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FOREWORD

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

In 2008 by the decision of the Presidium of the Academy the nationwide scientific periodical – the 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, as well as research associates, who work in the Academy's research institutions and other leading research and higher education institutions of Kyiv, Kharkiv, Donetsk, Lviv, Odesa, are published.

Yearbook aims to become a 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 striving to become a 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. The journal's pages contain modern legal concepts and theories of the further development of Ukraine as a democratic, social, law-governed state, full of the most provoking contemporary ideas, fundamental and substantial issues of jurisprudence.

The selection process 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.

From 2014, the Yearbook of Ukrainian Law is published in English. Each issue of the English version is sent to more than 70 law libraries of the world, including USA, Canada, Australia, Great Britain, Germany, Portugal, Switzerland, Norway, Denmark, Latvia, and Lithuania. This enables scientists from other countries to get acquainted with the problems relevant to Ukrainian legal science, both the general theoretical, as well as different branches of law, modern Ukrainian legislation and practice, to provide opportunities for international scientific cooperation.

Honorary President of the National
Academy
of Legal Sciences of Ukraine
V. Ia. Tatsii

THEORY AND HISTORY OF STATE AND LAW

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LEGAL UNDERSTANDING IN UKRAINIAN JURISPRUDENCE: TOWARDS AN INTEGRATIVE APPROACH

Integrative jurisprudence is a direction of modern legal science and legal practice, based on the perception of law as a holistic and multidimensional social phenomenon, designed to serve as an effective regulator of social relations, the guarantor of fundamental human rights and freedoms [1].

Formation of integrative jurisprudence as one of the actual legal concepts became the answer to the comprehensive differentiation and specialization of legal knowledge, which threatened the loss of a holistic vision of law, an understanding of its role and functions in society. After all, each area of legal research became more and more self-sufficient, obtaining its own argumentation and a special conceptual expression that led not only to theoretical discussions but also to some extent the principal incompatibility between the main schools of legal thought – natural, positive, historical and sociological.

The stratification of legal concepts and relevant theoretical arguments «eroded» the content and structure of legal science, provoked a certain level of distrust in the jurisprudence, its conclusions, and recommendations, devalued the significance and capability of law as a universal social regulator, which could not but affect its ability to influence the streamlining of social relations, prevention and resolution of social conflicts.

The urge to perceive the law as a holistic and versatile social phenomenon was conditioned by the updating of methodological foundations and tools of modern scientific knowledge. First of all, it is about understanding the priority methodological pluralism in the study of phenomena of social reality, because reality itself as a social fact is

not exhausted by only unilateral characteristics. Instead, it must be investigated from a variety of points of view and with the use of a number of methodological techniques and means, each of which denotes only a specific method of cognition, one of the ways of acquiring knowledge, thus bringing it to a comprehensive understanding.

The broad social context of the scientific study of legal reality is a challenge in the search for a «new legitimacy of law», which leads to a cognitive situation where no theoretical construction itself can serve as an adequate reflection of the social world and therefore, by its definition, cannot claim to be uncontroversial truth or absolute objective reality. At the same time, each legal theory, reflecting certain essential features of the law, gives the ability to synthesize them, thus representing such a complex and multidimensional phenomenon. Accordingly, different study approaches should be considered as necessary important components of the cognition of law and must be integrated into a coherent scientific representation of the legal world.

The need to rethink the science of law principles of jurisprudence was conditioned by a change in the cognitive parameters of the legal design of society. The complication and differentiation of social reality contributed to the emergence of the need for generalized legal knowledge. Accordingly, the general theoretical legal discipline created in the late nineteenth century had its direct objective set on the elimination of legal research beyond the scope of the encyclopedic description of law by restricting the knowledge about the most significant norms of various branches of law in one discipline. Formed in this way the general theory of law, distancing itself primarily from natural law concepts, was viewed in the context of cognitive priorities of its time as «solely a subject of positive science.» The terrible consequences of the Second World War substantiated the need to shift the emphasis on the perception of the legal component of social life to a search of values, instead of concepts, norms, and ideologies, which relied on the «apparent neutrality of legal terms and rules».

To achieve a holistic vision of law, we must first overcome the dualism of natural and positive law as the most controversial and «irreconcilable» views on law, its essence, meaning and social purpose. Under any circumstances, the natural law concept is intended to become the rational basis of positive law, providing the development of the basic concepts that should form the conceptual foundation of the legal theory, since fundamental legal values are one way or another an integral part of the content of legal norms, and the norms themselves are perceived as ones protecting social values.

Today, this approach is represented by the concept of «soft positivism» by the English philosopher of law H. L. A. Hart, which implies the need for a certain rule of cognition to ensure the connection between the two levels of legal reality – the natural-legal and positive-legal, compulsory justice of the German scientist Otfried Höffe etc.

Thus, the law is perceived as a synthesis of two content components – human rights and rules of conduct (norms of law). The only question is which of them is considered as the main factor, a pivotal cornerstone of the whole construction of the legal system: the system of norms of law is based on the foundation of inalienable human rights or human rights are considered only as derivatives of the will reflected in the laws (objective law), and therefore, not derived beyond the subjective rights of the participants in specific legal relations.

It is also important to reject the perception of the legal world as a derivative of legal definitions that often lead to the formation of a closed system of «jurisprudence of concepts», when the laws of the mental process are given the status of universal categories, allegedly serving as a basis for social practice. Such a vision of the specificity of legal knowledge, which is actually removed by the laws of «speculative intelligence» from the study of the real subject, in spite of the Occam's razor leads to the multiplication of entities, and thus building excessive abstractions, that have little to do with reality, could in no way contribute either to the authority of legal science, or to the rising of respect for law as a component of the process of streamlining social relations. Therefore, in the context of finding relevant approaches to legal thinking today, one must start with identifying its clear focus on solving practical social problems and tasks that are impossible without the close interaction of jurisprudence with other social disciplines – philosophical, sociological, psychological, ethical.

At the beginning of the twentieth century, outstanding Ukrainian lawyer B. Kistiakivskyi insisted on the creation of the pluralistic foundation of the new methodology, which is intended to provide a multidimensional approach to legal thinking [2]. In his opinion, the very diversity of the factors of law implies the need to apply different scientific approaches, resulting in the isolation of at least four important manifestations of law – «state-order», psychological, normative and sociological. The progression towards a holistic perception of law was also carried out under the title «synthetic point of view in legal theories». Russian lawyer A. Yashchenko argued that the «distraction» of the special aspects of a single idea from a holistic vision caused excessive abstraction and one-sidedness of legal definitions [3]. P. Vynohradov studied law as a social phenomenon and as a part of social experience [4]. From the standpoint of a synthesized approach, Russian and American sociologist P. Sorokin observed the law from three points of view: as rules of conduct; as rules and regulations in the form of legal beliefs; as legal beliefs, implemented through the sources of law and political institutions [5].

According to the well-known scholar of the history of the Western law tradition H. J. Berman, today a law school is needed that will combine all the traditional lines of legal thought and, at the same time, go beyond their limits. Hence the first objective of the social theory of

law, which is to depart from the overly simplified concepts of the causality of law. Accordingly, the law cannot be completely reduced to the material conditions of the society of its origin or to the corresponding system of ideas and values. The active law consists of people involved in lawmaking, the administration of justice, the adoption of court decisions, negotiations and other legal actions [6]. The law should be considered as an independent factor, and not just one of the results of a range of social, economic, political, intellectual, moral and religious phenomena. H. J. Berman concludes that the synthesized jurisprudence must combine three classical schools: legal positivism, the theory of natural law and the historical school; he emphasizes the special role of historical jurisprudence in combining legal positivism and the theory of natural law.

For the first time, the term «integrative jurisprudence» is used by the American lawyer and philosopher of law J. Hall, combining the provisions of the theory of natural law, legal positivism with the sociological understanding of the law on the principles of both theoretical knowledge and practical experience [7]. The law for a scientist as a norm and the law as a process of its implementation should not be studied separately, instead, they form a single whole and should be considered in close interconnection. The law is both a normative act and an act of a legal person, and legal consciousness. It is integrative jurisprudence, in his opinion, designed to become the most «adequate jurisprudence», which will be the focus of redeveloped key ideas, compatible with many legal theories, each of which has its own achievements. As a result, integrative jurisprudence acts as a synthesis of such classical units of legal thought as legal ontology, legal axiology, sociology of law and formal legal science.

Renown French scientist J-L. Bergel summarizes the analysis of law as a system is a short expression: «in law, everything is interconnected.» In this case, the law as such is simultaneously the product of events of social order and manifestations of the will of man, the phenomenon of material and combination of moral and social values, the ideal and the reality, the phenomenon of the historical matter and normative order, a complex of internal voluntary acts and acts of subordination to external, acts of freedom and acts of coercion. Regarding the various manifestations of law, they are partial and express to a greater and lesser extent what is dependent on a particular legal system: either a social system or moral values, individualism or collectivism, power or freedom. Today, according to J-L. Bergel, in any legal activity, such general elements of the legal way of regulating the society as the definition of law, the source of law, the basic principles of law, legal order, geographical, time and social environment of a legal problem, institutes, concepts and categories, special language of law, the correlation of fact and law, judge, process, special types of judgments are necessarily involved in any legal activity [8].

Substantial, according to V. Krawitz, Professor of Munster University (Ger-

many), should be the cognition of the legal system as a kind of social system, reflecting the deep standard of law, exposed to the complex structure of social relations. Since the law is a self-improving social system, the use of the systematic and sociological approach exclusively from the standpoint of the analytical theory of law – natural-legal, positive, historical, psychological, etc., under any conditions comes as limited and counterproductive. As a result, this approach to law implies different levels of comprehension of legal reality: 1) legal practice; 2) practical jurisprudence; 3) dogmatic method doctrine; 4) general theory of law; 5) legal linguistics; 6) legal sociology; 7) legal philosophy; 8) legal logic. The legal system acts not only as a conceptual image, enshrined in legal texts, but above all – as a social reality, which includes both things and actions, and people – prosecutors, judges, officials, etc. It is the system, according to V. Krawitz, which can combine philosophical, legal and sociological and theoretical and dogmatic knowledge of the law, is a necessary and sufficient component of the formation of a modern integral theory of law.

Based on the principles of methodological pluralism, which, incidentally, is understood not as an eclectic combination of different cognitive principles and elements, the Ukrainian philosopher of law S. I. Maksymov offers their methodological ordering in the knowledge of the structure of legal reality that does not pretend to characterize the substantive part of reality, but is only a significant way of organizing and interpreting various aspects of social life and communication, in the absence of which the social world itself collapses, which makes it possible to disclose not only its statics, but also dynamics: the world of ideas (the idea of law), the world of sign forms (legal norms and laws), the world of interaction between social actors (legal life) [9].

A system establishing factor for law as a social phenomenon can be the communicative approach that is used where it is acceptable, an interdisciplinary approach that, according to the Dutch scientist Mark van Hook, bridges the facts with the norms, trying to understand the tension and close relationships between them, whereas traditionally they were completely dissociated, trying to «clear» the norms from the facts. In the categories of communication, understanding the legal phenomenon has important advantages, it: 1) identifies the law as a means of human interaction, and not as a self-sufficient phenomenon; 2) provides for a broad analysis, since communication can be detected at different levels and in different forms; 3) does not lead to the development of a closed system, it remains incomplete, since the emphasis is on the communicative process, rather than on certain fixed elements, such as «norms»; 4) calls for different points of view to be taken into account and protects from unilateral analysis and conclusions [10].

Consequently, the understanding of the concept of law in the narrowed instrumental sense is insufficient to construct a modern theory of law, which predetermines the search for other,

more meaningful and those that are in line with the modern view of the social purpose of law, among which the «act of law», «legal system», «legal life», «law-making», etc. Moreover, the main argument in their favor is reduced to the urgent need to overcome the excessive abstraction of domestic jurisprudence, its actual removal from real social problems and specific social relations, which often leads to an extremely dangerous trend in the knowledge of legal phenomena, in particular the theory of law, which today presents a real obstacle to its development.

The notion of «legal system», which correlates with society as a holistic and multidimensional phenomenon, significantly expands the range of law research, drawing on the arsenal of cognitive capabilities of the systemic approach. It is becoming more and more stable for domestic jurisprudence [11], stimulating the movement towards a more complete and meaningful understanding of the law, which in the context of the legal system can no longer be confined to the proper field (ideology). However, we should not forget that the purpose of the systematic approach, which reflects the specifics of scientific research of real phenomena and processes, is schematization, and hence a certain «simplification of reality». Therefore, a legal system as such is not capable of exhausting all legal reality, and its main problem, as well as any other social system, is the relationship with the environment: the more coherent and intrinsically consistent the system becomes, the more self-sufficient and closed it gets [12].

The conceptual design of the «act of law» is regarded as intended to shift the emphasis in the perspective of the practical implementation of legal norms. However, this notion cannot be interpreted but as a derivative of the traditional understanding of the law, which now remains unchanged and immutable. As a result – the problems of the dynamics of law again fall behind the scenes of the subject of the rule of law, meaningful features of law as a social phenomenon. Therefore, the introduction of the concept of «law of action», expanding the horizon of legal science, is unable to refresh our ideas about the essence of the law itself, and therefore to provide a significant increase in scientific knowledge.

In this context, attention is also drawn to the attempts to introduce into legal science and practice such specific categories as the legal field and legal space, borrowed from the arsenal of sociology and political science [13]. Their main purpose is the emphasis not only on the static, but also on the dynamic dimensions of legal phenomena, in particular, the functioning of a certain network of legal interrelations and relationships of participants in social relations, which can be localized into the relevant «legal segments» (general, regional, local, individual).

An important step towards the cognition of the general social value of law is the proposed by M. I. Koziubra extension of the general problem of understanding of law, its role, significance and opportunities by distinguishing the theoretical (scientific) legal under-

standing, which was the priority topic of the study of domestic jurisprudence of this problem, its specific levels, like a common-empirical and professional legal understanding. The latter is more closely connected with the certain experience of the perception and application of law, the features of the legal mentality and reflects the affiliation to a certain cultural-historical type of society [14]. Everyday understanding of law, in addition, can be characterized as the most mass, widespread, established and in this sense – conservative.

The next attempt to overcome the one-sided approach to legal thinking was the introduction of the concept of «legal life» by the Russian scientist A. V. Malko [15]. The undoubted achievement of this concept is the attention to the real aspects of the behavior of subjects of law, so to speak, «energy of law». An attempt to capture all necessary, as well as random factors, both positive and negative legal constituents (for example, offenses), should also be noted. In general, this category is intended to provide, in the author's opinion, a view of a legal reality without «pink glasses» in order to perceive it with all achievements and disadvantages, strengths and weaknesses [16]. At the same time, A. V. Malko, without going beyond the usual methodological canons, argues that the legal life is called «to cultivate personal, state and social life in a certain way», reduces it to legal acts, «a peculiar pyramid of legal acts», systematization acts-documents [17], which in turn virtually returns it to the context of established legal issues.

The suggestion of the consideration of the elements of creative activity in law, the subject of which can only be a person, by placing in the center of legal theory the concept of «lawmaking» deserves special attention. Thus, the emphasis is placed on the socio-anthropological nature of legal reality, but this factor is proposed to be taken into account in the limited version only in the process of drafting legislation, excluding the possibility of linking the creative approach to the implementation of the norms of law and enforcement, which is thus considered solely through the prism of formal mechanisms. The latter, in particular, is not consistent with the current understanding of the essence of the judiciary, which cannot be considered as a mechanism for implementing decisions of another branch of government, and therefore should have additional grounds and own arguments for resolving legal disputes and conflicts, first of all – established judicial practice [18].

Significantly, the approach of P. M. Rabinovych, who declared the aim towards «European legal thinking» to be based on the interpretation of the practice of the European Court of Human Rights, which implies the need for in-depth study of the essence of law, the establishment of certain «ontic» properties, unusual for the domestic science: the ability to satisfy certain interests, the taking into account of the biosocial characteristics of individuals and their psychological state, the feasibility of the possibility of satisfaction of interests, the uniqueness of the social situation in general, the inability of formal-

ized-only approach, the need to extend beyond the legal text, the fair balance principle [19].

However, the attempt to invoke the proposed criteria of legal thinking, developed based on the analysis of the practice of such a specific legal instance as the European Court of Human Rights, in the canon of «dialectically interpreted materialist understanding», leads to an unexpected context of «general social» (that is, non-state-power, non-legal law) [20]. Obviously, the law has a complicated and multidimensional nature, which implies the need for different approaches to its study and allows for the specifics of its definitions, but this does not mean that it is advisable to recognize the existence of different «types of law» – «social» and «legal». Hence the thesis that human rights are «non-legal rights» and become legal only in the case of recognition by means of legislative consolidation of them by the state authorities.

A more productive, albeit more complicated, the approach should be the one that would allow realizing the principle of unity of legal form and social content in the interpretation of both law in general and individual legal phenomena. As you know, a form cannot exist without content, and the content can exist, only having a form. At present, the separation of the legal form from social content would mean the creation of a special world, which, in its «virtual» nature, is not suitable for testing by reality.

From this point, one must consider the law and human rights as a homogeneous phenomenon, which has a single social and legal nature, and therefore human rights outside of the law cannot exist, as well as the law outside of human rights [21]. Human rights act as a socio-anthropological foundation of law as a normative system, which ensures that it is conditioned by the needs and interests of various subjects of social relations. After all, legal norms, in any case, cannot be used, executed, observed or applied outside the limits of conscious and volitional human behavior.

Summing up, it is vital to conclude that the law always includes at least two essential components – human rights and rules of conduct (norms of law). The problem lies beneath – which of them is considered a system-forming factor, a pivotal cornerstone of the entire basis of the legal system of a country: is the system of law built on the foundation of inalienable human rights or are human rights considered only as derivatives of the will reflected in the laws (objective law), and therefore, are reduced exclusively to the subjective rights of participants in legal relations.

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ESTABLISHMENT OF THE UKRAINIAN PEOPLE'S REPUBLIC – A SIGNIFICANT EVENT IN THE UKRAINIAN HISTORY

The preamble of the Constitution of Ukraine 1996 states that the Verkhovna Rada of Ukraine on behalf of the Ukrainian people – Ukrainian citizens of all nationalities, adopts this Constitution, the Fundamental Law of Ukraine, including «relying on the centuries-old history of Ukrainian state-building and upon the right to self-determination realized by the Ukrainian nation» [1]. Adoption of the III Universal by the Ukrainian Central Rada on November 7 (20), 1917 was a significant milestone in this centuries-old history of the state of the Ukrainian people, which proclaimed: «Henceforward Ukraine shall be the Ukrainian People's Republic» [2, 35]. Revival of the Ukrainian state in the form of the UPR became a regular consequence of the centuries-old struggle of the Ukrainian people for their state, which dates back to the times of Kievan Rus. The chronicles dates formation of this state to 882 when the Varangian leader, Oleg, united two huge Slavic political centers, Kiev and Novgorod, under the authority of Kiev. As recorded in The Tale of Past Years, «And Oleg sat down, ruling, in Kiev, and Oleg said: «Let it be a mother of Russian cities» [3, 20].

As far as the question of Kievan Rus state formation is concerned, V. M. Litvin notes that modern researchers determine the fact that «Old Russian state with a centre in Kiev came well ahead of the Novgorod north in regard to both political, economic and cultural development. And therefore, proclaiming Kiev the center of his state, Oleg only

stated the obvious primacy of Kiev in the East Slavic world» [4, 42].

State machinery effectively functioned in Kievan Rus headed by the great Kiev princes. Princes Vladimir and Yaroslav the Wise did much to strengthen and flourish Kievan Rus. Russkaia Pravda is an outstanding monument of the law of this state.

Kievan Rus in the Ukrainian history of state and law occupies an outstanding place. It was a strong power of the medieval period which had a significant impact on political life of Western European countries and neighbouring Asian countries, as well as countries that were of great importance in the trade system between Europe and Asia. It became a barrier, protecting the European countries from invasion of nomadic hordes. The high authority of Kievan Rus in the medieval world was formalized by numerous international treaties, close matrimonial links of the great Kiev princes with many foreign courts (Byzantium, France, England, Sweden, Hungary, Norway, etc.). Kievan Rus occupies an outstanding place in the world history.

At the end of the first third of the 12th century Kievan Rus was divided into fifteen separate princedoms and lands. Kiev, Chernigov, Pereyaslav, Volyn and Galicia principalities were situated in the south-western part of Rus on the Ukrainian lands. Galicia-Volyn principality (1199-1349) which actually continued and developed the «traditions of Ukrainian statehood» stood out from the indicated principalities existed during the period of political disunity on the territory of Ukraine» [5, 6]. This state achieved significant political development and became one of the most advanced European countries in regard to economic and cultural level.

Neighbouring states took advantage of severe condition of the southwestern lands caused by invasion of nomadic hordes of Batu at the turn of 30s and 40s of the 13th century and subsequent exhausting Golden Horde yoke. As a result of a continuous struggle, they managed to overcome the resistance of the Ukrainian population and take possession of the lands by the end of the 14th century. Poland received Galicia and Western Volynia, Hungary occupied Transcarpathia, and Moldavian principality took possession of Bukovina. Eastern Volynia, Podolia, Kiev and Chernigov-Severshchyna were included in the Grand Duchy of Lithuania. The fact that these lands were a part of other states occurred to be a loss of the national statehood by the Ukrainian nation. But the Ukrainians never forgot that they are a state people. At the beginning of the 16th century small Cossack fortified cities emerge behind the Dnieper rapids, on the basis of which the Zaporozhian Sich was formed representing one of the stages in the development of Ukrainian statehood. Occupying a small territory, the Zaporozhian Sich at the same time spread its political influence over significant areas of populated Ukrainian lands. Its political system is characterized as an Orthodox republic with democratic features.

Administration experience accumulated in the Zaporozhian Sich was used in the liberation war of the Ukrainian

people of 1648–1654 commanded by Hetman Bogdan Khmelnitsky. One of the important consequences of this war was the revival of the Ukrainian state. The state created by Bogdan Khmelnitsky had all the features, such as territory, political power system, political and administrative structure, judicial system and legal proceedings, sources of law, financial system and taxes, the army, international relations. In regard to the form of government, this Ukrainian national state was a republic with a high authority, a combined-arms council. At the same time, it should be noted that the problem of state building processes in Ukraine during the liberation war of 1648–1654 has been in the centre of attention of historians and historians of law for a long time. Thus, judgements concerning that the full-fledged Ukrainian national state was developed and functioned during the time of the said war can be found in the legal literature of the late 19th and early 20th centuries. Thus, the historian of law, V. I. Sergeevich, considered Ukraine a state during the liberation war of 1648–1654. [6, 107]. Ukraine during the reign of B. Khmelnitsky was repeatedly determined by I. B. Rozenfeld as a full-fledged state [7; 3, 8, 9, 12, 20, 21]. According to the scientist, «in the period 1648–1654 Little Russia was an independent military-democratic republic» in regard to the form of government [7, 12]. In the opinion of M. S. Grushevsky, «Cossack Ukraine in 1648–1654 was indeed an independent state, and entered into contractual relations with Turkey, Crimea, Poland, Moscow on its own account in those years» [8, 18]. According to the famous historian of law, A. Yakovlev, even the day before the Treaty of Pereyaslav was concluded in 1654 «Ukraine was both legally and actually a completely independent state» [8, 572].

During the Soviet period, the state building process during the liberation war of 1648–1654 was deliberately presented in a deformed form in historical and historical and legal literature. In early 1954, the Central Committee of the CPSU published the theses dedicated to the 300th anniversary of the Pereyaslav Rada of 1654 [9]. This document established ideological guidelines for interpretation of many problems of Ukrainian and Russian relations, including the history of the Ukrainian state. Thus, the theses, in particular, noted that during the liberation war Bogdan Khmelnytsky headed «the process of Ukrainian Great power s t a t e h o o d formation (underlined by me, GVD)» [9, 29]. As you can see, the theses refer to the process of assembling (and not completeness) of statehood only; they don't refer to functioning of a full-fledged Ukrainian national state.

Since the theses of the Central Committee of the CPSU appeared in the Soviet historical and historical and legal literature, the assertion that a full-fledged state was absent in Ukraine in 1648–1654 had prevailed for many years; instead, there was some amorphous phenomenon defined as «statehood» which, moreover, was in the process of assembly. Thus, in the first volume of The History of the Ukrainian

SSR published in 1956, I. D. Boyko noted that «in the struggle of the Ukrainian people for their liberation, military and administrative bodies were formed, which were the e m b r y o (underlined by me, PDV) of the Ukrainian statehood» [10,254]. The existence of embryonic statehood in Ukraine during the times of Bogdan Khmelnitsky was repeatedly stressed by V. A. Dyadichenko [11, 19, 33, 35]. In historical and legal literature of the 1960s and 1980s, there was an assertion that during the liberation war of 1648–1654 statehood was in the process of formation while the full-fledged Ukrainian state, the republic in its form of government, did not function [12, 38; 13, 369; 14, 265, 275; 15, 124].

When Ukraine independence was proclaimed in 1991, the canonical notorious theses of the Central Committee of the CPSU «On the 30th Anniversary of Reunion of Ukraine with Russia (1654-1954)» «receded into the historical distance». It became possible to reconstruct the objective history of the Ukrainian state and call things as they are. Today, experts in history of state and law have convincingly proved that during the time of Bohdan Khmelnitsky the full-fledged Ukrainian national state was revived and functioned, unlike many monarchic countries, it was a republic according to the form of government.

This Ukrainian state, in the context of internal factors, had a real possibility of existence and development. However, this is not referred to external conditions, which were extremely unfavourable for Ukraine. Therefore, Bohdan Khmelnitsky justifiably believed that it was necessary to have a reliable ally in order to preserve state independence and establish new social and economic relations in the country. He decided in favour of the Moscow kingdom. In January 1654, the Pereyaslav Rada was held to address the question of the relationship between Ukraine and the Moscow State. March Articles mutually developed by Ukraine and Russia in the same year defined foundations of the legal status of Ukraine in the military and political and religious alliance between the Moscow and Ukrainian states. According to the Treaty of Pereyaslav, Ukraine retained broad rights in the field of independent state legal construction.

But shortly after the death of the Ukrainian helmsman, Bogdan Khmelnytsky, in 1657, an uninterrupted process of Ukrainian autonomous rights impairment began. This process was especially active in the second half of the 18th century. This was clearly manifested in the final abolition of a very important institution, the hetmanship. Thus, the Tsar Manifesto of November 10 and the Senate Decree of November 17, 1764, relieved the last Ukrainian hetman, Kirill Razumovsky, from hetmanship. Little Russian Collegium of Ukraine headed by Count P. Rumyantsev was created to manage the abovementioned legal acts. This meant the beginning of complete liquidation of the Ukrainian state. At the beginning of the 1880s of 18th century, the process of liquidation of local administrative, political and military bodies and their

replacement by the all-Russian provincial government system was noticed. Thus, the Ukrainians were once again forcibly deprived of their state and had been without their own statehood for almost a century and a half. But even in this period the Ukrainian people did not lose hope for their national state revival. And only the Russian February Revolution (1917) provided proper conditions for the Ukrainian state revival.

The initiative in this noble work was taken over by the Ukrainian Central Rada (UCR) which was founded in Kiev in early March 1917. In the early summer 1917, the UCR, as V. A. Rumyantsev rightly notes, came to the peak of its success. It received support among the millions of Ukrainian people, became the expresser of their national and state aspirations» [16, 42]. These aspirations were expressed by the Ukrainian Central Rada in its III Universal adopted by this institution of a parliamentary type on June 10 (23), 1917. This document, in particular, stated: «Let Ukraine be free… Let a National Ukrainian Assembly (Soim), elected by universal, equal, direct, and secret balloting, establish order and harmony in the Ukraine. Only our Ukrainian Assembly has the right to establish all laws which can provide that order among us here in the Ukraine» [2, 29]. The content of this provision of the I Universal gives grounds to assert that this document was used by the UCR to proclaim the state autonomy of Ukraine as the first step towards its future independence. The next step towards this goal was the adoption of the III Universal by the Ukrainian Central Rada on November 7 (20), 1917, according to which Ukraine was proclaimed the Ukrainian People's Republic. It should be noted that the text of the IIII Universal was announced by the Chairman of the UCR, M. S. Grushevsky, with a storm of applause, shouts of «Glory» and accompanied by Shevchenko's «Testament» [17, 106]. Then the text of the Universal was solemnly manifested near the monument to Bogdan Khmelnytsky in Kiev. A moleben was held in the St. Sophia's Cathedral on the occasion of the UPR proclamation [18, 93]. The III Universal of the UCR was «solemnly proclaimed in Poltava, Ekaterinoslav, Odessa and other cities of Ukraine» [19, 90]. The III Universal justly deserved such a solemn attitude towards it. Proclamation of the Ukrainian People's Republic meant the revival of the national state of the Ukrainian people after many decades of its stateless being. At the same time, it was not just the state that was revived, but according to the well-known definition of the famous Ukrainian lawyer, Professor A. Yakovlev, it was a «democratic, popular sovereignty state» [20, 16]. One cannot but agree with the high evaluation of the III Universal which proclaimed formation of the Ukrainian People's Republic, which is given to it by A. N. Mironenko, when he notes that the significance of this document «is difficult to overestimate in regard to the history of Ukrainian statehood and accumulation of experience in the national democracy formation» [21, 137].

The III Universal was a constitutional and constituent instrument in its

content. This document defined the legal status of central bodies along with the form of the Ukrainian government in the form of a republic. The Universal stated: «Until the Constituent Assembly of the Ukraine, all power to establish order in our country, to promulgate laws, and to govern belongs to us, the Ukrainian Central Rada, and to our government – the General Secretariat of the Ukraine» [2, 35]. According to this Universal provision, the CAU was legitimized as a sovereign legislative body – the parliament, and the General Secretariat received government authority.

It is commonly known that one of the most important signs of the state is its territory. The III Universal had an answer to this question. The document noted: «To the territory of the Ukrainian People's Republic belong regions inhabited for the most part by Ukrainians: the provinces of Kiev, Podillia, Volhynia, Chernihiv, Poltava, Kharkiv, Katerynoslav Kherson, Taurus (excluding Crimea). The final demarcation of the borders of the Ukrainian People's Republic as well as the annexation of parts of the Kursk, Kholm, Voronezh provinces and the neighbouring gubernias and areas where the majority of the population is Ukrainian, will be determined in agreement with the organized will of the peoples» [2, 35].

The constituent nature of the III Universal was determined by that broad program aimed at the UPR development. The Universal contained the following provisions: 1) abolition of private ownership of landlord, appanage, monastery, clerical and church lands in the UPR and proclaiming them the property of the whole people, to whom they had to be transferred without redemption after the Constituent Assembly; 2) from the day of the III Universal proclamation, an 8-hour working day was established in all enterprises; 3) state control over products was introduced, which should be carried out together with representatives of workers; 4) the death penalty was abolished, amnesty was declared to political prisoners, the general secretary of court cases undertook to streamline the proceedings and bring it into line with the spiritual and legal concept of the people; 5) consolidation and dissemination of the rights of local self-government was proclaimed; 6) democratic freedoms of speech, press, faith, assembly, unions, strikes, inviolability of the person and home, the right and the possibility of using local languages in relations with all institutions were consolidated; 7) Great Russian, European and Polish peoples were granted the rights to national and personal autonomy, a draft law hereof should have been developed by the general secretary of interethnic affairs in the near future, the right to free national development was guaranteed to all other peoples inhabiting Ukraine; 8) food business was recognized as an important matter of state importance; 9) December 27, 1917 was proclaimed the election day in the Ukrainian Constituent Assembly, and January 9, 1918 was the day of its convocation [2, 35–38].

The III Universal was adopted by the Ukrainian Central Rada after October 25, 1917, when the Bolsheviks committed a coup d'état and seized power in Petrograd, having overthrown the Provisional Government to which related the UCR. Therefore, the question of relations between Ukraine and Russia in the new conditions was not easy. The Third Universal solved this question as follows: «Without separating ourselves from the Russian Republic and maintaining its unity, we shall stand firmly on our own soil, in order that our strength may aid all of Russia, so that the whole Russian Republic may become a federation of equal and free peoples» [2, 35]. Such an attitude of the Ukrainian Central Rada to federal ties between the UPR and Russia did not remain unaddressable by UCR researchers. Thus, I. Nagachevsky, characterizing the Universal provision, noted that «defending the federation with Moscow was a big mistake of the Ukrainian socialists» [18, 90]. According to A. Rumyantsev, «with its stubborn policy towards federation with Russia, the Central Rada came out against logic» [16, 59]. P. P. Zakharchenko believes that the content of the III Universal «testifies to the fact that the Central Rada, de facto and de jure, proclaimed the Ukraine independence, and not federation, as stated in many scientific papers and teaching aids» [22, 24]. To substantiate this thesis, the author writes: «Analyzing the document, we argue that the III Universal gives two references to federation with the Russian Republic, and both in the future» [22, 24–25]. It seems that P. P. Zakharchenko somewhat exaggerates the significance of the III Universal in Ukraine independence achievement by the UCR. This occurred when the Ukrainian Central Rada adopted the IV Universal on January 9 (22), 1918, which proclaimed the UPR «independent, subject to no one, a free, sovereign state of the Ukrainian People» [2, 40]. And immediately after these historical words the Universal stated: «We want to live in harmony and friendship with all neighbouring states: Russia, Poland, Austria, Rumania, Turkey, and others, but none of these may interfere in the life of the Independent Ukrainian Republic» [2, 40]. As noted by B. I. Tishchik and I. I. Boyko, proclamation by the Fourth Universal of the «sovereign Ukrainian People's Republic has caused a significant international resonance. It was recognized in 1918 by Romania, France, Great Britain, USA, Germany, Austria, Hungary, Bulgaria, Turkey, Japan, China, Portugal, Denmark, Greece, Norway, Iraq, Spain, Finland, Poland, Sweden, Switzerland and others» [23, 404].

Proclamation of the Ukrainian People's Republic opened the way for development of its own state, as A. L. Kopylenko aptly notes, «on the example of the Western democracies» [24, 749].

The Ukrainian People's Republic Proclamation Day of November 9 (22), 1917 left a mark in history as a remarkable event in the difficult and long-term struggle of the Ukrainian people for their national state.

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ABOUT ORGANIZATION AND RULES OF PROCEDURE OF UKRAINIAN CENTRAL RADA

The history of the Ukrainian Central Rada (UCR) occupies a significant place in the modern national historical, legal and historical studies of the formation of parliamentarism in the motley system of higher representative institutions during the period of national liberation struggles of 1917–1920 in Ukraine. This is logically due to the historical place and active state building by the first national parliament, its brief but the wealthiest experience. However, today there are still a lot of unexplored facts in its study. Among them: the organizational experience of the UCR, the development of its parliamentary rules of procedure and its role in lawmaking. Published records of the UCR's meetings, works and memoirs of its leaders, some aspects of the research on the history of Ukrainian parliamentarism help to highlight enumerated unexplored facts.[1]

From the first general meeting of the UCR begins its transformation into

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a parliamentary institution: the formation of organizational structures, the development and adoption of rules of procedure. At the suggestion of M. Hrushevsky at the first general meeting of the UCR, its executive body was elected – «Committee of the Central Rada».[1] It consisted of the Presidium of the UCR (Chairman and two deputies), 17 members of the Committee, elected Chairmen of commissions and individuals co-opted by the Committee – there was 33 of its members altogether.[2]

Records of the Committees of the UCR meetings from April 9 to April 24, 1917 were preserved and were first published in 2013.[3] They confirm: on April 9, on the proposal of M. Hrushevsky, the «internal organization of the Committee» was considered: F. I. Krizhanivskyi was elected as the «friend» of the Chairman; the treasurer, secretaries and head of chancery also were elected; financial, organizational, school committees were organized, days of work and current issues for the following days were defined.

At one of the first meetings on April 14, the Committee of the UCR instructed its members Kh. Baranovsky and V. Sadovsky to develop the «Order» of the UCR and its committee.[4] It was considered at the second general meetings and was approved with minor amendments. This «Order» became, on the basis of a determination of a member of the UCR Committee P. Khristiuk, «its internal constitution».[5] Indeed, the provisions on the general meetings of the Rada were assumed a great importance, and the activity of its Committee was transposed into legal boundaries.

In the second session, 22–23 April 1917 the Rada considered and adopted «Order of UCR» with minor amendments – rules of procedure that defined it as «a representative body of all organized Ukrainian people», which has the task to fulfill its will, that was expressed at the National Congress, «so, the transfer of Ukraine's autonomy to the Federal Democratic Republic of Russia with the protection of national minorities rights, that are living on the territory of Ukraine».[6] The UCR was endowed with the authority of «initiative, association and management» of organizations that were represented in it, the enforcement of the resolutions of the National Congress, the right to replenish its membership through the co-optation of new members.

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[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 72.

[3] Kudlai, O. (2013). Protokoly zasidan Komitetu Ukrainskoi Tsentralnoi Rady (kviten 1917 r.). Problemy vyvchennia istorii Ukrainskoi revoliuii 1917–1921 rokiv, 320–383.

[4] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 68.

[5] Khrystiuk, P. (1921). Zamitky i materialy do istorii Ukrainskoi revoliutsii. 1917–1921 rr. Viden, 29–30.

[6] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 71.

The «Order» itemized the powers and procedures for the general meetings of the UCR and its Committee. The general meetings defined the direction and nature of the entire work of the UCR, and the Committee «carries out the work of the Central Rada in a concrete, continually changing situation of the moment». The meeting also adopted two resolutions – the organization of provincial, county and city Ukrainian councils and adopted a resolution of the financial commission on taxation «to cover the expenses that our national needs demand», the sizes and mechanisms of taxation were set.[1] Thus, the UCR assuredly took over the elements of sovereign power.

The powers of the Committee included preparation of decisions of the Rada, management of the work of its chancery, election of chairmen of permanent commissions, secretaries and treasurer of the UCR. The «Order» did not contain a clear demarcation of the powers between the Central Rada and its Committee. Judging from the records of its meetings, the most important issues were considered only in the area of competence of the general meeting of the UCR.[2] Consequently, the legal boundaries of the Rada and its Committee considerably expanded, and its powers and decisions acquired a national, parliamentary significance.

On June 20 – July 1 the fifth general meeting fundamentally amended legal status of the UCR Committee. As its protocols testify, it quickly became the governing body of the Central Rada, formed the rules of representation and composition of its commissions, the daily protocol of the sessions, prepared drafts of major decisions, approved the organization of the General Secretariat. In the hands of the Committee the finances of the Rada were concentrated, it controlled and directed the current work, communicated with places. On June 23, informing the general meetings on the creation of the General Secretariat, M. Hrushevsky noted that its organization «does not eliminate the Central Rada Committee, which should be the «Small Central Rada», carrying the legislative functions between the two sessions».[3] A committee on the reorganization of the Committee was formed, which reported its findings and proposals on June 28. In discussing the report of the commission, Deputy Head of the UCR, M. Schrage proposed to provide the Committee with the right of legislative initiative and the fulfillment of all functions of the Rada between its sessions.[4]

In the resolution of the commission, which was adopted at the meeting, the

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 71–72

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 89.

[3] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 116, 262.

[4] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 143, 541.

Committee was entitled to «resolve matters that fall within the authority of the Central Council» between its sessions, convoke regular and extraordinary meetings, prepare materials for them, and complete the composition of the General Secretariat. The same resolution determined the work of the Committee, expanded its membership to 40 members that were elected from the factions of the UCR, its Presidium and the Soviets of Workers, Peasants and Military Deputies. The meeting gave it the right to replenish its composition by representatives of national minorities.[1] As a result of the reform, the Committee became known as the Small Council.

As recalled the member of the UCR and its Committee, the general clerk P. Khristyuk, on June 30 the Central Rada adopted a special decree: «Taking into account that the transformation of the UCR into the temporary regional parliament was foreseen at the Ukrainian National Congress … the meeting decided»:

1. Now begin the process of transforming the National Ukrainian Central Rada into the Provisional Parliament and instruct the case (apparently the case of the election – V. Ye.) to the General Secretariat.

2. The most appropriate way to replenish the national composition of the Central Rada is to recognize the proportional representation by which the national minorities are given the number of seats in the Central Rada according to the population of these national minorities of Ukraine …»[2].

On the next sessions of the Small Council, that followed the fifth meeting, on July 2–7, a decision on grant legislative and other powers to the Small Council was made, which made it an effective structure for the Ukrainian parliament. After that, she absorbed the organic features of the general meeting. Her meetings showed increasing productivity. Supplemented by another 18 representatives of national minorities, the Small Council discussed and decided on the replenishment of the General Secretariat, developed and adopted projects of its structure, budget, «Statute of the highest regional authority in Ukraine», defined its responsibility before the Rada, and between its sessions – the Small Council.[3] Regarding the conflicts between it and the government, §16 of the Statute provided for their solution in this way: «When the General Secretariat does not agree with the decision of the Small Council in any case, the latter is postponed for consideration by the Central Rada, which is convened immediately». In case of a mistrust to the General Secretariat, it resigns (§17). All acts of the Central Rada and the Small Council are coun-

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 143–144.

[2] Khrystiuk, P. (1921). Zamitky i materialy do istorii Ukrainskoi revoliutsii. 1917–1921 rr. Viden, 86

[3] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 175–176, 180–182.

tersigned (affirmed) by the General Secretariat (§18). The Statute consolidated the legal force of the «laws of the Provisional Government» in Ukraine that were published in the regional government «Visnyk» in Ukrainian. At a meeting of the Small Council on July 9, for the first time question about the establishment of a state control institution was raised. Thus, the Statute testifies the continuation of comprehension by the UCR community and the legal confirmation of the powers of its various institutions, the growth of the rule-making role of the Small Council.

Studying of the materials of the fifth and sixth sessions of the UCR gives grounds for an important conclusion: the sessions of the Central Rada, meetings of the Small Council take more expressive parliamentary form. Firstly, the formation of the composition of parliamentary and government structures is completed, and important decisions are made on the division of competences between them. At this time, a necessity is recognized, and measures are taken to expand the national and territorial representation of the UCR. This was evidence of the achievement of a consensus between Ukrainian democracy and non-Ukrainian revolutionary democratic circles, which made it possible to transform the UCR from a purely national body into a regional institution, a center of political and legal life in Ukraine. High hopes were put on the convocation of the Ukrainian Constitutional Assembly, which had to be elected on the basis of direct, general and equal representation. A commission for development an electoral law, holding territorial meetings and organizing All-Russian and All-Ukrainian Constitutional Assembly elections was set up.

Secondly, the leaders of the Central Rada recognized, proclaimed and started legislation. Even though the first stage of its legislative work was mainly political-declarative (the adoption of appeals, applications, universals, as well as the adoption of the Declaration, the Statute of the General Secretariat, UCR's rules of procedure, etc.), it certainly contributed to the national revival, was an important prerequisite for state building, the development of its ideology. After the proclamation of the I Universal, the Central Rada began to develop the Constitution of Ukraine – the Statute of the Autonomous Ukraine. At that time, the organizational function of the Central Rada was shown – the foundation of the General Secretariat, the formation of its membership, and the work on the preparation of «electoral ordination» for the Ukrainian Constituent Assembly.[1]

Thirdly, on the basis of the adopted rules of procedure of the UCR and the Small Council, their parliamentary procedure was determined and improved.

Finally, the length of the general meeting of the Rada varied from 2–3 to 5–11 days. Their daily protocol was also expanded. Meetings took sessional form. Therefore, we cannot fully agree with the widespread opinion of UCR's history

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 231

researchers that, despite the high powers of the UCR general assembly, it was the least effective in its structure. Some sessional meetings had a protest character, turned into verbal battles of numerous factions.[1] We want to add to the above mentioned that: firstly, at the general meeting the most important issues of internal and foreign policy, local situations were discussed, draft laws were considered, and laws and other normative acts were adopted, the progress of preparation for the Ukrainian Constitutional Assembly, the question of peace were discussed etc. Secondly, in revolutionary times is hardly possible quiet legislative work. Thirdly, verbal battles, intensity of emotions take place also in certain sessions in modern parliaments; this is in the nature of the parliament.

In view of this, the Central Rada acquired the features not only of a representative body, but also a temporary plenipotentiary parliament – until the general elections, the convening of the All-Ukrainian Constitutional Assembly. Since October Small Council began an active legislative work. An important direction of the legislative work became the legal groundwork for the convening of the Ukrainian Constitutional Assembly. On August 21, the Small Council elected two commissions: to determine the competence of the Constitutional Assembly itself, the second – to develop an «electoral ordinance» (the law on elections). As noted in the record of the meeting on October 10, «because of that the meeting of the Small Council was extremely numerous».[2] Representatives of the factions of the Ukrainian Socialist-Revolutionary Party and the Ukrainian Social Democratic Party (O. Sevryuk, M. Tkachenko, B. Martos, V. Vinnichenko, M. Porsh, etc.) insisted on the sovereignty of the Ukrainian Constitutional Assembly. The Mensheviks, the Bundists (M. Rafes, M. Balabanov, A. Tomenkin, etc.) bore up the principle of indivisibility of Russia, proposed to wait for the convening of the All-Russian Constitutional Assembly, «and everyone should take this will». The debate lasted more than a week.[3] The October uprising led by the Bolsheviks in Petrograd resolved the fate of both the Provisional Government and the Constitutional Assembly.

The seventh session (October 29 – November 2, 1917) represented a further step in the development of the Central Rada as a temporary parliament. The meeting listened to M. Hrushevsky's reports on the activities of the Small Council and on the work of the Commission on the Statute development of the Ukrainian Autonomy and formulated two immediate goals: the formation of the Ukrainian Democratic Republic as an integral part of federal Russia and the convening of

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 16.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 266, 334.

