understood as «defence, support, intercession»[4], and therefore security (protection) of labor rights can and should take place at their preservation and as well as at renewal. As for the concept of security (protective) function of labor law, in our view the one offered by V. I. Scherbyna is the most appropriate, and we adhere to the idea that the employee's rights especially need to be protected in the first place, so in the context of this concept the attention should be focused on the rights of the given subject. Although we believe it is necessary to specify in determination also the influence on other subjects of labor relations. Therefore, in view of the proposed V. S. Venedyktov's concept and taking into consideration the definition of «function», which is worded in a legal context by V. P. Rabynovych, we think it is necessary to define the concept of the security function of labor law as:

Security function of labor law – a direction of legal effect on the subjects of labor jural relationships in order to preserve and ensure their legitimate rights and interests in the process of working activity.

To clarify the features of security function of labor law the abovementioned definitions should be examined and the scientists' ideas on this subject should be studied. After analyzing them we can see that mentioned purpose of labor law that is aimed at protecting the labor interests and rights of direct participant of legal relations. In legal science, in our opinion, the features of security functions of labor law theme is not paid enough attention, but a number of scientists have been working deeply to study this area. So N. V. Urhanova gives

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[1] Урганова Н. В. Охоронна функція трудового права / Н. В. Урганова // Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди «Право». – 2009 – Вип. 9 – С. 58.

[2] Жернаков В. В. Теоретичні засади формування інституту захисту прав людини в сфері праці / В. В. Жернаков // Форми соціально-правового захисту працівників у службово-трудових відносинах: матер. наук.-практ. конф. – Х., 2005. – Вип. 25. – С. 331.

[3] Теліпко В. Е. Трудове право України: навч. посіб. / В. Е. Теліпко, О. Г. Гутова [за заг. ред. Теліпко В. Е.]: – К.: Центр учб. літ., 2009. – С. 69.

[4] Словник української мови: в 11 тт. / АН УРСР. Інститут мовознавства; за ред. І. К. Білодіда. – К.: Наукова думка, 1970–1980. – Т. 10. – С. 653.

the most detailed description of the features of security function of law, describing them as obligations of the state regarding employee. In particular, scientist believes that "… the government regarding the employee assumes a number of responsibilities: ensuring freedom of labor; the provision of adequate, safe and healthy working conditions; limiting the arbitrariness of the employer; providing guaranteed remuneration; ensure the universal development of the employee's individual, including by limiting working hours and guaranteeing rest periods etc.»[1]. Analyzing the works of V. E. Telipko and O. G. Gutov we can conclude that these scientists distinguish such main features of the security functions of labor law as: focus on protection of labor rights and interests of one of the direct participants of labor relations; creating equal opportunities for the realization of efficiency by labor law, thus establishing the same rules about working conditions in enterprises regardless of their ownership; fixing the minimum guarantees of wages, social security, recreation, etc. and limiting the degree of exploitation[2]. The positions of both scientists are alike in our opinion they don't have significant drawbacks. V. S. Venedyktov on this occasion thinks that the classification of the features of security function of labor law needs to be examined as a system. The scientist emphasizes that three subfunctions which give effective results only by acting together, and that's why they undoubtedly are the features of security (protective) function of labor law should be distinguished in the security function of labor law, namely: preventive or prophylactic subfunction (feature that indicates the warning nature applicable rules); restoration or compensation subfunction (feature that characterizes rehabilitation in labor rights and compensation for damage); punitive subfunction (feature which detects the presence of penalties for infringements)[3]. We do not share the opinion of this scientist about the specific classification. K. M. Husov and V. M. Tolkunova believe that protection (security) function of labor law is characterized by the following features that express it in: establishing the normal level of working conditions and its direct increasing by contracting method; in the control and supervision of the implementation of labor laws and occupational safety regulations; in order to resolve individual and collective labor disputes; restoration violated labor cases[4]. These features, in our opinion describe the given function optimally, taking into account that labor jural relationships are carried out exclusively on a contractual basis.

[1] Урганова Н. В. Охоронна функція трудового права / Н. В. Урганова // Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди «Право». – 2009 – Вип. 9 – С. 60.

[2] Теліпко В. Е. Трудове право України: навч. посіб./ В. Е. Теліпко, О. Г. Гутова [За заг. ред. Теліпко В. Е.]: – К.: Центр учбо-вої літератури, 2009. – С. 25.

[3] Венедиктов В. С. Трудове право України: підруч. / В. С. Венедиктов. – К.: Істина, 2008. – 384 с.

[4] Гусов К. Н. Трудовое право России: Учебник / К. Н. Гусов, В. Н. Толкунова. – М.: ТК Велби, Изд-во Проспект, 2003. – 496 с.

In any case, the analysis of scientists' works on the study of features of security function of labor law leads to the conclusion that this branch of law primarily protects the interests of the employee side, because the latter is generally more limited in his rights during employment. Although security function also is aimed at protection of other participants' interests, but especially accentuated attention on protecting the rights of employed persons who somehow are «exploited» and forced to sell their own labor[1].

Analyzing the domestic labor laws it is quite reasonable to assert that one of the main characteristics (manifestations) of the abovementioned function is to create equal opportunities for the realization of the opportunity to work, and the establishment of common rules and working conditions in enterprises regardless of their ownership. In this context it should be noted that the security function of labor law excludes any restrictions connected with the language of the subject, his gender, religious beliefs, race, property status and so on. Described above is stated in paragraph 2–1 of the Labour Code. Limits made by the state with the help of labor law regulations of the labor exploitation degree by the employer, ensuring the level of wages, establishment of the time for rest and so on in the legal field (defined by paragraphs 2, 5–1 and others of the Labour Code) are part of the security function of labor law and they definitely are its feature at the same time. In summary we can conclude that the features of the security function of labor law reveal its essence. Analyzed the scientists' works in the sphere of labor law, as well as sectoral legislation, largely relying on system of features of security function of labor law, which can be seen in the works of N. V. Urhanova[2], we conclude that the security function of labor law has the following features that are provided by the state legal effect on the employment relationship:

• Provides the freedom of labor, which consists in the ability to choose freely within your knowledge and abilities the sphere of work, profession, place of work, regardless of any race, religion, sex, etc. (except the cases when because of the physical or other abilities performance or the proper performance of job duties is not possible by the person).

• Provides ensuring the payments for work, that are not below the minimum established by law, which is defined as a legally enforceable right of employee to paying by employer wages not lower than the minimum. We should also allocate the right to a decent wage that consists in paying emolument, which taking the specificity and working conditions into consideration fairly corresponds the work done.

• Ensures the compliance of proper, healthy and safe working conditions for

[1] Теліпко В. Е. Трудове право України: навч. посіб./ В. Е. Теліпко, О. Г. Гутова [За заг. ред. Теліпко В. Е.]: – К.: Центр учбо-вої літератури, 2009. – С. 69.

[2] Урганова Н. В. Охоронна функція трудового права / Н. В. Урганова // Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди «Право». – 2009 – Вип. 9 – С. 53.

the employee that consists in compliance with the abovementioned conditions by means of legal regulations and implementation of the latest by the subjects of labor relations.

• Limits the arbitrariness of the employer that prevents illegal exploitation, violation of labor rights of the person hired that is defined as a system of restrictions for a person who directs labor personnel in making administrative actions that violate the rights and legitimate interests of workers.

• Provides guarantee limitation of working hours and provides sufficient time to rest, which is in compliance with norms that establish 40 working hours per week and 8 hours per day, etc., unless another is provided by law, financial compensation for the violation of these norms, and guarantee necessary time for full value rest, which cannot be less than the one specified by labor law (including international law).

The abovementioned features of the security function of labor law are somehow enshrined not only in the Constitution of Ukraine, the Labour Code, the Law of Ukraine «About Labour Protection», but are also expressed in the daily activities of the competent state bodies whose vocation is to oversee their compliance and restoration in case of their violation. However, the legal mechanism of restoration of violated labor rights is very complex, contains the remnants of the Soviet system and needs significant improvement on the legislative level.

Summarizing this work we believe that the security function of labor law has social character, it is one of the labor law's leading destinations and trends of legal effect on the subjects of labor relationships in order to preserve and ensure their legitimate rights and interests in the workplace. Today scientists have not reached consensus on the most appropriate range of features of security function of labor laws, there are many differences in opinions on this. And in general the security function of labor law has the following features: provides freedom of labor; provides a guarantee of payment of remuneration not lower than the minimum fixed by law; enforces compliance with proper, healthy and safe working conditions for workers; limits the arbitrariness of the employer; provides a guarantee of limitation of working hours and provides sufficient time to rest. In addition, the analysis of domestic practice of national labor law rules application leads us to the conclusion that the practical implementation of security function of labor law needs substantial revision of the regulatory framework and improvement of the competent authorities' activities.

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IMPLEMENTATION AND PROTECTION OF NATURAL PERSON RIGHTS IN THE INFORMATION FIELDOF A CIVIL SOCIETY

Introduction. The challenges of implementation and protection of the rights of natural persons in civil society information field should advisably be considered today in connection with and in the light of the notion of safety which has become commonly used. This is the approach that ensures comprehensive and complementary study of the information field through private and public law mechanisms for protection of the rights of the main participants of informational relations in civil society.

Based on the above-said, the purpose of this publication is to search for possible semantic and legal similarity of protection and safety categories in the process of information rights implementation, as well as to form conclusions about the theoretical and practical meaning of such combination of the given categories.

Main Points. The experience of some leading countries of the world proves that the informational and legal basis of civil society should be formed providing strict fulfilment of specific rules by all entities and participants of informational processes, as well as applying necessary governmental restrictions thereon to ensure national safety.

The well-developed civil informational society is characterized by, first, the ability of both the society and the State operating to provide for public and personal interests of its members to establish conditions for free access to information resources for its citizens; second, the ability to protect national information resources and interests of each person, society and the state from negative effects, to ensure reliable and free operation and development of national informational infrastructure.

Thus, the challenges of creation of informational and legal basis of a civil society are closely related to the matters of protecting informational relations as

a whole as well as tasks which have been named «informational safety» in subject-specific literature. Today, a great number of works is dedicated to the research of this matter both in Ukraine and around the world.

According to Article 17 of the Constitution of Ukraine, ensuring informational safety along with the protection of sovereignty and territorial integrity of Ukraine, as well as ensuring its economic safety, is one of the most important functions of the State[1].

Considering the definitions of the very notion of «safety» provides the following explanation: safety is «a condition when there is no threat of danger; protection from danger»[2], «absence of threat, integrity, and reliability»[3] [3, p. 67]. Some modern definitions differ by various criteria which were set by their authors as a base.

Considering the general theoretical approaches to understanding the modern informational threats, we believe it necessary to mention not only the protection of informational rights, but also the protection of informational relations as a whole, because not only rights but also parties to informational relations, the most important of which being the information as a non-property benefit, are subject to protection in the informational field.

In this sense, civil and legal means of protection of informational rights should be coordinated with the general legal understanding of informational safety. The very term of «informational safety» should be included in the Civil Code of Ukraine (hereinafter referred as «Civil Code») as «the right to safety of informational environment» or «the right to a safe informational environment» along with the notion of environmental safety.

This would also enable guaranteeing the protection of informational rights for all entities of informational civil relations, among which the most attention should be paid, in our opinion, to protection of rights of natural persons.

Among the main and most commonly identified factors affecting the status of ensuring informational safety are the following: imperfection of national legislation for informational safety, in particular the absence of framework Law of Ukraine «On Informational Safety»; insufficient regulation of legal relations between the State, owners of informational resources, domains and Internet providers by the provisions of national legislation of Ukraine; low level of budgetary financing of measures to ensure informational safety; failure to adhere to the requirements of legislation currently in force in the field of information protection, and many others.

Meanwhile, providing for national safety in the informational field, establishment and maintenance of functional informational safety and information protection system at a decent level according to modern requirements and ex-

[1] Конституція України від 28 червня 1996 р. № 254к/96 // Відомості Верховної Ради України. – 1996. – №30. – Ст. 141.

[2] Ожегов С. И. Словарь русского языка. – Изд. 22-е, стереотипное. – М., 1991. – 915 с.

[3] Даль В. И. Толковый словарь живого великорусского языка: в 4 т. – М.: Русский язык, 1999. – Т. 1. – С. 67.

isting threats, encouragement of national manufacturers of information products and technologies, computerization means and information protection means should become a priority of the state informational policy.

Foreign specialized sources believe that safety is a condition, a development trend and requirement for vital activity of the society, with all its structures, institutions and organizations, at which preservation of their qualitative certainty is guaranteed with objectively conditioned innovations and free functioning which conforms to its own nature and is determined thereby[1]. In the meantime, such approach to safety is subject to fair criticism as it does not disclose its specific nature as a social phenomenon; besides, it is noted that while safety intends to restrict the innovation progress within the confines of a certain qualitative certainty, it can become a factor of standstill, conservatism and regression. So, in fact, the safety system should not prevent quantitative (evolutionary) and revolutionary (qualitative) changes where they have been objectively raised, but, instead, should facilitate coping with the obsolete forms of life without damaging the society and citizens. At that, as the authors have conclusively proved, disclosure of the notion of safety similarly to the notions of protection and protectability only narrows down its meaning.

Commonly, «to protect» means protecting or shielding someone or something. At least, that is the way this word is explained in encyclopaedias today. Yet, it is important to take into account both the statics and the dynamics of the social system when studying the content of the concept of safety.

It should be noted that the authors also consider safety as a system quality that allows development and flourishing under conditions of conflict, uncertainty and risks, building upon self-organization and government. At that, they suggest including social safety (including state and national safety), cultural safety (including intellectual and informational), political, military, economic and environmental safety etc. into the structure of safety of the country[2] [5, pp. 198–199].

In civil society, protection of informational legal relationships against threats in the field of information is viewed by the specialists in terms of legal basis of such protection. Great attention is paid to these matters around the world, that's why, despite the significant share of «publicity» in the methods of their resolution, we consider it necessary to also pay due attention to them, first, for the purpose of making the termino-

[1] Безопасность // Информационный сборник Фонда национальной и международной безопасности. – М., 1994. – №3 (19).

[2] Концепция обеспечения безопасности личности, общества, государства // Белая книга российских спецслужб / редкол.: Е. И. Алаев, В. П. Анищев, А. П. Большов, Н. Ф. Бугай, В. П. Воротников, В. П. Григорьев, И. Н. Еременко, М. Д. Коровников, М. Д. Котилевский, Ю. В. Лебедев, И. С. Лютов, Д. А. Майоров, Ю. Д. Новиков, А. И. Подберезкин, И. И. Подберезкин, Ю. М. Репкин, С. С. Слободянюк, Ш. З. Султанов, В. М. Тарасов, В. В. Штоль. – Изд. 2-е, перераб. – М.: Обозреватель, 1996. –С. 198–199.

logical base universal in the field of legal protection of informational relations; second, for the purpose of detecting private law elements in the workings of authors and determining their place in private law. In our opinion, establishing the contents of these research workings would allow to find more effective means of protection of informational rights and relations in civil law.

In the Law of Ukraine «On the Fundamentals of National Security of Ukraine» of June 19, 2003 (hereinafter referred to as «the Law»), national safety is defined as «protectability of vitally important interests of an individual and a citizen, society and the State, which ensures steady development of society, timely detection, prevention and neutralization of real and potential threats to national interests in the field of law enforcement activities, anticorruption activities…», – and so on (Article 1)[1]. Article 1 of the given Law also contains the definition of national interests as vitally important material, intellectual and spiritual values of the Ukrainian nation as the bearer of sovereignty and the only source of power in Ukraine. In return, vitally important interests could be defined as an aggregate of needs meeting which ensures existence and possibilities of progressive development of personality and society as a whole, while threats against safety are defined as an aggregate of conditions and factors that create a threat to such vitally important interests. Finally, ensuring safety in the modern civil society can be understood as implementation of a unified policy in this field and a system of measures of economic, political, organizational and other nature appropriate for the threats posed against vitally important interests of a person, a society and the State, aimed at detection and prevention of threats.

All the above-mentioned definitions with their possible informative changes should be further developed in the new Informational Safety Doctrine of Ukraine which shall become an aggregate of official opinions on purposes, tasks, principles and main trends of ensuring informational safety in the terms of civil society development. Let us note that in comparison the base of doctrinal and legal definition of informational safety in the Russian Federation is formed by generic notion of safety as «a condition of security, immunity». According to O. O. Gorodov, here ends the similarity of the two specified definitions of informational safety, as the legal formulation indicates the immunity or protectability of informational environment in the interests of citizens and the State, while the doctrinal one concerns protectability of national interests in the informational field[2]. As of today, the matter regarding the object of protection is also unsolved; this object should be understood as the interests of civil society as a whole and each of its members in particular, which are, in their turn, deter-

[1] Про основи національної безпеки України: Закон України від 19.06.2003 р., №964-IV // Відом. Верхов. Ради України. – 2003. – №39. – Ст. 351.

[2] Городов О. А. Основы информационного права России: учеб. пособие. – СПб.: Юридический центр Пресс, 2003. – С. 267.

mined by the aggregate of balanced interests of each natural person, society and the State and lies in the defining the real balance of such interests. It is obvious today that the interests of an individual do not always meet the interests of society in general, not to mention those of the State; and, vice versa, things that conform to the interests of the whole society could clearly contradict the interests of an individual.

Along with the mentioned above, the authors qualify the State represented by its authorities, organizations and citizens as principal safety provision entities[1]. Without denying this approach as a whole, we should note, however, that the condition and status of the modern informational environment, as well as the national interests, require all the more activity and initiative coming from the natural persons in this process. It is their conscious position that forms the base upon which the informational freedom of each society member depends, along with the level of legislative provision for the given matters both at the level of individual countries and the international level. The Internet, in particular, provides a maximal range of possibilities to develop whole new vision of the process of establishing a new informational civil society based on moral principles and understanding of the unity of the world and mutual dependence of all and sundry therein.

Article 5 of the Law of Ukraine «On Fundamentals of the National Security of Ukraine» establishes the principles of ensuring national safety directly related to informational safety and protection of information and informational relations, including those in civil law. At that, the priorities of the national interests of Ukraine have been clearly defined as follows: ensuring constitutional rights and freedoms of individuals and citizens; development of civil society and its democratic institutions etc. (Article 6 of the Law).

Among the threats to national interests and safety of Ukraine in the informational field, Article 7 of the Law of Ukraine «On Fundamentals of National Security of Ukraine» determines the following: introducing restrictions of the freedom of speech and access of citizens to information; distribution of the cult of violence, cruelty and pornography by mass media; cybercrimes and cyberterrorism; disclosure of information which forms a state or other kind of secret, as well as confidential information owned by the State or aimed at providing for the needs and national interests of the society and the State; attempts to manipulate public opinions, namely by means of distributing inaccurate, incomplete or preconceived information.

We should emphasize the fact that the notions of «incomplete» and «preconceived» information in the final paragraph of Article 7 are not actually defined in the given law, nor are they defined in other specialized laws of Ukraine regarding informational safety, that is why it is hard to explain what the legislator meant to say in this context. We believe that this less – than-responsible

[1] Бачило И. Л., Лопатин В. Н., Федотов М. А. Информационное право: учеб. / под ред. акад. РАН Б. Н. Топорнина. – СПб.: Юридический центр Пресс, 2001. – С. 480.

activity in the field of definitions currently present in Ukrainian legislation has already become one of the reasons of inconsistences and misunderstandings in the process of implementation of informational rights and their protection, as well as protection of informational relations as a whole. For the purposes of uniform understanding, we suggest providing all of the definitions in the informational field in the Law of Ukraine «On Information»[1] and the Civil Code of Ukraine[2], and including references to such statutory instruments in other laws, or, at the worst, providing a definition in the law where these notions are used.

Also, another important methodological problem today is the clarification of national interests and definition of correlation of national interests and national safety, as safety is protectability of national interests, and safety by itself is an important national interest.

Article 1 of the Law defines national interests as vitally important material, intellectual and spiritual values of the Ukrainian people who act as a bearer of sovereignty and the only source of power in Ukraine, determining needs of society and the State the implementation whereof guarantees state sovereignty of Ukraine and its progressive development.

We believe that the notion of national interest should be improved based on historical experience of the Ukrainian State and cannot be built on those developments related only to the common historical background with other countries or on provisions regarding class interests dominating in the 20th century etc. A great number of separate works on this matter has yet to be analysed and introduced into the legislation of Ukraine as implementation of civil society ideas.

Without going into much detail, we believe it necessary to draw attention to the fact that an interest is usually understood as the reason of actions of individuals or social communities (class, nation or professional group) that determines their social behaviour[3].

Legislation defines the following as the priority national interests of Ukraine, among many others: establishment of a civil society, increase of efficiency of state and local government authorities, development of democratic institutions to guarantee human rights and freedoms of; achieving national concord, political and social stability; equitable and mutually beneficial relations with all states, integration into the European and global community. All of the above-mentioned can be achieved by means of balanced state policy. Meanwhile today there is a number of obstacles such as lack of the necessary infrastructure in the informational field; slow introduction of Ukraine into the global informational space; lack of objective concept of Ukraine within the international community; informational expansionism from other states; leak of information bound by a state or

[1] Про інформацію. Закон України від 2 жовтня 1992 р. № 2657-XII // Відомості Верховної Ради України. – 1992. – № 48. – Ст. 650.

[2] Цивільний кодекс України від 16 січня 2003 р. № 435-IV // Відомості Верховної Ради України. – 2003. – № 40–44. – Ст. 356.

[3] Философский словарь / под ред. И. Т. Фролова. – Изд. 5-е. – М.: Политиздат, 1986. – С. 162.

other kind of secret, as well as confidential information; possibility of introducing censorship.

Among the options of establishing correlation of interests of an individual, society and the state, the following three types are customarily named: priority of interests – parity of interests – balance of interests. At that, we believe that the principle of balance of interests should be preferred to all others because it allows consideration of the interests of each entity in the specific historical and other conditions to the fullest extent possible. In the meantime, the mechanism of definition, altering and ensuring of such balance of interests of the main entities is practically absent, except for some developments in the field of civil and legal regulation.

Unfortunately, like many other states, Ukraine still considers an individual mainly as an object of its activity and only slightly – as a party to relations in the field of public and personal safety, an approach that could lead to negative consequences. We are certain that the positive role is mostly played by civil law which focuses on an individual by shifting traditional accents to a natural person – a real person as a subject of rights. The reasons of a different, negative attitude lie in the dominating status of the State (which is not always justified) in all the processes, and overstatement of public and legal interests in the matters concerning informational field. This has already caused a considerable nonacceptance of public safety bodies, namely state bodies. People don't feel safe and start looking for other ways to protect themselves, while viewing the system of public and state safety as a hostile power, inclining to revolutionary (and not evolutionary) methods to resolve the conflict.

Protection of rights and freedoms in the informational field of Ukraine is performed mostly with the application of provisions of the Constitution and the Civil Code of Ukraine. Thus, a great number of constitutional provisions in Ukraine evolve, first of all, through the provisions of the Civil Code of Ukraine and some other laws. In our opinion, the notion of personal safety requires legislative consolidation at the level of the Civil Code of Ukraine as a condition of security of a natural person, including security in the informational field. For the civil society this means guaranteeing the interests of an individual in the informational field; establishment of a democratic and social state; consolidation of democracy, building the informational civil society etc. It should not as well be forgotten that the interests of the society also lie in guaranteeing interests of an individual in the informational field, consolidation of democracy and a democratic and social state based on achieving and maintaining public concord and spiritual renewal of the country.

Interests of the State can be determined as the establishment of conditions for implementation of constitutional rights and freedoms of individuals and citizens in the field of obtaining information and using it to support political, economic and social stability etc. Thus, we can draw a conclusion that the public and legal understanding of safety can be

viewed not only as a notion closely related to the problem of protecting informational rights in civil law, but also more widely, through the notion of civil and legal security and protection of informational relations in their widest sense.

A deeper research of this notion reveals a lot in common with the implementation and protection of informational rights and protection of informational relations in civil law. The list of threats detected by specialists to produce a general informational safety doctrine can serve to define problems in the field of protection of informational rights and relations in civil law.

At that, one should distinguish the notions of «safety» and «protection» in the field of informational rights. «Safety» is a wider notion than «protection» as it also includes economic, political and other measures which have mostly civil and legal meaning. «Protection» is used in law, namely in civil law, within strict and clear frameworks. It can be proved by theoretical and legislative developments in the field of means and ways of civil rights protection. Protection of information and protection of informational rights and freedoms shall be performed with the help of provisions of the Civil Code of Ukraine along with provisions of other branches of law and specialized legislative institutions.

Conclusion. To sum up the abovementioned, we should draw a series of additional conclusions to those already formulated during this writing, in conformity with its consecutive statements.

First, the provisions of the Civil Code of Ukraine are effectively applied today to protect interests of an individual, a society and the State against «harmful, dangerous and negative information», whatever the legal and doctrinal understanding of these definitions is. This can be proved by Article 293 of the Civil Code of Ukraine «Right to a Healthy and Safe Environment» which can be considered as covering informational relations as well. Yet, a specific provision of «the right to safe informational environment» should be introduced and formulated at least in general in the Civil Code of Ukraine, which should also stipulate such right for every natural person.

Second, it is characteristic of the Ukrainian legislation that virtually all the trends of protection of informational rights and relations are related to the provisions of the Civil Code of Ukraine which, along with the provisions of the Constitution of Ukraine, form the basis for the whole range of legislation on information. It is the Civil Code and civil legislation in general that provides wide and diverse range of measures to protect violated informational rights.

Third, democratization and further development of civil society, market relations and civilization as a whole should cause a significant impact upon the choice of civil and legal means of protecting informational rights and relations.

Besides, considering protection of informational relations as a significant component of informational safety, it is important to speak about protection

of informational relations in particular, and not only about protection of informational rights, because both the objects and the subjects of these relations have to be protected and not only their rights. In its turn, protection of informational rights includes protection of rights to information as personal non-property rights of natural persons and legal entities, as well as protection of informational rights which consist of intellectual property rights, rights to public information, rights to classified information, rights in the field of informational systems use etc.

In general we can indicate the necessity to establish an efficient system of informational safety, an important component whereof shall be civil and legal measures of protection of informational rights and relations.

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WHAT THE LEGAL IDEOLOGY OF THE LABOR CODE OF UKRAINE IN XXI CENTURY SHOULD BE?

The Labor Code of Ukraine as the main legal act intended to regulate the social relations in labor field, and of course it must meet the universal human values. The content of legal provisions that regulate the process of using person's ability to work as one of his essential qualities for the benefit of all society should objectively reflects the ideals of humanism, freedom, justice, equality, all the ideas of modern legal ideology of the state. In the concentrated form the legal ideology of modern Ukraine formulated and enshrined in the Basic Law of the State, particularly in the Article 3 of the Constitution of Ukraine.

The Constitution of Ukraine defined and enshrined the person's place in civil society and the state's attitude to the person as to the highest social value. And this fact is very important for the formulation of legal provisions of Labor Code of Ukraine. The person, his rights, freedoms and guarantees of its implementation determine the content and direction of the state activity.

The main duty of the state, that created by the people's right to self-determination, is to assert and take care about ensuring the people's rights and freedoms and the worthy conditions of their life. Public officials of state authorities and employers, regardless the ownership of enterprises, organizations or institutions, should aware their responsibility to the people for their activities.

So the answer to the question, what the legal ideology of labor Code of Ukraine in XXI century should be, contained in the rules of direct action of the Constitution of Ukraine, in the current labor legislation and in the objective necessity of its implementation in the Code for regulation of social and labor relations.

The codification of labor legislation has its own feature that effect on the for-

mulation of the legal provision. Thus, unlike the subjects of social relations that are governed by provisions of different branches of law, the subjects of labor law are interested in such high natural quality of person as ability to work. Hence, the object of socio-labor relations is labor – as comprehensive, deliberate human activity, as the ability to create material, cultural and spiritual values.

So, the need of ideals of humanism in the legal provisions of the Labor Code of explains by the place of employee in the industrial process. The person who has realized his natural ability to work, during the work activity meets not only the personal interests, as his primary natural need, but also meets the public interest, because the creation of material and cultural values is important for the welfare of society.

And here is very interesting natural thing. The nature and meaning of public interest, public need that are usually present both current and future personal interests of employees emerge during labor and work activity. Really, does the metallurgist, who make steel, give the priority to self-interest? It's the same about the mechanic who collects mechanical units. And the teacher! Does he teach the children to read, write and communicate only for personal interest? Do members of the volunteer movement guided only by self-interest? Although in all these cases the objective coincidence of personal and social interests takes place in both present and future time.

The natural personal interest of employee to meet his own needs should be consider as a driving force in the work activity process to create public goods in the form of material and cultural values. And this natural interest, this driving force should be encourage by the state and employers.

This is where the solution of most issues that arise in social relations between the state, employers and employees should be sought. In the unity of person's natural purpose to meet his needs through the implementation of his labor efficiency and of the aim of society, that implemented through the organization of production of material and cultural values are the basic requirements for the quality of the content of the legal provision of the Labor Code that are aimed to regulate people's work activity.

The legal provisions formulated by the state should take into account the principles of the moral and material incentives of the natural driving force of the employee with the aim to obtain from him the quantity and quality work and its results, due to the interest of increasing the public wealth, good and welfare of everyone.

The logic of the ideas of the legal ideology is obvious. Its components must be implemented objectively in the content of the legal provision, formulate the compulsory rules for the society. The legal provisions of law, acting on the will and consciousness of people, motivate them to complying with this rules, and to implement the ideas of legal ideology in the legal sphere of public life. What will be the content of these legal provisions? Will they take

into account the ideas of the Revolution of Dignity: justice, integrity, wisdom, freedom, equality?

In the case of legal ideology that has underlined the formation of the content of the legal provision of the Labor Code of Ukraine, it actually means the transformation of the ideas that constitute the legal ideology in the way of legal regulation of labor and closely related relations. We can conclude about the implementation of the ideas enshrined in the Constitution of Ukraine, on the base of the form of expression of the legal provision of the Labor Code that determine the rights and duties of legal relations subjects and the guarantees of its implementation.

If this important, but difficult relationship of legal ideology ideas that naturally must be translated into statutory rules of conduct, focuses on the process of systematization of labor legislation, but the legal ideology through the constitutional principles should be reflected in the rules of Labor Code of Ukraine in XXI century.

Unfortunately, it did not happen till now, because the developers of all draft laws of the Labor Code of Ukraine reacted to the preparing of this important document superficially, despite this act should regulate the objective relationship in the work activity process of people, society and the state.

The work and its results – are the basis for the existence and development of every person, society and state. Everything else is derivative.

The draft Labor Code that passed its first reading in the Parliament of Ukraine, unfortunately, doesn't reflect the perception of the employee with his ability to work as a source of creation the material and spiritual values. The state, society and every individual existence thanks to labor of such people. It seems that the main figure in the production process is not an employee with his unique natural ability to work, but the employer. Of course, the last one employs, organizes the production process and manages it. But he does not provide it for the state or society. No! The employer fulfills his social and public duty by the fact of employing, the content of such duty determines by the order of exercising and using the right to trade license (Art. 42 of the Constitution of Ukraine).

The exercising of the right to business activity, with the right to hire the manpower, entails a social and public duty of the employer not only to the state that allowed and registered his business, but also to the society, to its employed individual members. Terms and conditions of business activity, above all, should reflect the public interests, the interests of the Ukrainian people, who by the stubborn struggle fought his national independence to ensure the rights and freedoms to decent living.

Therefore, the employer-entrepreneur, despite on the personal financial interest in the form of profit, has a social duty that, in relation to the research's topic, reflects in providing the work and decent payment for it to the members of society.

The employer voluntarily took this duty when he registries his business activity in the state authority body. Unfor-

tunately, for some reason we forgot about this social and public duty of the employer, when it comes to filling with the content of his legal status as a subject of social and labor relations. Any enterprise or institution won't work without employees. That is why the employer interested in the employees as the employees wishing to exercise their right to work, with the aim to get a decent financial reward for the results of their labor.

The objective coincidence of the employer's and the employee's interests determines not only coincidence of the intention of the parties of the labor contract, but also provides state's ability to define the rights and duties that have to characterized the legal equality of participants in the production process.

The labor is a conscious, purposeful activity reflecting in making mental and physical effort by the employees in order to obtain useful results not only for themselves and their families, and this activity should be stimulated financially and mentally.

Logically, the question arises – who should adequately stimulate the employee's labor in the contemporary economic conditions? Actually it comes to decent pay for decent work. With regard to the socio-economic situation, the labor should be stimulated by those who assigns and uses its results. This is the employer who signed the labor contract with the employee, and who directly appropriates the results of work. This is the state that allowed business activity with the right to hire the manpower, and therefore indirectly uses the results of work by establishing and receiving a wide variety of tax from revenues of employer and the employee's salary. If you look at the essence of the income of the employer, it is nothing but the result of general work of employees, who signed a labor contract with him. And so the question of distribution of the results of social labor objectively, on the principle of social justice, fairness and reasonableness, should be decided jointly by the employer of employees. In such conditions, employees will get really decent salary for decent work.

The modern principle of labor results division, unfortunately, does include neither justice nor honesty, nor rationality. The needs of employers and society take first place compared to the interests of employees who, in reality, created this result.

The question arises – why does the state not consider that the results of labor, as labor itself, has a social character? Unfortunately, this fact don't taking into account by the authors of the draft Labor Code.

It so happened that due to objective and subjective reasons, the current policy of distribution of social and national wealth created by nature and by the efforts of all employees, has distortions and inconsistent with the principle of social justice that is enshrined in the Constitution of Ukraine. We should note that the authors of draft Labor Code tried to fix this principle in this legal document, but in general terms. But there are no words on this principle in specific prescriptions of the Code.

So the fundamental idea and therefore a key objective of the Labor Code

of Ukraine of the XXI century is the real enforcement of the rights and freedoms of employees by identifying and ensuring the equitable order of distribution of the results of social work and appropriate limits on the power of the employer. The state should establish such balance of rights and duties of the employment relationship parties that will provide the principles of justice, fairness and reasonableness.

It can't be so that those who by their labor creates national, social wealth and therefore has the absolute right to a fair and equal salary, in fact make ends meet.

We forget so quickly that the employer isn't a patrician and the employee isn't a plebeian. We should remember that the entrepreneur as an employer with the realization of the constitutional right to business activity that is not prohibited by the law (Art. 42 of the Constitution of Ukraine) has the social and public duty. The essence of social and public duty of employers revealed that he with his capabilities and by his choice should conduct its business that should contribute to the material and spiritual progress of Ukrainian society. Social and public duty of the employer based on the obvious fact that private property is guaranteed by the law (Art. 41 of the Constitution of Ukraine) that determines not only the ways of its acquisition and use, but also the bounders of its social function. The use of property should not prejudice the rights, freedoms and dignity of citizens, interests of society; aggravate the ecological situation and the natural qualities of land. That's why the private economic initiative and business activities are free. However, business activities can't be in contradiction with the general public benefit and human dignity.

Here is another fundamental issue of legal ideology of the future Labor Constitution – the Labor Code of Ukraine of the XXI century.

Unfortunately, some of the legal provisions of book II of the draft Labor Code that passed the first reading in the Parliament, in some degree violate the principle of legal equality of labor relations. It applies to such basic fundamental provisions of the labor law of Ukraine as a labor contract, labor relationship.

It is recognized that the labor contract as an agreement between the employee and the employer is a legal form of securing their will, and therefore it characterizes freedom of the will and serves as the basis of the labor relationship. In real life, the freedom of the will of employee and employer occurs when their rights correspond to their responsibilities and vice versa. And now pay attention at the formulation of art. 31 of the draft Code «labor relationshipis the relationship between an employee and an employer where the employee for the remunerationthat determined by the employer personally fulfil the work (labor function) under his direction and control with the subjection to work rules».

Where are the employee's rights and duties of the employer? They are absent. Why?

These distortions of basic concepts of labor law and, in fact, law in general have been explained by the Ministry of Social Policy of Ukraine represented by

V. Ivankevych as follows: «This provision is a positive novel of the draft Code. This provision is uniquely qualified the relationships concerning with the fulfillment of the work by an individual for the benefit of legal entity or other individual as labor relations. Due to this, the guarantees and rights provided by labor laws apply to employees who fulfill their work under the terms of civil law contracts and who aren't protected in the way of social guarantees for remuneration of labor, insurance and work safety by the provisions of acting Labor Code».

But everythingisn'tas simple as Mr. V. Ivankevych considers. We couldn't correct the distortion of the basic, fundamental provisions of labor law and the situation that has arisen from the legal status of employees who have negotiated the independent-work contract.

The labor law researchers in Ukraine, as the scientists in other countries, offered to extend the social benefits and guarantees of employees who have negotiated a labor contract to the persons working on civil contracts, including independent-work contract.

But it becomes possible when both parties of civil contracts will **really comply with the requirements** of labor legislation.

This fact is precisely the stumbling block. Every citizen is free to choose the place and kind of work. It is his constitutional right. There is no way to forbid to the citizen to work under the independent-work contract if the terms of this contract satisfy both the customer and the contractor?And the idea of draft Labor Code of Ukraine to «drive» the concept and the content of the labor contract and the labor relationship to the concept and content of the independent-work contract is wrong? Yes, there is a problem. We must seek the ways to solve it. But the distortion of the basic concepts of labor law is not the resolving of such problem. We need a comprehensive approach to this issue. Other fields of law, including civil and economic law, should wait for the changes of labor legislation. Today, the conflict of interests of the customer and the contractor (independent-work contract) so long has been the subject of court hearing. The courts always satisfy the claims of employees concerning with the establishing the fact of the existence of the labor relations.

Regarding to the possibility of protecting the employees' labor and socio-economic rights and interests through the trade unions, the authors of the draft Labor Code of Ukraine in general terms reproduce the idea formulated and enshrined in part 3 of Article 36 of the Constitution of Ukraine. But the content and forms of implementation by an elected body of primary trade unions the right to protect the labor rights and interests of employees in the draft Labor Code defined as a «clarification», «agreement», «consultation» and so on. It is unclear why the authors did not like the forms of cooperation between an elective body of primary trade union organization of enterprises, institutions, organizations and the employer that expressly and clearly stated in the Art. 38 of the Law of Ukraine «On trade unions, their rights and guarantees of activity» on September 15, 1999 № 1045-XIV with the fol-

lowing changes[1]. Here's how the law enshrines the forms of the rights' realization by elected body of the trade union organizations «involved», «consents» «controls» «represents.» This edition of the legal provision suggests a real opportunity and guarantees of the rights' realization by trade unions. Moreover, this cooperation of employers and trade unions' elected bodies required by the Law of Ukraine «On Social Dialogue in Ukraine» on December 23, 2010[2].

It is clear that the employer has their own regulations. But in the cases provided by law, by collective agreements and contracts, the regulations concerning the rights and freedoms of employees, the employer should enact **with the consent** of the elected body of primary trade union organization or of the trade union representative. Trade union bodies' participation form in these cases should prove that the employer adopted the regulation that embodies the common views and mutual understanding. Only the consensus of the elected body, the staff and the employer may indicate for social peace in the enterprise, institution or organization.

Even more «interesting» that in the draft Labor Code of Ukraine, that passed the Parliament first reading, formulated the provision on the trade union rights to terminate the labor contract with the head of the enterprise. The labor contract with the head of legal entity **may be terminated** at the suggestion of the elected body of primary trade union organization if the head violates labor legislation, goes back of the collective agreement negotiation or defaults it.

Now pay attention to the content of the provision of Art. 38 of the Law of Ukraine «On trade unions, their rights and guarantees of activity», «**elective body of primary trade union organization decides to request the employer to terminate the labor agreement** (contract) with the head of the enterprise, institution or organization» if he violate the labor legislation, avoid to participate in negotiations on the conclusion or amendment of a collective agreement, don't fulfill the duties under the collective agreement, allows for other violations of the collective agreements legislation.

The question arises – why the authors of the draft Code the word «**requirement**» of the elected body of primary trade union organization to terminate the labor contract with the legal entity replaced by the word «**proposition**» of the elected body? New Dictionary of Ukrainian language gives an answer to this question. «Requirement» is the claim that does not allow objections (vol. 1, p. 224). Therefore, in accordance with the Art. 45 of acting Labor Code of Ukraine, the employer must terminate the labor contract with the head of the enterprise, institution or organization. And if the head **does not agree** with the decision, **he could claim to the court** to resolve the dispute.

The «proposition» – that is what is proposed for discussion, a recommenda-

[1] Про профспілки, їх права та гарантії діяльності: Закон України від 15.09.1999 р., № 1045-XIV // Відом. Верхов. Ради України. – 1999. – № 45. – Ст. 397.

[2] Про соціальний діалог в Україні: Закон України від 23.12.2010 р. // Офіц. вісник України. – 2011. – № 3. – Ст. 62.

tion condition (vol. 3, p. 43). So in paragraphs 2–4 of Art. 98 the authors ofthe draft formulated a legal provision: the proposition of the elective body of the trade union organization is the subject to mandatory review within two weeks from the date of its receipt. In case of rejection of the proposition of the elected body of primary trade union organization, the elected body has the right to claim to the court.

Is there a difference!?

And if anyone of People's Deputies before the discussion and adoption of amendments to the existing Labor Code of Ukraine would read the article 24 of the Constitution of Ukraine and art. 22 of the acting Labor Code, it would have realized that it include the formulation of all the legal guarantees of non-discrimination in the labor field, including the principle of equality between persons irrespective of racial or ethnic origin. Moreover the Art. 22 of acting Labor Code clearly defined the rule of prohibit the unjustified denial of employment, as well as the responsibility of the employer.

Now let's talk about the formulation of the provision as the puzzles. We know that the labor relationships arise only between the employee and the employer, usually on the basis of the labor contract. So where were these «subjects that can participate in labor relations: (1) trade unions, their organizations and associations, and at the local level (enterprise, institution, organization, individual – employer) if no primary trade union – freely elected employees representatives (representative); (2) the employer (authorized representatives (representative) of the employer), employers' organizations and their associations; (3) other subjects defined by this Code».

The question arises – what is the set of labor relations' subjects, what is their legal status? If they act as employers, their legal status as subjects **of labor relations** comes within p. 1, Art. 19. If they act as **subjects of labor law**, they can't participate in labor relations; they can only participate **in the legal regulation of labor relations, not as its subjects.**

It is also unclear why in this list of «subjects» who may be involved in labor relations, along with trade unions listed – «individual – employer»?

Unfortunately, the authors of the draft Labor Code of Ukraine in the formulation of the Art. 18 «On the procedure for promulgation of labor legislation» committed the serious errors. Firstly, we promulgate legal or regulatory act that contain provisions. Secondly, the basic rules of promulgation of regulations formulated and enshrined in Art. 94 of the Constitution of Ukraine and the Decree of the President of Ukraine on June 10, 1997 (with amendment)[1]. And, thirdly, for the definition of «legislation» concept, it's important to read the decision of the Constitutional Court on July 9, 1998, № 12rp/98[2].

Sadly that around the adoption of the Labor Code of Ukraine, and it is the «La-

[1] Офіц. вісник України. – 1997. – №24. – Ст. 11.

[2] Офіц. вісник України. – 1998. – №32. – Ст. 1209

bor Constitution», such misunderstandings arise. It indicates about the ignoring of state's legal ideology that formulated and enshrined in Art. 3,5,8,21–24,36,43 of Constitution of Ukraine or about the lack of knowledge of acting legislation.

The provisions of the Labor Code of Ukraine of the XXI century are the vision of the democratic, social and law state, the vision of the rights and duties of the parties of the labor contract: the employee's rights and duties as the owners of the ability to work; the employer's rights and duties as a legal entity or individual who gives the work, organizes the labor process and manages it.

The main task of the state in the formulation of the provisions of the Labor Code of Ukraine lies in the fact that every working citizen should have just and favorable working conditions that meet the safety and health conditions, decent salary for the work, adequate standard of living for employee and his family. The employer, using its economic, legal and organizational principles, should direct the possibility of payment for labor to ensure the reproductive and stimulating function of the salary.

Therefore, the appropriate legal status of the employee and the employer should determine such important principles as the equality of parties of the labor contract, the work conditions, the principle of equitable distribution of the results of the work, and should determine the content of the legal provisions of the Labor Code of the XXI century.

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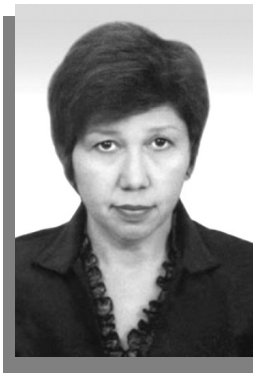

UDC 347.232

PROPERTY RESTITUTION

Restitution (from Latin *restitutio*) is considered as restoration of status quo that existed prior to committing damage, i. e. returning or restoring property in kind[1].

According to Civil Law, restitution is defined as restoring status quo that existed prior to a transaction, invalid by law or declared as such by judicial procedure (para. 1 Art. 216 of the Civil Code of Ukraine) [2]. It is in this manner that researchers and professionals treat restitution while working on their studies[3] [4].

However, recently, another understanding of restitution has gained relevance – as the restoration of the former property of a proprietor or his heirs, who were deprived of their rights due to unjust enrichment. Under these perspectives restitution is being addressed in several directions. This property restitution could be of any one of the following types (a) lost during the Holocaust; (b) ecclesiastical inventories; (c) private property lost in the course of nationalization, collectivization and other events that took place in our country since the beginning of the twentieth century; (d) cultural property the corresponding owners were deprived of during hostilities; (d) the property of unlawfully convicted persons and in some other cases.

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[1] Реституція [Електрон. ресурс] // Вікіпедія. – Режим доступу: https://uk. wikipedia. org/wiki/%D0%A0%D0%B5%D1%81%D1%82%D0%B8%D1%82%D1%83%D1%86%D1%96%D1%8F (дата звернення: 01.01.2016). – Заголовок з екрана.

[2] Реституція [Електрон. ресурс] // Лексика – українські енциклопедії та словники. – Режим доступу: http://leksika. com. ua/16120724/legal/restitutsiya (дата звернення: 01.01.2016). – Заголовок з екрана.

[3] Спасибо-Фатєєва І. В. Недійсні правочини та проблеми застосуванні реституції // Щорічник українського права. – 2009. – № 1. – С. 150–167.

[4] Спасибо-Фатєєва І. В. Окремі питання застосування реституції // Актуальні проблеми приватного права: матеріали міжнар. наук.-практ. конф., присвяч. 92-й річниці з дня народж. д-ра юрид. наук, проф., чл.-кор. АН УРСР В. П. Маслова, 28 лют. 2014 р. / Нац. юрид. акад. ім. Ярослава Мудрого, Нац. акад. прав. наук України, Харк. обл. осередок всеукр. громад. орг. «Асоціація цивілістів України»; упоряд. В. І. Борисова. – Х.: [Б. в], 2014. – С. 34–37.

In Ukraine restitution has almost never been examined in such a broad sense, therefore there is a need for its completion. Especially, in case of intensifying the national European the complaints for restoring the properties located on the territory of Ukraine to the proprietors who were deprived of the latter in the twentieth century on the above mentioned basis will prompt simultaneously. The NGOs which are already set up in Poland and other European countries are ready to charge Ukrainians with property restitution. In this regard the issue of choosing the model for solving the problems associated with the property restitution could be brought into more acute and painful focus, particularly in Western Ukraine. Thus, the problems of restitution currently require in-depth research and quick resolution.

In addition, 'Crimean events' that turned out to be painful not only for the Ukrainian state as a proprietor, but for many private proprietors as well, led to numerous violations of the lawful possessors[1]. Consequently, all the aspects of property rights within the Autonomous Republic of Crimeahave exacerbated, particularly the issues of relevant property restitution.

The topic of property restitution is multilevel, as, from one hand, civil society has to get ready for the proprietors to claim the state for restoring property they were deprived of based on various grounds (revolutions, wars, confiscation, Holocaust etc.) and the legislator has to offer the most acceptable model of a relevant mechanism. From another hand, the societal issues of European integration *per se* encourage solving these problems. These matters require efforts not only to shape internal legal scope, but international legal rules as well. That is why the whole spectrum of these problems is not possible to be covered in this paper, which enables addressing only their particular aspects.

As Professor Karl Martin Born says, restitution as a legal phenomenon has been known for ages. E. g., the events in Athens in 403–402 B. C., when the oligarchs came to power and expropriated the property of democracy supporters, when the property of the latter was returned afterwards along with the restoration of democracy [2]. Hence, the analogy is obvious. Restitution was also held after the Thirty Years' War between 1618 and 1648, which involved most of the great powers of Europe. In England restitution took place after the fall of Cromwell's Protectorate and the Restoration of the monarchy. The French emigrants came back home and restored their possessions, that were taken a quarter century ago by revolutionary commissioners (if not the property itself, then compensation) subsequent to Napoleon's downfall. Immenserestitution of property, nationalized in 1974, has been conducted in Portugal in the late twentieth century.

Throughout the twentieth century and early twenty-first century in Ukraine

[1] *N. B.* This article does not attempt to consider the political and economic aspects of these relevant problems. It addresses only the legal mechanisms, significant for their resolution.

[2] Шешунова С. Это «страшное» слово – реституция // Реституция прав собственности. – М.: Посев, 2005. – С. 263–269.

there have took place numerous socio-political events that led to property redistribution between different actors. In fact, during 80 years there has first happened the nationalization of property possessed by individuals and private legal entities; then privatization of the same property, which was the opposite direction; posterior new wave of property nationalization in the Autonomous Republic of Crimea, which belongs to Ukrainian state, local communities and private owners; and the legal fate of property located in the area of armed conflict in the East remains unclear.

As a result, a continuous massive violation of proprietors' rights has been launched, which calls to recovery and subsequent protection of the latter. These complicated *per se* problems become particularly pertinentas they have all arose at the same time – both the ones, connected with property loss nowadays, and those associated with events that happened 70or almost 100 years ago.

In Ukraine, these issues remain unresolved at the legislative level and have almost never been raised. Individual cases of giving the property back to owners have no significant importance for the whole restitution process. It is difficult to assess the situation. Therefore, on the one hand, raising these issue without any material or moral opportunity to solve it properly means to exacerbate fairly high social tensions in the country. On the other hand, the state that the Constitution refers to as legal, has to find out legal mechanisms to resolve property issues, no matter how complex or outdated they seem to be.

In order to resolve these problems it is worth to apply practices of countries that have already admitted or are currently going towards introducing mechanisms for restitution. First and foremost these are states ofthe former Eastern Bloc (such as Hungary, Czech Republic, Slovakia, Bulgaria), as well as some former Soviet republics (Lithuania, Latvia, Estonia), which have adopted and enacted legislation that specifies the basis and procedure for implementing property restitution after the USSR collapsed.

In some countries this process was structured, logical, and sequentialin nature: first, restitution of rights, then privatization, and, finally, liberalization following a transition period. On the contrary, chaotic, ungovernable, nonlegal nature of restitution could be observed outside this scheme[1]. Thus, the experience of solving similar problems is present in other countries, and the extent to which restitution has been carried out is impressive, even taking into account certain specifics on the timing and breadth of the relevant processes. Let's consider some models of restitution mechanisms, exercised in other states.

Jewish property charged with restitution is quite expensive. These are numerous buildings (synagogues, houses, buildings which housed different public institutions: orphanages, hospitals, schools, libraries, archives, theaters,

[1] Деев С. Реституция (возврат) церковной собственности и имущества в Украине [Электрон. ресурс] // Livejournal. – Режим доступа: http://sergei-deev. livejournal. com/67562. html (дата обращения: 01.01.2016). – Заглавиес экрана.

clubs), cemeteries, valuable ecclesiastical objects etc. Many of those constituted the property of Jewish communities either private property. Moreover, restitution of the latter is much more complicated compared to the restitution of public property.

The problem issues of the subject, considered to be the successor of 'Jewish property' – local Jewish communities as well as Jewish immigrants from that country represented by local diaspora or similar organizations, is being discussed due to the matter of diverse modern Jewish organizations' legitimacy. There are no fewer problems with the range of the heirs, claiming to return private property within the framework ofrestitution[1].

Anyhow, despite many difficulties in this area, they are being gradually solved. Thus, in 1992 the World Jewish Restitution Organization (WJRO), whose purpose is to coordinate the requirements for restitution on behalf of world Jewry and local Jewish communities in various countries and negotiate with the state authorities, was set up by the World Jewish Congress.

In its resolution of December 11, 1995 (B4-1493/95) the European Parliament, inter alia, took note of the giving the plundered property back to Jewish communities. The paper contained an appeal 'to all countries of Central and Eastern Europe that have not yet done this, to adopt relevant legislation on the return of property plundered by the Communists or the Nazis and their accomplices, to its lawful owners'. The resolution was sent to the Council of Europe, the governments and parliaments of member countries and the countries that have applied to join the European Community.

Project HEART (Holocaust Era Asset Restitution Taskforce) has been carried out successfully, aimed to help people in the restitution of property, confiscated, stolen or forcefully sold during Shoah. This project in a non-profit initiative, developed by Israeli government with assistance of Jewish Agency for Israel (JAFI)[2].

As for Ukraine, the issue of Jewish property is still not solved yet, and the ways for its solution are merely not discussed at the governmental level, in spite of: (a) particular agreements that were reached in the summer of 1993 of Leonid Kravchuk and the president of the World Jewish Congress on restitution in exchange for investments to Ukraine; (b) Memorandumagreement between WJRO and representatives of Jewish Organizations and Communities of Ukraine on joint action in the issues of restitution; (c) agreement on cooperation between WJROand the Association of Jewish Organizations and Communities of Ukraine (VAAD) on the respective inventory and

[1] Право собственности и его реституция: опит пост коммунистической Европы и его значение для России [Электрон. ресурс] // Утро России. – Режим доступа: http://www.mko. ru/rus/konfka. shtml (дата обращения: 01.01.2016). – Заглавиес экрана.

[2] Зисельс И. Реституция еврейской собственности в Украине: постановка вопроса [Электрон. ресурс] // Евроазиатский еврейский конгресс. – Режим доступа: eajc. org/page18/news14007 (дата обращения: 01.01.2016). – Заглавие с экрана.

the return of Jewish Communities' property (1994). I. e., the movement, determined by the interest of certain civil society representatives in Jewish property, is currently at freezing point.