[3] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 334–339, 346–350, 353

the Ukrainian Constituent Assembly. The statute – «The Constitution of the Ukrainian Republic recognizes – said the Head of the UCR, – that the Ukrainian National Assembly has the highest national sovereign power. It gives part of the power to the federal parliament of Russia».[1] Thus, he unequivocally left the supremacy of power behind the Ukrainian Constitutional Assembly, but the UCR's favor to federalism made them still dependent on the All-Russian Constitutional Assembly and the future Russian parliament, and the problem of the division of competences between them – a hypothetical, dependent on the development of revolutionary events in Russia. Therefore, the Central Rada was recognized as a regional parliament.[2]

The session approved the extension of the competence of the General Secretariat, considered the draft laws of the Ukrainian Constitutional Assembly, heard a draft land law and adopted the resolution and the decision on the unification of Ukrainian lands, which the Provisional Government tried to separate. The conference of the party factions made a decision, which was supported by the assembly, on their closure, in order to «take a close look at the organization of the people at the local level».[3]

An important explanation was given by M. Hrushevsky at the general meeting and on the authority of the Small Council. When the representative of the Bund O. Zolotarev proposed that the Central Rada should confirmed the decision of the Small Council on the uprising in Petrograd, the Head of the UCR explained that «the decisions of the Small Council have the same force as the full Rada».[4] The explanation was accepted without objections and with full understanding. Small Council was perceived, obviously, as a shortened format of the UCR, most capable of law-making. Characteristically, that the leader of the Bund M. Rafes would later named the Small Council as «parliament».[5] Indeed, it took full advantage of competence of the UCR between the sessions of the Rada.

At this time the Small Council considered and made a decision on the development of tumultuous political events in Ukraine, in troops, in financial affairs. On November 7 it adopted the III Universal, which proclaimed the Ukrainian People's Republic (UPR), the sovereignty of the Central Rada and the General Secretariat.[6] 47 members of Small Coun-

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 374.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 375

[3] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 383

[4] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 377.

[5] Verstiuk, V. F. (1997). Ukrainska Tsentralna Rada. Dokumenty i materialy: U 2 t. T.2. 10 hrudnia 1917 r. – 29 kvitnia 1918 r. Kyiv: Naukova dumka. 94

[6] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 398–401.

cil were present during the vote. Consequently, the Universal declared the independence of the supreme authority of the UPR, unlimited in the sphere of internal state life, legislation, administration and court. UPR was limited only in relations with other states by provisions on federated relations with Russia. III Universal opened a qualitatively new stage in the state-building activity of the Central Rada, for the first time determined the territory of the republic, its borders, the idea of the unity of the Ukrainian lands was quite clearly formulated. The Universal became a real apogee of the national revolution, restoration of national statehood.

The eighth session of the UCR on December 12–17 reviewed the draft law of the General Secretariat, the cause of peace, the report of the Small Council and the General Secretariat. Reporting on the activities of the Small Council between the seventh and eighth sessions, M. Hrushevsky noted: «it was necessary during these 6 weeks to do that work, which at other times would have been done for several years. Under the exceptional conditions, it was necessary to work with the greatest stresses and to make with simple ax where, under other conditions, it would have been necessary to have some of the best tools. The most important thing that was done during this period is the proclamation of the Ukrainian People's Republic».[1]

The last, ninth session of the UCR was held on January 15–25, 1918. It approved the IV Universal, formed the government and its program principles, adopted a law on the 8-hour working day, amended the law on elections to the Ukrainian Constitutional Assembly. According to the Universal, the people of Ukraine were proclaimed the source of power. The Council of the People's Ministers was proclaimed as the executive body. It was formed by the UCR and was accountable to Rada. V. Golubovych was approved on the post of the Head of the Council of Ministers (his candidacy was proposed by socialist revolutionaries). Concerning the formation of the Cabinet of Ministers, M. Hrushevsky referred to the «Order of the UCR», according to which the authority in this case was transferred to the Small Council. He proposed to make changes to the rules of procedure, in the sense that the Great Council has the right to form the Cabinet.[2] In fact, such a norm was enshrined in the resolution of the commission on the reorganization of the Committee of the Central Rada, which was adopted by the fifth session on June 29, 1917. Participants of the session approved the reorganization of the Small Council. It was approved: «Totally in the Small Council should be 82 members according to the fractional composition of the Great Council».[3] If earlier most

[1] Verstiuk, V. F. (1997). Ukrainska Tsentralna Rada. Dokumenty i materialy: U 2 t. T.2. 10 hrudnia 1917 r. – 29 kvitnia 1918 r.. Kyiv: Naukova dumka 36–37.

[2] Verstiuk, V. F. (1997). Ukrainska Tsentralna Rada. Dokumenty i materialy: U 2 t. T.2. 10 hrudnia 1917 r. – 29 kvitnia 1918 r.. Kyiv: Naukova dumka, 114

[3] Verstiuk, V. F. (1997). Ukrainska Tsentralna Rada. Dokumenty i materialy: U 2 t. T.2. 10 hrudnia 1917 r. – 29 kvitnia 1918 r.. Kyiv: Naukova dumka, 103, 120.

of the seats in the Small Council had the Ukrainian Socialist-Revolutionary Party and the Ukrainian Social Democratic Party, now the Ukrainian Social Revolutionaries doubled their representation in the Small Council, the leadership of the Central Rada was in their hands. The reorganization of the Small Council, apparently, was caused by the impossibility in the these circumstances to convene a full session. The session ended on the evening of January 25 due to the attack of the Bolshevik forces. The members of the URC immediately went to Zhytomyr, then to Korosten and Sarn. Rada was in Volyn until March 7. Its competence was completely handled by the Small Council, which, moreover, worked in a shorten composition. Under the conditions of a foreign domination, even one session of the UCR did not succeed, and most of the adopted legally enforceable enactments did not come into force. The last legally enforceable enactment of the Small Council was the Constitution of the UPR – «Statute on the state system, rights and freedoms of the UPR», adopted on April 29, 1918. During the period of existence of the UCR, its executive office was developed and improved, which ensured its work, expanded adopted legislative acts. The Chancery of the Rada was divided into 6 departments: general, codification, publishing, accounting, librarian and economic. It acted on the basis of the Statute, according to which all its employees were members of the general meeting of the chancery, headed by the staff committee.

Two weeks before the end of the Central Rada's existence, the Law on the inviolability of its members was adopted. It noted that members of the Rada were not responsible for the consequences of voting, expressed opinions and, in general, for the activities related to the performance of their duties. They could have been investigated and put on trial only on the decision of the UCR, but their apprehension was allowed only while they were caught red-handed and it was necessary to inform UCR's leadership immediately. The prosecution of a member of the Rada should have stopped at any time at its request, and imprisonment should have postponed until the expiration of her powers or the release of this person from its membership. These privileges were extended also to the members of the Ukrainian Constitutional Assembly.[1] Consequently, the Central Rada acquired the main features of the parliament of that time according to its competence and its implementation.

Thus, the procedure of the work of the UCR as well as parliamentary procedures was produced by its own experience and the least by the models of the European or Russian State Duma.[2] The revolutionary, socialist nature of the Central Rada reminded of itself here. Its members began parliamentary activity predominantly with experience

[1] Shemshuchenko, Y. S., Pohorilko, V. F., & Stavniichuk, M. I. (1999). Ukrainskyi parlamentaryzm: mynule i suchasne. Kyiv: Parlamentske vydavnytstvo, 90–91

[2] According to the calculations carried out by the author, at the different times the UCR was composed of former deputies of the State Duma. – M. Bilyashivsky, A. Vyazlov, V. Chekhivskyi, V. Shemet and I. Shrag

in zemstvo institutions, in political and public organizations, in holding meetings, congresses, rallies. This could not have been unaffected on the work of the Rada. Its members were less poised to consider the parliamentary traditions due to their social and party composition, educational level, and socialist orientation. Parliamentary experience gained gradually and forcedly.

The reorganization of the Rada at the National Congress turned it into the highest Ukrainian representative body. The need of the establishment the Central Rada's Committee became obvious at the first meeting of the UCR. Hereafter the organizational and legal forms of its work were general meetings («sessions», «full Rada», «plenary session») and meetings the Committee or the Small Council between them. The second general meeting of the UCR began on the proposal of M. Hrushevsky, «reading the records of the first general meeting of the UCR» and «reviewing» the work of its Committee.[1] This order was fixed at subsequent sessions.

The next important step, which determined the legal forms of work of the UCR, was the adoption of rules of procedure – «Order of the UCR».[2] According to it, the work of the Rada should be held through its general meeting and the UCR's Committee. The meetings could be regular and emergency. The first of them must have been convened at least once a month. On the regular meetings all members of the Rada were sent «individual invitations» with the protocol daily ten days before they began, and announcement were also printed in newspapers. The emergency meetings were convened by need of the Committee, and they were considered valid with any number of attendees. Commissions for consideration of individual cases and preparation of decisions of the UCR and its Committee were created by them on a permanent and on a temporary basis. The elected head of the commissions (not members of the Rada) become its members and the Committee members. This right was not available to commissioned members, who were working on a temporary basis.

The work on improving organizational and parliamentary procedures was continued hereafter. At the fifth session, it was decided to elect a temporary commission with representatives from factions «to elaborate external order during meetings». It was proposed to check the certificate at the entrance, to ban sit on the stage and to stand in the passageways, to set up administrators for maintenance of order in the hall and the lobbies («choruses»). Thus, the organizing of fruitful parliamentary work and the deprivation of anarchistic habits of members of the Rada and the outside public was laid emphasis. At the session, the rules of representation in the Commission for the elaboration of the Statute of the Autonomy of Ukraine were developed, the Audit Commis-

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 69.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 71–72.

sion was elected, due to the formation of the General Secretariat, the UCR's Committee was reorganized into the Small Council, which would have had «all functions that belongs to the Central Rada» between its sessions. By the resolution of the Committee on the reorganization of the Committee on June 29, 1917, it was supposed to expand the composition of the Small Council, to hold regular (once a week) and extraordinary meetings on the initiative of members of the Presidium or on the basis of the application of not less than 5 members of the Small Council. For the consideration of cases of a legislative nature, the presence of 2/3 of its composition was established, for all others – not less than half. In the absence of a quorum, the subsequent meeting was valid with any number of attendees. All questions at the meetings were decided by a simple majority of votes.[1] Apparently, such provisions of the parliamentary procedure were dictated by the extremely difficult conditions of the revolution's development, the questions, «which life brings every day». These conditions also led to the inclusion in the order of holding closed general meetings: the fifth session in the closed session discussed the results of negotiations with the Provisional Government, II Universal and the General Secretariat.[2] On July 4, the UCR returned again to organizational issues in connection with the need to strengthened segregation of functions between the Small Council and the General Secretariat as legislative and executive bodies. The decision confirmed that «the presidium of the Central Rada is also the presidium of the Small Council», at meetings of which the General Secretariat «does not have the full voting status».[3]

Of fundamental importance for the further improvement of parliamentary procedures and native parliamentarism was the adoption on August 1, 1917, the rules of procedure of the Small Council – «Schedule of the work of the Small Council and its commissions».[4] The rules of procedure of the Small Council provided and sufficiently carefully recorded the legislative process, the places in it UCR's commissions. Legislative affairs should have to been resolved only after the report of the commission. Draft laws were distributed to members of the Council in advance. The Presidium convened the first meeting of the commission. Commissions were given the right to co-opt individuals with a consultative voice. The Commission was electing the Head and the Secretary and keeping records of its meetings. Upon com-

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 143–144.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 145–156.

[3] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 169, 171.

[4] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 210.

pletion of its work on the draft law, the speaker was elected.

The records of the meetings of the UCR have shown that the strict abidance by the rules could be achieved not always, especially at the end of 1917 and until April 29, 1918. The point at issue is about the quorum, the order of consideration of cases, the timing of receiving the draft laws by the members of the Rada and their consideration, etc. The main reason, again, was the objective circumstances, the kaleidoscopic change in political events in the country and beyond, which negatively affected in the order of the UCR.

And yet, despite all the difficulties, the UCR's work becomes stable, abidance by the rules, acquired traditions, and improvement of parliamentary procedures. Thus, the general meetings gradually acquired the character of sessional, plenary meetings. At the third general meeting of UCR, M. Kovalevsky proposed to reorganize the meeting, whose work was «unplanned», to conduct them monthly, «but for longer sessions».[1] The duration of the session was changed, which was determined by the complexity of the issues of the protocol daily: the fourth meeting lasted 3, fifth – 12, sixth, seventh – 5, eight – 6, nine – 11 days. At these meetings not only the «work» (reports) of the government and the Small Council were approved, but also, as a rule, the most important draft laws and resolutions, which were adopted by it. The meetings of the UCR and its Small Council were conducted, in general, openly. Except for most of the meetings of the eighth and ninth session, the general meeting was crowded, with the presence of the public «on the sidelines», which reacted lively to the speeches of members of the Central Rada.

Each of the functions of the UCR as a temporary Ukrainian parliament (legislative, constitutional, controlling, etc.) was carried out according to a certain procedure. Legislative procedure had the leading place among the developed, accepted procedures.

As can be seen from the text of the «Schedule of the work of the Small Council», the right of legislative initiative was granted to the members of the Council and the General Secretariat. Following the proclamation of the UPR, the need to improve the legislative process forced the Central Rada to create a legislative enactments commission (25 members – representatives of all factions). Consequently, when the commission was formed, the preference was still given not to the professional, but to the factional principle of the formation of commissions. In the draft Constitution of the UPR from December 10 the circle of subjects of the legislative initiative was clarified and expanded, obviously, based on its own parliamentary experience and the prospects for the formation of the National Assembly as the supreme authority in the UPR. Legislative projects should have been submitted for Assembly's consideration by its Presidium, individual factions,

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 83.

a group of deputies, a number not less than 30, the Cabinet of Ministers, self-governing bodies, which united not less than 10 thousand voters and directly by voters on lists, approved by communities and the General Court (not less than 100 thousand applications). But in practice in the parliamentary work, the UCR did not manage to consider draft laws on the initiative of local governments or the population: the distance between them and the Council was particularly expanded with the arrival of the German and Austrian troops called upon by Ukraine.

The legal procedure in the UCR involved several steps and stages. Legislative initiative or a ready-made draft laws came to the appropriate commission, which itself prepared a draft law (the Statute of the Autonomy of Ukraine, the draft Constitution, the Law on elections to the Constitutional Assembly of the UPR, etc.), or considered submitted, mainly by the General Secretariat (after the IV Universal – Council of People's Ministers) and separate secretariats. The most important and elaborate draft laws were considered article-by-article, in three readings or in regime of name. III and IV Universals were adopted by the Small Council exactly by the last procedure. For example, the Law «On Temporary School Board» from December 5, «Court draft laws» from December 23 were adopted with a shortened procedure (brief discussions, amendments, «annexions» or without them). «The Bulletin of the General Secretariat of the UPR» submitted information from the meeting of the Small Council in such manner: «After a long debate, the draft law was adopted in whole with some minor amendments».[1] A more complete picture of the legislative process in the UCR, the procedure for preparing and reviewing draft laws itself gave the procedure for preparing the most important, complex laws such as the Provisional Land Act or the Law «On National-Personal Autonomy».

Attempt of UCR to consider and approve the land draft law in the summer and in October 1917, which was developed by the Secretariat of land affairs and submitted to the Provisional Government, «had no consequences». [2] After its fall at the seventh session of the Central Rada on October 30, the Secretariat of land affairs submitted to the General Assembly the same draft law on the transfer of land to land committees. According to the adopted resolution, the draft of which was proposed by the faction of socialist revolutionaries, the draft law was decided to take «into account». Acknowledging this case immediate, the meeting charged the Small Council with a «thorough consideration», to supplement it, to adopt it «and, through the Secretariat, to translate into life, tirelessly to the socialization of the land».[3] However, the preparation of the

[1] Verstiuk, V. F. (1997). Ukrainska Tsentralna Rada. Dokumenty i materialy: U 2 t. T.2. 10 hrudnia 1917 r. – 29 kvitnia 1918 r.. Kyiv: Naukova dumka, 63.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka,.356–357.

[3] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4

law turned out to be more complicated. During the discussion of the III Universal draft at the meeting of the Small Council there were protests against the transfer of land to the disposal of land committees without ransom. However, taking into account the radical demands of the poorest peasantry, the III Universal announced the abolition of the existing right to ownership of land, declared it as the property of the entire laboring people and the transfer of land to it without a ransom. The UCR instructed the General Secretaryship of Land Affairs to develop immediately draft law on how to organize land committees until the Ukrainian Constitutional Assembly. Land committees were already distributing landlords' land and property. At the eighth session of the UCR, a draft law of the Provisional Land Law was read out and a long and sharp discussion of it started at six meetings on December 14–17. The resolution proposed by the Socialist-Revolutionary Faction, which recognized the draft law «not responding to the interests of the peasant labor of Ukraine», was approved. This draft proposed the creation of a commission with the representatives of factions, «with the right of co-optation of experts with an advisory capacity», «the complete abolition of ownership of land and it socialization». 131members of the Rada voted for the resolution of the socialist-revolutionary, against –101, abstained 13. Draft resolution of the faction of the Ukrainian Social Democrats, which proposed to set up a commission on a proportional basis, didn't gain a majority. Thus, the predominance of Socialist-Revolutionaries in the UCR identified the most important principles for resolving the land issue, had a decisive influence on the order of further work on the draft law. The IV Universal informed about completion of the commission. This draft law «will be considered in a few days in the full Central Rada».[1] But its work took place «under cannon shots and explosions of shells», as recorded in the protocol and therefore the procedure for discussing the draft law was violated. P. Khrystyuk only outlined the «basic principles and main ideas» of the new draft law and read it.[2] At the subsequent meeting of the General Assembly, M. Hrushevsky proposed to the Assembly «without discussion to approve the draft law on the whole, which was introduced the day before, so that the Small Council could make the small amendments to this law, if it would be required». The Central Rada adopted the land law unanimously. So, the extraordinary circumstances and Socialist-Revolutionaries preference of the Head of the UCR affected on the long-suffering law and the procedure of its reading, discussion and adoption.

The preparation of the Law «On national-personal autonomy» was more smoothly. The draft law that was being

bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 377.

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 103.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 113.

long developed by the General Secretariat was submitted to the Small Council with the amendments of the Legislative Commission on December 30, 1917. Discussion of this draft law began and lasted until January 9, 1918. The law was adopted with amendments «after article-by-article reading and detailed consideration … unanimously under the thunder of applause from everyone present».[1]

The legislative process did not stop during the stay of the UCR in Volyn. Despite the fact that the Small Council was not fully convened (at least 12–14 of its members), it adopted important laws and decisions. Based on the records of meetings, this was done by a simplified procedure: the introduction of previously drawn draft laws by one or another commission (more often – by the commission of legislative enactments), which were taken after a brief discussion or without it. Thus, laws on the transition of Ukraine to the new chronology, on state symbols, on the monetary unit, the Provisional Statute on public works, and others were adopted.

After returning to Kiev, the meetings of the Small Council took place (almost daily) under the usual regime – «There are a lot of members of the Council. Choruses are crowded with the public».[2] More attention was paid to compliance with the rules of procedure, to thorough elaboration of draft laws, to their discussion.

The texts of laws and other legislative acts, which were adopted by the UCR, were drawn up by its chancery and signed by the Head of the Rada or one of his comrades or deputies, the secretary, and were asserted by the general record keeper or acting record keeper. The short laws or resolutions of the UCR were printed as excerpts from the records of the meetings. Legislative acts were published for wide public awareness in such newspapers as «News from the UCR», «The New Council», «Bulletin of the General Secretariat», «People's will», «Labouring magazine», etc. The text of the Constitution of the UPR on April 29, 1918 was considered by the Small Council in three readings and adopted. However, for its promulgation was not enough time and the Organic Law of the UPR did not enter into force.

Other parliamentary procedures differed only in their simplified order.

Thus, the Central Rada fully implemented the competence and functions, proceedings of the parliamentary institution, which Rada gradually became, despite all the shortages and unresolved problems, especially the territorial representation. That problem was the consequences not only of the unprofessional composition of the UCR, the political preferences of its leaders and figures, but also the extremely difficult circumstances in which it acted. As the prominent figure of the Rada O. Shulgin noted, the sudden divide with the metropolis in the autumn of 1917 deprived

[1] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r. Kyiv: Naukova dumka, 82–83, 87–88, 98.

[2] Verstiuk, V. F. (1995). Ukrainska Tsentralna Rada: Dokumenty i materialy: U 2 t. T.1: 4 bereznia – 9 hrudnia 1917 r.. Kyiv: Naukova dumka, 190, 195, 226, 231 та ін.

Ukraine of the possibility to systematically create its statehood.[1] On the work of the Rada affected not only attempts to combine socialism with the national idea, but also the conscious aspiration of the leaders of the UCR to bring it closer to the models of western democracies.

It was the first nationwide supreme representative body that accumulated the state-building ambitions of Ukrainians and proclaimed the first in the twentieth century Ukrainian statehood.

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[1] Shulhin, O. (1918). Polityka (Derzhavne budivnytstvo Ukrainy i mizhnarodni spravy). Statti, dokumenty, promovy. Kyiv: Drukar, 13.

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FUNCTIONS OF LEGAL ANALYTICS: THEORETICAL DIMENSIONS, PRACTICAL PRINCIPLES

The article is devoted to the nature and significance of the phenomenon of social reality, as a legal analyst. A separate review is the vector of its functions, some attention was paid to the task of legal analysis on legal practice, jurisprudence and legal education.

Keywords: *legal analysis, law-making, rule-making, the functions of legal policy analysis in the legal field, prognostication.*

Relevance of research topic. Legal analytics, especially its functions, has not been widely studied in the modern legal science. However, this direction is extremely important for identifying «opportunities», «potentials», efficiency and constructive nature of regulatory acts, and, therefore, predicting the effectiveness of the current legislation as a whole.

It should not be proved once again that many of the miscalculations in modern conditions are related precisely with the lack of analytical developments, prognostic findings, and methods of «pre-evaluating» the consequences of certain processes, especially while talking about such a direction of social reality as law-making, norm-projecting, legal technique. Therefore, in this area we should, in our opinion, talk about such a direction as legal analytics, in particular its functions.

We offer dictionary vocabulary: «analytical» – one that is based on the application of analysis; the one is used during analysis[1]. Another definition:

[1] Куньч З. Й. Універсальний словник української мови. – Тернопіль: Навчальна книга. – Богдан, 2005. – С. 28

«analytics» – the theory of analysis, is based on analysis or used for it[1].

In this way, let us define legal analytics as methods and techniques dealing with conducting an analysis in a particular legal field (direction) for obtaining the relevant knowledge (doctrine). Structurally, legal analytics can and should embrace both an appropriate analysis of existing norms, and appealing to «prognostication», the prediction that it may be possible to program the necessity, the actual action, the potential, the potency of a certain law.

It is not a secret that unfortunately, the normative laws on which some public trust in ordering social relations is putted on does not work and explaining these phenomena only by referring to the complicated economic, political, social, etc. conditions, seems to make no sense. The fact is that every act must have basis for a serious and comprehensive study of its potential action, a certain constructive, real effect, compliance with public expectations, and so on.

What do the ordinary people require from legislature, what requires a civil society, what science predicts… A few remarks, in particular, today, unfortunately, one can state that legislation is assessed by modern society as:

a) an instrument for the enforcement of a certain policy;

b) a means of carrying out certain managerial tasks;

c) the command of the state.

Thus, the social purpose of the current legislation, the functioning of the legal system is identified only with the regulation of social relations, which does not leave space for autonomous regulation, initiative activity of citizens and their various associations, eventually for the free organization of rights, freedoms and legal interests of man. As a result, the decline of legal and political culture, mass dysfunctions of legal consciousness, which makes it impossible to speak about the authority of modern legislation in our society.

Of course, the very formulation of the problem indicates the essential inherent characteristic of the phenomenon, to be exact – its effectiveness. No phenomenon can be sustained, respected, appreciated in society if it does not perform properly its functions and social tasks[2]. However, the «effectiveness» and «authority» of a particular institution are not identical, coincidental, but influence and mutually determine one another. Using the philosophical, scientific arsenal, we can determine the interdependence of «effectiveness» and «authority» in the form of causal relationships, where the cause is the effectiveness of a phenomenon, and the result – its authority recognition in society. And in any case, it does not mean that «bad» legislature from the point of view of ordinary citizen or a certain social segment may not be used. The psychological component is accentuated

[1] Загнітко А. П., Щукіна І. А. Великий тлумачний словник. Сучасна українська мова від А до Я. – Донецьк: ТОВ ВКФ «БАО», 2008. – С. 24

[2] Оніщенко Н. М., Пархоменко Н. М. Соціальний вимір правової системи: реалії та перспективи. – К.: Юридична думка, 2011. – С. 9–23.

and emphasized – appropriate perception, respect for current normative legal acts in society.

A few words should be said about defining the effectiveness of legislation. Summing up the various approaches, the broadest definition of the effectiveness of legislation, norms of law is the ratio between the actual result of the legislation and the social goals for which this legislation was adopted[1].

A similar view is expressed at least in the writings of many well-known scientists[2], emphasized in the analysis of the effectiveness of the application of legislation, in monitoring activities aimed at identifying and eliminating the defects of the effectiveness of its application.

Using vocabulary, we will try to define the interpretation, the interpretation of the term «authority». Authority – a universally recognized meaning, influence, reputation (of person, organization, team, theory, etc.)[3]. The authoritative one is that who deserves full confidence. Almost similar definitions are given in other vocabulary publications[4].

The processes of rethinking the legal reality, and this is true, are actively stimulated by the development and adoption of a number of new laws. Under these conditions, the growth in the number of laws does not directly relate to the effectiveness of legal regulation, because the disadvantages of poor regulation are eliminated by adopting new «better» laws, and then «best» ones.

There is an ancient Latin saying: «It is possible that the law can be convenient for everyone, but if it is convenient for the majority, then it is useful.»[5] Today, this statement is completely untrue. One stratum of the population strongly supports the adoption of a certain legal act, the second – no less hotly denies it.

In such conditions, we observe rather an interesting phenomenon: the legislation as a whole meet: a) European standards; b) international norms; c) civilized forms, but it is completely or almost completely helpless.

Today, both in society and in the government, there is always a question about the effectiveness of the application of the law: can the Law really be implemented literally? Can the rules of a specific act of law be implemented in general? Are there any mechanisms, designs, schemes that affect the effective-

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[1] Законодавство: проблеми ефективності. – К.: Наукова думка, 1995. – С. 4.

[2] Рабинович П. М. Проблемы теории законности развитого социализма. – Львів, 1979; Лазарев В. В. Эффективность правоприменительных актов. – Казань, 1975; Керимов Д. А. Философские проблемы права. – М., 1972; Явич Л. С. Эффективность действия правовой нормы // Советское государство и право. – 1979. – № 3. – С. 41; Сабо И. Основы теории права. – М., 1974; Шаргородский М. Д. Наказание, его цели и эффективность. – Л., 1973.

[3] Великий тлумачний словник сучасної української мови (з дод. і доп.) / Уклад. і голова ред. В. Т. Бусел. – К., Ірпінь: ВТФ «Перун», 2005. – С. 8, 1728.

[4] Иллюстрированный энциклопедический словарь Ф. А. Брокгауза и И. А. Эфрона. Современная версия. – М.: Эксмо, 2009. – С. 14; Толковый словарь русского языка. Современная версия. – М.: Эксмо, 2007. – С. 12.

[5] Латинская юридическая фразеология. – М., 1978. – С. 263.

ness of a particular act, or systems of such legislative acts?[1]

Modern Ukrainian society is characterized by many different contradictions, among which there is a large number of normative legal acts and, at the same time, the spread of total legal nihilism. And the adopted laws are openly ignored, violated, not performed; they are not respected and not appreciated. In this context, special attention is required to counteract shadow legislation, which is the result of shadow lobbying. This fact has already been repeatedly emphasized in legal literature[2].

It is clear that each phenomenon is revealed in its functions. Appealing to the statement about the functions of legal analytics, we want to note that the term «function» is used in different meanings. Some scientists believe that this concept – the interdependence of various factors, others under the function understand the totality of processes taking place within the object of study. Also, a function can be defined as the result of a certain social action, process, and phenomenon. The term «function» means the totality of all expected and unforeseen consequences, processes, phenomena, their role in the social system, the rule of law, the development of civil society, etc.

Frequently this concept is used to denote the main essential processes. There are the functions of legal analytics designed to ensure and prevent from adopting without proper analysis, forecasting, calculations for the future a particular normative act which is far from perfect by a form of preparation, by the form of a source and, unfortunately, by content.

Consequently, the legal analytics, its functional capacity, should give an answer to the questions about the future of a particular legal act, its action or inactivity, because of the impossibility of regulating in effective way the social relations.

The functions of legal analysis can be divided into two groups:

– theoretical, providing development and qualitative growth of knowledge;

– pragmatic functions aimed at solving the problems of legal practice.

Theoretical functions should include the following:

1. Epistemological (cognitive) function. Legal analytics contributes to the broadening and deepening of scientific knowledge about the legal development of Ukraine, revealing general and specific features, analyzing stable and temporary legal situations in different countries, examining the functioning of certain elements of the legal system under particular national, political and socio-economic conditions. The analysis and evaluation of general and special in one or another legal phenomenon allows us to create appropriate typologies and classifications predicted for the future.

2. The heuristic function. Legal analytics provides not only the mechanical

[1] Фріс П. Переднє слово // Коротка методика юридичного аналізу ефективності застосування законодавства / Н. А. Розенфельд. – К.: Юстініан, 2009. – С. 5.

[2] Законопроект України «Про регулювання лобістської діяльності в Україні». – Ст. 9.

accumulation of knowledge about different legal phenomena and processes, but also analyzes stable, repeated links between them, reveals the patterns and tendencies of the emergence, functioning and development of various legal phenomena and individual legal institutes.

3. Prognostic function. The study of the patterns and priorities of the development of legal phenomena of the modern world and global political, economic and legal processes (such as globalization) allows to predict the further development of both individual legal regulation and law in general.

4. Critical function. Legal studies allow you to see the shortcomings and failures of developing your own legal system and legal systems in other countries. An unbiased analysis of foreign legal practice also contributes to the deideologization of legal doctrines and theories.

The pragmatic functions include, for example, the following:

1. The function of promoting lawmaking. The rules of modern normative activity require careful elaboration of texts of normative legal acts taking into account not only local, but also regional and worldwide experience in regulating relevant public relations. Studies of lawyers allow obtaining the necessary information, analyzing it and drawing conclusions about the acceptability or inexpediency of the use of legal models developed in other states, to predict the consequences of their implementation in national law.

2. The function of ensuring a proper interpretation of the law. First of all, it concerns the interpretation of international treaties and acts of international organizations that are applied in the territory of a certain state. In order to establish the true content of certain norms of these sources of law, it is necessary to refer to the international experience or experience of those countries where the relevant practice has already developed. The same applies to cases where some rules of law or legal institutions are borrowed (reception) from other legal systems.

3. The function of promoting law enforcement practice. Legal analytics, among other things, are exploring models for preventing and regulating social conflicts; it deals with a wide range of model decisions. The experience gained in various legal systems of the world expands and enhances the choice of the optimal solution of a particular case under the specific conditions of temporal and legal style.

4. Integration function. Legal analytical studies help to solve such tasks as unification and optimization of development of national law, harmonization and approximation of national legislation, the need to overcome existing contradictions between the laws of different countries.

5. Educational and pedagogical function. Legal education cannot be considered as complete without obtaining knowledge about the existing models of education in the world, about the peculiarities of their emergence, construction and functioning, and the application of law-state creation under certain conditions. This experience is valuable for Ukraine today.

Legal analytics should function in an effective way not only in terms of a practical cut of jurisprudence, but also in terms of scientific work. The fact is that the scientific developments today look like even more «Brownian motion» in comparison with the practice may. For example, it is not a secret that the topic of the dissertation research of a future researcher is being chosen, first of all, by criteria the future scientific mentor has already «comprehended», «embraced» with scientific outlook. It is not bad itself, not a subject for long discourse. However, it is precisely the dissertation research that should bring the corresponding effect to the improvement of legal creativity and legal regulation. One can hardly expect this to happen when the «51st or 60th» dissertation is written on the same topic, during which «small discoveries» become «small novels» that could be studied during seminars or round tables. It is obvious that exactly the dissertation research should bring an appropriate effect in improving the legal creativity and legal regulation. Therefore, legal analytics should become a concentration of directions necessary for the future legal, in this case, search development.

Let's emphasize, another stage to which should contribute the legal analyst is a thorough study of all components that will help to ensure the quality legal education in the state. Without any doubt in the need for reformation of the identified sphere, nevertheless, we note that it is necessary to take into account precisely the needs of ordinary people and to feel the impulses provided by civil society.

The attempts of theoretical and practical search for new educational legal programs are intensified with the development of European integration processes, their spread to all spheres of public life, the emergence of new, more complex integration systems, connected both to the deepening of integration, and to the expansion of the integration association itself.

The changes taking place in Ukraine, in particular, actively influence the current socio-cultural situation, which, in turn, requires a certain mobility from the society and an adequate response to modern educational requirements.

The priority of legal education is the creation of such conditions for the development of society, which would ensure in the future its readiness to live and successfully operate in the world of humanistic values. In the pedagogical aspect, this means that the main result of the educational process is not the system of knowledge, skills and abilities itself, but the readiness for modern intellectual, social-legal, communicative, informational practices, perception of law, its potential, as universal values.

The system of legal education is based on a single state policy aimed at ensuring the dynamic development of modern education in direct conjunction with the development of legal science. Modern legal education should meet the needs of the individual in a steady growth, increasing competitiveness under conditions of professional mobility and social safety.

In this way, we can state that legal analytics is a necessary component of both legal practice and legal science and legal education. It should be noted separately that its essence and prognostic character should serve as an important tool for the knowledge of legal reality, a means to establish the truth about the necessary legal regulation of social relations. This is the direction (legal analytics) – it is a method of analysis, certain tactics, strategy and prognosis of modern legal development, as well as «art of analysis,» as representatives of modern jurisprudence claim.

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WHAT IS LAW? KEY POINTS OF THE CONCEPT OF LEGAL REALITY

«What is law?» is the main question of philosophy of law in particular and jurisprudence as a whole. And behind any question of what law is, in each particular case there is a fundamental question: «What is law as such?» This circumstance indicates the internal philosophy of all knowledge of law or jurisprudence. Therefore, the question «What is law?», on the one hand, is both eternal and nonultimate[1]. However, on the other hand, the need for its formulation and finding at certain time decisions acceptable for the theory and practice is also irresistible (as proved by the presence of many concepts of legal thinking)[2].

Law is not a thing one can point out: this is law. Law is a special world – the world of law. To express its peculiarities in all numerous manifestations, the category «legal reality» was proposed (like the concept of physical, social, cultural, moral, psychological reality, etc.)[3]. It should be noted that quite often in the legal literature the ontological category of «reality» is replaced by its daily interpretation – the empirical manifestations of law, the way the law actually functions (in this sense, it would be more correct to use the term «legal actuality»). Since reality, according to P. Berger and T. Luckmann (representatives of phenomenological sociology), is «inherent in the phenomena the attribute of being existent, independent of our will and wish (we cannot «get rid of them»)»[4], then legal reality is

[1] From Kant's «lawyers are still looking for their definition of law» to Flober's «it is unknown what it is».

[2] Козюбра М. Праворозуміння: поняття, типи та рівні / М. Козюбра // Право України. – 2010. – №4. – С. 10–21.

[3] Максимов С. І. Правова реальність як предмет філософського осмислення : автореф. дис. … д-ра юрид. наук : спец. 12.00.12 / С. І. Максимов. –Харків : НЮАУ, 2002. – С. 2.

[4] Бергер П., Лукман Т. Социальное конструирование реальности. Трактат по социологии знания / П. Бергер, Т. Лукман. М.: Медиум, 1995. – С. 9.

not only what exists in the institutes of law and in legal relations, but also those obviousnesses, which although they do not have objective being, but which we cannot ignore. This concept makes it possible to combine the questions of what law is and how it exists, what is the way of its being, to what type of reality it relates to. At the same time, legal reality should be perceived not as external to a person reality (the subject of its comprehension), but as such, in which it itself is involved in the process of communicating with other participants of legal life.

They distinguish the broad and narrow meanings of the concept «legal reality». In the broadest sense, this is the whole set of legal phenomena, in the narrow sense it is the basic legal phenomenon: legal norms and institutions for legal positivism, legal relations for sociological jurisprudence, and legal consciousness (as reality of meanings) for the theory of natural law and the psychological conception of law. But I propose an integral concept of legal reality as the world of law which is constructed from legal phenomena, ordered according to their belonging to the basic phenomenon as a kind of «primary reality» (own reality) of law.

Legal reality does not represent any substantive part of reality, but it is only a way of organization and interpretation of certain aspects of social life, human being. But this method is so significant that, in its absence the human world itself collapses. That is why we imagine it as really existing. Already in this law being is seen as distinguished from social objects being because the world of law is at its basis is the world of ought (due), but not of being[1].

The introduction of the category of «legal reality» in the context of methodological and ideological problems of jurisprudence gives an opportunity to consider law not as a non-essential phenomenon, which exists only as a reflection of life of the economic structure of a society (as it appeared in the Marxist theory of law), but as a special world, a relatively autonomous sphere of human being, with its own logic and regularities to be taken into account. The main here is the problem of law being, which includes the question about its ontological grounds, that is, about the rootedness into human being. It should be taken into account the specificity of the ontology of law, since the law being is a special mode of being, «ought-being». Thus, the reality of law is estab-

[1] It should be noted that in our concept of legal reality law only «in its basis» refers to the proper world, leaving in its structure the elements of factual that is, existing. That is why, the opposition of the proper and the existing in legal reality has only a contextual rather than absolute character, and it is difficult to agree with the provision of the concept of «ought» some mystical meaning, using it with the capital letter «O», which would refer the attribution of the world of proper to the transcendental reality of God or Absolute Idea. To explain the author's concept can be basing on the views of the Italian philosopher of law E. Pattaro, who believes that the reality of law as a proper world is the reality in abstraction, that is, something that is conceived by us as present in behavior (Паттаро Э. Реалистский подход к объективности норм и права / Э. Паттаро // Проблеми філософії права. – Київ ; Чернівці, 2005. – Т. III. – № 1–2. – С. 23).

lished not as a fact but considering its significance to a person.

Ontological basis of law is inter-subjective interaction, but not as some substantive reality, but as its ideological and meanings aspect, when the common existence of people threatens to turn into arbitrariness, and therefore contains the moment of ought for such a restriction. Therefore, the legal ontology is the ontology of inter-subjectivity, and the «primary reality» of law serves as the meaning of law, which is a certain obligation (ought).

Thus, law is the deontological reality, that is, a perfectly constructed being, the essence of which is the obligation (ought), and although it does not close itself up, finds its expression in the empirical world, but still it is not limited to social facts. Legal reality has notional structure (structure of meanings). Legal meanings are objected in mental installations, in the ideas and theories, as well as in symbolic form of norms and institutions, and in the human actions and relationships, that is, in different manifestations of legal reality[1].

As a complex multi-level system, law is not a static set of elements, but a dynamic process of its formation. The source of its self-development is the contradictory interactions of its parties which is reflected in the polarity and complementarity of different approaches to law. Relatively autonomous levels of legal reality (the forms of law being) are: a) the world of ideas (the idea of law); b) the world of symbolic forms (legal norms and laws); c) the world of social interactions (legal life). They represent the levels of formation of law, which are expressed in the development of the concept of legal reality from abstract to increasingly specific definitions[2].

Logically the source component of legal reality, which contains the scale of the truth of law, is the idea of law[3]. Introducing abstract-general definitions of law and expressing the meaning of law, it contains pre-positive scale for legislative and judicial decisions. Expressing

[1] Legal meanings do not «hang» only at the level of consciousness, but also revealed in other manifestations of legal reality. At the same time, they do not exist in the consciousness as some a priori structures, but are opened by people in the process of their inter-subjective interaction. It is as a result of mutual recognition that legal meanings become meaningful. That is why, in any case, law can not pass the consciousness, which is a necessary component of human being. The essence of the latter, according to J.-P. Sartre, is in coexistence of Self and the Other, it is an individual unique being and is described through the concept of «being-in-itself», that is, the pre-personal state of man, «being-for-myself» as self-consciousness, and «being-for-other» – in relation to another person, the most important form of which is justice. There is no human being, including its being in law, beyond consciousness. As for the specifics of the legal due, different from the moral and the religious, it is rooted in human nature as a conflictual being, which endangers other people. It is the legal due that is aimed at neutralizing this threat both for a person himself and for others.

[2] The distinguishing of such levels is the result of abstraction. They only outwardly reminiscent of the Hegelian deployment of the system from the «pure idea of law» to its «alienation» in norms and the «return» to itself is in legal life and legal situations.

[3] It should be noted that the idea of law is «logically», but not «ontologically» the source element of legal reality.

the moment of obligation (due), it has a potential reality, but at the same time it sets the normative force to the current law. The significance of the idea of law is given by the operation of the logical recognition of law, or its justification.

Positive law, as a system of state sanctioned norms, is a concrete general definition, the realization of the idea of law. Being a form of empirical existence, it has a historical (temporary) character, it is distinguished by the requirements of comprehension of law for all cases and the account of social interests, that indicate its relationship with the life. The means of transition from the ineffective idea of law to current law is the process of lawmaking, phenomenological content of which is in combining the idea of law (the principles of justice) with the specific social conditions, expressed through categories of need and interest. The complicated contradictory combination of justice and expediency is a distinctive feature of positive law.

The world of social interaction is the most concrete level of law being. The moment of the transition from laws to material specific definitions is the process of legalization. The main element of this process is the subject in its interaction with other subjects. The condition for the transition to the law being in the right decisions and actions of people is such factors as recognition of norms, coercion and power. The most important form is judicial decisions, which accumulate the whole experience of comprehension of law. Adopted by the highly qualified professionals, they are an advanced training for all lawyers and citizens. In relation to justice, the efforts to unite all branches of power in the struggle for the law happen.

All elements of legal reality are penetrated with one single principle, the special legal ethos (a way of thinking and acting), the logical order of which allows for such elements that reflect on each other as the subject of law (with its proper «ability of recognition») in the interaction with other subjects, the system of legal values, the integral expression of which is justice, and the proper model of behavior that involves the unity of rights and duties.

The true reality of law is not such strict mechanism of authoritative coercion but a thin web of particular mental states, legal meanings. Fundamental legal meanings (the installations of legal consciousness) serve as a fundamental duty to respect someone else's right and, which complements it, the duty to uphold one's own right. The result of these principles is the assertion: in the relations between people –good faith, honesty and accuracy in the fulfillment of obligations, in the way of thinking – the legal installations, which is expressed: in relation to others – in the primacy of justice over compassion, in relation to oneself – in the idea of competence or in pursuit of independent achievement of benefits and well-being. The metaphysical condition for law and justification of internal independence (autonomy) is the establishment of a denial of slavery and the recognition of freedom as the supreme value; moral and anthropological condition of opportunity is the position of integ-

rity (the priority of civil honesty over other virtues – professional, family, patriotic). Compliance with these installations of legal consciousness leads to the establishment of a stable system of legal behavior – legal ethos. However, in real life the implementation of all legal meanings is impossible, therefore, to compensate for this imperfection of human behavior and to ensure that those who act in accordance with the installation of respect for the law do not lose. Besides, there is the legal coercion.

The question about the nature of law necessarily «comes out» on the problem of natural and positive law correlation. It can be considered in two aspects: as the interaction of fundamental structural elements of law (ontological aspect of the problem) and as a polemic between the theory of natural law and legal positivism, which unilaterally reflect this structure (the epistemological aspect of the problem).

Law as a socio-cultural phenomenon (the creation of man) is the unity of two major dimensions: notional (of meanings) and objective. Therefore, the ideally-notional and substantive-institutional aspects of legal reality are precisely the same as the traditional division into natural law and positive law, and their dialectical unity constitutes the fundamental structure of law. At the same time, if classical theories of natural law focus on the moral and value measurement of law, considering natural law as a moral criterion for evaluation and as a model for the formation of positive law, then classical legal positivism considers law only as a system of norms established by the state and ensured by its coercive power. However, law cannot be reduced either to moral proper, or to coercion. It is a unity made of the stated concepts faces or measurements, and therefore the nature of law can be more adequately reflected by such concepts of law, which seek not to the opposition, but to the combination of these various aspects of law.

There are different models of expression of the unity of natural and positive law. In ontological conceptions (the concept of the ontological structure of law by A. Kaufmann[1], my concept of legal reality[2]) law is the unity of natural legal justice and positive-regulatory legality, which relate to each other as essence and existence. Legal positivism and classical conceptions of natural law, interpret the nature of legal reality one-sidedly-monistic.

Legal positivism, considering positivity as a decisive feature of law, essentially reduces the essence of law to its existence, and in the name of security seeks to free itself from the spiritual content of law associated with freedom, which may lead to a dangerous thesis: as if to the nature of law, it is not matters, what content is positivized. The classic conceptions of natural law transfer the emphasis from the existence of law to its essence, but interpret it as a transcendental reality, the content of which

[1] Кауфманн А. Онтологическая структура права / А. Кауфманн // Российский ежегодник теории права. – 2008. – № 1. – С. 151–174.

[2] Максимов С. И. Правовая реальность: опыт философского осмысления / С. И. Максимов. –Харьков, 2002. – С. 162–174.

is absolutely correct and legitimate for all people.

The synthesis of different positions is expressed in the integral conception of the structure of legal reality, within which natural law (level of meanings) and positive law (institutional level) are correlated as the essence and existence of law. The reality of law, its true reality is the unity and complement of natural legal justice and positivity, because without justice law is manifested without its own essence, and without positive objectification, it has no opportunity to interact with the empirical reality of human practice. We believe that such conception of the ontological structure of law has significant ideological meaning, because it gives the opportunity to imagine a holistic and dynamic image of law, while linking it with the image of man as the only being, whose existence does not coincide with its essence[1]. Just as this internal contradiction serves a motive to a person for self-development, it is, reflected reflectively by it, is an incentive for the perfection of law.

There are biases against the use of the term «natural law» that complicate an adequate understanding of its nature and purpose. Considering the plurality of views on this phenomenon, it is expedient to speak of natural legal thinking as a certain paradigm of legal thinking. The basis of any doctrine of natural law is the idea that all existing legal rules should be based on some grounds that are independent from human arbitrariness. Since nature was considered the pattern of such objective grounds, then law, which does not depend on human will and wishes, was called natural.

The theory of natural law is aimed at the search for the special reality of law, which is not limited to the reality of state-authoritative installations. Since natural law in its generalized meaning is the supra-positive instance, then the feature of natural-legal thinking is, in a more familiar language, in the delimitation and comparison of *ius* and *lex* from the standpoint of the principles of justice. It focuses on seeking justice as the essence of law and the criterion for assessing the *lex* and other legal decisions.

As a result of the critical setting established in it, the natural law way of thinking acquires a special social significance in the transitional periods of the development of society, which are characterized by aggravation of contradictions between the ideal and the reality, new progressive aspirations and old positive law, or, in other words, by the experience of experiencing injustice. That is why, the most active and fruitful natural law conceptions are developed during the periods of reforms and changes.

Natural law thinking to some extent contains an element of utopia, because it does not come from what is, but from what should be, thereby denying the existing order of things. However, although utopian projects do not come true in reality, a person, being under the impression of a new reality and inspired by this picture changes the social world by his/her actions using the symbols and

[1] Максимов С. И. Правовая реальность: опыт философского осмысления / С. И. Максимов. –Харьков, 2002. – С. 168–171.

categories of the utopian project. It is natural law thinking that influenced the American and French revolutions and led to the emergence of the community of a modern type – democratic constitutional and legal state[1]. Integrally, the meaning of various theories of natural law can be expressed by the formula «through the criticism of the state and law to humanization of law and order».

Natural law thinking is not homogeneous. It is possible to distinguish between diverse types of conceptions of natural law:

1) on the basis of which of the key concepts is emphasized («nature», «reason», «human nature»), cosmological (naturalistic and theological), rationalistic and anthropological conceptions of natural law are distinguished;

2) depending on the understanding of the meaning of law, one should distinguish between «old» and «new» natural law; the first one is the characteristic of traditional societies, where the natural inequality of people was supposed, and the second one for modernist societies based on the idea of equality and freedom, and therefore it is the theory of human rights;

3) in the way of substantiation of the idea of law of the conceptions of natural law can be divided into naturalistic, deontological and logocentric, differing in the interpretation of ontological status of natural law: it was understood as existing: to positive law, as the law of nature (J. Locke), over positive law as a moral ideal (I. Kant), and in positive law itself, as his rational core (G. W. F. Hegel);

4) depending on the selection of different epochs in the development of philosophy and culture in general (the classics and the present), the conceptions of natural law can be divided into classical and modern (non-classical) ones.

Understanding of the diversity of the conceptions of natural law is important in order not to simplify its essence and not to reduce the concept of natural law to its literal meaning, that is, to interpret it as the laws of nature[2].

Opponents of the theory of natural law quite often substantiate their rejection of this concept by the fact that with its use «dualism» of law appears, which supposedly destroys the monolithic law and order. However, such «dualism» can only be the result of misinterpretation of the meaning of the phenomena under consideration. In fact, the recognition of the unity of natural and positive law does not at all mean the «dualism» of law, that is, the recognition of the existence of two parallel regulatory systems – really-acting and ideally-proper and means the recognition of its «two-component structure»[3], «binary

[1] Хеффе О. Политика, право, справедливость. Основоположения критической теории права и государства / О. Хеффе. – М : Гнозис, 1994. – С. 52.

[2] Максимов С. І. Методологічні підходи до дослідження правової реальності / С. І. Максимов // Правова система України: історія, стан, перспективи : у 5 т. – Харків : Право, 2008. – Т. 1:Методологічні та історико-теоретичні проблеми формування і розвитку правової системи України / за заг. ред. М. В. Цвіка, О. В. Петришина. – С. 56–58.

[3] Соловьев Э. Ю. Философия права / Э. Ю. Соловьев // Философия : учебник / под.

structure» or «duality»[1] as a necessary expression of its nature.

It is in this duality that is emphasized in the discursive conceptions about the nature (structure) of law, which, ideologically, focusing on the ontological conceptions of law, complement them, revealing new methodological possibilities (R. Alexy)[2]. The main point of R. Alexy's conception is the thesis that law has the dual nature, that is, it has two measurements: real or actual, which in the definition of law represented by the elements of authoritative establishment and social efficiency, and the ideal or critical, which is expressed in the element of moral correctness.

The dual nature of law (as the harmonization of ideal and real measurements) manifests itself in all fundamental questions of law: in the balance of the principles of justice and legal certainty, in the analysis of different versions of positivism and non-positivism[3] in terms of the adequacy of the expression the nature of law by them (with the priority given to «soft non-positivism», according to which moral defects lead to the denial of the legal validity of law only when the threshold of extreme injustice is violated). In the procedural aspect, the connection of positivity and correctness is realized in the form of democratic, or discursive, constitutionalism, the main elements of which are democracy and the constitutional rights. The requirement for a balance between the ideal and real measurements of law is also present in legal reasoning (interpretation) and law enforcement (as a correlation of principles and norms).

Finally, it should be noted that the recognition of the dual nature of law is not the recognition of the duality of law, that is, the existence of two independent realities (natural law and positive law) but is the recognition of two measurements of the single phenomenon of law[4]. These dimensions are reproduced in solving all legal issues and are the ontological basis of any legal conceptions that seek to adequately reflect the nature of law, including integral conceptions. At the same time, the degree of adequacy of the conception of law directly depends on how fully it is able to reflect such duality.

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ред. В. Д. Губина, Т. Ю. Сидориной. – 3-е изд., перераб. и доп. – М. : Гардарики, 2003. – С. 496–525.

[1] Алекси Р. Дуальная природа права / Р. Алекси // Российский ежегодник теории права. – 2009. –№ 2. – С. 9.

[2] Алекси Р. Дуальная природа права / Р. Алекси // Российский ежегодник теории права. – 2009. –№ 2. – С. 19–33.

[3] For more detailed analysis of the discursive conception of law, see (Максимов С. Дуальность права / С. Максимов // Право Украины. – 2011. – № 1. – С. 78–84).

[4] It is in this, that is, that such an interpretation of the correlation of the ideal and real in law (as well as the relation of the due and the present), when they are considered not as separate realities, but merely as the measurements of the only law by nature, I see a nonclassical, or post-metaphysical, approach to law. Not any recognition of the ideal means the recognition of the absolute idea, nor does any recognition of the ought as an essential characteristic of law mean worship of the mystical Ought.

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FORMATION OF UKRAINIAN NATIONAL REPUBLIC (100 YEARS OF THIRD UNIVERSAL)

On October 25, 1917, the Bolsheviks seized power in Petrograd, the Provisional Government was overthrown. The Bolshevik coup covered the vast expanses of Russia but met resistance in Ukraine and became a powerful impetus for the development of the Ukrainian state, raising it to a new level – building up its own national state.

This process took place under very difficult conditions. The situation in Kyiv was characterized by the fact that three forces continued to operate there: the Central Rada and the General Secretariat, which embodied the national democratic camp the Soviets of Workers' and Soldiers' Deputies, which were mostly controlled by the Bolsheviks; the headquarters of the Kiev Military District, which was the representative of the Provisional Government, although the government itself no longer existed.

Between the troops of the headquarters and the Bolsheviks, an armed struggle began, the outcome of which depended on the one supported by the Central Rada. The latter chose neutrality, which made it possible to defeat the Bolsheviks. It was a huge mistake that had tragic consequences for the development of further state-building processes in Ukraine.

During this struggle, D. Doroshenko notes, the «Ukrainian-Bolshevik alliance» was formed[1], namely: «The Revolutionary Committee for the Protection of the Revolution in Ukraine» was formed, in which representatives of the Central Rada were united with leaders of local Bolsheviks (V. Zatonskyi, I. Kreisberg, L. Piatakov)[2]. They recognized the Central Rada as a body of regional power, provided that all local power was transferred to the Soviets of

[1] Дорошенко Д. И. Война и революция на Украине // Революция на Украине по мемуарам белых. – М.-Л. 1930. С. 81.

[2] Робітнича газета. – 1917. – 27 жовт.

Workers' and Soldiers' Deputies[1]. The Bolsheviks supported the possibility for Ukraine of broad regional autonomy, the struggle against Great Russian imperialism, and defended the right of nations to self-determination. But all this had to be realized only with the adherence to the principle of internationalism and under the conditions of support of the proletarian revolution and, above all, the Petrograd uprising[2].

The Central Rada categorically differed from these proposals and adopted a resolution condemning the armed uprising in Petrograd and the transition of power to the Bolsheviks: «Recognizing that power, both in the state and in every single country, should go into the hands of all revolutionary democracy, considering the inadmissible transition of all power exclusively in the hands of the Soviets of workers' and soldiers' deputies, which are only part of organized revolutionary democracy, the Ukrainian Central Rada therefore speaks against the uprising in Petrograd»[3]. On October 27, 1917, the General Secretariat in its address «To all citizens of Ukraine!» stated that «it will resolutely fight all attempts to support the Petrograd uprising»[4].

These demarches of the Central Rada and the General Secretariat led to sharp disputes between the Ukrainian Socialists and the Bolsheviks and the disaffiliation of the latter with the «Revolutionary Committee», which then lost the sense of existence. As a result, all power passed to the Central Rada. At the same time, the Ukrainian leadership remained a supporter of a compromise in order to reconcile the parties. As evidenced by the statements of the General Secretariat «On the Army and Citizens of Ukraine» of October 31, 1917 «There is nothing for to bloody struggle in Ukraine,» it was spoken in it. – The Ukrainian Central Rada is elected by all peoples of Ukraine and is an expression of the will of all revolutionary democracy. In fact, it is a regional Rada of peasants', workers' and soldiers' deputies. All troops and all parties must recognize the power of the General Secretariat of the Ukrainian Central Rada and be fully subject to its instructions[5].

The separation of the Central Rada from the Petrograd armed uprising created a real opportunity to immediately gain autonomy for Ukraine without waiting for the convening of the Constituent Assembly. And the Central Rada made a number of practical steps in this direction: extended its jurisdiction to all ethnic Ukrainian provinces, expanded the competence of the regional government – the General Secretariat, and appointed the

[1] Мироненко О. М. Світоч української державності. Політико-правовий аналіз діяльності Центральної ради. – К., 1995. С. 132.

[2] Мироненко О. М. Світоч української державності. Політико-правовий аналіз діяльності Центральної ради. – К., 1995. С. 132–133.

[3] Центральний Державний Архів вищих органів влади і управління України (ЦДАВО України). Ф. 1063. ОП. 3. С.1. А.48.

[4] Національні відносини в Україні у XX ст.: Зб. док. і матеріалів. – К., 1994. С. 55.

[5] Центральний Державний Архів вищих органів влади і управління України (ЦДАВО України). Ф. 1115. ОП. 1. С.18. А.10.

elections to the Ukrainian Constituent Assembly. All this was reflected in the discovery of the General Secretariat of November 3, 1917: «The central government of all of Russia has no ability to govern the state life. All regions remained without ruling centres. Therefore, political, economic and social turmoil is growing. In this regard, the Secretariat is supplemented temporarily by the General Commissars for affairs: food, military, judicial, postal and telegraph, roads[1]. The competence of the General Secretariat extends to the province where the majority of the Ukrainian population is located. Because of this Kherson region, Kharkiv region, Ekaterinoslav region and Tavria (without the Crimea) are included in the territory of a united Ukraine»[2]. All the authorities of these provinces, as well as citizens of the united Ukraine of all nationalities, must address all affairs to the relevant secretaries of the General Secretariat. In the near future, the Central Rada had to proclaim the law on the Ukrainian Constituent Rada[3].

Here one should agree with the idea that «after the October coup in Petrograd in November 1917, the supreme authorities of Ukraine took over full authority»[4] and began to carry out legislative, managerial and control functions in full.

At the same time, in the statement of November 3, 1917, it was emphasized: «All the rumors and rumors of separatism, the separation of Ukraine from Russia is either a counter-revolutionary provocation, or a common philistine ignorance. The Central Rada and the General Secretariat have firmly and clearly stated that Ukraine should be part of the Federal Republic as an equal state body. The current political situation does not change this ruling at all»[5]. Finally, on November 20, 1917, the Central Rada adopted the Third Universal[6], which was no longer an act of appeal to the people, but a complete state-legal act, which initiated a fundamentally new stage in the development of Ukrainian statehood, namely the transition from autonomous to independent conception of state-building. The main provisions of the Third Universal were the proclamation of the Ukrainian National Republic (UNR): «From now on Ukraine becomes a Ukrainian National Republic»[7].

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[1] Українська Центральна Рада. Документи і матеріали: У 2 т. – Т. 1. 4 березня –9 грудня 1917 р. К., 1996. С. 391.

[2] Українська Центральна Рада. Документи і матеріали: У 2 т. – Т. 1. 4 березня –9 грудня 1917 р. К., 1996.

[3] Українська суспільно-політична думка в 20 столітті. Док. і матеріали. У 2-х т. / Ред. Т. Гунчак і Р. Сольчаник. – Нью-Йорк, 1983. Т.1. С. 339–340.

[4] Скрипнюк О. В. Теоретико-методологічні засади формування та розвитку громадянського суспільства і правової держави в Україні. – К., 1995. С. 80.

[5] Центральний Державний Архів вищих органів влади і управління України (ЦДАВО України). Ф. 1115. ОП. 1. С.12. А. 76зв.

[6] Центральний Державний Архів вищих органів влади і управління України (ЦДАВО України). Ф. 1115. ОП. 1. С.18. А.10

[7] Українська Центральна Рада. Документи і матеріали: У 2 т. – Т. 1. 4 березня –9 грудня 1917 р. К., 1996. С. 398.

The Universal has confirmed earlier the order made by the General Secretariat to extend the jurisdiction of the Ukrainian National Republic to the province mainly populated by Ukrainians: Kyiv, Volyn, Podillia, Chernihiv, Poltava, Kharkiv, Kherson and Tavria (without the Crimea). At the same time, the outlined area did not cover all ethnic Ukrainian lands, therefore, the Universal left the possibility to revise the territory of the republic, in particular, the inclusion of its parts of the Kurshina, Kholmshchyna and other lands with the consent of the population inhabiting it.

Unlike the I Universal, the III Universal contained a more solid definition of the place and role of the Central Rada in the state-building process. In particular, it was stressed that the Central Rada, created by the Ukrainian people «together with the fraternal peoples of Ukraine», was set «to protect the rights acquired by struggle, to create the order and to build their lives on our land»[1].

The program envisaged by the Third Universal was enormous. It provided for the rebuilding of Ukraine on a new basis, with new laws and economics[2].

The Third Universal outlined the main directions of the Central Rada's domestic policy, which should be detailed in the following laws. The whole land was proclaimed the property of the labouring people and had to go to it without redemption. The right to private ownership of the landlords, estates, cabinet and church lands was cancelled. The distribution of land among the peasants was to hold, in accordance with the law, the land committees elected by the people.

The UNR abolished the death penalty and proclaimed an amnesty for all those accused of political crimes; proclaimed democratic freedoms: words, press, religion, assembly, unions, strikes, personal integrity and housing; the right to a fair trial; established an 8-hour working day; introduced state control over the export of products. A characteristic feature of the Third Universal was its constitutional orientation and broad democracy. Most importantly, the Universal appointed an election to the Ukrainian Constituent Assembly on January 9, 1918, and their first general meeting had to take place on January 22. The Third Universal guaranteed the rights of local self-government; maintenance of national cultural rights of other people living on the territory of Ukraine. Russian, Polish and Jewish peoples were guaranteed the right to national autonomy; the same right could be obtained by other people in accordance with the law that was entrusted for drafting to the General Secretariat. All citizens were guaranteed the right and opportunity to use local languages in relations with all state institutions.

The primary task of the UNR's foreign policy was to establish a universal peace. To this end, the negotiations between the belligerent countries had to begin immediately, and the Central Rada was obliged to exert pressure on

[1] Нова Рада. – 1917. – 8 листопада.

[2] Полонська-Василенко Н. Історія України: У 2 т. – Т.2: Від середини XVII століття до 1923 року. – К., 1992. С. 472–473.

the central government in order to force it to peace as soon as possible.

In the plan of state-building the statements of the Third Universal were undoubtedly an act of great historical importance: for the first time in 250 years, the Ukrainian people resolutely declared their will, their desire for freedom, their right to dispose of all matters of their own state. V. Vynnychenko, one of creators of the Universal, wrote about its significance: «Now we had all the means for it. All state apparatuses went to the hands of the General Secretariat, all financial means were before its order, all military force was subject to his orders»[1].

The issue of the nature of state relations between the Ukrainian National Republic and the Russian was complicated and ambiguous. The Third Universal proclaiming the Ukrainian National Republic simultaneously declared the desire «to make the whole Russian Republic a federation of equal and free people»[2].

The confirmation of the course of the federation with Russia, where the Bolsheviks took power seriously from which the Central Rada had no assurance that they would reciprocate its agreement with the Provisional Government on the autonomy of Ukraine, certainly was an act contradictory. The Provisional Government with which the Central Rada concluded an agreement on the federation did not exist, to the Bolsheviks reacted Rada from the very beginning negatively, but there was no other government in Russia. The question arises: so, with whom, the Ukrainian National Republic was going to form a federation?

Considering on this situation T. Hunchak notes: «Such statements can be explained by the political impracticality of the leading members of the Central Rada for which the federation continued to remain a romantic dream. They did not understand that the Bolshevik coup in Russia fundamentally changed political circumstances when the very idea of the federation became unnecessary and it was necessary to concentrate in every way on the construction of an independent state.

«The Ukrainian government,» T. Hunchak continues, «had built up a state life entirely independently, but neither it nor the Ukrainian community were certain of what the ultimate form of their own state should have been»[3].

Even more categorical in his views on this statement of the Third Universal was I. Nagaevskyi: «The Central Rada with its stubborn policy of the federation with Moscow wasted precious eight months and a great rise of the people to create their own state. For these reasons, this Universal did not impress people more than the two previous ones, although it gave much more from

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the political side. The appeal of Hrushevskyi to save the dead already a Moscow state body not only had no effect on Ukrainian citizenship, but on the contrary discredited Hrushevskyi in the eyes of the people as a state husband»[1].

But there are opposing views on the meaning and significance of the statements of the Third Universal in relation to the federation. Estimating it the well-known Ukrainian lawyer A. Yakovlev noted that this act in Ukraine established a «democratic, nation-state», which was characterized by «independent state power, unrestricted, for all without exception cases of internal state system, legislation, court and administration»[2]. While appreciating the statements of the Third Universal, A. Yakovlev was forced to admit that «in relation to other states U. N. R. was formally limited by a declaration of federated relations with Russia»[3].

Such estimates given over a considerable amount of time are too categorical and do not take into account the realities of that time. It is safe to say that M. Hrushevskyi and other leaders of the Central Rada were adherents of the idea of the federation and urgently wanted to put it into practice. And this is no accident because the idea of the federation was leading in the socio-political and legal thought and position statements of the Ukrainian political parties of the Dnipro Ukraine during the second half of the XIX – early XX centuries. Here is a fair remark that the process of creating Ukrainian statehood in the time of the Central Rada had two stages: autonomous and independent. But the irony of history was that at both stages the Ukrainian state was practically the same people – far from being independent, but rather convinced federalists[4].

Speaking about the federation, the Ukrainian figures meant neither already abolished Provisional Government and nor the Bolshevik's Rada of People's Commissars. Realizing the commonality of the historical fate of the people of the former Russian Empire, they appealed to them with a proposal to create democratic republics that would be united into a federation[5].

Speaking about the federation, the leadership of the Central Council was guided not only by its dedication to federalist ideals, but also by practical assumptions. Vinnichenko's thoughts, set forth in a letter to the editors of a number of newspapers on the expediency of convening the Ukrainian Constituent Assembly, can be a vivid evidence of this. V. Vinnichenko stressed that Ukraine's development has not yet reached the point of independence. And the main reason for the connections of Ukraine «with the state integrity of Rus-

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sia» was economic relations. According to V. Vynnychenko, it was impossible to reject the historical and cultural connection, which «has grown into our spiritual and material lives as Ukraine by its will or not but had been a part of the Russian State for three hundred years. It would be a simple unnecessary dream and not a political real analysis, to think that this connection will break in the immediate political time. And on the other hand, – continues V. Vynnychenko, – independence is also impossible in accordance with the international situation. Ukraine does not have the power to break away from Russia and not to fall into the arms of a strong imperialist state»[1].

The proclamation of the Ukrainian National Republic led by the supporter of the national-state revival of Ukraine – the Central Rada did not correspond to the plans of the Bolsheviks. After the proclamation of the Ukrainian Soviet Republic in Kharkiv in mid-December 1917, the Bolsheviks were given the opportunity to begin an armed struggle against the UNR.

On January 4, 1918, the Bolshevik People's Secretariat issued an order to launch an offensive against Kiev. Soon, the city was occupied by the troops of P. Muravyov which committed butchery. The consequences of the storming of Kiev by the Bolshevik forces were terrible. According to an eyewitness, «since the time of Andrew Bogoliubskyi, Kyiv has not seen such a savage devastation»[2].

For the first time, the Ukrainian population in the short time of the Bolshevik rule had the opportunity to feel that this was the «socialist paradise» promised by the Bolsheviks. Robbery, violence, executions, humiliation over national feelings – that's what it saw on the part of the Bolsheviks. The people realized that only their own Ukrainian authorities could rationally and fairly address social issues. The hypnosis of communist propaganda began to disperse.

But under the cover of the Ukrainian Soviet Republic a war between the UNR and Soviet Russia began. Start looking for the perpetrators of this scourge today means to spark passion in the complex relationship between Russia and Ukraine at the present stage. Therefore, only one should be note: neither the Bolshevik government of Russia nor the leadership of the Central Council, unfortunately, did not want to «give way to the principles», and each side advocated its views uncompromisingly, which ultimately led to this conflict, the whole burden of which laid on the shoulder of labour people.

In this struggle, the Ukrainian village kept neutrality: the peasants waited for a winner. And it was at that time that the Central Rada's slogans on the socialization of land turned out to be false. The norm of 40 tithes per farm,

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the peasantry considered high and as a result did not support the Central Rada. The latter was forced to postpone the final resolution of this issue to the Constituent Assembly. Meanwhile, the Bolsheviks issued a decree on the land proclaiming the nationalization of land. The extension of this decree in Ukraine facilitated the transition of peasants to the side of the Bolsheviks[1].

The tragedy of Ukrainian national statehood was that Bilshovism did not meet in Ukraine a decisive counteraction. The Central Rada, which was mostly socialist, did not conceal its probilshovytskykh moods, and therefore could not lead a decisive struggle with them, besides there was no weapon against them in the main issue of the village – in the case of liquidation of landlord land tenure.

The night before February 9, 1918, the Central Rada, the Council of National Ministers and 3000 soldiers left Kiev. The government stopped in Zhytomyr and soon went to Sarny in Volyn where it arrived on February 19.

Leaving the capital, the Central Rada did not interrupt its legislative activities. At that time the calendar reform was carried out: the day of February 16, 1918, in the old style became March 1 for the new. At the same time, the Central Rada introduced the Western European time. She also approved the law on the monetary system, according to which the Ukrainian hryvnia contained 8.712 shares of gold and was divided into one hundred steps. The two Ukrainian hryvnias were equal to the value of one karbovanets in 1917. The 20-hryvnia coin was to be made of gold, and 1-hryvnia was made of silver, the steps were to be made of nickel. Banknote at face value 1, 2, 5, 10, 20, 100, 500 and 1000 hryvnias had to satisfy domestic needs of the state[2].

Trident is the state symbol of St. Vladimir, which was recognized as the emblem of Ukraine[3]. The Central Rada also approved the laws on Ukrainian citizenship[4] and the administrative division of the state into «land» which should have been thirty[5].

Thus, during the difficult period for Ukraine were resolved important public affairs of the Ukrainian National Republic but this was done at a time when the power of the Central Rada had already fallen.

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THE CONSTITUTION OF THE UKRAINIAN PEOPLE'S REPUBLIC 1918 – THE BASIC LAW OF THE EUROPEAN MODEL

Abstract. *The article analyzes the factors, which influenced the dominance of the idea of national-cultural autonomy within the federation among Ukrainians as well as the main provisions of the Constitution of the UPR of 1918. Such an analysis allows us to draw the conclusion that the creators of the Constitution envisioned Ukraine as a prolegal, social and sovereign state.*

Key words: *Ukrainian Central Rada (Central Council of Ukraine), National Assembly, electoral rights, judicial panel, property rights, the death penalty, National Union.*

April 2018 comes as the centenary anniversary of the statute on the state system, rights, and freedoms of the UPR – the Constitution of the Ukrainian People's Republic. This was an important step towards the establishment of Ukrainian constitutionalism. It came as a consequence of the events that took place in the Russian Empire from February to November 1917-the creation of the Provisional Government, whose authority was subsequently overtaken by the Bolshevik Council of People's Commissars. In turn, in the beginning of March, Ukrainian Central Rada (Central Council of Ukraine, hereinafter CCU) was established; its formation was endorsed by 20 thousand Ukrainians – participants of the Petrograd demonstration, which took place on March 12. There were similar events in Kiev a week after that, with almost 100 thousand participants [1, 266].

An event of such magnitude demonstrated the understanding and willingness of all Ukrainians to take responsibility for the fate of Ukrainian statehood. Out of hand, the councils of workers' deputies, various civil committees, commissariats and district councils were formed in most large cities. Even the army and the fleet were

drawn into existing political agenda. Taking into account the national struggle to achieve significant transformations in the socio-political life and understanding that the only way to achieve this is through joint efforts, in the spring of 1917 the creation of joint councils of officers and soldiers and workers deputies began [2, 7].

Such political activity led to the holding the All-Ukrainian National Congress in April, which elected additional members of the CCU from representatives from various political, public, cultural, educational and trade union organizations. This testified to the immense trust granted to the first-ever created national representative body and the widespread expectations that society relied on it. To ensure greater confidence in the state-building activities of the CCU in May-June 1917, the peasantry of Ukraine, the military located outside the country in various military units, as well as representatives of the working class held their congresses and elected more than 500 of their representatives to this entity.

Under these circumstances, the CCU executives deployed a range of measures to establish a territorial and cultural autonomy within federal Russia at first, and only later, after the Bolsheviks seized power in October 1917, focused on the development of a sovereign and independent state [2, 19].

This brings up the question on why the idea of the so-called «sovereign union of peoples» was spread among Ukrainians, within which only individual national and general human solidarity interests could be met yet making it impossible to obtain national sovereignty based on the theory of natural human rights.

The dominant ideas of the so-called «moderate» methods of struggle during the revolutionary competitions of the time of the CCU, a socialist rather than a capitalist route in the state creation of this period [2, 20] was associated with processes that took place in Ukraine as a result of aggressive policies projected from the side of Russian absolutism. By the end of the XVIII century, Ukraine lost its political elites [3, 36] and during the nineteenth and early twentieth centuries, it evolved into a «socially incomplete» nation [4, 5]. For several centuries' Ukrainian social life, as well as in the economy, was dominated from the outside by another nation. Ukrainian society at the time of revolutionary struggles turned out to be «non-bourgeois» and thus financially unable to fight for its sovereignty and economic freedom. Despite the fact that all revolutionary transformations are significantly influenced by people's riots, mostly spontaneous, nevertheless, history has proved that their consequences depend on processes that are associated with the political and economic elites of society [5, 111].

Ukrainian relationship with the «elder brother» began to emerge after the signing of the March articles of 1654 [6, 70]. These, on the one hand, legally established the recognition of Ukraine by Russia as a separate state, and on the other hand, launched the process of permanent restriction of its state sovereign-

ty with the aim of transforming Ukrainians into an integral part of the Russian Empire. We can responsibly state that the Russian rulers did not abandon this policy even in the 21st century.

The tsarist government treated Ukraine as a colonial entity. XVII–XX centuries proved a large number of nations of the world were in the same position. But colonial empires and dependent territories considered the sacred rule of capitalism that every individual, regardless of the legal status, could possess tools of labor and equal opportunities for personal growth. This position contributed to the emergence of the national bourgeoisie, which subsequently led the national liberation movement not only in America but also in India.

For 200 years England ruled over territories inhabited by a multimillion multilingual population of different religions. Conquering the descendants of the Great Mongols, the British were forced to reckon with the civilizational (religious, social structure) differences between Hindus and Europeans. Ukrainian and Russian religious ideas were much less diverse, subsequently bringing Ukraine under the Moscow Patriarchate canonical jurisdiction by the end of the XVII century. Religious oppression of Ukraine by the Russian Empire was supplemented with all sorts of cultural and educational limitations. By the end of the nineteenth century, Ukrainians were forced to switch to the Russian language in everyday communications [7, 168].

In turn, for the Hindus, the faith became a so-called «defensive charm» in the process of arbitrary destruction of Hindu traditionalism by the colonists. Brahmans and Kshatriyas have been involved in the management and protection of the country since ancient times. The British were forced to take this rule into account. One of the requirements for certain groups of the local population necessary to get involved in the administration of the colony was to obtain European education [8, 863]. Such position of the colonists led to the destruction of old social ties and the country began to gradually turn into a resource appendage of the metropolis. However, this contributed to the emergence of new political relations and the re-engagement of the various languages and religions of the regions into environmental and political integration processes, all of which subsequently led to the emergence of not only the national bourgeoisie but also raised the level of education, healthcare and other social guarantees.

At a time when the governments of most European countries in every way contributed to the improvement of general education processes and the increase in the standard of living of the bulk of the population of their countries, Ukraine was deeply immersed in administrative, economic, cultural and political dependence from Russia. The printing of books, the production of Ukrainian plays and much more was banned by The Ems Ukaz (Ems Decree) of 1876 [7, 176]. Subsequent reduction of vacancies in primary schools allowed the tsarist government to achieve the desired goal. At the turn of the century,

the bulk of Ukrainians were illiterate, and large industrial centers were mostly Russian-speaking [3, 38], despite the fact that ethnic Ukrainians constituted the majority of the population of Russian Ukraine.

At the beginning of the twentieth century, the peasantry remained the dominant population, which significantly influenced the composition of the formed CCU. Only a quarter of its representatives were intellectual elites. Peasants, workers, and soldiers constituted the majority of its members [2, 20].

It should be noted that according to V. O. Rum'iantsev, in the spring-summer of 1917, the CCU reached the «apogee of its authority and influence on Ukrainian society» [9, 15]. However, despite the fact that 75% of mandates in the CCU belonged to Ukrainians [9, 16], the Council in its state-legal activity for a long time adhered to only those ideas and goals that were once legalized by the first parliament of Russia and set national and cultural autonomy within Russia as an only possible and clear goal [3, 61].

In our opinion, the revolutionary Ukrainian intelligentsia (intellectuals) strived to cooperate with the Russian Provisional Government to preserve those sources of funding that existed during the existence of tsarism and those which remained after formation of the Provisional Government.

The Constitutional Commission of the CCU was established in June 1917 [10, 152], but the work on the «Statute on the State System, Rights and Freedoms of the UPR» (the Constitution) began only after the proclamation of the Ukrainian People's Republic by the 3rd Universal (decree) on 7 (20) November 1917. The provisions of the Constitution were formulated by M. Hrushevskyi by the end of November 1917 [11, 57]. At that point in time, the CCU leaders had almost completely exhausted their opportunities to implement federalist ideas for the transformation of unitary Russia into a people's community, where the Bolshevik Council of People's Commissars would have been stripped of its nationwide central government-like status [3, 118].

Understanding the perfect timeliness for the formation of an independent state, which required constitutional provision, the leaders of the CCU were forced to turn to a rich European experience in constitutionalism while working on the Basic Law.

Despite the fact that the Constitution of the UPR in 1918 did not enter the stage of acquiring public-legal practice [12, 208], some of its provisions still deserve attention since they were quite progressive for the time. «The Statute on the State System, Rights and Freedoms of the UPR» has endowed all Ukrainians, regardless of sex, the political, civil and statutory authority upon reaching 20 years of age.

Article 21 of the Constitution introduced the concept of political eligibility and determined that from this age all Ukrainians acquire not only active but also passive electoral law both to the legislature of the UPR and to all electoral bodies of local self-government.

This provision of the Constitution of Ukraine left behind the so-called countries of «liberal democracy». In the leading countries of Europe and in the United States, the age bracket was somewhat higher. It should be noted that at the beginning of the twentieth century American women were deprived of their right to vote. The XIX amendment eliminating such inequality was proposed on June 4, 1919. It was ratified only in August 1920 and came into force only after the approval of its provisions by 36 of the 48 existing states at that time – the majority. At the same time, the state legislature of the State of Mississippi and Delaware refused to do so [15, 37].

Constitution of the Kingdom of Prussia of 1850 permitted political activity only after the age of 24, while under the Decree of the King of 1849, which was later added to the Constitution, voters of the lower chamber of parliament were divided into three curiae. Men were differentiated according to the amounts of direct taxes paid [14, 510]. This led to the fact that only 3% of the wealthy Germans chose one-third of the representatives. According to the Constitution, one-third of the representatives were also elected by the third curia, which consisted of 70% of voters. The movement for the abolition of such a disproportion did not succeed during the second half of the nineteenth century, and this situation existed before the beginning of the November revolution of 1918.

The Constitution of the German Empire in 1871 rejected any mention of national sovereignty. The will of the monarch was dominant in both the legislative and executive branches, and only he defined the competence of state institutions and officials [14, 512]. In order for the conservative ruling circles not to experience any inconvenience, the Constitution substantially limited the electoral rights at the national level. The general electoral right was limited by a high age requirement (25 years). Army and naval forces officials were also not allowed to participate in the elections, as well as all those who, by the decision of the court, were limited in their civil and political rights. The legislator also forbade participation in the formation of the legislative body of the part of society that received social assistance not only from the state but also any other non-profit charity organizations.

In England, by the end of the nineteenth and in the early twentieth century, the situation with electoral rights came as even more conservative. It's worth noting that only at the beginning of the twentieth century the electoral law clearly defined the minimum age when the British received the ability to become politically active. The revolution of the middle of the XVII century provided no significant changes the Middle Age electoral system. The right to vote depended on a large number of factors: the marital status, the amount of taxes paid the possession of property etc. It is quite difficult to determine all the requirements and restrictions that an Englishman needed to either meet or overcome in the XVII–XVIII centuries

in order to exercise the right to vote. Some researchers believe that there were at least 100 of those. The Representation of the People Acts in 1832, 1867 and 1884 gradually reduced the size of the property and other types of requirements, which led to an increase of the number of voters by almost twice in the late nineteenth century [14, 325].

The beginning of the twentieth century did not significantly affect the qualification restrictions of electoral law in England. However, socio-political troubles that struck Europe in the second decade forced parliamentarians to turn to the problem of forming voter lists. The Representation of the People Act of February 6, 1918, firstly, provided, albeit in a limited version, women with the right to vote. They became voters only reaching the age of 30, and only when they were not restricted in rights and possessed real estate yielding at least 5 pounds [14, 580].

Speaking about the changes affecting men, it should be noted that by 1918 almost 40% of them had no voting rights, as they did not meet the requirements regarding the property of the previous legislation. Without going into the details of the contents of the new Act, one can state that the legislator still retained several types of restriction – residency, property, and education. Obviously, these restrictions should be treated as adverse. At the same time, they can be seen as an incentive for those who were deprived of the opportunity to influence the country's life through the elections. The legislator hinted that in order to be politically active –you must either work or study.

As noted earlier, the Constitution of the UPR provided all citizens of Ukraine with electoral rights, regardless of gender and property status after reaching 20 years of age. In this respect, the Constitution of the Ukrainian SSR of 1919 could be regarded as formally more «democratic», ensuring the right to be politically active regardless of religion, nationality, occupation, state, to all citizens of the Ukrainian SSR, who at the time of the elections have reached the age of 18. It is interesting, that Art. 20 of the Constitution allowed the local councils to reduce the age rating by the decision of the Central Government. Such a norm was introduced deliberately. Almost all the articles of the first Constitution of the Ukrainian SSR, according to V. D. Honcharenko, were imbued with «the lavish ideas of socialism and the dictatorship of the proletariat» [13, 18], and all of them, first of all, were embodied through electoral law. The Bolsheviks knew perfectly well that young people, due to lack of life experience, could be easily drawn into their tear-away «sect».

Unlike the Basic Laws of the leading European countries, in which one can observe the urge of the ruling elites to stimulate people into education and work through the restriction of electoral rights, the first chapter of the Constitution of the USSR, which was devoted to the basic regulations, abolished private property not only on land but also on means production. Article 1 of this section recognized capitalists and landlords as «age-old oppressors and exploiters» of the proletariat and the

poorer peasantry. Article 2 established the main goal of the poor and proletariat, who came to power in Ukraine, defined as the transition from bourgeois to socialism through socialist reforms [7, 140]. Representatives of wealthy classes were recognized as an enemy that can prevent such transition. For a more effective fight against the «people who use hired labor… who live on unearned profits, namely, profits from the private enterprise, from estates, etc., private traders, commercial intermediaries» were deprived of the right to vote. The clergy, former gendarmes, and employees of security departments were also subjected to such restrictions. Criminals who were prosecuted for committing mercenary (bribe) or shameful crimes were not overlooked by the creators of this Basic Law as well. The term of right deprivation was determined either by law or by a court sentence [7, 144].

Analyzing the Constitution of the UPR, one should focus on its second section, entitled as «The rights of Ukrainian citizens». Special attention should be paid to Art. 14, which states, that not only a citizen of the UPR but also anyone else on its territory, «cannot be punished by death» [7, 53].

The authors of this document rejected political, economic, cultural, religious and any legal factors in determining the extent of punishment. This constitutional requirement, if implemented, would allow the Ukrainian People's Republic to outstrip the majority of countries of «liberal democracy» by a decade. The death penalty in France, for example, was lifted only in 1981, in Germany – in 1987, in Switzerland – in 1992, in Italy – in 1994, in Spain – in 1995, in Great Britain – in 1998. It should be noted that in some countries the death penalty for ordinary crimes was abolished back in the nineteenth century, but the final prohibition was implemented only in the last decades of XX century [16].

All the rights granted to the citizens of the UPR by the Constitution (inviolability of property and housing, secrecy of correspondence, freedom of speech, press, conscience, organization, strike, freedom of movement, etc.) lead to a conclusion that the CCU did provide enough for the establishment of a social, a legal and democratic state. After thirty years, these provisions of the Constitution of the UPR of1918 have been enshrined in the Universal Declaration of Human Rights, which was approved by the General Assembly of the United Nations on December 10, 1948 [17]. In turn, the Constitution of the Ukrainian SSR of 1919, as well as the subsequent Basic Laws of the time of strengthening the dictatorship of the proletariat and the construction of so-called socialism gradually deprived Ukrainians of their sovereignty. Hiding behind the direct elections was the inability to exercise civic control or in any way restrict or influence the organs of state power. Bolshevik government, depriving Ukrainians of private ownership of the tools of labor, established a complete non-economic and non-legislative dependence of a citizen on the state of the dictatorship of the proletariat, led by the Bolshevik Party [18, 150].

The Constitution of the UPR also provided for restrictions or cessation of civil rights and freedoms but was made an option only in a time of war or internal disturbances. Only a law passed by the National Assembly ordinarily determines which rights or freedoms will be subject to restrictions. The government was also endowed with such a right but was also obliged to present its decision to the deputies of the Assembly at the first meeting of the next session. It was constitutionally regulated that extraordinary conditions may last no more than three months. Another European Constitution of the early twentieth century allowed a temporary restriction of personal freedoms. This was the fundamental law of the Weimar Republic of 1919 [14, 599]. It was adopted in rather complicated socio-economic and external political conditions. The November Revolution of 1918 established a republican system in Germany, but a bulk of the conservative population was dissatisfied with the abolition of the old Kaiser's order, and therefore the revolutionary situation in the country remained almost until 1924. This was also inherent for Ukraine, where revolutionary disturbances lasted until the end of 1920.

Analyzing the principle of the distribution of power, enshrined in the Constitution of the UPR, the judiciary comes as the most interesting one. According to Art. 66, the General Court consisted of a board elected by the National Assembly for a term of 5 years, although the National Assembly itself was elected for only 3 years. It seems that in this way the creators of the Constitution strived to give the highest judicial body certain guarantees of independence from the legislative and executive authorities. In order to determine the status of the General Court and how independent it should have been, it is necessary to determine how the higher courts in other countries were formed. Thus, the US Constitution granted the right to select and appoint members of the Supreme Court to the President of the country with the consent of the Upper Chamber of Parliament – the Senate. According to Section I of the Article 3, «The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour» [14, 346]. The Constitution of Prussia 1850, which longed after the introduction of the Constitution in 1871, established that the judiciary was exercised on the king's behalf by independent judges [14, 510], which were appointed for life. The judges of the higher courts of England were appointed by the monarch, yet the candidates for such positions were handpicked by the lord-chancellor. Judge term of service was limited by age restriction ranging from 72 to 75 years, depending on the tier of the court. In accordance with the Basic Laws of the abovementioned countries, judges of higher courts could be removed from office in case of committing a crime or due to a disease that led to the loss of capacity to make decisions.

The Constitution of the UPR did not specify the quantitative composition of the Judiciary Board, which in the future

could have caused inter-party confrontation in the National Assembly. Examples of a clear definition of the quantitative composition of the higher judicial body have already been known at that time. For example, the US Constitution of 1787 determined that the Supreme Court consists of only 9 judges. The overall number of judges has never been criticized. The struggle between the Democrats and the Republicans could only concern the candidate that the President picked up for the position of judge.

It is impossible to ignore the question of national minorities living on the territory of Ukraine during the existence of the CCU. Practical measures in this field allow us to conclude that its national policy envisaged the creation of national-personal autonomies, through which national minorities could receive guarantees of protection of their rights and freedom of self-government. Art. 6 of the Constitution of the UPR enshrined the opportunity for small peoples to «streamline their cultural affairs within the national boundaries». To this end, numerous National Minorities were allowed to create National Unions. All others could also take advantage of such a right after submitting an application to the Court for examination. The main requirement was to obtain 10 thousand signatures of Ukrainians who considered themselves a representative of the respective nation. It was assumed that the functioning of the National Unions would be carried out at the expense of the central and local budgets.

The Constitution of the UPR did not function for a single day. On the day of its adoption, the Hetman's coup took place, yet it contains, according to the definition of M. M. Strakhov, «an interesting promising experience» [19, 77], which can be used even today not only by Ukraine but also by other countries worldwide. However, after its transition to the21stcentury, it still holds a significant number of issues, with national-ethnic being one of them.

The Constitution of the Ukrainian People's Republic of 1918 rightfully holds its place in the hall of fame of Ukrainian political and constitutional thought.

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THE DOCTRINE OF THE «MARGIN OF APPRECIATION» IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract. *The main aim of this article is to discuss the essence and distinctive features of the margin of appreciation doctrine in the jurisprudence of the European Court of Human Rights. In accordance with Protocol No. 14, all Council of Europe member States have an obligation to apply a margin of appreciation.*

It is worth mentioning that in the text of the Convention and in the preparatory work there is no such term as «margin of appreciation». Nevertheless, this doctrine is well established in the practice of the European Court of Human Rights (in the case of Handyside v. the United Kingdom etc.).

The guarantees enshrined in the European Convention on Human Rights are a minimum standard. The European Court of Human Rights doesn't define, how exactly the States must secure these rights. Thus, the member States enjoy the margins of appreciation, that is, the national authorities are better placed to settle a dispute than the Strasbourg institutions (so-called the better position rationale).

If different rights of the European Convention on Human Rights collide, the member States have a certain degree of discretion when deciding which right has priority. Furthermore, the member States enjoy a certain degree of discretion in the definition of such terms, as «national security» (paragraph 2of Articles 8, 9 and 11 of the European Convention on Human Rights) or «necessity in a democratic society» (Article 10 of the European Convention on Human Rights, according to that, it is allowed to restrict the freedom of expression, provided that it is necessary in a democratic society).

In the doctrine of the «margin of appreciation» such significant principles as effective protection, subsidiarity and review, permissible interferences with Convention rights, proportionality and the «European Consensus» standard are developed.

Key words: *margin of appreciation, effective protection, dynamic interpretation of human rights, proportionality, subsidiarity and review, European Consensus.*

Introduction.

Respect for and effective protection of human rights and freedoms are an integral part of law-governed, democratic state. That is the main obligation of every civilized European state. Thus, it is set down in Article 3 of the Constitution of Ukraine, 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».[1]

The European Court of Human Rights examines the national legislation on its accordance with agreed human rights standards. It's worth mentioning that human rights are basic capabilities of every person, which are necessary to their being and development, recognized as universal, inalienable and equal for every human being and must be guaranteed by state to the extent of international standards.[2]

The States have positive and negative obligations under the European Convention on Human Rights (ECHR). A negative obligation requires states to abstain from human rights violations (e.g., the prohibition of torture – Article 3 of the Convention, deprivation of life – Article 2 etc.). A positive obligation requires states to take action to secure human rights. Thereby, positive obligations include social rights, economic and some cultural human rights: a right to work, right to rest and leisure etc.[3] Nowadays all provisions of the ECHR *de facto* contain «double» requirements for the states: to abstain from human rights violations, and positive obligations to their guaranteeing and protection.[4]

Hence, the states enjoy a certain margin of appreciation by securing human rights. It allows building so-called «bridge» between supranational and national legal human rights protection systems. The integration of different cultures furthers the evolution of human rights standards, helps to find

[1] Constitution of Ukraine [1996] at https://www.coe.int/t/dghl/cooperation/ccpe/profiles/ukraineConstitution_en.asp

[2] О. В. Петришин та ін., 'Теорія держави і права. Підручник для студентів юридичних вищих навчальних закладів' (Харків: Право 2014) 297

[3] Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights' (Council of Europe: Human rights handbooks No. 7 2007) 10–14

[4] Mattbias Klatt, 'Positive obligations under the European Convention on Human Rights' [2011] ZaöRV 71 692

a «fair balance» of interests and to reach a «consensus» at the European level.[1]

The doctrine of the margin of appreciation is well established and developed in the case law of the European Court of Human Rights. As pointed out by the President of the European Court of Human Rights Dean Spielmann, «it devolves a large measure of responsibility for scrutinizing the acts or omissions of national authorities to the national courts, placing them in their natural, primary role in the protection of human rights. It is therefore neither a gift nor a concession, but more an incentive to the domestic judge to conduct the necessary Convention review, realizing in this way the principle of subsidiarity».[2]

1. The essence and features of the margin of appreciation doctrine

The doctrine of the margin of appreciation gives priority to the state assessment of its own facts, actions, situations and any other events within its own jurisdiction. The European Court of Human Rights (the Court) emphasizes, that it is primarily for the national public authorities, in particular for the courts, to apply and interpret domestic law. For instance, in the *Edwards v. the United Kingdom* judgment of 16 December 1992, the Court underlined: «34. … It is not within the province of the European Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair»[3] (see also the *Vidal v. Belgium* judgment of 22 April 1992, para. 33,[4] the *Klaas v. Germany* judgment of 22 September 1993, para. 29, 30,[5] the *Rotaru v. Romania* judgment of 4 May 2000, para. 53,[6] the *Kopp v. Switzerland* judgment of 25 March 1998, para. 59).[7] In the case of *Winterwerp v. the Netherlands* (1979) the European Court of Human Rights confirmed: «46. Whilst it is not normally the Court's task to review the observance of domestic law by the national authorities (see the *Ringeisen judgment* of 16 July 1971, Series A no. 13, p. 40, para. 97), it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can

[1] Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (The Hague / Boston / London: Kluwer Law International 1996) 2

[2] Dean Spielmann, 'Whither the Margin of Appreciation?' [2014] UCL–CLP 1 at http://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf

[3] Edwards v. the United Kingdom, application no. 13071/87 [1992] at http://hudoc.echr.coe.int/eng?i=001–57775

[4] Vidal v. Belgium, application no. 12351/86 [1992] at http://hudoc.echr.coe.int/eng?i=001–57799

[5] Klaas v. Germany application no. 15473/89 [1993] at http://hudoc.echr.coe.int/eng?i=001–57826

[6] Rotaru v. Romania application no.28341/95 [2000] at http://hudoc.echr.coe.int/eng?i=001–58586

[7] Kopp v. Switzerland application no. 13/1997/797/1000 [1998] at http://hudoc.echr.coe.int/eng?i=001–58144

and should exercise a certain power of review (see the decision of the Commission on the admissibility of Application no. 1169/61, *X v. Federal Republic of Germany*, Yearbook of the Convention, vol. 6, pp. 520–590, at p. 588). … It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention «incorporates» the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection».[1]

Thus, the main task of the Court is to verify whether the effects of national legal interpretation are compatible with the ECHR. This applies, particularly, to the interpretation by courts of rules of a procedural nature, such as time-limits governing the filing of documents or the lodging of appeals that are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty.[2]

Moreover, the European Court of Human Rights regarding the interpretation of international law pointed out: «54. … It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, *inter alia*, the *Pérez de Rada Cavanilles v. Spain* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3255, § 43). This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention»[3] (see also the *Korbely v. Hungary* judgment of 19 September 2008, para. 72[4] etc.).