Ecclesiastical property restitution by the state is not yet so problematic. Basically, the complexities are those connected with the church's right to possess property obtained from the state, but not the only ones. Ecclesiastical property relations churches are under direct impact of political and social issues. E. g., if before 2014 the protests were sparking against the transfer of state property to Ukrainian Orthodox Church (Moscow Patriarchate) [12], afterwards the complaints were filed from the opposite side. Perhaps, it is necessary to heed the appeals for inadmissibility of favoritism towards any church, since during the Soviet times both Orthodox and Catholic churches were hurt badly. It has been proposed to solve these issues in the framework of dialogue between churches in order not to increase inter-confessional tension[3]. It's agreed, that in any case the issue of ecclesiastical property restitution should be decided from the standpoint of legal remedy to the church, where the property was seized without any administrative pressure. The property issues of Orthodox Churches of Moscow and Kiev Patriarchate are rather painful as well[4].

Cultural property restitution attracts the public attention. This has been approved through The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed on 14 May 1954 and UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome Convention) under which not the lawful owner of stolen property, but the state is the claimant for the matters of restitution. This could be also observed on the example of returning from Ukraine to the Dresden Museum (Germany) two albums of prints, which were taken away during the Second World War[5]. The issues of cultural property restitution are

[1] Прокуратура має перевірити, чи законно Азаров дає УПЦ МП майно у Львові [Електрон. ресурс] // Credo: католицький суспільно-релігійний сайт. – Режим доступу: http://www. credo-ua. org/2013/11/105887 (дата звернення: 01.01.2016). – Заголовок з екрана.

[2] *N. B.* The Prosecutor General's Office of Ukraine had to inspect whet her the govern mental resolution on obliging L'vivregional state administration to transferto Ukrainian Orthodox Church of Moscow Patriarchate the propertyset of the former military compo und (vul. Pekarska, 57–59) as the paper lacked motivation and grounds for passing the possession of property located in downtown to a particular religious community.

[3] Глава УГКЦ про митрополита Володимира та та ситуації навколо лавр [Електрон. ресурс] // Credo: католицький суспільно-релігійний сайт. – Режим доступу: http://www. credo-ua. org/2012/02/58578 (дата звернення: 01.01.2016). – Заголовок з екрана.

[4] На Сумщині новий конфлікт за церковне майно [Електрон. ресурс] // Християнський оглядач. – Режим доступу: http://pravoslavnews. com. ua/news/trostianec_cerkva_konflikt. (дата звернення: 01.01.2016). – Заголовок з екрана.

[5] Реституція культурних цінностей: Україна й Німеччина – зразкові партнери? [Електрон. ресурс] // DeutscheWelle. – Режим доступу: http://dw. com/p/APC2 (дата звернення: 01.01.2016). – Заголовок з екрана.

widely covered in the writings of historians [1][2][3].

It may be noted as well about ***some other cases of restitution,*** though not listed in the law. Sic, there are reasons to consider as restitution restoration of property to illegally convicted and posterior rehabilitated persons (Art. 46 of the Housing Code of Ukraine); escheat, if present (Art. 1277; para. 3 of Art. 1272 of the Civil Code of Ukraine); requisitioned property (para. 6 of Art. 353 of the Civil Code of Ukraine); property transferred under a treaty of life care after its dissolution (para. 1 of Art. 756 of the Civil Code of Ukraine). There is common sense in raising the question of restoring the property of All-Union public organizations' successors, which is now transferred to the management of the state represented by the State Property Fund with the right to dispose[4]. This issue is too politicized nowadays to be carefully addressed. Perhaps, this was one of the reasons for the refusal of the Constitutional Court of Ukraine to initiate constitutional proceedings in case upon constitutional petition of 52 Deputies of Ukraine regarding the constitutionality of the Verkhovna Rada of Ukraine resolutions 'On the property complexes and financial resources of NGOs of theformer USSR located in Ukraine' and 'On the property of All-Union public organizations of the former USSR' [5].

Private property restitution. However, probably other aspects of property restitution are completely politicized as well. This conclusion follows, first of all, from the approach chosen regarding the period of time the restitution covers and what range property will be restored. E. g., it was a political decision stating that Slovakia will only restore property withdrawn by the Communist regime. The assets, withdrawn from Nazi allies' possession short after the Second World War, were excluded from the range of restitution objects. In other words, the

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[1] Гетьман Д. І. Повернення і реституція історико-культурних цінностей в українсько-польсько-російських відносинах (1920-ті – 1930-ті роки): автореф. дис… канд. юрид. наук: 07.00.01 / Д. І. Гетьман; Нац. ун-т «Києво-Могилян. акад.». – К., 2010, – 20 с.

[2] Дацків І. До питанняреституціїісторико-культурнихцінностейУкраїни, втрачених у роки Другоїсвітовоївійни /І. Дацків// Мандрівець. – 2011. –№ 5. – С. 69–72.

[3] *Кот С.* Українсько-німецькі відносини щодо повернення та реституції культурних цінностей (1991–2012 рр.) / С. Кот // Міжнародні зв'язки України: наукові пошуки і знахідки. – К.: Інститут історії України НАН України, 2012. – № 21. – С. 162–180.

[4] Про майно загальносоюзних громадських організацій колишнього Союзу РСР: постанова Верховної Ради України від 04.02.1994 р. за№ 3943-XII// Відомості Верховної Ради. – 1994. – № 24. – Ст. 185.

[5] Про відмову у відкритті конституційного провадження у справі за конституційним поданням 52 народних депутатів України щодо відповідності Конституції України (конституційності) постанов Верховної Ради України «Про майнові комплекси та фінансові ресурси громадських організацій колишнього Союзу РСР, розташовані на території України» та «Про майно загальносоюзних громадських організацій колишнього Союзу РСР»: ухвала Конституційного Суду України від 26.06.2012 р. за № 21-у/2012 [Електрон. ресурс] // Верховна Рада України. – Режим доступу: http://zakon5. rada. gov. ua/laws/show/v021u710–12 (дата звернення: 01.01.2016). – Заголовок з екрана.

property confiscated by the communists, but not by the democrats was restored[1].

Time limits of restitution were the reason for some of today Germany, Austria and Hungary complaints to repeal the 'Beneš decrees', issued immediately after the Second World War. The European Court of Human Rights has dismissed foreign complaints that include attempts to return property confiscated after war based on Beneš decrees. According to the Court's judgments, building the basis for restitution is the exclusive right of particular states in terms of International Law[2].

The restitution of confiscated or nationalized private property is almost complete in many Eastern European countries (Czech Republic, Bulgaria, Hungary, Slovakia, Poland, Estonia, Latvia and Lithuania). However, the terms of its implementation in these countries vary significantly. An important reason for this is the predicted response of civil society.

For example, in Lithuania the confiscated propertyofancestors was subject to the unconditional return to their heirs. If this property was absent, the heirs were paid inflation-indexedcompensation at 1939 prices. The repair and reconstruction of unsuitable for use property were not subject to payment. In Latvia, the property returned both to national and foreign citizens. The only objects banned from restitution were railway, state buildings, farmer lands and cultural sites. If the company had been returned to the former proprietor, he had no possession of equipment, stocks and securities[3]. In this country a seven year prohibition was establishedforejecting residents from an apartment building (acquired due to restitution). The residents, respectively, were required to pay rent, the maximum sum of which was provided by law.

A similarapproachwasusedinEstonia, resultingineviction ofmanyresidentsout of apartments, receivedintheSovietera. Unlikemostothercountries, in Estonia theplaintiffforrestitutionpaymentsinsteadof collected ancestralpropertyreceivesnot money compensation, but governmentsecuritiesinthesameamount, whichcanbeexchangedforsharesinprivatizedenterprises, landorotherrealestate.

The opposite approach, compared to the Baltic States, has been applied in Hungary, where in order to avoid social conflicts the direct transfer of property to former owners was not conducted. Foreign citizens were paid the equivalent of confiscated property, and national resi-

[1] Чарногурски Ян. Реституция имущественных прав в Словаки [Электрон. ресурс] // Рига криминальная. – Режим доступа: http://www. latkrim. sitecity. ru/ltext_0704181352.phtml?p_ident=ltext_0704181352.p_0904234810 (дата обращения: 01.01.2016). – Заглавиес экрана.

[2] Чарногурски Ян. Реституция имущественных прав в Словаки [Электрон. ресурс] // Рига криминальная. – Режим доступа: http://www. latkrim. sitecity. ru/ltext_0704181352.phtml?p_ident=ltext_0704181352.p_0904234810 (дата обращения: 01.01.2016). – Заглавиес экрана.

[3] К Евросоюзу готовы, а к неизбежной реституции? [Электрон. ресурс] // Газета. dp. ua. – Режим доступа: http://gazeta. dp. ua/read/k_evrosouzu_gotovi_a_k_neizbezhnoy_restitucii_ (дата обращения:01.01.2016). – Заглавие с экрана.

dents were given so-called compensatory coupons that can be used in the privatization and purchase of land on auctions.

The most complete payments for the former proprietors were compensated in the Czech Republic, where there property was returned along with costs for its restoration. However, if such property turned out to be destroyed or was rebuilt to the extent that its current price was far bigger than the former, or, on the contrary, measly, the plaintiff was paid a lump sum of $ 1,000 USD. The rest of the sum had been gradually paid from a special Restitution fund.

In Germany the property subject to restitution was estate confiscated by the Nazi government until 1945. Everything confiscated by the Soviet administration is not refundable. Anyhow, perhaps this restriction will soon be removed– a number of citizens and influential West German enterprises now appeal for it in court[1].Professor Hermann-Josef Rodenbach recalls that prior toimplementing restitution in this state, as well as in Ukraine, the citizens were frightened that it would bring property chaos and crowds of refugees as people would be forcefully evicted from apartments and houses, derived from the socialist state[2].

Comparing the restitution issues in these and other countries in Eastern Europe, particular objective reasons that complicate restitution in Ukraine or impede it have to be highlighted.

Firstly, this is the possession of disputable property by lawful owners (who gained it under the contract, due to inheritance or privatization). According to the current law these individuals are the proprietors and their rights are inviolable (Art. 41 of the Constitution of Ukraine) and, of course, are subject to protection. Challenging in court the legality of property withdrawal in 1917 and subsequent years, based on the unlawful possession of the property by the state for seven decades, there areno grounds yet for contesting the lawfulness of another owner's possession. Apropos, the main obstacle for this is a significant amount of time that elapsed from violating property rights to property restitution. And, if Eastern Europe nationalization process took place during 1940-s and 1950-s, and posterior legislation on the restitution was adopted in the 90-s, in Ukraine these arealmost centenary events[3].

Secondly, this is the lack of constitutive documents for nationalized property. The cadastral records of former owners have remained in Hungary, Bulgaria, the Czech Republic and Slovakia remained, and now the lawful owners have got back 96% of their former prop-

[1] Розеншильд Л. Реституция недвижимой собственности в Латвии [Электрон. ресурс] // Утро России. – Режим доступа: www. mko. ru/rus/restl. shtml (дата обращения: 01.01.2016). – Заглавиес экрана.

[2] Право собственности и его реституция: опытпосткоммунистическойЕвропы и его значение для России [Электрон. ресурс] // Утро России. – Режим доступа: http://www. mko. ru/rus/konfka. shtml (дата обращения: 01.01.2016). – Заглавие с экрана.

[3] *N. B.* Though there occurred cases of resolving restitution issues on the West 150 years afterwards. For example, in Spain it took place when the king's resolution restored not only the property withdrawn by Franco's regime, but the estate confiscated in mid-18th century as well.

erty[1], while in Ukraine a proper cadastral system has not still been observed.

Thirdly, due to the previous reason, as well as the absence of legislation on restitution in Ukraine launches attempts to resolve the issue by unscrupulous appropriation of property. Herewith the property seekers resort to falsification of documents, corruption, involving in schemes the law firms to which the former owners or their heirs sell their rights, and the solicitors are finish up the business.

Fourthly, if the houses, buildings or constructions[2] no longer exist, the former owner's heirs still have an opportunity to appeal for restoring the land wherethe real estate was situated. Taking into accountthe present Ukrainian problem with land titles, and the fact that most of them are either already occupied with buildings or are in public use (parks, squares, etc.), it is difficult to get an idea of how it would be possible, in principle, to grant these appeals.

Fifthly, a problem caused by national componentcan occur in Ukraine. Thus, a large part of the property in interwar Poland was owned by German citizens, and many Poles oppose their propertyrestitution. Similarly, in Estonia and Latvia dwelling houses fell in hands of the Swedish, Danish and Finnish citizens. Expectedly, similar problems are likely to happen in western Ukraine, whose territory was annexed to the Eastern part in the middle of the last century.

Sixthly, foreign citizens who became lawful owners due to property restitution in another state and are not interested in the possession usually sell the assets or rent them out. This exactly what the new owners do if they lack sufficient funds to maintain their property. Anyhow, quite legitimate proprietary actions caused negative societal reactions for the following reasons. The restituted property is usually bought by real estate agencies, while local budget does not receive any benefits from such transactions (as it would occur in case of privatization). Given this situation there is no need for the complex process of property restitution, which could be replaced by monetary compensation. In the case of renting out the former proprietorsusually become tenants form whose possession the estate was withdrawn due to the restitution in favor of the original proprietor's heir. Deprivation of property rights based on this is painfulitself, and in addition, by charging higher rents, the new owner manipulates the fact that people who lived in this house for a long time, do not want to change it. The compensatory costs are another burden for a local budget.

The problem is so acute nowadays that, for example, the Latvian government was forced to adopt a special resolution, which regulates the maximum

[1] Реституция отнятого имущества. В России – вряд ли [Электрон. ресурс] // NEWSru.com. – Режим доступа: www. newsru. com/background/27sep2006/restitutio2. html (дата обращения: 01.01.2016). – Заглавие с экрана.

[2] *N. B.* This is connected not only with the physical demolition of reale state, it's damaged condition, butal sowithmass destruction of property during the WWII when numerous buildings were ruined and new ones replaced them.

rate of rent in denationalized houses, and constantlyprolong its validity[1].

However, the restitution still somehow should be considered, as required by social justice. Thus, choosing the most suitable approach for Ukraine should first come from how ripe is this socio-economic problem. If restitution is an urgent need, evidenced by particularindependent indicators, it should be resolved based on traditional moral system, absorbing the existing approaches to the protection of property rights in the current legal framework.

Otherwise there is a real danger to adopt a law that does not reflect the conscious needs of society, or in favor of any persons or groups of persons, or as a result of abstract analytics about the restitution from the position of prevailing views at a democratic market state despite the present structure of our society.

It should also be borne in mind that the law on restitution in any case will represent a sort of revolutionary changes that have already repeatedly occurred in our country. And even assuming a carefully balanced approach to its development we must firstly understand the impracticability of implementing the requirements which must meet the security and protection of property rights in a legal state. It is also important to realize that talking about the restitution of proprietary rights, of course, the issues of non-retroactivity of rights and acquired rights should be left aside. This is true as well for the problems of acquisitive prescription, evaluating the benefits from nationalized or communalized property etc[2].

Furthermore, if despite the above mentioned difficulties a resolute decision on restitution will be made in Ukraine, then this act has to introduce a new legal order. It will promote economic efficiency of property redistribution along with taking into account the financial possibilities of our state.

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[1] Реституция отнятого имущества. В России – вряд ли [Электрон. ресурс] // NEWSru. com. – Режим доступа: www. newsru. com/ background/27sep2006/restitutio2. html (дата обращения: 01.01.2016). – Заглавие с экрана.

[2] Процессы реституции собственности в Польше [Электрон. ресурс] // Рига криминальная. – Режим доступа: http://www. latkrim. sitecity. ru/ltext_0704181352. phtml?p_ident=ltext_0704181352. p_0904234339 (дата обращения: 01.01.2016). – Заглавие с экрана.

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STRENGTHENING OF SOCIAL STATE PRINCIPLES AS A DIRECTION OF CONSTITUTIONALISATION OF LABOR LEGISLATION

Constitution of Ukraine (1996) has made legitimate base to great power statehood, constructed on democracy principles, has become a stabilization force of political life of a country providing society and authority with civilization forms of conflict solving. The accents principally changed in «state – human» correlation. If a person was engaged to coordinate her actions with state interests in soviet society conditions, nowadays the valid Basic Law determines another principle. Recognition, observance and protection of human rights and freedoms were proclaimed as a constitutional responsibility of a state. In none case a state can't trespass on human rights and freedoms or sacrifice them to their own interests. Human rights and freedoms, their economical, political and legal guarantees are the content and the direction of state activity.

One of the main manifestations of social worth of Constitution lie on its normativity. Realization of constitutional norms is a specific transfer of their normativity to relations orderliness. Negation of normativity results objectively to inappreciation of Basic Law, artificial minimization of its regulation possibility, great minimization of effective influence on relations.

The Constitution of Ukraine in Art. 43 declared: «Everyone has the right to work, which includes the opportunity to earn his living by work which he freely chooses or freely agrees.». This kind of approach comes from generally accepted international standards. So in Art. 23 of the Universal Declaration of Human Rights, under which every person has the right to work, to freely choice of employment, to fairly and favorable conditions of work and to protection against unemployment. Art. 6 of the Interna-

tional Covenant on Economic, Social and Cultural Rights, under which the state participating in this document, recognize the right to work, which includes the right of everyone to obtain opportunity to gain his living by work which he freely chooses or to which he freely agrees, and will make appropriate steps to safeguard this right. With the full implementation of this right States shall take appropriate measures, including the development of vocational education, achieving economic growth and full productive employment. A person should be able not only to choose work, but also the conditions under which this work is done, must be worthy of man. The proposed norm corresponds to the Christian tradition, as Scripture distinguishes two moral incentive of work: (a) work to feed himself, not bothering anyone, and (b) work to serve the poor. The book of the prophet Jeremiah says: «Woe to one who builds his house by injustice, and the upper rooms by rightless, who says his neighbor work for nothing, and pay him not giving» (Jeremiah 22:13).

Labor and capital are essential factors for the existence and development of social production. But there are also objective things inherent connection rules of labor and capital that reveal both their unity and contradiction. These lines of communication objectively transformed the content of labor relations, and therefore determine their complexity and contradictions. The employer has the capital, the worker – the ability to work. On the one hand, they are both interested in stability of arising between them employment relations because one without the other can not exist, and on the another – their interests are opposite: the worker concerned in the growth of salaries, improvement of working conditions, increasing leisure time, etc., and the employer – to increase profits, increase productivity of employees and others. Full equality of workers and employers is impossible because priority should be given to protection of the rights and interests of workers and therefore production function should not be implemented due to constraints of social function. The main function of labor law as a social sector should be the protection of labor rights, freedoms and legitimate interests of the employee as the weaker party of economically employment relationship.

The most important general-social function of work is that almost all social relations begin to form in the labor area. Members of the society are linked primarily through employment activity. Labor – the main force, deep physical bond that unites all members of society, all its social groups as a single unit, a single social body and determine the interaction between its elements. The entire building complex of society and social relationships builds on a foundation of work, employment activity in its various manifestations.

The legal meaning of freedom of labor is not limited to the legal field, produced by operating with categories of ownership. The basis of the worker's right to dispose abilities to work is not ownership, but internationally and constitutionally enshrined human right to free development. Freedom to work is

much broader category than those that may be right to freely dispose labor as an economic category, as some property. It is based on freedom of every individual in its development (Art. 23 of the Constitution of Ukraine), and not only in relation of using the labor. That legal regulation of labor relations should be carried out on the basis of freedom of labor, including the right to work, which everyone freely chooses or to which freely agrees.

In general, the citizen's freedom to work includes, in particular, the ability to:

– freely dispose of their abilities to work. But making a choice, the citizen must obey the rules that regulate social relations in connection with one or another form of social organization of labor. At this stage, freedom of choice is related to more specific objectives. At the same time the person is unable to change their choice and seek reassignment or dismissal of its own motion, or other forms of termination of work and changes therein will of citizens;

– choose the type of activity and profession;

– carry out labor activity on the basis of labor or civil contracts, membership in the cooperative, self-employment business activities;

– choose place of work;

– job placement both in Ukraine and abroad;

– independently decide on the employment contract or other transaction with a specific employer on a contractual basis.

The right to work advocates a kind of foundation upon which all other rights and freedoms in the work sphere based. Among the socio-economic rights there is one, whose presence makes possible the existence of all the others – the right to work. It is governed by the main system and determining the rights enshrined its members. The content of the right to work is revealed through constitutional provisions, in which are fixed: freedom of choosing labor; prohibition of forced labor; the right to proper, safe and healthy working conditions; the right to timely payment for labor is not below the legal minimum; protection from unlawful dismissal and others.

The right to work – a category that reflects personal approach to the study of the legal status of citizens in the sphere of work. It allows better understanding the need for improvement of legislation in terms of adequate, that is of vital importance, the significance of the right to work for the man. As a citizen's right, it reflects the level, degree and extent in which the state provides and guarantees citizens their implementation. The right to work is a category of legal order, reflecting the need for human labor that exists both in the form of ideas, requirements to human society and the state, and in the form of legally binding capacity to meet this need.

The main difference between the understanding of the right to work in the soviet era and its modern interpretation is the change of the state's role as guarantor of this right. If in the first case, the state becomes directly obliged to provide citizens with work according to the specialty and qualification, which was carried out through the national system of

employment, in the second there is no such duty.

The right to work is an absolute value. Absolute evaluation of this law means: a) a person can not be deprived of the right to work; b) the state and society are co-responcibilited to implement the human right to work, if it is a temporary restriction to a violation of personal dignity; c) human has the right to consider themselves not guilty due to temporary restriction of the right to work on various circumstances.

Freedom of work implies the existence of principle of freedom of contract of employment. Its meaning is that the fate of the employment relationship between the employer and the employee is determined by the employment contract. It is the basis for the emergence of these relations. With free conclusion of employment contract a person who reached working age, has the right to enter to work, to realize their right to work. However, freedom of employment contract can be real only when it is based on the right to work. Article 43 of the Constitution of Ukraine, stipulating freedom of employment contract, determines at the same time the duty of the state to ensure fair conditions of employment and dismissal from it, including the proper protection of the rights and legitimate interests of the employee as economically weaker party in labor relations consistent with the general purposes of legal regulation of labor in Ukraine as a social state of law.

Freedom of employment contract is manifested in the fact that: everyone has the right to dispose of their abilities to work, choose the type of activities or refuse any activity; a person may offer himself as an employee of any employer; has the right to freely discuss the employment contract conditions, agree with them or abandon them. Based on their interests, employers are free to choose and invite to work any citizens. Freedom to choose their employee depends on the needs of the employee and the free choice of the citizen due, ultimately, the needs of society. Two freedoms, two groups of needs. You can not prefer one interest at the expense of others.

In contrast to the employee, the employer freedom partially limited by legislation. Restrictions on freedom has three main objectives: a) protect the right of citizens to work; b) protection of the employee as the weaker party of employment contract; c) protection of the interests of state and society.

The principle of freedom of labor contract backed by the labor legislation with the lack of discrimination and prohibition of forced labor.

The report «On Equality at work: The call is stored» 2011 International Labor Organization notes that, despite the constant improvements in the area of anti-discrimination legislation, the global economic and social crisis has led to an increase in the likelihood of discrimination against certain groups of workers. «In difficult times for the economy begins to flourish discrimination in the sphere of work, and in society in general. We see this with the adoption of a growing number of populist decisions,» – said ILO Director-General Juan Somavia said, adding that» this threatens

to nullify the results of hard work achieved over the last few decades. «The report states that to the bodies that are dealing with equality comes a lot of complaints that indicate that discrimination in the workplace takes a variety of forms and signs are becoming more the rule rather than the exception. «Tough austerity measures, budget cuts of bodies involved in the regulation of labor and labor inspection, as well as reducing funds allocated to specialized bodies responsible for combating discrimination and ensure equality, capable of seriously affect the ability of existing institutions to counteract the spread of discrimination and inequality caused by the economic crisis,» – noted in the report. Inequality and discrimination provoke frustration and anger underlying social unrest and political instability.

Nature endows all with mind, will and feelings, but to varying degrees. When the social state of law announces by the equality principle, it means one thing, equality in freedom or equality of opportunity. However, on equal opportunities to act and equal freedom of people through physical, spiritual distinction achieve unequal achievements. Thus, equal opportunities and freedom lead to inequality. Justice demands to recognize such inequalities because elimination of it can not be without elimination of freedom. So we have to recognize the validity of inequality, but not the opportunities but the results of different physically and spiritually people.

ILO Convention № 111 «On discrimination in employment and occupation» (1958) Art. 1 interprets the term «discrimination» that includes: a) any distinction, exclusion or preference which is based on race, color, sex, religion, political opinion, national or social origin and causes nullifying or impairing equality of opportunity or treatment in employment and occupation;

b) any other distinction, exclusion or preference which leads to nullifying or impairing equality of opportunity or treatment in employment and occupation, and determined by the Member of the ILO after consultation with the representative organizations of employers and workers (where available) or other relevant bodies.

In general, discrimination in the sphere of work should recognize the action or inaction that contain any direct or indirect distinction, exclusion or privileges based on race, color, political, religious and other beliefs, sex, ethnic and social origin, property, location residence, language or other characteristics not related to the qualifications of the employee or their group if they intended to limit or prevent recognition, enjoyment or exercise, on an equal bases human rights committed willfully and entail legal liability.

The reasons for discrimination in the sphere of work, despite their diversity in nature can be summarized in three main groups:

– social, existence of them caused by prejudice relation to some groups to others and presence in society of informal settings, promoting loyal look at some discrimination. The origins of the social causes of discrimination lies in the fact that a particular employee is judged

on the characteristics of the group to which it belongs, and not on his personal qualities or abilities;

– economic, explaining the existence of discrimination by opportunities to generate additional profits by reducing costs for employees;

– legal, including: lack of experience protecting labor rights in conditions of discrimination workers and organizations representing their interests. No people, no organization or the state has this experience. In modern conditions there is a trend of individualization in labor relations, which leads to the fact that the employee is increasingly manifested without intermediaries in their relations with the employer, including in the event of a labor dispute; the shortcomings of current labor legislation that prevent the exposure of discriminatory practices and laying on penalties for the use of this phenomenon; actually existing differences between employees and between their conditions of employment. In labor relations and related relations are a significant number of differentiating criteria. Some of them are acceptable, others unacceptable, ie creating discrimination; the dominance of informal practices over formal. What is written in the law may be violated by any holder of power. Motives for such violations can be varied from state benefits to instant personal selfish interest. In this situation, the population recognizes the most effective adaptive strategy of social behavior.

Worldwide the problem of equal rights and opportunities of people at work is quite acute, is complex and requires special legal regulation. In this connection it is necessary to develop and adopt the Law «On Principles of Prevention and Combating Discrimination», an important part of which will be combating discrimination in labor-legal sphere. However, the creation and implementation of regulations prohibiting discrimination in the field of work – is a necessary condition but insufficient. This negative phenomenon would not disappear, even if it is prohibited by law. It's necessary to establish effective enforcement mechanisms, positive action, unbiased education system, vocational training services and further employment. This combination of legal policy and instruments for its implementation – is an important prerequisite for the organization to combat discrimination. However, it should be remembered that the last is the result of combination of different factors, and therefore the fight against it must be comprehensive, to include economic, legal, informational and other measures at various levels of managing of social and labor sphere.

Part 3 Art. 43 of the Constitution of Ukraine prohibits the use of forced labor. According to Art. 2 ILO Convention № 29 «On forced or compulsory labor» term «forced or compulsory labor» means any work or service that is required from any person under the threat of any penalty and for which the person has not offered his services voluntarily. According to Art. 1 of ILO Convention № 105 «On abolition of forced labor» the State – Members of ILO undertake not to resort to any forms of forced or compulsory labor as a method of mobilizing

and using labor for economic development. Exceptional list of activities that are not considered as forced labor, found at the same part of the Art. 43 of the Basic Law (military or alternative (non-military) service, work or service performed by a person by the verdict or other court order or under the laws of war and state of emergency), and by the laws of Ukraine or any other legal acts can not be extended.

The category of «forced labor» should be read in conjunction with such antisocial phenomena as human trafficking and economic exploitation. The first one is the purchase and sale of human or committing on her other illegal transactions in which it acts as an object of property, and exactly carried out regardless of the victim's consent, for purposes of her exploitation or obtaining illegal benefits by another way, proposal, recruitment, transportation, transfer, harboring or maintenance of a person using coercion, deception, guilty person abuse of authority, misuse of trust or by the vulnerable position of the victims of trafficking or bribery of a person, depending on where he is located. The second one is the exploitation of human or its labor to obtain pecuniary or other benefits to another person through putting it in debt bondage or other addiction, putting it into slavery, forced labor, practices similar to them. Due to the foregoing forced labor should include also work and services that were made with breaching legislation on labor protection and its remuneration by the employer intentionally.

The current Labour Code of 1971, despite making many changes and additions in it less corresponds to the socio-economic situation. Appears and grows extremely dangerous gap between the legal regulation of various spheres of socio-economic activities. Actions of norms oriented on high level of formal legal worker protection, leads to adverse economic and, at first sight is paradoxical social consequences. Greatly inefficiency of the legal regulation of labor relations caused by the absence of a clear mechanism of realization laid down principles and warranty provisions. This situation is due to many reasons, among which are the following sense: not a clear separation of issues that are solved at different levels of legal regulation; collision of regulations among themselves; not efficient filling gaps in the current legislation; insufficient level of legal technique and others. Inflexible system of hiring and firing reduces labor mobility, prevents their redistribution between enterprises, industries and regions, is an obstacle to gradual transition from inefficient to efficient sectors of employment. Saturation of current Labor Code with unrealistic guarantees and privilege contributes the emergence and further development of negative trends. Including: labor relations, especially in the commercial sector, often mechanically substituted by civil law relations, with the result that workers actually lose even the existing minimum guarantees since the application of labor law in its entirety to the employer becomes economically disadvantageous and unrealistic; formally most protected by labor law workers (women, youth, persons who combine work and studies, the dis-

abled, etc.). actually become less competitive in the labor market and in mass order repleced out of it.

Currently, the most difficult problem to be solved in the new Labour Code – achieving the optimal combination of the interests of employees and employers, while ensuring adequate protection of the rights and interests of workers and the preservation of effective social production. Labour laws should stimulate employees to effective work under the labor contract and to protect them from the arbitrariness of employers. But such protection should not be excessive and hinder the development of production, job creation, and become an obstacle to the employment of persons looking for work. It is also necessary through the LC consistently hold the next value of state and contractual regulation of relations in the sphere of work: the state reserves the right to consolidate and specify in labor laws constitutional provisions and the basic procedures and complex of compulsory guarantees of labor rights of employees; on a collectively-contractual regulation level defined sectoral, regional and other features of work organization and realization of labor guarantees; individual-contractual regulation becomes a way of determining with the participation of the employee of the immediate conditions of work and stimulation.

The new Code must not only proclaim and record the levels and standards of labour protection, benefits and compensation, and yet stimulate the economy, which in turn will create conditions for real security of foregoing rules. The main condition for this – the accelerated introduction of scientific and technological progress, the systematic renovation of technical base. This, in turn, as the experience of economically advanced countries, provides broad participation in the production management of direct producers of wealth – employees through their representative bodies.

Adoption of a new Labor Code of Ukraine will allow to streamline labor relations, increase their flexibility, relieve the employer from undue economic costs on guarantees and compensation of employees. Thus, opportunities for development of illegal employment will reduce. There will be a real increase of level of protecting the rights and interests of workers.

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FREEDOM OF CONTRACT IN CIVIL LAW OF UKRAINE

Law, especially civil law, is a reflection of the way and direction of change, elected by society and the state in certain moments of the history of its development.

It seems important to analyze changes not only in relation to specific institutions of private law, which on an incredibly regular basisbecome the subject of various studies, but also in relation to broad, as it can be said, core ideas which are the basis for civil legal regulation of social relations in general. Undoubtedly, the idea of freedom of contract in private law can be considered as the same.

This research does not attempt to formulate any characteristics, manifestations or featuresof freedom of contract, which are notable for qualitativescientific novelty. Rather, it is devoted to the analysis of certain trends accompanying the requirement on freedom of contract in the process of development of society, the state and law, the identification of the features of implementation of freedom of contract ideasin the modern private law of Ukraine, which will be used for scientific work and the work of developers of the Civil Code of Ukraine, which entered into force in 2004, as well as analysis of the implementation of the principle of freedom of contract in the practice of higher courts in Ukraine.

Formation of the freedom of contract idea

As it is known, freedom of contract as a concentrated general requirement, recognized as a legal doctrine, has emerged relatively recently. However, some of the requirements discussed in the modern private law as a part of the freedom of contract principle, have come a long way of growth and development.

An example of this can bethe right of parties to the agreement on the free formulation of the terms and its manifestationin the conditions of struggle, or, on the contrary, underthe weakening of the struggle against usury, which at various times was expressed by contradictory regulations: ranging from almost total ban on charging interest and ending with

the full freedom of establishment of the rateof interests.

However, the requirement of freedom of contract has received the most widespread consolidation, as well as many other institutions of private law, during the codification of works. Reflection of the freedom of contract principle between the major codifications of nineteenth and twentieth centuries also depended on the nature of the objective economic and social changes in society and state, which, of course, were influenced by scientific thought and in such a matterlegislators were guidedto the formation of legal norms.

Whence, during the adoption of the Civil Code of France the ideas of the French Revolution were strong. Of course, «Liberty, Equality, Fraternity» in public life could not penetrate to the provisions of the Napoleonic Code, despite the fact that in its preparation the convinced royalists were involved. Therefore, the French Civil Code was «thoroughly imbued» with the ideas of freedom of contract. At the time, Y. A. Kantorovich has written: «In the Napoleonic Code, published in the early nineteenth century, the principle of contractual freedom is carried out with the entire sequence: the parties by means of their will stipulate all the conditions of contract and consequences of all their obligations, the normsof law relating to contract law shall apply only when the parties failed to provide anything to the contract or forgot to provide any condition or simply did not settle their relations; in these cases, a gap or a lack of will of the parties shall befilled with the norm of law, which is «the presumed will of the parties.» Thus, rules of law in contract law are entirely optional.»[1]

On the contrary, later, when romanticism of political changes collided with theharsh economic laws, moreconsiderablerestrictions of unreasonable freedom graduallyappeared and in some cases came to economic oppression. Therefore, at the time of the adoption of the German Civil Code and the Swiss law of obligations a significant amount of rules and regulations were formed, which could not be contradicted by the terms of the contract, which clearly provided conclusion of the contract or limited the ability of persons to change the terms of contracts. However, these restrictions were also justified, in general, from the viewpointof the overall direction of private law, in particular bythe protection of the weaker party to the contract, the maintenance of free competition etc. In any case, regardless of the number of restrictions, freedom of contract has always been a fundamental principle of economic regulation.[2]

Domestic doctrine of civil law also did not stayaside from these general trends. Civil law of pre-revolutionary Russian Empire, which was under the influence of the French and later of German private law ideas, also recognized the general requirement of freedom of

[1] *Канторович Я. А.* Основные идеи гражданского права. Х.: Юрид. изд-во НКЮ УССР, 1928. С. 52.

[2] *Базедов Ю.* Свобода договоров в Европейском союзе / Пер. с нем. Ю. М. Юмашева // Право. Журнал Высшей школы экономики. 2011. №2. С. 90.

contract. As it was noted by the eminent scholar G. F. Shershenevich, freedom of contract with the elimination of subjective limitations, as well as the formalism beingthe next to the right of private property, was one of the main foundations of the modern legal order.[1]

After the revolution, the changes in the political and economic foundations of society have left their mark on the entire branches of law, including the civil law. Under the rule of the planned economic system the freedom of contract frankly lost its central role in private-law contractual relationship. Other categories came to the forefront, such as contract enforcement and the conditionality of the conclusion of contracts by the means of acts of planning. In such circumstances, the contract had a subordinate position in relation to the plan, and in the scientific literature it was stressed that the timely and proper execution of the contractual relationship provided a solid basis for the successful implementation of the plans.[2]

However, it would be a mistake to say that in this period of history the concept of freedom of contract was completely «filed as a history». According to A. S. Dovhert, in the real life at least small islands of freedom were still remained, which objectively demanded a private, rather than public regulation. It was a kind of «territory» of human freedom, which human had, in particular, in the sphere of family relations, turnover etc. Since 1985, there was a gradual expansion of this area of freedom.[3] In the scientific literature of that periodit was emphasized that concluding of unplanned agreements between legal entities, between them and citizens or between citizens – is the area of the «so-called autonomy, the implementation of a certain freedom. Entering into a contract legal entities and individualshave an opportunity to look after thesecurity of their interests: initiative and independent, self-interest should lead to the largest (from the perspective of public positions) result.»[4]

Later, after the transition to market methods of management, there was a gradual but irreversible return to the classical understanding of the idea of freedom of contract and its specific manifestations. In the early 90s civilists justified a fundamentally different correlation of plan and contract, «because in a market economy namely an agreement becomes the basis for the formation of the plan (and the purpose and content of the plan and the procedure for its approval are changed significantly), it

[1] *Шершеневич Г. Ф.* Учебник русского гражданского права. 9-е изд. М.: Изд. Бр. Башмаковых, 1911. С. 448.

[2] *Луць В. В.* Хозяйственный договор и эффективность производства. Львов: Вища школа, 1979. С. 55.

[3] *Довгерт А.* Кодифікація цивільного права незалежної України – важливий етап розвитку цивілістичної доктрини // Право України. 2014. № 6. С. 37.

[4] *Свердлык Г. А.* Принципы исполнения обязательств по заключению договоров – основа соблюдения плановой дисциплины // Договорная дисциплина в советском гражданском праве: Межвузовский сборник научных трудов / Отв. ред. Г. А. Свердлык. Свердловск: Изд-воСвердловского юридического института, 1985. С. 30.

should be recognized that the plan should not be construed as limiting the freedom of contract.»[1]

Thus, during the period of planned economy, the principle of freedom of contract didnot completely disappear from the horizon of civil law. In the end, the Civil Code of the Ukrainian SSR provided the individual components of this principle, fixing, for example, in Art. 4 the possibility of civil rights and obligations arising from the transactions prescribed by law, and as well from the transactions, which were not prescribed by law but did not contradict it.

Nevertheless, the above mentioned in no way calls into question the conclusion that in the process of a new codification of private law of Ukraine, as well as in other former Soviet republics, scientific thought has swept the idea of freedom of contract to a new level by returning it to the bosom of its classic understanding. It was reflected in the directsecuring of freedom of contract as a fundamental principle of the civil legislation of Ukraine.

The origins and essenceof the freedom of contract idea

The basis of the requirement of freedom of contract are general social and common law ideas of freedom of the person and equality of parties at all stages of modern private law. As it was noted by I. A. Pokrovsky, whose works continue to have a huge impact on modern processes of development of private law, civil law, and originally itself was the right of individual human beings, its sphere of freedom and self-determination. Here the idea of man as the subject of rights was born, i. e., notion of personality as something legally separate and independent even in relation to the state and its authorities.[2] If public law is a system of subordination, the civil law is a system of coordination; if the formeris the domain of power and subordination, the latterisan area of freedom and private initiative.[3]

S. S. Alekseev expressed his point of view in thesame manner, he claimed that private law is a sovereign territory of freedom based on law[4], it is a source of civilized freedom, its native, primal abode which does not have any alternatives available in a number of areas of social life.[5]

Caution made by another outstanding civilest M. M. Agarkovis also significant in this sense: «for those who consider freedom as something unimportant, for those who need to band all people in a single mass of the vast mechanism, private law does not only have no value, but it is something that must be overcome.»[6]

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[1] *Кузнецова Н. С.* Подрядные договоры в инвестиционной деятельности в строительстве. Киев: Наукова думка, 1993. С. 67.

[2] *Покровский И. А.* Основные проблемы гражданского права. 4-е изд., испр. М.: Статут, 2003. С. 307.

[3] Ibid (p. 44)

[4] *Алексеев С. С.* Частное право: Научно-публицистический очерк // *Он же*. Собр. соч.: В 10 т. Т. 7: Философия права и теория права. М.: Статут, 2010. С. 351.

[5] Ibid (p. 360)

[6] *Агарков М. М.* Ценность частного права // *Он же.* Избранные труды по гражданскому праву: В 2 т. Т. 1. М.: Центр ЮрИнфоР, 2002. С. 105.

According to the developers of the Civil Code of Ukraine, the cornerstone of private law is the position of the «genetic code» of civil relations: legal equality, free expression of will, dispositivity etc.[1]Autonomy of will is a defining feature of civil relations which is well-known since Roman times and which requires participant's freedom, participation in the implementation of hisinterests, sanctioned and sanctified by law as a main features of participants. Own initiative in this case has a special role, which involves the ability to act at their own risk and take responsibility for their behaviour.[2]

Thus, the fundamental principle of freedom of contract is rooted in the essence of civil law, as a direct product of its features and characteristics. In this sense, thereis clearly visiblethe continuity in qualification of the Institute of contract in private law, its understanding and significanceby the developers of the new Civil Code of Ukraine..

As it was noted by I. A. Pokrovsky, every contract is an exercise of private autonomy, the implementation of the active freedom, which is a necessary assumption of the civil law. As a consequence, the origin of this area is the principle of contractual freedom. Along with the beginning of private property this principle is one of the cornerstones of modern civil order. The destruction of this principle would mean a complete paralysis of civilian life, its total immobility.[3] Y. N. Shevchenko expressed heropinion in the same manner: the contract as a legal institution in the highest degree corresponds to the onset of civil rights – equality of persons, dispositivity in their relationship (resolving issues at their own discretion), the initiative in the occurrence of these relations.[4]

These judgments clearly indicate that as of today there is a return to the real natural understanding of both the contract and the principle of contractual freedom.

However general and abstract the above statements of civilistsand their conclusions seem to be – in fact this is not so. They play (and should play!) a very important role at any stage of existence of rule of law. The origins of this idea, located in the bowels of private law as such, should be taken into account, in the first place, in law enforcement sphere in the event of situations that are not directly regulated by the law. Meanwhile, it is not the most important thing. Much more important is the fact that all legal limitations of requirementof the freedom of contract should be considered and applied solely through the prism of this requirement, which is a part of the essence of

[1] *Кузнєцова Н.* Основні методологічні засади сучасного цивільного права України // Право України. 2009. №8. С. 13.

[2] *Шевченко Я. М.* Поняття цивільних правовідносин і їх значення в суспільстві // Актуальні проблеми приватного права України: Збірник статей до ювілею доктора юридичних наук, професора Наталії Семенівни Кузнєцової / Відп. ред. Р. А. Майданик та О. В. Кохановська. К.: Юридична практика, 2014. С. 499.

[3] *Покровский И. А*. Указ. соч. С. 247–248.

[4] Шевченко Я. М. Теоретичні засади нового цивільногозаконодавстваУкраїни // Она же. Вибраніпраці (1964–2012 рр.) / Вступне слово акад. Н. С. Кузнєцова; відп. ред. Р. О. Стефанчук. Камянець-Подільський: Рута, 2012. С. 231.

private law. Taking into consideration theprovided nature of the freedom of contract idea, its limitations should be formulated for a reason, not because of notorious protection of the interests of the state (or rather, protection of individual state officials), which traditionally tries in all cases without exception to put theirown interests above the interests of the individual not because of the will of legislator in the specific moment of time. On the contrary, any restriction of freedom of contract should be displayed as part of a compromise with the precepts of not less general and total principle of private law. In this case, as history shows, the restrictions on freedom of contract have been developed – and based on the protection of the weak party in the contract, prevention of the violation of «higher» principles of good faith, reasonableness and equity etc. Only in this case the principles of civil law really get their full implementation, and civil law itself will turn into an effective instrument of economic development in general.

In turn, the essence of the freedom of contract idea can be very generally defined as guaranteed by the rule of law possibility of any member of the civil relations to neglect, within certain limits, coercion of the third parties and authorities in questions as to entering into a contract relations and determination of their content.

Regulatory consolidation and content of thefreedom of contractidea in the law of Ukraine

According to p. 1 of Art. 19 of the Constitution of Ukraine legal order in Ukraine is based on the principles, according to which no one can be forced to do something that is not required by law. This initial postulate of individual freedom is the basis for the rule of law in general, and finds its expression within different spheres of legal regulation.

The main regulator of social relations of a private nature is civil law. Namely its standards accompany the person from birth till death, and sometimes, these standards capture even longer period (nasciturusrights in the succession law, copyright law etc.). The Civil Code is not only a major act of civil law, but also the basis for the whole system of private law, the code of life for the whole civil society.[1] Therefore, if the idea of freedom of contract had to receive a direct regulatory acceptance, it, of course, should have happened within the provisions of the new Civil Code of Ukraine.

As of today, it is possible to talk about the realization of the idea of freedom of contract in civil law at several levels.

The first and basic level is to secure freedom of contract as the start of the civil law in Sec. 3p. 1of Art. 3 of the Civil Code of Ukraine. Essentially, all the statementsenclosed in Art. 3 of the Civil Code of Ukraine are universal, fundamental requirements that concern all the rules of civil law without exception. According to the intention of the authors of the new Civil Code of Ukraine, listed in Art. 3 of the Civil Code of Ukraine the principles are statementsof natural law, and this character shall not disappear in connection with their registration in positive law,

[1] *Кузнецова Н. С.* Развитие гражданского общества и современное частное право Украины // *Она же.* Вибрані праці. К.: Юридична практика, 2014. С. 241.

but only emphasizes the fact that it is a natural right, coming from the rationality and reasonableness, is the primary source of the modern civil rights.[1]

In general, such a characteristic of the provisions of Art. 3 of the Civil Code of Ukraine correlates with the traditional understanding of the principles of law as guidelines, basic principles that express the objective legal normalities, trends and needs of society.[2] Nevertheless, the principles of law are often indicated with regulatory character or enforceability in order to consolidate their power in the law. On the contrary, general principles of civil law mentioned in Art. 3 of the Civil Code of Ukraine have received regulatory consolidation due to the perception of them as obligatory in accordance with the requirements of life itself, natural law.

So, taking into account the abovementioned option, thecivilists' opinion considering the principle of freedom of contract as a civil right seems to be motivated.[3] Nevertheless, the Ukrainian legal literature contains doubts as to the general character of the principle of freedom of contract. In particular, it is noted that freedom of contract is exclusively related to the sphere of contractual relations and, therefore, it should be recognized as a principle of contract law.[4] However, it is difficult to agree with such statement, because in the pre-citedapproach several important pointswere neglected.

Firstly, the principle of freedom of contract is directly linked with the implementation of certain aspects in other sub-sectors and institutes of civil law, for example, with the idea of the free disposition of property. Secondly, it is likely that in the case of securing freedom of contract only as a principle of contract law in the relevant section of the new Civil Code of Ukraine, its value would be reduced solely to the regulatory function. In such a case, the meaning of this idea as a basis for the formation of positive law would be lost, the manifestation of which is the requirement of accounting the provisions of Art. 3 of the Civil Code of Ukraine in the creation of new legal rules, which has been repeatedly mentioned in the civil law literature.[5] And finally, thirdly, recognition of freedom of contract as presupposition of all

[1] Цивільний кодекс України: Науково-практичний коментар / За ред. розробників проекту Цивільного кодексу України. К.: Істина, 2004. С. 9.

[2] *Алексеев С. С.* Общая теория права. Курс в двух томах. Т. I. М.: Юрид. лит-ра, 1981. С. 98; *Грибанов В. П.* Принципы осуществления гражданских прав // *Он же.* Осуществление и защита гражданских прав. 2-е изд., стереотип. М.: Статут, 2001. С. 223.

[3] *Шевченко Я. Н.* Проблемы и перспективы развития гражданского права Украины в соответствии с новым Гражданским кодексом // *Она же.* Вибрані праці (1964–2012 рр.). С. 335; *Цюкало Ю. В.* Щодо розуміння свободи договору: теоретико-прикладний аспект // Часопис Київського університету права. 2013. № 1. С. 211.

[4] *Бервено С. М.* Проблеми договірного права України: Монографія. К.: Юрінком Інтер, 2006. С. 118.

[5] *Кузнєцова Н. С.* Стан і тенденції розвитку цивілістичної науки в Україні // Право України. 2014. № 6. С. 10; *Довгерт А. С.* Кодифікація цивільного права незалежної України – важливий етап розвитку цивілістичної доктрини // Право України. 2014. № 6. С. 39.

modern civil rights suggests that the restriction of realization of this idea should meet the criteria of natural law, namely reasonableness, social necessity, proportionality etc.[1] In other words, any restriction of the idea of freedom of contract, as it was mentioned previously, should be based on general principle of law.

The second level of regulatory consolidation of the idea of freedom of contract is the provisions of Art. 6 of the Civil Code of Ukraine, according to which parties have the right to conclude a contract, which is not stipulated in the acts of civil law, but meets the general principles of civil law (p. 1). The parties have the right to settle in the contract, which is prescribed by acts of civil law, their relations, which are not regulated by these acts (p. 2 of Art. 6). The parties to the agreement may recede from the civil law and settle their relations at their own. The parties to the contract may not recede from the provisions of the civil law, if these acts clearly indicate this, and if the parties are bound by the provisions of civil law which derive from the content or substance of the relationship between the parties (p. 3 of Art. 6).

Perhaps, namely the Art. 6, or rather its third part has caused the most debate in the scientific literature after the new Civil Code of Ukraine entered into force. For example, the position of M. N. Sibilev deservesdue attention. M. N. Sibilevappreciates the direction of p. 3 of Art. 6 of the Civil Code of Ukraine but, however, he does not agree with the instructions provided in this Article as to the impossibility of deviation from the provisions of civil law due to reasons derive from the content or substance of the relationship between the parties.[2]

However, in addition to interesting ideas, the literature contains openly dubious claims, for example, the claim that p. 3 of Art. 6 of the Civil Code of Ukraine does not have any relation to the principle of freedom of contract,[3] though even after cursory reading of the text of the norm the fallacy of this position became obvious.

Without a doubt, the provisions of Art. 6 of the Civil Code of Ukraine do not comply with the theory of commercial law where the state has traditionally a major role both in the legal relations and in the sphere of legal regulation of these relations. «It should be noted – writes N. S. Kuznetsova – that our opponents, the representatives of science of commercial law, met with «hostility» this rule of law and with varying degrees of regularity tryto amend Art. 6 of the Civil Code of Ukraine. Even by itself this fact indicates that the provisions of this article are deeply democratic by their content and do not fit the vision of «representatives of commercial law»

[1] Цивільний кодекс України: Науково-практичний коментар. С. 9.

[2] *Сібільов М. М.* Співвідношення актів цивільного законодавства і договору та базові моделі регулювання договірних відносин за чинним Цивільним кодексом України // Вісник Хмельницького інституту регіонального управління та права. 2004. № 4. С. 59.

[3] *Шевченко В. В.* Сутність принципу свободи договору та його значення у земельному праві України // Ученые записки Таврического национального университета им. В. И. Вернадского. Серия «Юридические науки». 2013. Т. 26. № 2–1 (Ч. 1). С. 446.

about the general principles of «legal commercial order», enshrined in Art. 5 of the Commercial Code of Ukraine.»[1]

In general, evaluatingprimarily the provisions of Art. 6 of the Civil Code of Ukraine, which, however, find its reflection in other norms of this Code, the contract hasa priority position compared to the norm of civil law (of course, with existing exceptions). We can therefore agree with the opinion that Article 6 of the Civil Code of Ukraine brings a civil contract to a new level in the mechanism of legal regulation, as at the first stage (the stage of legal regulation) not law or other act of civil legislation but the contract itself is the source of a legal standard that will define the model of proper behaviour of the parties.[2]

The third level of regulatory consolidation of the idea of freedom of contract is the Art. 627 of the Civil Code of Ukraine: in accordance with Article 6 of this Code the parties are free to conclude a contract, to choosea contractor and determine the conditions of the contract with regard to the requirements of the Code, other acts of civil law, customs of business turnover, the requirements of rationality and justice. In contracts involving an individualconsumer legislation takes into account the requirements of consumer protection.

There can be no doubt that the purpose of this article is to consolidate the main content of the rules of freedom of contract in private law. At the same time, even textually, it is directly connected with the provisions of Art. 6 of the Civil Code of Ukraine. This means that the provisions of Art. 627 of Civil Code of Ukraine used to be implemented in close cohesion with the requirements of the contract and the relationship between civil law.

The fourth level of regulatory consolidation should be recognized as individual rules of the Civil Code of Ukraine, especially those which are dedicated to the regulation of contractual relations, but not in ways that are specified in Art. 627 of the Civil Code of Ukraine.

Thus, the legislator came to realization of the idea of freedom of contract in the positive law deeply enough, providing logical stage structure of norms and securingit as a fundamental principle of civil law principle of freedom of contract, followed by the disclosure of its substantive content, which requires separate analysis.

The content of thefreedom of contract principle in civil law of Ukraine

As it was already noted, the Art. 627 of the Civil Code of Ukraine specifies the freedom of contract by reference to the freedom in the contract, the choice of contractor and determining the conditions of the contract.

Within the framework of the doctrine of civil law, even the researchers who insist on the impossibility of expanded or restrictive interpretation of the above rules, agree that freedom of contract can be expressed and find its expression in

[1] *Кузнецова Н. С.* Гражданское законодательство Украины: проблемы и перспективы совершенствования // *Она же.* Вибрані праці. С. 295.

[2] *Кузнєцова Н. С.* Договір у механізмі регулювання цивільно-правових відносин // *Она же.* Вибрані праці. С. 405.

other aspects of contractual freedom.[1] In the scientific literature, for example, the freedom to choose the form of the contract[2], the type of contract, amendments, extension and termination of the contract[3] etc. receive their individual mentions.[4]

Of course, many of the mentioned in scientific literature additional manifestations of freedom of contract can in one or another way be interpreted in the thought of the principle of contractual freedom, enshrined in Art. 627 of the Civil Code of Ukraine. However, the limitation of this principle only to the provisions of Art. 627 of the Civil Code of Ukraine still seems inappropriate. On the contrary, taking into consideration the comprehensive nature of the idea of freedom of contract to the private law which is perceived by Ukrainian legal order due to the fact of fixing this idea among the general principles of civil law (Art. 3 of the Code), any limitation of freedom of contract as such does not meet the general orientation, general core of modern civil law. However, if we talk about the basic elements, the directions of this principle, it becomes clear that they are just set out in Art. 627 of the Civil Code of Ukraine.

So, for example, statementsthat **the parties are free to conclude a contract** are of a high importance. As it was rightly pointed out by T. V Bodnar, the legislative technique of fixing the rules of conduct in the provisions of law in this case suffers from faults because literally individuals and legal entities will became contracting parties after the conclusion of contract. However, the contents of the rules, the meaning stated in these words by the legislator do not become unclear. This provision clearly assumes the further implementation of the contract within the contractual sphere of the provisions mentioned above the p. 1 of Art. 19 of the Constitution of Ukraine, as well as p. 2 of Art. 14 of the Civil Code of Ukraine, in the sense ofwhich a person cannot be forced to take action, the performing of which is not obligatory for him or her. On this basis, Art. 627 of the Civil Code of Ukraine allows a person to have a choice whether to enter or not to enter the contractual relations, while prohibiting all other participants of civil relations to prevent the implementation of any behaviour selected by person, as well as to influence the choice in unlawful means.

The following casemay serve as an example of practical implementation of this provision. By the decisions of the Executive Committee of the Kharkiv City Council dated 28.12.2011 № 940 «On the determination of services for removal of household wastes in the city of Kharkivby the executive» LLC «KharkivEkoresurs»was established as the executive of services. Pursuant to the requirements of Art. 35–1 of the Law of

[1] *Боднар Т. В.* Договірні зобов'язання в цивільному праві: (Заг. положення): Навч. посіб. К.: Юстініан, 2007. С. 39–40.

[2] *Луць В. В.* Договірне право України: сучасний стан і тенденції розвитку // Юридичний вісник. 2009. №2 (11). С. 54.

[3] *Голубєва Н. Ю.* Свобода договору як принцип цивільного права // Актуальні проблеми держави і права. 2009. Вип. 51. С. 66–67.

[4] *Луць В. В.* Контракти в підприємницькій діяльності: Навч. посіб. 2-е вид., перероб. і допов. К.: Юрінком Інтер, 2008. С. 36.

Ukraine «On Waste» dated 05.03.1998 № 187/98-BP, Art. 20, 21 of the Law of Ukraine «On Housing and Communal Services» dated 24.06.2004 № 1875-IV the company sent a defendant a draft contract on services for domestic waste removal, signed by the director and sealed, annex to the contract, as well as tariffs for services, rules on services, the list of the categories of persons who have benefits as to payments for housing and communal services. However, the defendant made no actions on the adoption of the conditions, in connection with this fact the plaintiff appealed to the court demanding the defendant to enter into theagreement. By denying the claim, Krasnoarmeyskiy District Court of Kharkiv in its judgment dated 25.12.2012 pointed out that the basic principle of regulation of civil relations, among others, is the principle of freedom of contract –Sec. 3 p. 1 of Art. 3 of the Civil Code of Ukraine. The content of this principle in accordance with Art. 627 of the Civil Code of Ukraine lies in the fact that the parties are free to conclude a contract, to choice the contractor and determine the conditions of the contract with regard to the requirements of the Code, other acts of civil law, customs of business turnover, the requirements of rationality and justice. Based on the above, the Court concludes that no one can be forced to contract and assumed with corresponding obligations. According to Sec. 2 p. 2 of Art. 4 of the Civil Code of Ukraine the acts of civil law, including the laws of Ukraine, shall be adopted in accordance with the Constitution of Ukraine and this Code. Thus, the Civil Code of Ukraine is the act of a special action in the civil-law relationship, which has the highest legal force in the system of legal acts compared to other Acts, which must comply with the Civil Code of Ukraine. The provisions of those legal acts, which are contrary to the Civil Code, cannot be applied.[1] Supreme Specialized Court of Ukraine for civil and criminal affairs denied the plaintiff's claim to institute appeal proceedings, because it considered that the courts of first and appeal instances had not violated the rules of substantive or procedural law in making decisions.[2][3]

The freedom to define a counterparty under the contract is also not least important. In this way, in 2008, between the plant, the bank and the company the contract of factoring was adopted, but later the plant turned to the economic court for recognition of the contract as void. The Supreme Economic Court of Ukraine upheld the decisions of the economic courts of previous instances and relying on the rules on freedom of contract noted that according to p. 1 of Art. 1079 of the Civil Code of Ukraine the parties to the factoringcontract are the factor and the client. However, the rules

[1] *Боднар Т. В.* Виконання договірних зобов'язань у цивільному праві: Монографія. К.: Юрінком Інтер, 2005. С. 39–40.

[2] Заочне рішення Червонозаводського районного суду міста Харкова від 25.12.2012 року по справі № 2035/8034/2012 // http://www. reyestr. court. gov. ua/ Review/28909143

[3] Ухвала Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ від 20.05.2013 року по справі № 6-22372ск13 // http://www. reyestr. court. gov. ua/Review/31459225

of civil law do not contain a direct prohibition to a third party – the debtor – to enter into a factoring contract. Accordingly, the adopted by the parties factoring contract is not contrary to the law, since there is no prohibition on the conclusion of a tripartite factoring contract. It also does not contradict the essence of factoring contract, since the debtor was a party to factoring transactions, and his rights and obligations are defined in Art. 1082 of the Civil Code of Ukraine, according to which the debtor is obliged to make a payment to factor.[1]

Further, the participants of civil relations **are free to determine the type of contract**. In particular, they may enter a contract which is stipulated by law or not stipulated by acts of civil law. For example, in one of the cases the courts established that the parties had concluded the contract of the debt instalments, under which the plaintiff should return the debt to the bank account or in cash to the defendant. The contract determined the order and timings of performance of liabilities. The contract provides the liability of the parties in the event of default. Then, the plaintiff brought an action to the Economic Court ofMykolaivRegion and claimto invalidate the contract of debt instalments. In support of the claim the plaintiff referred to the failure of compliance with the requirements of the current legislation by the parties at the stage of conclusion of the contract and its uncertainty due to the legal nature of the contract. The decision of the Economic Court of the first instance satisfied the claim, however, the Economic Appeal Court of MykolaivRegion reversed the decision of the Economic Court of first instance and adopted a new decision and denied the claim. When upholding the decision of the Odessa Economic Court of Appeal, the Supreme Economic Court of Ukraine proceeded from the following. Art. 6 of the Civil Code of Ukraine and Art. 174 of the Commercial Code of Ukraine provide parties with the right to conclude contracts which are non-stipulated by law, parties to a contract may derogate from the civil law and settle their relations at their own discretion. Therefore, on the basis of the provisions of the above regulations, the plaintiff and the defendant have the right to conclude a contract, which is not stipulated by law and which is not among pro forma and model contracts prescribed by the legislation. This contract in accordance withgeneral rule shall be set out in the form of a single document, signed by the parties and sealed, the parties agreed on the subject, price and term of the obligations. In addition, as follows from the case, the plaintiff agreed to the terms of the contract by acknowledging the debt completely, and committed banking operationstowards performance of his obligations. The court of appeal rightly pointed out that the current legislation does not provide the necessity of guidance in the contracts, the conclusion of which is related to the results of the previous business transactions, the content of the latter, in particular, the name, quantity of goods, works or services,

[1] Постанова Вищого господарського суду України від 02.08.2010 року по справі №33/268 // http://www. reyestr. court. gov. ua/Review/10687701

grounds of certain amount of debt, source documents in support of the business transactions performed by the parties.[1]

Among other things, the parties of the future contract according to the general rule **are free to determine its terms.**

In 2010 the Supreme Court of Ukraine considered the case as to the recovery of funds and a counter claim for recognition contract as void. The courts established that in 2006 the plaintiff and the defendant concluded a maincontract for construction of facilities. For violation of terms of the contract which were stipulated in additional agreements by the fault of the contractor, the customer had the right to charge the contractor a contractual penalty of 0.1% of the outstanding or improperly performed work for each day of delay in their implementation. While submitting an action to the Supreme Court of Ukraine with the application to review the decision of the Supreme Economic Court of Ukraine dated 03 March 2010, the plaintiff pointed out that the appeal court in the instantcase applied to legal disputes Art. 546, p. 3 of Art. 549 of the Civil Code of Ukraine and came to the conclusion that the paragraphof the maincontract as to the assessment of the contractual penalties as a percentage of nonperformance or improper performance of the obligation does not correspond to the current legislation and is contrary to the definition of interest and penalties, the principles of reasonability and equity of the agreement, violates the rights and interests of the defendant. However, in similar cases and in the same circumstances the Supreme Court applied the same substantive law but made the opposite conclusion that the contract penalty which is calculated as a percentage of non-performance or improper performance of contractual obligations meets the requirements of the law. While satisfied the claim and reversed the decision of the Supreme Economic Court of Ukraine in this case, the Supreme Court of Ukraine proceeds from the following. The right to establish other than those provided by the Civil Code of Ukraine ways as to enforcement of the obligations defined by p. 2 of Art. 546 of the Civil Code of Ukraine, which is consistent with the freedom of contract stipulated by Art. 627 of the Civil Code of Ukraine. Thus, at the conclusion of the contract subjects are endowed with the right to enforce the commercial obligations by establishing a separate type of liability – contractual penalties for nonperformance or improper performance of contractual obligations, in particular prescribed by p. 8.3. of the maincontract.[2]

The abovementioned elements of the freedom of contract principle in private law of Ukraine, as it was already noted, are not exhaustive, however, they provide grounds to assert with confidence that they are the main directions of the

[1] Постанова Вищого господарського суду України від 29.04.2010 року по справі № 8/251/09 // http://vgsu. arbitr. gov. ua/docs/28_2785427. html

[2] Постанова Верховного Суду України від 22.11.2010 року посправі № 3-24гс10 // http://www. reyestr. court. gov. ua/Review/13485886

implementation of this principle. Of course, in judicial practice there are examples of the successful defence of the participants of civil relations in the frameworks of other elements of the principle of freedom of contract, in particular, freedom of form of a contract. However, in essence, the mechanism of the implementation of these components is similar to the principles mentioned above.

It should be underlinedthat **the general permission to participants of civil relations to deviate from the rules of civil law** has no reference to stages and dynamics of a contractual relationship. There are sufficiently large number of judgments delivered by the courts on the basis only (or, among other things) of the provisions of Art. 6 of the Civil Code of Ukraine.[1] Nevertheless, the potential of this norm is disclosed more fully in the case of its application in the connection with the provisions of Art. 4 of the Civil Code of Ukraine, which determines the list and the hierarchy of acts of the civil law. It allows us to formulate the following rule: the parties of the future treaty may not only deviate from the statements of the civil law but alsoaccording to general rule are not obliged to considernot relating to the civil law statements of legislation instrument which are not statutory under the public law statements, but tosome extent regulate the activity of one of the parties to the contract.

In this sense, the one of the cases reviewed by the Supreme Court of Ukraine should be noted. According to the circumstances of the case the bank and the bar association signed thecontract on legal assistance in 2009, which regarded, inter alia, the collection of overdue debt in the bank's favor, including pre-trialsettlement, court proceedings, representation in enforcement proceedings etc. Under the contract, the bank should pay the fee to the bar association exclusively for the achievement of the final result: in case of crediting the bank's account with borrower's funds –10% of the funds which were actually received by the bank; if the bank takes over the pledged property or obtain any other assets towards debt repayment – 8% of the appraised value of the mortgaged property or assets; in the case of the restructuring of obligations of the borrower –1% of the restructured liabilities. According to the bank, the terms of the payment of a fee were contrary to the requirements of p. 1 of Art. 901, p. 1 of Art. 903 of the Civil Code of Ukraine and theModel Rules of Professional Conductwhereforethe bank asked to recognize the contract as a null and void.

By denying the claim, the Court of First Instance proceeded from the fact that during the period of the contract lawyers provided a legal assistance to the bank debt recoveryfrom the borrow-

[1] См.: Постанова Вищого господарського суду України від 01.02.2012 року по справі № 37/172 // http://www. reyestr. court. gov. ua/Review/21273821; Постанова Вищого господарського суду України від 23.05.2011 року по справі № 42/421 // http:// vgsu. arbitr. gov. ua/docs/28_3272482. html; Постанова Вищого господарського суду України від 01.10.2012 року по справі № 5019/2778/11 // http://vgsu. arbitr. gov. ua/ docs/28_3840693. html.

ers, which is evidenced withthe relatedreports and isnot disputed by the parties. In accordance with the principle of freedom of contract, enshrined in Art. 627 of the Civil Code of Ukraine, the parties voluntarily entered into a contract to provide services for a fee and independently determined the size and order of payment. Current legislation does not prohibit the determination of the amount of payment (fee) for the services (legal assistance) as a percentage of the final result achieved (actually charged debt). According to the payment documents the lawyers were paid namely for the providing legal assistance. Therefore, the plaintiff's reference to the fact that the contract and its annexes did not meet the requirements of Art. 203, 901, 903 of the Civil Code of Ukraine, the Law of Ukraine «On Advocacy»dated 19.12.1992 №2887-XII, Model Rules of Professional Conduct were baseless. The judges of the courts of appeal and cassation also agreed with these conclusions.

In reviewing the court decisions of this case, the Supreme Court of Ukraine has also agreed with these conclusions, however, among other things, added that Model Rules of Professional Conductisappliedonly to lawyers and their professional activityand isnot the act of civil legislation within the meaning of Art. 4 of the Civil Code of Ukraine.[1] In this connection, there were no grounds for recognition the contract as void. Later, this legal position was re-announced in a letter of the Supreme Court of Ukraine dated04.01.2014 the «Analysis of theimplementationpractice ofthe Art. 16 of the Civil Code of Ukraine by courts.»[2]

Restriction of principle of contractual freedom in the civil law of Ukraine

As is seen from the above-mentioned examples, Ukrainian courts quite often use the standards of the Civil Code of Ukraine, fixing the principle of freedom of contract in the private law. However, one can hardly deny the fact that the action of this principle does not have absolute nature and is not the same for different situations. On the contrary, the history of private law suggests that the implementation of freedom of contract is subject to known restrictions in some constructions.

Under the meaning of Art. 627 of the Civil Code of Ukrainein accordance with Art. 6 of the Code, the parties are free to conclude a contract, to choose the contractor and determine the terms of the contract with regard to the requirements of the Code, other acts of civil legislation, customs of business turnover, the requirements of rationality and justice.

Thus, the first restriction of the principle freedom of contract realization are**statementsof civil legislation acts**. At the same time, the indicated restriction is applied «in accordance with Art. 6 of the Code».

[1] Постанова Верховного Суду України від 28.11.2011 рокупосправі № 6-55цс11 // http://www. reyestr. court. gov. ua/Review/19848663

[2] Лист Верховного Суду України від 01.04.2014 року «Аналіз практики застосування судами ст. 16 Цивільного кодексу України» // http://www. scourt. gov. ua/clients/vsu/vsu. nsf/%28documents%29/6AF1EBA6DF621DEDC2257CE60053FFC3

As mentioned above, according to p. 3 of Art. 6 of the Civil Code of Ukraine the parties to the contract may derogate from the provisions of civil legislation and settle their relations at their own discretion. The parties to the contract may not derogate from the provisions of the civil legislation if these acts clearly indicated on this and if the obligatory character of the provisions of civil legislation for the parties results from their content or substance of the relationship between the parties. It follows from the indicated that the implementation of the freedom of contract idea within specific relationships is limited not by any act of civil legislation, but only by mandatory rules, although these provisions are not referred to as «mandatory» in the text of Art. 6 of the Civil Code of Ukraine.

In fact, this approach by itself should not cause any rejection, since it is quite consistent in keeping with the traditional regulation of public relations by the civil legislation rules. In addition, the provisions of p. 3 of Art. 6 of the Civil Code of Ukraine in comparison with the previous codifications contain fundamentally new approach to the relationship of mandatory and optionalrules. If classic, though not unobjectionable, approach to determining the nature of the rule liesin the fact that optionality of rule of conduct must be stipulated separately, then today, according to A. S. Dovgert, a presumption of optionality of private law rule is established[1]. It is the ratio of optionaland mandatory rules laid down in p. 3 of Art. 6 of the Civil Code of Ukraine, has generated patchy response of the scientists.

For example, referring to the vagueness of the criteria for the rules division into mandatory and optional, some researchers oppose the laid down approach on the merits and propose to set a rule in p. 3 of Art. 6 of the Civil Code of Ukraine, according to which all that does not contradict the legislative acts and the general principles of civil legislation is allowed in the contract[2].

In fact, heavy criticism was heaped on statementsof p. 3 of Art. 6 of the Civil Code of Ukraine by O. P. Podtserkovnyi, according to whom it is generally accepted that the provisions of the civil legislation actsfrom the Constitution of Ukraine to the bylaws adopted on the basis of the laws in the absence ofspecial reserves are naturally obligatory. However, p. 3 of Art. 6 of the Civil Code, according to the scientist, ignores this postulate and involves searching for the item of obligatoriness in the content of all rules of civil law, even in those which are recognized as obligatory by only one criterion – the absence of reservation about the possibility of free contract conclusion. Such search for obligatoriness of civil law rules is not only devoid of theoretical justification, but is not adapted to practical implementation. The solution of thequestion of what kind of item in the content of the law rule indicates that it is obligatory may be the subject

[1] Цивільний кодекс України: Науково-практичнийкоментар. С. 14.

[2] *Горєв В. О.* Свобода договору як загальна засада цивільного законодавства України: Автореф. дис.… канд. юрид. наук. Київ, 2007. С. 9.

of litigation but at the stage of conclusion of the contract it looks so abstract that it inevitably provokes a chaotic retreat from the provisions of the civil legislation or ignoring p. 3 of Art. 6 of the Civil Code[1].

It is advisable to apply separately to the understanding of freedom of contract in the doctrine of commercial law, the representative of which is O. P. Podtserkovnyi. Here it is appropriate to point out that calls for a total ban in the contract area of anything that is not explicitly permitted by law, can only be described as an attempt to reverse the logic of development of the civilistic idea.

At the same time, the arguments about the possible practical problems of differentiation of optionaland mandatory rules are noteworthy, first and foremost, for the ordinary members of civil relations. Possible practical problems are caused by inconsistency or rather the imperfection of the Civil Code of Ukraine, which directly pointed out their mandatory nature only in a small number of rules, however, it should be taken as a given, and the task of the doctrine and judicial practice consists in disclosure and justification of the chosen criterion applicable to the individual rules of civil legislation.

So, under the meaning of p. 3 of Art. 6 of the Civil Code of Ukraine mandatory rules are primarily those that contain a direct reference to their mandatory nature[2]. P. 2 of Art. 260 of the Civil Code of Ukraine, according to which the procedure for calculating the limitation period cannot be changed by agreement of the parties, may be indicated as an example. In such cases, there shall not be problems with determining the nature of the rule.

It is much harder to determine whether a rule is mandatory, based on its content. Firstly, under general principles, the rules, which allow the existence of other principle only if it is established exclusively by law, may be considered mandatory. For example, according to p. 1 of Art. 425 of the Civil Code of Ukraine the moral rights of intellectual property remain in force without limit of time, unless otherwise is provided by law. According to regulations of p. 1 of Art. 344 of the Civil Code of Ukraine, a person who faithfully took possession of another's property and continues openly, continuously to own real estate within ten years or movable property – within five years, acquires the ownership right for the property (acquisitive prescription), unless otherwise is provided by this Code. In such cases, the possibility to change the rules is formulated as an exception. Since exceptions cannot be interpreted broadly, in the absence of other guidance on this matter, the change of the rules of conduct laid down in this rule by the contract shall be recognized impossible.

[1] *Подцерковний О.* Недоліки норм про свободу договору в новому Цивільному кодексі України // Вісник академії правових наук України. 2004. №3 (38). С. 80.

[2] *Кузнєцова Н.* Принципи сучасного зобов'язального права України // Українське комерційне право. 2003. №4. С. 11; *Сібільов М.* Зміст цивільно-правового договору // Вісник академії правових наук України. 2003. №1 (32). С. 98–99.

Secondly, the mandatory nature of rules may appear from the fact, which legal consequences follow the non-compliance with the rule. For example, according to par. 1 of p. 1 of Art. 739 of the Civil Code of Ukraine perpetual annuity payer has the right to cancel the annuity agreement. The parties may not change thisrule in the contract, since by virtue of the statementsof par. 2 of p. 1 of Art. 739 of the Civil Code of Ukraine, the contract term under which a perpetual annuity payer cannot cancel annuity agreement is void. A similar method was used by the legislator in regulating the form of the transaction on the enforcement of obligations. Thus, p. 1 of Art. 547 of the Civil Code of Ukraine states that the transaction on the enforcement of obligations is made in writing. As a general principle, set in p. 1 of Art. 218 of the Civil Code of Ukraine, the failure of the parties to comply with the written form of the transaction established by law, does not have the consequence of invalidityunless authorized by law. Therefore, there shall be a separate indication in p. 2 of Art. 547 of the Civil Code of Ukraine to the fact that failure to comply with the written form of the transaction on the enforcement of obligations entails its invalidity, to add a mandatory nature to the rule of p. 1 of Art. 547 of the Civil Code of Ukraine.

Thirdly, other factors may indicate a mandatory nature of the rule, among which nature of legal relations, arising from regulatory action of the rule, occupies an important place. For example, it is unlikely to require a separate rule, which would establish the inability of the contracting parties to change the content of property rights by their agreement. According to p. 1 of Art. 515 of the Civil Code of Ukraine change of one creditor for another is not allowed in the liabilities *inseparably associated* with the identity of the creditor, in particular in the liabilities for reimbursement of damages caused by injury, other harm or death. The nature of these legal relations does not imply the possibility of assignment of these rights, which is confirmed in special studies[1].

Actually, even the rule formulated as a ban cannot always be regarded as mandatory. As an example, the provisions of p. 2 of Art. 17 of the Law of Ukraine «On Pledge» dated 02.10.1992 №2654-XIImay be pointed out, according to which the pledger may transfer the mortgaged property only with the consent of the pledgee. Although the question of the consequences of a breach of this regulation remains controversial both in the literature and the judicial practice, however, there is a reason to believe that a ban on disposal of pledged property at the sole discretion of the pledger formulated in the law shall not entail the voidability of the relevant contract. Pledge of property must not interfere the owner to dispose of its property[2]. According to G. F. Shershenevych, there are no grounds to restrict the pledger's

[1] *Пушай В. І.* Уступка права вимоги і переведення боргу в цивільних правовідносинах (за матеріалами судової практики): Монографія. Х.: Екограф, 2010. С. 100–101.

[2] *Барон Ю.* Система римского гражданского права. Вып. 2. Кн. II: Владение. Кн. III: Вещные права / Пер. с нем. Л. Петражицкого. 2-е изд. М., 1898. С. 136.

possibility to sell, donate the pledged things since a lien as proprietary right, follows the thing everywhere[1]. Thus, the prohibition of the pledger to dispose of the object of pledge does not constitute the essence of the lien, which is reduced to the ability to satisfy its claims from the value of things, what is not affected by the identity of the owner. Taking into account the foregoing, the violation by the pledger of the indicated ban and the conclusion of the contract of sale of the pledged thing shall not be deemed to be the basis for invalidation of such contract.

Confirmation of the above-mentioned approach includes a few examples of judicial practice. For example, in one case on the recognition of the contract null and void, the Supreme Commercial Court of Ukraine has concluded that the non-compliance of the transaction with the legislative acts as the basis of its invalidity should be based on the violation by the transaction (or part of it) of the mandatory provisions of the legislation or the transaction realization in contrary to the content or substance of legal relations of the parties[2].

In another case, the carrier applied to the local council with a claim for compensation for the recovery of damages caused by a travel privilege of certain categories of persons. It was found during the case consideration that under the terms of contracts between the council and the carrier, the latter allocates at least 30% of the seats of the transport vehicle for unsubsidized transportation of the privileged categories of citizens subject to their availability. Despite the presence of these terms in the contracts, the Commercial Court of First Instance satisfied the claim on the basis of the norms of law of Ukraine «On Automobile transport» as of 05.04.2001 № 2344-III and regulations of the Cabinet of Ministers of Ukraine as of 18.02.1997 № 176 «On Approval of Rules of passenger transport services provision»which include full compensation for the relevant losses of the carrier at the expense of the local budget. However, the Supreme Commercial Court of Ukraine disagreed with the findings of the local commercial court and pointed out that according to Art. 6 of the Civil Code of Ukraine the parties to the contract may derogate from the provisions of civil legislation and settle their relations at their own discretion. The parties to the contract may not derogate from the provisions of the civil legislation, if these acts clearly indicated on this, and if the obligatory character of the provisions of civil legislation for the parties results from their content or substance of the relationship between the parties. The Law of Ukraine «On Automobile Transport» and the Resolution of the Cabinet of Ministers of Ukraine «On Approval of Rules of passenger transport services provision» does not indicate that the parties have no right to retreat from their provisions on the compensation of losses. In such circumstances, the parties must be guided by the terms of their contracts, in par-

[1] *Шершеневич Г. Ф.* Указ. соч. С. 357.

[2] Постанова Вищого господарського суду України від 18.04.2012 року по справі № 8/135/2011/5003 // http://vgsu. arbitr. gov. ua/docs/28_3660949. html

ticular, the terms under which the plaintiff undertook to provide services for the unsubsidized transportation of the privileged categories of citizens[1].

In another case, on the basis of p. 3 of Art. 6 of the Civil Code of Ukraine, the Supreme Commercial Court of Ukraine has agreed with the conclusions of the commercial court of appeal that the grounds for the recovery of rent in two-fold amount from the defendant are not available. Despite the «categorical» nature of regulations of p. 2 of Art. 785 of the Civil Code of Ukraine on the right of the lessor to demand payment of a penalty equal to two-fold fee for the use of the thing, the court of cassation has given priority to the contract terms in which the parties derogated from the provisions of p. 2 of Art. 785 of the Civil Code of Ukraine and settled relationship at their discretion[2].

The indicated allows to suggest that p. 3 of Art. 6 of the Civil Code of Ukraine, among other things, can removethe shortcomings of legislative methods of the formation of laws. In particular, using this rule the private law of Ukraine moves away from the so-called «traditional» understanding of a mandatory rule, expressed in categorical statements. And as can be seen from the above examples, the courts are actively using p. 3 of Art. 6 of the Civil Code of Ukraine. Therefore, the Civil Code of Ukraine may be blamed only forthe fact that the rules with direct reference to the mandatory nature constitute a small part of the total number of mandatory rules in civil legislation at the moment. However, it seems, that there is not a reason to change the approach laid down in Articles 6, 627 of the Civil Code of Ukraine. Rather, it is a question of possible difficulties in answering the question about the mandatory nature of a rule by an average person. In other words, this situation is reminiscent of the well-known comparison of the BGB, as it is written for lawyers, and the CivilCode of Napoleon, as it is created for the ordinary people. At the same time, it does not affect the progressive nature of the BG-Bprovisions.

The freedom of contract in accordance with Art. 627 of the Civil Code of Ukraine is also limited to **customs of business turnover**. This provision should be recognized quite controversial, because, according to p. 2 of Art. 7 of the Civil Code of Ukraine the practice contrary to the contract or acts of civil legislation does not apply to civil relations. Therefore, the contract is given a priority in comparison with the practices in matters of regulatory action.

One more restriction of the freedom of contract principle in Art. 627 of the Civil Code of Ukraine includes the **requirements of rationality and justice**. In this case, it comes to providing priority to the principle of equity, good faith and reasonability set in par. 6 of p. 1 of Art. 3 of the Civil Code of Ukraine over the principle of freedom of contract. This

[1] Постанова Вищого господарського суду України від 13.11.2007 року по справі № 24/329/06 // http://vgsu. arbitr. gov. ua/docs/28_1758890. html

[2] Постанова Вищого господарського суду України від 22.02.2012 року по справі № 18/196 // http://vgsu. arbitr. gov. ua/docs/28_3603964. html

leads to two conclusions. Firstly, in the framework of the basic principles of civil legislation, fixed in the provisions of Art. 3 of the Civil Code of Ukraine there is an internal hierarchy. Secondly, according to Art. 627 Civil Code of Ukraine, the lack of an indication on the good faith as an item limiting the action of freedom of contract should not be taken literally: good faith with regard to the freedom of contract has the same effect and the meaning, as equity and reasonability. In particular, this is confirmed by the position of the Constitutional Court of Ukraine.

Thus, in decision №7-rp/2013 dated 11.07.2013, the Constitutional Court of Ukraine noted the following. Provisions of p. 1, p. 2 of Art. 18 of the Law «On Consumer Rights Protection» dated12.05.1991 №1023-XII set that the seller (performer, producer) shall not include terms that are unfair in the contracts with the consumer. Terms of the contract are unfair if, contrary to the principle of good faith, it results in significant imbalance of contractual rights and obligations to the detriment of the consumer. P. 3, p. 4 of Art. 18 of the Law «On Consumer Rights Protection» state some unfair contract terms, the list of which is not exhaustive. The same par. 4 of p. 1 of Art. 21 of the Law «On Consumer Rights Protection» establishes that for the purposes of this Law and related legislation on consumer rights protection, the rights of the consumer are considered violated in any case, if the principle of equality of parties to the contract, to which the consumer is also a party, is violated. The Constitutional Court of Ukraine proceeds from the fact that the requirement of accrual and payment of penalties under the contract of consumer credit, which is clearly excessive, does not meet the principle of equity, good faith and reasonability specified in par. 6 of Art. 3, p. 3 of Art. 509 and p. 1, p. 2 of Art. 627 of the Code as a component of the general constitutional principle of the rule of law. The possibility of the creditor to charge excessive amounts of money from the consumer as a penalty distorts the actual legal assignment as a reasonable means of stimulating the debtor to perform the basic monetary obligation, the penalty is converted into an unfair excessive load for the consumer and the source of unnecessary additional revenue of the creditor. The Constitutional Court of Ukraine believes that, given the provisions of p. 4 of Art. 42 of the Constitution of Ukraine, consumer's participation in the contract as the weaker party, subject to special legal protection in the relevant legal relations, narrows the principle of equality of participants of civil relations, and freedom of contract, in particular in the contracts on consumer credit provision in the payment of consumer interest for delay in repayment of the credit. The limits of the principle of freedom of contract are defined by the legislation taking into account criteria of equity, good faith, proportionality and reasonability. Besides, the state should support on the principles of proportionality a balance between the public interest of effective redistribution of money savings, the commercial interests of the banks to obtain a fair income from crediting and the rights and lawful interests of consumers of their credit services. Thus,

the Constitutional Court came to the conclusion that the terms of the contract of consumer credit, its conclusion and execution shall comply with the principles, according to which the identity of the consumer is considered to be a weaker party to the contract and is subject to special legal protection based on the principle of equity, good faith and reasonability[1].

In addition to these regulations, the civil legislation of Ukraine provides a whole range of cases in which the effect of the freedom of contract is somehow limited. They may be associated with the type of contract construction (contract of adhesion, a public contract etc.), the nature of the primary relationships (preemptive right to purchase a share in the property right, share in the authorized capital of the company etc.), form of the contracts, participants of the contractual relationships and with other elements of legal relations. However, in general, all these restrictions are completely absorbed by the constraints indicated in Articles 6, 627 of the Civil Code of Ukraine in the form of mandatory norms and the principle of equity, good faith and reasonability.

Nevertheless, even in the analysis of the «classical constraints» of the freedom of contract it should be noted that the Civil Code of Ukraine sometimes is opted for giving more autonomy to the contracting parties. For example, within the meaning of p. 1 of Art. 635 of the Civil Code of Ukraine the preliminary contract establishes the obligation of the parties to conclude the main contract in a certain period of time. This norm is not just «formulated categorically», but assumes the specified obligation as the main purpose of signing the preliminary contract. At the same time, the Civil Code of Ukraine does not expressly preceptthe possibility of the forced conclusion of the main contract pursuant to the preliminary contract. In one of the cases examined, the Supreme Court of Ukraine pointed out that one of the fundamental principles of a private regulation is the principles of freedom of contract laid down in par. 3 of p. 1 of Art. 3 and Art. 627 of the Civil Code of Ukraine, according to which the conclusion of the contract is voluntary, and no one can be forced to enter into contractual relationships. According to this principle, neither Art. 611, nor Art. 635 of the Civil Code of Ukraine provide such legal consequences of a breach of the undertaking set in a preliminary contract on the conclusion of the main contract, as a compulsion to its conclusion in court order. Therefore, the conclusion of previous instances courts that the disputed contract of purchase and sale violated the plaintiff's right to conclude the main contract in the absence of the will of the counterparty, and the restoration of the right of the plaintiff through the recognition of the disputed contract null and void, is erroneous[2]. Later this legal position was confirmed in a letter of the Su-

[1] Рішення Конституційного Суду України від 11.07.2013 року № 7-рп/2013 // http://zakon2.rada. gov. ua/laws/show/v007p710-13

[2] Постанова Верховного Суду України від12.05.2010року посправі№ 6-8078св10 // http://www. reyestr. court. gov. ua/Review/9449988

preme Court of Ukraine dated April 1,2014[1].

The reviewed restrictions of the principle of freedom of contract in private law, whatever it was, are represented as exceptions, not questioning the validity of the main rules of contractual autonomy of the participants of civil relations:«Unlike the branches of public law, in the civil law containing private law «genetic code» in the concentrated formthe priority in the selection of behaviour model typically belongs to the subjects themselves. And only in exceptional cases imperative appears in civil law because of the need to ensure real public interest, public order»[2].

Instead of an epilogue or returning to the issue of limiting the action of the freedom of contract principle in the law of Ukraine

In conclusion of the performed study, the application of the principle of freedom of contract in the legal relationship complicated by the participation of the authorities shall be explained separately. The factor of the participation of authorities in private law legal relationships is of particular importance taking into account the simultaneous entering into force and action of the Civil Code of Ukraine and the Commercial Code of Ukraine.

The comparative study of the principle of freedom of contract was carried out by E. A. Belianievichthrough the prism of the rules of the Civil Code of Ukraine and the Commercial Code of Ukraine. In particular, it was concluded that a freedom of contract proclaimed in the Civil Code of Ukraine stands to a large extent as a tribute to the civil law tradition, founded by the Western European legislator in the early XIX century, as the text of the Civil Code contains a number of mandatory restrictions of freedom of contract. Moreover, one of the general requirements which shall be followed for the validity of the transaction is a rule of p. 1, Art. 203 of the Civil Code of Ukraine that the content of the transaction cannot contradict this Code, other legislative acts, the moral principles of the society. Therefore, in an ideal situation the parties while concluding contracts create «the right for themselves» within the limits permissible by the legislation and on certain principles defined by the legislation. If the contract as a volitional actionis aimed at achieving a certain legal result, this result shall conformnot only to the interests of the contractors but also to the public interests (at least, not contradict them), regardless of whether the subjects are aware of the need of that or not. The principle of freedom of contract can be applied in the pure form only to private law (within the meaning of the Civil Code of Ukraine) contractual relationships. The public and social orientation of contracts burdened by public law component (contracts for the supply of goods for state needs, contracts of the

[1] Лист Верховного Суду Українивід 01.04.2014 року «Аналіз практики застосування судами ст. 16 Цивільного кодексу України» // http://www. scourt. gov. ua/clients/vsu/vsu. nsf/%28documents%29/6AF1EBA6DF621DEDC2257CE60053FFC3

[2] *Кузнецова Н. С.* Проблемы гармонизации и унификации современного частного права // *Она же.* Вибрані праці. С. 329.

purchase and sale of objects of privatization, rent of state property) and the participation of state in them do not allow to use standards and principles of the Civil Code of Ukraine in pure form. In the contractual relationships with the state, the principle of freedom of contract operates unevenly and, among other things, is excluded for public authorities that perform corresponding functions in the contractual relationships (the seller of the state property, the landlord, the state customer) within their competence as defined by legislation[1].

Position of the researcher is described here in detail not incidentally. Far from objecting the arguments about the restrictions of the principle of freedom of contract, existing in the framework of legal relations to meet the needs of the public, one can hardly overestimate the importance of such restrictions. In such a case it would be unreasonably high temptation to go from exceptions of private order to a denial of the general rule, and in all cases without exception. In addition, the economic categories (in particular, the needs), of course, affect the content of the objective law and its orientation, but it happens not in isolation but through the existing rule of law, in which the role of the idea of freedom of contract and restrictions of the action of this principle are defined at the level of the Constitution and the Code already as the rules and their exceptions. In connection with this, it is believed that, albeit with certain restrictions, the principle of freedom of contract can be applied to relations with authorities. Moreover, failure to comply with this principle (subject to restrictions), as well as its improper applicationcan greatly infringe onrights and legitimate interests of individuals, and not for the sake of public interests but for the sake of self-will of the authorities which often have nothing to do with the legal provisions.

The validity of these arguments shall be illustrated with examples of the development of the situation regarding the disposal of state and municipal property lands by the state authorities and local government bodies. The Supreme Court of Ukraine consistently recognizes such legal relations as private law relations[2] to which the rules of the Civil Code of Ukraine and the Commercial Code of Ukraine shall be applied. At the same time they are «burdened» with the participation of authorities, so the example is quite appropriate.

It is necessary to start with the fact that according to Articles 13, 14 of the Constitution of Ukraine land is the main national wealth that is under special state protection. Land is an object of the ownership right of the Ukrainian people. On behalf of the Ukrainian people, the own-

[1] *Беляневич О. А.* Принцип свободи договору за Цивільним та Господарським кодексами України // Вісник Київського національного університету імені Тараса Шевченка. Юридичні науки. 2004. № 60–62. С. 66–68.

[2] См.: Постанова Верховного Суду України від 23.09.2008 року по справі № 21-1523во07// http://www. reyestr. court. gov. ua/Review/2338194; Постанова Верховного Суду України від11.11.2014 року по справі № 21-493а14 // http://www. reyestr. court. gov. ua/Review/42010800.

ership rights are exercised by state authorities and local self-government bodies within the limits defined by this Constitution. Every citizen has the right to use the natural objects of the ownership right of the people in accordance with law.

Because of the special value of the land as a national wealth and the main resource of the society it seems quite natural, among other things, to establish a special procedure for acquiring the land leaseholdby the individuals. Consideringthe fact that in USSR times the land was in the socialist (state) property, after the transition to market methods of management, individuals can receive the land titleonly by derivative method in case of the disposal of lands by state authorities and local self-government bodies taking into account the allocation of their competence. The procedure for obtaining land plot for use initially assumed to be a long way from choosing the location of the object, obtaining permission to develop land surveying documentation for the transfer of land into rent, development of such documentation, obtaining a significant number of approvals of various agencies and organizations, making the decisions on the transfer of land into rent by the authorities, signing the corresponding contract and its state registration.

In practice, there are many cases where the person concerned agreed on the location of the object, obtained permits for the development of the project for the land allocation into rent, ensured the development of the documentation, received all necessary approvals, ensured the passage of state examination of the land surveying documentation and, after such a long way, as a result received either the refusal of the authorized bodyto transfer land into rent or the appropriate body generally shied away from considering this issue and render any decision. Naturally, after considerable time and money costs, individuals and legal entities considered their rights and legal interests violated (considered themselves cheated on the merits). Therefore, the indicated persons, following the order of conclusion of the contract, established in the Commercial Code of Ukraine, sent to the authority a proposal to conclude a contract with the draft contract and in case of failure to get an answer within a certain period, addressed to the courts with lawsuits, in which they asked the court to recognize the land rental contract concluded on the terms that meet the model contract and proposed draft contract.

Initially, such claims were satisfied but the Supreme Court of Ukraine had changed this practice. In particular, the court proceeded from the fact that, within the meaning of Articles 116, 123, 124 of the Land Code of Ukraine, citizens and legal entities acquire the right to use land plots on the basis of decisions of the competent authorities. Since, according to the Constitution of Ukraine state authorities and local self-government bodies dispose the land on behalf of the Ukrainian people, the recognition of the conclusion of land rental contract by the court in the absence of such decision is a violation of the exclusive competence

of the authority to dispose of the land[1]. Moreover, whatis typical in such disputes authorities referred to, inter alia, the rules of Art. 627 of the Civil Code of Ukraine on the freedom of contract in support of their position and making objections to the claim[2].

Is it possible to recognize the approach adopted by the Supreme Court of Ukraine reasonable in terms of «pure» idea of freedom of contract? Surely! After all, under a general rule one cannot make a participant of civil relations to conclude the contract against its will. Another thing is that in this case the state represented by its authorities did not act in good faith, initially expressing the will of the further pre-accession to the contractual relations, and at the last moment evading from the decisive step.

Generally speaking, one can talk here about the restriction of manifestation of freedom of contract, although this issue requires an additional separate study.

On the other hand, the stated claims for the recognition of contract as concluded appeared initially not due to the fact that there has been a restriction of freedom of contract, but due to the fact that the restoration of the property interests of private individuals otherwise is hard to imagine in the present time, especially due to the absence of theclearly defined institute of pre-contractual liability.

However, peripeteia of the «land tenants» did not end there. Supposedly, the desired rental contract has been concluded, but over time it has expired. In accordance with Art. 764 of the Civil Code of Ukraine, if the tenant continues to use the property after the expiration of the rental contract, then, in the absence of objections of the lender within one month such contract *shall be interpreted as renewed for a period* that was previously set by the contract. These provisions completely fit in the frame of the freedom of contract, since, according to p. 3 of Art. 205 of the Civil Code of Ukraine in cases stipulated by the contract or by law, the will of the parties to the transaction can be expressed by its silence. In other words, the silence during the month after the termination of the contract expresses the lender's consent to extending the contract. There is notrace of compulsion to conclude a contract here at all.

At the same time, relations with regard to the land lease are regulated by the Law of Ukraine «On Land Lease» dated 06.10.1998 № 161-XIV, which take precedence over the provisions of the Civil Code of Ukraine in this respect. According to p. 3 of Art. 33 of the specifiedLaw (as amended up to 2011) if the tenant continues to use the land after the expiration of the lease, in the absence of written objection to the lender within one month after the expiry of the contract, it shall be subject to renewal for the same period and on the same terms

[1] Например, см.: Постанова Верховного Суду України від 17 січня 2011 року (витяг) // Рішення Верховного Суду України / За заг. ред. П. П. Пилипчука. 2011. № 2 (23). С. 78–83.

[2] Например, см.: Постанова Вищого господарського суду України від 26.03.2009 року посправі № 2/341 // http://vgsu. arbitr. gov. ua/docs/28_2293936. html.

that were stipulated by the contract. Written objections shall be made in notification letter.

As can be seen, the rule of p. 3 of Art. 33 of the Law is perfectly conformable with Art. 764 of the Civil Code of Ukraine, has the same focus and the same objective, except for the seemingly insignificant differences: instead of the words «shall be deemed renewed», the words «shall be subject to renewal» are used. Because of this nuance, on the one hand, p. 3 of Art. 33 of the Law of Ukraine «On Land Lease» does not allow to talk about the extension of the rental contract based on the tacit consent of the lender. At the same time, on the other hand, the contract is subject to renewal, thus, the duty to extend the contract is clearly fixed.

In other words, a restriction of freedom of contract is established: on the merits this entails the extension (changing) of the term of the contract, a change of the contract is made in the same form as the contract itself, then, logically, p. 3 of Art. 33 of the Law of Ukraine «On Land Lease» establishes the *obligation* of the parties to conclude an additional agreement to extend the term of the contract. In this way conscientious tenants thought, applying to the authorities with the draft additional agreement to extend the contract and, once again, receiving no answer, went to court to recognize an additional agreement terminated, to oblige to conclude an additional agreement or with other claims arising out of the fact of extending the contract, as they thought. Indeed, let's say again, there is the restriction of freedom of contract in the interests of fairprivate persons, manifested in the obligation to extend the contract.

Nevertheless, the courts once again refused to protect the interests of the tenants. Reason for the refusal was that the meaning of p. 3 of Art. 33 of the Law of Ukraine «On Land Lease» requires the authority's order to extend the contract, which is again effected by rendering a decision by virtue of the requirements of articles 116, 123, 124 of the Land Code of Ukraine. In turn, it is impossible to force the authority to render such a decision, since it is free to choose the person which will be provided the right to use the land plot[1]. In other words, protecting the interests of the state and local authorities which even in the most persistent search in this particular situation are far enough from the public interests, the courts have appealed to the same freedom of contract.

Trying to solve the arising problem, in February 2011 the law-makersets out the Art. 33 of the Law of Ukraine «On Land Lease» in the new edition. According to the new edition of Article, if the tenant continues to use the land after the expiration of the rental contract and in case of the absence of the notification letter of the lender on the objection of extending the rental contract within one month after the expiry of the contract, such contract *shall be interpreted as re-*

[1] См.: Постанова Верховного Суду України від 06.11.2012 року по справі №21-228а12// http://reyestr. court. gov. ua/Review/27760572; Постанова Верховного Суду України від 01.10.2013 року по справі № 21-345а13 // http://reyestr. court. gov. ua/Review/35669789.

newed for the same period and on the same terms that were stipulated in the contract. Thus, the revision of Art. 33 of the Law has been brought into line with Art. 764 of the Civil Code of Ukraine and from then, the above-mentioned provisions of the will to extend the contract, expressed in silence, are applied to extension of the land rental contracts.

However, it is not possible to fully withdraw from the necessity to obtain additional agreement in this case, due to the need for following registration procedures. Therefore, Art. 33 of the Law clearly indicates the necessity of signing an additional agreement of extension of the rental contract, moreoverit directly establishes the duty of its signing, terms of execution of this duty and the opportunity to appeal delay in its signing to the court. Thus, the systemic interpretation of the new edition of Art. 33 of the Law of Ukraine «On Land Lease» leads to the conclusion that an additional agreement of extension of the rental contract is in fact an agreement of fixing the fact of extending the contract, which already exists. Again, as in the case with Art. 764 of the Civil Code of Ukraine, all provisions remainunder the principle of freedom of contract and without any force to enter into contractual relationships.

However, as it was expected, even now authorities often refuse to sign the requiredadditional agreement. But in this case the Supreme Court of Ukraine did not accept such a position and fully stood up to protect the interests of tenants. Among other things, a letter dated 01.04.2014 of the Supreme Court of Ukraine noted the following: it is possible to agree with the practice of the courts which in accordance with Art. 33 of the Law of Ukraine «On Land Lease» consider the additional agreement to the rental contract of renewal of this contract concluded, in case of the lender's failure to sign it, if the tenant no later than one month before the expiry of the contract sent to the lender the notification letter of intention to make use of the preferential right to conclude rental contract and after the expiry of the contract continues to use land and within one month after the expiration of the contract the lender did not express objections to the additional agreement and proposals for making amendments in the contract[1].

Thus, the need to considerand meet the public interests is an important task of law, of course. However, the principle of freedom of contract is not restricted in all legal relations, burdened with public element. On the contrary, sometimes it is the freedom of contract protects the interests of individuals against suppression from the authorities. Therefore, in the framework of private law relations in which there is no pure legal relations of power and subordination, the principle of freedom of contract will never be just a tribute to the civil law tradition.

On the contrary, the above said seems to demonstrate clearly the importance of a proper understanding of the idea of freedom of contract in private law. The

[1] Лист Верховного Суду України від 01.04.2014 року»Аналіз практики застосування судами ст. 16 Цивільного кодексу України» // http://www. scourt. gov. ua/clients/vsu/vsu. nsf/%28documents%29/6AF1EBA6DF621DEDC2257CE60053FFC3

term «restriction of freedom of contract» is to some extent arbitrary and should be understood as establishing a limit of action (implementation) of this principle in certain contractual structures and not as a restriction, incompleteness, or loss of strength of the principle of the idea of freedom of contract. This principle has been and remains one of the key and fundamental elements of private rights under specific present conditions of life of civil society and is not subject to any restrictions by itself.

Thus, the principle of freedom of contract can be regarded as a kind of litmus paper of having freedom of choice in today's society, because this principle is one of the manifestations of the freedom of choice of the individual in modernsociety., One can be confident enough to judge onthe existence of a free civil society in a particular state due to the fact how well the state allows its citizens – participants of civil turnover – to use this principle in private law

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ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

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ENVIRONMENTAL AND LEGAL SCIENCE: CURRENT STATE AND PROSPECTS OF DEVELOPMENT

Problem setting. The modern world is now in the active stage of globalization and integration processes which are taking place in the political, economic, social, spiritual and other spheres of public life. In this context legal integration is of great need for the national science. Many scientists and lawyers consider this integration to be the process of formation of a new worldwide system of the rules ensuring global interstate cooperation in various spheres of life of the society and state. The nature of legal integration is determined first of all by participation of the state in the activities of the world community, as well as apprehension extent of the relevant aspects of other states' law.

The aim of legal integration is to unite national legal systems into a single global legal environment. This process is complex and consists of several stages, namely: a) close cooperation and coordination of the principles of the development of the international legal system; b) bringing closer national legal systems to the international one under conditions of the preliminary adaptation of national legislation to the legal standards of this system; c) national legal systems entry into the international one and their final adaptation within the framework of a single legal environment.

Thus, legal integration is a global process which at the internal state level is reflected in the internationalization of national law. General globalization sig-

nificantly influences on the transformation and modernization of the state and legal institutions, regulations and relations at the international, national and regional levels, stimulates and accelerates the internationalization of law[1].

Ukraine does not stand aside of these globalization processes, but rather makes powerful steps for entering the European integration space and direct participation in them at different levels.

European democratic cooperation provides the solution of a wide range of political, social, economic, cultural, educational and other «domestic» tasks, coordinating national requirements with international standards, carrying out research including the legal research in various areas of public life. Among them is environmental and legal research conducted on in accordance with national approaches to rulemaking and foreign experience of regulation of relations in the sphere of use and reproduction of natural resources, environmental protection, environmental safety.

Paper objective of this paper is to examine the various types of research which are of great need for the Ukrainian society and are in the purview of environmental legal science. They are as follows: to substantiate the advisability for further codification of environmental legislation, to further develop the doctrine of human rights to a safe and healthy environment, to study the theory of contractual relations in Ukraine's environmental legislation, to develop the concept of legal liability for violation of environmental legislation, etc.

The analysis of recent research and publications. The research of the issues of environmental legal science is constantly in the purview of the leading scientists of our state. There are the works of V. I. Andreitsev «Up-to-Date Issues of Environment Law Science»[2], A. P. Getman «Genesis of Environmental Law Science: a Historical Aspect»[3], A. P. Getman «Doctrine of Environmental Law Science: Genesis of Theoretical Research of the Environmental and Legal Issues in the 20th Century»[4]; O. O. Orendarets's «Development of Environmental Law Science»[5] etc. In addition, in recent years a series of re-

[1] Гетьман А. П. Юридична наука в умовах глобалізації / А. П. Гетьман // Особистість. Суспільство. Право: зб. наук. статей за матеріалами Міжнар. наук.-практ. конф. (м. Полтава, 15.03.2012 р.). – Харків: Точка, 2012. – С. 5.

[2] Андрейцев В. І. Актуальні проблеми науки екологічного права / В. І. Андрейцев // Екологічне право в системі міждисциплінарних зв'язків: методологічні засади: матеріали «круглого столу» (м. Харків, 04.12.2015 р.). – Харків: Право, 2015. – С. 13–15.

[3] Гетьман А. П. Генеза науки екологічного права: історичний аспект / А. П. Гетьман // Актуальні проблеми реформування земельних, екологічних, аграрних та господарських правовідносин в Україні: Міжнар. наук.-практ. конф. – Хмельницький: Видво Хмельницького ун-та упр. та права, 2010. – С. 196–199.

[4] Гетьман А. П. Доктрина науки екологічного права: ґенеза теоретичних досліджень еколого-правових проблем у XX ст. / А. П. Гетьман // Правова доктрина України: у 5 т. – Т. 4: Доктринальні проблеми екологічного, аграрного та господарського права. – Харків: Право. – С. 10–96.

[5] Орендарець О. О. Розвиток науки екологічного права: автореф. дис…. канд. юрид. наук / О. О. Орендарець. – Київ, 2015. – 16 с.

search, research and practice conferences, seminars, «round-tables» have been hold concerning the issues of natural resources management, environmental protection, environmental policy, methods of legal and environmental disciplines teaching, etc.[1]

Paper main body. In this sense, ecological and legal science as part of legal science occupies an important place in the social life and has different levels: fundamental, methodological, philosophical and legal, general theoretical, branch theoretical and applied. In the above mentioned context ecological and legal science is examined at the fundamental level. It should be interpreted as a system of knowledge and ideas on environmental law and its different institutions (ownership of natural resources and the right of environmental management, the legal principles of ecological safety, legal environmental protection, legal responsibility for environmental violations, etc.), the purpose of which is to develop the doctrine of environmental law, to study the relevant theoretical and methodological issues of environmental law and legislation, to design its conceptual apparatus and scientific categories and to analyze the role of the state in the implementation of the environment functions and policy.

The discussions on the subject of environmental law, its structure, content component and, accordingly, its science, having been hold since the emergence of the relevant regulations in the framework of the state as an independent legal phenomenon. Along with this the economic transformations taking place in the Ukrainian society, reformation of public relations, the constitutional reform, the reform of higher education, including legal education, introduction of new educational standards cause the need to make the up-to-date decisions concerning the development of environmental legal science, its impact on legislative activity and legal practice, modernization of legal education and the development of scientific legal schools.

The subject of environmental law science includes not only the rules and institutions of this branch of law, but also the research of environmental and legal relations regulated by other branches of law (environmental management, environmental tax, taxes and

[1] Сучасні екологічні проблеми та методика викладання еколого-правових дисциплін: республ. наук.-практ. конф., 25–26.11.2010 р. – Харків: НЮАУ ім. Ярослава Мудрого, 2010. – 256 с.; Правові аспекти реалізації екологічної та природоресурсної політики: матеріали міжнар. наук.-практ. конф., 07–08.10.2011 р. – Дніпропетровськ: Дніпропетр. нац. гірн. ун-т, 2011. – 190 с.; Актуальні питання кодифікації екологічного законодавства України: зб. тез наук. доп. учасників «круглого столу», 09.11.2012 р. – Харків: НЮАУ ім. Ярослава Мудрого, 2012. – 203 с.; Сучасні досягнення наук земельного, аграрного та екологічного права: зб. матеріалів «круглого столу», 24.05.2013 р. – Харків: НУ «Юрид. академія України ім. Ярослава Мудрого», 2013. – 157 с.; Актуальні проблеми екологічних, земельних та аграрних правовідносин: теоретико-методологічні й прикладні аспекти: матеріали «круглого столу», 05.12.2014 р. – Харків: НЮУ ім. Ярослава Мудрого, 2014. – 320 с.; Екологічне право України: система та межі правового регулювання: матеріали Всеукр. наук.-практ. «круглого столу», 25.09.2015 р. – Дніпропетровськ: Дніпропетр. нац. гірн. ун-т, 2015. – 247 с.

fees for special use of natural resources, environmental insurance and audit, international environmental cooperation, etc.), their specific character, the grounds of origin, development and termination.