In the case of *Slivenko v. Latvia* of 9 October 2003 the Court once again emphasized: «105. … it is for the implementing party to interpret the treaty, and in this respect it is not the Court's task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation. Nor is it the task of the Court to re-examine the facts as found by the domestic authorities as the basis for their legal assessment. The Court's function is to review, from the point of view of the Convention, the reasoning in the decisions of the domestic courts rather than to re-examine their findings as to the particular circumstances of the case or the legal classification of those circumstances under domestic law».[5]

For the first time the doctrine of the margin of appreciation was recognized and discussed by the Court in the case

[1] Winterwerp v. the Netherlands application no. 6301/73 [1979] at http://hudoc.echr.coe.int/eng?i=001–57597

[2] Miragall Escolano and Others v. Spain application no. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98 [2000] at http://hudoc.echr.coe.int/eng?i=001–58451

[3] Waite and Kennedy v. Germany application no. 26083/94 [1999] at http://hudoc.echr.coe.int/eng?i=001–58912

[4] Korbely v. Hungary application no. 9174/02 [2008] at http://hudoc.echr.coe.int/eng?i=001–88429

[5] Slivenko v. Latvia application no. 48321/99 [2003] at http://hudoc.echr.coe.int/eng?i=001–61334

«*Handyside v. the United Kingdom*».[1] In this case the applicant published the Schoolbook, which contained some obscene episodes that might encourage children to smoke spot, consume pornography and promote sexual activity. The British authorities decided to confiscate and destroy these books. However, the author complained that it was the violation of his right to freedom of expression under Article 10 of the ECHR. The British government pointed out, that such interference was justified as necessary in a democratic society for the purpose of protection of morals (Article 10 Para. 2 of the Convention).[2]

The European Court in turn underlined, that the Contracting Parties to the Convention, in the first place, must secure any Convention rights (in compliance with the subsidiarity principle). Moreover, there is no common understanding of the term «morals» in Europe. Thus, the Court stressed: «48. … The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the «necessity» of a «restriction» or «penalty» intended to meet them. … Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of «necessity» in this context».[3]

Hence, the national courts have priority in determining the sense of morality within their own jurisdiction. Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given to the domestic legislator («prescribed by law») and to the bodies, judicial amongst others, that are called upon to construe and apply the laws in force.[4] The Court emphasized, however, that Article 10 Para. 2 didn't give the States an unlimited power of appreciation. The European Court of Human Rights with the Commission are responsible for ensuring the observance of the States' engagements (Article 19), and the Court is empowered to give the final decision on whether a «restriction» or «penalty» is reconcilable with freedom of expression as guaranteed by Article 10 of the ECHR. «49. … The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its «necessity»; it covers not only the basic legislation but also the decision applying it, even

[1] Handyside v. the United Kingdom application no. 5493/72 [1976] at http://hudoc.echr.coe.int/eng?i=001–57499

[2] European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf

[3] Handyside v. the United Kingdom application no. 5493/72 [1976] at http://hudoc.echr.coe.int/eng?i=001–57499

[4] Ibid, Para. 48

one given by an independent court»[1].

In this case the European Court of Human Rights argued that the Court's supervisory functions obliged it to pay a great attention to the principles characterizing a «democratic society». Freedom of expression constitutes one of the most fundamental principles of such a society, which furthers its progress and the development of every person. Herewith, paragraph 2 of Article 10 provides not only the «information» or «ideas» that regarded as inoffensive, but also those that offend, shock or disturb the State or any sector of the population. These are the requirements of pluralism, tolerance and broadmindedness, which are the foundations of the conception of a «democratic society». It means, particularly, that every «formality», «condition», «restriction» or «penalty» imposed in this field must be proportionate to the legitimate aim pursued.[2]

In addition, the exercise of freedom of expression undertakes «duties and responsibilities» the scope of which depends on the situation and the technical means. In the present case the European Court stressed, that it wasn't the Court's task to take the place of the national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation. Thereby, the Court had to decide, on the basis of the different data available to it, whether the reasons given by the national authorities to justify the actual measures of «interference» they had taken were relevant and sufficient under Article 10 Para. 2 of the Convention. Consequently, the European Court of Human Rights concluded that there hadn't been a breach of Article 10 of the ECHR.[3]

So, as points out Dean Spielmann, in applying the margin of appreciation «judge-made» doctrine, the Court imposes self-restraint on its power of review and accepts that domestic authorities are best placed to settle a dispute.[4] There are many reasons for this, for instance: respect for pluralism and State sovereignty, the Court's failure to carry out difficult socio-economic balancing exercises, the subsidiarity of the European Court of Human Rights' review, a shortage of resources precluding the Court from extending its examination of cases beyond a certain level, a Court's distance to settle particularly sensitive cases etc.[5]

At the same time, as emphasizes the judge of the European Court of Human Rights Rozakis, the application of the margin of appreciation doctrine by the Court mustn't be automatic. In the case of *Egeland and Hanseid v. Norway* (2009) concerning the taking of photo-

[1] Ibid, Para. 49

[2] Ibid, Para. 49

[3] Ibid, Para. 49, 50, 59

[4] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 2–3

[5] See, for example, F. Tulkens and L. Donnay, 'L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?', [2006] Revue de science criminelle et de droit pénal comparé 3–23

graphs of a convicted person and their publication in the press, judge Rozakis expressed the concurring opinion. The Court concluded that there had been no violation of Article 10 of the ECHR, thus, the respondent State was granted a wide margin of appreciation in balancing of the conflicting interests (namely, the interest of freedom of expression against the interests of privacy). However, judge Rozakis underlined: "(a) … the concept of the margin of appreciation has any meaning whatsoever in the present-day conditions of the Court's case-law, it should only be applied in cases where, after careful consideration, it establishes that national authorities were really better placed than the Court to assess the «local» and specific conditions which existed within a particular domestic order, and, accordingly, had greater knowledge than an international court in deciding how to deal, in the most appropriate manner, with the case before them. Then, and only then, should the Court relinquish its power to examine, in depth, the facts of a case, and limit itself to a simple supervision of the national decisions, without taking the place of national authorities, but simply examining their reasonableness and the absence of arbitrariness.»[1] Moreover, Rozakis stressed: "(b) … the mere absence of a wide consensus among European States concerning the taking of photographs of charged or convicted persons in connection with court proceedings does not suffice to justify the application of the margin of appreciation. This ground is only a *subordinate* basis for the application of the concept, if and when the Court first finds that the national authorities are better placed than the Strasbourg Court to deal effectively with the matter. If the Court so finds, the next step would be to ascertain whether the presence or absence of a common approach of European States to a matter *sub judice* does or does not allow the application of the concept.»[2] So, in this case judge Rozakis concluded that the European Court of Human Rights demonstrated the automaticity of reference to the margin of appreciation doctrine and pointed out, that this doctrine had to be duly limited to cases where a real need for its applicability better served the interests of justice and the protection of human rights.[3]

2. Determination of the width of the margin of appreciation

The width of the margin allowed for the interpretation of the European Convention on Human Rights depends on many factors, *inter alia* on the interests at stake, the context of the interference, the impact of a possible consensus in such matters, the provision invoked, the aim pursued by the impugned interference, the degree of proportionality of the interference and the comprehensive analysis by superior national courts.[4]

[1] Egeland and Hanseid v. Norway application no. 344308/04 [2009] 'Concurring opinion of judge Rozakis' at http://hudoc.echr.coe.int/eng?i=001–92246

[2] Ibid., (b)

[3] Ibid., (d)

[4] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine:

Hence, a certain margin of appreciation (the width of the State's discretion) depends on specific human rights. Thereby, on the one hand, by securing absolute rights (the right to life, freedom, prohibition of torture, slavery and forced labor, prohibition of retrospective legislation, the *ne bis in idem* rule), the margin of appreciation is limited and virtually inexistent. And, on the other hand, the states enjoy a wide margin of appreciation, e.g. in order to assess an exceptional situation for the purpose of Article 15 of the Convention[1] (Derogation of human rights in time of emergency, particularly, in time of war or other public emergency threatening the life of the nation), in respect of Article 1 of Protocol No. 1 (protection of property and prohibition of deprivation of possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law). So, Article 1 of Protocol No. 1 refers to national discretion, providing that States have the right to enforce such laws as *it deems 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.[2]

Consequently, as pointed out by the Court in the case of *Dickson v. the United Kingdom* (2007), «78. .., where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted. Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. … There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights. …».[3]

Herewith, the absolute nature of the prohibition of torture was acknowledged by the Court in a counter-terrorism context, *inter alia*, in the *Othman (Abu Qatada) v. the United Kingdom* judgment of 17 January 2012 concerning an applicant who faced deportation to Jordan, the European Court stressed:" 184. .., as part of the fight against terrorism, States must be allowed to deport non-nationals whom they consider to be threats to national security. It is no part of this Court's function to review whether an individual is in fact such a threat; its only task is to consider whether that individual's deportation

Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 11

[1] Ibid., 11

[2] European Convention on Human Rights [1950] at http://www.echr.coe.int/Documents/Convention_ENG.pdf

[3] Dickson v. the United Kingdom application no. 44362/04 [2007] at http://hudoc.echr.coe.int/eng?i=001–83788

would be compatible with his or her rights under the Convention. … 185. .., it is well-established that expulsion by a Contracting State … engages the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute, and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion. 186. … However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment.»[1] At the same time, the Court regards to the following factors: the terms of the assurances; person who gives the assurances (central government or local authorities of the receiving State); legality of the treatment provided by the assurances in the receiving State; whether they are given by a Contracting State; the length and strength of bilateral relations between the sending and receiving States; objective verification of the compliance with the assurances through diplomatic or other monitoring mechanisms; the existence of an effective system of protection against torture in the receiving State; the previous ill-treatment of the applicant in the receiving State; examination of the assurances' reliability by the domestic courts of the sending/Contracting State.[2]

If different rights of the ECHR collide, for instance, the right to respect for private and family life (Article 8) and the right to freedom of expression and information (Article 10), these rights deserve equal respect. Accordingly, the margin of appreciation should be the same in both cases. Thus, in the *Axel Springer AG v. Germany* judgment of 7 February 2012, the Court stated: «88. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.»[3] These criteria are as follows: the contribution made by photos or articles in the press to a debate of general interest (the publication can concerns political issues or crimes and sporting issues or performing artists); the role or function of the person concerned and the subject of the report and/or photo (e.g., facts, which contribute to a debate in a democratic society, relating to politicians in the exercise of their official functions and reporting details of the private life of an individual who does not exercise such functions); the behavior of the person concerned prior to publication

[1] Othman (Abu Qatada) v. the United Kingdom application no. 8139/09 [2012] at http://hudoc.echr.coe.int/eng?i=001–108629

[2] Ibid, Para. 189

[3] Axel Springer AG v. Germany application no. 39954/08 [2012] at http://hudoc.echr.coe.int/eng?i=001–109034

of the report or the fact that the photo and the related information have already appeared in an earlier publication (however, it can't serve as a definitive argument for the deprivation of the party concerned of all protection against publication of the report or photo at issue); the way in which the information was obtained and its veracity; the way of photo or report's publication and the manner of its representation; the extent of the dissemination of the report and photo (national or local newspaper, its circulation); the nature and severity of the sanctions imposed (in assessing the proportionality of an interference with the exercise of the freedom of expression).[1]

A basis for the evolution of Convention norms through the case-law of the European Court of Human Rights is the notion of consensus. [2]For the first time it was pointed out in the case of *Tyrer v. the United Kingdom* (1978), where the Court found, that «the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of «degrading punishment»".[3] The matter was that the Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the ECHR since it did not outrage public opinion in the Island. However, the Court stressed, that even assuming that local public opinion could have an incidence on the interpretation of the concept of «degrading punishment» under Article 3, the Court did not regard it as established that judicial corporal punishment was not considered degrading by those members of the Manx population who favoured its retention: it might well be that one of the reasons why they viewed the penalty as an effective deterrent was precisely the element of degradation which it involved. Moreover, the Court pointed out that a punishment did not lose its degrading character just because it was believed to be, or actually was, an effective deterrent or aid to crime control. The Court emphasized that it was never permissible to have recourse to punishments which were contrary to Article 3, whatever their deterrent effect might be. Thus, the Court concluded that the judicial corporal punishment inflicted on the applicant had amounted to degrading punishment within the meaning of Article 3 of the Convention.[4]

In the *Tyrer v. the United Kingdom* judgment of 25 April 1978 the principle of evolutive or dynamic interpretation was also established. The Court recalled that «the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions».[5] It means that the substantive content of the rights and freedoms secured by the

[1] Ibid, Para. 90–95

[2] A. Kovler, V. Zagrebelsky, L. Garlicki, D. Spielmann, R. Jaeger and R. Liddell, 'The role of consensus in the System of the European Convention on Human Rights', in Dialogue between Judges, European Court of Human Rights (Strasbourg: Council of Europe 2008) 15

[3] Tyrer v. the United Kingdom application no. 5856/72, Para. 35 [1978] at http://hudoc.echr.coe.int/eng?i=001–57587

[4] Ibid, Para. 31, 35

[5] Ibid, Para. 31

Convention must evolve in line with progress in the legal, social and scientific fields.[1] For example, in the case of *Christine Goodwin v. the United Kingdom* (2002) the Court emphasized: «85. … In the later *case of Sheffield and Horsham*, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.»[2]

The notion of consensus reflects «the delicate balance that has to be struck in the relationship between the Strasbourg system and domestic systems, which must go «hand in hand» – a well-known formula taken, *mutatis mutandis*, from Handyside v. the United Kingdom».[3] If there is no consensus within the member States of the Council of Europe on the issues at stake, the margin of appreciation will be wider, and *vice versa*. Thus, in the *Evans v. the United Kingdom* judgment of 10 April 2007 the Court stressed: «77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. … Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensi-

[1] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 18

[2] Christine Goodwin v. the United Kingdom application no. 28957/95 [2002] at http://hudoc.echr.coe.int/eng?i=001–60596

[3] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 18

tive moral or ethical issues, the margin will be wider. …»[1]

Herewith, as emphasize Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in the joint partly dissenting opinion in the case of *A, B and C v. Ireland* (2010), «5. According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the «harmonizing» role of the Convention's case-law. Indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonizing role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced – in accordance with the Convention – against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonizing role, preferring not to become the first European body to «legislate» on a matter still undecided at European level.»[2]

But sometimes it is difficult to find a consensus. It can be identified in the light of State practice (case-law, legislation, administrative practice); the absence of a consensus may have different reasons (e.g., lack of official positions on very new issues, significant divergence in practices etc.).[3]

The principle of proportionality, which is closely linked to the principle of effective protection, has a significant influence throughout the Convention case-law and it is an entirely legitimate judicial creation. The most of debate about what the principle of proportionality means is conducted in the context of the restrictions on the rights guaranteed by Articles 8 (2) to 11 (2) of the ECHR.[4] The assessment of the propor-

[1] Evans v. the United Kingdom application no. 6339/05 [2007] at http://hudoc.echr.coe.int/eng?i=001–80046

[2] A, B and C v. Ireland application no. 25579/05 [2010] at http://hudoc.echr.coe.int/eng?i=001–102332

[3] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 22

[4] Steven Greer, 'The margin of appreciation: interpretation and discretion under the European Convention on Human Rights' (Strasbourg: Council of Europe Publishing, Human rights files No. 17 2000) 20

tionality of an interference with a right requires the examination of its impact on the right, the grounds for the interference, the consequences for the litigant and the context (the importance of the local circumstances and the difficulty of objective assessment of the interests at stake). The state must justify such interference. Herewith, the grounds must be «relevant and sufficient», the need for a restriction – «established convincingly», any exceptions must be «construed strictly» and the interference must meet «a pressing social need».[1]

Thus, in the *Waite and Kennedy v. Germany* judgment of 18 February 1999, the Court found: «59. The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.»[2]

In the *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria* (1994) case, concerning the prohibition of distribution of a journal to soldiers, the Court emphasized: «49. … These articles were written in a critical or even satirical style and were quick to make demands or put forward proposals for reform, yet they did not call into question the duty of obedience or the purpose of service in the armed forces. Accordingly, the magazine could scarcely be seen as a serious threat to military discipline. It follows that the measure in question was disproportionate to the aim pursued and infringed Article 10».[3]

Conclusions

The margin of appreciation doctrine (margin of state discretion) is well established and elaborated in the practice of the European Court of Human Rights. It allows the competent national authorities to enjoy a certain degree of discretion in assessing the facts, actions, situations and any other events within their national jurisdiction. Thus, the doctrine of the margin of appreciation gives priority to the state assessment of its own situation when secur-

[1] Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (University Cambridge faculty of law: CELS Working Paper Series 2012) 22

[2] Waite and Kennedy v. Germany application no. 26083/94 [1999] at http://hudoc.echr.coe.int/eng?i=001–58912

[3] Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria application no. 15153/89 [1994] at http://hudoc.echr.coe.int/eng?i=001–57908

ing the rights enshrined in the European Convention on Human Rights. It promotes the development of uniform human rights standards, the achievement of a 'fair balance' of different interests at stake.

The European Court has developed a number of principles that determine the scope of the Convention rights and the legality of any interference. The principle of subsidiarity and review means, that the mechanisms for human rights protection established by the European Convention is subsidiary to the national human rights protection system. The Court becomes involved in this process only after all domestic remedies have been exhausted. Herewith, the margin of appreciation available to national authorities goes hand in hand with a European supervision (*mutatis mutandis* rule). So, the main task of the European Court of Human Rights is to ensure whether the domestic authorities have remained within the limits of their discretion and whether the Convention rights are protected effectively. It depends on the specific right in question and on the sphere of life in which the right is at stake. Thereby, absolute rights reduce the degree of state discretion, and conversely.

The principle of the effective protection represents one of the most significant function of the European Convention on Human Rights, that is the effective protection of human rights instead of the mutual obligations' enforcement between States.

The principle of proportionality requires that the domestic authorities strike a fair balance between the competing public and private interests at stake. Consequently, the European Court evaluates such factors as the importance of the interests at stake; the objectivity of the restriction in question; the existence of a consensus among the Member States of the Council of Europe on the specific issue at stake.

The «European Consensus» refers to the existence or inexistence of a common ground, view of the concerned issues in the law and practice of the States. If there is no consensus within the Member States on the issues in question, the States enjoy a wide margin of appreciation. If the consensus exists, the margin will be narrow. Hence, the «European Consensus» furthers the dynamic interpretation of the European Convention on Human Rights.

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STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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«INTERMARIUM» PROJECT AS THE IMAGE OF GEOPOLITICAL INTERESTS OF EASTERN EUROPE COUNTRIES

After gaining its independence, Ukraine, together with Azerbaijan, South Korea, Turkey and Iran, became one of the five geostrategic centers of the world.

The peculiarity of these states is that their geopolitical significance is primarily due to their location (the ability to control access to important areas or refuse geo-strategic players in obtaining resources), and in some cases also the ability to play the role of a defense shield for individual states or even the region. Z. Brzezinski emphasized that the individual peculiarity of Ukraine lies in the fact that without it, Russia will not be able to restore the empire. In addition, Russia cannot be in Europe if Ukraine is not there, while Ukraine cannot enter Europe if there is no Russia[1]. This pattern, as well as the military and economic potential that Ukraine possessed at the time of its recognition as a sovereign state, gave it a hypothetical chance to claim not only the role of one of the geostrategic centers but also to join a circle of geostrategic players, which made it a potential focus of tension between Russia and the West.

The main efforts of independent Ukraine in the field of foreign policy were aimed at gaining membership in the Council of Europe, the EU and NATO. At the same time, the problem of increasing the defense capacity was not one of the priorities of state policy. Thus, the Declaration on State Sovereignty of Ukraine in 1990 proclaimed the principle of nuclear-free nature; in 1991, the Concept of Defense and Construction of the Armed Forces was approved, which stated that Ukraine would exercise its intention to become a neutral, non-nuclear state in the future that would not take part in military

[1] Бжезинский З. Великая шахматная доска (Господство Америки и ее геостратегические императивы) / перев. О. Ю. Уральской. М.: Междунар. отношения, 2010. 256 с.

blocs; in 1994 the decision on Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons was taken and the Budapest Memorandum on Security Assurance in connection with the accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons was signed; in 1993 the Military Doctrine was approved, which confirmed the non-aligned status of Ukraine and proclaimed a course to reduce troops and conventional weapons. On November 16, 1994, the Verkhovna Rada adopted a decision on Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons[1], subject to the provision of security guarantees by the nuclear-weapon States. On December 5, 1994, a memorandum on security guarantees was signed in Budapest in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, according to which Russia, the United States and the United Kingdom provided Ukraine with security guarantees.

Implementation of each of these measures was usually accompanied by clarification regarding the need to maintain its own defense capability at an appropriate level. However, the steps of political leadership in the field of defense capabilities show the opposite: the construction of the Armed Forces was accompanied by a significant reduction in the number of personnel and armaments (if in 1993 the total number of the Ukrainian army was 455,000 military servicemen, in 2012–184,000 people, including 139,000 militants). The analysis of the reforms implemented in the period from 1991 to 2013 shows that in most cases it was about their imitation[2], and in some cases, about the criminal nature of the actions of the authorities (it is no coincidence that in 2014 the military prosecutor's office initiated proceedings concerning the activities of 8 former defense ministers on the subject of the collapse of the Armed Forces).

The mistakes made by the Ukrainian leadership in the 1990s on defense and national security were largely due to miscalculations in the assessment of the state and prospects of state-legal development of the Russian Federation. In the expert environment, the prevailing view was that, firstly, Russia entered the stage of the collapse of the internal belt of the Moscow Empire, which develops in the form of direct anticolonial wars and protest, as well as in the form of national-liberation wars, and can eventually lead to the formation of new sovereign states

[1] Меморандум про гарантії безпеки у зв'язку з приєднанням України до Договору про нерозповсюдження ядерної зброї http://zakon2.rada.gov.ua/laws/show/998_158

[2] Кінь О. В. Аналіз тенденцій реформування збройних сил провідних і суміжних з Україною держав та визначення напрямів розвитку Збройних Сил України / О. В. Кінь, О. Б. Захаров, Н. В. Гончарова // Системи озброєння і військова техніка. 2007. Вип. 1. С. 30–34; Куртов А. І., Потрогош Ю. О. Проблеми реформування та розвитку Збройних Сил України і шляхи їх подолання // Система озброєння і військова техніка. 2008. № 1. С. 141–145; Оборонна політик: потреба реформ Збройних Сил України. Зб. матеріалів за результатами публічних консультацій / За заг. ред. Р. В. Богатирьової. К.: Заповіт, 2011, 148 с.

(Ichkeria, Bashkortostan, Tatarstan, Ural and Far Eastern republics, etc.), and secondly, the formation of a single Russian empire that will be marketable is not possible[1]. At the same time, it was thought that Russia has too many problems of its own to initiate separatism in Ukraine. In addition, it has to rely so much on the interests of the West, so as not to oppose it directly in fundamental issues. And, of course, the independent state of Ukraine must be considered[2].

During the ministerial meeting of the NATO-Ukraine Commission in Vilnius in 2005, Ukraine officially declared its readiness to join the MAP. In 2008, during the 20th Summit of NATO member states in Bucharest, a Declaration was adopted, in paragraph 23 of which it was stated that the Alliance had agreed that Ukraine and Georgia would become NATO members, and that the MAP would be the next step on their way to membership[3]. However, due to Russian protests and indecision of individual members of the Alliance (Germany and France), as well as the US reluctance[4] to enter the confrontation with Berlin and Paris regarding Ukraine's future membership in NATO, Ukraine did not receive a NATO membership action plan.

The conflict with Russia revealed the crisis situation of the national security and defense system, its unwillingness to independently ensure the sovereignty and territorial integrity of the state. Given the possibility of Russia's open actions within the conflict in Ukraine, which resulted from the decision of the Federation Council of the Federal Assembly of the Russian Federation on the possibility of using the armed forces of Russia on the territory of Ukraine in 2014[5], the effectiveness of the modern security and defense system of Ukraine to a large extent depends on the preservation of the sanction mechanism applied to Russia primarily from USA and EU, as well as mediation between France and Germany in the Normandy format. However, the further preservation of these levers becomes more and more problematic: firstly, Russia's conservation of the situation in the East leads to a gradual disintegration of the position of the EU

[1] Соскін О. Роль України у створенні нової геоекономічної системи у Центральній Європі http://soskin.info/news/9.html

[2] Танчин І. Чи можливий російський сепаратизм в Україні? // Незалежний культурологічний часопис «Ї» . Число 18. 2000. http://www.ji.lviv.ua/n18texts/tanchyn.htm

[3] Декларації Бухарестського саміту НАТО, прийнята главами держав і урядів, що взяли участь у засіданні Північноатлантичної ради в Бухаресті 3 квітня 2008 р. http://www.nato.int/cps/uk/natohq/official_texts_8443.htm

[4] Колишній міністр оборони США Роберт Гейтс у своїх мемуарах «Duty: Memoirsofa secretaryatwar» писав, що в 2008 р. збройні сили США не мали жодних додаткових сил для нових глобальних місій. Чому отримання Україною ПДЧ в НАТО в 2008 році було б стратегічним самогубством для США http://hvylya.net/analytics/geopolitics/chomu-ukrayina-ne-mogla-otrimati-pdch-nato-u-2008-rotsi.html

[5] Об использовании Вооруженных Сил Российской Федерации на территории Украины: Постановление Совета Федерации Федерального Собрания Российской Федерации от 1 марта 2014 г. N 48-СФ https://rg.ru/2014/03/05/voyska-dok.html

member states towards Ukraine due to the growing tiredness of the European Union on Ukrainian issues, as well as the absence of additional weighty arguments in favor of continuation or strengthening secondly, the victory of D. Trump at the presidential election gave rise to a confrontation within the American political class and led to a significant fluctuation of foreign policy rate.

In March 2014, the Verkhovna Rada appealed to the US Congress to grant Ukraine the status of a main ally outside NATO. In December 2014, the US Senate supported the «Act of Support of Freedom in Ukraine 2014» on providing Ukraine with arms and ally status without NATO membership. However, the bill did not come into force, as it was not approved by the House of Representatives and signed by the President of the United States.

On December 23, 2014, the Verkhovna Rada adopted a decision to renounce non-aligned status[1], which resulted in amendments to Articles 6, 8 of the Law «On the Fundamentals of National Security of Ukraine» and Art. 11 of the Law «On the Principles of Internal and Foreign Policy», according to which Ukraine's course on Euro-Atlantic integration has been restored, and the main directions of the state policy on national security and the main principles of Ukraine's foreign policy have been determined by deepening of cooperation with the EU and NATO.

However, in the united Europe, the process of establishing an effective security and defense system that would be able to defend the interests of such the least secure neighboring countries of the Union as Georgia, Moldova, Ukraine, has just begun. It would not be an exaggeration to state that it was Russia's aggression towards Ukraine that provided additional arguments to the European Parliament to adopt on February 16, 2017 after the report of Guy Verhofstadt the resolution «Possible evolutions and adjustments to the current institutional framework of the European Union», in which he called on the European Council to develop a joint defense policy, which eventually may lead to the formation of a European Defense Union[2]. The stated idea was received by Jean-Claude Juncker, the head of the European Commission. In these circumstances, given the difficulty of obtaining EU membership and NATO membership in the near future, and taking into account the tendency towards a gradual decline in the solidarity of the EU Member States with Ukraine (the withdrawal of the clause on cooperation between Ukraine and the EU in the defense on the request of the Netherlands from the Association Agreement text) the periodic initiation by

[1] Про внесення змін до деяких законів України щодо відмови України від здійснення політики позаблоковості: Закон України від 23 грудня 2014 р. № 35-VIII // Відом. Верхов. Ради, 2015, №4, ст.13.

[2] Defence: MEP spushformore EU cooperation to betterprotect Europe http://www.europarl.europa.eu/news/en/news-room/20161117IPR51547/defence-meps-push-for-more-eu-cooperation-to-better-protect-europe

the highest officials of Austria, Greece, Hungary, and the Czech Republic of the idea of abolishing sanctions against Russia), the government should seek a new format for relations with the EU and NATO or individual member states of these unions in the military-political sphere, which would correspond to the provisions of the Sustainable Development Strategy «Ukraine 2010»[1] (safety vector) and contributed to the strengthening of security and defense.

One of the possible formats of such cooperation was announced by the former head of the Security Service of Ukraine I. Smeshko, offering the implementation of the «Intermarium» project, which since the mid-1990s was consistently defended and popularized in Ukraine by O. Soskin. He advocated the idea of creating by Ukraine, together with Poland, of the Baltic-Black Sea Economic Alliance as an analogue of ASEAN, which would help to adapt the countries of the Baltic Sea to the needs of the European Union in the socio-economic sphere, as well as to become a guarantee of the irreversibility of changes in the post-Soviet space[2]. The strengthening of relations between Ukraine and Poland with strategically important neighbors (Poland, Turkey, the Baltic states, Central and South-Eastern Europe, Transcaucasia region) was considered as a factor capable of contributing to the formation of a «belt of stability» and of regional security structures from the Baltic and Black Seas to the Caspian Sea. Close cooperation and cooperation with the countries of Central Europe and the Baltic-Black Sea region, not only in the economic sphere, but also in the field of politics and security, was considered as a transitional stage of Ukraine's integration into a united Europe. The formation of the strategic triangle Poland-Ukraine-Turkey with the possible participation of other strategically important countries was seen as the basis of regional stability of the Baltic-Black Sea region and Central Europe in general[3].

The possibility and the expediency of deepening of cooperation between the countries of the Baltic-Black Sea Region were always considered by the political authority of Ukraine. Thus, in February 1993, the President of Ukraine Leonid Kravchuk made an initiative in Budapest to create a zone of stability and security in the region of Central and Eastern Europe, which was the basis for the project to create a Central Eastern European space of stability and security.

The favorable conditions for the materialization of this idea emerged in

[1] Стартегія сталого розвитку «Україна – 2020», затверджена указом Президента України від 12 січня 2015 р. № 5/2015 [Електронний ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/5/2015

[2] Соскін О. Роль України у створенні нової геоекономічної системи у Центральній Європі http://soskin.info/news/9.html; Балтія – Чорномор'я – Каспій: Контури антимонопольного альянсу http://kyiv.osp-ua.info/politics/52088-baltija--chornomorja--kaspiy-konturi-antimonopolnogo-aljansu.html

[3] Матвіїв Т. Україна 2000 і далі: геополітичні пріоритети та сценарії розвитку // Незалежний культурологічний часопис «Ї». Число 18. 2000. http://www.ji.lviv.ua/n18texts/rnbu.htm

the early 2000s when certain steps were taken towards the institutionalizing of geoeconomically, geopolitically and historically determined Baltic-Black Sea cooperation. Thus, in December 2005, a constituent meeting of the Community of Democratic Choice took place in Kiev in which the presidents of Georgia, Estonia, Latvia, Lithuania, Macedonia, Moldova, Romania, Slovenia, Ukraine, as well as representatives of Poland, Bulgaria and Azerbaijan took part. At the summit, the Declaration of the countries of the Community was adopted in which the need to establish closer relations between the governments and societies of the Baltic-Black Sea-Caspian region in various spheres was highlighted. In May 2016, a summit of the leaders of the Baltic-Black Sea region took place in Vilnius where it was noted the importance of the regional cooperation for European and Transatlantic integration. However, the idea of the Baltic-Black Sea Union sounded not as explicitly as before[1].

During the same period, the elaboration of the development concept for the GUAM transport corridor was underway, which envisaged the combination of the GUAM transport corridor with the Viking combined transport trains and the Zubr container train connecting the Black and Baltic Seas[2].

In the modern Ukrainian political elite, the idea of creating a military-political association «Intermarium» is supported by the Chairman of the Verkhovna Rada Andriy Parubiy[3], the former President of Ukraine Leonid Kuchma[4], the director of the National Institute for Strategic Studies Volodymyr Horbulin[5], and the first commander of the volunteer-based Azov Regiment Andriy Biletsky[6]. At the level of the political parties, this idea was officially supported by the Ukrainian National Conservative Party and the All-Ukrainian Association «Svoboda».

In its pre-election campaign in 2014, «Svoboda» demanded «To define European Ukrainocentrism as a State's strategy. To direct foreign policy efforts to build a close politi-

[1] Мартинюк В. Балто-Чорноморський союз: проблеми сьогодення та перспективи розвитку // INTERMARUM: історія, політика, культура. 2015. Вип. 2. С. 132–133.

[2] Концепция развития транспортного коридора ГУАМ http://www.guam-organization.org/attach/conceptru.pdf

[3] Парубий предложил создать Балто-черноморский союз // ЛІГА Бізнес Інформ. – 21.05.2016.

[4] Підбиваючи підсумки саміту в рамках міжнародної конференції «Балто-Чорноморське співробітництво: до інтегрованої Європи XXI століття без розподільчих ліній» Президент України Л. Д. Кучма заявив: «Балто-Чорноморська вісь може й повинна стати одним з консолідуючих і стабілізуючих стрижнів нової Європи, а отже, невід'ємною її складовою».

[5] Горбулин В. 2017-й : продолжение следует… // Зеркалонедели. 02.07.2016

[6] Навесні 2016 р. «Азов» озвучив ідею Балто-Чорноморського союзу («Intermarium» («Міжмор'я»)) і провів в липні в київському готелі RadissonBluHotel установчу конференцію групи розвитку «Intermarium», на якій були присутні військові аташе Польщі, Литви, Румунії та Угорщини. Див.: Балто-Черноморский союз – восточноевропейская альтернатива http://azov.press/ru/balto-chornomors-kiy-soyuz-shidno-vropeys-ka-alternativa

cal and economic community with the countries of the Baltic-Black Sea axis»[1].The 16th March 2017, the main nationalist organizations of Ukraine («Svoboda», «National Corpus» (former «Azov») and «Right Sector») officially signed a «National Manifesto», in paragraph 2 of which it is stated: «to form a new vector of Ukrainian geopolitics, namely the orientation not to the West or East, but to the creation of a new European unity – the Baltic-Black Sea Union»[2].

In September 2016, the idea of the President of Poland Andrzej Duda to strengthen regional cooperation and security of the states of the «Three Seas» – basins of the Adriatic, Baltic and Black Seas (The Three Seas Initiative, also known as the Baltic, Adriatic, Black Sea (BABS) Initiative) was discussed during the forum in Dubrovnik, dedicated to coordinating the work of gas distribution and gas transmission capacities in this geographical triangle. The initiative is based on the conclusions of the report «Completing Europe – From the South-North Corridor to Energy, Transportation and Telecommunications Union»[3], which was prepared by the Atlantic Council in September 2014. The representatives of the countries of Central and Eastern Europe, as well as China and the United States took part in the discussion. Unfortunately, despite the invitation received, Ukraine did not participate in the event, although the forum was aimed at finding an alternative to the «Nord Stream 2». The 11th March 2017, during the XXVI meeting of the Consultative Committee of the Presidents of Ukraine and Poland, the Ukrainian side supported Warsaw's initiative to strengthen the role of the countries of Central and Eastern Europe. The meeting was focused on the cooperation in the «Adriatic – Baltic – Black Sea» region.

Despite the fact that the idea of forming an inter-state association «Intermarium» is discussed at the highest political level of both individual states and the European community, this problem has not been thoroughly studied by Ukrainian scientists, and as a result, the conclusions formulated in domestic publications are insufficiently substantiated. Therefore, there are no well-founded assessments of this project, and the public is practically unaware of its content. In these conditions, it is not surprising that the electronic petition of Kostyantyn Zholkiewicz posted on the 2nd of June 2016 on the website of the President of Ukraine, on the support of the establishment of the Baltic-Black Sea Confederation of Lithuania, Poland, Georgia, Moldova, Ukraine, Latvia, Estonia, the Czech Republic, Slovakia and Hungary, and on recognition of this idea as the official and public strategic aim

[1] Передвиборча програма Всеукраїнського Об'єднання «Свобода» http://holos.fm/page/peredviborchaprograma-vo-svoboda

[2] Націоналісти підписали та представили Національний маніфест http://svoboda.org.ua/news/events/00114270/

[3] Completing Europe – From the South-North Corridor to Energy, Transportation and Telecommunications Union http://www.ceep.be/www/wp-content/uploads/2014/11/Completing-Europe_Report.pdf

of Ukraine (№22/024611-ep) obtained only 42 votes[1].

Special attention is paid to this project in Poland, where the idea of creating a military-political association «Intermarium» replaced the concept of parallelism, which was supported by Presidents Lech Valensa (idea of the Black Sea-Baltic axis NATO bis), Lech Kaczynski and Andrzej Duda, and according to which Poland should no longer be a «buffer zone» but should become the eastern wing of NATO.

The support of Poland for the project may be explained primarily by the concern about Merkel's statement: «Our common goal must be the return of Germany to the leadership of Europe»[2].

It should also be taken into account the fact that the idea of Polish Foreign Minister Radosław Sikorski regarding the refusal (in fact the adjustment) of the Jagiellonian idea (the «Giedroyc-Mieroszewski doctrine») received friendly opposition from the Polish political elite, in the opinion of which this will lead not only to a weakening of positions of Ukraine and Lithuania but also of Poland itself, which will become a provincial state on the outskirts of the EU and will be deprived of the opportunity to pursue its own eastern policy[3].

The supporters of the Baltic-Black Sea Alliance were also former President of Lithuania Algirdas Brazauskas[4] and Prime Minister Kazimira Prunskienė[5], as well as one of the leaders of the Belarusian Popular Front ZenonPoznyak who put forward the idea of creating the Baltic-Black Sea Union as a buffer international formation without military bases of NATO and Russia. «The Belarusian Development Group» on behalf of the President of Belarus Alexander Lukashenko in 2010 prepared a report «Belarus 2018: a regional leadership on the basis of sovereign development of the country», which justified the need for establishing a zone of economic and political cooperation between the countries of the former Grand Duchy of Lithuania and The Polish – Lithuanian Commonwealth.

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[1] Електронна петиція Жолкевича К. Г. «Балто-Чорноморський союз» № №22/024611-епhttps://petition.president.gov.ua/petition/24611

[2] Мир 2020: российская и центрально-восточноевропейскаяперспективы / науч. рук. В. Г. Барановский. М. : ИМЭМО РАН, 2010. – С. 25.

[3] Мир 2020: российская и центрально-восточноевропейскаяперспективы / науч. рук. В. Г. Барановский. М. : ИМЭМО РАН, 2010. – С. 192–193.

[4] Колишній президент Литви Альгірдас Бразаускас на саміті 1997 р. у Вільнюсі вперше висловився за відновлення Балто-Чорноморського співробітництва за участю України. Під час головування Литви у Раді держав Балтійського моря було досягнуто консенсусу щодо участі України у діяльності організації. У 1999 р. на конференції у Клайпеді президенти Литви, України та Польщі обговорювали створення нових транзитних шляхів від Балтійського до Чорного морів. Рассоха Л. Балто-чорноморське партнерство: перспективи є / Л. Рассоха // Україна і світ сьогодні, №9 (359) 10.03.2006.

[5] Перший прем'єр-міністр ЛитвиК. Прунскене після здобуття незалежності заявила: «Я не втрачаю надії, що Балто-Чорноморський альянс – не тільки наше історичне минуле з часів Великого Литовського князівства. Певні історичні мотивації залишилися й досі».

The «Intermarium» project is also supported by the US analysts, in particular Jerome Friedman[1]. NATO in the Bucharest Summit Declaration (paragraph 36) reaffirmed the continued importance of the Black Sea region for Euro-Atlantic security. In this regard, NATO welcomes the progress in consolidation of regional ownership, through effective use of existing initiatives and mechanisms. The Alliance will continue to support, as appropriate, these efforts guided by regional priorities and based on transparency, complementarity and inclusiveness, in order to develop dialogue and cooperation among the Black Sea states and with the Alliance[2].

By contrast, the German experts (f. ex. Andreas Umland[3]) are skeptical about the project, considering the possibility of transforming Poland into a regional leader, which can limit the influence of Germany in the EU and the Eastern European region, and therefore does not correspond to its national interests. This argument is not meaningless because the formation of a military-political regional union under the aegis of Poland will allow it to gain a critical geopolitical mass, will automatically grant it the status of a regional state and will allow it to interact on a qualitatively new level both with France and Germany within the EU, and with Russia[4].At the same time, it should be noted that the Caspian oil factor makes the European Union increasingly frequently consider the Baltic-Black Sea-Caspian region as a kind of supporting structure of the geopolitical space of the EU, in comparison with the Baltic-Black Sea region[5].

At the same time, it would be wrong to say that the «Intermarium» is a foreign geopolitical project. In fact, the possibility of deepening the military-political cooperation of the countries of the Baltic-Black Sea region by creating a confederation aimed at protecting against aggression from Russia (and to

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[1] Фридман Дж. Геополитическоепутешествие. Часть 6: Украина, 2010. – [Електронний ресурс]. – Режим доступу: http://bbs-news.info/RU/opinion/geopolitichna-podorozh-chastina-6-ukrayina-stratfor-ssha/; Фридман Дж. НовоесдерживаниеРоссии. Американскаястратегияпослеукраины: от Эстонии до Азербайджана [Електронний ресурс]. – Режим доступу: http://conjuncture.ru/stratfor-29-03-2014/

[2] Декларації Бухарестського саміту НАТО, прийнята главами держав і урядів, що взяли участь у засіданні Північноатлантичної ради в Бухаресті 3 квітня 2008 р. http://www.nato.int/cps/uk/natohq/official_texts_8443.htm

[3] Umland A. DieIdeedesIntermariums: Ein mittelosteuropäischerPaktgegenrussischenNeoimperialismus [Електронний ресурс]. – Режим доступу: http://www.iwm.at/transit/transit-online/die-idee-des-intermariums-einmittelosteuropaischer-pakt-gegen-russischen-neoimperialismus/; Умланд А. Як вирішити українську проблему безпеки. Києву потрібне «Міжмор'я» – блок країн, розташованих між Балтійським та Чорним морями [Електронний ресурс]. – Режим доступу: http://nv.ua/ukr/opinion/umland/jakvirishiti-ukrajinsku-problemu-bezpeki-109695.html

[4] Ирхин А. А. Постсоветское пространство: конкуренция интеграционных проектов [Електронний ресурс]. – Режим доступу: http://rusprostranstvo.com/article/view/9

[5] Домашенко Л. М. Концепції чорноморської орієнтації в українській політичній думці першої половини XX століття : автореф. … канд.. політ. наук: 23.00.01. К., 2008. С. 3

a certain extent also from Germany), at the level of the idea in 1918–1934, was raised both by foreign (Jozef Pilsudski's «Intermarium» project; Carl Mannerheim and Rudolf Holsti –Baltic union; ZigfrīdsMeierovics – Baltic-Black Sea Union; Józef Beck's «Third Europe»; Giedroyc – Mieroszewski doctrine; Władysław Sikorski– The Polish- Czechoslovak federation) and Ukrainian (Mykhailo Hrushevsky – The Baltic-Black Sea alliance; Stepan Rudnytsky – The Baltic-Pontic Federation; Yuri Lypa – Black Sea-Baltic federation) public and state figures. However, it should be taken into account that the ideas of these authors can only be a starting point for the project of creating a military-political association, since the current conditions (first of all, the membership of Poland, the Baltic countries, Bulgaria and Romania in the EU and NATO, as well as the allied relations between Belarus and Russia) for military-political integration differ from the conditions of the early twentieth century. In addition, it should be noted that, unlike the previous views on the creation of such a community, the present requires new approaches to its institutional content, namely, a clear format, goals, objectives and mechanisms for its functioning, as well as identification of existing and potential obstacles to the realization of the idea.

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THE PROBLEM OF THE INTERPRETATION OF CERTAIN NORMS OF UKRAINIAN ANTI–CORRUPTION LEGISLATION

Summary. *The article deals with problems of the interpretation and application of the norms of anti-corruption legislation. In particular the article raises questions about the legitimacy of obtaining by subjects (who the Law of Ukraine «On Preventing Corruption» spreads on its power) additional income, the legal grounds for acquiring them corporate rights (to be a party, the founder), purchasing shares (units) of a business partnership, managing them, participating in the general meeting of shareholders, receiving dividends, information on the activities of the company, receiving a part of its assets in case of liquidation of the company. Through the analysis of the real legal situation with the head of one of the joint stock company who was suspended from performing his official duties, the problem of controlling the incomes of persons authorized to perform state functions (by submitting them «E» declarations) is considered.*

Key words: *corruption; anti-corruption legislation; dividends; additional income; corporate rights; income control; removal from official duties; «E» declaration.*

Problem formulation. Despite of measures by the state and the public aimed at combating corruption in Ukraine this negative phenomenon remains one of the most dangerous which threatens the existence of our society as civilized and legal. The current anti-corruption legislation is under the watchful eye of the state, constantly is updated and refined, but so far from perfect. All this prompts the scientific community to come back again and again to the problems of improving legal measures against corruption, anti-corruption legislation, to the need to rethink its individual norms, to clarify the essence of their provisions.