The current state of the development of environmental law science is characterized to a great extent by an extensive system of laws and regulations that regulate social relations in the field of natural resources, their reproduction, environmental protection and environmental safety. Notwithstanding the fact that environmental legislation has been updated mainly by means of excessive differentiation of regulations at the level of laws or by-laws[1], the relevant environmental and legal issues are studied in the context of the reflected by the Law of Ukraine «On Environmental Protection» idea of the development of the legal mechanism of the sustainable development of the country, prevention of harmful effects on the environment, prevention of negative environmental and social consequences of environmental hazard. In the research conducted after the adoption of this Law the basic principles of environmental protection were formulated, combined with efficient environmental management and provision of standardized quality of environment, the conceptual foundations of environmental rights and duties of men and citizens were worked out, the fundamental provisions of contractual relationship in environmental law[2] were identified.

The legislative model of the Law has determined the scientific prospect of environmental and legal research in the new social and economic, political, financial, environmental, cultural and educational realities of the sovereign state, the development of new laws and regulations in the sphere of ownership of natural resources and environmental management, environmental protection and provision of environmental safety.

This is that has become a basis and necessitated the following research:

– the mechanism of implementation of the law in environmental protection, the essential components of which include not only perfect legislation, but also the level of environmental legal awareness and culture of the subjects of implementation, their responsibility for environmental protection (S. M. Kravchenko);

– theoretical issues of ensuring the effectiveness of environmental assessment as an organizational and legal way of implementation of environmental law and legislation as well as guaranteeing the citizens' rights for safe and healthy environment (V. I. Andreytsev);

– the doctrine of the rise and development of environmental and procedural law as a mechanism for implementation of the rules of substantive environmental law (A. P. Getman);

[1] Попов В. К. Наукові основи екологічного законодавства України / В. К. Попов // Вісн. Акад. правових наук України. – 1995. – №4. – С. 35–36.

[2] Андрейцев В. І. Актуальні проблеми екологічного права: новітні доктрини: ретроспективний аналіз та погляд у майбутнє / В. І. Андрейцев // Матеріали доповіді Міжнар. круглого столу. – Дніпропетровськ: Дніпропетр. нац. гірн. ун-т, 2010. – С. 27–28.

– harmonization of environmental legislation in Europe through the scope of integration associations (N. R. Malysheva) and legal foundations of environmental policy of the European Union (V. I. Lozo);

– the issues of formation and development of nuclear law of Ukraine (H. I. Baliuk);

– legal support of recreational activities (A. G. Bobkova);

– issues of social regulation in the field of environmental protection, theoretical and methodological provisions and principles of forming the legal and economic aspects of environmental sate policy (V. V. Kostytskii);

– the concept of interdisciplinary legal institute of ecological damage compensation according to environmental legislation of Ukraine (M. V. Krasnova);

– conceptual foundations of environmental control and prosecutorial supervision in Ukraine concerning the optimal correspondence of institutional and functional elements of legal regulation (O. V. Holovkin);

– theoretical and practical issues of the development of floristic law of Ukraine (A. K. Sokolova);

– the concept of correspondence between the form and content of environmental and legal rules, legal regulation of relations in the sphere of interaction between man and nature through systematization of the references of environmental law (P. O. Hvozdik).

Moreover, the significant scientific results have been obtained during research of the issues of land law and legislation. The following of them should be highlighted:

– the current issues of legal regulation of land relations in present day conditions (M. V. Shulha);

– the issues of the implementation of Ukrainian people's right to land ownership (V. V. Nosik);

– conflict in the legal regulation of land relations in Ukraine (A. M. Miroshnychenko);

– the legal issues of protection and use of agricultural land in Ukraine (P. F. Kulynych);

– the theoretical issues of the development of Ukraine's land legislation (V. D. Sydor);

– the issues of legislative support of the principle of legality in the regulation of land relations in Ukraine (T. O. Kovalenko).

The significant results of environmental and legal research that have been conducted over the years of independence of our country in leading scientific and educational legal centers of Ukraine (Kharkiv, Kyiv, Odesa, Lviv, Donetsk), include the following:

– legal environmental safety in various areas of economic activity: environmental safety of food and agricultural products; prevention of environmentally hazardous activities; legal aspects of environmental risk; radiation safety; environmental safety in the planning and building of cities; environmental safety in aviation; prevention of the negative impact of the objects of high environmental hazard;

– ownership, use and reproduction of wildlife objects;

– subsoil use: the legal principles of use and protection of natural resources;

legal foundations of the mining concession; legal support of mining, termination of subsoil use right;

– forest use, private ownership of forests, their protection and management of forest resources, responsibility for violation of forest laws, the legal regime of the plant world and its objects in settlements;

– legal regulation of natural resources of the exclusive (maritime) economic zone of Ukraine;

– the right to use resort, treatment, health-improving and recreational zones, the legal regime of the sea outfall;

– water resources use: responsibility for violation of water legislation; legal regulation of water resources use in agriculture, sources of drinking water, groundwater use and prevention of harmful effects of water, legal regime of small rivers;

– legal support of hazardous and household wastes handling;

– the legal foundations of implementation of some management functions in the field of ecology: environmental control; environmental monitoring; environmental audit; ecological forecasting; environmental licensing.

These studies in ecological and legal science have contributed to further scientific development and discussions concerning the issues of ecological safety and rational nature management, environmental protection, observance and guarantee of the environmental human rights.

Legislation and legal practice should be clearly subordinated to the mechanism of effective functioning of legislation in the field of environmental protection in achieving national priorities. The main requirements for such legislation include its accordance to the Constitution of Ukraine, approaching the relevant EU directives, implementation of multilateral environmental agreements in which Ukraine is a party, social acceptability, feasibility, economic efficiency. Legislation should facilitate the flexible use of economic tools for stimulating the introduction of innovative environmental technologies, the solution of problems at the national, regional and local levels.

The principal ways of influence of scientists engaged in researching the environmental and legal issues concerning legislative activity and legal practice are as follows: the development of draft laws in working groups, temporary creative groups by state order; development of draft laws concepts by authoring teams; *the* development of the proposals for draft laws prepared by other working groups or temporary creative research groups; the development of scientific proposals to improve existing legislation; preparation of expert opinions on draft laws, developed by the subjects of legislative initiative and introduced to the Verkhovna Rada of Ukraine; preparation of expert reports on the effectiveness of existing legislation.

Experts in the field of environmental law within the framework of implementation of the above mentioned ways of influence on the legislative activities have formulated and submitted the proposals for: developing national legislation on biological safety and its further improvement taking into account the relevant pro-

visions of the EU legislation; optimizing the planning and development of green belts; improving the quality and access to safe drinking water; minimizing waste production, its safe utilization and disposal; improving the quality of transportation flows and minimizing the continuous sources emission, etc.

Environmental and legal science faces objectified challenges of social and political, economic, financial, cultural, moral and educational, instructional nature and connected to them processes taking place in the country. The author considers that within the period of significant changes caused by the crucial reform package proclaimed and introduced by the President and the Government of Ukraine the question now arises of discovering new horizons in the theory of environmental law and legislation, developing the scientific concept which will make it possible to provide for their working out under current conditions as well as their future prospects, setting out the priorities of such development, producing the algorithm of adoption of the legislative acts and regulations implementation of which in the context of environmental safety and environmental protection is of great need for the economy, social and political spheres of the country.

Under these circumstances, it is advisable, above all, to get rid environmental and legal science of pseudoscientific research and those that cause harm to the theory of environmental law. Recently, the authors of some research in legal literature in pursuit of academic degrees and academic status or with the aim to improve their image among colleagues propose to the scientific community the works of low theoretical quality, confuse the subjects of research, present as relevance and novelty of their achievements those that other representatives of legal community have already analyzed many times, draw conclusions without the adequate empirical basis or not taking into account methodological and gnosiological factors. Sometimes in the educational and literary reference environment the textbooks, study guides and other didactic and test guides are published, the authors of which generally neglect the established scientific achievements. In this regard, the thesis «Administrative and Legal Regulation of Subsoil Use in Ukraine» presented for the degree of the candidate of legal sciences in speciality 12.00.07[1] *seems to be surprising. In the first place, the thesis corresponds to the speciality 12.00.07 – Administrative Law and Process; Finance Law; Information Law, approved by the decree of the Higher Attestation Commission of Ukraine on 8 October 2008, which is quite natural because it is defended by this speciality. In the second place, the work also concerns the speciality 12.00.06 – Land Law; Agricultural Law; Environmental Law; Natural Resources Law, approved by the decree of the mentioned above HAC of Ukraine. But these factors together produce a violation of item 11 of the resolution of the Cabinet of Ministers of Ukraine of 24 July 2013 «Procedure for Awarding the Academic*

[1] Пашун А. В. Адміністративно-правове регулювання надрокористування в Україні: автореф. дис. … канд. юрид. наук / А. В. Пашун. – Київ, 2015. – 16 с.

Degrees and the Academic Rank of Senior Scientific Researcher» according to which the candidate thesis is submitted for defense only in one speciality.

But the main drawback of this thesis is that it does not contain any new scientifically grounded results that solve specific scientific problems, which would have a significant importance for the environmental and legal science. There are no differences between the obtained results and previously known ones in the theory of environmental law. Most of the provisions are formulated in general terms and do not allow to distinguish their constitutive essence and understand the novelty for environmental law and legislation. And finally, it may be dangerous from the standpoint of the theory and methodology of ecological research that in the nearest future we will witness the defense of the new theses like Administrative and Legal Regulation of Water Use… Forest Use… the Use of Fauna and Flora… the Use of Community Landscape; and the list will go on and on.

The textbook «Administrative and Land Law of Ukraine» should be considered to be even more unconvincing «educational achievement». It makes an attempt to introduce into the educational process and scientific use the following terms: administrative and land law; administrative and land legal relation; members of the administrative and land legal relations; an object of administrative and land legal relations; administrative discretion in administrative and land legal relations and so on. The author of the textbook, in particular, emphasizes: «In fact, administrative law like «penetrate» into the other areas of law and «brings them into effect»: civil law, commercial law, environmental law, land law, financial law, criminal law, criminal procedural law, etc.»[1]*. After such «penetration» most of branches of Ukrainian law and legislation rather than administrative law can disappear in the scientific legal environment. The list of low-quality works proposed to the legal scientific community of late can be continued.*

Therefore, an important task which should be resolved step by step in the scientific environmental and legal community is to create intolerance for accidental scientific products in the legal environment destroying the established conceptual achievements of scientists in the sphere of environmental management and environmental protection, ownership of natural resources and systems, environmental protection, implementation of environmental and economic mechanism and environmental activities, the well-balanced and effective system of quality environment management, guaranteeing the environmental human rights, etc. Without this environmental and legal science can not develop efficiently and solve the urgent problems of Ukrainian society taking into account the globalization processes which take place in today's world and have direct influence on Ukraine. There are the climate changes, depletion of ozone layer, conservation of biological diversity, chemical and radioactive pol-

[1] Бевзенко В. М. Адміністративно-земельне право України: навч. посіб. / В. М. Бевзенко. – Київ: Алерта, 2015. – С. 5.

lution, including acid rain, desertification, reduction of natural resource potential and others among them[1].

Conclusions of the research. *In terms of world integration processes national environmental legal science should perform the following tasks:*

– *to examine the foundations of environmental legislation taking into consideration estimation and advanced programs of socio-economic development;*

– *to substantiate the system background, principles of formation, implementation and development of environmental law;*

– to define clearly the criteria for legal regulation of environmental relations;

– to develop the mechanism of environmental law implementation;

– to provide for environmental law and legislation functioning in the context of fulfillment of conditions for state reforming in the economic, social, judicial, administrative and other spheres;

– to improve environmental law and legislation in the context of the development of the mechanism of globalization processes «challenges» that can have a negative impact on the «society-environment» interaction;

– to develop recommendations for optimizing the process of preparation, adoption and implementation of the «Code of Laws on Environment».

Science should present the reform of environmental law, current scientific concept and doctrine of its development in a contemporary economic and social context, correspondence to other branches of law, priority trends of legislative activities in this field of public relations for the short term and distant future, the sequence of adoption of environmental laws taking into account globalization economic, social and political challenges.

O. S. Kolbasov's words should be engraved by the gold letters saying to the environmentalists that environmental law should play a tremendous historical role as a counterweight to the rest of the right which protect the property prosperity and power combined with it[2].

Thus, environmental and legal science should clearly realize their own significance for further development of environmental law and legislation to be the tools of producing and organizing knowledge in the «environment-society-man» system in a contemporary context of the development of Ukrainian national identity.

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[1] Гетьман А. П. Екологічна функція держави в новому глобалізаційному вимірі / А. П. Гетьман // Актуальні проблеми екологічних, земельних та аграрних правовідносин: теоретико-методологічні й прикладні аспекти: матеріали «круглого столу», 05.12.2014 р. – Харків: Нац. юрид. ун-т імені Ярослава Мудрого, 2014. – С. 14–22.

[2] Колбасов О. С. Завещание экологам / О. С. Колбасов // Журнал российского права. – 2000. – № 5/6. – С. 89–90.

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SOME PROBLEMS OF REALIZATION OF PROTOCOL 1 ARTICLE 1 OF EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EXERCISE OF JURISDICTIONAL PROTECTION OF OWNERSHIP RIGHTS TO LAND IN UKRAINE

With the signing of the Association Agreement between Ukraine and the EU a new epoch in the development of Ukrainian society and state is coming in order to improve an existing legal system with the help of methodological, theoretical, ideological, political and constitutional principles that should ensure the formation of modern social consciousness and sense of justice to each one, the Earth, nature, environment, ethics and the state based on the rights recognized in the global democratic community and enshrined in the Universal Declaration of Human Rights on December 10, 1948, among which are the right to life, freedom, equality, justice, inviolability of property rights, rule of law, protection of the right to effective legal protection, a fair trial, etc.

The establishment of these and other values within Ukrainian society are accomplished by internal and external modern challenges associated, firstly, with the objective need for economic, state, political and especial judicial reforms in accordance with the requirements of the Association Agreement between Ukraine and the EU and, secondly, with external military aggression from Russia, the annexation of the Crimea, the counterterrorist operation at Donetsk and Luhansk regions.

In such circumstances, the problems of realization and judicial protection of ownership rights to land and other natural resources as property of the Ukrainian people, the same as jurisdictional protection of subjective rights to land and other rights of citizens, legal entities,

the state, local communities on the land in accordance with the guarantees secured by the Constitution of Ukraine and the European Convention on Human Rights standards became particularly acute.

In Ukraine the implementation and jurisdictional protection of individuals and legal entities land ownership rights has its own characteristics due to the legal consequences of land ownership relations reformation, to the formation and developmentof subjective rights to land system, to the legislative ensuring of the obligatory land ownership forms and other factors.

In particular, since January 1, 2013 a new legal model of regulation of ownership relations on land was introduced in Ukraine according to the law of Ukraine «On Amendments to Some Legislative Acts on Delimitation of State and Communal Property» dated 6 September 2012, which entered into force on January 1, 2013.

In general, the legal nature of such legislative novels is the follows: a) to provide the abolishment of legally enshrined concept of «demarcation of state- and communally owned land» as a legal category; b) noneedsin conducting complex of work on formation of land and determine their boundaries in nature (on ground) between the state and local communities; c) the criteria for classification of certain lands to communally- or state-owned property are determined, namely: a) the boundaries of settlements; b) belongingof located on land properties to the state or communal property; d) to establish the bases for acquiring the right of communal and state land ownership; e) to define grounds and conditions for the transfer of land ownership from the state to communal and vice versa; f) to provide a mechanism for transfer of rights to land; g) to establish the system of state and local authorities and their competence in the implementation of state and communal ownership of land; h) to provide the state registration of land and real rights to land plots of state- and communally-owned property; i) since January 1, 2013 all lands are considered to be demarcated.

Based on these and other legal novels in the legal regulation of land relations, the object of which is state- and communally-owned lands, three main periods can be identified in the determining of the state-owned land legal regime, in the formation and legalization of the right to communal ownership of land, in the acquisition and realization of the subjective rights to state- and communally-owned land. They are: the first – from December, 18 1990 till December, 31 2001; the second – from January, 1 2002 to December, 31 2012; the third – started on January, 1 2013 and continues now. Therefore, the legal regime of state- and communally-owned land and the procedure of realization and legal protection of subjective rights to land should be determined in the judicial practice of land law implementation with regard to the abovementioned period of legislative consolidation of land bodies jurisdiction of state and local governments for disposal of land and regulation of land relations.

According to Article 1 of the Protocol № 1 to the European Convention on Human Rights any natural or legal person is entitled to the peaceful enjoyment of his possessions.

Scientific andtheoretical analysis of this provision of the Convention allows us to determine several principal rules that should be taken into account when civil, land and other laws must be appliedin case of jurisdictionalprotection of land rightsaccording to the Constitution of Ukraine.

As the abovementioned provision of the Convention refers to the property, the logical question arises. Is it possibleto apply this norm of the Convention to the regulation of land relations and protection of land rights, the object of which is the land parcel or rights to land? Considering the research on the legal nature of such concepts as «property», «land», «land parcel», «real estate», conducted in Ukrainian land and civil science, it should be only noted that the answer to this question has to be positive.

Thus, jurisdictional protection of land ownership rights in the Ukrainian courts has to be based on a correct interpretation and understanding of the Civil Code of Ukraine and the Land Codeof Ukraine, as well as on the correlation and interaction of the civil and land legislation in combination with special laws on state land cadastre keeping and state registration of rights to real property and their encumbrances in the legal regulation of land and property relations. After all, the existing problem of the protection of ownership rights to land in Ukraine is that despite the continuous reformation transformations in the form of land ownership, the legal regulation of property and land relations is carried out in two parallel ways, which are not yet matched with each other. As the result – thelegal regime of land is defined by the Land law and partially Civil law rules, while, the legal regime of property on land parcels is defined by Civil law.

Taking into account these peculiarities of legal regulations of ownership relations on land, the phrase «peaceful enjoyment of possessions» in the context of the exercise and protection of land ownership rights involves in court practice of land ownership rights protection the implementation of the mandatory provisions of Part 2 of Article 13 of the Constitution of Ukraine that states that, the property obliges and should not be used for the detriment of the person and society; as well as Part 4 of Article 41 of the Constitution of Ukraine that states that, the use of property cannot infringe on the rights and freedoms of citizens, interests of society, make worse the ecological situation and the natural qualities of land. Furthermore, the term «possession» should be interpreted in its wide meaning through the prism of the powers of the owner»triad»: to possess, to use and to dispose the land parcel with regard to the limitations established by the law, the decisions passed by state or local authorities bodies, the contract or the court.

Scientific and theoretical analysis of the Article 1 of Protocol № 1to the Convention, in particularthe phrase «any natural or legal person is entitled to the

peaceful enjoyment of possessions» gives the grounds to insist on the existing of the principle of equality in the realization and protection of the land ownership right. According to the Constitution Ukraine the principle of equality in realization of rights and freedoms serves as one of legal guarantees of acquisition, implementation and protection of subjective rights to land.

Guaranteeing of land ownership rights, which is enshrined in Article 14 of the Constitution of Ukraine obliges the State to ensure equal opportunities for the realization and protection of subjective rights of land ownership, because under Articles 13, 21, 24 of Constitution of Ukraine, citizens have equal constitutional rights and are equal before the law, so all subjects of land ownership rights are equal before the law.

The comparative analysis of the contentsof Articles 13, 14, 21, 24 of the Constitution of Ukraine shows that «the equality of constitutional rights and freedoms» and «the equality of subjects of property rights» are two categories different by objects, subjects and content, but correlate and interact with each other as «general» and «specific».

Legal content of the constitutional guarantee of equality of rights and freedoms disclosed in Part 2 Article 24 of the Constitution of Ukraine, according to which there can be no privileges or restrictions based on race, colour, political, religious and other beliefs, sex, ethnic or social origin, property, residence, language or other characteristics. This constitutional provision is binding to the legislator when developing and adopting the land laws; tothe state and local authorities while making decisions regarding the acquisition and realizationof land ownership rightsby the citizens; to the courts in execution of justice in cases of protecting land ownership right and other land rights.

Although the Constitution of Ukraine has enshrined the principle of equality of realization of the land ownership right, in the current land legislation and in practice of application of its norms, this principle is not always kept. For example, the Article 130 of the Land Code of Ukraine establishes the preferential right to purchase agricultural land for commercial agricultural production by citizens of Ukrainewhose permanent residenceis on the territory of the local council where the sale is taken place, which is not consistent with constitutional principle of equality of all citizens rights to have free access to acquiring of the land ownership right.

Furthermore, provisions of the Land Code of Ukraine, according to which legal entities of Ukraine founded by the local authorities, together with other legal entities, stateless persons, foreign persons can not acquire ownership of landparcels, while foreign legal entities and citizens, and finally, foreign states and international organizations in Ukraine can acquire land for non-agricultural purposes, do not consistent with the constitutional principle of equality of land rights.

It also should be mentioned that itis impossible to consider constitutional the decision of those bodies of state and local authorities who make decisions con-

cerning the prohibition of privatization of land parcels by citizens who do not live on territory of district, village, town or a particular region. The decisions of local authorities about the refusal of transferring of the land parcel to the private ownership ofone of the spouses or other family member on the grounds that one of the spouses or family member has already received a land parcel in private property free of charge or has acquired the ownership of such land on any other grounds, are also likely to be the violation of constitutional guarantees of equal rights of citizens.

Constitutional guarantee of equality of citizens as subjects of land ownership rights can be regarded as one of the essential features of rule of law principle, which together ensure the free access to the acquisition and realization of land ownership rights to all of its citizens. At the same time according to the Constitution of Ukraine, the principle of equality of all subjects of land ownership rights before the law is applied only to citizens who have owned land parcelsand to legal entities and state, who are the owners of the land. The legal essence of the equality of the subjects of ownership right before the law means, that this constitutional guarantee defines the limits, acceptable behaviour, legal limitations and restrictions of law, means and ways within which owners of land parcels can exercise and protect their rights to land, and also carry out legal responsibility for breaking the law.

Based on this understanding of the principle of equality of all subjects of land ownership rights before the law, a requirement concerns the equality before the law of all subjects, who own the land, is considered to be quite unsuccessful, because in fact, the equality before the law of Ukrainian people, the state, citizens and legal entities for objective reasons can not be guaranteed. Therefore, for the correct application of norms of the Constitution of Ukraine on equality of all subjects of land ownership rights, it would be useful to have an appropriate decision of the Constitutional Court of Ukraine.

The application of the principle of equality of all subjects of ownership right before the law in legislative practice assumes, on the one hand, enshrining in the law such reasons, conditions, methods of acquiring and implementation of the right of land ownership, that would be common to all subjects, on the other hand – taking into account the peculiarities of the legal status of individuals, legal entities and the state as the subjects of land ownership rights. Such approach to the legislative implementation of realization of subjective land ownership rights of Ukrainian people creates legal preconditions for the accessibility of subjects, mentioned in Article 14 of the Constitution of Ukraine, to the acquisition and implementation of the land ownership right, and allows to implement transparent organizational and legal mechanisms in the sphere of land ownership rights of Ukrainian people.

The scientific and practical analysis of only the first sentence of Article№ 1, Protocol№ 1 to the European Convention on Human Rights in the context of implementation and protection of sub-

jective rights on land shows that the current land and civil legislation requires substantial analysis and improvement of legal definitions of the terms and categories in accordance with European legislation, the development of a common law model of legislation maintenance of land and property relations and protection of land ownership and other rights in Ukraine. However, in-depth scientific and theoretical study of other provisions of Article № 1, Protocol № 1 to the European Convention on Human Rights on the peculiarities of the principles of the inviolability of land ownership rights implementation, validity of condemnation of land ownership rights for public interest, limits of state interference in the realization of land ownership rights in accordance with the general interest or to secure the payment of taxes or other contributions or penalties is require.

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LEGAL FRAMEWORK OF STATE SUPPORT OF AGRICULTURE AS A MEANS OF ENSURING FOOD SECURITY

It is stated, that after joining to the Trade Organization (hereinafter referred to as the WTO) Ukraine is assumed a number of obligations, among them this is bringing of the internal state support of agricultural producers in accordance with the requirements of the Agreement of agriculture, that involves the gradual restriction measures, which have a direct impact on the trade and production (measures of a «yellow box»). But for the purpose of obtaining an efficient production of agricultural products and ensuring food security, an important role is played by the analysis of the domestic legislation in the sphere of the state support of agricultural producers, the identification of the ways in order to improving it in accord with international standards.

One of the main priorities of the state of agrarian policy are the state support of subject of agrarian sector by focusing the state resources on a priority directions of development, the establishment of an acceptable target, financial credit, insurance, tax and fiscal policy, the ensuring of rational internally and externally branches of the economic relations.

The domestic legislation doesn't provide for certain state support of agricultural producers, it's important for its implementation. I. P. Safonov analyzing the existing agrarian legislation and the present state of agriculture, he defines the government support as a multidimensional purposeful activity: firstly, the establishment and functioning of agricultural producers; secondly, the adoption of relevant laws and regulations; third, the creation of a system and the definition of tasks, functions, competences of the bodies that should carry out the state support of agriculture.[1]

However, under current conditions, the state supports domestic agricultural

[1] Сафонов І. Правові проблеми державної підтримки сільськогосподарських виробників // Право України. – 2005. – № 6. – С. 56.

producers to identify conditions to help them function effectively, production of quality agricultural products and raw materials, stimulating the manufacture of agricultural products, motivating agricultural workers, reform of pricing, finance and credit relations, regulating agricultural land use, market relations between the agro-industrial complex and villages etc. [1]

The legal regulation of the state support to the domestic agricultural producers has for objective the implementation of two basic functions. Firstly, it is food security. It means to provision of population with foodstuff at the expense of the own resources. Secondly, it is creation of safeguards for those who work in agriculture taking into account its specificity, which associates with seasonality, depending on the weather conditions, the high of the necessary production infrastructure and the process support of the land (as a means of production) in comparison with the cost of the final product.

It should be stress that the main principles of the state support are: a) the recognition, observance and protection of rights of agricultural producers and rural population; b) professionalism in the implementation of the state support of agricultural producers; c) sustainable development of agricultural production; d) the relationship of state bodies, local self-government, public associations, citizens; e) legality etc.

The possible measures of the state support for the domestic agricultural producers are the subject of a separate study. Here it is appropriate to focus only on the certain types of such support in the aspect of the completeness and efficiency of its legal regulation. It is necessary to assume that forms of state support of the agricultural producers can and should be filled with the different content depending on the needs of the particular type of such support.[2] The state support provides by both the state and the local budgets.

An important form of the state support is the proper pricing for agricultural products. In relation to the method of formation in the economic theory prices are divided into competitive, monopolistic and regulated. The adjustable rates constitute a system of the state regulation of prices, consisting of economic and administrative means. The economic tools provide for the implementation of the system of support prices, they have wide application in national economy, it took some time for the price reacted to the implementation of systems indicative (regulated prices, formulated on the basis of the agreement of the parties, they cannot exceed or be below a certain level determined by the competent state authority) and imperative (fixed prices are the final price level and neither the seller nor the buyer isn't entitled to deviate from them) price regulation, their use is limited, in their application a change in the price level occurs immediately.

[1] Сафонов І. Правові проблеми державної підтримки сільськогосподарських виробників // Право України. – 2005. – №6. – С. 54–55.

[2] Козырь М. И. Аграрное право России: состояние, проблемы и тенденции развития (М. И. Козырь. – 2-е изд., перераб и доп. – М.: Норма, 2008. – С. 140.

The economic means of the state regulation of prices for the agricultural products include interventional operations, compensation, application of the mechanism of subsidies and concessional lending. Administrative tools, provided for in article 191 of the Civil code of Ukraine,[1] include the establishment of state and utility fixed prices, the boundary levels of prices, limits of trade allowances, limit norms of profitability or by introducing the mandatory declaration of price changes.

In the legislation of Ukraine the state regulation of pricing for agricultural products is economic and administrative ways, is provided in a mixed form, because there is no clear distinction between them and independent order of application.

According to article 3 of the Law of Ukraine «On state support of agriculture of Ukraine» the main provisions of the state price regulation are as follows: 1. The state regulation shall be subject only to wholesale prices, it is performed in the sphere of retail trade; 2. The mechanisms of the regulation is to establish minimum and maximum intervention prices, the application of other measures envisaged by legislation; 3. The condition of realization is compliance with the Antimonopoly legislation; 4. The boundaries of the implementation of state price regulation is an organized market of agricultural products, the market exchange trading; 5. Objects of state regulation are clearly defined in legislation types of agricultural products – hard wheat, soft wheat, grain mixture of wheat and rye (meslin), corn, barley, winter rye, spring rye, peas, buckwheat, millet, oats, soybeans, sunflower seeds, rape seeds, flax seeds, hop cones, sugar (beet), flour of wheat, rye flour, meat and offal of slaughter animals and poultry, milk powder, butter and sunflower oil.

The Law of Ukraine «On state support of agriculture of Ukraine» defines a complex mechanism of the state regulation of prices for the agricultural products through consistent implementation of such regulations: setting minimum and maximum intervention prices; to use of the commodity and financial interventions; to establishment of a temporary administrative regulation of prices; to use of the budgetary subsidies. The minimum and maximum purchase prices isn't an independent means of regulation, it is a tool application intervention operations, a temporary administrative regulation, the temporary budget subsidies. These elements constitute a single mechanism and must be used only in the sequence specified in the Law.

The substantial state support of the agricultural producers is a subsidy. The grant (from lat. – a gift, a donation) is non-repayable cash assistance that is provided from the state budget organizations, enterprises, local authorities, private entities to cover losses, compensation of losses, balancing local budget and others targets.[2]

[1] Господарський кодекс України: від 16 січня 2003 року // [Електронний ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/436–15.

[2] Райзбер Б. А., Лозовський Л. Ш., Стародубцева Е. Б. Современный экономический словарь. – 2-е изд., исправ. – М.: ИНФА – М. – 1999. – 495с.

In Ukraine are subsidized, generally inefficient productions, which are important for the national economy. The concept of «subsidies for agricultural production» there is in the legislation. Subsidies to agricultural producers in Ukraine are regulated by Laws «On state budget of Ukraine» and «On state support of agriculture of Ukraine». The law on State budget determines only the amount of funds that will be allocated to finance the industry, and the utilization of budgetary funds is established by the Cabinet of Ministers.

In article 15 of the Law of Ukraine «On state support of agriculture of Ukraine»[1] states the following: the Cabinet of Ministers of Ukraine, when planning the expenditures of the state budget for the next year, provides for expenditure on the provision of subsidies to livestock producers (hereinafter referred to as – budgetary subsidies). Budgetary subsidies are given in order to support the level of effective demand of the Ukrainian consumers of animal products and preventing loss of the Ukrainian manufacturers such products.

The objects of the budget grants according to this article there are cattle; pigs; sheep; horses; poultry; rabbits; whole milk extra, premium, the first and second grades (aren't subjected to any handling, processing or packaging for the requirements of further sale); shorn wool; the cocoons of the silkworm; honey natural. The objects of the special budget grants there are cattle large horned dairy, the large horned cattle of meat, the young cattle of different ages; the horses; the sheep; the pigs.

The objects of the special budget grants are also bee family defined as such in accordance with the Law of Ukraine «On beekeeping» of February 22, 2000 and the products of sericulture. A direct manufacturer of the object of such grant is either the subject (recipient) budget grants or special budget grants.

Special budgetary subsidy is available only upon animals that have passed registration and identification in accordance with the Law, subject to full implementation of the system of subsequent control over target use of budgetary funds provided for these needs. The Cabinet of Ministers of Ukraine annually adopts the resolution on regulations for the provision of budget grants and special budget grants, based on the standards of this article; upon submission of the central executive body on agrarian policy sets minimum acceptable level of prices for livestock products, which is used as the basis for calculation of subsidies, as well as for pricing, when purchasing animal products directly from the manufacturer.

That is, agricultural producers in Ukraine can receive budgetary livestock subsidies (hereinafter referred to as – subsidy budget). It is at the expense of the State budget of Ukraine only for domestic livestock producers and aims

[1] Про державну підтримку сільського господарства України: Закон України від 24 червня 2004 р. № 1877-IV [Електронний ресурс]. – Режим доступу: http://zakon4. rada. gov. ua/laws/show/1877–15.

are:[1] keeping the level of solvent demand of Ukrainian consumers of animal products; preventing an average loss of Ukrainian producers of livestock products.

The Law contains provisions regarding the objects and subjects of the budgetary cattle-breeding subsidy. The objects like grants are distributed for two types. The Law also defined the objects of budgetary livestock subsidies and special budgetary livestock subsidies. The subject (recipient of budgetary subsidies (including special) is a direct manufacturer of animal products, which is related to such grants. The entity, what providing the subsidy budget, there is the Agrarian Fund. Like the subsidy is provided to the last in order defined by the Cabinet of Ministry of Ukraine.

The same for the budget and specifically the budget subsidies is that, their size is set at fixed amounts per head of object subsidies (farm animal), which were in the ownership of the subject grants at the beginning of the next fiscal year. Additionally, the size of budgetary subsidies established by the Cabinet of Ministers of Ukraine in fixed amounts based on: a metric unit of live weight sold (realized) object subsidies or metric unit of weight the sale of milk and wool; one family breeding a bee, that was in the ownership of the subject of subsidies at the beginning of the next fiscal year; based on the increase in the number of heads purebred (thoroughbred) breeding animals and breeding of bee colonies, which were owned by the subject of budgetary subsidies at the end of the next fiscal year. The increase is relative to their number at the beginning of the respective fiscal year.

The budgetary livestock subsidies and special budgetary livestock subsidies differ (in animal products). The special budgetary subsidies in article 15, paragraph 15.9 of the Act stipulates, that it is only available on animals, that have passed registration and identification in accordance with the law. The legal regime of the special budgetary grant is also characterized by the presence of a system of subsequent control over target use of budgetary funds, are provided as subsidies.

The mode of use of budget grant and special budget grant for the relevant fiscal year is determined by the Cabinet of Ministers of Ukraine. The calculation of the amount of subsidy for the relevant year must be provided as an addition to the draft Law of Ukraine on State budget of Ukraine for the next year.

In Ukraine there is also plant granting along side with cattle-breeding granting. According to the legislation there are the following characteristics subsidies in agricultural production: the grant is non-repayable cash assistance; the grant is from the state budget; the amount of subsidy is set in fixed amounts; the grant is in the order determined by the Cabinet of Ministers of Ukraine; subject (recipient) budgetary subsidies (including special) is a direct

[1] Науково-практичний коментар до Закону України «Про державну підтримку сільського господарства України / За заг. ред. А. М. Статівки // Бюлетень законодавства і юридичної практики України. – 2005. – № 10. – С. 115–121.

manufacturer of animal products, which refers to objects such grants, namely, it is provided in accordance with the legislation of processing enterprises of all ownership forms, which have their own or rented processing facilities, agricultural producers, regardless of the form of ownership and management, including maintaining a personal country economy; the entity, that providing the subsidy budget, there is Agrarian Fund; the purpose of providing subsidies is to maintain the level of solvent demand of Ukrainian consumers of animal products and prevent the average unprofitability of Ukrainian producers of agricultural products.

Based on the characteristic, a subsidies in agricultural production is a non refundable cash assistance from the state budget, in the order determined by the Cabinet of Ministers of Ukraine, the processing enterprises of all forms of ownership and management, including maintaining the personal peasant economy, in the cases provided by law, to support the level of effective demand of Ukrainian consumers of animal products and prevent the average unprofitability of Ukrainian producers of agricultural products.

The problems of food security in different countries have both common features and significant differences, that related to the mentality of the inhabitants, national traditions, level of development of productive forces and production relations, the place occupied by the country in world politics. The reliable food supply of population at the expense of own production is of strategic importance and is the main function of the state, because it affects not only food, but also the national security of the country.[1]

It should be noted, that it is true P. F. Kulinich, that the regulation of the economy, the policy of resource provision of agriculture has certain disadvantages. First of all it is related to the problems subsidiaries industries.[2] So there are two alternatives: either to subsidize the production of resources for agriculture or to raise prices for agricultural products.

From the perspective of society, subsidizing of production resources for agriculture is more appropriate than the maintenance of prices for agricultural products. This subsidy makes it possible to reduce production costs of agricultural enterprises and not to raise the prices of agricultural commodities in terms of increasing its production. This would benefit all society, not only manufacturers and industry resources for agriculture. The subsidies for the production of resources for agriculture have several disadvantages, like any effect in the economy regarding the regulation of market mechanism.

First, the difference between low domestic prices of resources due to subsidies and high world prices for such resources is not efficient from the point of

[1] Верзун А. А. Основні напрями державної фінансової підтримки сільського господарства // Науковий вісник Національного аграрного університету. – №44. – С. 237.

[2] Кулинич П. Ф. Організаційно-правове засади розвитку аграрного і земельного ринків в Україні. – К.: Юрид. думка, 2006. – С. 215.

view of the whole economy. Consequently, there is inefficient allocation of resources between different sectors within the country, as producers use distorted price information, resulting in financial and material resources flow into less efficient industries, which loses all society.

Secondly, it is a problem of control over the use of subsidies and rising production costs. This refers to the trend of growth of production costs in the conditions of the grant. This applies to any sector of the economy. In terms of subsidy, the manufacturer disappear stimuli to rational use of resources and, consequently, to the reduction of production costs.

Thirdly, there is the problem of compensation of expenses on subsidies from the state budget.

And, fourthly, it is a problem of inefficient use of cheap resources in agriculture.

Thus, directions of state regulation of agro-industrial market in many countries of the world, despite the level of their development, are aimed at supporting farmers 'incomes. Developed states use various instruments of state support of the industry (government assistance program for agricultural producers, export subsidies, quotas, tariffs etc.). All of them are members of the WTO. Therefore, membership in this organization puts Ukraine in front of the problem of development and realization of such directions of an agrarian policy, which wouldn't only provide the necessary level of food security, but also conform to the requirements of the trade, carry out in the framework of the WTO.

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ECONOMIC CODE OF UKRAINE AS THE BASIS OF LEGAL SUPPORT THE STATE OF THE ECONOMY

Already eleven years entered into force as the Economic Code of Ukraine, adopted by the Verkhovna Rada of Ukraine on January 16, 2003. During this time, the effectiveness of the economic legislation system has increased significantly, due to the ongoing work to improve the quality of economic and legal norms. The basis of this work on the principle of deepening codification, the content of the Code of capacity additions due to new regulations that take into account the rapidly changing needs of the economy of the state and results of enforcement.

The adoption of the Economic Code of Ukraine (hereinafter – Ukraine EC) should be recognized as a conscious step on the part of the state, an adequate response to the resultant complex economic processes, streamlining them exclusively civil law or administrative and legal methods is not possible. Not by chance the idea of development and

adoption of the codified act in the field of economic legislation arose at the dawn of the Ukrainian state, where the laws of the free market, not knowing any restrictions, created the preconditions for the emergence of structural imbalances in the economy. Suffice it to recall the results of the privatization of state-owned and municipal property, which led to the infringement of the Ukrainian people interests.

Howshould consider, these and other circumstances led to the emergence of the development idea onEconomic (Trade) Code has been restated in the concept of judicial reform in Ukraine, approved by the Verkhovna Rada of Ukraine of 28.04.1992.

As is known, the drafting of EC Ukraine occupied by Institute of Economic and Legal ResearchesNAS of Ukraine, which experts rather scrupulously approached to write the content. As a result, the EC project, with minor revisions by the specialized committees of the Verkhovna Rada of Ukraine, was approved and, in general, as a basis.

It is important to note that simultaneously with the EC of Ukraine, January 16, 2003 adopted a new version of the Civil Code of Ukraine. However, the attention of foreign scientists attracted on EC, the text of which that year was translated in English. This work was conducted by Professor of Comparative Law, University of London W. Butler, who wrote in the summary and in the introduction to the translation: «Of all the codes adopted in the CIS since the beginning of the transition to a market economy, the Economic Code of Ukraine is the most unusual, at its most innovative part legislation»[1]. Additionally, as the NAS academician V. K. Mamutov, EC of Ukraine became available on the respective national languages in Poland and Belarus[2].

By the way, the experience of the codification of the Ukrainian economic legislation is still in demand. An example of the interest to EC is by academia and public authorities of the Republic of Kazakhstan. In particular, in order to study the experience of the development of EC in 2011 in the city of Donetsk and Kiev came to the visiting delegation of the Republic of Kazakhstan, represented by researchers from leading academic institutions and senior officials of the Ministry of Justice of the Republic. The nature of the visit should be considered as an official, as the administration was initiated by the President of the Republic of Kazakhstan.

The development of this cooperation in September 2012 in Astana was organized by an international scientific-practical conference «systematization of legislation in the field of entrepreneurship: Status and Prospects», the results of which were published the collection of materials containing scientific works of the Ukrainian and Kazakhtan researchers dedicated definition of business law codification areas of the Republic of Ka-

[1] Butler W. E. Economic Code of Ukraine. London, Wildy, Simmonds and Hill, Publishing, 2004. P. IX.

[2] Мамутов В. К. Хозяйственному Кодексу Украины – десять лет / В. К. Мамутов [Электронный ресурс]. – Режим доступа: http://hozpravo. com. ua/conferences/arhiv/uchastnik. php?ELEMENT_ID=663&ID=666

zakhstan. It is also noteworthy that the analysis of the project Entrepreneurial Code of the Republic of Kazakhstan with the appropriate assessment of its provisions was made by Ukrainian scientists and business executives. The result of this successful collaboration was the adoption in October 29, 2015 by the Parliament of the Republic of Kazakhstan TheBusiness Code as a fundamental act that defines the legal, economic and social conditions and guarantees of business, cooperation of business entities and the state. The Business Code of the Republic of Kazakhstan consists of 324 articles and comes into force on 01.01.2016, with the exception of certain provisions for which there is a later date[1].

Attention is drawn to the fact that the great idea of codification of the economic (business) rights is perceived in a very sharp form with unreasonable denial of the possibility of a constructive dialogue with the opponents of economic and legal philosophy. And this despite the fact that Western European legal tradition is replete with examples of the existence of Commercial (Trade) and the Civil Codes. In particular, the legal community is fully aware onenforcement practice of these Codes in Germany, France, Italy, Austria and other countries. In addition, the lawmaking practices of individual member states of the European Union, indicates the increased interest in the codification of the economic law. In particular, it can be considered a clear example of the legislative work of the Belgian Parliament, which was accepted 21.02.2013 Commercial Code (Code de droit économique), which entered into force on 05.21.2014[2].

Experience the codification of commercial law has been perceived also by individual countries belonging to the family of common law. Of course, in this case we are talking about the United States Uniform Trade Code, which is also well-known by the representatives of civil law science. With a focus on the economic legislation codification conducted the legal reforms in some countries of East Asia. In particular, in Japan coexist harmoniously Civil, Trade and Economic Codes[3].

Thus, in spite of awareness on the legal regulation of economic relations in foreign countries it takes deliberate distortion of reality in order to disorganize the scope of legal support of the economy. It has been repeatedly emphasized in the print media and scientific journals inaccuracy of representations of those who are trying to claim the lack of foreign countries in economic legislation and commercial law. Willfully misleading the public authorities and inefficiency imaginary EC of Ukraine, opponents of codification of the economic legisla-

[1] Предпринимательский кодекс Республики Казахстан от 29 октября 2015 года №375-V / [Электронный ресурс]. – Режим доступа: http://online. zakon. kz/m/Document/?doc_id=38259854

[2] Code de droit économique / [Электронный ресурс]. – Режим доступа: http://www. droitbelge. be/codes. asp#econ

[3] Хозяйственное право / под ред. акад. В. К. Мамутова. – К.:ЮринкомИнтер, 2002. – С. 43.

tion of Ukraine often raise the question of the EC abolition.

By the way, it should be noted that there have been repeated attempts to repeal EC of Ukraine. In particular, in 2008, by manipulating the Ukrainian Cabinet of Ministers as a subject of legislative initiative, contrary to the provisions of the Law of Ukraine «On the basis of state regulatory policy in the sphere of economic activity» from 11.09.2003, was submitted to the Verkhovna Rada a draft law «On the main provisions economic activity»(Register. number 3060). Trying to replace the defective EC of Ukraine, Law has 23 articles jeopardize the existence of Ukrainian system of economic laws, which provides the adjusted activity the hundreds of thousands business entities. Economic losses from the adoption of this bill would in their totality to paralyze the economic mechanism of the state. However, the timely response of business executives, academics and legal practitioners prevent the onset of adverse consequences.

Attempts to cancel EC of Ukraine didn't stop until now. In particular, in 2014, along with a desire to the elimination of economic courts was an attempt to undo Ukrainian EC. This fact testifies to the draft law «On Amendments to the Law of Ukraine» On the Judicial System and Status of Judges»and other legislative acts regarding the improvement of the foundations of the organization and functioning of the judiciary in line with European standards», which was distributed to the State Court Administration, and indirectly received publicity during Briefing the Minister of Justice[1]. In addition, according to the bill provides abolition of the Economic Procedural Code of Ukraine.

However, the joint efforts of progressive-minded part of the legal community and representatives of business associations managed to prevent the commission of hasty steps, which could cause significant harm to the legal and economic system of Ukraine.

Sometime passed since the last failed attempt to disorganize the system of economic laws of Ukraine as new in November 2015 the Ministry of Justice of Ukraine suddenly announces a press conference dedicated to the issue of the EC initiation on abolition. As always compelling argument was not expressed, but journalists were granted a large number of false information, which, according to the initiators, the basis for decisive action on the abolition the EC of Ukraine. After a small break, 21.01.2016 held another press conference, which was chaired by the Minister of Justice, aimed at artificially low values and the role of EC in the regulation of economic relations. Once again, the event initiators massive verbal attack tried to publicly devalue the worth of Ukrainian EC.

The provisions of the Law of Ukraine «On the basis of state regulatory policy in the sphere of economic activity» from 11.09.2003 were completely ignored as monitoring the effectiveness of the regu-

[1] Грядут масштабные реформы судебной системы – глава Минюста / [Электронный ресурс]. – Режим доступа: http://comments.ua/politics/485351-gryadut-masshtabnie-reformi-sudebnoy. html

latory act, which is the EC of Ukraine, not satisfied. This is evidenced by a Ministry of Justice of Ukraine letter from 16.12.2015, № 3464/X-25554/8. Therefore, to date there is no objective assessment of the impact of the using EC of Ukraine.

Given the European aspirations of Ukraine and the signing of the Association Agreement between Ukraine and the EU, as soon as possible, canceling The EC of Ukraine to talk about getting closer to European standards. The above examples indicate that the leading countries of the European commercial codes are widely used, based on centuries-old traditions.

At the same time, as stressed by NAS academician V. K. Mamutov constantly working in order to convergence of national economic legislation with the rules of economic EU law. In particular, the scientist gives the example to modify the name of the item 15 of The EC of Ukraine «Standardization and Certification in the field of management», which in the version adopted on 1 December 2005 began to sound like a «technical regulation in the area of management.» Technical regulation is seen as part of the legal regulation as a participation form of the economic sphere[1].

Cancel EC ofUkraine is responsible not to the European standards, and the teachers of civil law concepts. It is always easier to deny the fact that barely understands. In this case, there is no reason to revise established views on the essence of relations in the economic sphere. As a rule, focused primarily on the argument that, according to some researchers, the Civil Code of Ukraine (hereinafter – the CC of Ukraine) regulates the scope of relations that form the subject of Ukrainian EC.

It should be noted that such kind of judgment – the outcome of ignorance of the civil law. It follows from Article 1 of the Civil Code of Ukraine, the civil law governs the moral and economic relations. At the same time if you remember the sound of the standards under consideration as the Civil Code of Ukraine the bill, you'll find that fell out of the existing rules of business relations clause. Accordingly, the scope of business they don't correspond to existing 'personal' relationship was related to the conduct of Ukraine EC. And it is hardly possible to refer to the fact that the developers of the Civil Code of Ukraine could not but draw attention to the final wording. It is testament to their agreement with the result of the harmonization of the CC of Ukraine and the EC of Ukraine at the stage of legislative work.

It is important to bear in mind that the subject of EC is much broader and is not limited solely to the nature of the business relationship. In this, as is seen, it is one of the features of the document, since no small role for a non-profit economic activities, the achievement of socially significant results, including the implementation of business activity.

The economic and legal science «housekeeping», «economic activity»

[1] V. K. Mamutov. Economic Code of Ukraine – a decade / V. K. Mamutov [electronic resource]. – Access: http://hozpravo. com. ua/conferences/arhiv/uchastnik. php?ELEMENT_ID=663&ID=666

are seen as a broader concept than entrepreneurship. The practical value of this approach is evident, in particular, that even in 2001 the name was changed to Section VII of the Special Part of the Criminal Code of Ukraine. The name «crimes in the sphere of entrepreneurship» was replaced by the name of «crimes in economic activities», since the former name of unreasonably narrowed the scope of the criminal law.

It should be considered well-established views on the broad subject matter of regulating economic law, which is not confined exclusively to the business relations with a view to profit. The sphere of economic and legal relations and make those a basis of origin of which is not so much to obtain commercial advantage, as the achievement of social welfare, security and the protection of the public, the public interest. Such relationships arise in the implementation of non-profit economic activity. Manage effectively means send the authority of the owner in respect of his property, to manage it efficiently in order to meet their own interest (and in the case of state and municipal public interest). Rationality may be in satisfaction of interest, does not have the properties of bring profits or income from which is insignificant.

Reasonably represents the position of NAS academician V. K. Mamutov and Doctor of Juridical Sciences I. V. Doynikov is the fact that recently there has been a kind of **socialization of economic activity** with a predominance of social interests and their preferential satisfaction and security. In the light of the marked can be considered indicative of the experience of countries with Western European legal tradition that have already recognized the importance of corporate social responsibility and the need for economic entities in the activity of public interest. In particular, the Danish legislation stipulates the terms under which business entities may qualify for certain financial and investment incentives. In addition, these conditions are closely connected with the principles of corporate social responsibility, is intended to stimulate commercial organizations in matters of social security[1]. The Fixed rate of a similar nature is in h. 5, Art. 11 EC of Ukraine from 16.01.2003.

The last but not least is the presence in economic relations, in addition to economic entities, state and local authorities, as well as society (population), acting as the final link, the needs of which are directed the results of these entities, determined by **the specificity of the method of economic and legal regulation.** Especially the latter, as correctly noted by the Doctor of Juridical Sciences, N. M. Korshunov, is to ensure *the balance of funds of public law and private law regulating economic relations.* According to the just remark N. M. Korshunov, to achieve such a combination is possible within **the limits of the Economic Code** as an instrument designed to optimally combine the means of verti-

[1] Ручкина Г. Ф. Социальная ответственность субъектов предпринимательской деятельности и правовое регулирование отношений по распределению прибыли / Г. Ф. Ручкина, В. В. Купызин // Предпринимательское право. – 2010. – № 1. – С. 37.

cal and horizontal regulation of economic relations[1].

Naturally, there are opponents of this approach to defining the essence of the method of economic law, trying to split it into two parts with their allocation to the two traditional legal industries – civil and administrative law. This serves the ultimate goal of reducing to deconstruct the very possibility to argue about the objective laws of existing legal regulation of public relations, requiring the use of complex legal instruments. In this regard, the statement seems fair Doctor of Juridical Sciences V. K. Andreeva that one or other method of legal regulation does not appear a necessary element inherent in only certain areas of the law, besides the border between which is rather arbitrary[2]. This view is shared by the NAS academician V. K. Mamutov, noting the absence of rights among the branches of «Chinese walls».

Also don't look serious arguments, which are trying to convince the possibility of using civil law to the economic, trade relations. Perhaps in some cases it will look like an exception to the rule and then provided «omissionship» special legal regulation. At the same time supporters of this approach not fully take into account the history of the law and the recent history of codification.

Defects caused by exaggeration importance of civil rights in all spheres of life, has repeatedly pointed out in Ukrainian, Russian legal literature. Apparently these factors explain the criticism of Russian scientists Concept of development of civil legislation of the Russian Federation, published at the end of 2009. In particular, the scientists drew attention *to the unacceptability of the demarcation of public and private law rules* to effectively interact within a single legal act. According to Academician RAN Yu. K. Tolstoy in *«section of Property Act provides» drag and drop «in the Civil Code (of course, with the necessary processing) almost all the rules and laws of the relevant codes that are of a private nature, leaving them only public law. This operation seems to me very dangerous»*[3].

The above makes it possible to a certain degree of confidence that the compound benefits of public and private law practices legal regulation of public relations and leveling deficiencies related to this combination is **an integrative nature and characteristics of economic law science.** The features of the economic and legal method, corresponding member of the Ukrainian NAJN G. L. Znamenskii drew attention to the growing role of the so-called «kentavristika» in science in general, and legal, among others. After all, the combination of seemingly incompatible substances in

[1] Коршунов Н. М. Противостояние «хозяйственников» и «цивилистов» в контексте конвергенциичастного и публичного права / Н. М. Коршунов // Предпринимательское право. – 2011. – № 1. – С. 2.

[2] Андреев В. К. Сущность и структура предпринимательского права / В. К. Андреев // Бизнес и право в России и за рубежом. – 2010. – № 3. – С. 8.

[3] Толстой Ю. К. О концепцииразвитиягражданскогозаконодательства / Ю. К. Толстой [Электронный ресурс]. – Режим доступа: http://www. justicemaker. ru/view-article. php?id=4&art=233

science managed to open up new, previously unexplored horizons for scientific research. In this case, it is able to achieve such a result, which also received a standard fastening. In particular, the combination of funds market self-regulation of economic relations of economic entities and state regulation of macroeconomic processes in Ukraine recognized as a key basis for the implementation of the regulatory capacity of EC and economic bases of the legal order formation.