Analysis of recent research and publications. A sufficient number of works is devoted to the issue of striving corruption in all its manifestations and anti-corruption legislation

improvement. Such researches began, literally, from the first days of passion of the first normative act in Ukraine in 1995 – the Law of Ukraine «On Combating Corruption» [3] (we recall the works of P. P. Andrushko, V. M. Garashchuk, M. I. Kamlyk, O. M. Kostenko, V. M. Kyrychko, M. I. Melnyk, E. V. Nevmerzhytskyi, M. I. Khavroniuk, etc. who were the first analysts and constructive critics of anti-corruption legislation. Besides there are some researches of last years for example, Berdnikova K. V. Improvement of the Effective Anti-corruption Legislation and Examination of the Renovated Prevention System and Corruption Management in Ukraine // Administrative Law and Process – No. 2 (8). – 2014. – P. 31–38; Busol O. Yu. Counteraction to corruption crime in Ukraine in the context of modern anticorruption strategy: Dissertation of Doctor of Law Sciences: 12.00.08 Kyiv, 2015. – 479 p.; Solonar A. V., Zimohliad I. I. Areas of Improvement of Legislation on Prevention and Combating Corruption in Government // Law Forum. – 2016. – No. 3. – P. 240–244) and others.

Formulating the purpose of the article. The main anti-corruption act – The Law of Ukraine «On Preventing Corruption» [2] contains a significant number of controversial provisions that complicate its application. Such problems become not only a «substratum» of making mistaken decisions by law enforcement agencies, but also «provoke» them for abuse, negatively affecting the career of public servants, sometimes destroying it at all. We will analyze some of the provisions of this act which, as for us, are the most ambiguous and we will try to find an answer to them.

Presenting main material. The analysis of the cases of judicial and law-enforcement bodies, statements in the law literature shows some difficulties in the understanding of the scientists and practitioners of the essence of rights and the limits of possible actions of the persons specified in paragraph 1, subparagraph (a) of paragraph 2 of clause 1 of Article 3 of the Law of Ukraine «On Preventing Corruption "[2] (subjects who the Law applies to) to acquire corporate rights (to be a participant, founder), to acquire shares of a business partnership, to manage them, to participate in the general meeting of shareholders, to get dividends and information on the activities of the company, to receive a portion of its assets in case of liquidation of the company. Mostly this applies to persons who have already been appointed (elected) to a position when such persons acquire corporate rights (for example, as an inheritance) during their service.

In seeking the answer, we appeal to the Constitution of Ukraine [1], which states that: Everyone has the right to own, use and dispose of his property. The right to private property is acquired in the manner prescribed by law. No one can be illegally deprived of property. The right to private property is inviolable (Article 41 of the Constitution); citizens have equal constitutional rights and freedoms and are equal before the law (Article 24 of the Constitu-

tion); all subjects of property rights are equal before the law (Article 13 of the Constitution).

These constitutional rights of citizens are detailed in the relevant articles of the Civil Code of Ukraine [4] and the Commercial Code of Ukraine [5]: «The owner owns, uses, disposes of his property at his own discretion … The owner has the right to make any actions that do not contradict the law in relation to their property … All the owners are provided with equal conditions for the exercise of their rights "(Article 319 of the Civil Code of Ukraine). «Possession of corporate rights shall not be considered as entrepreneurship» (Article 167 of the Commercial Code of Ukraine).

Such legislative statements cause some individuals to whom the Law of Ukraine «On Preventing Corruption» [2] extends its power to think that in matters of ownership, use and disposal of property they have the same rights as other Ukrainian citizens. The norms of the Constitution are the rules of direct action.

But nonetheless: a) although the norms of the Constitution are the rules of direct action, they nevertheless outline the general rules (principles) of social relations. Exceptions to these general rules are established by the state and are enshrined in separate norms of other normative acts. The reason is that it is impossible to foresee and consolidate in such a static normative act as the Constitution all variants of development of social relations (before the whole sphere and the form of protection of the public interests); b) the principles of civil (and commercial) legal relations (equality of parties in relations; allowed everything that is not directly prohibited by law …) cannot be spread over relations in the field of public administration. Any equality cannot be here. Management is not carried out on the basis of equality of the parties. There is a principle in management: «Only what is directly provided by law is permitted». This principle has found its reflection in part 2 of Article 19 of the Constitution of Ukraine [1]: «Bodies of state power and bodies of local self-government, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided by the Constitution and laws of Ukraine». Moreover, even the general principles of civil legal relations do not always have a «non-violent» character. An example of this can be part 2 of Article 167 of the Civil Code of Ukraine [5], which provides for the possibility of imposing restrictions on certain holders of corporate rights and / or their implementation. It should also be emphasized that corporate rights, the issue of their turnover is not subject to constitutional and legal regulation.

In spite of the fact that possession of corporate rights shall not be considered as entrepreneurship (Article 167 of the Civil Code of Ukraine [5]), and the right to participate in a partnership is a personal non-property right and cannot be separately transferred to another person (Article 100 of the Civil Code of Ukraine [4]), the anti-corruption legislation (part 1 of Article 36 of the Law of Ukraine «On Preventing Corrup-

tion») obliges the persons who is specified in paragraph 1, subparagraph (a) of paragraph 2 of part 1 of Article 3 of this Law, within 30 days after appointment (election) to the post to transfer to the management of another person their respective enterprises and corporate entities in the manner prescribed by law. This norm is an example of «setting limits …». But we must consider other important circumstances.

Undoubtedly, the legislator has not quite rightly approached the problem of establishing preventive anti-corruption measures. In our opinion, not all corporate rights are the same. A large number of them do not perform a corruption threat (for example, dividends, information, company activities, etc.) in contradistinction to joining the board of directors of the company or the supervisory board, other executive or supervisory bodies. But the legislator does not make any difference and demands transferring such rights to the management of another person.

How to resolve the contradiction between the requirements of civil and commercial law and the requirements of administrative law? As for us the answer is that the right to participate in the partnership is not transferred here. The participant remains the same official person. Only the right to manage corporate rights is transferred. The owner of corporate rights (securities, enterprises, etc.) pays the manager certain cash for this.

It is the owner who receives income (dividends) from the activities of such an enterprise. And indeed no one has the right to demand that one refuses the rights to the relevant assets. The official person authorized to perform the functions of the state should avoid taking actions that may lead to a conflict of interest and must comply with the restrictions on the combination with other activities, other prohibitions (Articles 25, 26, 27 etc. the Law of Ukraine «On Preventing Corruption»).

Receiving the same dividends can't be considered as «other paid … or entrepreneurial activity» as the person doesn't independently carry out any actions on management of an enterprise or corporate rights. They are not paid for work.

In the case when such a person acquired corporate rights or acquired property (for example, inherited them) during the service of a position in the exercise of state functions, then the requirements of paragraph 1 of Article 36 of the Law of Ukraine «On Preventing Corruption». It means that such person must be granted 30 days (as well as after appointment (election) to the position) in order that he could act on the transfer of ownership (corporate rights) in the management of another person. After this, within a one-day period, such person will notify the National Agency on Corruption Prevention by providing a notarized copy of the concluded agreement.

In support of certain positions we propose to refer to the Decision of the Constitutional Court of Ukraine in the case upon the constitutional petition of 53 People's Deputies of Ukraine concerning conformity with the Constitu-

tion of Ukraine (constitutionality) of Article 7.1.2, item 2 of Chapter VIII «Final and Transitional Provisions» of the Law of Ukraine «On Fundamentals of Preventing and Counteracting Corruption» dated March 13, 2012 No. 6-rp/2012 (case 1–14 / 2012) [6].

For example, paragraph 4.4 of the Decision states: "… The preamble of the Recommendation of the Committee of Ministers to the Council of Europe states that, although public servants are endowed with special rights and duties to perform the functions of the state, however, they are citizens, and therefore they should be recognized same rights as other citizens, to the extent that it is possible. International Code of Conduct for Public Officials also allows state officials to carry out activities aimed at obtaining financial profit (paragraph 5). At the same time public officials are obliged to refrain from owning financial, commercial or other similar interests that are incompatible with their office, functions, duties or their performance (paragraph 4).

Paragraph 4.5 of the Decision states that: «According to part two of Article 167 of the Civil Code of Ukraine, possession of corporate rights shall not be considered as entrepreneurship, but the law may establish restrictions for certain persons to own these rights and/or implement them. One of these restrictions is provided by Article 7.1.2 of the Law pursuant to which persons indicated in Article 4.1.1 of this Law shall not be members of a governing body or supervisory board of a profit-seeking enterprise or organization, in particular to be a head or a member of a supervisory board, executive body, auditing committee, auditor of a commercial associations, as well as head or member of other body of association if creation of such body is envisaged by the statute of association. The established prohibition does not apply to ownership and/or implementation by persons authorized to perform functions of the state and local self-government of other corporate rights related to participation (membership) in management of operating activity of commercial associations».

Thus the Constitutional Court of Ukraine came to the conclusion that the prohibition on persons referred to in Article 4.1.1 of this Law to participate in general meetings of an enterprise or a profit-making organization as it is seen from the content of Article 7.1.2 of the Law contradicts Articles 24.1 and 24.2, Articles 41.1 and 41.4 of the Constitution of Ukraine "(see: Paragraph 4.8 of the Decision).

The problem of control (reporting) of persons authorized to perform state functions and the submission of an electronic declaration (so-called «E» – declaration) is closely linked with the situation we have discussed above.

Indicative may be the case of Mr K., the Chairman of the Board of one joint-stock company (hereinafter – JSK), which was suspended on April 27, 2015 by the decision of the supervisory board of the JSK from his position as the Chairman of the Management Board of the JSK (but was not deprived and it's important). This case raised the question if Mr. K obliged to submit an «E»

declaration for 2016 in such circumstances.

In resolving the issue in essence, it should be noted: The Law of Ukraine «On Preventing Corruption» [2] extends its power to persons authorized to perform functions of the state or local self-government (Article 3.1.1 «Entities subject to distribution the effect of this Law "). The legislator distinguishes two main qualifying features among such categories of persons: 1) the presence in the entity subject a position in the body of state or local self-government and; 2) fulfillment of the functions of the state or local self-government.

These two features must be available to the person at the same time. If a person is on position but he does not perform official duties, does not represents the interests of the state or local government (for example, he is on vacations or in a business trip or in a hospital and for this period he is replaced by another person), then decisions or actions are carried out by his deputy. At this time the executive himself cannot make any legally significant actions that give him his post, that is, he cannot abuse it.

The Law of Ukraine «On Preventing Corruption» [2] aims to control the income and expenses of persons who may abuse their official duties and opportunities which provides them with service in these bodies.

Thus, the mere availability of the person position itself is not sufficient to exercise financial control over them. Especially when such person is legally deprived of the right to exercise administrative, legally significant functions and has no opportunities to overuse.

Regarding the question of the reporting period for persons who cease activities related to the exercise of state or local government functions (this is exactly the case with Mr. K. who ceased to perform management functions on April 27, 2015 and had to submit his declaration for 2015). This is explicitly stated Article 45.3 of the Law [2]: «Persons who have ceased activities related to the exercise of state or local government functions are obliged next year after the termination of their activities to submit a declaration in the order specified in part one of this article of a person authorized to perform functions of the state or local government for the last year».

If Mr. K. in 2016 did not perform any administrative functions, did not exercise legally powers, he was not obliged to submit a declaration for 2016.

Opponents of this point of view refer to the fact that Mr. K. in 2016 probably received a «salary» according to his post. Their mistake is that the payments he receives are not actually salary. These are the monetary amounts related to the so-called «guarantee payments» which are paid to the person during the vacation, the temporary suspension of their duties while performing official inspections etc. These payments are legal, «transparent» and not related to remuneration for the performance of labour functions. So, it is impossible to require from Mr. K. to submit «E» declaration under such circumstances. Since he ceased to be the

subject of the submission of the «E» declaration although formally and he was in office. Only a combination of two components: the real fulfilment of their official duties and the presence of a position may be grounds for demand from the person submitting an annual «E» declaration.

Conclusions. The current version of the Law of Ukraine «On Preventing Corruption» [2] requires a lot of work. The same applies to other normative acts of anti-corruption orientation. In our opinion the main direction on the way of building an effective mechanism of combating corruption in Ukraine should be the logical and unequivocal presentation of legal norms, a clear delineation of the circle of subjects in which these norms spread their force. It is appropriate for the state to abandon excessive (duplicate) control over the income of persons who authorized to perform state functions in cases when such revenues are legal and transparent sources of income.

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5. The Commercial Code of Ukraine // Journal of Verkhovna Rada of Ukraine. 2003. No. 18–22. Article 144.
6. Decision of the Constitutional Court of Ukraine dated March 13, 2012 No. 6-rp/2012 in the case upon the constitutional petition of 53 People's Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of Article 7.1.2, item 2 of Chapter VIII «Final and Transitional Provisions» of the Law of Ukraine «On Fundamentals of Preventing and Counteracting Corruption». – Electronic resource: http://zakon3.rada.gov.ua/laws/show/v006p710–12.

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RESTORATION OF THE TERRITORIAL INTEGRITY OF THE STATE IS THE MAIN TASK OF THE CURRENT STAGE OF STATE-BUILDING IN UKRAINE

Battle on – and win your battle! These prophetic words of the genius of the Ukrainian nation can be considered an essential characteristic of those processes that the Ukrainian state has experienced during its 26 years of sovereign existence and national affirmation.

The idea that only the last three and a half years have become for us a test of power and endurance is absolutely false. It is imposed on the public consciousness by those who would like to attribute their achievements and successes in the Ukrainian statehood of 1991–2013. In fact, the Ukrainian nation have been forming in confrontation with the Communist Party Nomenclature, which violently defrauded its people by crony capitalism, artificial inflation, nullification of our savings, humbled hard-working ones by unemployment, the honest ones by the racket, the brave ones – just killed and eventually sentenced us: «the Ukrainian idea did not work.» But Maidan 2004 responded to these thefts, that the highest value for Ukrainians is not bank deposits and not imported trash, but freedom and own state. And we will fight for it, asserting ourselves as a European nation. And when the second time, already a gangster-oligarchic Nomenclature, tried to prevent the European choice of Ukrainians, then the Maidan 2013 – Revolution of Dignity appeared. And the Ukrainian nation was heard and supported the whole democratic world. Today our struggle continues. We will fight both separatists and their foreign «conductors» with BUKd and GRADs, and their own traitors from high offices. Because Maidan is our indescribable, worthy, majestic nation.

So the most important achievement of our 26-year-old independent state is the Ukrainian political nation, a united country, free people, a democratic state, an active civil society. We strived

for that. We will not give that to anybody. We can be proud of that. We are Ukraine, eternal and beautiful! Our national idea works! Let's struggle!

Our first and most important task in this struggle is territorial integrity, preservation and restoration of national sovereignty throughout the state territory of Ukraine, introduction of effective mechanisms of ensuring territorial integrity, which proved to be effective in similar situations in other countries.

Territorial integrity is the constitutional principle of the organization of the state and international law, it is closely connected with the security of citizens, the ability of the state to maintain its territory within the borders established by the international law, to counteract internal and external threats aimed to change them/

The Constitution of Ukraine contains the concept of «inviolability of the territory» (Article 2: «The territory of Ukraine within the existing border is integral and inviolable») and «territorial integrity» (Article 132: «The territorial structure of Ukraine is based on the principles of unity and integrity of the state territory») Since violations of inviolability may not always have the purpose of violating the integrity of the territory, the «inviolability of the territory» is wider in scope than «territorial integrity». However, in international law, the most established is the most recent concept («territorial integrity»).

The threats to the territorial integrity of the state can be divided into external, generated by actions of foreign powers, and internal ones, which are the result of the policy of a sovereign state. As for the external aspect, it is governed by international law. Territorial integrity is one of the fundamental principles of international public law, which establishes the inviolability of the territory of the state from encroachments by other states by means of the use of military force or threat of force. This principle began to be formed in the XVII century, when the formation of sovereign states began and was formulated in the draft declaration of the National Assembly of France in 1790, was contained in General Treaty for Renunciation of War as an Instrument of National Policy (the so-called The Kellogg – Briand Pact or Pact of Paris) of 1928. As an international legal principle, territorial integrity was first established in Clause 4 of Art. 2 of UN Charter 1945, and subsequently in Declaration on the Strengthening of International Security of December 16, 1970, in Final Act of the Conference on Security and Cooperation in Europe of August 1, 1975, as well as in a number of other international documents.

However, it should be noted that in international law the principle of the territorial integrity of the state is not clearly defined, but related to such principles as: inviolability of state borders (unlawful change of state borders), equality and self-determination of peoples, non-use of force or threat of force, principle of inviolability of state borders (adherence to the passage of the state border in the area and its regime), non-interference, etc. In addition, a sovereign state recognizes the right to use all permissible measures in accordance

with international law to preserve its territorial integrity.

Nevertheless, today there is no holistic concept of the development of international law that corresponds to the modern conditions and needs of ensuring the territorial integrity of the states, which would determine the list of measures that need to be taken to counter such threats, which complicates the settlement of the situation in Ukraine with the help of international legal instruments.

It should be noted that in addition to the above-mentioned documents, the territorial integrity of Ukraine is guaranteed by a number of international legal agreements, primarily the Budapest Memorandum on Security Assurances[1], to which the United Kingdom, the United States and Russia are parties. These countries promised to respect the independence, sovereignty and existing borders of Ukraine, refrain from threats of force or its application against the territorial integrity or political independence of Ukraine. They also assured that none of their weapons would be used against Ukraine, except for self-defense purposes or in any other way, in accordance with the UN Charter.

However, the response to the aggression on the part of Russia and its violation of the territorial integrity of Ukraine were only a series of sanctions imposed by international organizations.

Even before the annexation of the Crimea by Russia in March 2014, the West took a firm common position against Russia on the territorial integrity of Ukraine. In February 2014, US President Barack Obama warned the Russian President that «Any violation of Ukraine's sovereignty and territorial integrity will be deeply destabilizing that is not in the interests of Ukraine, Russia or Europe.» … this will be a clear violation of Russia's obligations to respect Ukraine's independence, sovereignty and borders and international law»[2].

European leaders have taken a similar position. During the 7124 session of the Security Council on March 1, 2014, Britain and France supported the United States in condemning the invasion of Russian troops in Ukraine, recalling the danger of escalating the situation, which threatens the territorial integrity of Ukraine and international law[3]. References to these threats were reflected in the speeches of the representatives of the United States and European countries at the March 3 meeting[4].

As the situation worsened, a critic of the violation of the territorial integrity

[1] Меморандум про гарантії безпеки у зв'язку з приєднанням України до Договору про нерозповсюдження ядерної зброї від 5 грудня 1994 р. URL: http://zakon4.rada.gov.ua/laws/show/998_158.

[2] White House Statement by the President on Ukraine, February 28, 2014 / URL: https://obamawhitehouse.archives.gov/the-press-office/2014/02/28/statement-president-ukraine.

[3] 7124th meeting of the United Nations Security Council / URL: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7124.pdf.

[4] 7125th meeting of the United Nations Security Council / URL: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7125.pdf .

of Ukraine was aggravated. The statements of the leaders of the European Union and North America have been supported by a number of statements of international organizations, including NATO, which stated on March 2, 2014 that «Military actions against Ukraine by the Russian military forces are a violation of international law and are contrary to the principles of the NATO-Russia Council»[1]. On March 7, the Parliamentary Assembly of the Council of Europe «strongly condemned the violation by the Russian Federation of state sovereignty and territorial integrity … and a direct violation of international law»[2].

Moreover, the General Assembly of the United Nations on March 18 adopted a resolution «On the territorial integrity of Ukraine»[3], in which recalled the obligation of all member states in accordance with Art. 2 of the UN to refrain in international relations from a threat of force or its application against the territorial integrity or political independence of any state. The resolution of March 24, 2014 «Territorial integrity of Ukraine» urged all states, international organizations and specialized agencies not to recognize any changes in the status of the Autonomous Republic of Crimea on the basis of the referendum held on March 16, 2014 and to refrain from any actions or steps that could be interpreted as recognizing any change in such status[4]. On February 15, 2015, the United Nations Security Council adopted Resolution No. 2202[5], which recalled «the goals and principles enshrined in the UN Charter and confirmed full support for Ukraine's sovereignty, independence and territorial integrity».

Today, the sanctions have not achieved the goal, but the international community demonstrates readiness to strengthen them for the sake of peace. So, on June 22, 2017, the European Union once again extended for six months economic sanctions against the Russian Federation for non-fulfillment of the Minsk agreements. On July 7, 2017, the Parliamentary Assembly of the OSCE adopted a resolution «Restoration of Sovereignty and Territorial Integrity of Ukraine»[6]. In the resolution of the PA, it acknowledged «full respect» for the sovereignty, independence, unity

[1] North Atlantic Council statement on the situation in Ukraine / URL: http://www.nato.int/cps/en/natolive/oficial_texts_107681.htm.

[2] PACE strongly supports Ukraine's territorial integrity and national sovereignty / URL: http://www.assembly.coe.int/nw/xml/News/News-View- EN.asp?newsid=4908&lang=2&cat=17.

[3] Territorial integrity of Ukraine / URL: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_68_262.pdf.

[4] Резолюция ГА ООН от 27 марта 2014 г. №68/262 «Территориальная целостность Украины». \ URL: http://www.un.org/ru/documents/ods.asp?m=A/RES/68/262.

[5] Unanimously adopting Resolution 2202 (2015), Security Council calls on parties to implement accords aimed at peaceful settlement in Eastern Ukraine / URL: https://www.un.org/press/en/2015/sc11785.doc.htm.

[6] Restoration Of Sovereignty And Territorial Integrity Of Ukraine / URL: https://www.oscepa.org/documents/all-documents/annual-sessions/2017-minsk/declaration-25/3555-declaration-minsk-eng.

and territorial integrity of Ukraine within its borders recognized by the international community, including the membership of the Autonomous Republic of Crimea. Delegates also condemned the temporary occupation of the Crimea by the Russian Federation and the hybrid aggression of Moscow in the Donbass. The resolution «strongly urges» Russia to stop sponsoring terrorist activity in Ukraine through the influx of militants, money and weapons through the uncontrolled by government the part of the Ukrainian-Russian state border and cease to support any illegal armed formations in the Donetsk and Luhansk regions that carry out terrorist acts Ukraine.

The willingness to introduce more rigorous sanctions was demonstrated by the United States, where in late July the Congress passed the Law «Countering America's Adversaries Through Sanctions Act»[1], in which the main focus was on Russia, which is accused of violating the sovereignty and territorial integrity of Ukraine, interference in the course of the presidential election in 2016. The document also confirms the unrecognition of the illegal annexation of the Crimea by the Government of the Russian Federation or the exclusion of any part of the territory of Ukraine using military force.

The problem of restoring territorial integrity is closely linked to the fate of unrecognized states. After the proclamation of the independence of Kosovo, J. Keating published recommendations that should follow secessionist movements in order to achieve their goals: 1) to make sure that there are grounds the right of peoples to self-determination; 2) proclaim independence; 3) to receive recognition; 4) join the club of sovereign states (in particular, to join the UN)[2]. However, far from always, unrecognized states manage to reach the last point. This is evidenced by the existence of four groups of countries depending on the degree of their recognition by the United Nations:

1) UN members not recognized at least by one member of the UN (South Korea is not recognized as North Korea; Armenia is not recognized as Pakistan; Cyprus is not recognized by Turkey; the PRC is not recognized by 23 states; Israel – 24);

2) non-members recognized by at least one member of the UN (Northern Cyprus recognized by Turkey, the Chinese Republic (Taiwan) recognized by 23 states), Kosovo, Western Sahara, the Palestinian state; Abkhazia and South Ossetia are recognized by Russia, Nicaragua, Venezuela and Nauru;

3) recognized only by non-members of the United Nations – Transnistria, the Nagorno-Karabakh Republic;

4) not recognized by any state – Somaliland.

De facto States are usually territories that have gained actual indepen-

[1] H. R.3364 – Countering America's Adversaries Through Sanctions Act / URL: https://www.congress.gov/bill/115th-congress/house-bill/3364%20.

[2] Keating J. How to start your own country in four easy steps / URL: http://foreignpolicy.com/2008/02/26/how-to-start-your-own-country-in-four-easy-steps

dence, often after the war, but who have not been able to obtain international recognition. They can exist for a long time (two years of control over the territory are considered a sufficient criterion), appeal to the right of peoples to self-determination, and insist on their independence from the mother country and neighboring countries[1]. These entities may have a number of attributes of statehood, but they are not members of a club of sovereign states. It is necessary to note that today such quasi-states are not isolated cases in the international system and constitute a serious threat to regional and international security: the territory controlled by them is a potential source of renewed armed confrontation.

Moreover, despite the long history of the existence of de facto states, there are no effective international legal, political, economic or any other means of restoring the territorial integrity of the states in whose territory they arose. First of all, this is due to the incompleteness of the reform of the world order caused by the disappearance of the world arena of one of the main players of the bipolar world – the Soviet Union. Indeed, it was on the territory of the former republics where four (without the DPR and LPR) quasi-state arose, belonging to the second and third groups of unrecognized states. Secondly, most often this phenomenon took place on the periphery of world politics and did not attract due attention from the leaders of Western Europe and the United States. However, the events of 2014 in Ukraine have made significant adjustments to the activities of regional and international organizations, military alliances, in particular NATO. This allows the unification of the efforts of the states and international organizations and finding a comprehensive approach to solving the problem of the existence of «frozen» conflicts, including the settlement of the situation in certain districts of Donetsk and Lugansk regions.

The internal aspect of the territorial integrity of the state is represented by its objective ability to counteract the violation of the inviolability of borders or to restore territorial integrity and adequate state, primarily ethnonational, policy that prevents separatism and any tendencies towards the disintegration of the territory.

In July 2013, the Ukrainian Defense Minister confidently stated that the next seven years of territorial integrity of Ukraine would not threaten, but territorial conflicts with its neighbors are possible[2]. According to the plans of the state authorities by 2017, the strength of the Armed Forces of Ukraine should decrease – 60 thousand people to 122 thousands[3]. However, because of the aggression on the part of the Russian Federation at the end of 2016, 250 thou-

[1] Caspersen N. The pursuit of international recognition after Kosovo // Global Governance. 2015. Vol. 21. № 3. P. 393–412.

[2] Павел Лебедев: территориальной целостности Украины ничто не угрожает / URL: https://www.kommersant.ru/doc/2223606.

[3] Про Концепцію реформування і розвитку Збройних Сил України на період до 2017 року; Рішення РНБО від 29.12.2012 // Офіційний вісник Президента України. 2013. 5 лютого. № 3. Стор. 39. Стаття 76.

sand people were in the Armed Forces of Ukraine, and its defense capability significantly increased compared with 2014.

As for the patriotism of Ukrainian citizens, whose indicator is, first of all, readiness with the weapon to defend the territorial integrity of the state, only about a third of Ukrainians (31%) are ready for this step[1]. At the same time, a little more – 34% – are not ready for such a step. Such results can be partly explained by the fact that for Ukrainians, this question is not hypothetical, but means the possibility and / or duty to resist the armed aggression of Russia. The correlation appears to be in the Netherlands (42% and 43%), and Germany is the only country where the share of those willing to fight for their country is less than the share of non-prepared (41% and 53%), whereas in Poland and Russia, the majority of respondents (71% and 53%) give a positive answer.

At the same time, in Ukraine, the willingness to fight for the country is expressed by the relative majority of residents of the Western region (41%, the negative answer is 32%), while in the Eastern region the relative majority (42%) give a negative answer (positive – 23%). In the Central region, in the South and in Donbass, the proportion of those who give positive and those who give a negative answer is not statistically significantly different. Statistically significant differences among those ethnic Ukrainians (32% and 33% respectively) do not differ between those who give a positive and negative response, while among ethnic Russians there are more negative respondents (26% and 42%). Those who give a positive answer to this question are predominantly those who give a negative answer among Ukrainian respondents (36% and 31%), whereas among Russian speakers (25% and 35%) and bilingual speakers (28% and 40%) more than those who give a negative answer. At the same time, in 2012, sociologists recorded a decrease in the level of readiness to protect their country with weapons in their hands in the last two years (from 43% to 33%), while unpreparedness – on the contrary, increased (from 38 to 54%)[2].

During the post-Soviet period of Ukraine's history, manifestations of ethnopolitical disintegration and separatism were predominantly latent by nature and did not contain such a threat to the ethnopolitical security and territorial integrity of the state, as at the present stage of state formation.

However, post-Soviet polyethnic Ukrainian society was characterized by a high level of deconsolidation, split on the priorities of Ukraine's development, first of all regarding the foreign policy and ethnopolitical vector, indicating the potential threat of disintegration under the influence of certain factors. These peculiarities were caused partly by the fact that the state devoted little attention

[1] Ідентичність громадян України: ціннісно-орієнтаційний аспект (Результати соціологічного опитування) // Національна безпека і оборона. 2017. № 1–2. С. 3–62. С. 12.

[2] Найбільше сепаратистів – серед жителів Півдня та Донбасу / URL: http://tyzhden.ua/News/58213.

to the ethnopolitical split, harmonization, coordination of interests, to the search for compromises acceptable to all constituents of the multiethnic society and all regions of Ukraine in ethnonational policy.

As a result, most of the problems of the ethnonational sphere, which eventually became the grounds for separatism and disintegration, remained unresolved, preserved and accumulated conflict-related potential. The adoption of democratic laws regulating the ethnopolitical and ethnonational sphere in the early 1990s and the ratification of major international instruments in the area of protecting the rights of national minorities proved to be insufficient to prevent the politicization of ethnic groups and the neutralization of threats to the country's ethnopolitical stability.

Ethnonational policy for many years did not respond to the needs of ethnic communities, did not develop effective legal mechanisms for the realization of their rights. The authorities of Ukraine were afraid of the territorialization of the requirements of certain ethnic communities (autonomy, separation), for example, of Rusyn, Crimean Tatars. Therefore, the unsettled nature of a number of ethnic and cultural rights not only of national minorities, but of the nation as a whole remained a powerful ethnoconflict factor, which eventually enabled the deployment of an ethnopolitical conflict on the territory of Ukraine.

In August 2012, an absolute majority of Ukrainians supported neither the separation of Galicia from Ukraine (84%), Crimea (90%) or Donbass (90%)[1]. Only 5% separation of Galicia supported, with less than 1% in the West, but more than 10% in the Donbass and the South. The separation of the Crimea from Ukraine only 3% supported, with less than 1% in the West, 4% in the Donbass and at the same time every tenth person in the South. And the separation of the Donbas was supported by only 2%, with about 2% in the West and at the same time 8% – in the Donbas.

Soon after the annexation of the Crimea, a poll was conducted in April 2014 showed that 77% of Ukrainians, of whom 93% in the West and 70% in the East of Ukraine, supported the territorial integrity of their country. Only 14% believed that some regions should be allowed to separate. In Crimea, only 12% favored territorial integrity, and 54% opposed[2].

Popularization of the political consolidation of the elites by the common goal – the settlement of the ethnopolitical conflict, the reunification of Ukraine, the overcoming of the ethnocultural split, the rejection of ideas about the unnecessary nature of the territories that were split up or were annexed, the deconsolidation tendencies through dialogue, the formation of a single eth-

[1] Найбільше сепаратистів – серед жителів Півдня та Донбасу / URL: http://tyzhden.ua/News/58213.

[2] Опитування американської соцслужби: 77% українців підтримують територіальну цілісність країни / URL: http://tyzhden.ua/News/109361.

nopolitical space, taking into account ethnocultural, historical peculiarities in each region, the accumulation and spread of common values, the common future will allow the end to the use of the deconsolidation as a political technology, will contribute to strengthening the sovereignty of Ukraine and restoring its territorial integrity.

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ABUSE OF PROCEDURAL RIGHTS IN THE ADMINISTRATIVE PROCEEDINGS AS A MANIFESTATION OF CORRUPTION RISKS

Abstract. *The article deals with approaches to the concept of the category of «abuse of procedural rights in the administrative proceedings. Attention is drawn to the fact that this category hasn't had increased interest for the unification of the process of fair consideration of administrative cases. However, it is a very important category and it should be used effectively in the administrative and judicial practice, despite the existence of legal conflicts.*

Key words: abuse of procedural rights, administrative proceedings, procedural integrity, procedural law, objective rights, subjective rights, procedural sabotage, corruption manifestations, procedural protection.

The problem of abuse of legal process by subject of procedural rights granted to them by participants, nonfulfillment of legal obligations is characteristic of any type of legal process of Ukraine (administrative, civil, economic and criminal). So, the existence of these unacceptable possible «corruption agreements» for the rights of those in the field of justice claims O. Yu. Hablo. In particular, she emphasizes that in connection with the development of criminal procedural legislation and the expansion of the legal status of persons involved in criminal proceedings, the number of cases of use of procedural rights to protect those who are not protected by law or interest. This impedes the achievement of the tasks of criminal justice, causes dissatisfaction of the results of law enforcement activities[1].

[1] Хабло О. Ю. Зловживання у сфері кримінального процесу: автореф. дис. к.ю.н.: 12.00.09 / Київ. нац.. ун-т внутр.. справ. – К., 2008. – С. 1

Almost all personalities involved in the case, O. V. Bobrovnik – may abuse their procedural rights in civil proceedings. This negatively affects on the activities of courts of various instances, which are forced to repeatedly review the same case. Therefore, the author, the court should be empowered on the initiative of the party whose rights are violated, to determine the requirements of another participant in the process, which should be regarded as abusing procedural rights and adequately respond to them[1].

The cases of abuse of procedural rights and participants in the process of economic legal proceedings in Ukraine are widespread in our time. Therefore, the emergence in administrative proceedings of the abuse of procedural rights involved in it, violation of the principle of good faith, can be considered the expected consequence of the introduction of the functioning of a judicial mechanism for the protection of subjective legal capacity (rights and legitimate interests) physical and legal persons in the public power sphere in order to decrease corruption risks. After all, as O. S. remarks Background, the negative phenomenon of abuse of procedural rights exists since the state-regulated legal process for resolving disputes in society. Since the person has been granted legal capacity in the trial, she has a desire to use the granted rights not for the purpose, in order to cause negative consequences for the other party to the dispute[2].

Today, A. Zabrodsky notes, the problem of abuse of procedural rights has become a stable negative tendency in domestic legal proceedings, a common means of achieving success in any litigation[3]. This is due to the fact that A. Smithuk rightly emphasizes that every experienced lawyer tried at least once in his practice to prevent loss in the case, using procedural institutes not intended[4]. Meanwhile, such «tactical moves» with legal knowledge of participants in litigation, including those related to the resolution of cases of administrative jurisdiction, do not have a positive effect on the possibility of prompt and timely judicial protection of the rights and legitimate interests of individuals and legal entities in Ukraine, which constitutes the constitutional task of justice in our state, ultimately damages the image of the judiciary and the implementation of the rule of law. In this regard, the use by participants in court proceedings, in particular administrative court proceedings, of non-assignable procedural rights to the detriment of the other party to the dispute

[1] Бобровник О. Зловживання процесуальними правами в цивільному процесі // Право України. – 2008. – № 7. – С. 29.

[2] Фонова О. С. Зловживання процесуальними правами учасниками господарського процесу // Соціально-економічні проблеми сучасного періоду України. Збірник наукових праць. – 2008. Вип.6 (74). – С. 187.

[3] Забродський А. Зловживання правом як загальна тенденція процесу // Юридичний радник. – Х.: Вид-во «Страйд», 2006. – № 5 (13). – С. 26–27

[4] Смитюх А. Что такое процессуальные диверсии // Юридическая практика. – 2005. – № 1 (367). – С. 12, 13.

and as a consequence of the interests of justice as a whole, requires the adoption of adequate legal measures, primarily anticorruption, to counteract such acts or inactivity, bringing the guilty to liability established by law or imposing other legal restrictions on them.

Abuse of subjective procedural as well as subjective material rights in general in any case is a manifestation, violation of the principle of fair use of these legal possibilities, which today is the basis of initiation and movement of administrative court proceedings (part two of Article 50 of the KAC of Ukraine). The category of «honesty» is the basic notion of law since it began to be considered as a measure of social justice and a way of ensuring it. Therefore, as D. G. Pavlenko, this concept was put into circulation in Roman private law[1]. In our humanistic time, the concept of this category has also penetrated into the public-law branches, which include administrative litigation. Thus, the tax law of Ukraine already has an axiomatic existence of the presumption of good faith of the taxpayer[2] [7, p. 77], as well as in the Customs Code of Ukraine (Article 8), the principle of integrity was introduced[3] [8].

The concept of bona fide use of subjective legal possibilities, including in the field of legal proceedings, began to evolve from the term «fides» introduced in the days of ancient Rome. As noted by M. Bartoshek, under him understood his own honesty and trust in someone else's honesty, loyalty to this word, the moral obligation of all people to fulfill their obligations, whatever they were. The notion of «bona fide» in the sense of a strict connection with its own statement and the mutual trust of the contracting parties was denoted as «bona fides». There was also the opposite of the content of this category the term «mala fides», which meant that fraud[4].

At the same time, the problem of abuse of legal personality in legal proceedings is characteristic for all types of litigation based on a compelling procedural form established by law, in any civilized country.

Meanwhile, in the administrative judicial process of Ukraine, taking into account its introduction only in 2005, as in material administrative law, the phenomenon of abuse of subjective legal capabilities, in particular public authority competence, is practically unexplored. In modern native administrative-legal science, in the circumstances of its existence in the area of administrative activity of the executive authorities one of the first accentuated the attention of Professor O. A.

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[1] Павленко Д. Добросовісність як принцип господарського процесуального права // Юридичний журнал. – К.: Вид-во «Юстиніан». – 2005. – № 5. [Електроний ресурс]. – Режим доступу: http: // www.justinian.com.ua/article.php?id=1734

[2] Податковий кодекс України від 02.12.2010 № 2755-VI // Відом. Верхов. Ради. – 2011. – № 13, / № 13–14, № 15–16, № 17. – Ст. 112

[3] Митний кодекс України від 13.03.2012 № 4495-VI // Відом. Верхов. Ради. – 2012. – № 44–45 / № 46–47, № 48. – Ст. 552.

[4] Бартошек М. Римское право (Понятия, термины, определения) / пер. с чешск. – М.: Юрид. Лит., 1989. – С. 131, 132.

Selivanov in the monograph «The administrative process in Ukraine: the reality and prospects of the development of legal doctrines» (2000). In particular, while the scientist noted that «often in practice creates an illusion of an effective administrative process in public administration, but in reality, the law does not apply to the individual, its relations with state executive bodies may be arbitrarily»[1].

It should be noted that the introduction of the administrative judicial process in Ukraine just has become a modern civilized way of preventing and stopping the abuse of the national public power mechanism granted to it by material and legal powers, ensuring the prosecution of the guilty of such facts of officials. This conclusion follows from the provisions of part three of Art. 2 KAS of Ukraine in which the tasks of the administrative courts are assigned to verify whether the decisions, actions or omissions taken (executed) by the subjects of the authority are: 1) on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine; 2) using the authority for the purpose with which it was provided; 3) justified, that is, taking into account all the circumstances relevant to the decision-making (commission of action); 4) impartially (impartially); 5) in good faith; 6) reasonable; 7) observing the principle of equality before the law, preventing unfair discrimination; 8) in proportion to, in particular, the observance of the necessary balance between any adverse consequences for the rights, freedoms and interests of the person and the goals to which this decision (action) is directed; 9) taking into account the right of a person to participate in the decision-making process; 10) in a timely manner, i.e., within a reasonable time.

At the same time, with the commencement of functioning of the administrative judicial mechanism, the control over the legality and validity of the exercise by the public authorities of its powers, the problem of abuse of his subjective rights has not completely disappeared, but only has evolved from the material to the procedural and legal sphere. This is the appearance of cases in our time the use of representatives of the authorities – respondents in cases of administrative jurisdiction, provided to them procedural rights are not intended. First of all, this is manifested in attempts to delay litigation in order to postpone the adoption of unfavorable court decisions in cases at a later time. In addition, non-provision by administrative bodies, at the request of the courts, necessary for the resolution of a public-legal dispute, judicial protection of the rights and freedoms of citizens, rights and legitimate interests of legal entities of materials, non-appearance of representatives to court hearings, appeals for the apparent lack of prosecution of court decisions in all possible court instances, etc.

Along with the aforementioned, abuse of procedural rights, mainly in

[1] Селіванов А. О. Адміністративний процес а Україні: реальність і перспективи розвитку правових доктрин: наук. видання. – К., Вид. Дім «Ін Юре», 2000. – С. 28.

the form of unreasonable appeal to administrative courts by claims to various authorities, officials, have become a typical phenomenon of citizens. The purpose of such actions may be to declare in such a way their political, economic, social or other views (ideas) to the general public, «paralyze» the activity of the power mechanism by distracting it from solving the main tasks, which may act as revenge for the unfavorable for the applicant managerial a decision or, in general, a consequence of any, including unreasonable, personal dislike or disappointment in the social-property situation, social prejudice, in the current anti-corruption system manifestations.

Moreover, taking into account the probable «failures» in the work of the administrative or judicial apparatus, their congestion, by initiating consideration and resolution of cases of administrative jurisdiction by citizens, may be pursued by the purpose of accumulation of facts of certain violations of individual rights of a person in the sense of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 year (lengthy legal proceedings, non-enforcement of judgments, refusal to provide legal protection, etc.) in order to obtain a decision by the European Court of Human Rights on prosecution that applicant, a certain amount of satisfaction for the improper work of the state mechanism, violation of its activities of one or another guaranteed personal rights and freedoms[1]. The phenomenon of unreasonable initiation of litigation against the authorities, their officials with the flourishing of civil liberties in the former Soviet territories, in general, became massive and has the title «blasphemy» in the jurisprudence[2].

The foregoing determines the urgency of the scientific study of the problem of abuse of rights in the administrative court process, and especially the processing of effective legal methods to combat this negative phenomenon, its prevention, termination. However, in the domestic administrative-legal science, there are no gains in solving this problem, the legal response to the use of subjective procedural possibilities not for the purpose for which they are provided. In this regard, in view of the similarity in the nature of abuse of procedural rights in all existing types of legal proceedings, constructed on a dispositive and competitive basis, in our opinion, as the theoretical basis for the administrative and legal development of these issues, clarification of the essence and forms this unacceptable for the sphere of administrative justice phenomena and the struggle against it, the application objectively need the relevant, related to ensuring integrity, the provisions of the general theory of law and sectoral procedural disciplines.

From the following, the main oblig-

[1] Константий О. В. Конституційні перетворення не можуть оминути правового механізму судового захисту основних прав і свобод людини і громадянина // Бюлетень Міністерства юстиції України. – 2007. – № 1. – С. 12–18.

[2] Бурков А. Л. Судебная защита прав граждан от незаконных нормативных актов. – Екатеринбург: Изд-во Урал. Ун-та, 2005. – С. 127.

atory essential features of the phenomenon of abuse of subjective rights is, firstly, the implementation of the appropriate legal capacity contrary to the purpose with which it is provided (enshrined in the law), and secondly, the harmfulness of activity from such the use of law, the onset of any adverse consequences (material, legal) for the objects of providing objective rights.

In modern legal science is already a well-established consideration of the abuse of subjective rights as one of the forms of offenses. In particular, the definition of abuse in subjective law may be filed through the design of the offense, namely, as a guilty act (action or inaction) that directly or indirectly directed against the integrity (constitutional) order of social relations, causes damage and / or damage to personal and / or public goods and legitimate interests of individuals, expressed in concrete forms of the use of human rights or freedoms and based on the principles of good and faith behavior of participants in the administrative-judicial process.

However, unlike other types of legal delinquency, abuse of subjective right is latent, such that it is difficult to disclose an act against the principles of integrity. At the same time, the social danger of abuse of subjective procedural rights lies in the fact that the external actions of the person are within the legal framework, but in fact they are detrimental to the interests of justice and the interests of other participants in the trial. The danger of such an act can be several times greater than the danger of an «ordinary» offense: illegal acts are externally executed in a legal form and therefore capable of causing significant harm as they cause corruption risks in the area of justice.

The peculiarity of the approaches to understanding the concept of «abuse of subjective law» in administrative proceedings is that they primarily focus on the issues of objects, which as a result of such acts is harmful. Meanwhile, in our opinion, while unjustifiably not paying enough attention to the aspect of the use of individual rights not for the purpose with which it was provided. Thus, the administrative process dominates the understanding of the essence of abuse of procedural rights, as the parties' implementation of their rights to achieve goals incompatible for the purpose of the process – a fair and rapid resolution of disputes.

Based on the subject of the research, it should be mentioned that abuse of procedural rights occurs when, as a result of the exercise of the right, an obstacle is encountered in solving the tasks of the administrative process specified in the laws of the Code of Administrative Procedure. At present, the abuse of procedural rights, sharply dissociate from the goals and objectives of administrative justice proclaimed by the legislator. Proper and timely consideration and resolution of administrative cases in the context of procedural unfairness becomes burdensome, since the actions of the subject of the offense impede solving these tasks and actually create the corresponding corruption risks.

At the same time, in today's conditions of filling the individual-centered

content of the activities of the Ukrainian state and its agencies[1], which is caused by the effect of the provisions of Article 3 of the Constitution on the recognition of a person, his life and health, honor and dignity, inviolability and security of the highest social value, the ultimate goal of the organs of justice is not to ensure «comfortable» conditions for their work, but effective judicial protection of the rights and freedoms of citizens, the rights and legitimate interests of legal entities in the public-power sphere. Therefore, in our opinion, it is quite obvious that because of the abuse of subjective procedural rights by persons involved in administrative cases, the interests of all are the interests of other specific participants in the relevant lawsuit, the purpose of judicial protection of their violated (limited) individual legal capacity (part the first article 2 of the CAS Ukraine), and only then – the task of the functioning of administrative justice in relation to the speedy and correct resolution of cases.