It is important to note that with the adoption The EC of Ukraine **managed to achieve the unification of the set of regulations governing** in one or another degree of economic activity, organizing them in a certain well-coordinated system of economic legislation. This is largely due to the EC of Ukraine **managed to avoid irreversible consequences in the economy**. In particular, attempts have been warned reorganization closed joint stock companies, private companies and subsidiaries, corporations, consortia, associations, corporations and other unknown to the Civil Code of Ukraine organizational and legal forms of management in public companies or independent from the owner of the establishment. It is necessary to mention that the rate of EC allowed to keep a significant part of the property assets in state and communal property, the provisions on the possibility of securing the possession, use and disposal of the right of economic management or operational management. As is known, these entities unknown to the civil law, which also provides for the recognition of the legal entities subjects status of private property without any reservations and exceptions. In addition, unlimited possibilities of the parties to the agreement to regulate their relationship in its sole discretion, sometimes unequal basis, The EC of Ukraine opposed the balanced system of legal measures for the protection of economically «weak» economic entities.

In addition, The EC of Ukraine laid the foundations for the development of free economic zones (FEZ), the effectiveness of which is proven in various countries around the world. Only in 2003, two years before the abolition of preferential and customs regimes within the FEZ, it was approved 630 investment projects, which cost $ 2.7 billion by The United States and was drawn into the economy of Ukraine more than $ 1 billion. US investment[1]. Naturally, this trend of economic-legal regulation now requires a corresponding improvement, as evidenced by numerous legislative initiatives on the restoring feasibility the full functioning of the FEZ.

Of course, this is unlikely to be exhausted by the positive effect of EC on the system of economic relations and want to learn more detailed information on the practice of enforcement of norms of economic legislation can address and website of the Institute of Economic and Legal Researches NAS of Ukraine, located at the: http://iepd. dn. ua, and http://hozpravo. com. ua.

In general, the effectiveness of the economic and legal regulation of the

[1] Зельдіна О. Р. Спеціальний режим господарювання: навч. посіб. / О. Р. Зельдіна. – К.: Центр навчальної літератури, 2005. – С. 27.

economy of Ukraine may indicate not only the personal assessment of the authors, but also obtained for the duration of the Ukrainian EC positive response from foreign legal practitioners and academics. No wonder that our Russian colleagues – representatives of the school of business law – actively support the idea of developing a draft law «On the basis of state regulation of business activity in the Russian Federation» (*Doctor of Juridical Sciences* V. K. Andreev) or Economic (Business) Code (*Doctor of Juridical Sciences* N. M. Korshunov), Concept of economic (business) law (*Doctor of Juridical Sciences* I. V. Doynikov). Undoubtedly, the cumulative effect of these proposals in the near future to get some formal objectification.

In summary, it's necessary to emphasize creativity and integrative economic and legal doctrine, not only within a single state, but also its importance in the context of strengthening the international legal research. Also it's necessary to urge the Ministry of Justice not to make hasty steps towards the EC of Ukraine abolition of as a communist approach «to the ground, we destroy everything, and then…» unreasonable and only leads to the destruction of an effectively functioning system of economic legislation of Ukraine.

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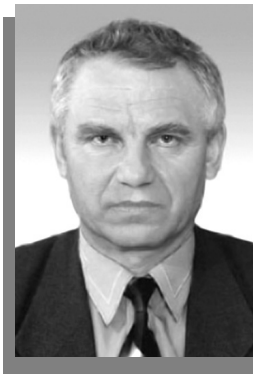

UDC 349.4

THE LEGAL REGULATION OF LAND FEE: THE PAST AND THE PRESENT

According to the current law the land fee is one of the fundamental principles of the legal rational use and protection of land. The essence of this principle is that the use of land in Ukraine is carried out for a fee. Its implementation is manifest in the fact that the land tax is seen as a duty of land owners and land users, as a part of economic incentives for sustainable land use and protection, as a method of regulating land relations and as the main source of revenue. It should be noted that a fee applies only to the special use of land in Ukraine, so as a general use of land is free.

The payment for land, as an independent legal institution in the system of land law, combines the set of legal norms that regulate social relations between landowners and land users. It also regulates relations with state and local authorities on the definition of size and order of payments for using land and use of proceeds coming from payment for land, the liability of payers, control over the correct calculation and collection of land payments.

Some general problems of the legal regulation of land fee are always in sight of representatives of legal and economic sciences. Among them the names of V. Hohulyak, I. Krynytska, N. Vorotin, M. Kucheryavenko, P. Kulynych, A. Miroshnichenko, V. Nosik and other representatives of the financial and land legal sciences can be called. However, the question concerning the historical and legal problems of land fee hasn't been investigated objectively and comprehensively.

The land fee is a historical category. The use of land in the Soviet period was free. Art. 8 of Fundamentals of the Land Legislation of the USSR and the Union republics (Art. 14 LC Ukrainian SSR) provided that the land was given to collective farms, state farms and other state, cooperative, public enterprises, institutions, organizations and citizens of the USSR for free. Any charging for the use of land was proclaimed illegal. However the free use of land didn't exclude

claim compensation of costs related to the management of land, keeping it in good condition, protection, improvement and so on.

A discussion about the necessity of introduction of paid land use in order to improve its effective and efficient use was started in 1970.

For the first time the land fee has been provided at the federal level in the Fundamentals of the USSR and Union Republics on land in 1990. In Ukraine, the legal basis of land fee ownership and land use were established by the Land Code of the USSR in 1990. Article 35 of the Code proclaimed land ownership and land use became paid. The land fee under the Code had to be paid annually in the form of land tax or lease payment that determined depending on the quality and location of land, based on cadastral valuation of land. The order and rate of land tax as well as the size limits of lease payment had to be defined by the Supreme Soviet of USSR. According to the Article 37 of the Land Code the payments for the land came to the budgets of the village, town or city council, in which the land was located.

The Land Code of Ukraine in edition of 1992 except land tax and land lease payment also determined the fee for acquisition of land in property. The Article 35 of the Land Code Ukraine established that the transfer of land ownership for a fee in cases proclaimed in the Code was carried according to the normative price, which was determined by the legislation of Ukraine. In the Article 36 it was underlined that the lessee pays the land lease payment, the amount of which had to be set by the agreement of the sides in the lease agreement.

Establishment of the order of taxing, average rates of land tax, as well as limit of the amount of lease payment for the land was taken to the jurisdiction of Verkhovna Rada of Ukraine. Some changes in comparison to the Land Code of the Ukrainian SSR in 1990, concerned the revenues of payments to the budget. In particular, part of the funds of the payment for the land was transferred to the state, republican and regional budgets in order and amounts that the established by the laws of Ukraine. Finally, it was found that the money from the land tax were used only for purposes that are determined by the laws of Ukraine, and expanded the list of exemptions in the payment for land.

In the future, all given the provisions of the Land Code of Ukraine were detailed and specified in the special Law of Ukraine «On Land Payments» from 03.07.1992 №2535-XII (which expired because of the adoption of the Tax Code of Ukraine in 2010). It was found that the land fee had to be paid in the form of land tax or lease payment that determined depending on standard valuation of land plots.

The land tax has been classified by the Law of Ukraine «On taxation system» as a state tax Its size was determined by a percentage of the standard valuation of land plots and didn't depend on the results of the economic activity of land owners and land users. The Land tax was determined as a compulsory payment which individuals and legal entities had to pay for land use exclu-

sively in cash. Land owners and land users, except lessees had to pay the land tax, and for the land granted on lease, lease payment had to be paid.

The law of Ukraine «On Land Least» found that the lease payment was a payment that lessee paid to the lessor for the use of the land. Unlike the land tax the lease payment may be established in cash, natural or labor form. The lessee and lessor can provide in lease agreement the combination of these forms or define other forms of payment. But there is an exception – the lease payment for state and municipal land plots has to be charged only in cash.

The lease payment with indicating of its size, indexing, forms of payment, terms, procedure for making and viewing and responsibility for its failure to pay is one of the essential conditions of the land lease agreement between a lessor and a lessee. Public relations in the sphere of establishing and changing of the size of lease payment were the subject of regulation by civil law, combined with specific land law.

Most of the land lease agreements concluded between a lessor and a lessee, contained a condition of setting of the size of lease payment not in absolute numbers but as a percentage of standard valuation of land plots.

The taxable item is the land plot leased. The payer of lease payment is the lessee of the land plot.

It should be noted that the lease payment for the use of state and municipal property has always been an important and reliable source of cash revenues to local budgets. The law of Ukraine «On taxation system» from 31.03.2005 assigned the lease payment for state and municipal land to the tax payments. Since making these changes the administration of this payment to budgets became one of the main tasks of the State Tax Service of Ukraine.

With the adoption of the Tax Code of Ukraine in 2010, the mechanism of charge of the lease payment for state and municipal property has suffered significant changes, but this payment in its essence has remained tax.

The current Land Code of Ukraine (Art. 206) provides that the land fee should be charged according to the law. The Tax Code of Ukraine is known as such law. According to it the taxpayers are owners of land plots, land shares and land users. Article 270 proclaims that the taxable items are owned or used land plots and owned land shares. Thus there is a situation created where the land is actually set under a double taxation: the land tax should be paid at the same time and for the land, and the right to land (share), the object of which is recognized land. This underlined in the legal literature [2, p. 500].

The subjects of the land tax under the current legislation of Ukraine doesnot recognize persons – landusers, which use the land on other bases than the ownership right, right of permanent use and lease. It comes in particular, the persons who use the land by the right of perpetual lease, superficies, easement or land sublease.

Before the adoption in 2010 of the Tax Code of Ukraine legal basis for regulation of the land tax was a series of

legislative acts, namely: Land Code of Ukraine (2001), Budget Code of Ukraine (2001), Laws of Ukraine «On Land», «On Land Lease», «On taxation system» and others.

With the introduction of the Tax Code the Law of Ukraine «On Land», «On taxation system» and others have lost their validity. A special place in the system of legal regulation of social relations regarding payment for land, particularly for its calculation and collectionoccupy the laws that are made for each calendar year dedicated to the State budget.

According to the Budget Code of Ukraine (Art. 2) the law of the State Budget of Ukraine – is the law, which establishes the powers of public authorities for execution the State Budget of Ukraine during the budget period.

The Law of Ukraine «On State Budget of Ukraine» determines for the specific year the specific features of calculation and collection of the land tax in the current year, land tax, provides the indexing of its size, sets the collecting for land and order of transferring it the budget and so on.

The introduction of land fee in Ukraine was intended to ensure the rational use of land resources and their preservation, equalization of socio-economic conditions of management on land of different quality, financing for functioning costs of land cadaster, land management and land monitoring, land reform and the development of infrastructure of settlements and more. It was assumed that the proceeds from the land tax would be used strictly for the intended purpose. However, in the current financial crisis, land fee used only as one of the main forms of replenishment of total revenues.

Payment for land, being one of the key elements of the economic and legal mechanism of state regulation in land relations, in market conditions should encourage landowners and land users for effective and efficient use of land. At the same time land fee in the form of land tax and rental fees for land plots of state and municipal property acts as a kind of tax payment. The legal value land fee is that it not only acts as a source ofreplenishment of local budgets and is the foundation of realization of economic interests of the owner, but also stimulates the efficient and rational use and land protection.

In the absence of a legal definition in law of the term land fee in the literature was rightly suggested to consider as a pay for the land a regular payment, which the landowner (land user) under the law or contract contributes to the budget or in favor of the landowner for the use of the relevant land plots[1].

The literature sometimes conclude that understanding the concept of land fee is much wider than stipulated in the Tax Code of Ukraine. According to representatives of the land – legal science, the composition of this notion must also include compensation for losses of agricultural production related to the with-

[1] 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. 267.

drawal of agricultural land, as well as fines for violation of land legislation[1].

The approach to the components of the term «payment for land» seems debatable. The feasibility of attributing compensation for «losses» to the payment for landseems in the broad sense appropriate. As highlighted in the land and legal literature, it would have removed an existing legal uncertainty regarding the nature of the payments and allowed to apply to the «losses» adjusted mechanism of calculation and collection of tax payments[2].

As for the suggestion, which concerns the inclusion in the composition of land fee of fines for violation of land legislation should be made certain reservations.

Taking into account the legal nature of fines as penalties for violations of the rights of the owner or user of land plots would hardly be right to regard them as part of the land tax.

The land fee in the broad sense is generally considered legallyprovided a set of legally binding land paymentswhich are necessary during the realization of the right of ownership and use of land plots, which can get and pay the state, municipalities, individuals and legal entities, the purpose of getting which is to stimulate owners and users of land for use according to the special purpose, rational and efficient land use and protection.

Paying of land use should not be mixed with paid means acquiring of land plots or rights to them in the order foreseen by the current legislation of Ukraine and local regulatory legal acts. In case of acquisition of land rights, for example, on a competitive basis or on a civil transactions subjects of land relations are not exempted from the obligation to make payment for the land in the manner prescribed by law.

The collocation «payment for land» is usually understood as a fee for its use, which is levied in the form of land tax and lease payment for the land. Thus before effective Law of Ukraine «On Land» in term of «payment for land» united land tax and lease payment for any land. But given approach changed the Tax Code of Ukraine. According to Article 14 of the Code payment for the land was considered nationwide tax that levied in the form of land tax and rental fees for land plots of state and communal property.

Land tax – a compulsory payment levied from the owners land plots and land particles (shares) and permanent land users. Lease payment for land plots of state and communal ownership was considered a mandatory payment that the lessee payed to the lessor for using the land.

The subordination by legislator lease payment for land plots of state and communal property of regime of mandatory payment, inherent nationwide tax and

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[1] Лисанець О. С. Правове регулювання плати за землю / О. С. Лисанець // Земельне право: підручник / М. В. Шульга, Н. О. Багай, В. І. Гордєєв та ін.; за ред. М. В. Шульги. – Х.: Право, 2013. – С. 295.

[2] Мірошниченко А. М. Науково-практичний коментар Земельного кодексу України / А. М. Мірошниченко, Р. І. Марусенко. – 5-те видання, змінене і доповнене. – К.: Алерта, 2013. – С. 503.

distribution on rent the same order and timing as land tax, and the regime of responsibility for failure to make the lease payment on time raises certain concerns.

As rightly emphasized in the literature, described approach of the legislator to determine the regimerent for land plots o state and municipal property is false[1]. The mechanism of transfering to budgets land tax and rental fees for use of land of state and municipal property may not be identical. Indeed, in the first case it comes to payment of tax liabilities in the second – the implementation of treaty obligations by lessee.

It should be noted, that the classification by the law of rent payments to the mandatory payments contrary to the legal nature of the treaty, such as lease relations, which are the relations that should be based on the principles of legal equality of the parties. Perhaps in this regard, the Plenum of the Supreme Economic Court of Ukraine of 17.05.2011 p. Number 6 (as amended on 12.17.2013 g.) (P. 13) states that the lease payment for the land, which is owned by the state or is in municipal property, has a dual legal nature, because on the one hand, it is provided for payment of land lease agreement, the lessee to the lessor for using the land for making use of the land on the other – a form of land fee as state land tax along with tax.

As is known, in connection with widespread leased land using in Ukraine the rent for the land gradually turned into one of the most powerful sources of revenues to the local budgets. These circumstances prompted the local authorities and the Tax Authorities to implement measures designed to increase revenues from rent for the use of state and municipal property. These measures, as noted in the literature[2], aimed in particular at increasing the actual amount unilaterally, outside the established order resolving contractual disputes.

Mode of rent for use of land under lease is characterized by private ownership and contractual basis, based on the norms primarily land and civil law. Significant changes in land tax made to the Tax Code of Ukraine by the Law of Ukraine of 12.28.2014 № 71 «On Amendments to the Tax Code of Ukraine and some other legislative acts of Ukraine on tax reform.

In particular, land fee from the list of state taxes and fees was removed and as a part of the tax on real property transferred to the list of local taxes. This Law also abolished a number of special land tax rates that have been established within the individual categories of land and taxpayers. Thus the left only four limiting size of bets of land tax.

Changes made to the current legislation regarding land taxation laid the foundation for empowerment of village, town and city councils regarding how the bidding of land tax, and to provide

[1] Мірошниченко А. М. Науково-практичний коментар Земельного кодексу України / А. М. Мірошниченко, Р. І. Марусенко. – 5-те видання, змінене і доповнене. – К.: Алерта, 2013. – С. 499–502.

[2] Бахуринська М. М. Практичні проблеми правового регулювання встановлення та зміни орендної плати за землю / М. М. Бахуринська // Бюлетень Міністерства юстиції України. – 2015. – № 2. – С. 78.

exemptions from land tax. In addition, local councils got the right to establish land tax rates within the size limits set by the Tax Code of Ukraine.

The obligation to timely payment of land tax or lease payment law relied on traditional carriers of land rights since the emergence of these rights.

Article 22 of the Land Code of the Ukrainian SSR (1990) provided that ownership or right to use on given land arises after installation by land surveying organizations this site boundaries in nature (on ground) and obtaining the document certifying that right. Right of possession or the right of permanent use of land was certified by the state acts that were issued and registered by village, district and city councils. The right of temporary use of land (including a lease) was proceed by the agreement, the form and order of registration which established the Council of Ministers of the USSR.

Under the current Land Code of Ukraine by the (Art. 125) emergence of property rights on the land plot and the right of permanent use and land lease right associated with moment of state registration of these rights. As we see, some property rights on land by this Article are not named (perpetual lease, superficies, servitude). Thus registration of real rights on land (ownership, permanent use, perpetual lease, superficies, easement, lease and mortgage) carried out in accordance with the Law of Ukraine «On State Registration of Rights to Real Estate and Their Encumbrances».

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CRIMINAL–LEGAL SCIENCES

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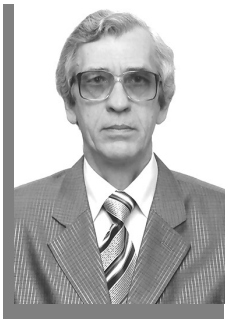

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UDC 343.21 (477)

PROBLEMS OF STABILITY AND DYNAMISM OF THE MODERN CRIMINAL LEGISLATION OF UKRAINE

The world's social life, including the Ukrainian one, has two contradictory development tendencies. From the one hand, it shows the tendency to dynamism which is manifested in a constant search of new forms and methods of providing it, in the

economy innovation, significant transformations in social, informational, cultural, educational and other spheres and in the active development of new technologies and science etc. Yet the social life development includes the aspiration to the preservation of a certain consistency, stability, succession, sustention of the best previous achievements. On the other hand, this is the reason why the society aspires to stability which is manifested in the social demand for certain unchangeability of the fundamental principles and rules, predictability of their content at least for the near future etc. Exactly these tendencies provide sometimes rather stable and gradual and sometimes rather rapid and dynamic development of the society.

Both tendencies in their dialectical interaction and confrontation are also fully manifested in the development of the Ukrainian legislation, including the criminal one. From the one hand, it has been aspiring to certain stability, on the other hand, there is an urgent need in its dynamism, changeability, adjustment for the changing needs of social life and new challenges from the criminal environment. But stability and dynamism of the criminal legislation still remain interconnected and dialectically conditioned by its properties. The life shows that the legislation can't be only stable or only dynamic, because in any given historical period of the society and state development it always features the both tendencies mentioned[1]. The other thing is that in some periods of country's development its legal regulation is marked with certain stability while in other periods – dynamism which, however, does not necessarily means the loss of experience succession of the previous periods[2].

It's absolutely obvious that such radical economic, political, social and even cultural and mental changes that are taking place in the Ukrainian society provoked certain dynamism in the development of domestic legislation including the criminal one. The adoption of the effective Criminal Code (CC) of Ukraine in 2001 marked the beginning of a rather radical reform of this sphere of law and reflected the level that was achieved by the Ukrainian science and law-enforcement practice in the sphere of criminal law[3]. But even

[1] Монастирський Д. А. Стабільність закону: поняття, сутність та фактори забезпечення: автореф. дис. … канд. юрид. наук. – К., 2009. – С. 8–10; Веніславський Ф. В. Співвідношення стабільності та динамізму в конституційно-правовому регулюванні / Ф. В. Веніславський // Держ. будівництво та місцеве самоврядування. – Х., 2009. – Вип. 18. – С. 17; Суходубова І. В. Стабільність і динамізм законодавства: поняття, співвідношення та засоби забезпечення: автореф. дис.…. канд. юрид. наук. – Х., 2013. – С. 8–10.

[2] Таций В. Я., Борисов В. И., Тютюгин В. И. Стабильность и динамизм – необходимые условия эффективности и качества законодательства Украины об уголовной ответственности // Современные проблемы уголовно-правового воздействия: межгосударст. сб. научн. статей / редкол.: Е. А. Письменский (отв. ред.) [и др.]; МВД Украины, Луган гос. ун-т внутр. дел им. Э. А. Дидоренко, Волгогр. гос. ун-т. – Луганск: РИО ЛГУВД им. Э. А. Дидоренко, 2013. – С. 72–75; Баулін Ю. В. Вибрані праці. – Х.: Право, 2013. – С. 823–827.

[3] Тацій В. Я., Сташис В. В., Баулін Ю. В. Новий Кримінальний кодекс України в контексті сучасної кримінально-правової думки // Антологія української юридичної думки: в 10 т. – Т. 10. Юридична наука незалежної України. – К., 2005. – С. 591–626

at that period there were no doubts that this Code would remain unchanged during continuous and active changes in our country and society[1]. And the real life proved that. For more than fourteen years of the CC enactment (as of 15/12/2015) it was amended and supplemented 666 times. During this period 87 articles were added to the Code, 292 articles were fully or partially altered or redrafted which amounts to more than 65% of its rules. During this period 87 articles were added to the Code. 35 articles were excluded from the Code and 14 of them are those articles that were added to the Code after its enactment. Some prescriptions were altered more than once. For example, Articles 96^1 364^1, 368^3 of the Code (i. e. the Articles recently introduced to the Code) were amended five times while such new Articles as 364^1 and 368^2 were amended six times. Article 364 of the Code was amended seven times, Article 369 nine times and finally Article 368 ten times. It's obvious that this situation can't be explained solely by the tendency to the dynamism of the legislation based on the real needs for changes in the country and society. An idea inevitably comes to mind that such quick, drastic and frequent changes are not sufficiently connected with the real life needs and thus they are not motivated, systematic, scientifically and practically grounded and they even can be of an arbitrary character.

It seems that modern criminal legislation is significantly and not always reasonably affected by political programs, aims and convictions and the difficulties arising today are often settled exclusively by criminal and legal measures of influence. Especially it can be traced in the attempts to resolve complex political, economic, social or even historical and conceptual issues by means of criminal legislation[2]. It's not always taken into account that the means of criminal law are connected with the most significant restrictions of rights and freedoms of the human person and citizen so they should be used solely as *ultima ratio* in countering the most socially dangerous acts which can cause significant damage to social relations safeguarded by the law. That is why the legal realization of criminal policy is to be carried out exclusively on the basis of preliminary fundamental scientific work, it must be scientifically grounded, theoretically modelled, predicted, verified and approved[3]. Science has to provide and substantiate the strategy and tactics of criminal legislation development and solely the ideas elaborated and spelled out on its basis can become the product that will obtain political support and enactment.

But the Ukrainian criminal and legal thought is developing. Even according

[1] Сташис В. В. Актуальні питання системи покарань за Кримінальним кодексом України 2001 р. // Право України. – 2010. – №9. – С. 16–24.

[2] Баулін Ю. В., Пономаренко Ю. А. Наука. Політика. Закон // Юрид. вісник України. – 2009. – №43. – С. 6.

[3] Правова доктрина України: у 5 т. Т. 5: Кримінально-правові науки в Україні: стан, проблеми та шляхи розвитку / В. Я. Тацій, В. І. Борисов, В. С. Батиргареєва та ін. за заг. ред. В. Я. Тація, В. І. Борисова. – Х.: Право, 2013. – С. 56–71.

to the purely formal indicators such as: the number of theses, published monographs, scientific articles, coursebooks, comments to legislation and its implementation, scientific conferences etc. – there is an onrush of scientific research in the field of criminal law. Sure enough such purely formal (quantitative) indicators not always guarantee high quality of scientific research because this extremely important problem is of another dimension. In any event, the analysis of a huge number of scientific products shows that they bring up and elaborate on the variety of problems of criminal and legal regulation, offering rather contradictory ways of solving them.

It is clear that such a variety of scientific research, conclusions, recommedations and proposals makes it difficult for the legislator not only to choose the idea or direction appropriate for further support, but even to perceive, analyse and systematize all of them. That's why special consultative and deliberative bodies are to carry out the function of a kind of link between scientific research and practical legislation. Some of them, for example, the Legislation Institute of the Verkhovna Rada of Ukraine, work on the permanent basis and perform the role of a certain «filter» which has to prevent low-quality and purely populist bills from reaching the Parliament[1]. Others, such as the Scientific and Consultative Boards of the Committees of the Verkhovna Rada of Ukraine or specially created working groups for the elaboration of the most important bills, work predominantely on a voluntary basis and their possibilities as to the passing of scientific contributions to the Parliament are much more limited.

In any event, the communication and transmission of data is to be organized exactly via these structures and exactly in this direction – from scientists to legislators. The reverse direction of data transmission – from legislators to scientists – is absolutely unacceptable, as in this case the scientists are actually tasked by political forces or the interested groupings to ground or explain, interpret or sometimes even justify the decisions already taken by them. This approach diminishes the role and significance of the legal science, lowers it to the level of a servant who has to catch new trends in proper time and to follow changeable policy. One of our most important tasks is to clearly define and firmly keep to the role and significance of the legal science in relations with the government and to establish the above mentioned links of passing scientific knowledge through political institutes to legislative provisions.

It's widely known that such mechanisms proved to be quite reliable and showed their high effectiveness in drafting the effective Criminal Code of Ukraine. The working group, created by the Cabinet of Ministers of Ukraine for drafting a new Criminal Code, studied and elaborated on hundreds of domestic

[1] Швець В. Д., Грицак В. М., Василькевич Я. І., Гацелюк В. О. Законодавча реалізація кримінально-правової політики: аналіз законопроектної діяльності Верховної Ради України V скликання з питань кримінального права / Вступне слово проф. Мельника М. І. – К.: Атіка, 2008. – 244 с.

as well as foreign scientific papers, synopses, theses, dozens of foreign criminal laws, huge practical experience of implementing the previous legislation, and on this basis offered the most optimal solutions to the legislators. In certain instances it also offered to the legislators some alternative proposals that failed to obtain unanimity among scientists and practitioners. And in this case only political decisions implemented either one scientifically grounded idea or another. Unfortunately, at the present legislative stage such mechanisms of work are often being forgotten which results not only into laws containing ideas without adequate scientific grounds and validation, but also laws containing obviously erroneous provisions, serious ambiguities and incongruities. We have to note with regret that neither the Legislation Institute of the Verkhovna Rada of Ukraine nor the Scientific and Consultative Boards of its Committees managed to prevent the approval of such laws by the Parliament. In particular, during the past year several laws of this kind were passed and enacted becoming part of the Criminal Code.

First of all we should mention the Act of Ukraine № 191-VIII of 12/02/2015[1], which contains the revision of the measure of restriction (§ 1, Article 213 of the Criminal Code) imposing imprisonment of «up to one year» as the most severe punishment out of the several alternative main ones. But under § 2 Article 61 of the Criminal Code one year is the minimal term for this type of punishment. The mistake doesn't seem to be very rude and perhaps the legislator strived to establish an absolutely definite term for this measure of restriction – one year. Potentially this answer could satisfy practitioners if it were not for the provisions of § 2 and 3, Articles 68 and 69[1] of the Criminal Code providing for the obligatory reduction of the maximum term of the most severe type of punishment to one-half or two-thirds of the term correspondingly. Thus, in applying these provisions to the person who has committed an offence provided for in § 1 Article 213 of the Criminal Code, the court will have to order imprisonment for the term of less than one year which is a flagrant violation of § 2 Article 61 of the Criminal Code as well as of a number of prescriptions of the General Part of the Code.

Let's examine one more case. The Act of Ukraine 629-VIII of 16/07/2015[2] introduced in § 4 Article 220[1], Article 220[2] and § 1 Article 365[2] of the Criminal Code the imposition of an additional punishment in the form of deprivation of the right to occupy certain positions or engage in certain activities for a term of up to ten years. In addition, in § 4 Article

[1] Закон України № 191-VIII від 12 лютого 2015 р. «Про внесення змін до деяких законодавчих актів України щодо спрощення умов ведення бізнесу (дерегуляція)» // Відом. Верхов. Ради України. – 2015. – № 21. – Ст. 133

[2] Закон України № 629-VIII від 16 липня 2015 р. «Про внесення змін до деяких законодавчих актів України щодо вдосконалення системи гарантування вкладів фізичних осіб та виведення неплатоспроможних банків з ринку» // Відом. Верхов. Ради України. – 2015. – № 43. – Ст. 386.

220 of the Criminal Code this punishment was referred to as a «*restriction* of the right to occupy certain positions or engage in certain activities». At the same time, it is known that under § 1 Article 55 of the Criminal Code the maximum term of this punishment in cases when it is an additional one is only three years while such a punishment as «*restriction* of the right» is provided for neither in Article 51 nor Article 55 of the Criminal Code.

Such a «loose» treatment by the legislators of the types and terms of punishments established in the measures of restriction indicates considerable significance of the correlationt issue of the prescriptions of the General and Special Parts of the Criminal Code. No doubts that the Articles of the Special Part contain special provisions that define signs of a certain offence and establish certain types and terms of punishments that can be applied for its commission. But sometimes, from such a correct understanding of the role of the Articles of the Special Part, a wrongful conclusion is made that they take precedence over the Articles of the General Part as they seem to correlate with each other as special and general rules. This position causes a reasonable criticism in scientific papers. According to our point of view, the Articles of the Special Part do not correlate with the Articles of the General Part as special and general rules, because for ensuring such a correlation we need an indispensable condition that both general and special rules regulate the same social relations. Although the rules of the General and Special Parts regulate general criminal and legal relations, these relations are different in their content. While the rules of the General Part provide the main provisions on the criminality of acts, criminal liability and punishability for committing them, the rules of the Special Part regulate certain criminal and legal relations arising under the commission of certain crimes. That is why these rules correlate not as a general and special one, but rather as a general and individual one. In addition, in order not to go beyond the borders of the general rule, the individual rule has to be fully covered by the general one and not to conflict with it. Otherwise, the individual rule, having gone beyond the borders established by the general rule, has to be included into the set of other general rules or to stay outside any general rules of regulation. Taking this into account, in case of conflict between the general rules of the criminal law (rules of the General Part) and its individual prescriptions (rules of the Special Part), the absolute precedence must be given to the rules of the General Part. This basic rule is followed not only by scientists[1]. It is also stated and approved in legal conclusions of the Supreme Court

[1] Пономаренко Ю. А. Положення Загальної частини Кримінального кодексу України, що регулюють діяльність законодавця // Нове законодавство України та питання його застосування: Тези доп. та наук. повідом. учасників наук. конф. молодих учених та здобувачів (м. Харків, 26–27 груд. 2003 р.) / За ред. М. І. Панова. – Х.: Нац. юрид. акад. України, 2004. – С. 117–119; Тютюгин В. И. Соотношение норм Общей части УК Украины о наказании и санкций статей Особенной части // Проблеми законності: Респ. міжвідом. наук. зб. □

of Ukraine which are mandatory for all subjects of the power structures using in their activities the corresponding legal rule and for all courts of general jurisdiction. The Supreme Court of Ukraine states explicitly that the rules of the Special Part of the Criminal Code shall be based on the rules of the General Part of this Code, that's why any rule of the Special Part which is in conflict with the rules of the General Part shall not be applied[1].

Taking into account the above mentioned information, the conflicts described above that were caused by the legislation novels of 2015, can be decided in the following way. In the restriction measure in § 1 Article 213 of the Criminal Code of Ukraine the words «or imprisonment for a term of up to one year» shall not be applied as being in conflict with § 2 Article 61 of the Criminal Code of Ukraine. So the offence provided for by the rule (the main constituent elements of violation of procedures related to operations with scrap metal) shall be punishable by «a fine of 1,500 to 2,000 tax-free minimum incomes, or correctional labour for a term of up to two years». As for the measures of restriction of § 4 Article 220^1, Article 220^2 and § 1 Article 365^2 of the Criminal Code of Ukraine, taking into account the provisions of § 1 Article 55 of the General Part of the Criminal Code of Ukraine, they establish additional punishment in the form of deprivation (not restriction) of the right to occupy certain positions or engage in certain activities for a term of up to three (not ten) years.

It is clear enough that our conclusions are mainly recommendations for the courts. That's why, we believe that today we can and have to bring up the issue concerning the possibility of using this rule in the criminal legislation application as well as the issue concerning its direct introduction to the Criminal Code of Ukraine. We suggest introducing it in the form of a new paragraph of Article 3 of the Criminal Code of Ukraine spelling it out in the following way: «6. In case of conflicts between the provisions of the General and Special Parts of this Code, the provisions of its General Part shall be applied».

We should also mention one of the newest laws on amending the Criminal Code of Ukraine which has already caused a significant social response. We speak about the revision of § 5 Article 72 of the Criminal Code of Ukraine[2], under which «A court shall merge the pretrial detention into the term of punishment, in case of sentencing to imprisonment for the same crime, basing on the following proportion: one day of pretrial detention is equal to two days of imprisonment». If the court orders any punishment other than imprisonment, merging of the pretrial detention into the term of punishment for the same crime

[1] Рішення Верховного Суду України від 04.04.2011 р. // Вісник Верховного Суду України. – 2011. – № 8. – С. 9–11.

[2] Закон України № 838-VIII від 26 листопада 2015 р. «Про внесення зміни до Кримінального кодексу України щодо удосконалення порядку зарахування судом строку попереднього ув'язнення у строк покарання» // Голос України від 23 грудня 2015 р. – № 242. – С. 3

is carried out under the following procedure. First of all, the term of the pretrial detention is converted into the term of imprisonment under the same proportion (one day of pretrial detention is equal to two days of imprisonment). Than the term of imprisonment calculated in this way is converted into the ordered type of punishment according to the proportions establshed in § 1 Article 72 of the Criminal Code of Ukraine (one day of imprisonment equals to: one day of arrest or custody in a penal battalion; two days of restraint of liberty; three days of correctional labor etc). If the court orders such a primary punishment which cannot be converted into imprisonment (a fine or deprivation of the right to occupy certain positions or engage in certain activities), it shall discharge the convicted person from serving the sentence imposed.

In this case the legislator has interpreted the term «pretrial detention» too loosely becuase it extends to cover not only the time of imposing this preventive measure but also the time of detaining a person in custody without the permission from the investigating magistrate, court; the time of detaining a person in custody under the permission for detention from the investigating magistrate, court; the time spent by a person in the appropriate hospital for conducting forensic medical or forensic psychiatric examination; the time spent by a person, who serves his/her sentence in the establishments for serving previous terms, for conducting investigating actions or taking part in the court proceedings in the criminal case.

It's absolutely obvious that this prescription, improving the state of a persom who has committed an offence, is a retroactive law (§ 1 Article 5 of the Criminal Code of Ukraine). Thus it affects all persons who committed appropriate acts prior to the enactment of the aforementioned law, including those persons who are serving their sentences. It places an additional burden on the Ukrainian courts to review all sentences of the persons to whom during the pretrial investigation or during the court hearings they applied for at least a day the preventive measure in the form of pretrial detention or who were detained in the form which the legislator sets equal to the pretrial detention. After converting the term of the pretrial detention into the term of imprisonment or other type of punishment, the part of the punishment that de facto has already been served by the person is to be de jure increased and the rest of the term is to be decreased correspondingly. We should also focus attention on the fact that if after this convertion it will turn out that, taking into account the pretrial detention, the person has de jure served a term of punishment longer than ordered by the court sentence, this person isn't entitled to compensation from the state for the «overserved term». This situation can be explained by the fact that the person is entitled to compensation only for damage inflicted by unlawful conviction (item 2, § 2 Article 1167, Article 1176 of the Civil Code of Ukraine) while in our case before the enactment of the Act № 838-VIII of 26/11/2015 the execution of the sentence was carried out on the

basis of a lawful sentence, imposed and executed under the legislation effective at that period of time.

At the same time we believe that the law contains a serious drawback which provides the opportunity for corrupt practices. We speak about the provisions contained in sub-paragraph 5, § 2 Article 72 of the Criminal Code of Ukraine under which «In imposing primary punishment not specified in paragraph 1 of this Article, a court shall discharge the convicted person from serving this primary punishment». It means that if pretrial detention (in a broad sense of this term as it is described above) was applied to the person convicted by the court to punishments which under § 1 Article 72 of the Criminal Code of Ukraine can't be converted into the term of imprisonment, the convicted person shall be unconditionally fully discharged of serving this punishment. Such punishments include a fine and deprivation of the right to occupy certain positions or engage in certain activities. Thus, if a person has committed an offence for which the primary punishment is a fine (after the reform in 2011 their number increased significantly), the application to this person of pretrial detention for at least a day will provide the basis for discharging him/her from paying the fine regardless of its amount. We conclude that this provision is in conflict with the generally positive tendency in the development of our legislation in the direction of extending posibilities of applying a fine as the main punishment and it is also a significant factor that promotes corruption.

It's obvious that such rude mistakes in the criminal legislation could be easily avoided provided that the abovementioned mechanisms of coordinating legislative decisions with scientific research were applied. These mistakes are detected, scientists and practitioners have attracted attention to them and they are actually easy to correct. That's why the question «Who is guilty?» isn't pressing at the monent as opposed to the question «What shall we do to avoid such situations in future?»

We should also attract attention to the drawbacks of both the enacted laws and the bills, the enactment of which has been persistently lobbied recently. In particular it applies to the introduction of the so-called criminal misdemeanour to the criminal legislation.

It is known that the introduction of the criminal misdemeanour to the national criminal legislation of Ukraine, that remained quite a debatable issue of the science for several decades, obtained its political and legal solution in the Code of Crinimal Procedure of Ukraine of 2012 that draws a principal distiction between the two criminal offences: crimes and misdemeanours. We do not bring up the issue on the extent of impact of the procedural legislation on the content of the material (criminal) one and we do not doubt the position of the legislator as for the introduction of the liability for the misdemeanour, but we consider necessary to draw attention to the ways of implementing this concept into the legislation.

At present, a new bill of Ukraine «On Amendments to Certain Legislative Acts

of Ukraine Regarding Introducing Criminal Misdeameanours» of 19/05/2015, reviewed of 03/06/2015, is presented to Parliament by a group of Ukrainian deputies. The analysis of this bill and documents accompanying it provides grounds for the generally negative conclusions. And although this bill is another attempt to implement the provisions of the Concept of Criminal Justice Reform approved by the Decree of the President of Ukraine № 311/2008 of 08/04/2008 on the introduction of the criminal misdemeanour to the Ukrainian legislation, it has considerable conceptual drawbacks and it is in conflict with Article 22 of the Constitution of Ukraine, the determinant provisions of the Concept and the principle of humanization of the criminal liability.

As we can see from the explanatory note to the bill, the implementation of the state policy of humanization of the criminal liability constitutes the aim of this bill. Nevertheless, the analysis of this bill shows a significant expansion of the borders of criminalization of acts as it recognizes as criminal offences more than 100 acts which today constitute administrative offences, provided for in the Code of Ukraine on Administrative Offences and the Customs Code of Ukraine, but which are not administrative violations that encroach on the established order of management (involving trespass against health of a person, social order and other values which are not connected with administrative procedures). According to the proposal of the authors of the bill, the person who has committed such violations which are not criminal today will be criminally liable and the court will have to render a sentence imposing punishment. Leaving alone any insignificant information, we should state that this decision per se means distinguishing one more category of offences (in addition to minor, medium grave, grave and special grave offences) within the scope of the Criminal Code and providing the status of an offence, but only under a new term criminal misdemeanour to those acts which today constitute administrative violations. Thus, the bill is another attempt to resolve the issue of establishing the concept of criminal misdemeanour at the expense of practically absolute destruction of the criminal legislation as a system, built on the basis of implementation of the most socially important, reliable scientific and legal conceptual provisions proved by the many years of their effective application.

The bill mentioned above is almost identical to the Bill № 4712 of 16/04/2014 «On Amendments to Certain Legislative Acts of Ukraine on Implementing the Provisions of the Code of Crinimal Procedure of Ukraine»[1] with some differences which, nevertheless, do not change the general conceptual basis of these bills. The bills of 2014 as well as of 2015 aim to introduce to the Gen-

[1] This bill has already been criticized in details. It has also been criticized by the authors of this paper (Тацій В., Тютюгін В., Капліна О., Гродецький Ю., Байда А. Концепція впровадження проступку шляхом прийняття Закону (Кодексу) України про проступки (Проект для обговорення) // Юрид. Вісн. України. – 2014. – № 21. – С. 12–13; № 22. – С. 12–13; № 23. – С. 12–13).

eral and Special Parts of the effective Criminal Code of Ukraine a number of other amendments which deal with the fundamental basis of the criminal law (signs of a socially dangerous act, forms of its guilt etc) and, in our opinion, such bills are to be drafted and discussed involving scientists, practitioners and the whole judicial community of Ukraine. One can make us confident that such novels are useful and necessary only by means of providing conceptual basis for such changes, substantial, detailed reasoning of their appropriateness, broad discussions of the proposed novels by scientists and practitioners[1]. Rashness in such cases isn't a necessity for building an effective legal system, it becomes rather a ruining factor.

In conclusion we should note that, in our opinion, today the criminal legislation of Ukraine faces a real theat of its uncontrolled and unsystematic reformation which may result in both its further encumbering with scientifically groundless and unneccessary provisions and violating the principles on which it is built, system interconnections and interdependencies of its prescriptions that, in its turn, will entail essential decrease in effectiveness of measures of criminal and legal influence on the crimes. Taking all this into account, we would like to emphasize that legislative responses to the challenges of the modern life can't take an exclusively political form, they are to have a scientific basis.

[1] We should mention that some authors of this paper took part in drafting conceptual model of rendering liability for misdemeanours in the Ukrainian legislation, which is based on the grounds different from those of the mentioned bills, and it was published for a broad discussion by the judicial community (*Таций В. Я., Тютюгин В. И., Каплина О. В., Гродецкий Ю. В., Байда А. А.* Концептуальная модель установления ответственности за проступок в законодательстве Украины (Проект для обсуждения) // Проблемы законности: сб. науч. тр. / отв. ред. В. Я. Таций. – Х.: Нац. юрид. ун-т имени Ярослава Мудрого, 2014. – Вып. 125. – С. 7–31).

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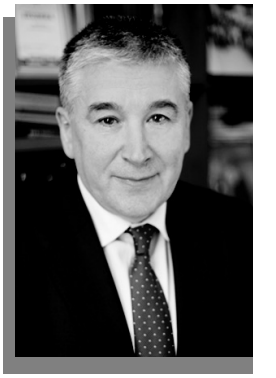

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CONSOLIDATION OF CRIMINALISTICS KNOWLEDGE IN THE CONDITIONS OF HISTORICAL TRANSFORMATIONS AND GLOBALIZATION OF THE MODERN WORLD

Consolidation of criminalistics knowledge in the conditions of historical transformations

Formation and development of criminalistics in the different countries of the world is traced in its separate directions or in forming of independent scientific disciplines – judicial toxicology, judicial chemistry, judicial medicine, judicial biology, judicial examination, judicial (criminal) psychology, judicial pharmacology[1]. There are new directions in criminalistics – criminalistics polygraphology, criminalistics advocotology, criminalistics to technology of exposition and other. In this aspect the problems of integration and differentiation of

[1] История криминалистики четко прослеживается в личностях (в деятельности ученых и практиков), посвятивших себя данной науке. Более детально см.: Энциклопедия криминалистики в лицах / под ред. В. Ю. Шепитько. – Харьков: Апостиль, 2014. – 400 с.

scientific knowledge are reflected in the sphere of counteraction of criminality. In addition, history of criminalistics is indissolubly related to becoming and development of institute of bringing in of persons, possessing the special knowledge, to administering law (expert persons).[1]

Consolidation of criminalistics knowledge passed in the conditions of different meaningful scientific processes and discovery, and also historical events influencing on development of criminalistics. The association of criminalistics knowledge is directly related to: 1) by an appearance of practical necessity of their use; 2) by the origin of the system of scientific (criminalistics) knowledge; 3) by influence of criminalistics on practice of application of its knowledge and process reverse to adopted; 4) by the necessity of educating of representatives of law application practice to criminalistics on scientific basis. Actually the question is that consolidation of criminalistics knowledge corresponds to understanding of criminalistics as science, educational discipline and practical activity. For this reason is not possible exactly to specify, when criminalistics arose up or began to be conceived. Only, what it is possible with a confidence to assert that this process began yet to appearance of the state and law, as a necessity of application of criminalistics methods historically corresponds to the necessity of renewal of justice (justice) and search of truth.

An important event in development of criminalistics is creation in 1889 in Vienna (Austrian-Hungarian Empire) of International Criminalistics Union (Internationale Kriminalistische Vereinigung). Professors came forward the founders of association is Franz von List, University of Halle-Wittenberg (Franz von Liszt, Universität Halle-Wittenberg), Gerard Antonius van Hamel, Amsterdam University (Gerardus Antonius van Hamel, Universität Amsterdam), Adolf Prins, Brussels Free University (Adolphe Prins, Université Libre de Bruxelles)[2]. In such kind of a union lasted 1924 to, as a result of the political processes related to completion of the First World War, it changed a format and continued the existence in Paris (French republic) as International Association of Criminal Law (International Association of Penal Law or Association Internationale de Droit Pénal), that operates till today[3]. Exactly on Linz (on August, 13, 1895) and Copenhagen congresses (on August, 30 1913) of International Criminalistics Union were made decision, on that further development of criminalistics depended as science and educational discipline. On Linz congress International Criminalistics Union on «purpose to do more perfect preparation of lawyers and specially in an order anymore to prepare them to practice, confesses desirable not to limit formation of their employment a criminal law… charges to the bureau to make a report about educational establishments on criminalistics

[1] Эксархопуло А. А. Криминалистика: учебник. – СПб, 2009. – С. 58.

[2] See: Landecker W. S. Criminology in Germany // Journal of Criminal Law and Criminology. – Vol. 31. – Issue 3, January-February – P. 556.

[3] See: www. penal. org/en/node/168

in different countries and about the methods of establishment of such education», on Copenhagen Congress International Criminalistics Union «expresses a wish, that this preparation in universities, not ignoring the tasks of universal education, the value of that is substantial, was sent to the study of auxiliary sciences»[1].

By the publication of series of fundamental labours («Handbuch für Untersuchungsrichter als System der Kriminalistik» (1892), «Handbuch für Untersuchungsrichter, Polizeibeamte, Gendarmen» (1893) of and other), and also efforts of International Criminalistics Union, Prof. Hans Gross (Hans Gustav Adolf Gross) obtained appearance of the name of criminalistics, forming of the system of criminalistics with its intercommunications with sciences of criminal law, and also plugging of criminalistics in the structure of teaching as university discipline. What be more, in 1913 Institute of Criminalistics (K. K. Kriminalistische Universitätinstitut) was founded them in Graz University (Austria-Hungarian empire)[2]. In the same 1913 during realization of Copenhagen congress of International Criminalistics Union by means of performances of representative of the Berlin police-office Lindenau, judge of Goal from Copenhagen, and also doctor Hans Schneickert was supported creation of institutes of criminalistics for example, created in Graz. Doctor Hans Schneickert saw his task – «in the study of causations of crime and forms of its display. Only on soil of deeper study of question, it is possible to think such institute will manage to give good examinations of criminally-technical character» [3]. Thus, by means of activity of Union were ratified and shown direction of activity of criminalistics as science, educational discipline and practical activity. The necessity of application of system knowledge on criminalistics gave possibility will take place to criminalistics as independent science and educational discipline. A just the same necessity influenced on creation the initiative criminal scientists-lawyers of separate criminalistics schools, institutes and nongovernmental public organizations.

Development of criminalistics is possible only at active research activity of separate scientists, practical workers, their initiative groups. To our opinion the special contribution to development of criminalistics Alphonse Bertillon, Rodolphe Archibald Reiss, Nikolay Sergeevich Bokarius, Edmond Locard, Raphael Samuilovich Belkin carried out together with Hans Gross. They not only moved forward criminalistics researches

[1] Люблинский П. И. Международные съезды по вопросам уголовного права за десять лет (1905-1915) / сост. и вступ. статья В. С. Овчинского, А. В. Федорова. – М.: ИНФРА-М, 2013. – С. 159.

[2] See: Криминалистика как учебная дисциплина в структуре юридического образования // Модели преподавания криминалистики: история и современность / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Х.: Видавнича агенція «Апостіль». – С. 131.

[3] Люблинский П. И. Международные съезды по вопросам уголовного права за десять лет (1905-1915) / сост. и вступ. статья В. С. Овчинского, А. В. Федорова. – М.: ИНФРА-М, 2013. – С. 136–137.

the scientific deposit far forward, carried out discoveries but also gave a push to the future researchers.

The beginning of the work of Alphonse Bertillon in 1879 as a clerk of the First bureau police of prefecture of Paris (and then – by the chief (director) of anthropometric bureau at a Parisian constabulary prefecture), marked creation of separate criminalistics direction, and after and schools. By means of educating (acquaintances) with the criminalistics methods of Alphonse Bertillon well-known criminal scientists-lawyers passed is Sir Francis Galton, Sir Edward Henry, Robert Heindle, Alexander Dmitrievich Kiselev, Sergey Mikhajlovich Potapov, Rodolphe Archibald Reiss and other[1].

Actually the Institute of criminalistics (Institut de police scientifique) of the Lausanne University, created in 1908 by a follower Alphonse Bertillon, became separate criminalistics school – by Rodolphe Archibald Reiss. The institute of criminalistics, corresponding to the founded name, exists till today, carrying the name of the creator. An institute executes scientific and educational tasks, preparing bachelors and master's degrees on the special programs [2].

Creation in 1910 at the police of Lion a criminalistics laboratory marked establishment of criminalistics school. Educating of Edmond Locard for Alphonse Bertillon, visit with the visit of Rodolphe Archibald Reiss, and also study of work of police of Berlin, Rome, Vienna, New York and Chicago was preceded it. This laboratory exists also till today as the National institute of criminalistics (Institut National de Police Scientifique), named after a creator Edmond Locard. An institute is plugged in itself by 6 laboratories and 650 employees that execute mainly practical tasks on research of proofs[3].

From the beginning of XX century all over the world were created and continue to be created the institutes related to practical expert (criminalistics) activity. In 1995 the European network of criminalistics institutes (European Network of Forensic Science Institutes) was even founded in Hague. The network of institutes puts before itself expert tasks, called to extend criminalistics knowledge and interchange experience.

Experience on the association of institutes, providing the decision of vital expert tasks to the organs of justice, is positive. Such organization of network of institutes does not take into account the necessity of practical consolidation of criminalistics knowledge, necessary to the professional participants of rule-making (legal process) – judges, public prosecutors, investigators, advocates and other. Also the scientific and educational necessities of participants of legal process are taken into account not to a full degree.

The attempt of creation of such base was already undertaken in 1929, when

[1] See: www. crimcongress. com/portretnaya/bertilon-alfons/

[2] See: www. crimcongress. com/portretnaya/rejs-rudolf-archibald/

[3] See: www. crimcongress. com/ portretnaya/lokar-edmon/; www. interieur. gouv. fr/content/download/29317/215384/file/Dossier_de_pressecentenaire. pdf

in Lausanne by efforts of Prof. Marc Bischoff, Prof. Siegfried Turkel, Prof. Georg Popp, Prof. Christiana Jacob van Ledden Hulsbosch and Edmond Locard was founded the International academy of criminalistics (International Academy of Criminalistics). Vienna was select by being a place. An academy lasted to 1939 (to beginning of Second World War). An academy put before itself tasks in decision of tasks before all scientific character, that was settled by means of realization of Assemblies and publication of official magazine, – «La Revue International de Criminalistique». Experience of this organization is positive, however optimal, because for complex development of criminalistics it is necessary to settle except scientific, yet educational and practical tasks.

By continuation of traditions of creation of public organizations, there is creation a criminalistics orientation in 1973 Polish criminalistics society and in 2001 Lithuanian society of criminalists. Positive is that these organizations are nongovernmental (non-state) organizations. They provide not only the scientific association of criminalistical but also practical. It besides able to execute educational functions.

It is in this connection necessary to pay attention to that on February, 17 2012 in Kharkov was founded nongovernmental organization International Criminalists Congress. By the aim of its activity combining effort was certain for assistance to development of criminalistics and other contiguous areas of knowledge, and also popularization of criminalistics knowledge. Experience of creation of different criminalistics public organizations prompts that consolidation of knowledge can happen only by the association of three constituents: scientific, practical and educational. As it appears us exactly non-state, that is independent, public associations are able most effectively to carry out criminalistics tasks, helping to develop to criminalistics out of political processes on the achievement of aims of justice.

Creation of criminalistics institutes, nongovernmental public organizations of national and international level, teaching of criminalistics as educational discipline in universities in a historical context demonstrates science ability steadily to exist and develop in the conditions of different historical, global character of processes that put to it new aims and do possible to realize tasks taking into account scientific and technical progress. However it is here needed to mark circumstance that science, frequently, not only acquires new possibilities, but in a great deal throws away opportunity in development of science and realization of discovery. The negative examples of influence of globalization on development of criminalistics it was been: the First World War – International Criminalistics Union (1924) stopped activity; Second World War – International Academy of Criminalistics (1939) ceased to exist. Thus, possibilities of activity of scientific criminalistics initiative groups operating out of governments were lost by then, that did their activity free and independent. Therefore actual and symbolical is the speech pronounced by a professor Gerard Antonius van Hamel on parting dinner, arranged by

a local committee in the enormous apartment of the Hamburg zoological garden on occasion of Hamburg convention (1905) of International Criminalistics Union. A professor specified that «Hamburg by it as though symbolizes the tendencies of Union history and modern activity and in general to every scientific collective activity. In the political history Hamburg is the carrier of ideals of freedom and independence and at the same time it is closely bound by cultural and political connections with all empire. Does not science must exactly such character to be self-sufficient, free and independent and at the same time to form part of single unit of life? By the brave initiative in trade and marine businesses the Hamburg citizens showed an example and for research workers. Together with them they aspire to the association of cultural humanity the bonds of mutual interests and mutual respect»[1].

Integration of criminalistics in the conditions of globalization of the modern world

Developments of criminalistics, its tendencies are conditioned by influence of world dataflow, by integration of knowledge about possibilities of counteraction of criminality by means of scientific and technical achievements of modern society. Generality of scientific knowledge becomes objective basis of globalization of science. The modern stage of development of civilization it is accepted to name time of informative society, in that science can be presented as the world informative process conditioned by the epoch of globalization. One of main world the tendency of the newest time the process of globalization became[2].

Science is the special type of cognitive activity, aimed at making of objective, system organized and reasonable knowledge about the world. Permanent aspiring of science to expansion of the sphere of the studied objects irrespective of the real possibilities of their mass practical mastering, comes forward a certain systemforming sign grounding it's another descriptions, what distinguishes science from ordinary cognition[3]. R. S. Belkin writes that science is a living, dynamically developing organism. As every social phenomenon, product of the epoch, science tests revolutionary shocks, and the protracted process of evolutional development experiences[4]. In the conditions of globalization the most general lines are inherent criminalistics: 1) unitization of criminalistics knowledge; 2) technolization and informatization of postulates in criminalistics; 3) expansion of sphere of influence of criminalistics.

[1] Люблинский П. И. Международные съезды по вопросам уголовного права за десять лет (1905-1915) / сост. и вступ. статья В. С. Овчинского, А. В. Федорова. – М.: ИНФРА-М, 2013. – С. 37–38.

[2] Блинов А. С. Национальное государство в условиях глобализации: контуры построения политико-правовой модели формирующегося глобального порядка. – М.: МАКС Пресс, 2003. – С. 34.

[3] Энциклопедия эпистимологии и философии науки. – М.: «Канон+» РООИ «Реабилитация», 2009. – С. 560, 561.

[4] Белкин Р. С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики. – М.: Изд-во НОРМА-ИНФРА-М, 2001. – С. 68.

Scientific cognition supposes creation and functioning of international collectives, forming of scientific (including criminalistics) associations. H. Malevski marks that international cooperation of criminal lawyers must lean not only against a «mechanical» exchange information but also joint researches, «international division of labour» in criminalistics researches, processes of rapprochement and integration of scientific theories, conceptions, concepts.[1]

In the global world there is the natural necessity related to the necessity of exchange by ideas and results of scientific researches. To it growing interest testifies, especially lately, in new industry of knowledge – scientific-metrical, to the quantitative analysis of world dataflow, different family to the international scientific-metrical databases (for example, Scopus, Web of Science, Webometrics and other) and corresponding editions. Scientific-metrical databases analyse publication activity of edition. In the thematic databases of type of Scopus, PubMed, elibrary. ru is present and accessible to the readers output these articles, resume, and quite often list of literature and reference to the web-site of publishing house[2].

In a modern kind criminalistics is the integral system of scientific knowledge. Their accumulation resulted in that criminalistics outgrew the potential and went out outside «constabulary science» dealing with or «science dealing with investigation of crimes». Facilities, receptions and methods of criminalistics, are successfully used in other spheres (operatively-search, judicial, public prosecutor's, expert, advocate activity). T. S. Volchetskaya underlines justly, that the last years all more often the attempts of adaptation of criminalistics scientific works began to appear not only in the different aspects of criminal trial but also in other types of rule-making, in legal and another aims… The question in this case is about adaptation of positions of criminalistics to new, unconventional for this science, to the objects: about the specific usage of criminalistics science in the civil, arbitrage, administrative rule-making, on custom business, in activity of notary and etc.[3]. Confirmation of this thesis is an address of the Lithuanian colleagues to research of criminalistics (criminalistical meaningful) information in an administrative process[4].

Criminalistics is on the nature associate with natural and technical sciences.

[1] 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. Яблоков, В. Ю. Шепитько. – Харьков: Апостиль, 2014. – С. 62, 63.

[2] Тихонкова И. А. DOI (digital object Identifier) – обязательный элемент современного научного издания // Наука України у світовому інформаційному просторі. – Київ: Академперіодика, 2013. – Вип. 8. – С. 69.

[3] Волчецкая Т. С. Перспективы и пути развития современной криминалистики // Современное состояние и развитие криминалистики: сб. науч. тр. / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2012. – С. 7, 14.

[4] Bileviciute E., Bileviciene T., Kurapka K. Application of criminalistics information in administrative procedure // Criminalistics and forensics examination: science, studies, practice. – 2014. – Chapter I. – P. 22–31.

Its origin is conditioned by introduction of achievements of naturally-technical sciences in practice of fighting against criminality (physics, chemistry, biology, psychology, medicine, mathematics and other). The paradigm of criminalistics changes, its maintenance does not remain unchanging. Development of science, including 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. Replacement of scientific paradigm and makes essence of scientific revolution»[1].

Development and forming of criminalistics knowledge are conditioned by scientific and technical progress of modern society. Informatization of social environment resulted in «technolization» of criminalistics, development and introduction informative, digital, telecommunicational and other technologies. K. Krassovski specifies that no doubt a stream of information and effective communication means are basis of successful work of law enforcement authorities, that also plays a key role providing of progress and efficiency of inquisitional process at all stages of the development. The recent decade of the technological opening in the personal communications provides new possibilities for an exchange by information that, maybe investigated further for the increase of efficiency of inquisitional process[2].

Information technologies are the new category of criminalistics, applying to take the proper place in the structure. Lately the use of technological approach comes true not only in a criminalistics technique or judicial examination but also in criminalistics tactics and methodology (suggestion of investigational or criminalistics technologies, technologies of realization of separate investigational (search) actions). In addition, a certain tendency is «possibility of the use of the information technologies already worked out in criminalistics in other spheres of law application and another types of legal activity»[3]. N. P. Yablokov underlines that as base elements of methodology of the use of criminalistics technologies of law application the legal adjusting and informative filling as the closely associated manner and matter of the indicated activity were certain in the different spheres of legal activity. Connection of these elements has different displays, including in character of transition from one connection in other at the decision of tasks of law

[1] Белкин Р. С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики. – М.: Изд-во НОРМА (Изд. группа НОРМА-ИНФРА-М), 2001. – С. 14.

[2] Krassowski K. Perspectives regarding flow of information in the framework of investigative process // Criminalistics and forensic examination: science, studies, practice. – 2014. – Chapter I. – P. 92–101.

[3] Яблоков Н. П. Основные тенденции развития криминалистики как науки и учебной дисциплины в современной России // Современное состояние и развитие криминалистики: сб. науч. тр. / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2012. – С. 56.

application by means of facilities of criminalistics[1].

«Informatization» of criminalistics stipulates the usage of new scientific categories and concepts also. V. Ya. Koldin writes, that the special role in providing of reliability of evidential information has perfection of concept vehicle of evidential law in connection with introduction in practice of law application of information technologies, creation of bases and banks of data, functioning of that is possible only on the basis of strict unambiguity of the terms used in the corresponding system. Proving, as system of law application, in the conditions of contention process produces especially strict requirements to the cleanness and unambiguity of the used base concepts and terms[2].

All anymore the question is about the necessity of realization of the special researches of the newest technique (smartphones, plane-tables, notebooks, subnotebooks of and other), and also corresponding software. It is related to that computer technique, services of global network the Internet, mobile communication, the systems of videosupervision become the inseparable components of everyday life of man[3]. The problem of the usage of information technologies and newest technical «product» in criminalistics aims can be considered as global.

In new terms criminalistics is from the study of traditional tracks – force to pass to research of voice, electronic, odorologycal or genome tracks. Methods, receptions and means of work also with such tracks, order of their collecting, research and fixing are changed. There are revolutionary transformations also and in the sphere of the usage of documents. Along with traditional writing documents, an all greater value is acquired by electronic. Objective reasons of development of science and technique result in forming of new industries of criminalistics technique.

On criminalistics changes what be going on in the legal sphere, «revision» of traditional institutes of criminal law and process, render influence. This problem acquires the special actuality in connection with the necessity of harmonization of criminal-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 advocotology», «criminalistics providing of activity of

[1] Яблоков Н. П. Указ. соч. – С. 57.

[2] Колдин В. Я. Криминалистические решения в системе права // Современное состояние и развитие криминалистики: сб. науч. тр. / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2012. – С. 25.

[3] Кукарникова 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.

public prosecutor», «criminalistics constituent of court».

Changes in a legal sphere substantially influence on criminalistics. There is bilateral connection of law and criminalistics. First of all the question is about the global problem of correlation of «freedom and safety», about substantial changes in legal regulation in a criminal law and process, and also presence of the real facilities of protection of human and citizen and prevention of danger rights with the use of all arsenal of criminalistics. H. Malevski specifies justly, that the ultimate goal of any science is cognition of the surrounding world and on this basis, realization of existential aims and tasks of man. Criminalistics must assist strengthening of safety of man and his environment by the scientific providing of prophylaxis, opening and investigation of crimes[1]. G. Kedzierska marks that criminalistics as science was needed for legal realization of judicial activity, replacement of inquisition process the judicial listening, requirement of wide consideration of rights for personality[2].

Criminalistics executes, in certain sense, providing function criminal or another legal (judicial) process. Development and realization of criminalistics facilities depend on their certain consumer (investigator, investigational judge, public prosecutor, defender, judge and other), form of criminal procedure, set order of realization of investigational (search) and judicial actions.

In this relation it is necessary to pay attention to the tendency related to so-called «policizing» of criminal procedure. The example of this tendency in Ukraine is suggestion in Criminal Procedural Code of wide enough arsenal of secret investigational (search) actions that on the amount exceed the list of traditional investigational actions. In addition, Ukraine contained a militia there is more than in 2,5 time that it is accepted in the world (744 on a 100 thousand population)[3]. World middle index – 300 policemen on a 100 thousand population and on recommendation of the UNO – 222 policemen on a 100 thousand population. Presently in Ukraine reform of law enforcement authorities and reduction of amount of militia (to the police) come true to the level 150–162 thousand persons[4].

A few words of the relatively legal providing of vital functions of population and participants of trial. H. Kolecki specifies that actual realization of operating in Polish criminal procedure principle of irreconcilablity requires, that for the estimation of rightness of realization of criminalistics actions law enforcement authorities was prepared also advocate. It testifies in behalf on that yet

[1] 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. 58.

[2] Кендзерска Г. Изучение криминалистики в Польше // Модели преподавания криминалистики: история и современность: сб. науч. тр. / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2014. – С. 99.

[3] Данные приведены на 2012 г.

[4] See: www. rbc. ua/rus/news/mvd-v-2015-g-planiruet-sokratit-chislennost.

on the stage of educating on the faculty of law a future public prosecutor, judge or advocate, became familiar with bases of «classic» criminalistics[1].

Presently in more than 4 million advocates are the world counted that at providing of legal aid must use facilities of criminalistics. In this number the approximately 850 thousand of the USA, 450 thousands from countries EU, 400 thousands advocates are included from India, 300 thousands from Brazil and approximately 1 million 500 thousands from another countries. From data of EU, advocates in Great Britain – 123 500, in Norway – 5 770, in Sweden – 4 271, in Finland – 1 735, in Estonia – 447, in Latvia – 833, in Lithuania – 2 835, in Poland – 21 500. An amount of advocates is in Ukraine (on February 2012) – 31 898. Middling world indexes: 312 advocates on a 100 thousand population.

The tasks of criminalistics in modern global terms are conditioned by the necessity of the system criminalistics providing of corresponding organs of law application, functioning in the different countries of the world and processes of exposure, discovery, and investigation, prevention of crimes sent to optimization, and also assisting renewal of justice. All trial must be based on the last achievements of science and technique, front-rank technologies of accumulation and information transfer. The consolidation of criminalistics knowledge, conditioned by the integrative processes of world community, is traced exactly in these terms.

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[1] Колецки Х. Современное состояние криминалистики как университетской дисциплины в Польше // Модели преподавания криминалистики: история и современность: сб. науч. тр. / под ред. Н. П. Яблокова, В. Ю. Шепитько. – Харьков: Апостиль, 2014. – С. 9.

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TECHNOLOGIES OF CONSTRUCTION OF SEPARATE CRIMINALISTICS METHODOLOGIES OF CRIMES' INVESTIGATION

A modern scientific paradigm in relation to separate criminalistics methodologies of crimes' investigation foresees determination of the conceptual going near «technology of creation» these methodologies. In fact, lately in criminalistics literature attention all more often applies on a process, terms and facilities of forming of separate methodologies of crimes investigation. In particular, V. O. Obrazcov, speaking about «methodology of creation of methodologies», marks the necessity of receipt of answers for such questions: what methodologies it is expedient to form; what methodological and empiric basis certain methodologies must be constructed on; what a structure and maintenance of certain methodologies that is addressed investigator to practice must be[1]. Yu. P. Garmaev and O. F. Lubin assert categorically, that «technology of creation of methodologies» is absent for today in general[2].

As given out, one of possible directions of decision of this problem there is a presence of the only, universally recognized and nonconflicting classification of methodologies of crimes investigation, as, on our persuasion, to the different classification levels of these methodologies different technological approaches can offer on their formation (construction).

Among criminalistics methodologies of crimes' investigation, it is expedient

[1] Образцов В. А. Общие положения криминалистической методики расследования / В. А. Образцов // Криминалистика: учебник / под. ред. В. А. Образцова. – М., 1995. – С. 374–375.

[2] Гармаев Ю. П. Проблемы создания криминалистических методик расследования преступлений: теория и практика / Ю. П. Гармаев, А. Ф. Лубин. – СПб.: Юрид. центр Пресс, 2006. – С. 38.

to distinguish such levels: 1) base methodology; 2) simple (single) methodologies to the specific, subspecies (micromethodic); 3) complicated (group) methodologies to patrimonial, intergeneric, complex. In offered approach the hierarchicalness of location of the marked varieties of methodologies, and presence of two opposite tendencies is clearly enough traced in relation to their construction of differentiation and integration of scientific knowledge.

Base criminalistics methodology of crimes' investigation, in an offer interpretation, is examined as an universal form (model) that serves as a reference-point for development of more subzero levels of methodologies. The use of term «base methodology», to our opinion, is more logical and reasonable, than including is to the classification constructions of «generals of criminalistics methodology», as it took place in separate literary sources[1].

Simple (single) criminalistics methodologies unite specific and subspecies levels. From offer classification levels most withstand, cored is a specific level after that and the system of separate criminalistics methodologies was before formed, as it is based on criminal and legal classification of crimes. Recommendations, stated in specific criminalistics methodologies of crimes' investigation, have the materialized character, touch the certain syllables of crimes, expose the mechanism of their doing, give advices from forming of evidential base, tactics of realization of separate inquisitional actions and tactical operations, realization of prophylactic measures an investigator.

Except specific another variety of simple (single) methodologies there are criminalistics methodologies of subspecies of crimes' investigation. They legally can be considered the product of differentiation of criminalistics recommendations, when subspecieses or varieties are distinguished among the crimes of one kind after criminalistics by meaningful signs. So, murders can in criminalistics aims be classified after certain criminalistics by meaningful signs on subspecieses, for example, after a subject, method, terms, place of perpetration. It speaks about murders that, or foreseen by norms of Criminal Code of Ukraine (premeditated murder committed on the order – p. 11 part 2 art. 115), or will overstep the limits of the corresponding article of Criminal Code not enumerated in it, but have substantial criminalistics signs, for example, murders committed on religious soil, in the process of opposition of the organized criminal groups, with the aim of laying hands on the dwelling-place of citizens, on a railway transport, drivers of cars, murder with adaptation for stage and others like that.

Taking into account marked a task appears in relation to development of methodologies of investigation of narrower circle of crimes of one kind, so-called methodologies of subspecies, or micromethodic. As specified in criminalistics literature, «exactly these methodologies approach scientific recommendations to the queries of practice, allow building the clear algorithms of behav-

[1] Бахин В. П. Криминалистическая методика: лекция / В. П. Бахин. – Киев, 1999. – С. 21–22.

iour of investigator in that or other situation. The table of contents and structure of methodologies of subspecies (micromethodic) represent in the most concentrated kind criminalistics meaningful information on certain criminal or inquisitional situations. Only in micrometodics most full statistical indexes can be presented in relation to cross-correlation dependences between the elements of criminalistics description of certain subspecies of crimes»[1].

In parallel with differentiation, there is integration of criminalistics methodologies that represent to the not kind, but other features of commission and investigation of the united types of crimes. It speaks about group (complicated) criminalistics methodologies to the varieties of that taken to patrimonial, intergeneric and complex methodologies.

A group level foresees possibility of association of a few types (kinds) of crimes in only methodology of their investigation based on inherent to these crimes criminalistics meaningful signs. As notices D. O. Solodov, these methodologies are constructed something on other principle, in basis of that lie criminalistics meaningful signs, copulas and dependences[2]. It speaks first about such signs, as a subject of crime, victim of crime, crime, form of organization scene and facilities of criminal activity, condition of commission of crime, time of commission of crime and place of its investigation, presence or absence of the special facilities of commission of crime and others like that. Based on the enumerated signs methodologies of investigation of the crimes accomplished minor are formed, by person's slipshod psyche, foreign citizens, recidivists, by the organized criminal groups, in the places of imprisonment, on a transport, in the sphere of entrepreneurial activity, at the grant of medical services and other.

The examined level is relatively new in the structural construction of methodologies of investigation of separate types of crimes, appearance of that is fully related to introduction of criminalistics classification of crimes. Thus it is necessary to notice that attitude of scientists and practical workers toward this level of separate methodologies of investigation is ambiguous. So, supporters of this classification level[3], acceding to that specific concepts are more rich in content comparatively with patrimonial, that groups criminalistics alike types of crimes are characterized the less number of the special signs, than separate kinds or subspecieses of crimes, assert, that development of recommendations of very high level ab-

[1] Синчук В. Л. Розслідування вбивств: шляхи вдосконалення: монографія / В. Л. Синчук / за ред. д-ра юрид. наук, проф. В. А. Журавля. – Х.: Харків юридичний, 2005. – С. 73.

[2] Солодов Д. А. Основания структурирования и виды частных криминалистических методик / Д. А. Солодов // Воронежские криминалистические чтения: сб. науч. тр. / под ред. О. Я. Баева. – Воронеж: Изд-во Воронеж. гос. ун-та, 2005. – Вып. 6. – С. 221.

[3] Абдумаджидов Г. А. Типовая криминалистическая характеристика групповых преступлений / Г. А. Абдумаджидов, В. М. Быков // Алгоритмы и организация решений следственных задач: сб. науч. тр. – Иркутск: Изд-во Иркут. ун-та, 1982. – С. 59–62.

stractions that are group methodologies, does not diminish them practical meaningfulness. «Cognizing the signs of class, – marks V. O. Obrazcov, – we cognize the signs of its parts the same, and reporting about them to the investigator, we inform it of signs of subclass. And exactly herein main rational grain of problem of development and introduction consists in inquisitional practice of recommendations that contain general methodologies of investigation criminalistics alike types of crimes»[1].

At the same time, in such methodologies information is represented enough high level of abstraction that touches criminal activity of separate categories of subjects mostly. This information gives only general reference-points in relation to its application. Methodologies have a mainly heuristic value, their recommendations used for the decision of certain tasks of investigation, for example, version in relation to possibility of commission of murder will be checked up a person that has psychical defects on the basis of recommendations, the stated in corresponding group methodology. At the same time it is necessary to take into account that task investigational become complicated that it forces in all totality of data to find those information that belong to the article of its research (on condition that these information is in this methodology), for example, in group (intergeneric) methodology of investigation of useful-violent crimes to find information in relation to organization of process of investigation of such variety of criminal displays as murder[2]. In connection with it see a fit to support opinion of V. L. Sinchuk in relation to that to patrimonial and intergeneric methodologies of investigation of crimes as have educational models right on existence, but from the point of view of necessities of judicial and investigational practice of their application it is hardly possible to admit optimal[3].

In science, the new variety of methodologies appeared lately – so-called complex[4], in other words formed simultaneously on criminal and legal and criminalistics criteria. It speaks about creation of new methodologies or modernisation of existent typical recommendations in complex. To their number it is possible to take methodology of investigation of mercenary crimes in the sphere of entre-

[1] Образцов В. А. Криминалистическая классификация преступлений / В. А. Образцов. – Красноярск: Изд-во Краснояр. ун-та, 1988. – С. 63.

[2] Тищенко В. В. Корыстно-насильственные преступления: криминалистический анализ: монография / В. В. Тищенко. – Одесса: Юрид. лит., 2002. – 360 с.

[3] Синчук В. Л. Розслідування вбивств: шляхи вдосконалення: монографія / В. Л. Синчук / за ред. д-ра юрид. наук, проф. В. А. Журавля. – Х.: Харків юридичний, 2005. – С. 70.

[4] Гармаев Ю. П. Разработка комплексных методик расследования как перспективная тенденция развития криминалистических методических рекомендаций / Ю. П. Гармаев // Правоведение. – 2003. – № 4. – С. 25–46; Гармаев Ю. П. Комплексные методики расследования: сущность и значение / Ю. П. Гармаев // Криминалистика: проблемы методологии и практики расследования отдельных видов преступлений: сб. науч. ст. – Н. Новгород: НЮИ МВД РФ, 2003. – С. 37–44.

preneurial activity[1], in the sphere of outwardly-economic activity, in the sphere of credit-financial and bank[2] and other. In relation to the adopted groups, then between crimes that is accomplished, there are the real intercommunications, that is why and their investigation needs certain complex approaches. A. V. Shmonin specifies justly, that the special value on the modern stage is acquired by development of integration (complex) separate criminalistics methodologies (technologies of investigation of crimes) of relative crimes skilled after totality of committed the criminal forming (by the organized groups, criminal concords) often on a few objects. In a criminal law, this problem is determined as multiplicity of crimes, which appears in different forms setting of that by means of criminalistics methods and facilities presents one of major tasks. Indisputably, development of such methodologies (technologies) does not taken to their ordinary drafting. It must show a soba qualitatively new system of criminalistics recommendations, that takes into account the typicalness of combination of relative criminal acts, their consequences, and typical inquisitional situations of every stage of previous (pre-trial) investigation[3].

The analysis of materials of criminal realizations about crimes committed with the use of subjects of economic activity grounded to conclude that by this act «intellectuality», good organization, drawing on accomplishments of the newest technologies, is inherent A. F. Volobuev. Thus, organized criminal groups accomplish no single, but totality (complexes) of different, but relative one aim of crimes, that testifies to existence especially of developed technologies of criminal activity. So, occupation of stranger property with the use of enterprises is appropriately related to the commission of such crimes, as an imitation of documents, fictitious enterprise, twisting of computer information, legalization (washing) of the property obtained by a criminal way, and some other[4].

In relation to the adopted classification levels, then they to a full degree represent the possible going near technology of forming (creation, construction) of criminalistics methodologies. So, one of approaches that after that separate criminalistics methodologies as scientific product are developed on the base of results of generalization of judicial and investigational practice is considered, and thus, are considered most optimal, effective (for example, development of criminalistics description of subspecies with the detailed analysis of its elements, exposure of cross-correlation dependences between that is possible

[1] Волобуєв А. Ф. Наукові основи комплексної методики розслідування корисливих злочинів у сфері підприємництва: автореф. дис. … д-ра. юрид. наук: 12.00.09 А. Ф. Волобуєв. – Х., 2002. – 42 с.

[2] Корнилов Г. А. Расследование преступлений, совершаемых в финансово-кредитной сфере / Г. А. Корнилов. – М.; Якутск: Изд. СО РАН, Якутский филиал, 2002. – 252 с.

[3] Шмонин А. В. Методология криминалистической методики: монография / А. В. Шмонин – М.: Юрлитинформ, 2010. – С. 378–379.

[4] Волобуєв А. Ф. Проблеми методики розслідування розкрадань майна в сфері підприємництва / А. Ф. Волобуєв. – Х.: Видво Ун-ту внутр. справ, 2000. – С. 51–80.

only on the base of considerable empiric material). Exactly criminalistics methodologies of subspecies most close to the necessities practices, because exactly at such level possible formulations of certain tasks of investigation and construction of the corresponding programs and algorithms of their decision. What be more, exactly these typical programs of investigation and algorithmic charts of actions of investigator present basis of corresponding criminalistics methodology[1].

At the same time, it follows to take into account warning expounded in criminalistics literature in relation to the marked level of criminalistics methodologies. So, G. Yu. Jirnyi marks that not «in all cases necessarily to develop methodical recommendations from investigation of varieties of crime as independent methodology, as their features not always affect substantially electing and application of necessary criminalistics facilities, receptions and methods. The tasks of investigation decide in accordance with recommendations of specific separate criminalistics methodology»[2]. That is why beside the purpose and unreal to try to build micromethodic of investigation of sexual murders in relation to such classification criteria, as a presence of previous conviction in a criminal, orientation of intention of maniac, method of concealment[3] or murders that is accomplished by the organized criminal groups, to such grounds as a situation of commission of murders, aim of murder, instruments of murder and others like that[4], because such the methodologies on the maintenance in a great deal gather and will duplicate each other. In practice every crime is determined after a few classifications and it is represented in maintenance of certain separate criminalistics methodologies. Thus into consideration undertake only those criminalistics meaningful signs that substantially influence on the basic component commissions of crime, that is exactly they stipulate the features of commission of crime and possibility of the use of information about it for optimization of process of investigation[5].

It is resulted convinces once again, that only totality of signs gives an opportunity to distinguish such separate methodology that would have a certain difference from other, that is the criminalistics description, typical versions, typical inquisitional situations, algo-

[1] Косарев С. Ю. История и теория криминалистических методик расследования преступлений / С. Ю. Косарев / под. ред. В. И. Рохлина. – СПб.: Юрид. центр Пресс, 2008. – С. 351.

[2] Жирний Г. Ю. До питання про класифікацію окремих криміналістичних методик / Г. Ю. Жирний // Актуальні проблеми криміналістики: матеріали міжнарод. наук.-практ. конф. (Харків) 25–26 верес. 2003 р. – Х.: Гриф, 2003. – С. 104.

[3] Старушкевич А. В. Особа злочинця та потерпілого як елемент криміналістичної характеристики сексуальних убивств: навч. посіб. / А. В. Старушкевич. – К.: НВТ «Правник» – НАВСУ, 1997. – С. 16–18.

[4] Здоровко С. Ф. Розслідування вбивств, що вчиняються організованими групами (типові тактичні операції): монографія / С. Ф. Здоровко. – Х.: Гриф, 2004. – С. 16–18.

[5] Бахин В. П. Криминалистическая методика: лекция / В. П. Бахин. – Киев, 1999. – С. 20.

rithms of actions of investigator and others like that. Moreover, exactly totality of these signs are stipulated by the decision of corresponding level of criminalistics methodology that is distinguished.

Modern stage of development of criminalistics, activation of its prognostic function predetermine possibility of application of other technological approach, after that methodologies of investigation of certain categories of crimes are created mainly on the basis of scientific developments. In such cases, science passes ahead practice, compensates the shortage of necessary empiric material or summarizes existent recommendations on typical signs, inherent to one not type of crimes, but their whole group. It speaks foremost about such scientific abstractions, as patrimonial and intergeneric criminalistics methodologies. The point is that these levels of methodologies are formed with the aim of grant of recommendations from investigation of crimes that did not yet purchase widespread practice of application, are not representative enough for generalization of practice of their investigation or have latent character. Even criminal scientists-lawyers cannot expect under these circumstances, while practice will accumulate thousands of legal precedents, their generalization and forming of corresponding recommendations will begin before. Opposite, depending on prognostic vision of credible ways of development and structural changes of criminal displays, international experience of fighting against them, scientists with passing provide must investigative agencies necessary methodical recommendations. Such scientific and prognostic facilities are used exactly for this purpose, as an analogy, extrapolation, modelling.

The special variety is presented by group (patrimonial, intergeneric) methodologies investigations of crimes, that is attributed to the digit of criminal and legal short stories, for example, crimes against freedom, honour and dignity of person; crimes in the field of the use of electronic machines (computers), systems and computer networks; crimes in the sphere of the grant of medical services and other. Exactly to the mechanism of creation of such methodologies inherent tendency – from general to separate, when in default of sufficient volume of empiric data on the basis of scientific prognosis the generalized (group) methodology that is a base for the further forming of specific methodologies is built, as necessities of practice, accumulation of empiric material, advanced experience objectively will put before scientists a task in relation to necessity of development of specific, and on occasion and criminalistics methodologies of subspecies. So, in the second Division of Special part of Criminal Code of Ukraine there is the presented group of crimes that is accomplished at the grant of medical care. In their number such specific crimes are included: improper implementation of professional duties, that entailed the infection of person the virus of immunodeficit of man or other incurable infectious disease (Art. 131); ungrant of help to the patient by a medical worker (Art. 139); improper implementation of professional duties

by a medical or pharmaceutical worker (Art. 140); violation of rights for a patient (Art. 141); illegal realization of experiments above a man (Art. 142); violation of legal order of transplantation of organs or fabrics of man (Art. 143); violent donorship (Art. 144). Majority from the enumerated syllables of crimes arose up only with the acceptance of operating Criminal Code of Ukraine, and to the volume, does not have necessary empirical of data for forming of specific methodologies. In the same time judicial and investigational practice tests requirements in corresponding recommendations that stimulated a necessity for development of group methodologies of investigation of these crimes. Undoubtedly, on maintenance they will differ from specific methodologies. So, in criminalistics description of group methodologies there cannot be the cross-correlation dependences presented at statistical level between its elements, not certain percent indexes are used in it, but a concept as more «often» in all, more «reliable all». In addition, such the recommendations make sense and can be successfully use during investigation of certain criminal display.

Consider it clever also to expound and certain disturbance and to mark that next to the positive tendency of creation of group methodologies of investigation of crimes is seen and negative, foremost when specific methodologies unite enough high degree of development. On this occasion want to notice that such association is in general inadvisable, and it is possible even if, then at certain terms. Firstly, specific methodologies must necessarily mother important general line. Secondly, a process of association must be justified and have certain limits, that is to create such configurations that have an exceptional practical value, and limited to the special criminalistics classification criterion. In opposite cases such scientific abstractions will not have a corresponding theoretical and practical value.

Thus, totality, complexity criminalistics meaningful signs are grounds for the decision of question in relation to the necessity of selection and development of different levels of criminalistics methodologies of investigation of separate categories of crimes. In turn, different classification levels predetermine differential goings near technology of construction these methodologies, giving to them certain maintenance and form.

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CRIMINOLOGICAL PROPHYLAXIS OF CRIMES: THE CONCEPT, THE SPECIFICS, THE STRUCTURE, THE OBJECT OF PRECAUTIONARY INFLUENCE

Problem setting. Crime (from Latin *crimen*) – is one of the oldest existing forms of social life, despite the fervent desire of the overwhelming part of humanity to get rid of it. This is a complex social phenomenon, the causes and conditions of which are connected bothwith the genetic predisposition of people to deviations, including criminal behavior, and drawbacks and imperfections of the society itself and the degree of its ability to form a law obeying person. Over the course ofhistory, the mankind has been gradually convinced that inappropriate treatment of the offender and his body (cruel, inhumane punishments) is not appropriate for the efficient crime prevention. It is necessary to change the spiritual condition of an individual which is possible through the elimination of various stimuli that increase passions and lead to irrational, destructive behavior. So, penalties are not enough for crime prevention. Despite the importance of the latter, it is obvious that they are limited due to incomplete affecting the causes and conditions of crimes. There has emerged an understanding (since ancient times) that a more or less prospectivecrime prevention requires not only special, including penal, but also common legal measures to improve public relations, law, culture, education, welfare, the person, eliminating (if possible) negative phenomena and processes in society, implementing legality and justice.

Recent research and publications analysis. The idea of connections between the law, justice, legality and crime prevention was given significant development in the works of particular phi-

losophers and educators in XVII–XIX centuries: Thomas More, Jean Jacques Rousseau, Tomaso Campanella, Jean Meslier, Jeremy Bentham, Montesquieu, Voltaire, Cesare Beccaria, Henride Saint-Simon, Charles Fourier, Robert Owenetal. Those times the science was complemented with the concept of the Legal State, in which the law is a powerful regulator of social relations and the means for resolving societal contradictions [1]. The theory of counteracting crime primarily through its prevention was enriched with new content through research of national and foreign criminologists, as well asthe scientists of other disciplines during XIX–XXI centuries. These works laid the philosophical, sociological, moral, psychological, social, anthropological, organizational, administrative, economic, educational, penal and other basics of crime prevention and its individual aspects (Yuri Antonyan, André-Michel Guerry, Adolphe-Quetelet, Ceasre Lombroso, Dmitri Drill, Emile Durkheim, Gabriel Tarde, Enrico Ferri, RaffaeleGarofalo, BohdanKystyakivskyy, Karl Marx, Friedrich Engels, Vladimir Lenin, Mikhail-Gernet, AlekeiGertsenzon, Edwin Sutherland, Ninel' Kuznetsova, Vladimir Kudryavtsev, Aleksandr Sakharov, IhorKarpets, Anatoly Zelinsky, Viktor-Dryomin, OleksiyTulyakov, OleksiyLytvynov, Anatoly Zakalyuk, VasylShakun, BohdanGolovkinet al.). However, there hasn't appeared any works devoted literally to the problem of criminological prophylaxis as a part of the specialcriminological crime prevention yet.

Paper objective is providing a thorough analysis of a range of issues, related to the criminological prophylaxis of crimes as an essential part of special criminological crime prevention.

Paper main body. Consequently, crime prevention –is a societal state policy aimed at overcoming criminally dangerous contradictions in social relations with a view to their positive resolution and the gradual displacement (so-called common social prevention) and special anticipatory practice of counteracting the formation and implementation of criminal offenses at various stages (special-criminological prevention).

Theory and practice of developing and implementingthe measures and practices of influencing the phenomena and processes that cause or may cause activation of societal criminogenic potential in the form of criminal acts and preventing their commitment at various stages of criminal behavior, that is at the stage of criminal motivation, the emergence of intent to commit crimes, preparation of a crime and attempted crime, is named special criminological prevention. Considering the above, we can conclude that the task of specialcriminological prevention is both preventing the determining negative phenomena and processes, that determine criminal acts, limiting their spread and scope, as well as removal and operative (coercive) reaction on forming and development of criminal behavior. In this regard, special criminological prevention is being carried out in three main areas: a) criminological prophy-

[1] Запобіганнязлочинності (теоріяіпрактика): навч. посібник / В. В. Голіна. – Харків: Нац. юрид. академіяУкраїни, 2011. – С. 14–18.

laxis; b) debarment of crimes; c) suppression of crimes [1].

Criminological prophylaxis is the most complicated and yet sophisticatedin developing and implementing precautionary activity. Despite the considerable interest of researchers and practitioners to the problem of prophylaxis of crimes, many theoretical questions have to be examined. First of all, it concerns the structure of prophylaxis, proper content understanding of which is of not only theoretical but practical importance as well. The matter is that some scientists do not want to distinguish this particular criminological direction in combating crime and use the term 'prophylaxis' as a synonym for 'prevention'[2]. In our view, it's like that, e. g., if in medicine, scientists and practitioners would have shrugged offmedical prophylaxis, which gave humanity crucial means of maintaining health, surviving and treatment of dangerous diseases (immunizations, vaccinations, hygiene, vitaminsetc.).

Thus, prophylaxis means taking actions that are able to prevent the realization of undesirable events, occasions, connections, consequences of something. Timelyinterference as a sort of objective activity includes the measures for advancing the origin or use for criminal purposes criminal phenomena and processes, limiting the spread and reduction actions of already existing ones, eliminating them, along with protection of persons and other social (material and spiritual) values and benefits from possible criminal attacks. Depending on which projected or existing criminogenic phenomena and processes the prophylactic activity is focused at, on the criterion of professionalization and socialization it could be presented as certain types of criminological prophylaxis: a) proactive prophylaxis; b) restriction; c) elimination; d) protection. In spite of some researchers' objections, we believe that the present practice of combating crime requires exactly this structure of criminological prophylaxis, as the latter enables crystallizing the types of activities that demand specific skills, training, knowledge, that is what the practice does not address properly attention to and, frankly, is not perceived by the state and society. It's hard to disagree with A. Zhalinskyi, who pointed out that the professionalization and specialization in the field of crime prevention consists of, firstly, more specific, including criminological, knowledge, training, founded on the basis of Criminology; secondly, of expanding the range of officials for whom this activity is major; thirdly, new activities that require specific knowledge, skills and abilities are being formed within the prophylaxis [3].

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[1] Правова система України: історія, стан, перспективи: в 5 т. – Харків: Право, 2008. – Т. 5: Кримінально-правові науки. Актуальніпроблемиборотьбизізлочинністю в Україні / за заг. ред. В. В. Сташиса. – С. 357–400.

[2] Давиденко Л. М. Противодействие преступности: теория, практика, проблемы: монография / Л. М. Давиденко, А. А. Бандурка. – Харьков: Изд-во Нац. ун-та внутр. дел, 2005. – С. 9.

[3] Жалинский А. Э. Предупреждение преступлений в условиях НТР / А. Э. Жалинский // Совершенствование мер борьбы с преступностью в условиях научно-технической революции / отв. ред. В. Н. Кудрявцев. – Москва: Наука, 1980. – 283 с.

Dynamics and transformation of processes that take place in society oblige the actors of preventive activities to anticipate and stay ahead of the emergence of new criminological phenomena and processes or new connections on the background of already existing ones. The gap in time between the origin and understanding of a criminological problem is, as practice shows, directly proportional to the danger of deepening contradictions, the emergence of negative consequences that are expensive to our society and the state (alcoholism, human traffic, migration, drug addiction, corruption, domestic violence, homelessness, begging, etc.).

Proactive prophylaxis is a type of preventive activities of specialized subjects, based on the prognosis, which aims to prevent the emergence of criminal phenomena and processes that are able to generate massively criminal motivation. Proactive prophylaxis informs the authorities in advance of socially dangerous phenomena that may occur as a result of certain socio-economic measures and directly or indirectly determine certain criminal offenses. E. g., the timely regulation of social relations aimed to eliminate this way the causes and conditions for the future (possible) crimes. Various disadvantages in different spheres of people'slife and activities are quickly improperly used by particularsocietal representatives in their own interests. As the famous Russian criminologist ViktorLunyeyevhas stated, other areas of law that are entrusted with the task of optimal legal regulation of social relations in various fields, exactly the latter in which have been focused the main determinants that lead to the commitment of offenses, have strongly insulated from providing any assistance in resolving criminological problems. However, particular legal regulation of various spheres of public relations determines direct or indirect conditions for crimes whether legal obstacles to their commitment, preventing these actions at different stages of the subject's intentions formation and solving their problems in a criminal way[1]. As ViktorDryomin wrote, crimesgenerally reflect the specific features of satisfying certain human needs in a particular variety of his activities[2]. That is why Professor AzaliyaDolgova defines crimes as 'a social phenomenon, which is solvingby a part of population their problems along with guilty violation of criminal law prohibitions'[3].

An example of a possible implementation of proactive prophylaxis is realizing the idea of criminological expertise of draft laws in Ukraine. According to its developer Academician Anatoly Zakalyuk, the value of the expertise is seen

[1] Лунеев В. В. Правовое регулирование общественных отношений – важный фактор предупреждения организованной и коррупционной преступности: тез. докл. / В. В. Лунеев // Государство и право. – 2001. – № 5. – С. 111.

[2] Дрёмин В. Н. Преступность как социальная практика: институциональная теория криминализации общества: монография / В. Н. Дрёмин. – Одесса: Юрид. лит., 2009. – С. 90.

[3] Долгова А. И. Преступность, е, организованность и криминальное общество / А. И. Долгова. – Москва: Российская криминологическая ассоциация, 2003. – С. 7.

in the fact that it gives justification for the timely, usually even before adopting the law, societallyrationalprofessional adjustments to their content, aimed at eliminating doubtful or conflicting provisions and thus preventing negative consequences of implementing the laws as favorable conditions for committing crimes [1].

Restrictive prophylaxis involves the precautions that prevent the spread arounda country, a region or a city criminogenic phenomena, determination of individual types of crime and forming typical features of various categories of offenders [2]. In academic writings restrictive prophylaxis is not specifically distinguished and frequently is presented as a method, different ways of organizing and managing the activities aimed at limiting the factors and phenomena that determine crimes. Anyhow, the fact itself that this method is characterized as an aggregate of different modes for organization and management of certain subjects, that is, in fact, that this activity is of clearlyspecific nature, suggests that restrictive prophylaxis is rather a type of criminological prevention than its way or method, which has certain objects of impact, resource, experts, the criteria for evaluating progress etc. Restrictive measures are applied when it comes to phenomena and processes whose existence is inevitable due to certain historical conditions, and which cannot be eliminated in short terms. Thus, restrictive prophylaxis –both as a method, as a set of specific measures, and as an activity – occupies an intermediate position between proactive and eliminative prophylaxis. It is well known, that many negative phenomena in modern life, unfortunately, cannot be eliminated or destroyed through the means and technologies, nowadays available to the state and society. This is a fact and should be considered in the course of preventive activities. Restrictive prophylaxisaddresses all subjects (primarily focused not only at combating crime) and trying to resolve not utopian but real tasks – complex, perhaps unresolvable at this time, but yet to be resolved. Restrictive prophylaxisis caution of voluntarism in preventing crimes. E. g., the measures for restricting illegal circulation of drugs in Ukraine; restricting the victimization of the population; drinking alcohol in the workplace and in public places; the sale of alcohol to minors; restrictinghuman traffic; restrictingthe illicit traffic of firearms, explosives, ammunitions; funding terrorism; corruption etc.

*Eliminative prophylaxis*defines a specific activity aimed at exterminating the criminogenic features or even eliminatingcompletely the negative phenomena and processes that determine criminal actions. The results of eliminative prophylaxis currentlyare very modest. There is no major criminological phenomenonthat we have managed to eliminate yet. On the contrary, there have

[1] Закалюк А. П. Курс сучасноїукраїнськоїкримінології: теорія і практика: у 3-х кн. / А. П. Закалюк. – Київ: Ін Юре, 2008. – Кн. 3: Практична кримінологія. – С. 191–192.

[2] Игошев К. Е. Социальные аспекты предупреждения правонарушений (проблемы социального контроля) / К. Е. Игошев, И. В. Шмаров. – Москва: Юрид. лит., 1980. – С. 80.

arisen new ones, e. g. cybercrime, terrorism, traffic of human organs or tissues, etc. In this regard the science and practice faces the need to find out new prophylactic measures (prophylactic techniques and technologies) and their experimental verification, without which it is impossible to develop acceptable problem solutions. The failures to conduct the eliminative prophylaxisof crimes can showeither the inadequacy of implementing the measures, incompetence of performers, superficial judgments about the nature of phenomena, or their untimeliness or prematurity. As international experience shows, eliminating some antisocial transnational phenomena turns out in a war (in the US – Prohibition, Colombia –combating drug traffic, Iraq – countering terrorism, Somalia – piracy etc.). Eliminative prophylaxis is a costly counteractingcrimes. Implementingthe eliminative prophylaxis of negative phenomena requires from the state and society the development of relevant scientific and managerial approaches, experience, experts, research, legal, financial, technical and other resources. Consequently, only a wealthy country is able to afford this ambitious criminological project.

Protective prophylaxis is considered to bea set of measures taken in order to eliminate conditions conducive to the emergence of criminal offenses, and (indirectly) antisocial attitudes. Unlike the restrictive or eliminative prophylaxis, the protective prophylaxis aims to create sufficient protection and safety of people and things, real estate and other property, as well as external obstacles to assaulting social values. Preventive protection, separately, of course, doesn't finally solve the task of eliminating criminogenic phenomena or preclude criminal motivation, but its widespread and consistent implementation complicates and sometimes makes impossible to commit a large groupof crimes (especially mercenary ones). The forms for implementing protective prophylaxis are well known and widely used within the framework of countering crimes since ancient times (night watch, window bars, metal doors, sophisticated locks, providing weapons (in some countries), video surveillance, anti-theft products, packaging goods and other protective techniques). However, this is not the point: protective prophylaxis as a global strategy for reducing thepractical opportunities for crime commitment, requires scientific support of preventive influence on the minds of potential criminals, technical security equipment of society, studying the practice of vulnerability and efficiency of protecting certain material and spiritual values from assaults, using new means of protection in different spheres of life, business, distribution of wealth, etc., state's interest in involving and implementing various know-how, adoption of international experience in protective prophylaxis etc. Anyhow, it's not that simple. State agencies, which would be concerned with this problem, are necessary.

Criminological prophylaxis should be subject-oriented, as preventive measures are linked to specific subjects, their capabilities and resources. Therefore, in order to operate effectively within the above-

mentionedtypes of criminological prophylaxis, the subject of these informative and practical activities must be familiar with the object he is dealing [1]. Without going deep into the philosophical understanding of the object, nor the debates on this issue, in criminological sense the object of preventive activities consists of separate real negative phenomena and processes of material and spiritual character (or their aggregate), different inorigin, scope, forms and intensity of displays that interact with personal features andresult in unlawful, including criminal, motivation, intention, the decision to commit the crimes and their implementationon common and individual levels. The concept of the object is hard to formalize, but it is clear that the object (objects) of preventive influence are classified as criminological determination. Even during the emergence of criminology as a science, the term 'criminogenity'originated as a dangerous feature of objects to create a probability of criminal behavior, determine crimes[2][3]. The criminogenity of an object is variable, so it can be displayed in quantitative and qualitative indicators: the degree of criminogenity (higher – lower); criminogenic set (larger – smaller); criminogenic interval (closer – further in the criminal causal chain).

Criminological prophylaxis is comprised of activities of state and society, aimed at preventing or turning human outrageback to the mainstream of democracy and the legality. Therefore, not the list of unspecified objects for common criminologicalprophylaxis, which would be hardly rational, but the definig theobjects based on its structural types, i. e. objects of proactive, restrictive, eliminative and protective prophylaxisare really important.

Objects of proactive prophylaxis. Let's recall that proactive prophylaxis is an intervention of specialized subjects in the social relations of different spheres of social life (the existing or possible ones) in order to complicate their criminogenic influence. To be frank, that sounds like an exaggeration and even as fiction until this type of prophylaxis (or its measures) is not practically implemented. The mechanism of detecting criminogenic objects in the framework of proactive prophylaxis is comprised of, e. g., scientific criminological expertise of bills and later overall draft laws, the idea of which dates back to the 90s of XX century. In this case the objects are doubtful contradictions, dysfunctions, discrepancy, and other destructive factors that can lead to social destabilization, economic, social and psychological stress, aggravation of conflicts, contradictions; strengthening the criminogenity of objects and eventually – possible offenses and crimes [4]. Thus, objects of

[1] Смирнов Г. Г. Причинный комплекс преступности как объект криминологического предупреждения / Г. Г. Смирнов // Правоведение. – 2005. – №2. – С. 107.

[2] Российская криминологическая энциклопедия / под общ. ред. А. И. Долговой. – Москва: НОРМА, 2000. – С. 292.

[3] Запобіганнязлочинності (теоріяіпрактика): навч. посібник / В. В. Голіна. – Харків: Нац. юрид. академіяУкраїни, 2011. – С. 50–53.

[4] ЗакалюкА. П. Курссучасноїукраїнськоїкримінології: теоріяіпрактика: у 3-хкн. / А. П. Закалюк. – Київ: ІнЮре, 2008. – Кн. 3: Практичнакримінологія. – С. 191.

proactive prophylaxisare the drawbacks of draft laws and other regulations, which can be used with criminal intent. This is just a single example for detecting objects of proactive prevention.

Objects of restrictive prophylaxis. Criminogenic objects of this sort of prophylaxis are placed in the areas of public relations associated with major negative phenomena, such as drunkenness, alcoholism, drug addiction, corruption, vandalism, terrorism, amorality, hooliganism, sexual perversions (homosexuality, pedophilia, etc.), human traffic ('white slavery') and others. Specifying criminogenic objects depends on the nature and prevalence of a phenomenon. Therefore they can be classified into socio-economic, ideological, legal, socio-hygienic, control and licensing, medical, educational etc. Anyhow, as a whole, the objects of restrictive prophylaxis are: legal regulation of social relations that emerge and spread due to the existence of these phenomena; legal consciousness of general public; socially dangerous behavior of contingent requiring correction from the side of state and society; the criminogenic behavior of individuals etc.

Objects of eliminative prophylaxis. Its criminogenic objects are the same as in the previous typesof criminological prophylaxis. Repeatedly, the criminogenic objects vary depending on the social level of public relations. One case is eliminating criminogenic objects at the individual level (e. g., treatment for a drug or alcohol addicted person), yet another – at the level of society. The history of human civilization shows that the elimination of large criminogenic objects (phenomena) at the level of society or the state is rather difficult, to say the least – almost impossible nowadays. Both the state and society lack the resources and methods of preventive action. The humanity is being changed, but not for the better. But working in this direction, searchingis essential, as evidenced by international experience. For example, the US –Prohibition, Colombia – the war against drug traffic, Iran, Somalia – countering terrorism and maritime piracy, Georgia – fighting corruption. And there is some progress in the mankind! The eliminative prophylaxis is the most difficult line of crime prevention, which requires appropriate scientific approach, experience, skills, professionals, research, legal, financial and other resources.

Objects of preventive prophylaxis. The objects of preventive prophylaxis include, on the one hand, various methods for protection and preservation of public and private property, documents, money, personal protection equipment (weapons, special clothing, safety advertising, technical devices, anti-theft tools, victimological activities, observation techniques, the latest biotechnologies); on the other hand – the legal consciousness of potential criminals. Preventive prophylaxis, as a global strategy for reducing the practical opportunities for crime commitment, requires scientific support of preventive influence on the minds of potential criminals, technical security equipment of society, studying the practice of vulnerability and efficiency of protecting certain material and spiritual values from assaults, using new

means of protection in different spheres of life, business, distribution of wealth, etc., state's interest in involving and implementing various know-how etc.

Conclusions. As far as our research shows, there is a certain incompleteness of the crime prevention theory, while the object preventive impact doctrine is in fact absent within its framework. Particular scientists only refer this problem briefly without developing it, or solving the relevant theoretical and practical problems. It is necessary to support the arguments of some criminologists about that criminological prevention should engage not those who can only speak, but those who know how to do constructive work, combining optimally verbal means and methods with practical solutions for purely utilitarian problems (organizational, legal, financial,, technical and otherwise character) [1].

It should also be emphasized that to address theoretical and practical issues the certainty of concepts' content in criminology is no less important than in other sciences. In practice the scientific concept is being 'materialized' in a certain activity, enables to determine its outer limits, specify the nature, scope of introducing, appropriate methods and tools. The implementation of criminological prophylaxis requires substantial scientific, legal, financial, personnel and other resources.

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[1] Смирнов Г. Г. Причинный комплекс преступности как объект криминологического предупреждения / Г. Г. Смирнов // Правоведение. – 2005. – № 2. – С. 108–109.

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CRIMINAL AND LEGAL PROTECTION OF LAW ENFORCEMENT OFFICERS: CURRENT STATE AND PERSPECTIVES OF IMPROVEMENT

Problem's setting. The ability of Ukrainian state to fulfill obligations for the citizens designated by the domestic Constitution, to solve social conflicts, to organize the normal functioning of the society as well as interacting with other subjects of international law, to participate in maintaining regional and world peace largely depends on the efficiency of the public apparatus of management of social processes and control over them. Thus, one of the important parts of the mechanism, which assists to fulfill the main tasks of the state is law enforcement system. The significance of this socio-legal institution is difficult to overestimate. The phrase has become winged that law enforcement agencies – are a thin line, a barrier that separates the world from rampant anarchy. There are many examples in the history, where omission of law enforcement agencies paralyzed the life of entire cities or even countries. This confirms the experience of many countries. In particular, let's remember the Liverpool police strike in the UK. As you know, in 1919 they stopped working, went out to the streets and demanded higher wages, as a result, the number of crimes dramatically increased – murders, robberies, thefts, etc. In Denmark in 1944 after the divisions of Nazi army and SS occupied all police stations and arrested police officers thieves began to «dominate»on the streets. Another country is the USA. In 1977 in New York during the «big blackout» the light was off for 24 hours that made impossible the work of police services, the result was almost the same – disorder, tyranny, the criminals had a free hand[1].

The effectiveness of fulfilling the law enforcement function of the state de-

[1] Анденес И. Наказние и предупреждение преступлений / И. Анденес; пер. с англ. В. М. Коган. – М.: Прогресс, 1979. – С. 11.

pends not only on logistics, equipment, personnel strengthening, financing of the relevant agencies and institutions. An important component is its legal guaranteeing, including a special criminal and legal protection of law enforcement sphere, which should be aimed at creating conditions for the safe performance of their official duties by the employees and optimal operation of the relevant authorities and departments. It is not a secret that if the state protects the rights and legitimate interests of law enforcement officers very reliably then it significantly affects the readiness of these subjects to perform service tasks, their level of dedication and professionalism. Moreover, the relatives of law enforcement officers should be also under the protection of the criminal law, which is an additional guarantee for the protection of these persons and ensuring impeccable execution of their duties in the sphere of of keeping the law and order.

Considering the constant complication of external conditions, affecting the work of domestic law enforcement officers and taking into account the long period of mistrust and (unfortunately) decrease in respect for the authority of the state in general and its law enforcement system in particular, the cases of resistance to the officers of law enforcement agencies, efforts of offenders to take revenge to them or their close relatives for performing their official duties have spread in Ukraine. The low level of effectiveness of the law enforcement system in Ukraine and the quality of implementation of its functions that for a long time caused fair complaints from the community, were at least due to the insufficient degree of protection of this system's officers, as a result due to their low motivation to address often the risk, associated with the threats to personal security, life, health, property and other wealth of operative and service tasks. Thus, the provision of criminal and legal protection of law enforcement officers should be one of the priorities of the state towards building an effective model of law enforcement system.

Nowadays Internal Affairs Agencies of Ukraine are experiencing a period of radical reforms, radical restructuring in accordance with the best international standards. The society requires from their staff much more vigorous and effective fulfillment of their duties. In this connection there is an increase of loading on each of them in the sphere of professional and service practices that on the background of a crime surge due to the peculiarities of the modern sociopolitical stage of life of our country, greatly increases the risks to life, health, bodily integrity, other rights, benefits and legitimate interests of the representatives of domestic law enforcement agencies. In particular, already according to the first results of the new patrol police units' activities in Kyiv, Kharkiv, Lviv and other cities of Ukraine it becomes apparent that the number of contacts between police officers and citizens, including with offenders, is rapidly growing. Thus, considering the principle of continuity of the police activity, its officer is not entitled to refuse in the proceedings or postpone consideration of appeals on ensuring human

rights and freedoms, legal entities, interests of the society and the state from illegal encroachments referring to weekend, holiday or day off or the end of working hours[1]. These circumstances affect the increase in situations during which or by the results of which there are threats to personal and official interests of a law enforcement officer. In this connection, the relevance of the issues of legal protection of persons, who speaking on behalf of the state within official and imperious relations, are directly involved in the implementation of its law enforcement function, has become more urgent. Inevitability of criminal liability for a number of socially dangerous encroachments against law enforcement relations takes a prominent place among the measures, the conduction of which is intended to contribute to solving this problem. Its bases are concentrated in the Section XV of the Special Part of the Criminal Code of Ukraine (hereinafter – CC), «Crimes against the Authority of the State Agencies, Local Self-Governments and Associations of Citizens», the provisions of which according to the practice are always in demand. Thus, only during the last year there were 23 268 crimes officially registered in the country, the liability for which is provided by the norms of the mentioned section. It also contains a number of specialized criminal and legal prohibitions, the implementation of which is intended to protect law enforcement officers.