From the very term of «abuse» it follows that a person deliberately uses the given legal possibility (a certain variant of permitted conduct), including in an administrative proceeding, not for the purpose or with exceeding its limits (volume) in the case known to legal science as «abuse procedural law ". That is, abuse of procedural law as a form of procedural offense is always committed intentionally, on the basis of volitional, consciously aimed at achieving a certain desired result for the person concerned in a «legally incorrect» way.

It will not be an abuse of the right to mislead (unconscious) the use of one or another procedural possibility (or refrain from taking actions, when required by law), although from the specified and there may be some negative consequences for the proceedings (for example, delaying the trial due to the petition of the petition for requesting the respondent (subject of authority) documents that, in his opinion, may contain information that is relevant to the resolution cases, but in fact they do not contain them).

Another compulsory sign of abuse of procedural law as grounds for applying to the subject of his commission by the court of any unwanted measures is the offensive from such behavior of certain damage to the tasks of administrative proceedings (for example, postponement of judicial protection of violated «restricted» rights or freedoms of the person, unreasonable initiation of the trial, which entails expenses of the material and other resources of the state providing the work of the judiciary or the defendant). It is impossible to consider the procedural offense of actions committed contrary to the purpose with which they are authorized to carry out, if it did not lead to the occurrence of certain negative material or legal consequences for other participants in the administrative judicial process or judicial proceedings in general, in particular, exceeding the limits of procedural capacity which is constructive in nature (for example, provides for the prompt

[1] Адміністративне право України. Академічний курс: підруч.: у 2-х т.: Т. 1. Загальна частина / ред. колегія: В. Б. Авер'янов (гол.) та ін. – К.: Юрид. думка, 2007. – С. 7–9.

decision of an administrative case in a way that takes into account the interests of both parties).

Consequently, the abuse of subjective procedural law in order to be recognized as such should be destructive (harmful) to the nature of the process or its participants. In this sense, it is close to the one used in the everyday vocabulary of practicing lawyers for the term «procedural sabotage», which relates with the tactics and legal technique of participating in the trial in order to ensure the achievement of the most favorable for the «client» result in in any legal approximation.

The nature and forms of procedural sabotage in domestic legal proceedings as an objectively existing phenomenon of legal reality were investigated by A. V. Smithukh, which, in particular, gave them definition «as an indirect and destructive action on the use of procedural rights of the person taking part in the trial, in order to make it difficult for the opponent to win the legal conflict in general or to harm his particular interests». In this case, the researcher noted that in modern conditions of distorted enforcement, procedural sabotage is often the only one an effective response to actions aimed at resolving a dispute of the other party that has all signs of abuse of the law[1].

However, actions denoted by the term «procedural sabotage» may, in their content and forms, have a more destructive, dangerous character compared to the abuse of procedural rights. In particular, they can be committed not only within the limits of a particular court process in order to achieve the desired result, but also outside it. Thus, the form of such measures may be the initiation of another proceeding, including claims of third parties; in order to simplify the solution of procedural tasks in the main or to prevent its effective completion (for example, by imposing an arrest on objects of property rights, the prohibition of certain actions or the invalidation of constituent documents of the opposite party of the process, etc.). In addition, sometimes procedural diversion refers to the application of not only legal but apparently unlawful measures to ensure the desired result in a litigation (for example, in the form of psychological pressure on the other party or judge, etc.).

On the basis of the foregoing one can conclude that there are no sufficient grounds for introducing the category of «procedural sabotage» into the system of knowledge of the theory of judicial administrative process, and especially for its consolidation in procedural law, since in many of its manifestations it is not related to the application of law, does not mean actions committed with exceeding its limits or not for the purpose with which the appropriate opportunity is provided, but indicates an obvious (open) offense, which requires qualification under the rules of the criminal, the administrator rational or anti-corruption legislation.

[1] . Смітюх А. В. Процесуальні диверсії та зловживання процесуальними правами в умовах правової реальності України // Вісник господарського судочинства. – 2007. – № 1. – С. 89–92.

Consequently, the notion of «abuse of procedural rights» and «procedural sabotage» are diverse in the actual sense of the phenomena, for the administrative judicial process are not the same and the same negative for harmful consequences, stipulate the need to apply for the commission of appropriate actions not the same types of legal responsibility – procedural or criminal, administrative (depending on the forms of illegal influence).

However, ideally, they are simultaneously and close enough in content, since in both cases there is a disregard for the legal principles of legal proceedings, the impossibility of rapid, operational fulfillment of its tasks, judicial protection of the rights and freedoms of the individual, the rights and legitimate interests of legal and natural persons.

Thus, in the administrative justice of Ukraine, it is possible to identify the following groups of abuse of procedural rights: 1) the scale of their application: abuse of the administrative judicial procedure as a whole (the right to an administrative suit) and abuse at certain stages (stages) of the process; 2) Depending on their impact on the outcome of the case: abuses that have made him an appropriate action (consequences); 3) taking into account their quantity: single and plural; 4) Depending on the subject of the commission: abuse of the parties and third parties (materially interested in the outcome of the case) and their representatives.

So, summing up the above-mentioned, one can conclude that today in the administrative procedure there are serious problems of abuse of procedural rights, which require an immediate solution. In order to remedy this situation, it is necessary first of all to improve the legislative framework for more coordinated work of the anticorruption direction of administrative courts; it is necessary to resolve certain cases, drawing attention to the conclusions and recommendations of the European Court of Human Rights (ECHR), it is necessary to create the proper working conditions of the court apparatus, assistants and secretaries of the court session. Only by observing these requirements, it can be argued that administrative judicial proceedings of Ukraine will be characterized by considerable efficiency in the consideration of administrative cases.

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SOURCE OF TAX PAYMENT AS AN ADDITIONAL ELEMENT OF TAX MECHANISM

The article is devoted to the analysis of the legal nature of the source of tax payment. Its definition as an additional element of the tax mechanism, which has independent significance is presented, specifics of its legislative regulation are considered.

Key words: *tax, fee, legal mechanism of tax payment, additional element, source of tax payment.*

The current legal mechanism of tax payment can work only as a single system that combines existing components. It is in this way that we can achieve a constructive result in the field of taxation. However, its conditional structuring is objectively needed, and corresponding differentiation is not purely theoretical but has immediate practical value. First of all, classification of the elements of tax mechanism must be considered in its legislative regulation. Another thing is how it was promptly and professionally implemented, particularly in codification of the domestic tax laws.

The simplest internal grouping of the tax legal mechanism traditionally consists of mandatory and optional elements. This separation is generally supported by the majority of the scientists and has virtually no objections. However, it is unlikely that the result of this classification should be considered final, and stopping this process is not yet justified. More consistent with the existing realities is the further structuring of mandatory elements and allocation in their array of basic and additional elements of the tax mechanism. Academician M. P. Kucheryavenko was the first financial expert who developed such a classification, as well as researched the problems of the division of additional elements into subsystem elements: a) those that detail the main components

of the tax mechanism; b) those with independent value[1].

At the same time, «additional elements» is the most numerous and diverse group of components of the tax mechanism. They detail the specifics of a particular payment, create a complete system of the tax mechanism and provide a logical and rational mode of its consolidation[2]. A source of tax payment takes a special place in this particular group. Firstly, such an understanding of this component is influenced by its essence as a source (by origin), and at the same time securing (aimed at proper implementation, a kind of «guarantor») toolkit. A similar dualism is inherent for understanding the term «source» in science and is reflected in the special weight of the outlined multidimensional concept. It is no coincidence, that in historical science, this component is formed and developed as a source study. Secondly, in the context of the tax source, one can speak about certain levels of filling, connecting vessels. After all, the source of tax at the same time serves as a source of public finance formation, that is, it is a «source of a source» in the area of accumulation of public financial resources.

For all its significance, the source rarely becomes the subject of scientific research. At the same time, the scientific searches on this topic and the results achieved are often characterized by descriptive and applied nature, superficiality, episodicity and contradictions. Therefore, it can be argued that in the scientific community there is no unity in understanding the nature and specificity of the outlined phenomenon. At the same time, scientific discussion of these problematic issues is virtually absent. As for the educational literature on financial and tax law, this legal category gets a cursory mention (in the context of the tax mechanism) or is absent. It is unlikely that the science of financial law and practice of law enforcement will benefit from the fact that such a multifaceted and complex notion as a source of tax payment does not receive an adequate professional support.

In addition, it should be emphasized that the source of tax payment (tax source) caused a scientific interest in the classics of financial law. Although chosen approaches not always can be recognized as indisputable. Thus, I. I. Yanzhul distinguished three main elements of taxation: the subject of tax; object or source of tax; tax rate. At the same time, the tax source was defined as a part of the national property from which taxes should be drawn from[3]. As we can see, formulation it in this way a well-known scholar somewhat exceeded the real value of the source. This conclusion was probably based on the identification of the object and the source of tax. Sometimes the source

[1] Кучерявенко М. П. Теоретичні проблеми правового регулювання податків і зборів в Україні: автореф. дис. … д-ра юрид. наук: спец. 12.00.07. – Х., 1997. – С. 10.

[2] Кучерявенко М. П. Податкове право України: підручник / М. П. Кучерявенко. – Х.: Право, 2012. – С. 150.

[3] Янжул И. И. Основные начала финансовой науки: Учение о государственных доходах. – М.: Статут, 2002. – С. 247.

may coincide with the subject of taxation (for example, the income for the collection of personal income tax), but in the vast majority of cases these are two different categories both by nature and by their purpose (there are even more differences between the source and the object of tax). Indeed, unlike the subject of taxation (one of the integral components of such a basic element of the tax mechanism as the object of taxation), the source of tax is an additional element of the legal mechanism of the tax payment. If subjects of taxation are things of the material world with the presence of which tax law links the emergence of a taxpayer's duty to pay taxes or fees, then the source of tax – is the reserve, a kind of payer's «wallet», at the expense of funds for which tax liability is eventually realized.

The source of tax is not included by the domestic legislator in the list of elements, which must necessarily be determined during the establishment of the tax (Article 7.1 of Article 7 of the Tax Code of Ukraine). This category is absent in the Tax Code of Ukraine[1]. In the meantime, this fact in no way reduces the mandatory nature of the outlined element of the legal mechanism of the tax payment. The source is necessarily present in the tax mechanism of any tax payment. Otherwise, in the absence of the appropriate «piggy bank» the payment of taxes or fees becomes impossible. Another thing is that formally legal regulation of the tax mechanism of a particular tax or a fee may not contain (and often does not contain) indications of a specific source of tax payment. The above-mentioned situation is not a result of the legislator's negligence. On the contrary, such a decision is quite conscious and well-considered. It can be regarded as a separate manifestation of the intersection in the tax regulation of dispositivity. The payer is given some freedom in choosing a convenient option for him. Thus, the decision as to which asset it can use to pay a tax payment is given at the discretion of the payer. This approach gives grounds for the optionality of the source of tax (its optional determination in the legal «scheme» of the legal mechanism of a specific tax payment).

Along with this, the current tax legislation of our state provides for cases where the source of the tax payment is determined without an alternative. This applies to situations when tax agents or representatives of a taxpayer are involved in the collection of taxes or fees. In particular, the general procedure for the calculation, retention and payment (transfer) to the budget of the personal income tax, provides that a tax agent who pays (provides) taxable income in favor of the taxpayer, is required to withhold tax from the amount of such income on his account (Sub-article 168.1.1 of Article 168.1 of Article 168 of the Tax Code of Ukraine) [4]. That is, the source of the tax in this case is exclusively these revenues and nobody asks the payer or tax agent if they object, whether they have another form of payment or not. It is obvious that this approach is the result of a deliber-

[1] Офіційний вісник України. – 2010. – №92. – Ст. 3248.

ate restriction of the initiative of a tax agent or a representative of a taxpayer to minimize the possibility of committing unlawful actions; it serves as a kind of precautionary measure for the negative consequences in the interests of the payer and the state.

At the same time, the source of tax as an element of the tax mechanism rarely complements or clarifies the object of taxation, as well as none of the other main elements. Moreover, it is not correct to discuss their close connection, because they operate at different levels of the tax mechanism. Interdependence between them as such is absent, but they do can accidentally coincide (mainly in relation to taxes and fees from profits). Therefore, under the above conditions, it is more accurate to characterize the source of tax as an additional element of the legal mechanism of tax payment, which has an independent value.

In modern legal literature, the source is mainly identified with the cash of the taxpayer. In our opinion, this approach does not bring the scientific community closer to an objective answer to the questions about the perimeter of the «natural territory» of this legal category. We believe that determining the source of tax payment as an additional element of the tax mechanism will help solve the following problems (presented here in an arbitrary order):

1) Categories «form» and «source» of tax payment cannot be mixed. In fact, the form of tax payment, as a rule, is monetary (cash or non-cash). Even in the very few cases in the national tax history when taxes with a natural form were included into the tax system, the direct contribution to the budgets was carried out in cash. In addition, the question of the form of tax payment belongs to the additional element of the tax mechanism – the procedure of paying taxes and fees (that is, it is part of the tax process). The source of the same tax is mainly a material component; it is those tangible and intangible values that ensure the implementation of the individual's tax liability. As for the legal definition of its boundaries, among the scientists the general rule is to choose the widest option – inclusion of the maximum number of existing varieties of assets. In this case, the restrictions should not be arbitrary;

2) Obviously, the optimal direction in determining the source of tax can be considered income received by the payer. It is in this case that the person's wealth will not decrease, payment of taxes will still be possible and eventually will not lead to bankruptcy. This option, in our opinion, is the most equitable and one that can somewhat reduce the conflicts of tax relations (both in economic terms and in psychological terms). Therefore, the efforts of the legislator to expand the cases of indication of income as the only possible source of tax payment could only be welcomed. It needs to be stressed that the form of tax payer's income is essential for taxation. It is necessary to distinguish four basic forms of income: a) wages; b) profits; c) land rent; d) interest on capital (loan interest). However, income can have a «disguised» character. Thus, in determining the source of property taxes and

fees, one should not ignore the fact that mainly property objects were acquired in due time at the expense of income received. That is, in such a situation income (albeit hidden) already exists in the property;

3) It should be emphasized that the payment of taxes or fees at the expense of non-income and other assets of the taxpayer may be justified primarily in natural or man-made emergency situations (natural disaster, transport accidents, nuclear or hydrodynamic accidents etc.) or political events (revolution, war, acts of terrorism etc.). Because in these critical situations taxpayer himself understands that it is better to lose a part than to lose everything. In general, the realization of the tax objects itself (for example, the sale of a land plot for the payment of land fees) or the inclusion of processes resulting in a decrease in its efficiency (when tax payments are made at the expense of funds planned to expand production or its reconstruction) are possible to make the payment. Thus, due to the share of assets, it is possible to solve temporary extraordinary fiscal problems and to achieve not only stabilization of the situation, but also further constructive transformation of economic activity at the macroeconomic and microeconomic levels, stimulation of household development;

4) We proceed from the fact that the term «source of tax» deserves a much broader interpretation than what scientists currently offer. After all, the source of tax not only includes income, but also property component. Along with this, the payer can pay a tax payment at the expense of credit funds, as well as at the expense of means of targeted financing, proceeds from bonds etc.;

5) In legal literature, along with the income as a source of tax payment, a category that is often interpreted as «capital» is used. The payment of taxes or fees in this case is made regardless of income or profit. The determining factor in this case is the presence of the object of taxation (possession of property, transactions of sale or exchange of property etc.). One should not ignore the fact that economists argue that the definition of capital is closely associated with entrepreneurial activity. Thus, in determining the source of tax payments in cases when payers are individuals, the use of the category «capital» is not undeniable, since it is not undeniably universal in subject matter. Incidentally, we can propose another («technological») aspect of the analysis of income and capital of the taxpayer as sources of taxation. Under all convention, income in this case is a term that represents dynamics and capital – static. Assets of a taxpayer, on the other hand, are a broader category that encompasses both static and dynamics. At the same time, it should be noted that motion and static in this case are relative concepts. With regard to the assets of the taxpayer, in the outlined context this category should be understood as means, tangible and intangible values belonging to a legal entity or a person (taxpayer) under the ownership or other substantive rights

(the right of economic management, the right of operational control).

As we have already noted, the current tax legislation of our state does not contain a definition of the source. Domestic lawmaker prefers another category – the source of self-payment of monetary obligations. Thus, Paragraph 1 of Article 87.1 of Article 81 of the Tax Code of Ukraine [4] stipulates that sources of independent payment of taxpayers' monetary obligations are any own funds, including those received from the sale of goods (works, services), property, issuance of securities, in particular corporate rights received as a loan and from other sources, taking into account the features specified in this article, as well as the amount of excess payments paid to the corresponding budgets. Along with this, the legislator also establishes the specifics of the source of independent payment of monetary obligations from such an indirect tax as a value added tax (Paragraph 2 of Article 87.1 of Article 87 of the Tax Code of Ukraine) [4]. In this capacity, in addition to the above components, the amounts of funds accounted for in the system of electronic administration of value added tax are also determined.

Particular attention deserves delimitation of the source of tax payment in the case of self-payment of taxes or fees (with the voluntary execution of the tax duty) and the source in the case of the forced collection of its amount (with the forced repayment of tax debt). They may coincide, but these are two different legal categories. It is not at all accidental that the domestic legislator establishes a limit – it defines a number of assets that cannot be used as sources of repayment of tax debt (Article 87.3 of Article 87 of the Tax Code of Ukraine) [4]. In total, the legislator highlights eight categories of relevant values, in particular, the taxpayer's property, which was given to him by pledge to other persons, if such a pledge is registered in accordance with the law until the moment of the emergence of the right for a tax pledge; proprietary rights of other persons, provided to the taxpayer for use or possession, as well as non-property rights, including intellectual property rights, transferred without the right of their alienation; property the free circulation of which is prohibited in accordance with the legislation of Ukraine; property included in the integral property complexes of state enterprises that are not subject to privatization; property belonging to the ownership of other persons and owned or used by the taxpayer; property that cannot be the subject of a pledge in accordance with the Law of Ukraine «On Pledge»; funds of other persons, provided to the taxpayer in a deposit or trust management, as well as own funds of a legal entity, used for payment of arrears of basic salary to individuals who are employed in such a legal entity.

Thus, the analysis of the legal nature of the source of tax payment allows to determine it as an additional element of the tax mechanism, which has an independent significance. In our view, it is advisable to enter into Sec-

tion 1 «General Provisions» of the Tax Code of Ukraine a separate specialized article «Source of tax payment» in order to solve the existing problems. The definition of the outlined category and the basic (general) aspects of its legal regulation should be enshrined there.

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CIVIL-LEGAL SCIENCES

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THE SUBJECT AND THE SYSTEM OF CURRENT CIVIL LAW OF UKRAINE

Annotation. *Based on fundamentally new approaches to regulate civil relations – from the perspective of civil society and market economy – the subject of civil law and its methodological foundations are researched. The subject and the method of legal regulation are correlated in order to determine which of the is primary in the process of legal regulation and legal entities formation. The structure of the subject of civil law is analyzed. The questions related to the place of civil law in the system of law, in particular in the system of private and public law, are considered. In terms of systematization of civil law norms, characteristic of its system is given. General conclusion is drawn that with the renewal and deepening of private principles to regulate public relations at the present stage, the subject of civil law regulation is expanding due to the coverage of new public relations by private law, which causes corresponding changes in the civil law system that characterize the process of its further institutionalization.*

Key words: *civil law subject, civil law method, civil law system, legal regulation, private law, public law.*

From the historical events, when the new private law of Ukraine began to emerge almost a half of the century separates us. It's time to understand both the subject of civil law itself and its methodological foundations in the context of fundamentally new approaches to regulating of civil-law relations – from the standpoint of civil society and a market economy. Methodology of civil law – is its basement, on which private law is formed and kept.

Discussions on these problems do not subsist till now and are especially acute in the period of codification works. The adoption of civil codes often does not contribute to the completion of discussions, but vice versa,

changes direction or even exacerbates them.

And now, after completing the codification of civil law, having some practical experience in applying the Civil Code of Ukraine (hereinafter – c.c. of Ukraine), it is important to answer some questions: what does civil law make for; can we disregarding today's realities (economical, political, social), base ourselves upon socialistic legal doctrine of 60-s last century; is it possible without certain clarifications and precautions to use prerevolutionary doctrine of civil law?

Despite the clarity of the raised questions, it is difficult to answer them. It is necessary to understand as accurately as possible the content of modern civil law structures, to penetrate more deeply into their legal nature, to see better their regulatory potential.

The moment of glory of civil law has come, since not only civilians, but also legal co-authors in general try to find out what is the subject of civil law and what is primary in the process of legal regulation and development of systemic legal formations – subject or method of legal regulation. Until we find any standing point in clarifying and resolving this issue, we will not find the exact answer.

May be statement of the question itself: what is main – subject or method? – is in its basement wrong. Certainly, by detecting criteria of systematic legal and regulatory formations delamination, which are traditionally named as branches of law, very important for us is such a field of social relations, that is subject to the relevant legal instructions (statutes of the law).

The subject of legal regulation is not the law. In this meaning the method of legal regulation also is not the law. However, we cannot detect homogeneous legal arrays in any other way, as through the prism of the subject and the method of legal regulation.

In no way diminishing the meaning of the subject (i.e. Those social relations that are part of the field of legal regulation), we however should always remember, that the method itself is the tool (mechanism), with the help of which we search social relations, which are covered with the subject of civil law. In this meaning method – is a peculiar «indicator of civilism». However, it does not exhaust its role in the process of legal regulation, but «manifests itself» in the civil law relations by revealing their private legal content. At the same time social relations acquiring the legal form of civil law relations carry the characteristic features of the method, which are peculiar to the civil law: legal equality of participants, discretion of rights and obligations, organizational and property autonomy etc.

In this way, a sign of the legal equality of subjects – is a sign, specific only to the method of civil law regulation, or it is also immanent to the subject?! It is quite clear that this problem requires detailed analysis, that should be based not only on the civilist doctrine, but also on the practice of applying civil law.

At the same time, there is no doubt that the object and method in its organic combination are those factors that make

it possible to reveal in the social relations the measure of privacy that gives them the most private law characteristic as a necessary and sufficient basis for inclusion in the subject of civil regulation.

As rightly observes R. Stefanchuck «the subject of civil law must be formed only by the separation of the general principle, which is decisive for the definition of certain relations as the relations of civil law. <…>Such principle is *civil right character* of pointed out relations. Which means that the subject of civil law can be only relations, that are based on legal equality and freedom autonomy and free expression of the will (discretion) of their participants» [1, 90].

In the process of transition to a market economy, there was reanimated division of the public and private law, which was characterized by the return to the origins of the classical private law doctrine. In this context, as we move forward, we try to systematically isolate the private legal principles of our being and introduce them into the realm of private law.

However, at the same time, we are faced with objectively existing difficulties, since private law does not exist in a «sterile form», that is, completely separated from any public-law inclusions (in the form of individual norms, clauses, and possibly, instruments).

Famous civilist L. Chanturia rightly states: «… even though the legal science unanimously recognizes the division of the right to private and public, we must not portray them as isolated from each other and finely divided phenomena. Such a gap is practically impossible. This is especially evident in the study of private law, since private and public interests and relationships are closely interwoven» [2, 56].

The legal literature states that the guarantees of the implementation of civil rights are established by means of public law, since they involve the use of coercion.

The issue of coercion in civil law makes it necessary to involve those public-legal mechanisms that ensure the normal functioning of subjective civil rights.

At the same time, the use of coercion in civil-law relations has its specificity.

Forcible measures in civil law are characterized by the same signs as the civil law method, they are imbued with the principles of civil law and reflect its functional purpose.

These measures play a limited role in civil law, in comparison with other sectors, especially those that fall under public law. Civil law solves the problem not only using coercive measures, but also by ensuring the parties' interest in fulfilling their own obligations for acquisition and enjoyment of their rights. Therefore, the main warrantor of legal order in the field of civil law is not compulsory measures, but the availability of onerousness and equivalence in the mutual relations of the parties [3, 214].

Analyzing the composition of the subject of modern civil law in its dynamics, it is possible to notice uncon-

ditional tendencies of expansion. First, this can be illustrated by the example of corporate relations regulation of which is carried out not only by the rules of private (and primarily civil), but also the rules of public law. The above mentioned is due to the need to guarantee and ensure the proper protection of minority shareholders (or in other words – a mass investor). It is for this purpose that various restrictions and special regulations are introduced in the implementation of corporate relations. However, these restrictions, and the features of legal regulation do not change the legal nature of private law of the most corporal relations. By the way, during the modernization of the Civil Code of the Russian Federation, corporate relations at the legislative level were defined as part of civil-law regulation.

Civil law at the present stage cannot remain the way it was in the 60s of the last century.

Life has changed, the challenge of time has become the adoption of new civil codes. Is it possible today to imagine a stock market that develops in the notion that securities – this is necessarily a document that certifies the property right, which can be realized no other than as a way of its presenting. In modern conditions, virtually the whole circulation of securities is carried out in a non-documentary form, and few are surprised by the wording «record in the account». It is possible to talk about resuscitation of the bill circulation, that is why it deserves special attention to bill agreements and other civil-legal aspects of bill legal relations.

Speaking about the expansion of the subject of civil law, one cannot but mention personal non-property relations.

Thoroughly investigating the legal nature of personal non-property relations, R. Stefanchuk convincingly proved that they «not only form the subject of civil law because they are based on the principles of legal equality of their participants, their free expression of will, and aimed at ensuring their private non-property interest. Personal non-property relations should be considered as *primary, independent and equal in value in the structure of the subject of civil law*» [1, 92].

If in the civil codes of many CIS countries, as before, remains only the protection of personal non-property relations that are not related to property, then the regulation of these relations is envisaged the Civil Code of Ukraine (Article 1, chapters 20–22). As a result, these different approaches provide an opportunity, by comparing positive and negative experiences, to determine the measure of «reasonable sufficiency» in solving this problem, which has been the focus of civilians for more than half a century.

A new issue today is the question of the system of law and the place in it of civil law. Recognition of the feasibility of the division of the right to private and public has still not changed the traditions of the previous period in the formation of various branches of law. Moreover, in addition to the fundamental branches, the existence of which no one denies (constitutional, civil, administrative, procedural, labor),

the separation of new legal arrays into independent branches of law has, in our opinion, become uncontrolled. Space, energy, investment, innovation – this list can be continued for a long time.

On this issue is noted in the domestic literature that «the field of law with the *polyelemental methods* appeared *(italics is ours. – N. K.)* in legal regulation. As a result, the very opportunity to instruct in the system of law the same type of branch of law is lost» [4, 10].

If we recognize that along with the fields of law (branches of law), which have the unique (universal) method of legal regulation of the corresponding groups of social relations, there are normative-legal formation of a complex nature (or of a polymethod type), it is necessary to answer the question: what are these complex normative legal formations and how are the formed? It is obvious that there is no their own foundation in such entities and cannot be, since the legal rules from which they are drawn were selected (removed) from the fundamental branches of law (civil, administrative, possibly procedural).

It is quite logical to ask whether these «selected» norms continue to be in the role of working regulatory mechanisms in these fundamental branches in such a situation? If the answer is affirmative, then what does a complex entity have the form of, which is derivative and secondary to the fundamental branches of law?

One can agree with the position of V. Chubarov, who, considering the problem of the ratio of civil and land regulations, says that in cases where by the will of the legislator civil law rules placed in the sources of land legislation, they do not lose their tribal affiliation and remain civil law. The author notes that land relations include only relations on the use and protection of land as the basis of life and activity of people, that is, relations that are subject to regulation norms of public law. Property relations with regard to the possession, use and disposal of land, as well as the commission of transactions with them passed beyond the boundaries of land, and, as a general rule, should be governed by the norms of civil law. The fact that the peculiarities of the implementation of transactions, mainly with land parcels, can predominantly be determined by land, forest, water legislation, subsurface legislation, environmental protection and other special laws, should not influence the general conclusion. First, these features do not change the nature of the regulated civil-law relations, and secondly, it refers to the *norms of civil law (italics is ours – N. K.)*, which are contained in the Land, Water, Forest Codes, and other special laws [5, 355].

Thus, the combination of multisectoral norms with a view to a more complete comprehensive regulation of the relevant social relations leads to the emergence of special laws, and sometimes codes, which by their nature and nature are complex. Based on such normative legal regulations (including those referred to as «codes») complex branches of legislation are formed.

Recently, it is likely that, to avoid unnecessary discussions about their legal nature, such normative arrays are

referred to as «complex legal and regulatory entities».

Recognition of the appropriateness of the allocation and existence of such secondary complex normative entities does not exempt from the need to establish the limits of «fragmentation» of the subject of legal regulation in order not to slip, according to the well-meaning and vivid expression of E. Sokhanov, to the creation of «bath-washing and grocery-gastronomic law».

In Ukraine, such a process has already begun with the adoption of the Commercial Code of Ukraine (hereinafter – the CC of Ukraine). It can be regarded as a complete defeat of civilians, but only to a certain extent. In general, for the Civil Code of Ukraine, the status of a normative act of general character is defined, which is undeniably applied subsidiary to relations not regulated by the Civil Code of Ukraine. As you can see, the point in this confrontation has not yet been set.

Reanimation of the division of the norms of law by the principle of dichotomy – «public» and «private» – actualized the question of the place of civil law in this system.

The norms of family, labor, and sometimes land law, as noted, have, despite all the peculiarities, private law character, which creates objective provisions for their consolidation within the framework of private law. The core of this legal arsenal, of course, is civil law.

Noting about the private law as a mega subsystem, which has its own internal structure, it is necessary to consider that the rules of family, labor, private international law, part of the norms of land law are regulated by the method of legal coordination, which is typical for private law. At the same time, according to the objective criterion, these norms have certain peculiarities: family law regulate marital and family relations, labor relations are related to a labor agreement (contract), internationally private law – with civil relations involving a foreign element, and others like that. Why does civil law play a key role in the system of private law? Because civil law is applied subsidiary by the terms of Article 9 of the Civil Code of Ukraine to the settlement of relations arising in the areas of natural resources and environmental protection, as well as to labor and family relations, if they are not regulated by other acts of legislation.

Norms of civil law also regulate relations in the field of commercial relations, if the features of their legal regime are not established by a special law.

The question of the systematization of civil law rules has not only an «external» aspect, but also, conventionally speaking, and «internal», that is, the question of the system of civil law itself.

At first glance, the problem is practically exhausted by the structure of the Civil Code of Ukraine, which in general determines the internal structure of the branch of law. Indeed, the construction of the main codified act involves the separation of the norms of the general and the special part, in turn, merged into institutions. However, one cannot but

agree that changes in the subject of legal regulation necessitate certain correlations in the system of civil law. First, there are new institutes, which consolidate the norms governing the relations that «expand» the subject of civil law regulation. Thus, there is an extension, and sometimes also a restructuring of both individual institutions and civil law in general. This process can be illustrated by the appearance of the Second Book of «Personal Non-Property Rights of Individuals», which combines norms that were not previously in the civilities newly created institution «fit» into the civil law system, but it continues to evolve along with our perceptions of the limits of regulation of personal non-property rights of an individual, its mechanisms, methods of implementation and protection.

The Second Book of the Civil Code of Ukraine defines only general approaches to the regulation of personal non-property rights of an individual and the named *basic rights that ensure the natural existence of an individual* (the right to life; to eliminate the danger that threatens life and health; on health care; for health care; information on health status; the secret on the state of health; the rights of an individual who is inpatient treatment in a health care institution; on freedom, on personal integrity, on donation, on a family; at the ward and guardianship for the environment safe for life and health, etc.), as well as *personal non-proprietary rights that ensure the social existence of an individual* (right to name, use and change of name; the right to dignity and honor; the right to inviolability of business reputation; the right to individuality; the right to privacy and its secrecy; right to information; the right to personal papers; disposal of personal papers; the right to the secret of correspondence; right to a place of residence; on the inviolability of housing; the right to freedom of movement; the right to choose a kind of occupation; the right to freedom of association; the right to peaceful assembly; the right to freedom of literary, artistic, scientific and technical creativity; etc.).

The rather detailed list of personal non-property rights of an individual provides the basis for concluding that the legal regulation of these rights and their regulatory setting will form a structured array of legal norms that will be included in the Institute of personal non-property rights of an individual.

Such a conclusion is confirmed by scientific studies that after the adoption of the Civil Code of Ukraine have become a powerful direction in the civilist doctrine [6, 471–472].

The analysis of this scientific report demonstrates not only the elaboration of the legislative provisions contained in the Civil Code of Ukraine but also the fact that the Institute of Personal Non-Property Rights has the prospect of further development and significant expansion of the scope of its application.

S. Slipchenko, analyzing the legal relations that arise in relation to intangible goods and evoking their place in the system of civil legal relations, justifies the provisions on the turnover of ob-

jects of personal non-property relations.

Considering this problem, the author notes: "… the establishment of a place of personal non-property legal relations that arise about the transferable objects, allows them not only to distinguish them from personal non-property rights that arise in relation to non-material in transferable objects, but also to resolve a whole block of relations, which arise according to transferable non-property objects, with the same regulation, defining the new ways, the limits of the exercise of subjective rights in the personal non-property legal relationship with the transferable objects and their protection» [7, 472].

One can agree with the thesis of the researcher that this poses a new task to the theory of civil law – to clarify the nature and types of such legal actions, to determine their place in the system of legal facts, to identify the conditions that are put forward to them.

Based on the research carried out, R. Stefanchuk proposed promising legislation on personal non-property rights of individuals [8, 979–994].

L. Fedyuk grounds the existence of personal non-property rights of legal persons, defines their concept and proposes classification based on established internal ties. Such rights include rights to: name, location, business reputation, information, commercial activity. The necessity of normative consolidation of personal non-property rights of a legal entity to individuality is also substantiated, as well as the exercise of free activities, and fair competition [9].

The above shows that all doubts concerning the appropriateness of settling the personal non-property rights of an individual in the Second Book of the Civil Code of Ukraine were unfounded. It is the consolidation of these rights at the codification level that has become a significant event in the legal regulation of personal non-property relations, in the definition of their legal nature and sectoral reliance.

From this moment, at least in Ukraine, personal non-property relations ceased to be «neglected», as rightly stated in legal literature.[1]

They found their legitimate place in the system of modern civil law, which, undoubtedly, greatly enriched its legal potential and tools.

With the awareness of the processes available in the science of civil law, and their reproduction in the legal-regulatory dimension, of course, there will be adjustments in the system of civil law. If during the times of the CC of the Ukrainian SSR in 1963 we spoke exclusively of property rights, then the Civil Code of Ukraine consolidated the system of substantive rights, among which the right of ownership though dominates, but does not exhaust all material rights.

All this gives grounds for the general conclusion that with the restoration and deepening of private law relations of principles in the regulation of social relations at the present stage there is an extension of the subject of civil law regulation in the result of the coverage of new social relations by private law, which results in corresponding changes

[1] R. Stefanchuknotes, referringtotheestimationof B. Gongal. See.: [1, 69; 10, 16].

in the system of civil law, which characterize the process of its further institutionalization.

In conclusion, we should note that we the movement with the maximum preservation of centuries-old civilist traditions. In this tireless movement, one cannot stop and «get stuck» in the dogmas of the people, which today directly contradict the new real social relations. We should not miss the chance to feel the new civil law – more powerful and dynamic. We can lose this chance if we stay in half of the old constitutions, which have long restrained this energy of true civil law.

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OBTAINING A SOCIL ASSISTANCE BY CHILDREN WITH DISABILITIES: THEORETICAL AND LEGAL ASPECT

The problem statement. Social assistance plays an important place in the system of social security of the population of Ukraine. The practical value of social assistance is that every citizen of Ukraine has the right to material security at a level not lower than the subsistence minimum, in case when his average monthly income does not correspond to the level established by the legislation, due to the reasons independent from him, and if such a citizen is not insured in the system of compulsory social insurance, due to different circumstances; or if the length of his pension insurance period does not allow to receive any social insurance benefits. Financing of all types of social assistance is made at the expense of the State and local budgets. This is one of the main features of this form of social security. Along with this there are other specific features of social assistance, which distinguish it from other forms of social security of the population of Ukraine.

The aim of the article is to reveal the theoretical and legal aspects of legal regulation of obtaining a social assistance for disabled children.

The analysis of recent researches and publications. Problems of state social assistance of various groups of the population, including various aspects of social assistance, were studied by many prominent scientists, such as: V. Bidak, N. Boretska, A. Briukhina, M. Galchun, 0. Davidovich, O. Yermolovskaya, V. Zagorskyi, L. Ilchuk, O. Kabanets, V. Kapyltsova, L. Kramarenko, A. Krupnik, L. Kulachok, L. Kuranda, I. Lavrinenko, E. Libanova, E. Lopushniak, T. Levanisova, R. Levin, V. Makarenko, O. Paliy, S. Sidenko, V. Skurativskyi, P. Spikr, N. Tymchyshena, P. Shevchuk, O. Yaremenko and others. However, the problem of state social assistance for families with children needs

deeper scientists' attention, especially in the context of the study of mechanisms for implementing state policy on children in Ukraine, as well, as its separate direction – state social support of families with children.

Presenting of the main material. A disabled child is a child with a persistent disorder of the body's functions caused by illness, trauma or birth defects of mental or physical development, which causes the restriction of his normal life and the need for additional social assistance and protection (the Article 1 of the Law of Ukraine «On the Protection of Childhood»)[1].

In the system of social protection of disabled children, an important place has the social assistance, which is performed in accordance with the Law of Ukraine «On State Social Assistance to the Disabled from the Childhood and Children with Disabilities»[2] and the Procedure for Granting State Social Assistance to the Disabled from the Childhood and Children with Disabilities No. 226/293/169 dated 2002[3], departments of labor and social protection of the population of district, regional in Kyiv and Sevastopol state administrations, structural divisions on labor and social protection of the population of executive bodies of city and district councils in cities (in case of their creation) (hereinafter – labor and social protection bodies).

The Law of Ukraine «On State Social Assistance to the Disabled from the Childhood and Children with Disabled Persons» defines the right to material support at the expense of the State Budget of Ukraine and social protection of disabled children from childhood and children with disabilities by establishing state social assistance according to percentage of the subsistence minimum. The amount of state social assistance to disabled people from childhood and children with disabilities in 2017 is calculated taking into account the norms of the mentioned Law and the Article 7 of the Law of Ukraine «On the State Budget for 2017»[4], taking into account the norms of the Cabinet of Ministers of Ukraine from March 26, 2008, No. 265 «Some issues of citizens' pensions» (with revises), state social assistance from January, May, December:

for disabled children from childhood of I group of subgroup A with an extra pay for care – 2561,50 UAH, 2695,40 UAH, 2821,10 UAH.

for disabled children from childhood of I group of subgroup B with an extra pay for care 1870,50 UAH, 1968,00 UAH, 2059,50 UAH;

for disabled children from child-

[1] Про охорону дитинства: Закон України від 26.04. 2001 р., № 2402-III // Офіц. вісник України. – 2001. – № 22 – Ст. 981.

[2] Про державну соціальну допомогу інвалідам з дитинства та дітям-інвалідам: Закон України від 16.11.2000 р., № 2109-III // Відом. Верхов. Ради України. – 2001. – № 1. – Ст. 2.

[3] Порядок надання державної соціальної допомоги інвалідам з дитинства та дітям-інвалідам від 30.04. 2002 р., № 226/ 293/169 // Офіц. вісник України. – 2002. – № 24. – Ст. 1191.

[4] Про Державний бюджет України: Закон України від 06.12.2012 р., № 5515-VI // Відом. Верхов. Ради України. – 2013. – № 5–6. – Ст. 60.

hood of the 2nd group, single invalids from the childhood of the 2nd group, which, according to the conclusion of the MSEC (medical and social expert commission), require permanent external care with an extra pay for care: 1247,00 UAH, 1312,00 UAH, 1373,00 UAH;

for disabled children from childhood of the III group, single disabled children since the childhood of the III group, who, according to the MSEC, require permanent external care with an extra pay for care: 1247,00 UAH. 1312,00 UAH, 1373,00 UAH;

for disabled children:1247,00 UAH, 1312,00 UAH, 1373,00 UAH;

for disabled children of subgroup, A up to 6 years care with an extra pay for care: 2227.90 UAH, 2344,40 UAH, 2453,10 UAH

for children with disabilities up to 6 years with an extra pay for care: 1550.40 UAH, 1631,40UAH, 1707,10 UAH;

for children with disabilities of subgroup A from 6 to 18 years with an extra pay for care: 2561,90 UAH, 2695,40 UAH, 2821,10 UAH;

for children with disabilities, the diseases of which is connected with the Chornobyl catastrophe: 1309,35 UAH, 1377,60 UAH, 1441,65 UAH;

for children with disabilities of subgroup A, whose diseases are connected with the Chornobyl catastrophe up to 6 years with an extra pay for care: 2664,35 UAH.,2803,60 UAH, 2933,65 UAH;

for children with disabilities, whose diseases are connected with the Chornobyl catastrophe up to 6 years with an extra pay for care: 1986.85 UAH, 2090,60 UAH, 2187,65 UAH.

for children with disabilities of subgroup A, whose diseases are connected with the Chornobyl catastrophe from 6 to 18 years with an extra pay for care: 2998,35 UAH, 3154,60 UAH, 3301,65 UAH;

for children with disabilities, whose diseases are connected with the Chornobyl catastrophe from 6 to 18 years with an extra pay for care: 2153.85 UAH, 2266.10 UAH, 2371,65 UAH.

It is important to note that there is a clear gap in the current legislation. The term, for which disability is established for the children with disabilities and the reason for it – they are determined by the medical advisory committees of children's treatment and prevention institutions. After reviewing the child by the Medical advisory committee, the medical report about the recognition of the child as disabled is sent to the labor and social welfare office at the place of residence of the disabled person from the childhood or the legal representative of the disabled child. Not later than 10 days from the day of receiving the conclusion, the Labor and Social Security Organization is required to send a written notice to parents (representatives) of the disabled child about the right to state social assistance, the conditions, size and procedure for its appointment. After receiving this notification, legal representatives of the disabled child should go to the labor and social welfare office for receiving documents for social assistance (under legal represen-

tatives of children with disabilities we mean parents, adoptive parents, guardians or trustees). Authorized persons, who take decisions about social assistance are guided by the List of medical certificates that give the right to receive state social assistance for disabled children under the age of 16, approved by the Order of the Ministry of Health of Ukraine, Ministry of Labor and Social Policy of Ukraine, Ministry of Finance of Ukraine from 08.11.2001 No. 454/471/516. But the difference in the age determined by the Order No. 226 / 293/169 of 30.04 .2002 is not clear.

An application for the appointment of state social assistance for a disabled child shall be submitted by one of the legal representatives at the place of residence or at the place of actual residence of the person submitting the application, on the condition that the certificate of non-receipt of this assistance in the labor and social welfare office at the place of residence will be submitted. If the legal representative lives at a different address than the disabled child, then together with the application, he should submit a certificate to the labor and social welfare authorities that the second legal representative does not receive state social assistance for a disabled child at his place of residence.

The Order No. 226 / 293/169 specifies the list of documents, that are required in the Labor Office. Particularly, these are: an application on the appointment of all types of social assistance in the form approved by the order of the Ministry of Labor; a passport or, in case of its absence, another document that can prove the identity of the person, who submits the application; a certificate of the registration number of the taxpayer's registration card or a series and the passport number (for individuals who, due to their religious beliefs, refuse to accept the registration number of the taxpayer's registration card and have officially notified the relevant body of the State Tax Service and have a note in the passport); the original document and a copy of the certificate of birth of a disabled child; a certificate from the place of study indicating the fact of being in full state maintenance; a certificate of place of residence of a disabled person from a childhood or a disabled child or a copy of a passport of a disabled person from a childhood or a disabled child with information about a place of residence; a certificate of the place of residence of the legal representative or the trustee who filed the application, or a copy of the passport with information about the place of residence. If a person submits copies of these documents, they must be signed by the officials of the labor and social protection bodies and certified by the seal of this body.

When accepting an application, a receipt for acceptance of the application and attached documents, indicating the date of acceptance of the application should be given.

According to the legislation, these documents may be sent by post. It is interesting, that although this way is noted in the Order №226/293/169, however, it is rather difficult to implement in practice because of crudity of

the requirements for documents. For example, it is difficult to imagine a person who will forward his passport to the relevant body, and if the applicant decides to send a copy, he must place on it a signature of the authorized representatives of the labor and social protection body and to affix it with the seal of that authority. Therefore, the purpose of sending documents by mail is lost at all. Therefore, although the right to forward documents is provided for by the Procedure, and it could really help parents (trustees) who were faced with the necessity to get social assistance for a disabled child, in practice, its implementation is doubtful.

The recipient of state social assistance is issued a certificate of established standard by the labor and social welfare authorities.

The labor and social welfare authorities should notify in written form a person about appointment or refusal in appointment of a state assistance.

State social assistance is appointed from the date of application for its appointment. The day of application for the appointment of state social assistance is the day of acceptance by the labor and social welfare bodies of the application with all necessary documents. If the documents are sent by mail, then the day of application is the date on the postal stamp on the envelope. For children with disabilities, state social assistance is granted for the period specified in the medical conclusion, issued in the order established by the Ministry of Health of Ukraine, but not more than in a month after a disabled child will be 18 years.

The payment of state social assistance shall be suspended in case of a passage of the period of re-examination of the health status of a disabled child by the medical committees of children's treatment and prophylactic institutions, and in case of recognition child as disabled again, the payment of state social assistance shall resume from the day of its suspension, but no more than one month. If the reason for the passage of the term is recognized as valid, then the payment is renewed from the date of its suspension, but not more than for 3 years.

State social assistance is paid monthly by state enterprises and associations at the place of residence of the legal representative, who is assigned assistance for children with disabilities. Also, the payment may be made by the authorized bank according to written request of the recipient, including the card account. Social assistance is paid together with an allowance for care (in case of such an allowance). State social assistance may be paid according to the power of attorney, the procedure of registration and the validity period of which are determined by the legislation of Ukraine.

Amounts of state social assistance, intended but not received in time by the recipient without compelling reasons, are paid for the past time not more than 12 months before the application for its receipt. If the labor and social protection body is guilty in non-payment, then the payment is made for the entire period of delay without limitation, and the amount of the subsistence minimum

is determined at the time of payment of this assistance.

If the labor and social protection bodies do not pay or refuses to pay for the past period, it can be appealed in the court according to the law.

The decision on the appointment or not of the appointment of social assistance and extra allowance for care may be appealed by the applicant in the relevant executive authorities (administratively, in a higher authority or official, as well as in local administration) or in the court.