[1] Про Національну поліцію: закон України від 2 лип. 2015 р. № 580-VIII // Офіційний вісник України. – 2015 – № 63. – С. 33.

Analysis of recent research and publications. The issues concerning protection of law enforcement activity in the theory of criminal law were the interest of M. I. Bazhanov, Yu. V. Baulin, L. P. Brych, Ye. M. Blazhivskyi, V. A. Horbunov, D. Yu. Hurenko, I. I. Davydovych, V. T. Dziuba, L. V. Dorosh, S. I. Diachuk, V. A. Klimenko, M. I. Korzhanskyi, M. I. Melnik, V. A. Navrotskyi, V. V. Stashys, M. I. Khavroniuk, S. S. Yatsenko and others. The most thorough study of these issues was made by V. I. Osadchyi (we mean his doctoral dissertation «Problems of Criminal and Legal Protection of Law Enforcement Activities» and the monograph «Criminal and Legal Protection of Law Enforcement Activities»). The papers of the mentioned expertscover a wide range of problems in the sphere of protecting the authority of government agencies in general and law enforcement activities in particular. However, not all of their sensible conclusions and propositions for the provision of the protection of law enforcement system and its representatives by criminal and legal measures are duly implemented in the legislation on criminal liability. So, let's pay attention, first, to perfectness of the legal foundation for guaranteeing criminal and legal protection of the following basic personal benefits of a law enforcement officer as life, health, safety and bodily integrity.

Considering everything said the **objective of the article** is the study of providing recommendations on the matter of achieving the balance between law enforcement officers' duties and

their rights, namely their right on protection.

The main part. As it is noted in professional literature, the generic object of crimes under the Section XV of the Special Part of the Criminal Code, is a group of social relations that arise between the state authorities, local self-governments, associations of citizens and individuals in connection with the execution of administrative and regulatory functions to protect the rights, freedoms and legitimate interests of individuals and legal entities[1]. As we see, this kind of object of criminal and legal protection as law enforcement activity is «absorbed» by the mentioned above generic object in the domestic criminal law. However, it is quite clearly demonstrated in modern penal doctrine that a certain group of crimes described within this section infringes on a relatively isolated area of public relations, that is it has its own specific object that is directly related to the field of keeping public order. Therefore, many domestic scholars, who studied the provisions of the Section XV of the Special part of the Criminal Code of Ukraine, consider it necessary to use specific object to display the specifics of crimes against law enforcement officers. Thus, I. I. Davydovych isolates crimes under the Articles 342, 343, 345, 347–349, 350, 352 of the CC into a separate group according to the specific object of encroachments, which forms such components as «carried out official activity of the representatives of the authorities according to the law, in particular law enforcement officers, other officials and activities of public representatives for keeping public order; personal and property safety of the stated subjects of management activity and their relatives»[2]. V. A. Horbunov characterizes the specific object of these crimes more laconically. To his mind these are relations composed from the proper execution of duties by law enforcement officers[3]. Studying the norms combined by the mentioned specific object indicates that the center of gravity in their constructions is in the plane of violent encroachments against law enforcement officers and persons close to them. So, the conceptual provisions for the priority protection of state agents' personality (and their relatives) in relations to law enforcement are realized in the CC. This situation is quite justified, as recently there have been frequent cases of criminal combating law enforcement officers, the most common forms of which are violence, the threat of its use against law enforcement offiicers or their relatives. Frequent are the encroachments on the lives of law enforcement officers.

[1] Кримінальне право України. Особлива частина: підручник / Ю В. Баулін, В. І. Борисов, В. В. Тютюгін та ін.; за ред., В. Я. Тація, В. І. Борисова, В. І. Тютюгіна. – [5-те вид., перероб. і допов.]. – Харків: Право, 2015. – С. 449.

[2] Давидович І. І. Кримінально-правова охорона представників влади і громадськості, які охороняють правопорядок: автореф. дис. … канд. юрид. наук: 12.00.08 / Давидович Ірина Ігорівна. – Київ, 2007. – С. 8.

[3] Горбунов В. А. Кримінальна відповідальність за знищення або пошкодження майна працівника правоохоронного органу: автореф. дис. … канд. юрид. наук: 12.00.08 / Горбунов Валерій Анатолійович. – Харків, 2012. – С. 7.

Specialized studies of the quality of criminal and legal protection make it possible to reveal some of the gaps that exist in the legislation. Thus, it is indicated in the literature that indication in the Art. 347 of the CC for a close relative as a victim should be replaced by the indication on a close person for a law enforcement officer[1] in order to provide, in particular, the completeness of relations' protection, concerning the proper execution of the duties by law enforcement officers, from the influence (we talk about the attempt to influence on their legitimate service activities), which can occur through encroachments on the property of a person, whose interests are essential for law enforcement officers,; and an encroachment on the lives of people close to him (not just «close relatives», as it is required by the current edition of this norm)[2], except encroachments on the life of a law enforcement officer, should be criminalized in the Art. 348 of the Criminal Code. It is stated in other scientific studies that the Art. 345 of the CC «Threats or violence against a law enforcement officer» lawmakers lost the following form of committing a corresponding encroachment as a threat to law enforcement officers by kidnapping or imprisonment. It is hard to disagree with the idea that «this threat has the same high degree of public danger as those listed in the first paragraph of the Art. 345 of the CC of Ukraine»[3].

The study of the current domestic and foreign legislation, analysis of scientific and theoretical sources makes it possible to talk about the fact that the limits of criminal and legal protection of law enforcement activities should be broadened in the future. In particular, contradiction in the wording of the section's title that provides criminal liability for crimes against law enforcement officers, and the content of its regulations points on this. According to V. O. Navrotskyi the authority – is a generally accepted meaning, impact. Therefore, «the orders and instructions of competent managing agencies are executed without additional review and discussion, unquestioningly»[4]. Consequently, the authority of the institutions stated in the Section XV of the Special Part of the CC (public authorities, local self-governments and associations of citizens) – is one of the necessary preconditions underlying their ability to manage social processes in not in advance defined spheres of public life. However, their authority is inseparable from the

[1] Горбунов В. А. Кримінальна відповідальність за знищення або пошкодження майна працівника правоохоронного органу: автореф. дис. … канд. юрид. наук: 12.00.08 / Горбунов Валерій Анатолійович. – Харків, 2012. – С. 7.

[2] Гуренко Д. Ю. Кримінальна відповідальність за посягання на життя працівника правоохоронного органу: автореф. дис. … канд. юрид. наук: 12.00.08 / Гуренко Дмитро Юрійович. – Харків, 2011. – С. 15.

[3] Бойко А. В. кримінальна відповідальність за погрозу або насильство щодо працівника правоохоронного органу: автореф. дис. … канд. юрид. наук.: 12.00.08 / Бойко Андрій Володимирович. – Одеса, 2013. – С. 167.

[4] Навроцький В. О. Кримінальне право України. Особлива частина: курс лекцій / В. О. Навроцький. – Київ: Знання, КОО, 2000. – С. 576.

authority of those who represent the appropriate authorities or self-governments. However, this section of the CC does not provide liability for encroachments that are directed exclusively against the authority of these subjects, including against law enforcement officers. Meanwhile, the history of criminal law and foreign legislation are aware of relevant encroachments and examples of their restrictions. These are, in particular, the norms on liability for abuses of law enforcement officers. So, an abuse as an illegal behavior degrades the honor and dignity of a person or his relatives, undermining the authority to other members of the society, affects self-esteem. Thereby, committed against a law enforcement officer it can affect his service and professional activity and change attitudes of others to the authority of a law enforcement agency, which he represents. Let's recall that V. I. Osadchyi has already suggested to criminalize an abuse against a law enforcement officer in connection with fulfillment by him the official duties, as well as a member of a public organization in protecting public order and state border or a soldier in connection with their activities on keeping public order[1]. Foreign experience of the organization of criminal and legal protection of the honor and dignity of the representatives of the state indicated in favor of such a proposition: the Art. 226 of the Criminal Code of the Republic of Poland provides liability for the abuse of an official during or in connection with the fulfillment of official duties[2]; the Art. 275 of the Penitentiary Code of the Republic of Estonia provides liability for libel on government officials and other persons performing duties to protect public order and liability for their abuse[3]. Abuse of a representative of the authorities is criminalized in the Art. 318 of the Criminal Code of the Republic of Armenia[4], the Art. 320 of the Criminal Code of the Republic of Kazakhstan[5], the Art. 330 of the Criminal Code of the Republic of Tajikistan[6]. As we can see the legislator in many foreign countries evaluates more balanced public danger of psychological impact on the representatives of the authorities (including those who perform their duties in the field of guaranteeing public order and public safety) by abuses and libels. In this case, the criminal and legal protection is spread not only on providing basic bases (life, health, property) of the officials

[1] Осадчий В. І. Проблеми кримінально-правового захисту правоохоронної діяльності: автореф. дис. … д-ра юрид. наук: 12.00.08 / Осадчий Володимир Іванович. – Київ, 2004. – С. 27.

[2] Уголовній кодекс Республики Польща. – СПб.: Юрид. центр Пресс. – 2001. – С. 112.

[3] Пенитенциарный кодекс Эстонской Республики [Internet resource]. – Access mode: http://estonia. news-city. info/docs/sistemsw/dok_iegdab/page9. htm.

[4] Уголовный кодекс Республики Армения [Internet resource]. – Access mode: http://www. parliament. am/legislation. php?sel=show&ID=1349&lang=rus#1919.

[5] Криминальный кодекс республики Казахстан [Internet resource]. – Access mode: http://www. pavlodar. com/zakon/index. html?dok=00087&oraz=08&noraz=320.

[6] Криминальный кодекс Республики Таджикистан [Internet resource]. – Access mode: https://www. unodc. org/tldb/pdf/TAJ-CriminalCode. pdf].

(including law enforcement agencies' officers), but also on the protection of their personal honor and dignity. We believe that this experience can be implemented into criminal legislation of Ukraine.

Conclusions and perspectives of further research. Summing up the results of the conducted study, it must be emphasized that the new era of social and political development of Ukraine checks on the strength a lot of state institutions, including national law enforcement system. However, the guarantee for the effectiveness of initiated reforms must be acknowledged finding and ensuring a balance between law enforcement officers' duties and their rights, including the right on the effective criminal and legal protection.

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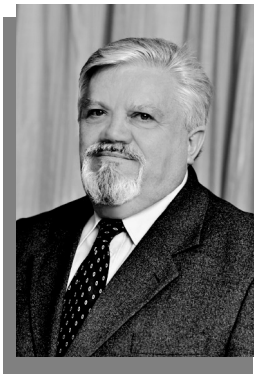

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ABOUT THE STANDART MODEL OF TECHNOLOGY OF SOLUTION OF TASK OF ASCERTAIN THE IDENTITY OF UNKNOWN CRIMINAL

One of the most important tasks of the criminal proceedings is to ensure rapid, complete and objective investigation and prosecution, so that everyone who has committed a criminal offense has been prosecuted to the extent of his guilt or innocent person is charged and convicted (Article 2 of the Criminal Procedural Codeof Ukraine). Pre-trial investigation conducted by qualified and in conformity with the law, in many ways provides a solution to the named problem.

Investigation of a specific crime, also population (series) crimes is a complex organizational management, information and cognitive, search and identification activities which are carried out by means of methods and techniques, procedural and criminalistical equipment and aims to establish the essence of investigated event, his circumstances and perpetrators. Thus one of the most difficult tasks is to establish the perpetrator, and proving his guilt. Various aspects of this issue in the criminalistical literature paid much attention[1]. At the same time, you need a comprehensive study of criminalistical

[1] Біленчук П. Д. Процесуальні та криміналістичні проблеми дослідження обвинуваченого /П. Д. Біленчук. – К.: Атіка, 19997– 352 с.; Калюга К. В., Лукашевич В. Г. Мистецтво здобувати і використовувати початкову інформацію про особу злочинця. – Зопоріжжя: Дніпровський металург, 2012. – 352 с.; Мухин Г. Н. Криминалистическое моделирование личности неустановленного преступника и его поведения/ Г. Н. Мухин, О. Г. Каразей, Д. В. Исютин-Федотков. – М.: Юрлитинформ, 2012. – 208 с.; Образцов В. А. Выявление и изобличение преступника.-М.: Юристъ, 1997. – 336 с.; Повезнюк Г. И. Криминалистические методы и средства установления личности в процессе расследования преступлений. – М.: Юрлитынформ, 2005. – 366 с.

approach to the process of finding and establishing a criminal, as well as proof of his guilt in the commission of the offense under investigation.

It seems that the identification of the offender should be viewed as a strategic task of investigation, be solved with the help of the technological approach that is gaining ground in the works of modern criminalistical scientists[1]. Criminalistical technology in practice is a system of used by the investigator means and methods, techniques and rules of gradual and progressive solutions of tactical and strategic tasks of investigating the crimes[2].

The complexity of the task during the investigation to establish the perpetrator, calls for the separation of a series of tactical objectives and consistent resolution, which is achieved through the development of targeted program that includes algorithms for the gradual achievement of this goal. Description of the activity constitutes a technological model of the identity of the perpetrator.

More precise understanding of the identity of the offender in the context of the study of the problem

In philosophy personality is a concept that worked out to show the social nature of man as the subject of social and cultural life, manifests itself in the context of social relations[3]. Psychological understanding of the personality implies a multi-dimensional and multi-stage system of psychological characteristics that provide individual identity, temporal and situational stability of human behavior[4].

In legal theory, talking about the identity of any person, including the offender, based on the fact that the person, as the professor M. F. Orzih says, is a system that synthesizes biological and social qualities of human combined their diverse relationships and dependencies, allowing to individualize each person, including individual properties and features[5].

In criminalistics, the term «person» is used in the broadest sense of the word and includes a set of properties and attributes that characterize a particular person as a carrier of morphological, physiological, psychological and social human qualities[6]. Appropriately, each particular person has a set of named properties and features that are unique to it, individualizes it distinguishes it from the mass of

[1] Белкин Р. С. Криминалистика: проблемы сегодняшнего дня /Р. С. Белкин. – М.: НОРМА-ИНФРА-М, 2001. – С. 85–87; Образцов В. А. Криминалистика: модели средств и технологий раскрытия преступлений.-М.: Изд-во ИМПЭ-ПАБЛИШ, 2004–400 с.; Тіщенко В. В. Теоретичні засади формування технологічного підходу в криміналістиці / В. В. Тіщенко, А. А. Барцицька. -Одеса: Фенікс, 2012. – 198 с.; Шмонин А. В. Методология криминалистической методики / А. В. Шмонин. – М.: Юрлитинформ, 2010. – С. 363.

[2] Тіщенко В. В. Криміналістичні технології в теорії і практиці розслідування //Актуальні проблеми держави і права. -Вип. 44. – Одеса: Юридична література, 2008. – С. 18.

[3] Всемирная энциклопедия: Философия / Главн. науч. ред. А. А. Гришанов. – М.-Мн., 2001. – С. 559.

[4] Психология /Под ред. В. Н. Дружинина. – СПб: Питер, 2009. – С. 272.

[5] Орзих М. Ф. Личность и право. – Одесса: Юридична література, 2005. – С. 22–43.

[6] Криминалистика / под ред. Н. П. Яблокова. – М.: Юристъ, 2005. – С. 171.

people. A number of somatic symptoms manifested outwardly in statics (signs appearance) or dynamic (gait, gestures, facial expressions), and becomes the object of direct perception of other people, is fixed in photographs or displayed in the material traces of a subject. Psychological symptoms are expressed in actions, deeds, bonds and relationships of the individual with other people and material objects. Social indications of socio-demographic and socio-role functions of a particular person.

All these attributes and properties depending on the nature and content of solved during the investigation of the problem becomes a source or means to identify, explore and expose the perpetrators of crimes face.

Establishing a person guilty of a crime can be considered not only as a strategic objective of the investigation, but also as a process, specific activities, special technology which is the subject of criminalistical investigation.

This task is accomplished by gradual and consistent solution of intermediate (tactical) tasks, the content of which is determined by the nature and extent of the initial and subsequent problematic investigative situations.

At the beginning of the investigation there are two typical investigative situations, depending on the presence or absence of data on the identity of the offender: 1) the offense is committed by an unknown person; 2) the offense is committed by a person known to which point directly to the victim, witnesses, documents, or specific person declares itself committed an offense.

Of course, the first situation is more complex, and the task to establish the perpetrator is solved by posing and solving the following phased sequential tasks:

1) identification of the person that is likely to commit the offense in (suspected of committing the crime of a particular person);

2) collecting of evidentiary information confirming or refuting the suspicion against suspected persons;

3) study of the personality of the suspect;

4) the conviction of a suspect in the commission of the alleged offense and proving his guilt.

Consider a typical program of action of the investigator on the first of these steps, forming a typical model of technology for solving the problem of identification data indicating the identity of an offender.

Means and methods of solving this problem is largely dependent on the availability of certain sources of information about the offender. So, if there are victims or eyewitnesses, should get their description of the signs on the exterior of the criminal rules of verbal portrait; its functional (dynamic) characteristics: especially when traveling posture, gestures, facial expressions, body movements, walking; related symptoms: clothing, footwear, headgear, glasses, masking agents appearance; speech feature: the language of communication, the presence of an accent, peculiarities of vocabulary and pronunciation, tone, volume and characteristics of voice (hoarseness, squeaky), the rate of spe-

cific momentum and emotional speech, word-parasites, speech impediments (stammering, «swallowing» endings, lisp, non-pronunciation of individual sounds); especially clothes and body odor; signs tactile (cold hands, sweaty palms, sticky fingers, etc.).

The subject of the testimony of these individuals may be psychological and personality traits of the offender: intelligence, mental and emotional condition, the symptoms of mental disorders, the manifestation of perversion, the response to external stimuli. Attention should be paid to the behavioral symptoms: preliminary statement by threats or use of violence without warning, in the aggressiveness of activities or evasion of physical violence, or illogical sequence of actions, skills, habits and other criminals.

If the offense was committed without witnesses, or at the beginning of the investigation, they are not revealed, but the victim was killed or can not give a description of the perpetrator, source of information is setting the scene, tracks, objects and documents left behind by the perpetrator. At the same methods and tools for their research determined the nature and content of the events happened. Revealed traces can be focused on the range of persons or an individual, able to commit the offense in, and also serve as identifying objects in the subsequent identification of the suspect. Inspection of the scene should be considered mandatory, urgent and productive means to retrieve information about the event a crime, the identity of the perpetrator and his actions in any investigation of the situation.

It is also necessary to obtain data about the offender and his actions to verify the existence and contents of the fixed camera information external and internal monitoring, if installed near or on the site of the accident.

The subject of the questioning of the victim and his friends, relatives and co-workers are the events preceding the crime, and followed him. The analysis of such events, evidence of problems of a personal or business nature, expressed fears that took place the threat posed by certain persons, details of meetings with certain people, unusual behavior on the part of certain individuals, as well as other circumstances may serve as a basis for the nomination and verification versions of the suspects.

In the case of criminal appropriation of the mobile phone (smartphone) it is advisable to carry an unspoken victim (search) investigative action – locating electronic means (st. 268 CCP) to contain the location of the vehicle, its identification and subsequent determination of the entity by means of the data.

Getting information about the identity of an unknown perpetrator is also possible using the methods and means of operational and investigative activities: surveys, the use of a confidential co-operative identification of photographs, and others.

The importance of identifying and finding the unknown criminal gets to use the help of knowledgeable persons – professionals and experts, as well as the expertise they possess. Experts may be invited to participate in the investigative action in which they are commissioned

by the investigator search for the next hidden, identify, capture, seize in kind, made copies of them, carried out a preliminary study, and to voice their suggestions, which are used for the nomination and verification search Version. Carrying identification, diagnosis, classification expert studies (trasological, handwriting, biological, criminalistical, etc.) Contribute valuable information about the various properties and characteristics of the offender, makes it possible to search for it, and to establish the identity of the signs used in the future when identifying suspected persons in order to identify it.

In order to identify the persons involved in the crime under investigation, it is appropriate to use the criminal register and include various types of criminal records, including operative-search and background records. Registration and archiving the information collected and stored in the relevant law enforcement units, allows you to compare and use the available data on the investigator unknown criminals for its further research and identification. Thanks to information retrieval systems can identify and verify a variety of personification data in respect of persons who are likely to commit the crime. This, in particular, promote the alphanumeric reference counts: 1) persons who have committed crimes on certain administrative territory; 2) convicts serving their sentences; 3) persons on the wanted list; 4) persons who have committed administrative violations.

Expanding the boundaries and find information on the identity of the unknown offender at the expense of analytical methods for the accumulation and analysis of the extracted information. So, it is advisable to analyze the relationship between the person who committed the offense with the elements of the criminal events: the subject of crime method, tools, place, time and other conditions of the crime. Formulated the question is this: who could have committed the crime set method to use certain means to know certain conditions, to influence the situation of crime have access to the equipment, property, and others.

Of particular importance to find the perpetrator becomes the identification and study of the relationship between the victim and the perpetrator[1].

To do this, first we need to analyze all the data about the identity of the victim. If the beginning of the investigation the identity of the victim has not been established (which is in the investigation of murders in a situation of detection of a corpse of an unknown person), primary and urgent task is to establish the biological and socio-demographic data about the victim. Without the identity of the victim is very difficult to investigate because it is impossible to identify and

[1] See: Тищенко В. В. Криминалистическое згачение связи «преступник-жертва» для методики расследования// Криминалистика и судебная экспертиза.-Вып. 16. – К.:Вища школа, 1978. – С. 35–39; Центров Е. Е. Криминалистическое учение о потерпевшем: монография. – М.: Изд-во Московского унта, 1988. – С. 59–61; Кащук О. О. Значення використання зв'язку «жертва-злочинець» у розслідуванні злочинів // Актуальні проблеми держави і права. – Вип. 65.-Одеса: Юрид. літ., 2012. – С. 588–593.

explore the relationship between him and the offender.

Between the perpetrator and the victim may exist various kinds of communication: kinship, intimate, domestic, industrial, criminal, arising on the basis of joint leisure. They can be long, short-term, including arose shortly before the crime was committed, close and distant, etc. Versions of the nature and content of the communication of the criminal and the victim should have to be put forward and verified, as it is one of the productive methods to identify the offender, which may be called the Victim[1].

Thus, accumulation, analysis and synthesis of information on the perpetrators, victims, and the mechanism of crime can create a number of basic search and information models.

1. The model of the biological substructure of offender, which is based on anthropological data (sex, race, nationality, age, height, size of body parts), anatomical (physical description, distinguishing marks) and functional (gait, gestures, facial expressions, speech, etc.), the biochemical characteristics (composition of blood, saliva, semen, odor).

2. The model of social substructure, including demographic, household, industrial signs, financial situation, professional experience of crime, social status; signs of a relation of the person to the place (region) where the offense was committed (a local who knows or does not know this area).

3. The model of psychological substructure includes intellectual level, mental and emotional condition, the symptoms of mental disorders and pathologies, behavioral symptoms in the course of committing the offense, traits, motives and goals of the alleged crime.

4. Victimological model that includes data about the victim, his ties and relationships with others (family, intimate, commercial, household and so on.), On friendly or hostile relations with specific persons (reasons, genesis), the appearance of new faces in its environment, meetings with someone shortly before the crime, signs of staging the event.

5. Retrospective criminal behavior model to recreate the action (or inaction) of a person prior to the commission of the crime, in particular, if there are signs pointing to the preparation of the crime and the persons involved in it, as well as other circumstances related to the events under investigation.

6. The predictive model of behavior of the offender includes options for possible postcriminal behavior of a person who can perform additional steps to conceal the circumstances of the crime and his participation in it, a variety of means of counteraction to investigation (slander innocent people, bribing of witnesses, etc.), identification of behavioral acts with side of a particular person, pointing to his possible involvement in the events under investigation (sudden departure from the residence, the disposal of property disappeared, a sudden improvement in the material conditions and other so-called evidence of conduct), as well as forecasting in relation to the commission

[1] Тіщенко В. В. Теоретичні і практичні основи методики розслідування злочинів. – Одеса: Фенікс, 2007. – С. 201–203.

by the person of new crimes (their possible locations, time and other circumstances of alleged victims) for the purpose of prevention or suppression.

The above models provide a basis for the construction of divergent versions as to the identity of an unknown perpetrator and the circumstances of his crime, and their check, followed by the subsequent criminalistical analysis of information received, the adjustment of search directions and signs perpetrator reveals the range of persons suspected of a particular suspect.

This introduces the first phase of the identity of the offender, which can be used in the investigation of violent, selfish and violent, selfish, and other categories of crimes.

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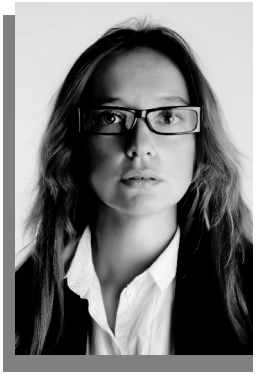

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THE SIGNIFICANCE OF CRIMINAL PROCEDURAL DECISIONS GOOD-QUALITY STANDARDS

Introduction. The history of the administrative science development has shown the impossibility of improving any managerial decision quality beyond working out and arranging the system of their quality standards. And this is reasonable, as, particularly, requirements for a judgment are basic for developing the qualitative model of such act, and compliance with them ensures enforcing the functional purposes of a judgment. Definition of the concept and system of qualitative distinctiveness standards in the context of working out conceptual basis for ensuring good-quality of criminal procedural decisions (further – CPD) is one of the central questions in the structure of constructing the mentioned comprehensive theory.

The study of indicated questions allows defining criminal procedural decisions good-quality standards (further – CPDGS) as a total set of certain normative prescriptions (norms, requirements and rules) which CPD form and content should comply with in order to fulfill its functional purpose in the common dynamics of criminal procedure.

Although, clarifying practical and theoretical benefits of formulating CPDGS is impossible without a substantial study of these standards in the common law-enforcement mechanism in the scope of criminal procedure. The system of these standards should evolve into a strategic basis (benchmark) in the common mechanism of a corresponding procedure for providing their good-quality.

Describing the level of this issue's *scientific development*, it should be stated that the problem of defining CPDGS, as well as clarifying their meaning hasn't been outlined before in the contemporary scientific literature. Simultaneously, the theory of criminal procedural law was always paying significant attention to requirements, claimed for CPD that confirms their theoretical and practical value.

At the same time the conditions of legal ideology transformation in our state and essential criminal procedural model modification after having accepted the new Criminal Procedural Code of Ukraine cause an objective need both for rethinking the substantial content of traditional law-enforcement principles, e. g., legality, reasonableness, justifiability and constructing new, naturally following from the rule of law conceptual requirements. The issue of CPDGS is especially difficult and ambiguous under the modern conditions of common legal integration and globalization process that includes Ukraine from the end of XX century, as well as active implementing international legal standards in the national criminal procedural legislation.

The outlined above determines the need for CPDGS essence comprehensive research, for what the article states as a goal to define the place of CPDGS in the common mechanism of law-enforcement in criminal procedure. Solving two interrelated tasks appears to be necessary for reaching the mentioned goal: 1) defining the main aspects of CPDGS functional purposes; 2) characteristics of main directions of CPDGS functional purposes.

Main content.

On the basis of considered legal phenomena essence we can assume that the role of CPDGS is multifaceted and can be studied in the following directions – the aspects of their functional purposes for: those who make CPD (TWMD); the trial participators in respect of which the act was approved; those who examine a certain decision from the angle of its legality and reasonableness; constructing rational practice of pre-trial investigation bodies, prosecutor's office and justice in common interests; as well as public (or external) CPDGS objective.

The above said determines the structure of this article outlay.

1. CPDGS is a set of certain binding provisions, imperatives, implementing which is considered to be a tool for compliance law-enforcement acts with desired features that are first of all addressed to TWMD. The significance CPDGS for them can be analyzed in two aspects.

1.1. The total set of such standards is a fixed model, prototype of a future desired result, «really achievable concretized objective», thus guiding law-enforcers on making a high-quality legal act (guiding for the value of CPDGS). If the investigator, prosecutor or judge knows beforehand the requirements his CPD must meet, particularly, that the act should include the motivation besides the conclusion, it helps to realize the foundations for rejection or admitting as unreliable information on the crime commitment, the convict's fault, his personality, i. e. to realize the motives of personal decision. All this facilitates working out a justified sureness, certitude of law-enforcer in a particular legal issue on a concrete procedural stage and firmness of his procedural position and readiness to defend his own opinion in all the procedural instances.

1.2. In turn, the realization by TWMD the fact that complying with the total set of CPDGS during decision-making ensures a high level of the approved act's qualitative definition (its good-quality),

and gives this person a sense of stability in conducting his activity. This is connected to another aspect of CPDGS value for TWMD, namely: making good-quality (logical, persuasive, with a detailed justification) decisions prevents, from the one hand, their possible unjustified appealing by interested persons, and, from the other hand, their abolishment by the superior institutions. Yet the existence of integrated CPDGS provides also the precognition of a final instance court's decision considering the circumstances of a particular criminal procedure that allows TWMD to forecast the prospects of their decision in case of its compliance with all the standards, including the ingrained judicial practice. Thereby are being created real preconditions for decision's stability, providing the fulfilment of its functional purposes, producing necessary effects, expected and predicted by the law-enforcer.

2. The CPDGS significance for those who examine this act from the angle of its quality. The outlined aspect of guiding significance of CPDGS that direct on a proper law-enforcement level in a legal state can also be called one of the closest functions of CPDGS category. Its final purpose is to be a measure of CPD quality, estimated by certain procedural participators on different stages. If a standard is a model, taken for initial in order to compare with similar objects, then it's completely clear that for particular decision quality estimation it is necessary to compare its features with the corresponding normative prescriptions, which would fulfill the function of a «criterion» or estimative basis. A standard, as V. Gmyrko reasonably admits in this scope, «is designed to serve as a method of assessment … a standard is devoted to help in solving the ambiguity of appropriateness/inappropriateness of a certain product for fulfilling the purposes of its creation[1]". In this scope the particular applied significance of CPDGS for organizing procedural decisions evaluation from the angle of their quality by appropriate competent official bodies (the examining judge, the court, the prosecutor, the superior prosecutor, the head of the pre-trial investigation body) is unconditional.

3. The CPDGS significance for participators of the procedure, whose interests refer to the taken CPD is the following.

3.1. Firstly, it is about making necessary pre-conditions for a desired law-enforcement result, expected by such persons, thus also needed for ensuring the rights of a participator, involved in the criminal procedure. The Universal Declaration of Human Rights of 1948 prescribes that everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law (Art. 8). The right to an effective remedy is also foreseen in the International Covenant on Civil and Political Rights (Art. 2) and in the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 13). However, the criminal proceeding

[1] Гмирко В. П. Доказування в кримінальному процесі: діяльнісна парадигма / В. П. Гмирко. – Дніпропетровськ, 2010. – С. 179.

is connected with a possibility for a substantial restraining constitutionally stipulated human and civil rights and freedoms as well as taking towards person procedural coercive measures. The mentioned restraints can be applied only based on the CPD, made by the competent bodies in a manner set forth in law. Respectively, the existence of an agreed, socially adequate normative system any CPD must comply with allows such persons to expect a correct, reasonable, persuasive and just CPD with more certainty, thus contributes to creating the atmosphere of confidence and relative rapport between the participants of the criminal proceedings.

3.2. In turn, the CPDGS implementation in everyday practice ensures making completely reasoned and logically agreed CPD by investigators, examining judges and judges, what in particular cases allows to persuade a person in the fallaciousness of his position and the futility of appealing this CPD in the superior bodies. In case of mistaken CPD, a study of the CPD motivated text by the suspect, the convict, his advocate or the victim allows to appeal to the superior body, thus also to defend effectively personal rights and legitimate interests.

4. *The CPDGS significance for constructing proper high-quality law-enforcement practice in the interests of society.*

This aspect of CPDGS significance is that the practice of making good-quality CPD during the comprehensive complying with all the standards in particular criminal procedures contributes to building a habit of TWMD to work out logical thinking, develops their system analysis skills, supports strengthening the legality in the activity of pre-trial investigation bodies, prosecutor's office and the court, as well as implementing the social justice principles.

4.1. Taking into consideration that, in general, any standard is a basis for industrial technologization, called to organize the activity in a certain sphere, its strengthening, stabilizing significance in a corresponding scope of application is evident. In fact, any norm exists to ensure something permanent, stable and resistant in a particular relationship – a common criterion for coordinating certain human activity. In turn, technological approach to the CPD making foresees guiding on CPDGS that, from the one hand, must ensure gaining a certain result in a certain manner and from the other hand – minimize or exclude undesirable or unscheduled consequences[1].

4.2. Regarding the mainstreaming social and legal value of such a law-enforcing feature as *coherence of court practice* it is necessary to pay special attention to the following CPDGS significance aspect. Any act that embodies justice should be an example for solving other, similar situations when positive legal norms, concerning the particular case, are somewhat defective (lacunae in legislation, its unconstitutionality, social inadequacy etc.). Respectively, a good-quality CPD, complying with all the necessary standards in case of overcoming certain legal defectiveness in this deci-

[1] Мизулина М. Ю. Власть. Политика. Технологии / М. Ю. Мизулина. – М.: ДиАр, 2002. – С. 216–217.

sion (by law analogy application, interpretation of law) is objective and law-making. Literally, conclusions, contained in such CPD, in case of their persuasiveness and comprehensive reasonableness often receive further «acknowledgement» of other law-enforcers while solving similar legal situations. In other words, in these cases CPDGS themselves have a certain *law-making significance* for forming «precedential» practice. Although the question of judge's right for referring to case law was not given a univocal answer among scientists and lawyers, it seems to be correct that on the occasion of a difficult and often controversial situation a careful study of CPD made in a similar situation by judges would contribute to a proper problem solution. As V. Yershov has appropriately pointed, whether a particular decision becomes a sample or not, depends mostly on the decision itself, its persuasiveness, and justification of formulated therein norms as well as the compliance of its conclusions with the principles of law, justice and reasonableness. It is precisely this regulation that could be admitted by other law-enforcers, and hereafter possibly by the legislator as well. The essence of the demand and repeatability of such decision is currently determined not by its binding nature but by the need for stability and uniformity of judicial regulation and predictability of public relations' results[1]. It appears that the latter scientist's statement describes the considered aspect of CPDGS significance brightly enough – particularly, their *ensuring role* in constructing such social and legal value as uniformity of judicial practice, its accuracy, gaining justice in case of legal uncertainty that in turn enables predictability of judicial practice. Indeed, the orientation of TWMD on the judicial practice (in the broadest sense) contributes to its unification, legal system's stability and simultaneously guarantees legal confidence of people who apply to judges for protecting their rights … in other case the citizens won't understand, which values are in the priority in courts[2].

5. *Public (or external) CPDGS significance*, from our point of view, consists of a range of aspects – *preventive (or precautionary), administrative, social, political, anti-corruptive and training*, that are tightly inter-connected, what, however, doesn't exclude a possibility for their separate consideration.

5.1. *The preventive significance of CPDGS* in case of their compliance in law-enforcement is stated in making conditions for citizens' lawful behavior, ceasing negative consequences of their activity, guiding for adequate fulfilling legal prescriptions, contained in particular procedural acts and, often, social intensification of fighting crime.

5.2. *The administrative significance of CPDGS* is that the standards as the criteria for individual CPD quality assessment are basic for constructing a

[1] Ершов В. В. Самостоятельность и независимость судебной власти Российской Федерации / В. В. Ершов. – М.: Юристъ, 2006. – С. 268.

[2] Валанчус В. Навіщо потрібна уніфікована судова практика / В. Валанчус // Право України. – №.11–12. – 2012. – С. 138.

system of qualitative indicators for law-enforcement results in criminal procedure in general, thus also receiving objective information about the qualitative condition of justice in our country. Another manifestation of the existing standards system's managerial significance is that the majority of system administration issues in the judicial framework, prosecutor's office and pre-trial investigation are solved exactly based on the qualitative criterion of CPD, made by these bodies' representatives.

5.3. *The social and political CPDGS significance* reveals in a clear conceptually agreed system of norms, binding for any CPD making by all the official bodies of criminal procedure, that creates a foundation for persuading society that the administration of justice is fulfilled on high standards, thus also is a precondition for increasing the trust in judicial and law-enforcement bodies and their public prestige. Of course, reaching this result is possible only under the condition of CPDGS compliance with public needs, implementing social expectations, particularly, regarding just and timeous remedy of violated human rights.

5.4. The anti-corruptive CPDGS significance requires particular considering.

5.4.1. CPDGS are a substantial component of a more common legal phenomenon – anti-corruptive criminal procedural standards (a system of requirements for criminal procedural legislation, compliance with which determines its ability to be an effective mechanism of preventing and counter-acting corruption in this sphere).

5.4.2. During all the stages of criminal procedure CPD is the main object of bribery deals, when involves law-breaking. Making a legitimate, reasoned and just CPD during the criminal procedure is an indicator of all the criminal procedural activity's good-quality, thus also its decency. And, on the contrary, the essence of various corruptive activities often is that the investigator, the prosecutor or the judge, using own discretional powers (frequently involving violations of law), following illegal interests, for a certain corruption payment or profit make consciously lawless procedural decisions (illegal, unreasoned, unjust, evidently not timeous – sudden or, vice versa, delayed etc.). Besides, this happens on different stages of criminal procedure in line with different goals (continuous delay of the proceedings by the means of red tape or oppressing the parties, assisting to the suspect or the convict in destroying crime traces, hiding the assets which can be subject to distraint, disguise from pre-trial investigation bodies etc.). Using specific entries, such decisions, made with law-breaking, are an object of corruptive exchange.

5.4.3. Therefrom it is obvious that the set of activities for providing CPD good-quality is simultaneously one of the effective means for fighting corruption in this sphere. And this regards, first of all, the excellence of CPD making technology legal regulation. In fact, its normative regulation, including the elimination of legal uncertainty during constructing foundations and conditions for CPD admission (particularly, because

of excessive overload of these norms with subjective value judgments and univocal terms) determines certain «difficulties» and makes an «unpleasant micro-climate» for corruption misfeasance of TWMD in their discretional powers. In these cases the subjects of corruption offences in order to receive corruptive profits meet more difficulties in maneuvering within the legal framework – they have to neglect legal requirements, what makes corruption more evident and harder in realization, considering the control over criminal procedure. And, on the contrary, the drawbacks of procedural and substantive legislation, which, in opinion of experts, comparatively with other circumstances aren't, however, the main corruption factor, though contribute the origin of a range of corruption activities during the criminal procedure.

5.5. It is therefore unthinkable to leave unseen the significance of worked out CPDGS for the effective organization of training personnel for the bodies of investigation, prosecutor's office and justice.

Conclusions

Summing up, it is necessary to set the following statements.

1. CPDGS, being a total set of normative prescriptions, binding for any CPD making, under the condition of their adequate construction, obtain a huge regulative potential in the common mechanism of law-enforcement in the criminal procedure.

The role of CPDGS is multifaceted and manifests in various (internal and external) directions.

The main CPDGS significance for a particular criminal procedure parties reveals in their orienting function for law-enforcing, criterial and evaluative – for those who examine CPD from the angle of its quality and ensuring – for the parties whose interests refer to the admitted decision.

External or public (exceeding the boundaries of a particular criminal proceeding) CPDGS significance is considerable enough as well. The main manifestation of these standards positive role in regulating public relations is their *preventive, social, political, anti-corruptive and training effect.*

Besides, on the modern stage of national society's development, under the condition of active corruption-fighting, including the law-enforcement sphere, the CPDGS anti-corruption significance is especially up-to-date. The existence of adequately reflecting the legal reality requirements for the main object of the corruption exchange in the criminal procedure – CPD and appropriate control on upholding them is exactly the powerful preventive factor for various trespasses in this sphere.

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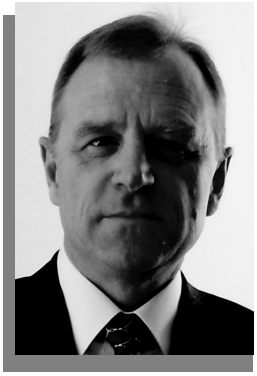

UDC 343.915

CRIMINALITY OF CRIMINALLY ACTIVE PART OF YOUTH AND ITS PREVENTION IN UKRAINE

\Protection of moral and physical development of young people is one of the priorities of Ukraine, as under such conditions the state and society can be confident of the future prospective. Young people, as noticed by F. A. Voltaire, D. A. Dril, J. J. Rousseau, I. Kh. Fenelon, – is the color of every nation, and with the right behavior and attitude human could enjoy the results in the future. We need to recall the expression J. J. Rousseau: «Water young sprout and its fruit will someday be your consolation». This expression is to better understand the significance and role of the young generation. It's young people that in the future may form a civil society where people not declaratively, but really become the highest value in all areas, including the means of ensuring the rights and freedoms of citizens, ensuring economic and social support to all layers of the population, solving the problem of providing crime prevention.

It is known that, the declaration of provisions on paying careful attention and promotion of good mental, physical development of young people, their moral well-being of the State, does not provide with valid guarantees of following of these principles. Significant role in this matter is given to the society, as it's considered to be more mobile and efficient force. The State and the society should make every effort to provide young people with the decent living conditions, promote their full mental, physical development and moral well-being. Unfortunately, nowadays the existing negative trends in the country, social and economic problems lead to increase in crime level in general and some of its types, including the crime of criminally active young people in particular.

Youth criminality as a social problem dates back to the distant history. The situation in the youth violence was an integral part of the moral and legal char-

acteristics of the society at all times. Over the past several millennia prominent scientists, politicians and public figures around the world proposed a lot of interesting ideas to prevent youth violence. The application of these ideas varied from introduction of quite violent criminal activities to humane precautions political, economic, ideological, religious nature activities. But the fact that today the crime has not disappeared as a phenomenon; in fact it took new forms. It could be in particular crimes of economic activity, distribution of «computer crime» etc., which shows that none of the methods of crime prevention are completely effective.

The study of youth criminality in recent years has become increasingly important because nowadays modern youth environment undergoes sufficient reorientation due to the influence of political, economic and social situation. On the one hand, rethinking of value orientations of previous generations, the continuity of experience, contribute to the training of lawful behavior and ways of thinking of young people, promoting its harmonious adaptation to the law and avoid «conflict» with criminal law. On the other hand, political instability and the weakness of the existing authorities, economic disintegration and impoverishment of the majority of the population, low level of morality, justice and legal culture of society, social hypocrisy and fictitious goal which are frequently set by ideological and mass culture to the young person may act as blockers or stimulants of the respective illegal actions of youth as misdemeanors and crimes. It is young people who are more likely to accept the propaganda goals of «life without limits», «enjoy today», the «non-recognition of authority.» It is clear that the assimilation of these values creates more problems and difficulties with criminal law to a young man. Ukraine, which is under transformation of social processes which are an essential factor in the transition period should not lose its powerful potential – young people, otherwise the next time it may face a dangerous, or to be more specific, an explosive social situation, as people of young age have always been the most socially active part of society. Thus, the isolation of the problem issues on youth criminality and its component parts, criminality of the criminal active young people is explained by many reasons and in multiple dimensions.

First of all, it is shown through the importance and magnitude of tasks on health problems of young people, public policy for the protection of rights and legal interests of this category. Second of all, peculiarities of the development and motivation of young people who have committed crimes due to their specific socialization and life (during the formation of their personality, are the variability of social position, range and content of social functions, etc.), personal and social group characteristics. The third reason is the close connection of the criminality of criminal active part of young people with a common crime, its causes and conditions.

Of course, it's impossible to give answers to all the questions in one article, so now it is necessary to outline only the

most serious problems, and to outline the others as questions asked, which in the future should be processed on monograph level.

It's necessary to mention that criminality should be viewed as a general phenomenon of youth crime – a special, crime and criminal active part of youth – as a unit. During the study of criminality it's necessary to base on socio-legal and specially-legal principles that ensure the dominance of human values, the unity of social and personal interests. In our point of view, special attention should be focused on criminal active part of the youth because as it's emphasized by A. P. Zakalyuk «Criminal activity is the core essence of the crime»[1].

Interrelation of different age groups in the mass crime shows that most criminal activity belongs to people aged from 25–29 years, followed by 18–24-year-olds, then –14–17-year-olds and, finally, 30–40-year-olds. If we go to a particular type of crime, we can establish that criminal activity of youth, such as rapes which are committed mostly at the age limits of 13 to 19 years (50,3% more), crimes against property – 18 to 25 years, the commission of group violent crimes – from 21 to 29 years.

As it's stipulated by most of the scientists, a person – is first of all a human as the subject of relationships and conscious activity. Second of all, it is a stable system of socially significant features that characterize the individual as a member of the society or community. In the modern scientific literature there is no single scientific point of view or definition on the age limits of youth, but as age limits for my studies and research are important, I found it necessary to devote this issue, as well as the characteristics of young offender, special attention. The Law of Ukraine «On promoting social advancement and development of young people in Ukraine»[2] age limits of people of young age are set from the 14 to 35 years of age. Most psychological literature conventionally defines youth ranging from 20–23 years to 30, in addition adds that the concept of «young people» – is not so much determining the age, as it is the concept of social and historical. Sociologists gave the definition to «youth» and set its age limit from 15 to 28 years, and juveniles from 13–14 years to 29–30 years. Criminologists also come to an unambiguous interpretation of the age limits of people of young age. In my opinion, age limits of the concept of «youth» with regard to the essential characteristics should be more precise, thus, such limits are defined in two subgroups: 1) from 18 to 25 years and 2) from 25 to 29 years. If a young person being 18 years of age just begins his adult life in which there is a gradual transition from child, youth to adult worldview, and then at the age of 25–29, usually young people have a cer-

[1] Закалюк А. П. Курс сучасної української кримінології: теорія і практика: у 3 кн. / А. П. Закалюк. – К.: Ін Юре, 2007. – Кн. 1. – С. 137.

[2] Про сприяння соціальному становленню та розвитку молоді в Україні: Закон України від 23.03.1993 р. № 2998-XII (в ред. Закону від 23.03.2004 р.) // Відом. Верхов. Ради України. – 1993. – № 16. – Ст. 167; 2004. – № 29 – Ст. 370.

tain educational level, social experience of living in a society, builds its own family. In these age limits we can note the highest level of activity of youth. At each stage of life a person takes certain skills, opportunities to use their previous experience. It is natural that the next step is closely linked to the previous one. The crime of criminally active youth is preceded juvenile delinquency in particular. At the age of 30, young people tend to already have a place of residence, chosen profession, social status, family, specific features and experience and so on. This allows saying that the personality is already formed. It's due to this fact the way of getting criminal orientation young man is not prospective, if she obeyed the law before. However, as we know it is an active crime criminal bench of youth adds more «mature» criminality, including people of young age who are the criminal gangs' members, commit crime systematically and soon.

To outline the range of determinants of crime of criminally active young people we should consider the provisions under which the crime of criminally active youth is hierarchically-determined phenomenon, which is having an impact, first, on the criminalization of society through the widespread practice of criminalization of certain government structures and weakening means centralized criminological prevention (macro factors); second of all, dysfunction, failure at the institutions level that provide legal socialization of youth crime prevention and provide means of social influence (institutions of education, family, work, leisure areas); thirdly, the factors of personal profile of a young offender, associated with the respective applications of the principle of individuality of criminal penalties and personalized means of prevention of crimes committed by young people. This priority should be given to social and informal, social and corporate nonrepressive means of correction and correction of the behavior of young people who have committed certain crimes. After all, today one of the trends of science is to replace the methods of legal regulation: the transformation from using mostly imperative, own to discretionary management, providing the opportunity to the participants of public relations to determine their rights and obligations. This change should be aimed at ensuring initiative, creativity, finding new, civilized steps: minimizing the use of harsh punishments to persons age youth; alternative punishments to imprisonment; implementation of juvenile justice. Thus, prevention of criminality of criminal active part of the young people could be made by building prevention strategies in the chain «social determinants microenvironment – mezoenvironment determinants – microenvironment determinants – personal determinants – strategy of criminal law prevention of young people criminality and re-socialization of young criminals – of socio-community prevention youth crime and re-socialization of young offenders».

Issues related to providing theoretical and practical crime prevention among youth are worth separate attention. In our opinion, this multistage process, including scientific forecasting, strategic and

operational-tactical planning, resource provision and coordination of relevant entities which, by virtue of its authority, social status, public debt in the relationship and coordination perform this work in time and space.

In general organization and managing of the crime prevention criminal active part of youth should include three basic steps:

1) criminological forecasting of crime of Criminal active part of youth;

2) criminological programming preventing crime of criminally active part of youth;

3) coordination of activities of preventing crime of criminally active part of youth.

Criminological forecasting is based on predictive activities include processing and analysis of criminological information to obtain knowledge of the future state of crime of criminal active part of youth, its individual species and groups or probability crimes individual young people.

In criminological forecasting the following issues are considered:

– what factors and with what force negatively or positively affect the crime of criminally active youth;

– which is the probability in changes in the types of crime of criminal active part of young people, and therefore – in the categories of young offenders;

– which types of persons may chose criminal way of life;

– how will look certain indicators of crime of criminal active youth (the state, level, structure, nature, dynamics) taking into consideration a certain probability for the corresponding period;

– what is the correlation between the nearest and more distant objectives of crime preventing and what measures are most suitable to achieve them.

Taking into consideration the answers to the above questions a factor-criminological matrix is formed. Criminological forecasting includes processing and analysis of information related to the comparison of data on overall state of active part of crime criminal youth in the previous period, according to its individual types and groups or individual probability of committing crimes by young people considering factor determination. According to the results of criminological forecasting the central and local authorities with the assistance of law enforcement agencies, including the Ministry of Interior Affairs, which performs functions of law enforcement, must carry out development programs preventing youth crime. The program of crime preventing of criminal active part of young people – a separate document (or part of the document – the program of crime prevention) that defines the system measures to prevent crime by identifying objectives, methods, stages of implementation mechanism appropriate measures, and monitoring and forecast results for the program implementation.

The typical structure of the program of crime preventing of criminally active part of youth includes the following.

1. *Concept of counterreaction.* The concept of counterreaction contains a set of priorities (fundamental directions) fighting crime of criminally active part of the youth that proved their effectiveness and efficiency in the global, regional and

national practice. In particular, the priority may take place on the basis of four fundamental models of crime prevention of the youth: repressive and preventive, preventive and supervision, social, educational and propaganda and ideological.

2. *Organizational and legal support* – a collection of links to regulations (laws, presidential decrees, acts of Cabinet of Ministers, the standard-form positions, etc.) to ensure the practical implementation of priorities of the repressive and preventive, preventive and supervision, social, educational and propaganda –ideological preventive measures of crime of criminal active part of youth. Depending on the model, these regulations may include areas of constitutional, criminal, criminal-procedural, labor, administrative, penal, social, civil, family, information legislation.

3. *Human resources maintenance* – a structural unit of the program that contains a list of government agencies (agencies), non-governmental (public and private) organizations are required to directly implement general social measures, specially-criminological and individual prevention of crime of criminally active part of the youth that are responsible for implementation of prevention programs based on the law of the authority granted.

4. *The system of measures (methods) preventing certain types of crimes and background phenomena*. It includes measures of early prevention, direct prevention, preventive measures at the time precrime behavior and recidivism prevention.

Early prevention measures are aimed at preventing and eliminating infringements of normal living conditions and education of young people (mainly pupils and students), eliminating sources of negative impact on the living conditions and education, targeted at correction in personal development at an early stage, normalization and improvement of environmental conditions of life and education specific individuals or certain subgroups of youth. They relate to young people who are in the category of criminogenic risk, but not yet committed administrative violations or crimes.

Direct preventive measures are aimed at normalization of living conditions and education of youth, improvement of environment, social assistance for young people, support, protection in different forms, in time for their recovery if individual members of the group commit administrative offenses and commit crimes while are not any danger to society, but require removal by the police (violation of public order, petty theft, drunkenness in public places, etc.). These measures are mostly concerned random and situational young offenders.

Prevention measures at the time of pre crime behavior implemented on young people who are members of groups of negative orientation and are a danger to society. They relate to young people with dominant negative direction and include registration with the relevant authorities and institutions after committing a crime and serving a specific sentence (fully or partially), the implementation of measures of social influence (preventive talks with the district inspectors, parents, teachers, influence through student groups, etc.) placed in the sports and labor camps, clubs and sections, application of civil law measures.

Measures preventing recidivism – a set of measures to prevent the commission of repeated crimes by young people released from prison. This list may include labor and domestic arranging activities to identify the causes and conditions conducive to the commission of crimes (by officers of the criminal police, investigators, prosecutors, judges), the timely removal of weapons and guns from earlier convicted young people.

The majority of the above mentioned measures can be implemented within the framework of the activities of the police. These areas are the following:

– analysis of the reasons and conditions that contributed to the commission of crimes and other offenses; develop recommendations for their elimination; presentation to the central government and local executive authorities generalized information on youth crime;

– development and implementation of comprehensive programs of prevention of youth crime and delinquency, and the prevention measures of certain groups of young people to certain types of offenses;

– public participation in prevention activities in overcoming criminogenic conditions for juveniles, pupils and students;

– taking into preventive registry young people who systematically violate the public order; conducting individual preventive work with the above mentioned categories;

– identify problem families with antisocial behavior; detection and placement in reception centers juveniles who have no permanent residence and are engaged in begging;

– contributing to a public atmosphere of stability, coherence and intolerance to unlawful behavior of young people;

– creating the organizational conditions for the existence of an effective relationship between the general organization of youth crime prevention and law enforcement activities;

– informing the population regarding criminological situation in the country, some of its regions, the preventive measures taken and their effects on actual results of preventive work with young people, which is characterized by illegal behavior and negative direction;

– organization of cooperation on crime prevention with other law enforcement and public enforcement units;

– contributing of preventive activities that fairly and voluntarily carry out their preventive function, timely and fully perform their tasks, achieve significant results in crime prevention;

– research and dissemination of positive experience that leads to a correct understanding of the essence of prevention activities, dissemination of perspective forms.