Generally, we can say that the considered procedure for the provision of state social assistance to disabled children from childhood and children with disabilities does not really protect the interests and rights of children with disabilities. So, firstly, we can note the huge number of documents, required by the labor and social protection body. And that is a real negative moment. And although, from one point of view, such a number of documents are really reasonable, in order to prevent fraudulent actions, but those who actually need this help, people who have a child with disability, they really suffer from it. Therefore, the first important step for the support of such families should be the priority servicing for persons, who came to receive a certificate from the place of study, indicating the fact of being in full state maintenance; a certificate from the place of residence of a disabled person from a childhood or a disabled child or a copy of a passport of a disabled person from a childhood or a disabled child with information about a place of residence; a certificate about the residence of legal representative or the trustee who filed the application, or a copy of the passport with the information about the place of residence. Secondly, in the labor and social protection bodies, such persons should be assisted in filling applications for the appointment of all types of social assistance in the appropriate form. Even, it would be reasonable to oblige a certain official to write and issue such application for receipts. Thirdly, it would be even better to have the electronic register of persons in state and communal institutions. If such register will exist, the person applying to the labor office would not have to collect the indicated certificates, it should be the responsibility of labor bodies just by sending by Internet a request for information about the specified persons.

We can also characterize negatively the unsuccessful attempt to «help» the people, who apply to the labor and social protection bodies for receiving social assistance for a disabled child, by provision an opportunity to send the documents by post. So, for its realization, it would be reasonable to provide a mechanism for its implementation or, alternatively, to entrust the duty to certify copies of documents without any charge on state notaries.

Also, we would like to note the obvious fact that the level of social assistance is extremely low in our country. The indicated amounts, although they correspond to the minimum subsistence level in the country, but they are still insufficient to financially secure the

disabled child. Such amounts are insufficient to fulfil the basic needs of child care, and we are not even talking about expensive drugs and the need for repeated medical examinations.

Besides, the Commissioner for Human Rights receives numerous appeals from the disabled people and their representatives with complaints about the non- objective definition by the medical and social expert commissions about the group of disability and the reasons for the disability, or the unlawful deprivation of the status of a disabled person. There were 128 appeals in 2008, and in 2009–133. Particularly, citizens complain about unlawful actions of workers of medical and social expert commissions, who demand bribes for establishing or confirming a disability group[1]. Also, in practice there are cases of delaying the decision about establishing a disability for children with disabilities over the years, requiring parents to make additional medical examinations, to give an incredible number of analyzes, although it is obvious from the first glance that the child has a mental defect. Probably, such situations should be excluded from our society only in two ways: firstly, by raising the level of morality in society, so that such children and their families evoke feelings of compassion and desire to help them, rather than the cold intention to make profit from the troubles of another's person; and secondly, by raising the level of responsibility of authorized persons of medical commissions for the indicated actions in case of their disclosure.

Conclusions. By summarizing all the mentioned above, we would like to give an excerpt from the report of the Commissioner for Human Rights on the status of observance of the rights of vulnerable children groups: «Monitoring of the Commissioner for Human Rights for the observance of the rights of children with special needs in Ukraine indicates an inadequate level of their social and legal protection. The amount of state social assistance is insufficient to ensure the full and harmonious development of these children, and, unfortunately, the bureaucratic attitude of officials to the problems of children with disabilities, makes it impossible for them to integrate into full participation in the life of society. «We also support the Commissioner's opinion that» despite the socio-economic difficulties, all authorities need to pay much more attention to the needs of children with special needs. Their material, medical care, provision of educational services, rehabilitation facilities should correspond to modern international standards. It is clear that the legal regulation of social protection of children with disabilities, including the procedure for providing social assistance, should be improved.

Published: Соціальне право. – 2017. – №2. – С. 100–107.

[1] Стан дотримання та захисту прав і свобод людини в Україні: Доповідь Уповноваженого Верховної Ради України з прав людини. – Київ, 2010. – С. 253.

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INTRODUCTION TO THE PROPERTY LAW OF UKRAINE

Abstracts. *Article deals with investigation the general provisions of property law Ukraine. Evolution of Property Rights is investigated, the concept, legal nature and place of property rights, their separation from the law of obligations are considered. Peculiarities of the implementation and protection of the proprietary rights are analyzed, system and titles of property rights, their state registration are investigated.*

I. Evolution of Property Law

A. The current State of the Property Rights in the Law of Ukraine

In the civil law countries, which include also the legal system of Ukraine, the institution of property law, intended to govern relationships on appropriation of property by entities of law, is decisive.

The term 'property right' in the classic civil law countries refers to the division of property rights into rights in rem and rights in obligation that defines the modern civil law system of Ukraine.

The modern science of civil law recognizes the institute of property rights, which had been forgotten in Ukraine until recently.

The civil law doctrine of property law is under development and the approach to law is generally recognized at the Western European level.

Ukrainian civil law doctrine has not produced a unified concept, principles and system of property rights, the issues of special property legal ways to protect real rights (in rem lawsuits) and interpretation of the list of property rights (open or closed) has not been resolved, the nature of possession and certain rights, including the right of mortgage, the right to lease, and the right to manage property, has not been defined.

B. Models and Internationalization of Property Law in the Modern Western European and Anglo-American law

The legal model of property law, and civil law in general, is a product of not only economic relationships, but

first of all certain national historical relationships.

It is a mistake to believe that right is determined exclusively by the economic basis of society.

Certain types of relationships, such as land ownership, may be legally formulated differently in economically similar legal systems – Anglo-American and continental European law.

If in Western European Law immovable things are legally formalized by means of ownership and other property rights (and in the legal systems of the German type immovable things refer only to land), the approach of the Anglo-American law regarding rights of private persons may differ, including relatively 'broad' and 'narrow' 'titles' (estates) to land as immovable property (real property or realty), because 'ownership right' to them (in European understanding) can only belong to the crown or state.

In addition, these 'titles' exist both in 'common law' (estate in law), and in 'equitable law' (equitable estate), so they have dual meaning, but at the same time they cannot exist regarding movables (personal property, or personality), which are in full ownership.

The set of the above mentioned 'ownership' rights and 'titles' (estate) constitutes the concept of 'property rights', which has been easily translated by our economists as 'ownership rights', although in reality one should talk about proprietary rights.

In this regarding literature has been noted, there are no 'ownership rights' both in continental European legal orders (where there is a meaning of single ownership right), but also in Anglo-American law. Therefore, in particular, 'intellectual property' is not some kind of 'ownership' or 'ownership rights', and is only the result of mistranslation, because in reality it refers to 'proprietory rights to the results of creative activity'[1].

Obviously, one may explain these differences in legal regulation of economically equal relationships of land ownership in the law of continental Europe with property rights and in Anglo-American law with a complex system of 'titles' (estate) using the peculiarities of national historic development of specific legal order.

It is well-known that relatively early bourgeois revolution in England of XVII century preserved feudal principles of law and order (known as a system of 'common law'), which was then transferred with some modifications to the US, while the bourgeois republics in Europe of XVIII century completely swept away the feudal system of 'split ownership' (dominium directum and dominium utile), replacing it with the

[1] Sukhanov Ye. A. O problemahmetodologiitsivilisticheskihissledovaniy // Aktualnyyeproblemychastnohoprava. Liber amicorum v chest akademika M. K. Suleymenova / Ye. B. Zhusupov, A. Ye. Duysenova. – Almaty: Yuridicheskaya firma 'Zanger', NII chastnohoprava, 2011. – (544 p.). – (P. 30–41). – P. 36–38 (СухановЕ. А. Опроблемахметодологииицивилистическихисследований // Актуальные проблемы частного права. Liberamicorum в честь академика М. К. Сулейменова / Е. Б. Жусупов, А. Е. Дуйсенова. – Алматы: Юридическая фирма 'Зангер', НИИ частного права, 2011. – (544 с.). – С. 36–38).

system of property rights developed by German pandect scholars.

The above shows that the process of internationalization (convergence and unification) of civil law, especially in property law, has certain limitations caused by national legal traditions in a certain state, based on the principles of respective legal family.

Accordingly, during the general systematization of civil law in the field of property law one must take into account the peculiarities of its legal development and formed national legal traditions that ultimately will determine the permissible degree of modification and integration of respective property legal structures of national law.

II. Concept and Nature of Property Rights

A. Concept of Property Rights

In the system of the modern civil law of Ukraine rules governing material relations are traditionally grouped into two sections: property law and law of obligations.

Subjective rights arising under the rules of property law and law of obligations are accordingly called property rights and rights in obligation.

Marking out property rights and rights in obligation is common for European continental legal system, namely in Ukrainian civil law.

This division of subjective rights is de facto absent in the Anglo-American legal system, where, for example, the content of the owner's or trustee's rights include the authority not only of property, but also of obligatory legal nature.

In Ukrainian civil law doctrine such legal category as 'property rights' was first reflected in the rules of the 2003 Civil Code of Ukraine. Before that (in particular, in the 1963 Civil Code of the USSR) legislation was only about ownership right; other kinds of property rights were not represented in the regulatory rules of the Civil Code. Consistency in this area was achieved during the modern codification of civil law.

Category 'property rights' is often perceived by practitioners as a purely theoretical concept that is not entirely correct, because the vague understanding of the notion and elements of property rights by judges and other law enforcement entities leads to controversial litigation, and sometimes judicial mistakes[1].

The CC of Ukraine in the third book, 'The Right of Ownership and Other Property Rights' (Articles 316–417) generally adequately governs the ownership right, possession and property rights to someone else's property.

However, concise provisions of the CC are not always justified, in the lack of an established judicial practice in applying the rules on property rights, complicating the interpretation of the rules and just solution of the corresponding categories of disputes.

The above explains the urgency of further scientific study of the general provisions on the nature, variety, and the grounds of the peculiarities of prop-

[1] 'Svishyi'poglyadnastariproblemyZK // Pravovyityshden. – 2008. – 19 lyutogo. N8. – S. 15. («Свіжий» погляд на старі проблеми ЦК // Правовий тиждень. – 2008. – 19 лютого. – N 8. – С. 15).

erty rights as a homogeneous system of independent rights of persons to a thing.

Property rights are a subkind of absolute rights that perform protective function, identify certain things belonging to a person and are regarded as rights of domination.

Any property right certifies and establishes the belonging of things (material, corporate objects of material turnover) to the entity in civil legal relationships on the basis of a single concept of 'dominium' that is absolute and indivisible right[1].

Property right includes a certain power over a thing, it burdens a thing, and therefore does not depend on the change of its owner; respectively, the new owner of a thing cannot unilaterally terminate this right and has to deal with the burden established[2].

In this context dominance above the object (thing) is rightly considered as a distinguishing feature of property rights[3].

The concept of property rights determines its specific features.

Property rights are characterized by absolute and exclusive nature. Property rights apply to all persons (they are absolute), no one may interfere with his or her property rights, that is authorized entity excludes all third parties from any influence towards the thing.

This right empowers an entity to be able to influence the object and exercise direct authority over it, regardless of any actions of obliged people[4].

In property law interest of the authorized person (owner, etc.) is satisfied by its own actions, and for all other (third) persons there is a duty not to perform any act with a thing.

Property right has no corresponding duty of the debtor's obligation to commit any positive action in favor of the creditor or other person determined by the creditor.

Holders of property rights oppose all third parties entrusted with the duty to abstain from action of the same content and scope.

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[1] BadayevaN. V. VladeniyeIvladelcheskayazashchitavzarubeshnomIrossiyskomgrashdanskomprave: diss. Kand. Yurid. Nauk. –M.: 2009. – 217 s. // [Elektronnyiressurs]. – Reshimdostupa: disserCathttp://www.dissercat.com/content/vladenie+vladelcheskayazashchita-v-zarubeshnom-grashdanskom-prave#ixzz385JeJnVH (Бадаева Н. В. Владение и владельческая защита в зарубежном и российском гражданском праве: дис. … канд. юрид. наук. – М.: 2009. – 217 С. // [Электронный ресурс]. – Режим доступа: disserCathttp://www.dissercat.com/content/vladenie+vladelcheskayazashchita-v-zarubeshnom-grashdanskom-prave#ixzz385JeJnVH)

[2] Pravosobstvennosti: aktualnyeproblem / Otv. red. V. I. Litovkin, E. A. Sukhanov, V. V. Chubarov; In-tzakonod. isravnit.Pravovedeniya. – M.: Statut, 2008. – (731 s.). – S. 48(Право собственности: актуальные проблемы / Отв. ред. В. И. Литовкин, Е. А. Суханов, В. В. Чубаров; Ин-т законод. и сравнит. правоведения. – М.: Статут, 2008. – (731 с.). – С. 48.)

[3] KharchenkoG. G. Oznakyrechovogoprava / G. G. Kharchenko // ChasopysKyivskogouniversytetuprava. – 2011. –N 2. –S. 137–138. (Харченко Г. Г. Ознаки речового права / Г. Г. Харченко // Часопис Київського університету права. – 2011. – № 2. – С. 137–138).

[4] Shimon S. I. Theoriyamaynovykhpravyakobyektzyvilnukhpravovidnosyn :monographiya / S. I. Shimon. – K.: YurinkomInter, 2014. – (664 s.). – S. 205. (Шимон С. І. Теорія майнових прав як об'єкт цивільних правовідносин : монографія / С. І. Шимон. – К. : Юрінком Інтер, 2014. – (664 с.). – С. 205.)

Property rights are characterized by certain features. For the individualization of property rights a reference to its kind, authorized person and subject is required[1].

Unlike property rights, for the individualization of a relationship in obligation a reference to right holder, the duty holder, an object of a relationship and its subject is required.

Property law covers things in the first place, i. e. material objects, but not limited to things. It also governs the position of animals and rights to rights (mortgage, usufruct, etc.).

By definition of K. Savigny, 'the basis' of property right is the possession or actual domination over things; as a right it is either about simple and full ownership, or about unrestricted and exclusive domination of person over a thing[2].

Those are property rights that empower entities with the possibility of direct influence over a thing that is in the field of their domination[3].

This means that only in the sphere of a thing the authorized person shall have the opportunity of unimpeded access to things in order to exercise certain authority, i. e. to certain actions comprising the content of specific property rights.

Property right is to have publicity. Third (obliged) persons shall be able to learn about the existence of property right and accordingly about their duties.

Relative legal relationships are not characterized by such feature as publicity, because they do not concern third parties.

Publicity of property rights is usually achieved by means of institutes of possession (regarding movables) and registration (regarding unmovables).

Cases, where the property right holder does not possess a thing (for example, the owner lent a thing), are more of an exception.

Property rights are characterized by certain features of protection nature that distinguish them from the ones in obligation.

In an obligation a party, who may violate obligation, is previously known and may be subject to the creditor's claim (claim, which is based on respective obligation).

Unlike rights in obligation, property rights may be violated by any third party which is previously unknown.

Specific property claim, like any other, is filed against a strictly defined

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[1] BabayevA. B. Sistemaveshchnykhprav :monographiya / A. B. Babayev. –M. : VoltersKluwer. – 2007. –S. 196–198. (Бабаев А. Б. Система вещных прав : монография / А. Б. Бабаев. – М. : ВолтерсКлувер. – 2007. – С. 196–198.)

[2] SavinjiF. K. F. Sistemasovremennogorimskogoprava / F. K. F. Savinji ;per. snem. G. Szigulina; pod red. O. Kutateladze, V. Zubarya. – M.: Statut. – T. 1. – S. 476. (Савиньи Ф. К. Ф. Система современногоримского права / Ф. К. Ф. Савиньи ; пер. с нем. Г. Жигулина; подред. О. Кутателадзе, В. Зубаря. – М.: Статут, 2011. – Т. 1. – С.476.)

[3] ZyvilnepravoUkrainy. Zahalnachastyna: pidruchnyk / zared.O. V. Dzery, N. S. Kuznetsovoyi, R. A. Maydanyka. – 3-tyevyd. pererob. idopov. –K.: YurincomInter, 2010. – (976 s.). –S. 653.(Цивільне право України. Загальна частина : підручник / за ред. О. В. Дзери, Н. С. Кунєцової, Р. А. Майданика. – 3-тє вид., перероб. і допов. – К. : Юрінком Інтер, 2010. – (976 с.). – С. 653.)

entity – the violator of property right.

Therefore, in property legal relationships the entity, which may be sued, is individualized only at the time of violation[1].

All this means that property law affects mainly the problem of 'what belongs to me' and not a problem of 'what I demand', and that makes out the static of civil property relationships as opposed to the dynamics of civil relationships.

This is how property rights differ from rights in obligation, governing transfer of things and other objects of civil legal relationships from one participant to another, and exclusive rights having intangible results of creative activity or means of goods individualization as their objects.

The Civil Code of Ukraine and other acts of civil legislation do not contain a legal definition of property rights.

Under these conditions the definition of property rights articulated by the theory of civil law is very important.

Property right, as any other subjective civil right, is considered in two meanings – in objective and subjective.

In objective sense, property law is regarded as a set of rules governing material relationships where the authorized person exercises its right to a thing without a need of positive actions from the others.

Property right in subjective sense is the right of a person carried out by its holder through direct relation to the thing in the holder's own interest or in the interest of someone else (in the cases determined by law).

In the latter case the property right shall mean the right of a person carried out by its holder in the holder's own interest and through direct relation to a thing, providing '… a direct impact on a thing that is in the area of economic domination'[2].

Property right can be defined in two ways: as a kind of domination over a thing by a person and as a relationship between persons about a thing, by virtue of which the owner can remove any unauthorized influence on the owner's thing[3].

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[1] Babayev A. B. Sistema veshchnykhprav. Monographiya / A. B. Babayev. – M.: Wolters Kluwer. 2007. – (408s.). – S. 197–198. (Бабаев А. Б. Система вещных прав. Монография/ А. Б. Бабаев. – М. : ВолтерсКлувер. 2007. – (408 с.). – С. 197–198.)

[2] See:TolstoyY. K. Ponjatiyeipriznakiveshchnogoprava // Grashdanskoyepravo: Ucheb.;V 3 t. T. 1. – 6-yeizd., pererab. idop. / N. D. Yegorov, I. V. Yeliseevidr.; Otv. red. A. P. Sergeev, Y. K. Tolstoy. – M.: TKWelbi, Izd-voProspect, 2004. – (776 s.) – S. 392;Kharitonov E. O. Pravovlasnosti v systemirechovykhprav. // Kharytonov E. O., Startsev O. V. ZyvilnepravoUkrainy :Pidruchnyk. – Vyp. 2.,pererob. idop. – K.: Istyna, 2007. – (816 s.). – S. 277. (Толстой Ю. К. Понятие и признаки вещного права // Гражданское право: Учеб.; В 3 т. Т. 1. – 6-е изд., перераб. и доп. / Н. Д. Егоров, И. В. Елисеев и др.; Отв. ред. А. П. Сергеев, Ю. К. Толстой. – М.: ТК Велби, Изд-во Проспект, 2004. – (776 с.). – С. 392; Харитонов Є. О. Право власності в системі речових прав.// Харитонов Є. О., Старцев О. В. Цивільне право України : Підручник. – Вип. 2., перероб. і доп. – К.: Істина, 2007. – (816 с.). – С. 277.)

[3] SukhanovE. A. Posledniypolnyiuchebnikdorevoluzionnogoperioda // SinayskiyV. I. Russkoyegrashdanskoyepravo. – M.: Statut, 2002. – (638 s.). – S. 37.(Суханов Е. А. Послед-

Property rights provide authorized person with power '…to dominate over the property (owned by a person or someone else) and not over the behavior of another (obliged) person. Therefore, the exercise of property rights does not depend on the actions of others. However, objective law establishes certain limits on the absolute impact of the authorized person on the way by removing it from all third parties, that is as an absolute right over the thing exercised by a person regardless of the will of others. This is its fundamental difference from the law of obligations, including those having individually defined thing as an object'[1].

For example, the tenant shall be entitled to exercise the powers of the holder of someone else's thing only by the will of the landlord, while the mortgagee is entitled to exercise someone else's rights to a thing regardless of the will of its owner.

Rights in rem should be understood as a set of legal structures, exclusive list of which is prescribed by law, including the CC of Ukraine, which provides for certain types of property rights.

Therefore, any property right has the nature of a separate right giving its holders independent legal domination over a thing; other rights provide their holders with powers of the dominion over the behavior of others (obliged) persons.

Accordingly, property rights should be recognized as rights that cannot be created by the will of participants and (or) changed by them in content, the scope of powers deriving from property rights is defined by legislation, depending on the type of property right, providing direct influence on a thing without any interference of others and removing all third parties from it.

B. Place of the Property Rights in the System of Ukrainian Law

Property law is a generic category of all legal forms of property belonging to parties of civil legal relationships.

The category of property law is not exhausted and is not absorbed by ownership law[2].

Property law in an objective understanding is a system of rules of law governing relationships of belonging of material benefits.

At the same time the subject of property law are the relationships connected to the appropriation and use of things as material objects[3].

нийполныйучебникгражданского права дореволюционногопериода// Синайский В. И. Русскоегражданское право. – М.: Статут, 2002. – (638 с.). – С. 37.)

[1] SukhanovE. A. Vkaz. pr. S. 6. (Суханов Е. А. Вказ. пр. – С. 6.)

[2] ShchennikovaL. V. Veshchnoyepravo: Uchebnoyeposobiye. – M.: Yurist, 2006. – (190 s.). – S. 9. (Шенникова Л. В. Вещное право: Учебное пособие. – М.: Юристъ, 2006. – (190 с.). – С. 9.)

[3] Skryabin S. V. Predmet, metodi Sistema veshchnogoprava: nekotoryievoprosykodifikazijigrashdanskogozakonodatelstvavKasakhstane // Aktualyjeproblemchastnogoprava. – Almaty: Yuridicheskayafirma 'Zanger', NIIchastnogoprava, 2011. – (544 s.). – S. 276.(Скрябин С. В. Предмет, метод и система вещного права: некоторые вопросы кодификации гражданского законодательства в Казахстане // Актуальные проблемы частного права. Liberamicorumв честь академика М. К. Сулейменова / Сост. Е. Б. Жусупов, А. Е. Дуй-

In the civil law system, it is appropriate to consider property law as a subsector of civil law, which consists of institutions of possession, ownership right, property rights to someone else's property and property remedies.

Legislative regulation of relationships on the belonging of material benefits actually contains general provisions on property rights.

There is formally no general part of property law in the rules of the Civil Code, because some part of the general provisions of property law (except for the concept, principles, and other fundamentals) is actually reflected in the general provisions on ownership right (Section 23 of the Civil Code, Articles 316–327) and property rights to someone else's property (Articles 395, 396 of the Civil Code).

In this regard the general provisions on property rights should include rules on the concept and principles of property law, the list of property rights, correlation of kinds of property rights with each other and with rights in obligation, procedure for the exercise of property rights, definition of the extent to which rules of public law influence the institution of property rights[1].

Inclusion of the Book III in the Civil Code titled 'right of ownership and other property rights' rather than 'property law' does not deny the existence of this legal creation and may be explained by the long period of denial and the revival of the institute of property law in the law of Ukraine.

The institute of property law is known in the history of the civil law of Ukraine, in particular, it was stipulated in a separate Section of the Civil Code of the Ukrainian SSR of 1922 'Property law'.

At the same time the Section of the Civil Code of the Ukrainian SSR 1922 'Property Law', which contained four parts: the ownership right, the right to building leasehold, pledge of property, pledge of goods in turnover, did not provide for the general provisions of property law (Civil Code of the Ukrainian SSR, adopted by the Resolution of the Central Election Commission of the Ukrainian SSR of 16 December 1922)[2].

However, in the 60's of the last century the institute of property rights disappeared from legislation. The Civil Code of Ukrainian SSR 1963 ruled out property law as a category, and the relevant section of the Code (section 2) was called 'Right of ownership'.

Today there is a revival of the institution of property law in Ukraine.

The legislative recognition of property law institute in Ukraine (rather than ownership right and other property rights) is a historical issue, including the recovery of lost traditions and the

сенова. – Алматы:Юридичекая фирма «Зангер», НИИ частного права, 2011. – (544 с.). – С. 276).

[1] Shchennikova L. V. Veshchnoyepravo: Uchebnoyeposobiye. – M.: Yurist, 2006. – (190 s.). – S. 14. (Шенникова Л. В. Вещное право: Учебное пособие. – М.:Юристъ, 2006. – (190 с.). – С. 14.)

[2] SUUSSR 1922 g. N 55, st. 780) // Gosudarstvennoyeizdatelstvoyuridicheskoyliteratury. – M., 1950. – 136 s. (СУ УССР 1922 г. N 55, ст. 780) // Государственное издательство юридической литературы. – М., 1950. – 136с.)

value of understanding of this legal category for doctrine and law enforcement practice.

Property law is a part of the legal order, which contains rules on domination of a man over things according to the principles, established by the Constitution and specified in the legal economic order.

Property law is the unified legal category that is covered by both civil and public law, and due to close connection of civil and public law approach to ownership as a single object with common content and properties, regardless of the owner's status (the state Ukraine, local community, legal person, an individual, etc.).

In addition to civil legislation the ownership right, the right of possession and other property rights are supplemented or limited by public law, namely the Constitution of Ukraine and other laws.

In particular, the property right and its exercising depends on: (a) the provisions of the Constitution of Ukraine on social connectedness of property rights; (b) the provisions of legislation in the spheres of economic activity, natural resources and environment, and so on.

Private ownership to land, for example, is strictly limited to the rules on land use, taxation, and the pre-emption right of acquisition of immovable property, which is attached in some cases to the exercising of rights by state or local communities (due to public necessity), etc.

C. Distinction between Property Rights and Rights in Obligation

The same property can be simultaneously the object of property and contractual rights. For example, this situation arises when the owner gave an apartment to rent to tenants.

Separating property rights and rights in obligation is based on the fact that in the field of property rights in order to meet the interests of the authorized person her own actions are crucial, while in the sphere of rights in obligation satisfying the interests of the authorized person is primarily a result of actions of an obliged person.

Thus, property rights are active rights and are expressed in the exercise of powers. While the object of property right is a thing, the object of right in obligation will always be an act depending on that base, from which there is a requirement of one person and a duty of another to fulfill this requirement.

In contrast to the relative nature of a right in obligation, property right is an absolute one, which is caused by the different nature of the certainty in a range of obliged persons.

Property right is absolute, as manifested in its action against all other persons who bear a general duty to prevent any interference in the powers of the property right holder and not to violate them.

All the people oppose the carrier of property right as debtors.

At the same time some individual property rights can neither be created by the will of the members of civil turnover, nor changed in their content, which is one of the main differences

between those rights and the rights in obligation[1].

Rights in obligation, being relative, are in force only in regard to persons who enter these legal relationships, i.e. are valid only among participants of obligations, between debtor and creditor, and do not concern any third parties.

In obligations the authorized person (creditor) is opposed only to certain individuals – one or more debtors.

In addition, unlike property rights, rights in obligation have a lasting contractual nature and reciprocity in rights and obligations of both parties in relationships, and this emphasizes their relative, rather than absolute nature.

D. Legal Nature of Property Rights

The essence of property right is characterized in two ways: as an absolute relationship about things (in the sense of eliminating all third parties) and property one establishing possession upon a thing which belongs to a person on the basis of ownership, possession, right to someone's else thing, absolute by their nature and secured by protection against all third parties.

Simultaneously, issues of the legal nature of property rights received various estimates and are subject to scientific debate in civil law.

In this regard two basic approaches as to how the right should be determined have been formed: as the relationship of a person to a thing and a relationship of persons in regard to a thing.

That is why property right is determined as a measure of domination over a thing in respect of third parties, or as a measure of power over third parties in respect of a thing.

The advantage of the former was simplicity coupled with an indication at the nature of law, drawing attention to the nature of the domination carried out by an authorized person.

The value of other position is in pointing out that relationship on things – it is always a relationship between people.

Prerevolutionary Ukrainian science of civil law traditionally considered property right as a form of relationship between a person and a thing, according to which 'property right empowers a party with direct, or legitimate, legal authority over property'.

These views reflected individualistic tendencies, based on the theory of natural law (H. Grotius, Charles Montesquieu, Zh.-Zh. Rousseau).

The essence of this theory is to ensure that people from the beginning are endowed with free will and this free will is a source of law, morality, political power, but the process of development of freedom and ensurance of human rights is associated with the development of state[2].

[1] SukhanovYe. A. Posledniypolnyyuchebni kgrazhdanskohopravadorevolutsyonnohoperio da // SinayskiyV. I. Russkoye grazhdanskoye pravo. – M.: Statut, 2002. – (638 p.). – P. 37 (СухановЕ. А. Последний полный учебник гражданского права дореволюционного периода // СухановЕ. А. Русское гражданское право. – М.: Статут, 2002. – (638 с.). – С. 36–37).

[2] Kavelin K. D. Sobranniyesochinenyiv 3-khtomah. – SPb.: TupografiyaM. M. Stasjulevicha, 1889. T. 2. –S. 113 (Кавелин К. Д. Собрание сочинений в 3-х томах. – СПб.: Типография М. М. Стасюлевича, 1889. Т. 2. – С.113).

Relationship between a person and a thing, defined by legislation as providing a person with certain powers of domination over property having the same meaning as a thing, is a manifestation of the subjective right of individual, based on inalienable natural rights.

Another point of view about the nature of property rights is based on the normative theory, represented by O. Comte, L. Duguit, who think that the individual has no rights, but only duties, and the supreme regulator of human communities is an objective rule issued by the state.

Normative approach is based on an understanding of property right as the rule not over things, but over third parties in respect of things, because 'any right exists only between a person and another person, not between a person and a thing' (B. Windsheid)[1].

Proponents of this concept say that the feature of property right is to establish a direct relationship to things not in the sense that the authorized person has to be in contact, touch thing, but meaning that to exercise the right to a thing he (she) does not need mediation of others (G. Shershenevich)[2].

This position is observed by M. Plianiol, alleging that the legal relationship cannot exist between a person and a thing; it would be nonsense. By its very definition, any right is the relationship between persons.

According to V. Sinaiskyi, 'the possibility to exercise property rights, regardless of who is the owner of the subject of property right, determines its nature as property one'[3].

The above shows that property legal relationships are characterized in two ways: as absolute and property relations.

Therefore, property legal relationships should be considered as a measure of dominance over a thing in respect of third parties (property relationships) and as a measure of power over third parties in respect of a thing (absolute relationships).

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[1] Windscheid.LehrbuchdesPandektenrechts, 9 Aufl.,IBd., 1906. – S. 101.

[2] ShershenevitchG. F. Uchebnilrusskogograshdanskogoprava (poizdaniju 1907 g.) / Vstupitelnayastatya, E. A. Sukhanov. – M.: Firma 'Spark', 1995. – 556 s. (Шершеневич Г. Ф. Учебник русского гражданского права (по изданию 1907 г.) / Вступительная статья, Е. А. Суханов. – М.: Фирма «Спарк», 1995. – 556 с.)

[3] Sinayskyi V. I. Russkoyegrashdanskoyepravo. – M.: Statut, 2002. – (638 s.). – S. 36–37. (Синайский В. И. Русское гражданское право. – М.: Статут, 2002. – (638 с.). – С. 36–37.)

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THEORETICAL AND METHODOLOGICAL PROVISIONS OF DOCTRINE OF LEGAL ENTITIES

The clarification of notion of legal entity, as V. V. Rozenberg remarked in the early 20th century, is without a doubt one of the most complicated and arduous problems of theoretical jurisprudence[1]. These words retain their relevance to this day.

There are many theories whose representatives tried to answer the question of what constitutes the essence of a legal entity, revealing its essential features[2], but they failed to do it to the full extent. This is due to the fact that legal entity institute is evolving, changing its main functions, depending on the so-

[1] V. V. Rozenberg. Limited liability company (on necessity to introduce it in Russia) / Rozenberg V. V. – St. Petersburg: Printing house of editorial periodic publishing of Ministry of Finance, 1912.

[2] See, for example: Bratus S. N. Legal entities in Soviet civil law. M., 1947; Vilnyanskiy S. I. Lectures on Soviet Civil Law. P. 1 / Vilnyanskiy S. I.; Publishing editor: Rogozhin A. I. – Kharkov, Kharkov University Press, 1958.; Genkin D. M. Legal entities in Soviet civil law // Problems of Socialist Law. 1939. No. 1; Gervagen L. L. Development of the doctrine of a legal entity. St. Petersburg, 1888; Gribanov V. P. Legal entities. M.. 1961; Greshnikov I. P. Subjects of civil law: a legal person in law and legislation. – St. Petersburg: «Legal Center Press» publishing house, 2002; Eliashevich V. B. Legal entity, its origin and functions in Roman private law. St. Petersburg. 1910; Ioffe O. S. Soviet civil law: The course of lectures. L., 1958. P.1; Kulagin M. I. State monopoly capitalism and a legal entity. Selected works. M.: Statute. 1997; Suvorov N. S. About legal entities under Roman law. M., 2000; Khokhlov E. B., Borodin V. V. The concept of a legal entity: history and modern interpretation // State and Law 1993. No. 9; Sukhanov E. A. Legal entities as participants of civil legal relations // Civil law: Textbook: In 2 volumes. / Publishing editor:. prof. E. A. Sukhanova. M., 1998. V.1; Arkhipov S. I. Subject of law: theoretical research. – St. Petersburg: Publishing house of R. Aslanov «Legal Center Press», 2004. – P. 312–335-, etc.

cial and economic formation in which it functions. As A. I. Kaminka wrote, the legal institution, regardless of its zenith at a certain historical moment, is only one of the phases in the process of the consistent development of the relations it covers, the result of the previous development, bearing in itself the germ of future modifications[1].

From this perspective, it should not go unnoticed that one outstanding civil law scholar of the 20th century Aleksandr Anatolievich Pushkin managed nevertheless to suggest a theoretical legal construction that was accepted by legislature and implemented in a normative theoretical construction – Article 80 of the Civil Code of Ukraine of 2003 (hereinafter – CC). This refers to a corporate theory[2] which confirms once more that the emergence and functioning of such a category as a legal entity is traditionally associated with economic development and social needs, and the legislation only contributes to the formation and strengthening of such entities, recognizing them as subjects of law[3].

According to the CC, a legal entity is an organization established and registered in accordance with the procedure established by law by incorporating individuals and / or property that is vested with civil legal status and capacity and may act as a plaintiff and a defendant in court (articles 80 and 81). Based on this definition, the legal form in which legal entities can be established and exist has not changed thus far, i.e. regardless of which legal entities are referred to – under private or public law, entrepreneurial or non-entrepreneurial, they all are established in a legal form of organization. Thus, A. A. Pushkin's corporate theory still reflects the nature of the legal entity.

The term «organization» has a twofold meaning. Firstly, it is a structure formed in a certain way, which can be established by the association of persons, capitals, by the decision of the relevant government bodies with a definite purpose to become a participant in civil transactions. At the same time, on the one hand, an organization that unites individuals into a single group is necessary, since without it, it is impossible to act externally as a definite unity, and on the other hand, it does not matter how this association is attained, what connections form and exist between its individual members. V. B. Eliashevich, emphasizing the importance of the organization, noted that regardless of whether it was a political organization that would grow on the basis of public law, or any unity of individuals pursuing a common cultural or other purpose, or an industrial association established by articles of partnership, the organization is sufficient to create a basis for

[1] Kaminka A. I. Joint-stock companies. Legal research. V.1.St. Petersburg, 1902, 488 p.

[2] Civil Law of Ukraine. In two parts. Part 1 Edited by prof. AA Pushkin and assoc.prof. V. M. Samoylenko. Kharkov. 1996. P.114–117. Pushkin A., Selivanov V. Relationships between entrepreneurs and the legal status of subjects of law. / The Law of Ukraine. 1994, 3 5–6. – P. 12.

[3] Civil law of Ukraine: [Textbook for high schools of the Ministry of Internal Affairs of Ukraine]: In 2 parts. Part 1 / A. A. Pushkin, V. M. Samoylenko, R. B. Shishka and others. – Kh.: University of Internal Affairs. «Osnova», 1996. – P. 114.

granting this group the rights of a legal entity[1].

Secondly, the term organization places emphasis that in a certain way the structure of the entity is organized internally. The fact that the types of organizations differ, as well as their organizational and legal forms in any legal entity may exist, thereby determines their interior arrangement.

Consequently, the national doctrine of civil law strengthens the feature of the organizational unity of a legal entity as a necessary condition, which enables to transform the will of its founders in the will of the legal entity acting itself as a single entity. Later on, this feature is expressed in a clear internal structure, in the specific subordination of governing bodies, in the regulation of relations between the structural divisions.

However, a legal entity is not just an organization, but an organization recognized as a legal entity by the state, since a legal entity is deemed established from the day of its state registration, that is, the state, in the interests of all participants of civil transactions, via specially authorized bodies, oversees compliance with legislation when establishing such a subject of law. Thus, the publicity of establishment and termination becomes the characteristic feature of legal entities resulting in ability to separate the organization – a legal entity – from an organization that does not have that status.

Generally, the following main ways of establishing of legal entities are distinguished: regulatory, normative-registration (registration-normative, registration), permissive and agreement-based. Market economy enables application of regulatory and normative-registration ones. While the first one is typical for the establishment of legal entities under public law[2], then the second one is typical for the establishment of legal entities under private law.

The normative-registration method of the establishment of a legal entity means that the latter is established on the conditions and according to the rules specified in the law (regulatory act) as a general authorization of the state. At the same time, the relevant body is obliged to register the organization as a legal entity subject to the existence of

[1] Eliashevich V. B. Legal entity, its origin and functions [Text] / V. B. Eliashevich. – St. Petersburg, 1910. – P. 449.

[2] The essence of the regulatory method is that a decision to create a legal entity is made by one or more property owners, or authorized bodies that approve its charter and apply to the state registrar. In Ukraine, legal persons under public law are established in accordance with the executive order of the President, the state authority, the authority of the ARC or the local self-government body (paragraph 3 of part 2 of article 80 of the Civil Code), which corresponds to the practice of legislation in many countries of the world. However, in Ukraine, a decision on the establishment of a legal entity under public law can also be made by several state authorities.

One must agree with O. V. Dzera that the decision to establish a legal entity under public law in the form of an executive order is certainly an administrative act, but in essence it has no difference from the decision of natural persons or legal entities to establish a legal entity under private law. [See: Civil Law of Ukraine [Text]: textbook.: in 2 volumes. / O. V. Dzera, D. V. Bobrova, A. S. Dovgert and others, Publishing editor O. V. Dzera, N. S. Kuznetsova. – K.: Yurinkom Inter, 2002. – P. 390).

not only the initiative of the founder(s) but also the fulfillment by the latter of certain conditions and their compliance with proper rules. The state, using such a form as registration, recognizes the organization as the subject of law, confirming the fact of the establishment of a legal entity by issuing a certificate of state registration of it[1].

Although the legal definition of a legal entity does not specify such a feature as the property autonomy, the definition contains characteristics describing the way a legal entity emerges – the incorporation of persons and property, or the incorporation (allocation) of property only. That is, in the first and second cases, it is a matter of mandatory allocation of property to establish a new subject of law, although it can occur simultaneously with the incorporation of persons/entities (natural, legal, etc.). Furthermore, according to article 318 of CC, legal entities are subjects of right of ownership.

The change in the legal regime of the property of private legal entities is due to the transition to a market economy, which introduced a different approach to resolving the issue of their legal status. Legal entities under private law have a common (undifferentiated) legal status (Part 1, Article 91 of the CC), which means that they must be property owners. Thus, property autonomy is one of the essential features of a legal entity. The separate property means that the property of a legal entity is separated from the property of the owners who established this organization, from the state, and from other subjects of civil law. The practical significance of the property autonomy of a legal entity is as follows: first, a legal entity becomes a subject of law, which allows it to act in civil transactions; secondly, this entails the distribution of the liability of the founders and the legal entity for their obligations.

One of the features of a legal entity is its several liabilities. A legal entity is liable for its obligations to the extent of its property (property assigned to it), unless otherwise established by law. The member (founder) of the legal entity is not liable for the obligations of the latter, and the legal entity is not liable for the obligations of its member (founder). However, the persons who established the legal entity are jointly

[1] In the science of civil law, there are also other ways of creating legal entities, in particular, permissive, which requires obtaining a prior permission to create such a legal entity from the authorized body. However, even when it is, for example, the establishment of a banking institution or an insurance company, and first it is necessary to obtain permission from the relevant authorities, it is not a permissive method, since the authorization does not constitute grounds for the organization's legal entity status. This is only an obligatory precondition, the stage that the founder(s) must undergo to create a certain organizational and legal form of the legal entity, that is, to observe the order established for this purpose. In the future, the establishment of these legal entities can be carried out by one of those methods that are provided for today by the legal system of Ukraine: either regulatory (for example, if the insurer is recognized as a state organization) or normative-registration. However, in these cases, although we are talking about these methods, the scope of actions of the founders is expanding, since a slightly different procedure for their implementation is being established.

and severally liable for the obligations emerging before its state registration. The legal entity will be responsible for the obligations of its members (founders) associated with its establishment, only in case of subsequent approval of their actions by the relevant body of the legal entity (article 96 of the CC).

One of the features of a legal entity is its activity in civil transactions on its own behalf, which means it is possible for a particular organization to receive and exercise rights and bear liabilities, and to act as a plaintiff and defendant in court.

Each legal entity is individual, and therefore it must have its location and name, which makes it possible to single it out from all other participants in civil transactions.

The CC distinguishes such concepts as «name» and «commercial (firm) name of a legal entity». Thus, a legal entity that is an entrepreneurial company may have a commercial (firm) name that can be registered in the manner provided by law, provided that it corresponds to the principles of reality, exclusivity and publicity. We believe that such concepts as «commercial name» and «commercial (firm) name» are in correlation as a class and type: the first one characterizes all subjects of civil law designed to engage in business activities, and the second one designates only the entrepreneurial company.

It should be noted that as a practical matter, the enterprise is the object of civil relations, and it often has its own name, different from the commercial (firm) name of its owner. This fact has not yet found its formalization at the legislative level in Ukraine, however, the law should not ignore the objective realities of the development of economic relations. Therefore, it is proposed to change the wording of part 2 of article 191 of the CC, focusing on the fact that the enterprise may include the right to own individualizing designation. Thus, at the level of the law there will be a separation of the name of the enterprise as an object of civil transactions and the name of the legal entity – the owner of this enterprise. Considering that the right to own name of an enterprise, unlike a commercial (firm) name, is not exclusive, its independent participation in civil transactions is not allowed, i.e. it will share the same destiny as the enterprise.

In the doctrine of civil law, the well-established view states that the right to the name of a legal entity, including a commercial (firm) name, is its personal non-property right[1]. At the same time, the list of personal non-property rights is not exhaustive in the Civil Code. For instance, in accordance with art. 94 of the CC, the personal non-property rights of a legal entity include the inviolability of its business reputation, the secrecy of correspondence, information and other personal non-property rights. Due to the fact that a legal entity requires indi-

[1] Humenyuk, O. I. Right to a name as a personal non-property right of a legal entity [Text] / O. I. Humenyuk // Bulletin of Odessa National University. Science of law. – 2010. – V.15. – Issue 22. – P. 20–29; Humenyuk, O. I. Personal non-property rights, providing individualization of participants in civil legal relations [Text] / O. I. Humenyuk. – P.11.

vidualization from the first minutes of its existence, and as early as at the stage of its establishment, the founders must choose the name (commercial (firm) name for a new legal entity), we emphasize that they must because, in our opinion, this is one of the conditions for the formation of a legal entity, we consider it advisable to change the wording of this article and refer the right of a legal entity to the name (commercial (firm) name – for entrepreneurial companies) to priority rights. At the time of fixation of the rights of a legal entity by the established organization, it has personal non-property rights, and the first of these is the right to a name (commercial (firm) name), which will ensure its right and capacity.

According to the current legislation, a legal entity under private law can have the same civil rights and obligations as a natural person, except for those that by their very nature can only be attribute to a person, that is, a legal entity acquires a common (undifferentiated) legal status (article 91 of the CC). However, does this go to prove that all legal entities under private law must have common (undifferentiated) legal status without exception? We consider that they must not, because there are entrepreneurial companies engaged in exclusive activities, for example, insurance, banking, tourism, that is, their legal status remains special. In addition, there are also non-entrepreneurial legal entities formed to achieve a specific goal, and therefore granting them common (undifferentiated) legal status is inconsistent with the target nature of their activities. At the same time, granting non-entrepreneurial legal entities a possibility to perform entrepreneurial activities does not mean that their legal status becomes common (undifferentiated), since this activity must be subordinated to the purpose of formation of such a legal entity and serves as an additional material security for the implementation of its core business.

The scope of participation of a legal entity in civil transactions depends on the purpose of its formation and is determined by the purposes of its activities. For entrepreneurial entities, it is the receipt of profit with the subsequent distribution of it between the participants; for non-entrepreneurial entities, it is the achievement of social, charitable, cultural, scientific purposes, the satisfaction of the spiritual needs of human, the protection of the rights and legitimate interests of citizens, etc. The purpose of the activities of a non-entrepreneurial legal entity should be specified in its constituent document.

A legal entity as an independent subject of civil relations with respect to its participants acquires civil rights and assumes liabilities via its bodies acting within the scopes of the rights granted to them by law or by charter. And although national science has no single concept of the body of the legal entity, certain aspects of this issue have been studied by the scholars[1].

[1] See: Blumhardt, O. Bodies of a joint stock company (comparative legal study) [Text]: Extended abstract of Dissertation for the academic degree of the candidate of legal sciences / O. Blumhardt. – K, 2002; Artemenko S. V. Civ-

We believe that the body of the legal entity (hereinafter referred to as the body) is a legal construction established by the law with the purpose of enabling to form and express the will of a legal entity and defend its interests. No legal relations between a legal entity and its body emerge, and the actions of the body are actions of the legal entity itself. The body is the legal representative of a legal entity, since its powers are based on the instructions of the law and can be exercised without a power of attorney. The body should be viewed as an institutional and functional representative of a legal entity[1]. Institutional representation of the body finds its expression in securing the mechanism for the acquisition by a legal entity of civil rights and obligations directly via its bodies at the legislative level, establishing not only the possibility, but also the need for the formation of the relevant bodies of the latter, their composition, formation procedure, and competence. The functionality of the body finds its expression in the exercise by it of its powers, in the interests of the legal entity, within the scope of the competence specified by law (charter).