5. *Participation of non-governmental organizations in crime prevention of criminally active part of young people* is a structural program unit that contains a list of non-state (public) organizations and activities to crime prevention in general and on certain types of crimes (background phenomena), and a list of preventive activities which conduct control of the mentioned non-governmental organizations. A meaningful component of this part is a plan of non-governmental

organizations participation in crime prevention of criminally active part of youth. Non-governmental associations and organizations can make social, cultural, educational and psychological measures to prevent youth crime. Thus, they include: the protection of youth representatives among the poor, orphans, the unemployed and homeless; different efforts of approval in the society of good ideas, legality, high morality and so on; education of legal behavior, positive activity, information about the means of reducing criminal victimity, formation of trust to law enforcement authorities, information about the negative consequences of violation of criminal law, demonstrating positive results of crime prevention and so on.

6. *Financing program* is a structural program unit that provides guidance on sources of financing of preventive activities. The financial plan, which is a part of the content of this block contains the code of the subject, the code of preventive measures, source of financing, the volume of financial resources, the basis for financing (allocation of funds), the terms of financial resources (duration and frequency), code of the state authority that monitors the spending of the funds.

7. *The terms of the program realization* is the deadline of the program of crime prevention of criminal active part of youth. The program is divided into the following periods: operational (duration up to 1 month), short-term (duration up to 1 year), medium (duration up to 5 years), long term (duration up to 15 years), long term (duration more than 15 years).

8. *Monitoring of the implementation of the program* – a structural unit program that contains a list of central authorities, and according to the current legislation are responsible for estimation of current legislation and the final results of the program of crime prevention of criminally active part of youth.

Thus, the organization and managing the process of crime prevention of criminal active part of youth includes criminological forecasting of quantitative and qualitative indicators of crime of criminal active part of youth, programming of preventive measures and coordination of crime prevention of criminally active part of youth.

And finally, it's necessary to mention that the essential characteristic of the people of young age is maximalism. Something simple and ordinary in general had little chance of success in youth because it had to meet the need of increased sense of life. Youth containes impulses to strive to the highest, best, maximum. This outstanding expression of life optimism has great power and value potential. A person of young age feels like titanium, able to make universal revolution; developing its own life projects, the young man sometimes behaves as if the world has to bow to its theories, not attempting to wonder about the vital capacity of his/her own theories.

Science has found a wide range of criminal personality traits and characteristics that most young people who commit crimes possess. And to our mind knowledge of these parameters to develop strategies and methods and techniques of prevention, define its main areas are very significant.

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ON THE STATE OF RESEARCH CHALLENGES THE APPLICATION OF MEASURES TO CURB THE PRISONERS IN UKRAINE

The article analyzes modern scientific developments on the application in Ukraine of physical effects, special means and weapons to inmates in prisons and substantiated the need for more active investigation of this problem considering the current state of law and order and safety activities of all entities and members of the criminal relations.

Keywords: research; scientific development; Penal activities; measures of physical restraint; special tools; weapon; places of detention; condemned; staff of the State Penal Service of Ukraine.

Formulation of the problem. Ukraine's accession to associate membership of the EU has set our country one of the key objectives – to adapt domestic legislation to the requirements of the regulations of the European Union. Especially urgent this problem is due solving problems and law enforcement in prisons and correctional facilities, as well as the need to improve the practice of in Ukraine to convicts in prisons of physical effects, special means and weapons, as this activity is not fully correlated as the rules of international law, with the requirements of Art. 3 of the Constitution of Ukraine. Practice shows that often these security measures apply correctional staff and correctional facilities disproportionate to situations assembly of penal institutions (hereinafter – OHR) and associated with severe consequences for prisoners – leading to their death, bodily injury, causing injury, al.

State study. Closest to the content of the object and subject of this article and those that made its methodological foundations, steel works, primarily scientists and administrative law process – namely scientific papers V. Averyanova, O. Andrew, O. Bandurka, Y. Baulina, D. Bachrach, N. Berlach, J. Bytyaka, V. Bilous, I. Borodin, I. Holosnichenko, D. Holosnichenko, E. Didorenko,

R. Kalyuzhny, V. Kovalchuk, V. Kolpakov, Ya. Kondratyev, A. Copan, E. Korystina, N. Kornienko, S. Kostantinova, A. Kuzmenko, A. Maruschak, A. Ostapenko, V. Olefir, A. Chubenko and others. It should be noted that a greater extent of the mentioned issues are closed (confidential) nature and therefore are not available for a wide range of professionals and ordinary citizens, including prisoners.

In penal science on this subject since independence Ukraine is not protected by any thesis. Some aspects issues reflected in textbooks, manuals and comments on the CEC of Ukraine, as well as scientific papers, V. Badyra, I. Bogatyrev, V. Vasylevych, P. Vorob'ya, A. Gel, V. Glushkov, A. Dzhuzhy, T. Denisova, A. Kyrylyuk, I. Kopotuna, V. Korchynskyi, O. Kostenko A. Lysodyeda, S. Lyhovoyi, J. Levchenko, L. Onika, V. Osadchy, A. Savchenko, A. Stepanyuk, V. Trubnikov, S. Farenyuk, V. Shakun, I. Yakovets and others. Scientists and led to the choice of the topic of this article.

The presentation of the main provisions. Analysis of scientific and educational literature showed that many scientific developments in the field of administrative activities, primarily those associated with the use of physical effects, special means and weapons by the police, do not reflect the content features penal and legal can not fully provide scientific support implementation of the century. 106 KEC «Foundations application of physical force, special means and weapons», which acted as an additional argument for choosing an object, the subject, purpose and objectives of this research paper.

As the results of this study, this problem is also not properly disclosed and scientists penal profile in Ukraine. In particular, a textbook on penal law Ukraine, prepared in 2010 under the general editorship of Doctor of Law, Professor A. Dzhuzhy, this issue is not seen as a separate entity (because of its importance and practical significance), and in section 21.2. «Functions mode and means of ensuring»[1] and partly – in section 7.4. «The right to personal security prisoners» [2] without revealing with those difficulties, gaps and shortcomings of a legal nature that occur when applied to convicts in prisons, measures of physical restraint, special means and weapons, which is very important in view of solving in this scientific work research tasks.

A similar approach is used in the textbook and in the penal law of Ukraine edited by Professor A. Stepanyuk 2006 issue in which questions about the use of prisoners held in penal and correctional facilities Ukraine, these measures and security measures discussed in chapter 19, «The regime in the colonies and means of ensuring»[3]. In the book on this

[1] Кримінально-виконавче право України: підруч. / [О. М. Джужа, І. Г. Богатирьов, О. Г. Колб та ін.]; за заг. ред. О. М. Джужі. – К.: Атіка, 2010. – С. 590–594.

[2] Кримінально-виконавче право України: підруч. / [О. М. Джужа, І. Г. Богатирьов, О. Г. Колб та ін.]; за заг. ред. О. М. Джужі. – К.: Атіка, 2010. – С. 215.

[3] Кримінально-виконавче право: підруч. [для студ. юрид. спец. вищ. навч. закл.] / за ред. А. Х. Степанюка. – Х.: Право, 2005. – С. 178–179.

field of study under the general editorship of Professor V. Golina and A. Stepanyuk 2011 release of the issue, although covered in a separate chapter §5 19 «mode in the colonies and means of ensuring» but essentially problems of application in practice prisoners in detention, measures of physical restraint, special means and weapons in this academic publication also not disclosed[1].

Not given proper attention to this issue and other instructional publications of Ukraine. Thus, the issue of textbook «Criminal Enforcement Law of Ukraine» (A. Gel, Semakov G., I. Yakovets) (2008 issue) discussed in section 18.3. Section 18 «Legal regulation regime in penal institutions»[2], which also provides answers to significant practical problems arising in practice, law enforcement personnel Backgrounder Ukraine in the application referred to in Art. 106 CEC activities providing the prisoners in colonies.

Not made a full understanding of the content of this perspective and the scientific and practical comments to the CEC. In particular, the first of them, which was published in 2005. under the general editorship A. Stepanyuk, not reflected those issues reflected in ch. 3. 106 KEC (concerning peculiarities of application of physical force, special means and weapons to certain categories of prisoners), and in ch. 6 of the articles of the Code (the security measures in other cases provided by the Law of Ukraine «On Police» and " On the National Guard of Ukraine ")[3] that has practical value for improving the enforcement activities of the said law. Did not change information provision century. CEC 106 and in scientific comments KEC 2008, prepared under the general editorship A. Stepanyuk, which virtually repeated those provisions were reflected in the previous comments[4]. The same content is available to formal explanation to that article KVK set out in the scientific and practical commentary to CEC under the general editorship of Professor I. Bogatyrev (2010)[5]. Not decided outlined above problems and one of the latest scientific and practical comments to the CEC published under the general editorship of Professor V. Kovalenko and A. Stepanyuk in 2012 [6].

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[1] Кримінально-виконавче право України: підруч. / [В. В. Голіна, А. Х. Степанюк, О. В. Лисодєд та ін.]; за ред. В. В. Голіни і А. Х. Степанюка. – Х.: Право, 2011. – С. 206–208.

[2] Гель А. П. Кримінально-виконавче право України: [навч. посіб.] / [Гель А. П., Сємаков Г. С., Яковець І. С.]; за заг. ред. А. Х. Степанюка. – К.: Юрінком Інтер, 2008. – С. 410–413.

[3] Кримінально-виконавчий кодекс України: наук.-практ. комент. / А. Х. Степанюк, І. С. Яковець; за заг. ред. А. Х. Степанюка. – Х.: Юрінком Інтер, 2005. – С. 354–356.

[4] Науково-практичний коментар Кримінально-виконавчого кодексу України / А. П. Гель, О. Г. Колб, В. О. Корчинський [та ін.]; за заг. ред. А. Х. Степанюка. – К.: Юрінком Інтер, 2008. – С. 315–316.

[5] Науково-практичний коментар Кримінально-виконавчого кодексу України / [І. Г. Богатирьов, О. М. Джужа, О. І. Богатирьова, Є. М. Бодюл та ін.]; за заг. ред. І. Г. Богатирьова. – К.: Атіка, 2010. – С. 228–229.

[6] Кримінально-виконавчий кодекс України: наук.-практ. комент. / за заг. ред. В. В. Коваленка, А. Х. Степанюка. – К.: Атіка, 2012. – С. 315–321.

Episodic and unsystematic in terms of information provision, according to the study of their content, there are other scientific teaching publications on issues related to the use of coercive measures against prisoners in Ukraine. In particular, the Guidelines' security measures applicable to prisoners and convicts in Ukraine «(O. Kolb, I. Ram, T. Kuzmuk) highlighted the problems that occurred in the practice of law enforcement personnel jail and PIs to 2000[1], ie at the time of the TCI Ukraine 1970 It is noteworthy the fact that in accordance with Chapter 13 of the Code «Security measures and grounds for using weapons» and Art. 81 «The application of security measures to persons deprived of their liberty» and Art. 82 «Foundations of the use of weapons», firstly, were located on the other the common grounds application of physical force, special means and weapons and, secondly, its name was of generalized meaning – «security measures» which, in addition to, the legislator at the time and took the «special regime in the prison» (Art. 81–1 TCI).

No word is said about the right to the application of physical force, special means and weapons, as well as the legal basis for such activities staff prison in «doctrinal model of building the prison system Ukraine new type: an innovative project,» which in 2014 was developed and.H. Bogatyrev[2]. Along with this, the doctrinal model law «On the penitentiary system of Ukraine», developed in 1997 G. Radovis, including the rights of the employees of the penitentiary system is recognized one of them as «in cases envisaged by law apply to convicted individual protection and active defense» (Art. 47)[3]. In addition, Art. 56 of the models was determined that the employees of the penitentiary system who work directly with prisoners shall be provided by means of radio communication, personal protection and active defense. If necessary, by decision of the director of the penitentiary institution employees can be equipped with other security measures required by law[4], which is not in the existing CEC nor the Law of Ukraine «On the State Penal Service of Ukraine» no.

Only in general terms about the use of physical force, special means and weapons it is the thesis I. Kopotuna «Theoretical and applied the legal principles of crime, which cause emergency situations in the prisons of Ukraine»[5]. In

[1] Заходи безпеки, що застосовуються до ув'язнених і засуджених в Україні / О. Г. Колб, І. Л. Баран, Т. В. Кузьмук: Методичні рекомендації. – Луцьк: РВВ «Вежа» Волин. держ. ун-ту ім. Лесі українки, 2000. – С. 19.

[2] Богатирьов І. Г. Доктринальна модель побудови пенітенціарної системи України нового типу: інноваційний проект / І. Г. Богатирьов. – К.: ТОВ «ВД Дакор», 2014. – С. 56.

[3] Радов Г. О. Доктринальна модель Закону «Про пенітенціарну систему України» // Проблеми пенітенціарної теорії і практики. – 1997. – № 1 (2). – С. 47.

[4] Радов Г. О. Доктринальна модель Закону «Про пенітенціарну систему України» // Проблеми пенітенціарної теорії і практики. – 1997. – № 1 (2). – С. 51–52.

[5] Копотун І. М. Теоретико-прикладні та правові засади запобігання злочинам, що зумовлюють виникнення надзвичайних ситуацій у виправних колоніях України: дис…докт. юрид. наук / 12.00.08 – Одеса: Нац. ун-т «Одеська юридична академія», 2014. – 510 с.

particular, section 4.1. this paper «Legal regulation of crime, which cause emergency situations in correctional facilities,» the author of steps penal nature, which are included in the content of crime, calls the actions of security staff and prisoners (Art. Art. 10, 102- CEC 106)[1]. Although further I. Kopotun in his thesis and analysis exposes some aspects of measures to curb convicted and offers to modify the content of Art. 106 of the Penal Code as a whole answers to all the problems relating to a specific subject studies, he does not[2]. The same approach I. Kopotun outlined in his monograph «Prevention of crimes that lead to emergency situations in correctional facilities» (2013)[3]. Thus, in section 5.3 of this scientific development «Specially-criminological and individual prevention measures prevent crimes that lead to emergency situations in prisons,» he only said that in a generalized form of activity on specially-criminological crime, leading to emergencies in penal colonies containing and applying special precautions[4]. Remained unchanged position IM Kopotuna in other of his scientific writings. Along with this, the manual «Organization of supervision of prisoners in penal institutions» (2012), which is co I. Kopotun, under «Application of physical effects, special means and weapons in the PI» is given a detailed analysis of these security measures and implemented them separation: a) personal protective equipment; b) Active defense; c) the means of special operations and characteristics made them potential[5]. At the same time, and in this work is not given the interpretation of the issues that arise in practice, law enforcement personnel and PIs are not subjected to analysis of key legal terms and categories used in the sense of Art. 106 KEC (physical resistance, and other violent actions, individuals who maliciously staff not comply colonies; t. Etc..), which is important in view of resolving conflict and other difficult situations that occur during the serving of punishment and deprivation will.

However, in the context of solving this study formed a more objective approaches of the abovementioned issues in AV works Vedmidskoho who are convinced that the rules of use of physical

[1] Копотун І. М. Теоретико-прикладні та правові засади запобігання злочинам, що зумовлюють виникнення надзвичайних ситуацій у виправних колоніях України: дис… докт. юрид. наук / 12.00.08 – Одеса: Нац. ун-т «Одеська юридична академія», 2014. – С. 341.

[2] Копотун І. М. Теоретико-прикладні та правові засади запобігання злочинам, що зумовлюють виникнення надзвичайних ситуацій у виправних колоніях України: дис… докт. юрид. наук / 12.00.08 – Одеса: Нац. ун-т «Одеська юридична академія», 2014. – С. 342–346.

[3] Копотун І. М. Запобігання злочинам, що призводять до надзвичайних ситуацій у виправних колоніях: моногр. / Копотун І. М. – К.: ПП «Золоті ворота», 2013. – 472 с.

[4] Копотун І. М. Запобігання злочинам, що призводять до надзвичайних ситуацій у виправних колоніях: моногр. / Копотун І. М. – К.: ПП «Золоті ворота», 2013. – С. 347.

[5] Дука О. А., Копотун І. П. Організація нагляду за засудженими у кримінально-виконавчих установах: посібник / За заг. ред. докт. юрид. наук, проф. О. М. Джужи. – К.: Державна пенітенціарна служба України, 2012. – С. 43–58.

force, special means and weapons must be clearly identified no sectoral regulations DPtS Ukraine, and in particular the law of Ukraine «On the application of physical force, special means and firearms in the organs and institutions of the State Penitentiary Service Ukraine "[1].

Among the issues that are relevant to the safety of staff and inmates, some researchers also call: 1) increasing the efficiency of personnel and of penal institutions, change of professional psychology and overcome stereotypes in relations between staff and prisoners; 2) the introduction of modern technologies in the activities of the State Penal Service of Ukraine, including engineering and technical support facilities and security in the full PI staff personal protection; 3) overcoming counter prisoners and security personnel PIs means Criminology and search operations the prevention of crime and offense; 4) neutralizing the impact of criminological determinants of the state of personal security prisoners in penal institutions; 5) the rights of prisoners to personal security through application of physical force, special means and weapons; 6) reducing the impact of psychosocial factors on the effectiveness of the professional staff of penal institutions; 7) improve training epsyholohichnoyi Backgrounder Ukraine; 8) Conduct staff reduction viktymnosti prisons; 9) improving law and discipline of personnel and penal institutions; 10) ensure the implementation in Ukraine of international standards on the rights and freedoms of prisoners; 11) the protection of public security and order in prisons[2]; al.

Thus, the analysis of scientific, educational and methodological literature suggests that today very topical and urgent theoretical and applied problems in Ukraine is the application of physical force, special means and weapons to prisoners in penal institutions, and so this issue needs greater involvement scientists in its decision, including at the level of master's and doctoral theses and specific monographs open nature.

Published: Юридичний вісник. Повітряне і космічне право. – 2015. – № 2. – С. 129–134.

[1] Ведмідський О. В. Застосування персоналом виправних колоній сили до засуджених у випадку вчинення втечі // Державна пенітенціарна служба України: історія, сьогодення та перспективи розвитку у світлі міжнародних пенітенціарних стандартів та Концепції державної політики у сфері реформування Державної кримінально-виконавчої служби України: матеріали Міжнар. наук.-практ. конф. (Київ, 28–29 берез. 2013 р.). – К.: ДПтС України; ВД «Дакор», 2013. – С. 313.

[2] Копотун І. М. Охорона громадськості безпеки та правопорядку у місцях позбавлення волі як складова сучасної кримінально-виконавчої політики // Науковий вісник Інституту кримінально-виконавчої служби. – 2012. – № 1. – С. 37–49.

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SOCIAL AND PERSONAL SIGNIFICANCE OF CRIMINAL OFFENCE AND THE PRINCIPLE OF FAIRNESS

The modern constellation of legal definitions of justice and its enforcement in criminal law of various law schools contains statements seeking humanization of criminal liability, maintenance of proper criminal law's treatment and providing reasonable protection of all generations of human rights by criminal regulation. All the transformations of this kind involve the declarative principle of fairness, which loses its primary meaning due to suppression of the rule of law principle by the rule of legislation principle, reducing enforcement of criminal norms to technological constructs. Under such conditions, the general proclamation of the justice principle loses its initial meaning, forcing international and internal criminal policy to seek the ways of introduction of «justice» on the level of derogation and situational infusion of new constructs into current criminal norms.

As outlined by professor V. Tulyakov (2015), some centuries ago the concept of personal vengeance in criminal law changed to fair state coercion that is appropriate to the needs and aspirations of the population, reflecting the natural and legal form of spreading kinds and forms of personal needs fair treatment.[11] Indeed, the change of concepts is unlikely to lead to fair treatment or enforcement of the principle of justice in general for each case of application of criminal liability if we fail to evaluate social significance of a criminal offence at specific time and scene.

[1] Vyacheslav A. Tulyakov. Criminal law and development / Сборник трудов по итогам Международной научно-практической конференции «Международное право развития: современные тенденции и перспективы» (Одесса, 17 июня 2015 г.). – С. 14–19 – [Electronicresource]. – Modeofaccess: https://docs. google. com/viewer?a=v&pid=sites&srcid=b251YS5lZHUudWF8aW50bGF3fGd4OjVmZjYxY2Q0NDZmZGQ4MGQ

The norms of most modern European and post-soviet criminal codes are not only enforced but are also designed based on assessing and determining objective attitude towards *actusreus* embodied in the law, as well as an individual and their «subjective» attitude towards an act.

There are a number of situations when assessment of the same act affects social as well as personal significance of an act in different ways due to heterogeneity of victims, unequal social and intellectual level of perpetrators, different relevance of criminogenic environments etc.

For instance, larceny of property of the same value from a magnate and from a pensioner will lead to the same qualification in case only objective and subjective elements of *corpus delicti*are considered, hence necessity to choose penalty within the limits of a respective sanction. That is to say, robbing a helpless old person and robbing a millionaire are virtually equated in their significance, which is fully demonstrated by the same qualification.

In much the same way, identical acts of a person driven into a corner by the low level of life and an outraging celebrity will be qualified in the same way, and, therefore, will entail the same penalty.

It is hard not to point out that an example of commitment of identical acts towards heterogeneous [tentatively non-victim-prone] victims would look cynical. Deprivation of life of a single person or, alternatively, a sole wage earner in a long family has different social significance. Even though human life is always equally important and requires penalty regardless of status and financial security, social consequences for minor children of the killed are substantially more serious than those in case of deprivation of live towards a person who is not depended on by a big number of the alive.

Nevertheless, can such an approach be considered fair? Does soulless assessment reflect the real role of an offence in a society and on an individual level?

Being reflected in the reality, the significance of any act affects the society on the micro-, meso- and macro level. Along with objective and subjective elements of a criminal offence, certain elements of significance of an act for the society and an individual affect assessment of an act. However, not all of them do, for only those elements that are reflected in the normative formulations have such an effect. For the most part, they literally concern extenuating or aggravating circumstances. For example, committing a crime towards an expectant mother or a minor aggravates penalty, while a concatenation of trying family circumstances which account for crime commitment extenuate penalty. Some of such circumstances are directly attributed to the grounds for exemption from liability: acts under extreme necessity, necessary defence etc. The significance of an act is minimized with the change of conditions or reconciliation of the offender with the victim.

One could hardly find either the offender's or the victim's counsel who would agree that all possible circumstances of the social and personal significance of an offence can be institutionalized separately. All the spectrum

of circumstances affecting significance of an offence is inexhaustible, all the way from a family crisis to the revolutionary events in the state.

They depend on a range of external and internal factors that predetermine significance variability under various circumstances, e. g. the environment, criminality of a scene or victimhood.

Let us try to distinguish two types of significance of a criminal offence:

1) social significance, i. e. objective significance of an act for a society;

2) personal significance, i. e. subjective significance of an act for the victim and the perpetrator.

Social Significance of Criminal Offence. We define social significance as public attitude towards a committed act measured in negative and positive values (possibly measured in points in the future). *Social significance is the effect of an act and its consequences on the social attitudes the way it is reflectedin the social consciousness at a certain point of space and time*.

This category can correspond with the category of objective elements of *corpus delicti*, since it characterizes the effect of an act on social attitudes, as it is reflected in the society, causing public rejection or acknowledgement. The criterion of social significance can perform one of the most important doctrinal missions in criminal law, since it can become the way of defining the interrelation of the categories of lawfulness and justice – the accordance of a requital and an offence.

The gradation of social significance can be either positive or negative. Based on the statements of Pitirim Sorokin and his followers, we would like to note that both a feat and a crime are deviations, the only difference being the sign attributed by a society, either "+" or "-", and the choice of the polarity is marked by a society, with either reward or punishment. Essentially, social significance can be a measure of good and evil in the society and, therefore, a criterion for defining the criminal and the heroic, the penal and the praiseworthy.

Negative and positive aspects of unlawful conduct can merely reflect its social significance objectively since only the latter can demonstrate the impact of a deed on social attitudes at a certain point of space and time. For instance, the act of resisting police in a stable society is criminal. However, resisting the police protecting the dictator from people's wrath under the conditions of popular revolution gains positive significance and is appraised as a feat.

Speaking about social significance, it is worth assuming that this notion, as already noted, corresponds to the objective elements of *corpus delicti*.

Within the system of objective elements of *corpus delicti* and, therefore, in the qualification formula, social significance of an act may correspond to a target of crime and *actusreus*.

The question logically arises as to whether the social significance can be included in the system of objective elements of a crime. The answer to this question is in the comparison of the functional load of such notions as «objective elements of an offence» and, accordingly, «social significance». The latter may be commensurable with such

categories as «social danger», «harm», «damage» etc., and in a certain sense arises from them. After all, social danger, harm and damage are the reference points of social significance: societies formtheir attitude towards an act by assessing harm and danger. However, the category of social significance cannot substitute for the features of an act and its consequences in the construction of objective elements, as it doesn't literally define the criteria of the criminal, but it can reflect the core reaction of the society to a particular an act.

Therefore, *social significance carries out a function of «defining the sign» for the construction of any non-legal action, defining unlawful deed as positive or negative, harmful or socially useful for the society at a particular point of time and space.* We also suggest that social significance among other things may serve as a criterion not only for defining the criminal and the non-criminal but also for demarcation of criminal offences and crimes. As a matter of fact, it can reflect the degree, the intensity, the level of rejection or acceptability of certain forms of deviations.

For instance, there might exist a scale of a negative social significance. It would be assumed that such a scale is filled with socially significant objective criteria of assessing a deed by the society according to a number of parameters that define the relation of a deed to the categories of either criminal offences or crimes.

It must not be ruled out that social significance of a deed in case of establishing a regular positive social evaluation may lead to decriminalization, which in turn would disburden the criminal legislation of post-totalitarian states of inquisitive criminal norms.

Personal Significance of Criminal Offence. Personal significance of an offence is the other side of deed evaluation. This fact was explicitly and implicitly observed by our colleagues Tulyakov (2014)[1]and Baulin (2012)[2]One could say that since it reflects the individual's attitude, it should correspond with the subjective elements of *corpus delicti*. Nevertheless, let us examine the alternatives of personal significance of a deed for participants of a criminal offence: the victim and the perpetrator.

Personal significance of an offence for the victim is the reflection of the victim's attitude (or the reflection of attitudes of the individuals recognized as injured by a certain criminal offence in case of victim's death or loss of ability to express their attitude) towards a committed act.

The modern doctrine of criminal law contains a number of institutions that demonstrate the role of personal signifi-

[1] Туляков В. О. Кримінальне право сьогодення: ренесанс ідей Ч. Беккаріа / В. О. Туляков // Про злочини та покарання: еволюція кримінально-правової доктрини: матеріали Міжнародної науково-практичної конференції, присвяченої 250-річчю трактату Чезаре Беккаріа (м. Одеса, 13 черв. 2014 р.) / МОН України; НУ ОЮА; ПРЦ НА ПрН України; Одес. відділ. ГО «Всеукр. асоц. кримін. права». – Одеса: Юридична література, 2014. – С. 27.

[2] Баулин Ю. В. Значение общественного мнения и интересов потерпевшего при моделировании современной уголовной политики / Ю. В. Баулин // Современная уголовная политика: поиск оптимальной модели: материалы VII Российского конгресса уголовного права (31 мая – 1 июня 2012 года). – Москва: Проспект, 2012. – С. 581–584.

cance of an act for the victim with a certain level of objectivity when imposing criminal liability. As a rule, their description is made by the medium of a thevictim's attitude towards post-criminal behavior of the perpetrator. These include the perpetrator's reconciliation with the victim as a basis for exemption from criminal liability, which is the most demonstrative in this case: the victim's decision to forgive the perpetrator is basically the reflection of a positive attitude towards post-criminal behavior: compensation, repentance etc. Still, would representation of personal significance be complete with such an approach? After all, a deliberate criminal offenceassumes a number of stages of its commitment, and the victim's representation of crime goes beyond receiving apologies and compensation of caused harm. A reckless crime also exists at a certain point of space and time coordinates where it «resides», and the victim goes along these coordinates along with the perpetrator.

Therefore, the victim personal significance of an act must reflect all the stages of an act, as well as pre- and post-criminal behavior of the perpetrator. However, it cannot be limited to that.

It must be highlighted that the factor of victim-proneness of the victim's behavior must be included in the scope of personal significance for the victim of a criminal offence. Thus, provocative, immoral or unlawful actions of the victim must be taken into account as elements of victim's personal significance of a crime along with evaluation of the very act and post-criminal behavior of the perpetrator, since only their constellation demonstrates a complete scheme of the victim's attitude towards an act.

The criteria of victimhood must correspond with objective elements of *corpus delicti* and affect not only the determination of personal significance, but also be reflected in the characteristics of the victim when determining the target of crime and *actusreus*. Obviously, the victim's personal significance of an act must be viewed alongside the target of a crime, *actusreus* and social significance of a crime as an independent category that includes the elements of victim-proneness having affected the commitment of a criminal offence.

Personal significance of an act for the perpetrator, in turn, cannot be understood apart from the issues of sanity and culpability. Therefore, it corresponds with the categories of subjective elements of a crime. However, it is directly linked to the perpetrator's awareness of the real social significance of their act and its personal significance for the victim. The perpetrator's attitude towards these two categories allows to optimize the answers to the questions «why has such an offence been committed [by the perpetrator]?» and «Is this actually a crime [in the victim's mind]?».

It is reasonable to define personal significance of an act for the perpetrator as the perpetrator's conscious attitude towards social significance of an act and its personal significance for the victim when committing a criminal offence.

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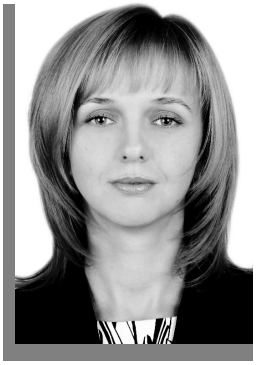

UDC 347.962

ASSESSMENT OF JUDGES AND THEIR DISCIPLINARY LIABILITY: ISSUES OF DIFFERENTIATION

Actuality of the research theme. The adoption of the Law of Ukraine «On Securing the Right to Fair Trial» dated 12 February 2015[1] has marked a new stage of judicial reform and established number of innovations concerning the legal status of judges, their responsibilities and career opportunities. One of the general court's judge career stages is the disciplinary authority qualification and regular assessment, which provides High Qualification Commission of Judges of Ukraine. In this regard, research activities in evaluating the legal nature of a judge's assessment are relevant, its features and disassociation from such an institution as the disciplinary responsibility of a judge, which is closely, linked its evaluation.

Research theme in the works of native scientists. Within local scientific legal literature there is no shortage of analysis dedicated to responsibility of the judges (L. E. Vinogradova[2], S. V. Podkopaev[3], R. O. Kuibida[4]). Simultaneously, the Institute of qualification and regular assessment of a judge is a new institution and therefore and therefore has not yet received sufficient scientific justification.

The purpose and objectives of the article. The purpose of this article is a

[1] Про забезпечення права на справедливий суд: Закон України від 02.02.2015 р., № 192-VIII // Офіц. вісник України. – 2015. – № 17. – Ст. 447.

[2] Виноградова Л. Є. Юридична відповідальність суддів загальних судів України: автореф. дис.… канд.. юрид. наук: спец. 12.00.10 / Л. Є. Виноградова. – О., 2004. – 18 с.

[3] Подкопаєв Д. В. Про підставу дисциплінарної відповідальності суддів / Д. В. Подкопаєв // Юрид. вісник. – 2005. – № 12. – С. 119–121.

[4] Куйбіда Р. О. Реформування правосуддя в україні: стан і перспективи: моногр. Р. О. Куйбіда. – К.: Атака, 2004. – 288 с.

comprehensive evaluation of a judge's qualification assessment institutes and his discipline responsibility. In particular, it is necessary to analyze the grounds and consequences of these two institutions that will help distinguish the criteria of their differentiation.

Main research materials presentment. The Law of Ukraine «On the Judicial System and Status of Judges» (dated 2010) has canceled a number of institutions and provisions which were envisaged by the legislation on the status of the judges, among which were the qualification judge classes and their qualification attestation[1]. The procedure of qualification attestation of judges was determined by chapter 13 of the Law of Ukraine «On the Judicial System of Ukraine» dated 7th February 2002[2], chapter VII of the Law «On the Status of Judges» dated 15th December 1992[3] and by the Provision on Regulation of the qualification attestation of the judges, approved by the Order of the State Judicial Administration of Ukraine, dated 4th August 2006, No. 80.

According to art. 40 of the Law of Ukraine «On the Status of Judges» dated 15th December 1992, depending on the position, experience and level of professional knowledge of judges were established six qualification ranks – higher, first, second, third, fourth and fifth. Judges who had the qualification ranks were receiving supplements to their salaries stipulated by legislation of Ukraine[4]. According to the President of Ukraine Decree dated 1st August 1999 «On the level of bonuses to the salaries of the judges for qualification ranks», monetary allowance to judges for the relevant qualification rank was set at the level of UAH 275–400, and although the level of specified allowances was not very significant, qualification ranks institution played itself the moral incentive role for career promotion of a judge.

The system of qualification ranks awarding was thus developed that a local court judge after being in the 5th qualification rank during three years could obtain 4th rank, three years later – 3rd rank, after five years – 2nd rank and further raising in the qualification rank was possible subject to a judge' highest level court transfer only.

We emphasize that the qualification system of ranks (or degrees) which assignment depends on individual experience and level of proficiency or personal achievements and appears in many professions, in particular, civil servants, diplomats, militaries, medics, prosecutors. The essence of qualification attestation is in assessing the professional level of officials in determining their degree of suitability and preparedness to the performed work, the characteristics of their professional knowledge and business skills. Furthermore, the attestation is aimed at maintaining the qualification of an individual at the proper

[1] Про судоустрій і статус суддів: Закон України від 07.07.2010 р., № 2453-VI // Офіц. вісн. України. – 2010. – № 55/1/. – С. 119–121.

[2] Про судоустрій України: Закон України від 07.02.2002 р., № 3018-III // Офіц. вісн. України. – 2002. – № 10. – Ст. 44.

[3] Про статус суддів: Закон україни від 15.12.1992 р., № 2862-XII // Відом. Верхов. Ради України. – 1993. – № 8. – Ст. 56.

[4] Ibid.

level and acts as a professional career integral element.

Comparative legal analysis testifies similar institutions of qualification attestation of judges exist in most of the CIS countries and several EU countries with the same infliction. Thus, the Italian experience on the professional assessment of the judges is quite interesting. Every four years a judge may pass the qualification attestation on which results his future career depends. In general there are seven levels of attestation in Italy and each level contemplates list of positions which a qualified judge may take up. Judges are being tested under the following criteria: competence, performance, diligence and motivation. The Supreme Council of Magistrates develops and approves clear assessment requirements for judges according to specified criteria. Chairmen of judges ensure attestation of judges. A judge who is being certified has the right to appeal the results to the regional Judicial Council or to the Supreme Council of Magistrates. Attestation result can be positive, not positive or negative. A judge who was positively certified can be further promoted. A judge certified not positive, should have re-attestation in one year. During this period his salary cannot be increased. A judge certified negatively must undertake re-attestation in two years with no increasing of his remuneration and the Supreme Council of Magistrates able to send such judge to take up raising efficiency courses or transfer him to another court within the same area. Should a judge receive again a negative certification in two years he would be dismissed. The decision on dismissal of a judge, approved by the Supreme Council of Magistrates can be appealed to the Administrative court[1].

It should be noted that the reporting of judiciary representatives is envisaged by the EU legislation. For example, judges appointed to the position in Belgium should be tested in a one year after appointment, and then – once in three years. The reporting does not apply to the content of the decisions taken by the judges, but only to the organization of their activity. The results of such assessment cannot be used within a disciplinary proceeding. Reports are being provided to a higher court in writing and their content is taken into consideration during promotion of a judge[2].

In Poland the powers on the judges work administration check are assigned to the Ministry of Justice of the Republic of Poland pursuant to Art. 8 of the Law «On the system of courts of general jurisdiction.» The Ministry also conducts administrative supervision control of the judicial system and has the right: to appoint and dismiss the heads of the courts of general jurisdiction by submission of the judicial self-government authorities; to monitor the effectiveness of their work; to initiate disciplinary proceedings against a judge; to appoint judicial administrators; to issue warnings to a judge in case inefficient organization of his work found; to establish work rules of the court.

[1] Judicial Independence in Transition / Editor A. Seibert-Fohr; LD Muller, D. Zimmermann, EK Schmidt, S. Klatte. – Springer, 2012. – 1382 p. – P. 372–373.

[2] Ibid (p. 337–338)

The Ministry of Justice of the Republic of Poland examines the work organization of the courts and their following statistical reporting through regular inspections and also generalizes complaints against judges. As a rule, these tests are carried out by the specially assigned judge inspectors. The purpose of the inspection may be either general performance of the court as well as the work of individual judges. Special attention is paid to the compliance with the terms of cases, court cancellation causes issued by the relevant court, by the highest judicial bodies, and the availability of complaints against the actions of judges[1].

The Opinion 17 (2014) «On the evaluation of judges' work, the quality of justice and respectfulness to judicial independence» dated 23 October 2014 of the Consultative Council of European Judges summarized the EU's experience in assessment of judges which main provisions could be reduced to: (1) in most European countries there are formal or informal assessment systems of judges; (2) the determination of legal grounds and assessment procedures depends on the state legal system; (3) unsatisfactory assessment results should not themselves (except in exceptional circumstances) have the possibility to lead to dismissal. This can happen only in case of serious violation of disciplinary regulations or criminal legislation, or if an objective conclusion derived in assessment of the result expressly confirms the inability or unwillingness of a judge to perform its judicial duties at the minimum acceptable level; (4) assessment of judges should be based on objective criteria. Mainly, these criteria should be produced based on quality indicators, but can also include quantitative indicators; (5) assessment of a judge should be conducted by the judiciary bodies; assessment by the Ministry of Justice or by other external bodies should be avoided; (6) the assessment procedure should take the proper procedure and be based on reliable evidences; judges should be able to express their views on procedures and preliminary assessment results and be able to appeal the assessment results.

The Law of Ukraine «On the Judicial System and Status of Judges» amended on 2 February 2015 has introduced the institute of qualification and regular assessment of judges. Qualification assessment is carried out by the High Qualification Commission of Judges of Ukraine in relation to:

(a) general court judges after the Law of Ukraine «On ensuring the right to a fair trial» dated February 2, 2015 has entered into force;

(b) Concerning judges which are elected indefinitely;

(c) in the order of disciplinary penalty. The criteria for qualification assessment are: professional competence (knowledge of law, ability to conduct a trial and to award decisions, personal competence (ability to perform the scope of work, self-organization), social competence (steadiness, stress resistance, communicativity) and ability to improve its professional level and to administer justice in the court of appropriate level.

Assessing the grounds and the procedure of qualification assessment of a

[1] Ibid (p. 723)

judge, it is hardly possible to cross direct analogies of this procedure with the institute of disciplinary judge responsibility.

Firstly, qualification assessment may be a stage of disciplinary proceeding against a judge. According to par. 4 ch. 1, Art. 97 of the Law of Ukraine «On the Judicial System and Status of Judges» one of the sanctions envisaged in result of disciplinary proceedings is the temporary (from one to six months) removal from the administration of justice with the deprivation of the right to receive additional payments to official salary of a judge and mandatory referral of a judge to the National School of Judges of Ukraine for a training course, as defined by body that implements disciplinary proceedings against judges and further qualification assessment to confirm the ability of a judge to administer justice in an appropriate court. The reason for the qualification assessment of a judge in this case is the decision of the High Qualification Commission of Ukraine on imposition of a disciplinary penalty on a judge.

Secondly, the procedure of qualification assessment of a judge has much in common with the disciplinary proceedings and meets the basic criteria of due legal process. Thus, qualification assessment carried out in public in the presence of a judge who is being assessed. The representatives of the judicial self-government authority body are able to take part in considering of the qualification assessment of a judge. The Commission creates conditions for enabling the presence of any interested persons during the qualification assessment (p. 13.1 Regulation of the High Qualification Commission of Ukraine). This procedure meets the requirement of *independence*, as it is carried out by the High Qualification Commission of Judges of Ukraine – an independent body within the judiciary system which majority consists of the judges. Qualification assessment of a judge is being conducted based on principle of *proportionality*, as carried out in a transparent manner on the objective criteria basis established by Law, subject to merits, qualifications and integrity of a judge, his skills and performance, qualitative and quantitative work performance of a judge (p. 13.4 of the High Qualification Commission of Ukraine Regulation). During the process of qualification assessment the content of judicial dossiers is carefully studied. *Staging* of qualification assessment procedure is appeared in the presence of its following stages: passing by a judge an exam (is composed of an anonymous written testing and the necessity to perform a practical task to identify the knowledge, practical skills and skills in the application of the law, the ability to administer justice in a court of proper jurisdiction and specialization), studying of judicial dossier, conducting interview with a judge (ch. 1, Art. 85 of the Law of Ukraine «On the Judicial System and Status of Judges»). A judge who does not agree with the decision of the High Qualification Commission of Judges of Ukraine for its qualification assessment been made, can *appeal* this decision judicially (ch. 2, Art. 86 of the Law of Ukraine «On the Judicial System and Status of Judges»). The decision of the

High Qualification Commission of Judges of Ukraine on qualification assessment must be *motivated*; it is publicly announced in the presence of any interested individuals and a judge who is being assessed.

The differentiation of the disciplinary judge responsibility institutes should be primarily conducted under the norm of grounds and consequences of respective proceedings. An essential feature of a judge responsibility institute is the existence of regulatory and legal ground that has no retroactive effect. The normative ground of responsibility – is an action (action or inaction), which through its danger to society determined by the legislator as unlawful and requires the imposition of sanctions. Sanctions always foresee negative consequences for a judge which can appear within organizational and material or personal aspects. Qualification assessment of a judge can have negative consequences (dismissal of a judge due to violation of oath under the initial assessment results or refusal to provide recommendations for the election of a judge on permanent position appointment), but they cannot occur as result of committing by a judge wrongful act (misconduct) and arise due to the inability of a judge to administer justice in the appropriate court – that is a sign of professional incompetence of a judge, his professional unfitness. *Thus, the ground for the qualification assessment of a judge is not conducting by him an offense, i. e. in advance (at the time of its committal) statutory wrongful act.*

Despite the external similarity of qualification assessment procedure of a judge with the disciplinary proceedings, it should not to make unjustified expansion of this institution. Thus, the Law of Ukraine «On the Judicial System and Status of Judges» does not specify the consequences of a negative qualification assessment of a judge by the Commission after taking a training course at the National School of Judges of Ukraine in the performance of disciplinary penalty. According to Art. 86 of this Law the High Qualification Commission of Judges of Ukraine based on the reasoned opinion takes decision on confirmation or disconfirmation of a judge ability to administer justice in an appropriate court. In accordance to the transitional provisions of the Law non-confirmation of the possibility to administer justice in the appropriate court based on the results of re-qualification testing (after negative result of initial qualification assessment and completion of a training at the National School of Judges) is the ground for the opinion of the High Qualification Commission of Judges of Ukraine to refer the recommendation to the High Council of Justice of Ukraine in order to solve the issue of submission on dismissal of a judge based on violation of the oath. In fact in this case it refers to the case of a judge responsibility, which is followed the procedure of its qualification assessment result. This ground of a judge dismissal is envisaged by the Law and is legitimated in terms of legislative technique, however controversial in terms of the rule of law, which requires clear differentiation of responsibility grounds of a judge: if there is a fact of committing statutory misconduct – this

is the realm of disciplinary proceedings, if there is no such fact – there should not occur consequences resulted due to disciplinary proceedings.

In the transitional provisions of the Law of Ukraine «On the Judicial System and Status of Judges» there is no anything concerning the qualification assessment procedure of a judge in order of disciplinary proceedings. It is logical to assume that in the case of a negative qualification assessment of a judge by the Commission after the training course at the National School of Judges of Ukraine took place, such judge should be dismissed. But it must be clearly stated in the law, because ch. 2, Art. 97 of the Law, which provides interpretation of violation of the oath does not secure such feature as a non-confirmation by a judge of its qualification on the grounds of the result of the qualification assessment in the order of disciplinary action. Analysis of the provisions of Article 93 of the Law certifies that the disciplinary proceedings against a judge could be instituted only and exclusively in the presence of the grounds established by part one of Article 92 of the Law. Therefore, such disciplinary sanction as dismissal for violation of the oath *cannot be applied to a judge on the grounds which are not covered by the first paragraph of Article 92 of the Law of Ukraine «On the Judicial System and Status of Judges».*

However, in the wording of the Regulations of the High Qualification Commission of Judges of Ukraine dated 8 July 2015 non-confirmation of the possibility of justice in the appropriate court grounded on the results of the qualification assessment, including repeated results, *is the ground for the opinion of the High Qualification Commission of Judges of Ukraine to refer the recommendation to the High Council of Justice of Ukraine to solve the issue of the submission on dismissal of a judge from his current position due to violation of oath* (p. 12.13)[1]. Thus, such solution of mentioned above specific issue is the broad interpretation of the concept of «breach of oath» by a judge and allows the High Qualification Commission of Judges of Ukraine (without corresponding instructions in the Law provisions) to provide the High Council of Justice with recommendations to solve the issue of the dismissal of a judge from its current position for violation of oath in the performance of sanctions under par. 4 ch. 1, art. 97 of the Law of Ukraine «On the judiciary and the status of judges». We believe that expanse of a oath violation features by a judge under existing legislation does not fall under the High Qualification Commission of Judges of Ukraine authorities but is the prerogative of the lawmaker. Therefore, all legal consequence gaps related to the procedure and grounds of disciplinary sanctions imposing shall be settled exclusively by amending the legislation.

The attempt to solve this problem has been made by the members of the Constitutional Commission which drafted the Law of Ukraine «On Amendments to

[1] Регламент ВККСУ в редакції від 08.07.2015 р. // [Електрон. ресурс]. – Режим доступу: http://www. vkksu. gov. ua/ua/about/reglament-vkks-ukraini/. – Заголовок з екрана.

the Constitution of Ukraine (on justice)»[1]. According to paragraph 3 of the Chapter XV of the Transitional Provisions of the draft, the compliance of the position to a judge, who was appointed or elected to this position before the Law of Ukraine «On Amendments to the Constitution of Ukraine (on justice)» has entered in force, must be assessed in the order specified by the law. Revealing of inconformity under results of such assessment with a judge's position based on the criteria of professionalism, ethics or integrity grounds for dismissal of a judge from the position.

Assessment of a judge, who was appointed or elected to the position before the Law of Ukraine «On Amendments to the Constitution of Ukraine (on justice),» has entered in force is also a case of its responsibility, because under certain conditions provides him with the onset of negative consequences in the form of dismissal from a judge position. In fact, a judge will be responsible for compliance with the criteria principles of professionalism, ethics or integrity. However, in its literal interpretation existing legislation does not contain the same grounds of a judge's responsibility. Such criteria as professionalism, ethics or integrity require additional clarification on the level of law because in case of detailing absence the legal certainty principle will be violated. Also detailed normative regulation will require a judge assessment procedure, which must face the standards of due process, developed during the practice of the European Court of Human Rights (see Decision of the European Court of Human Rights in the case «Alexander Volkov against Ukraine» dated January 9, 2013)[2].

Thirdly, in cases provided by the law (initial assessment and lifetime of judicial position) procedures for qualification and regular assessment of judges are an important organizational and legal measures in preventing judicial offenses as during the assessment the disciplinary authority body could reveal already committed violations or prevent from committing new ones by taken disciplinary measures (in the case when the High Qualification Commission of Judges of Ukraine does not confirm the ability of a judge to administer justice in an appropriate court or refuses to grant a recommendation for permanent position).

Regular assessment of a judge is a kind of qualification conducted during its training to maintain the assessment at the National School of Judges of Ukraine (which is conducted annually for the judges appointed for the first time and conducts once every three years – for judges appointed permanently). Based on each training results during training of a judge teacher (coach) of the National School of Judges of Ukraine fills

[1] Про внесення змін до Конституції України (щодо правосуддя): проект Закону, розробленого Конституційною комісією // [Електрон. ресурс]. – Режим доступу: http://constitution. gov. ua/news/tag/match/Robocha_grupa_z_piitan2_pravosuddya. – Заголовок з екрана.

[2] Волков проти України [Електрон. ресурс]: рішення Європ. Суду з прав людини від 09.01.2013 р. // Інформ. портал ХПГ – Режим доступу: http://khpg. org/index. php?id=1359450183. – Заголовок з екрана.

for a judge an assessment form which comprises: (1) assessment: a) acquirement by a judge of knowledge, skills based on training results; b) the accuracy and timeliness of the tasks; c) analytical skills, ability to assess the information; d) the ability to interact with colleagues (ability to negotiate, to work in a team, to work under pressure, etc.); e) communication skills (drafting documents, verbal speech); e) the strengths of a judge; (2) recommendations to a judge regarding the directions of self-improvement or taking additional training.

Regular assessment is also conducted by other judges of the respective court by way of questioning, by a judge completing the self-assessment questionnaires and by public associations who independently assess a judge work performance during court proceedings (art. 87–89 of the Law of Ukraine «On judicial system and status of judges»).

All regular assessment questionnaires are brought to the judicial dossier and may be taken into account during consideration of the issue of the judicial position lifetime and carrying out of a competition on position occupation in the relevant court. In our opinion, in this case the preference should be given to assessment questionnaires drawn up by the teachers of the National School of Judges of Ukraine. Self-appraisal of a judge, appraisal by his colleagues and community activists should have secondary importance, because there may be presented the elements of subjectivity and bias.

Judicial dossier is very important organizational and legal measure to prevent judge offenses, because it accumulates absolutely all information on the professional growth of a judge, the results of his work and the copies of all official decisions, which were taken by authorized individuals throughout the whole period of tenure. Transmitting these data from the regional branches of the State Court Administration of Ukraine to the judiciary body of the High Qualification Commission of Judges of Ukraine endowed with disciplinary-public authorities, will allow to monitor the work of each judge, timely detect weaknesses in its work which could be the grounds for the responsibility (in particular, by analyzing the number of canceled or modified court decisions and the grounds of its changing or cancellation, compliance with terms of cases etc.)[1].

[1] Judicial dossier under item 3 art. 385 of the Law of Ukraine «On the Judicial System and Status of Judges» shall contain:

1) copies of all judge applications related to his career, and documents attached to them;

2) copies of all decisions taken concerning a judge by the High Qualification Commission of Judges of Ukraine, the High Council of Justice, the President of Ukraine, the Verkhovna Rada of Ukraine;

3) information on the results of a judge participating in competitions for positions of judges;

4) information on the results of the completion at the National School of Judges of Ukraine of special training for judicial appointment, trainings of a judge during the tenure as a judge;

5) information on the results of the qualification assessment and regular assessment of a judge during its tenure;

6) information on the implementation of teaching activities at the National School of Judges of Ukraine;

7) information on occupation by a judge administrative positions with copies of decisions

In fact, *through the institute of judicial dossier there were introduced ideas of accountability of a judge to the body of the disciplinary authorities, transparency securement of his activities and regular reporting by a judge.* The order and frequency of judicial dossier information filling will determine the High Qualification Commission of Judges of Ukraine in conjunction with the Council of Judges of Ukraine. The reporting in the courts under the existing legislation is being held once every six months. the judicial and personal files should be updated with the same periodicity. The difference will lie in the fact that court institutions will not be only reporting on the work of the judiciary body, but also on the individual judge. The High Qualification Commission of Judges of Ukraine should ensure adequate sampling data analysis of judicial dossier with the aim to detect violations of the law timely. Such work has to be relied on judicial inspectors and other staff of the High Qualification Commission of Judges of Ukraine.

Conclusions. The Institute of a judge assessment corresponds to international standards and local historical traditions. Qualification and regular assessment of a judge shall not be aimed at denigrating its procedural independence and has a dual function: organizational provision carrier growth of a judge (i. e. promotion) and the identification and elimination violations of legislation by a judge and labor discipline (i. e. notification). The procedure of qualification assessment of a judge has much in common with the disciplinary proceedings and meet the basic criteria of due legal process (independence, publicity, staging, proportionality, decision justification on qualification assessment of a judge and

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on the appointment on these positions and firing from them;

8) information on the selection of a judge to the bodies of judicial self-government, the High Qualification Commission of Judges of Ukraine, the High Council of Justice;

9) information on the effectiveness of the administration of justice by a judge, namely:

a) the total number of cases reviewed;

b) the number of canceled court opinions and the grounds for their withdrawal;

a) the existence and number of decisions that have become the basis for making decisions by international judicial institutions and other international organizations that established infringement by Ukraine of international legal obligations;

d) the number of changed court decisions and grounds for their change;

e) compliance with the terms of cases;

d) the average duration of motivated decision making text;

e) judicial load compared with the other judges in the respective court, region, taking into consideration instance specialization of a court and a judge;

10) Information on disciplinary responsibility of a judge, namely:

a) the number of complaints against judges actions;

b) the number of disciplinary proceedings and their results;

11) information of a judge on compliance with ethical and anti-corruption criteria, namely:

a) compliance of costs and property of a judge and members of his family and close individuals to its declared revenues, including copies of respective filled declarations by a judge according to the legislation on prevention of corruption;

b) other information on compliance with the requirements of legislation in the field of prevention of corruption;

c) information on compliance of a judge conduct with rules of judicial ethics.

its judicial appeal against). Differentiation of institutes of qualification assessment of a judge and its disciplinary responsibility should be conducted under the grounds criteria and consequences of the appropriate procedures: (a) the grounds for a judge responsibility is the committing by him a wrongful deed (misconduct), and the grounds for qualification assessment of a judge – is the verification of its ability to administer justice in a court of appropriate level or a proof of professional level of a judge for his appointment to the post indefinitely; (b) if there is a fact of the statutory misconduct – it is the realm of disciplinary proceedings, if there is no such fact – than the consequences cannot occur if resulted from the disciplinary proceedings. The enlargement of the grounds of disciplinary responsibility within the institution of qualification assessment of a judge is unacceptable because it contradicts the rule of law and its component – legal certainty.

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