In relations with third parties, the body acts on behalf of a legal entity and is obliged to act in its interests and do not exceed its representation powers (part 3, article 94 of the CC). The members of the body of the legal entity are deemed as representatives as well under the law (part 4, article 94 of the CC).

The procedure for appointing or electing governing bodies, as well as other rules governing their activities, are established by laws and constituent documents of the legal entity.

However, the current legislation formalized not only the possibility of implementing the legal capacity and competence of a legal entity through the system of its bodies. The Civil Code provides that a legal entity may acquire civil rights and obligations also via its members in cases established by law (part 2, article 94). However, such an opportunity cannot be unlimited, and it should be recognized as correct that the legislature points to its limits – this can only happen in cases provided by law. This is due to the fact that in the system of legal entities there are such organi-

il and law problems of joint-stock company management [Text]: Extended abstract of Dissertation for the academic degree of the candidate of legal sciences / S. V. Artemenko. – K., 2004; Lutz, V. V., Syviy, R. B., Yavorska, O. S. Company law [Text] study guide / V. V. Lutz, R. B. Syviy, O. S. Yavorska; Publishing editor V. V. Luts, O. D. Krupchan. – K .: «In Jure» Publishing House, 2004; Borisova V. I. Governing bodies of a legal entity as its institutional and functional representatives [Text] / V. I. Borisova / The Law of Ukraine. – 2006. – No. 6. – P. 97–102; Borisova V. I. Issues of management of legal entities and their solution under the current legislation of Ukraine [Text] / V. I. Borisova // The Law of Ukraine. – 2009. – No. 5. – P. 113–120.

[1] There is another point of view on this problem. For instance, O. I. Zozuliak states that the realization of the civil legal capacity and competence of a legal entity via its bodies is not a representation, but represents the actions of the legal entity itself (see: Zozuliak, O. I A treaty as a legal form of juridical persons law subjectivity realization [Text]: Extended abstract of dissertation for the academic degree of the candidate of sciences / O. Zozuliak. – K., 2010. – P. 4, 7).

zations in which the implementation of legal capacity and competence via the system of bodies will lead to the demolition of the basic principles of their functioning (for example, a general or limited partnership).

Consequently, the current legislation has formalized several models of implementation of legal entity's legal capacity and competence: either via the system of its bodies, depending on the type of legal entity, or via members (persons) in cases established by law. But irrespective of the legal model for the implementation of legal entity's legal capacity and competence, the law requires both bodies and a person who, in accordance with the constituent documents or the law, acts on its behalf, to exercise the powers in such a way that meets the requirements of fair practice and reasonableness.

Regardless of the fact that some of the above-mentioned features were not formalized in the legal definition contained in art. 80 of the CC, recognition of the organization as a legal entity is possible only subject to the existence of a set of the indicated features. Thus, the features of a legal entity are imperative requirements to the organization, the observance of which allows it to become today a subject of civil legal relations.

On the basis of the foregoing, a legal entity is an organization recognized by the state as a subject of law, acting in civil transactions on its own behalf, having a separate property that belongs to it depending on the type (private or public) on the right of ownership or other proprietary right, bearing a several liabilities for its obligations.

At the same time, attention should be given to the fact that, depending on the availability of economic dependence, legal entities are divided into a main legal entity and a dependent legal entity. In this case, it is not a matter of any dependence, but of economic dependence[1]. Economic (financial) dependence finds expression in the fact that one enterprise controls the activities of the other so that the latter takes into account its interests and will.

Forms of economic dependence establishing are different, both property-financial form and contractual one. Formalization of dependence for certain types of business entities in the Civil Code is carried out through the concept of «dependent business company» (a limited liability company, additional liability company, joint-stock company). In a dependent business company, another (main) business company owns twenty percent or more of the authorized capital of dependent company, in particular a limited or additional liability company, or twenty percent or more of or-

[1] See: Borisova, V. I. On the dependence of legal entities [Text] / V. I. Borisova / Bulletin of Academy of Legal Sciences. – 2000. – No. 44. – P.62–59; Borisova, V. I. Concerning the dependence of legal entities [Text] / B. I. Borisova // The first legal disputes on the current problems of private law, dedicated to the memory of E. V. Vaskovskii: Materials of the International science and practical conference, Odessa, April 15–16. 2011 / Odessa I. I. Mechnikov National University. – Odessa: Astroprint, 2011. – P. 113–118.

dinary shares in the joint-stock company (art. 118)[1].

Dependency relationship is the most clearly manifested in the formation of holdings, investment and mutual funds, industrial and financial groups and other associations of legally independent and unaffiliated participants in civil transactions. Holding is a business entity and at the same time an economical mechanism of control over dependent enterprises. At the same time, regardless of the way in which the holding company is established, it is an atypical legal entity. And although under the law, the subjects of the holding are called subsidiaries, and the dominant enterprise is understood as the parent, in our opinion, it is an association / group / of legal entities, in which one can clearly defined, on the one hand, dependent legal entities, and on the other hand, the dominant legal entity exercising control and owning a controlling block of shares in the latters.

The emergence of dependent legal entities is based on various ways of their incorporation, however, we are not talking about merger or amalgamation in the legal sense of the word, since no new independent legal entity appears; that is, there is no universal succession. There is only an economic unity connecting legal entities, one or several of which depend on the main structure, which aims at decisive control over their activities in order to manage the created economic unity.

However, is the legal entity the only legal form that allows organizations to participate in the stream of commerce? To answer this question, let's look at several examples.

The first example. In modern conditions, one of the most important indicators of the democratic character of civil society is the existence of autonomous, voluntary associations of citizens, consolidating it. A separate place in the system of these structures belongs to religious organizations whose formation and activities are connected with the realization of the right of people to freedom of conscience in its collective form.

Ukraine is a multi-confessional state in which the constitutional legal principle of the separation of church and state operates, and therefore, on the one hand, religious organizations are deprived of the

[1] In the Commercial Code of Ukraine, the formalization of the financial dependence of legal entities is carried out on the basis of the concept of «associated enterprises» (economic organizations), which refer to a group of economic entities – legal entities interconnected by economic and / or organizational dependence in the form of participation in the authorized capital and / or management. The CC marks out the relationship between the associated enterprises as simple and decisive. A simple relationship arises when one of the associates may block a decision to be taken by the other (dependent) enterprise, which must be adopted in accordance with the law and / or constituent documents of this enterprise by a qualified majority of votes; the decisive relationship arises when control and subordination relationships are established between such enterprises due to the prevailing participation of the controlling enterprise in the authorized capital and / or general meeting or other governing bodies of another (subsidiary) enterprise, in particular owning controlling interest (art. 126). Relations of decisive dependence can be established upon the consent of the relevant bodies of the Antimonopoly Committee of Ukraine.

right to interfere in the affairs of the state, and, on the other hand, the state represented by the relevant body implementing state policy in the sphere of religion, ensures the implementation of this policy without interfering in the religious activities of such organizations, provided that they do not violate the provisions of the current legislation, and does not impose on them performance of state functions, does not finance their activities, etc.

Consequently, religious organizations cannot be regarded as legal entities under public law, whose activities, although to varying degrees, are always connected with state power[1]. We agree with I. A. Pokrovskiy, who pointed out that the question of separation of church and state, from the legal point of view, is nothing else than the question of transferring all this sphere of relations from the sphere of public law to the sphere of private law: satisfaction of religious needs should be granted to private unions of the faithful who will regulate their relations through private arrangements[2]. Any religious organization is a legal entity operating on the basis of the relevant charter (civil charter), but first of all, obeying the canonical rules.

At the same time, for certain types of religious organizations, a legal entity is only one of the possible forms of their participation in civil transactions. They can also exist in another state, which corresponds to the constitutional right of citizens to unite for certain interests, for which it is not necessary for them to receive the status of a legal entity for such a community. According to the current legislation, religious communities can operate without state registration and are not even obliged to report their formation to state bodies (part 3, article 8 of the Law of Ukraine «On Freedom of Conscience and Religious Organizations»[3]). However, in this case, the religious community does not become a party to civil relations, and hence its attempts to act on its own behalf are devoid of civil law significance, although according to the norms of canonical rules this does not affect its ability to minister and perform other religious rites and ceremonies.

At the same time, the requirement of «purity» of concepts requires the distinction between a religious community as a legal entity and a religious community that has not received the status of a legal entity, which can be done by naming religious communities that have not received legal identity as religious groups. It is necessary to agree with those scholars who consider it necessary to obligatorily notify state bodies about the formation of religious groups[4]. This will make it pos-

[1] Chirkin, V. E. Legal entity under public law [Text] /V. E. Chirkin. – M.: Norma, 2007. – P. 265, 81.

[2] Pokrovskiy, I. A. The main problems of civil law [Text] / Pokrovskiy I. A. – M: «Statut» (part of series «Classical works of Russian civil law»), 1998. – P. 41.

[3] The Official Bulletin of the Verkhovna Rada of Ukraine. – 1991. – No. 25, art. 283.

[4] Piddubna, V. F. Religious organizations as subjects of civil legal relationships [Text] / V. F. Piddubna // Extended abstract of dissertation for the academic degree of the candidate of sciences. – Kh., 2008.

sible to distinguish them from the existence of such associations of citizens as sects, new movements, groups of the newest and non-traditional cults, which can also be created without appropriate state registration, without being granted civil capacity.

The second example. The modern doctrine of civil law considers not only natural persons and legal entities as civil relations parties, but also the state of Ukraine, the Autonomous Republic of Crimea (ARC), territorial communities, foreign states and other subjects of public law.

In order not to destroy the basic principle of civil law regulation in relations with the participation of such public entities as the state, the ARC, territorial communities for which public authority remains the main feature, the legislature finds a substitute for their participation in these relations, applying the model known to civil law (legal form) as a representation. Due to this, public entities operate in civil relations on equal terms with other participants, using the same legal regime. They acquire and exercise rights and obligations via the relevant bodies within the scope of competence established by law for these bodies. In particular, the state acquires and implements rights and obligations via state authorities, the ARC via the ARC bodies, territorial communities via local self-government bodies.

Given that in accordance with the doctrine of civil law, only those organizations that are legal entities are allowed to participate in civil transactions, the bodies of public entities are granted the status of legal entities of public law. Such an approach makes it possible to qualify the act of each individual body in civil transactions, as the action of the corresponding public entity, while simultaneously creating a personification of a particular body as a participant of civil law for strictly regulated purposes.

Public legal entities are public entities with the aim of state interests, that is, the interests of the social community recognized by the state and secured by law, the satisfaction of which is an indispensable condition and a guarantee of its existence and development. The procedure for the creation, organizational and legal forms, and legal status of legal entities of public law is determined not by provisions of civil law, but by the norms of the state, administrative and other branches of public legislation. Hence, the basis for their formation is a public legal act that simultaneously determines the internal side of the relationship of a public legal entity. Legal entities of public law in civil relations, unless otherwise provided by law, are subject to the rules of the Civil Code (Article 82), i.e. they are, as it were, equated with legal entities of private law, but they do not become such entities, even though they lose any privileges before other participants in civil relations – individuals and legal entities.

In the cases and in accordance with the procedure established by law, other regulatory and legal acts, on behalf of the state, the ARC, territorial communities, natural persons and legal entities, state authorities, ARC authorities and local self-government bodies may act

under special assignments (Article 173 of the CC).

Nevertheless, it should be distinguished who becomes a party to the agreement concluded by such representatives. For example, if the agreement is concluded directly by the competent authority of the state on behalf of the latter, the state becomes the party to this agreement, which in this case has rights, obligations and liability for non-fulfillment or improper fulfillment of the terms thereof. However, if the agreement is concluded by a public legal entity without reference to the fact that it acts as a representative of the state, within the framework of special legal status, which corresponds to the purpose of formation such a legal entity, it acts as an independent participant in civil transactions and the state does not bear any liability for its actions.

Among the essential features of participants in civil relations, the CC of Ukraine points out their property autonomy (article 2), which means that each of them has property, belonging to it under the relevant right (title). The property right is the main of the rights, which represents the property autonomy of the participant. This justifies the logical approach adopted by the legislature in determining the types of property rights, according to the subject principle, securing such types as the property rights of the Ukrainian people, the right to private property, the right of state ownership and the right to communal property (articles 324–327 of the CC of Ukraine).

The legal person under public law, like a legal entity under private law, acquires the right of ownership of the property transferred to it in ownership, and the property acquired by it in ownership on grounds not prohibited by law (article 329 of the CC).

Thus, a legal entity, regardless of the type and organizational and legal form in the current market conditions, remains the legal form by which organizations pursuing different purposes created in different ways, having different organizational structures, different sources of financing, are given the opportunity to become participants in civil transactions. At the same time, this leaves open the possibility of using other legal forms (models), although their list should be clearly stipulated in the law.

And a few words should be said about the functions of legal entities. A legal entity, as a special legal reality, exists insofar as it acts, lives, that is, functions. Hence the functions of a legal entity can be defined as its main activity areas aimed at maintaining and preserving this single organism. The civil law studies has the established view that the institution of a legal entity performs several functions, namely it formalizes, implements and protects the collective interests of the founders (members); unites the capital of the founders; manages capital on a private basis; reduces entrepreneurial risk by the size of the property invested in the charter capital of a legal entity, since this function corresponds with such a feature of a legal entity as an several

and exclusively proprietary liability for its obligations[1], etc[2].

The fact that a legal entity can be established by incorporating individuals and (or) property (part 1, article 81 of the CC) certainly contributes to the existence of legal entities in various forms and types. However, this also has a significant impact on the functions they perform. Thus, the creation of legal entities in the form of companies, including one-man company, as well as in the form of institutions, inevitably entails certain difficulties in identifying those functions that would be equally inherent in all legal entities of private law. In addition, if one can agree with the above concept, then members of all legal entities should be in certain relations with each other, but what about the one-man company, or the fact that only one person can also be founder of the institution?

One cannot strongly agree with the fact that a legal entity formalizes, realizes and protects the collective interests of the founders (members) of a legal entity, since this practically turns a legal entity into a representative of the founders (members) and nullifies its existence as an independent center of legal reality. We believe that this function is retained only for corporate associations, including entrepreneurial companies, because they are by definition external (organizational) for such organizational and legal forms of legal entities of private law.

As for the function of limiting the member's property risk by the amount of the contribution to the capital of legal entities (entrepreneurial risk), with reference to the fact that this feature of the legal entity corresponds to the several and exclusive property liability of the legal entity for its obligations, it should be noted the following. At first glance, it does appear that this function is inherent in a legal entity, but, firstly, certainly not in all its organizational and legal forms, but only such as joint-stock companies and limited liability companies, and, secondly, this is the most important, one can hardly agree with the fact that this function also defines one of the main directions of their activities for the said legal entities.

The transformation of a legal entity that takes place in modern conditions entails a completely different arrangement of accents, not only in the essential features, but also in the functions of the latter. Thus, we can agree that under the conditions of privatization, the activity area of the legal entity was the redistribution of property; later on,

[1] See: Civil Law / Publishing editor Yu. K. Tolstoy, A. P. Sergeeva. Part 1. – St. Petersburg, 1996, p.105–109; Braginsky M. I. Commentary of the first part of the Civil Code of the Russian Federation. – M., 1996. p.93; Zalesskiy V. V. Legal entities // Civil law of Russia. Lecture course. Part one. – M., 1996. p.53; Pankratov P. A., Kozlova N. V. Legal entity as an instrument for the redistribution of property (Dedicated to the 15th anniversary of the reform of the institution of a legal entity // Bulletin of the Moscow University, 2002. No. 1, Series 11 Law, P. 90–98; Kosyakova N. Legal Entities in Russian and Foreign Law: Comparative Analyzes // Law and Politics. 2000, No. 4. P.46.

[2] A. V. Asoskov. Legal forms of participation of legal entities in international stream of commerce. M. Statut, 2003.

the legal entity turned into a universal tool for the participation of foreign entities in the economic life of a particular state. However, only such a function of a legal entity as centralization of capital and its most effective use remains unchanged, since without this it is impossible not only the activities of entrepreneurial companies, but also the activities of non-entrepreneurial companies and institutions.

It is possible to specify, for example, one of the stages of the transformation process, a change in the approach to the founding members, as to its qualitative membership, when it is also possible to act as founders of other legal entities, as well as its quantitative membership, when the existence of legal entities established by one person is recognized.

In connection with the emergence of one-man companies, it brings up a set of questions, in particular, does this company have a will different from the will of the founder? What is the situation with governing bodies in one-man companies? Answering these questions, one should proceed from the fact that regardless of the number of founders of a legal entity, their own interest is of a secondary nature and the interest of the legal entity founded by them always comes first. One-man company, like any other legal entity, has a special will, which differs from the will of the founder (founders). Undoubtedly, the founder individually shapes the governing bodies of this company, and may himself become their member, which will influence their activities. However, in this case, he subordinates his activities to the interests of the legal entity, the purpose of establishing the latter, realizing via the bodies (body) the interest of the established legal entity. Therefore, it may be affirmed that the will of the founder is transformed into the will of a legal entity.

On the basis of the foregoing, one should agree that some other functions acquire a certain importance, although they were known earlier, but as if they have stood in the background. We believe that the transformation of a legal entity entails a completely different prioritizing both in functions and in the essential features of a legal entity in the current conditions.

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ON THE CONCEPT OF THE PROTECTION OF SUBJECTIVE CIVIL RIGHTS BY ARBITRATION COURTS

The article deals with the peculiarities of the protection of subjective civil rights by arbitral courts. Particular attention is given to the qualification of the protection of rights by arbitration courts as the jurisdictional form of subjective civil rights' protection, despite the fact that arbitration courts are not the part of the state judicial system, and therefore do not dispense justice for the purposes of the legislation. The author also focuses on the issue of security for claim, which is considered by the arbitral court. The issue of appealing a decision of the arbitral court is also analyzed in accordance with the provisions of the Ukrainian legislation on arbitration courts.

Key words: *subjective civil right, the protection of subjective civil rights, arbitral courts, the right to appeal a decision of the arbitral court, jurisdictional and non-jurisdictional forms of civil rights' protection.*

The need from business entities for institutions which provide compulsory protection of rights and legally protected interests has recently become increasingly urgent. As the famous Russian civilist D. I. Meyer put it «every right is accompanied by the possibility of its enforcement. It so crucial, that there is no right at all if there is no possibility for any right to be enforced» [1, p. 224].

The issue of the protection of subjective rights itself has repeatedly become the subject of monographic research and scientific discussions. The right to judicial protection of civil rights is enshrined as one of the main postulates of the Civil Code of Ukraine (hereinafter – the «CC of Ukraine»). V. P. Gribanov rightly pointed out that «by its very nature, this right *(to protection – A. K.)*

can be carried out either through direct actions of the holder of right or through the activities of competent State and public bodies depending on specific circumstances. When the right to judicial protection of civil rights is being carried out through the recourse to the competent State or public bodies, the competent State or public bodies deal with all substantive claims against the defendant in accordance with the law which constitute the procedural form of carrying out the right to judicial protection» [2, p. 108].

There is a distinction between «jurisdictional» and «non-jurisdictional» forms of civil rights' protection in science. The jurisdictional forms are based on the recourse of the holder of right to the State or public bodies which have competence over the holder of right or the alleged offender. It is clear that the jurisdictional forms are characterized by binding nature of decision of the competent body on the merits. Conversely, non-jurisdictional forms of civil rights' protection are considered to be the activities of the holder of right himself (for example, the civil right to self-defense in accordance with art. 19 of the CC of Ukraine) or the recourse to the certain subject, appropriate body or organization which have no influence over parties to the dispute and their decision would not be binding for parties to the dispute (an example may be a mediation or other types of ADR).

It would be useful to consider the place of the resolution of disputes in arbitration courts in the above-mentioned system of forms of civil rights' protection. First of all, it should be emphasized that by its nature the arbitration court is an alternative way of protecting subjective civil rights. I. E. Engelman noted that the arbitration court by its name is the court of third party which was chosen for the resolution of disputes by parties. Its authority is based not on a general law, but on the contractual principles and on the will of individuals who freely and independently manage their own civil legal relationships and at the same time have right to refer the disputes to the judges who were chosen by mutual agreement. They also define the rules governing the settlement of disputes and, moreover, they decide on the procedure under which the judicial proceedings should be conducted [3, p. 405].

The Law of Ukraine «On Courts of Arbitration» (hereinafter – «The Law on Courts of Arbitration» or «The Law») defines the arbitration court as non-State independent body, which is created by agreement or by the appropriate decision of interested private individuals or legal persons for the settlement of disputes arising from civil and economic relations (art. 2 of The Law).

However, despite «non-State» status of the arbitration court, it is noted in legal literature that the function of the arbitration tribunal (it is defense of violated or disputed civil rights through the settlement of disputes, brought before them), expresses also public-law aspect. However, O. U. Scvortsov rightly points out that the judicial system does not include the arbitration courts which do not execute justice as the particular kind of state activity [4, p. 64–65].

In other words, an arbitration court may be considered as peculiar «quasi-court», which on the one hand performs the function of protection of civil rights like the state courts, and on the other hand it doesn't execute justice which is a function of the state.

Separately, according to art. 57 of The Law, the arbitration court decision which was not voluntarily performed, is legally enforceable according to the procedure established by The Enforcement Proceedings Act of Ukraine.

Considering the above, there is reason to believe, that the protection of rights and legally protected interests by arbitration court must be classified as the jurisdictional form of civil rights' protection.

In addressing the issues of the protection of entrepreneurs in the arbitration courts, separate weaknesses of the system of arbitration proceedings, which to a large extent, inspired from shortcomings and common inconsistency in legislation, should be analyzed in detail.

The practice of the application of Ukrainian legislation governing the resolution of disputes by arbitration tribunals and enforcement of their decisions point to the following problematic provisions of The Law.

The jurisdiction of the arbitration courts

At first sight, the issues of jurisdiction are sufficiently regulated by the art. 6 of The Law. In particular, the existing version of The Law allows the arbitration courts to resolve any dispute arising from civil and economic relations except for cases:

1) in disputes over the recognition of the invalidity of legal acts;

2) in disputes over the formation, modification and execution of business contracts related to public needs;

3) in disputes related to the State secret;

4) in disputes arising from family legal relationships except for cases in disputes arising from prenuptial agreements;

5) about renewal of solvency of debtor or confession his bankrupt;

6) where one party is represented by public authority, local administration or its official, other entity in carrying out his management functions or delegated authorities on the basis of legislation, the government agency or organization, the state-owned enterprise;

7) in real estate disputes, including land;

8) about determining facts of legal importance;

9) in disputes arising from labor relations;

10) arising from corporate relations in disputes between company and its member (company founder, shareholder), including the member who dropped out of company, and between the members (company founders, shareholders) of companies related with the establishment of companies, their activity, management and their winding-ups;

11) other cases, which are heard exclusively by the courts of the general jurisdiction or by the Constitutional Court of Ukraine;

12) when any of party to the dispute is a non-resident of Ukraine;

13) in which the execution of the court decision would require appropriate actions of public authority, local administration or its official, other entity in carrying out his management functions or delegated authorities on the basis of legislation;

14) in consumer disputes, including consumers of bank services (a credit union).

It should be noted that the first five years of the application of The Law had seriously damaged the reputation of arbitration courts as the instrument of civil rights' protection. Since the version of the art.6 of The Law allowed the arbitration courts to resolve i.e. the real estate disputes before 2009, the arbitration courts– most often, the ad hoc tribunals – were used significantly for the legitimization of some real estate transactions in which there were some violations (first of all, registration of rights on unauthorized premises, the legitimization of reconfiguring the premises and reconstruction of facilities which took place without a relevant permit, legal recognition of ownership of real estate with problematic property titles, etc.).

Consequently, on such «disputes», arbitration tribunals became an attractive alternative to the state justice system, which imposed far more stringent conditions upon consideration and appropriate action. However, one of the major arguments which was tilting the balance in favor of the application to arbitration court with corresponding action (for example, with the action for recognition of property rights), was almost complete impossibility of appealing against this decision subject to the formal requirements of The Law.

As a result, the legislator has substantially limited the competence of arbitration courts, however, it may take a long time to restore the credibility of the arbitration tribunals in Ukraine.

The Ad hoc Proceeding

Art. 7 of The Law provides for the possibility to establish the ad hoc court to resolve the individual case. The specificity of the ad hoc Proceeding lies both in the nature of such court and in the nature of its competence.

In contrast to the permanent arbitration court which has sufficient degree of organization (the presence of rules of permanent arbitration court proceedings, approved both the regulation and list of arbitrators, the presence of the arbitration court stamp, etc.), only requirements for arbitrator and for processing of court decision (because the enforcement document shall be issued on the basis of this decision) are set for ad hoc court.

The compliance with the remaining provisions of The Law in the ad hoc Proceeding (to assess compliance with requirements of the claim, credentials of representatives, evidence provided, etc.) is, to a large extent, a matter of arbitrator's own personal. Moreover, noncompliance with, or non-enforcement of provisions of The Law related to the procedure for cases, as will be seen below, cannot be qualified as the justification neither for challenging a judgement nor for refusal to issue the enforcement document, even if this decision violates the interests of third parties, who did not have or could reasonably not have

knowledge of this dispute.

Security for claim before the arbitration court

According to art. 40 of The Law, unless otherwise agreed by the parties, the arbitration court upon application of any party may order the type of measure of the party to the subject matter of the dispute that it considers necessary in view of the provisions of the civil and the economic procedural legislation. The arbitral tribunal may require any party to provide appropriate security for claim in connection with interim measures of protection.

What does this mean in practical terms?

In accordance with the voluntary choice of arbitration proceeding as the procedure for protecting civil rights which was executed by parties, the legislator quite rightly didn't establish the possibility of forcible execution of such measures and empowered the arbitral tribunal to order interim measures. The law provides the possibility of applying of the system of government coercion only for the enforcement of arbitral tribunals' decisions rather than for their orders regarding security for claim.

Therefore, in determining the appropriateness of the arbitration clause in the contract or formation of separate arbitration agreement, the absence of opportunity to ensure the security for claim at the stage of dispute and thus the absence of the institution which provides for protection for the parties of dispute from the failure to execute arbitral tribunals' decision should be taken into account.

The right to appeal a decision of the arbitral court

As already mentioned, the arbitral tribunals' decisions quite often affect third parties. This is particularly true for cases involving claims for legal recognition of ownership, for removing obstacles in use or for validation of contract, etc.

Given the nature of arbitration proceeding and its procedure, the third party, which rights could be affected by the tribunal decision, becomes aware of court's decision generally after the examination of the case on the merits. The essential problem is that in the light of the general rule set out in art 51 (1) of The Law, no appeal of decisions made by arbitral courts is generally allowed, except in the cases specified by The Law. According to art. 51 (2) of The Law the tribunal decision, regarding the jurisdiction, could be appealed to the competent court by parties, by third parties and even by persons not involved in dispute if the tribunal addressed the issue of their rights and duties in cases provided for by The Law.

The decision of the arbitral tribunal may be overturned only on any of the following grounds:

– the appropriate case had not subject matter jurisdiction by law;

– the decision of the arbitral tribunal on dispute which is not covered by the arbitration agreement, or the decision dealt with the areas beyond the arbitration agreement;

– the arbitration agreement was recognized as invalid by the competent court;

– the panel of the arbitration court did not meet the requirements of The Law;

– the arbitral tribunal addressed the issue of rights and duties of persons not involved in dispute.

From the practical point of view, the relations between grounds for annulment of the decision of the arbitral tribunal and grounds for the refusal to issue the enforcement document are regarded to be of great importance. The issue is that The Law, essentially, gives the person, against whom judgement was made by arbitral tribunal, two separate ways of countering the enforcement of this decision. The first way is direct appeal against the decision of the arbitral tribunal on the grounds specified in the clauses of The Law listed above (art. 51 of The Law).

The broader range of grounds is to be found in art. 56 of The Law for the refusal to issue the enforcement document upon appropriate application. The competent court refuses to issue the enforcement document on the same grounds as those envisaged for annulment of the decision of the arbitral tribunal and also in the following circumstances:

• the decision of the arbitral tribunal had been set aside by the competent court at the day when the decision to issue the enforcement document upon appropriate application have been made;

• the missed deadline for requesting the enforcement document for reasons which were not recognized by a court as valid;

• the decision of the arbitral tribunal covers the ways of protecting rights and legally protected interests which are not determined within the laws of Ukraine;

• the permanent arbitration court failed to provide the appropriate decision upon the competent court's request;

• the arbitral tribunal addressed the issue of rights and duties of persons not involved in dispute.

Hence, when the appeal failed, the legislator is giving him the «last chance» – to justify the need for refusal to issue the enforcement document in order to forcibly execute the decision of the arbitral court.

The analysis of the institution of arbitral courts as the mechanism of protection of civil rights leads us to consider that the improvement of legislation about arbitral courts and formation of impeccable reputation is the main prerequisite for the active development and effective leveraging of advantages of arbitral proceeding.

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METHODOLOGICAL PROBLEMS OF THE INTERACTION BETWEEN THE STATE AND THE CIVIL SOCIETY IN MODERN UKRAINE

This article analyses the problems of functioning of the state and the civil society, their interaction after the Euromaidan, the new trends in their development, the transformation of their interrelations under the conditions of a new quality of the civil society, the domination of the latter over the state in certain segments, the formation of a new type and level of the interaction between state and social institutions on the principles of parity, in the conditions of intensification of democracy and European integration processes.

Key words: *democracy, state, civil society, law, new forms, consistency, level of maturity, interaction, parity.*

The development of the civil society and the democratic law-governed social state in Ukraine methodologically actualizes analyses of new phenomena in the interaction between the civil society and the state, scientific conceptualization of this problem. We mean the most significant methodological aspects of the interrelations between the state and the civil society.

The principal problem in the interaction between the civil society and the democratic law-governed social state is how the increasing ambition to equality and the ideal of freedom of every specific member of the community can be harmonized. No doubt, this problem cannot be solved by depriving state institutions of the right to influence the civil society, as without the strong and competent state authority, it is impossible to procure either the principles of the rule of law or the worthy life of the society members. Besides, we cannot

restrict people's rights to establish alliances and associations as institutions of the civil society which should be protected by the democratic law-governed social state. Under these circumstances, to form two functional systems, the first of which is intended to create mechanisms to prevent a transformation of democracy and the law-governed state into despotism of majority, and the second one is intended to provide all citizens with the possibility to be involved in activities of the social society institutions, will be the correct method for the harmonized development of the state and the society.

Analyzing modern works on the problem of the interaction between the civil society and the democratic law-governed social state, the conclusion can be made that no unified understanding of the notions of new features of the civil society and the state has been formed. There are several key problems which are analyzed from different methodological positions.

First, it is the notion of the civil society. Some researchers consider that the civil society means the complex of interactions between individuals formed in the process of carrying out activities aimed at protecting human rights and freedoms. They mean various civil movements etc. Other scientists think that the civil society mainly includes institutionalized forms of these interactions, such as citizens' associations established and registered in accordance with the current laws. Differences between these notions also refer to the question whether the notion of the civil society should include new forms of alliances which have emerged during the recent years of rapid development. Some researchers, conversely, avoid the institutional factor and state that the civil society should mean the sphere of interaction between social players for the sake of certain ideas.

On the one hand, the notion of the civil society is, in fact, an abstract notion, to a certain degree. Consequently, one cannot find in the social practice an example of a thing (phenomenon, process) by pointing at which you can that it falls within the scientific notion of the civil society. This argument overturns many modern wide-spread perceptions of the civil society, particularly, of the «developed» civil society in some countries and of the «weak» one in others.

Another notion, though close in contents, is possible, according to which the said differences emerged due to the dynamic social transformations in Ukraine and abroad. Here one can find out that the civil society is a too general notion which describes many things (phenomena, processes), sometimes of various kinds. Consequently, the institutional and other interpretations of this notion can significantly differ, depending on social environments. The modern, rather unstable period of social development characterized by changes in the forms of people's social life, first of all, changes in social communications, causes gradual archaization of the prior forms of the civil society and gradual development of new forms. The old and new forms have been long coexisting; therefore, there are different interpreta-

tions of the notion of the civil society.

Today's key problem is directly associated with the interrelation between the notions of the civil society and the state. Nowadays, both the society and the state undergo radical transformations. In the conditions of the intensification of the social dialogue and the rapid development, the role of civil alliances in Ukraine is changing. Though separate social groups (social corporations) remain the source of interests which they protect, their activities aimed at protecting these interests is ceasing to be important only to these groups themselves, acquiring importance to the whole society. The problems that they solve in Ukraine today have fallen beyond the scope of lobbying interests of narrow social groups. Currently, the activities of non-governmental organizations are aimed at introducing quantitative and qualitative changes in various spheres of life, such as protection of human rights and freedoms, health, education, regional development, national security, territorial integrity.

The activities of these organizations are part of the civil society as a system. And any system is not just a set of components, but an integral complex. The system quality is its important characteristic feature, as a system cannot be narrowed down to a simple arithmetic sum of its components. It causes the reality of not only systematic, group entities, but also collective, individual interests and values. These interests and values are characteristic features of both the civil society in general and of separate social groups, professional, ethnic, age etc., representing its components. By the way, due to this fact, the Western science does not distinguish macro and micro, but also meso-scientific concepts and theories.

Second, though it may formally seem that the existence of interests and values of the «lower» level is a precondition for formation of interests and values of the «upper» level, in fact, this dynamic can be reverse. Particularly, even interests and values of an individual represent a social phenomenon, as they are formed in the process of an individual's social activities and, consequently, they are the results of internalization of certain collective interests or adaptation to them. In the same way, interests and values of social groups at the meso-level can be formed under the influence of interests and values of not only individual members of these groups, but also of social groups of the «upper» level, the civil society in general.

The latter is actualized in the conditions of the extremely rapid development of social communication means, which do not only intensify the social dialogue, but also provide some social groups with a possibility to impose their values and interests on other groups and, therefore, to the society in general. It is especially clearly seen during a period when certain social groups, having seized the leverage over social communications, gradually impose their corporate values on other social groups, within the whole civil society.

But it does not mean that the success of this imposition is guaranteed. On the one hand, if these values sug-

gest that the society will go beyond its systematic quality and shift to a new quality, this imposition should be gradual, otherwise, there will be inevitable critical conflicts of values in the society. On the other hand, given people's conservatism in their attitude to values, the «upper» social groups will face the need to adapt their corporate values so that they would not be in conflict with values of other social groups. It means that in their activities, they will have to account for interests and values of other social groups. It is, so saying, a standard variant. In fact, the dynamics of interrelations between different social groups suggests that adaptation of their corporate interests and values will include a number of social conflicts which may, at each of the stages, not only result in gradual evolution of social interests and values, but also in a collapse of the society as such.

In this context, it is expedient to examine the interrelations not only between social groups, but also between different spheres of social life, namely, politics, economy, spiritual sphere, law etc. Politics and law, as spheres which integrate individuals and social groups, cannot exist if there are no economic activities in which people can satisfy their material needs. They also reflect peculiarities of the spiritual development of the society and people's understanding of justice. But in the society, politics and law also influence the development of the economy and spirituality. And this influence can facilitate to disclose the society's creative capacities, but it also can restrain or even dilute it. A situation when politics or positive law contradicts with the social consensus is also possible, which may result either in revolutionary events or in a collapse of the society. In the latter case, the influence of politics and law on other sphere of social life will decline and no ritual spells, particularly, about the society's nihilism of law, will help.

The analysis of legal interrelations between the law-governed state and the civil society provides grounds to make a conclusion that the civil society, as a type of social organization, is formed to protect rights and interests of its members. Under these conditions, the modern state, democratic, law-governed and social, is the only possible partner to the civil society. The state's failure to observe such fundamental principles as priority of human rights and freedoms, limitation of state authority, legitimacy, rule of law, constitution, provision of citizens with a worthy level of life does not mean that the civil society has disappeared.

However, under these circumstances, the essence of the system of interrelations and interactions between the state and the civil society will transform significantly. In its turn, the political and legal absolutist of authority of the civil society is able to give rise to the state of permanent misbalance and instability of all and any political processes, which will directly affect the development of legislative and law-making activities in the state.

Provision of special rights and powers to institutions of the civil society causes a gradual decrease in the level

of legitimacy of democratic governments, as in this situation, the principle of a free democratic choice, ceases to be primary and becomes subordinate to the principle of assessment of efficiency of authorities' actions. At the same time, the practice of parliamentarianism, being the system of interaction between the state and the society and characterized by recognition of the leading role of the nationwide continuing collegial representative body of the state in exercising its state functions, significantly changes, too.

It takes place as a consequence of the fact that along with the mutually balanced legislative, executive and judicial branches of power, there appears a peculiar privileged «legitimator» which pretends to have the right of interference and redistribution of powers among the basic branches of state powers. This reformed civil society is able to undertake, at a certain stage, part of the functions from the legislative power, turning it into a promoter of its interests. It results in a violation of the fundamental principles of democracy, for, as Yu. Shemshuchenko states, the parliament and parliamentarianism are integral characteristic features of the democratic law-governed state and factors of the development of the civil society. Sometimes the system of compromises, on which the manner of activities of the civil society is based, between governmental and non-governmental organisations, between state authorities and civil control bodies, between executive authorities and independent associations of citizens seems to be so complicated that the final result does not meet the intentions and interests of either of the presented influence groups. The civil society is able to give rise to an illusion and a trend of solving all problems by neglecting the public or the national interests, which causes instability in the political and legal life of the state.

A split is another dangerous factor for the civil society. It can create a dangerous political and legal situation when there are several civil societies with many centres of decision-taking and social influence. Under these circumstances, the state, in its activities, will grow apart from the society. It will result in formation of a paradoxical situation: the state without the society, and the society without the state. So, despite all its importance, the civil society cannot, for a number of objective reasons, become a substitute for the law-governed social state which must guarantee certain specific rights to all members of the civil society.

Hostility of the state to the civil society is compensated in favour of the society by its distrust and disrespect to the state. The existing interdependence between the form of existence of the state and the civil society provides a possibility to identify three types of coexisting of the state and the civil society. The first type is characterised by a high level of proneness to conflict and realised by any non-democratic forms of government. The second type can be described in terms of complete isolation of the state and the civil society when the state, having the only intention to

preserve powers, does not interfere with social matters, and the civil society tries to solve all problems by itself. But this situation only looks like a transitional period, in fact being an initial stage, or a stage of aggravation of confrontation between components of the civil society and the state, or a stage when a constructive dialogue between them begins. Finally, the third type of interaction represents a model of coordination or partner relations which suggests that the democratic, law-governed, social state appears beside the civil society.

The major areas of the policy implemented by the democratic, law-governed, social state with respect to the civil society and its separate institutions must be the following: legal recognition of the civil society, inviolability of the sphere of private interaction between its members; guaranteeing and securing to all members of the civil society of their involvement in the process of development and adoption of state-level decisions; facilitation of citizens' exercise of their rights of associations and applications to state authorities; financial and material support to institutions of the civil society, including by establishing various funds etc.

Recognition of the principle of the state's servicing the civil society and channelling its activities to secure equal opportunities to all its members, as the fundamental of freedom and social justice is a sign of existence of legal relations between the democratic, law-governed, social state and the civil society. In its interactions with the civil society, the democratic, law-governed, social state must consider partner relations as the basic principle of its activities.

The analysis of interactions between the democratic, law-governed, social state and the civil society provides a possibility to say that the interactions between them can be defined as a dialectical synthesis: the civil society requires existence of the democratic, law-governed, social state as its precondition, while only the developed civil society, the wide and active involvement of people in state and political processes makes it possible to crease the democratic, law-governed, social state, being the basis for stability, a democratic legal regime, a strong reputable state and a pledge of public peace.

In our opinion, to define the notion of the «civil society» and the structure of the civil society, which is the subject of active discussions in the modern legal science, we should be based on the following methodological positions.

The civil society is not an institutional phenomenon like similar public institutions such as the state, the party, the civil organisation. It is an establishment which, in the institutional sense, differs from the society as a social phenomenon. The civil society is a characteristic feature of the society in terms of its self-organisation, the level of development of democracy, compliance with and exercise of human and civil rights and freedoms, performance by people, as citizens, of their political duties, being carriers of sovereignty, sources of power, conscious political actors, responsible for consequences of their actions and for the future of the

whole society. Therefore, the civil society cannot be built as something new, as something existing along with the «non-civil» society. It cannot be established as a new quality of the politically organised society, as an environment of democracy, freedom and responsibility for the future of the state and the nation.

Based on this methodological position, we can logically say the in late 2013 Ukraine underwent a jump-type transition from one condition of the civil society (inactive, passive, latent) to an active one. The civil society acquired features of a new quality. This quality was caused by the level of activity and political consciousness of citizens. This level was rather high, which enables to speak of the respective level of self-organisation of the society. Simple activists of the Revolution of Dignity gained invaluable experience in real self-organisation and political struggle, experience which showed that they represented the force that was able to win the anti-national regime and change the social system. Moreover, like every revolutionary activity, self-activity of people brought something more to these events. First of all, the Euromaidan gave experience of joint independent historic actions of citizens, experience of independent creation of history. So, it was a civil revolution.

It is the civil society that creates the state, not vice versa. That is why the state is part of the civil society, an institution which exercises public authority and a mechanism of securing safety, welfare, legal protection of citizens' rights and freedoms. The civil society and the state correlate as the whole and a part, as an organism and a mechanism. The declaration, struggle and development of the state confirm the maturity of the civil society, citizen's comprehension of solidarity of their political interests, legal rights and duties. Therefore, we cannot speak of the absence of the civil society if we have their parts, namely, the state. In the conditions of non-democratic political regimes, the civil society still exists, unlike representations of some researchers, but in this case, the society transfers too many uncharacteristic functions and powers to the state, which results in the state's «absorption» of the civil society.

The said methodological reference explains the problem of interpretation of the Euromaidan in Ukraine. The society regained the functions that it had transferred to the state. Figuratively speaking, the civil society set the state down by depriving the state of the society's most important, constituent features, functions and powers (social and economic self-organisation and self-regulation, civil control, provision of rather specific powers to state authorities, national sovereignty). It means that Ukraine did not only gain state sovereignty, but also national sovereignty. The people, the society declared that they are the source of power and demanded that the state authorities perform their delegated functions responsibly. Therefore, the fact that the country gained its national sovereignty (whose sense and scope of political subjectivity are wider than that of political sovereignty) means that the Revolution of

Dignity was a political revolution.

The level of development of the civil society is a characteristic feature of the level of democracy and legal culture of the society. It is developed to the extent to which it has reserved majority of functions and powers of institutions of citizens' self-organisation and self-activity. The state is strong to the extent to which it efficiently effects, within the functions and powers delegated to it by the civil society, political management in the interests of its citizens by creating the respective legal system and securing public order in a lawful manner. It means that the state is strong when the civil society is more active, when it occupies a smaller segment of law-regulating activities in the society, and when it efficiently performs its functions and objectives prescribed by the constitution. It means that the attribute «civil» which refers to the «society» correlates in the same way as the attributes «democratic, law-governed, social» refer to the «state». In the same manner that the state in a democratic country gradually gains the features of the democratic, law-governed, social state, the society gains, in the conditions of a democratic political regime, its specific characteristic features of the civil society, as it returns to its status of a politically organised society.

Consequently, the political maturity of the society and the political rise of broad layers of population confirm that it was a social revolution in Ukraine, not spontaneous actions of a crowd, with strange, unpronounced, populist slogans, as some researchers say.

The civil society is political, as its citizen is political, and, according to Aristotle, a human is a political being, a conscious party to political relations and a political actor. In view of this nature of the civil society, it is incorrect to define it as a sphere of realisation of its citizens' private interests beyond the state's interference and its organisational and regulating influence. The civil society is not a membership club, not a conglomerate of hobby groups, associations of exotic entertainment fans and not an alliance of mafia formations, though they are its mock forms. The civil society is a sphere of self-realisation of citizens who are conscious about their interests and needs, which are mutually correlated and require the state, a legitimate and legal political institute, for this purpose.

Accordingly, power which has firmed up as a result of citizens' socio-political self-realisation is legitimate and legal; it is an embodiment of the state as a political institution. Power, of which people have become the source at last, which is a constitutional provision, legitimises the institution of the state. Therefore, the state remains legitimate until its actions are based on laws, people's confidence and support. The Revolution of Dignity took several steps, but it did not set the record straight: the state should, in its activities, be guided by law, the constitution and the legislation, and only when it is, it will be legitimate and legal. It means that the revolution in Ukraine became a factor legitimising changes in the power system; it was a democratic, law-governed revolution aimed against

the rule of clans and oligarchs, against the authoritarian political regime and for the rule of verity, justice, law and democracy.

The civil society cannot be structured by analogy with the political or the legal system. The society itself is a system, being a collective of individuals and communities. The civil attribution only provides it with a certain dimension. Similarly, the law-governed state cannot be structured by the criterion of inclusion of any subsystems. It is characterised by certain qualitative parameters and principles, not by the hierarchy of institutions which it includes.

To analyse the civil society, the most acceptable classifiers can be the following: time and space characteristics (certain conditions, stages of development of the civil society in a certain country), indicators of the level of political involvement (an active, passive civil society), the level of observation of human and civil rights and freedoms (developed, undeveloped), the correspondence with social objectives, civilizational challenges, the ability to develop etc.

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HARMONIZATION OF UKRAINIAN WASTE TREATMENT LAWS WITH EU LEGISLATION

A significant factor of the growing environmental crisis is a multifaceted problem of waste. The near space contains about 3,000 of wasted satellites[1] and over 5,000 t of used materials, which have produced millions of fragments orbiting the planet.[2] Millions of tons of such toxic wastes as sulfur dioxide and nitric oxides are discharged into the atmosphere. The soils, especially those in the urban and industrial localities, are polluted with wastes that contain pesticides, heavy metals, radioactive substances, and other toxic components.[3] Fresh and sea water is contaminated with waste from wrecked ships[4] and scores of cubic kilometers of poorly treated sewage.

The scale of the challenge has increased due to a tripled growth of the global population in the 20th century coupled with a rapid industrialization. In addition, the aggregate raw material production has grown, its output exceeding that of all the human history, and 4/5 of this growth has taken place since the middle of the previous century. A fast-growing impact of the man on the terrestrial life, including discharge of waste, has resulted in the situation when *the environment is no longer a stable fundamental development factor*. The balance between material-and-energy and information exchange is disrupted, in particular due to forming an increasingly complicated artificial environment and unlimited acquired needs. According to the US National Commission on Materials Policy, over the period of 1940–1970 the total volume of raw material lost by the country's economy through turning it into waste

exceeded 20 billion tons. The speed of waste generation is incommensurable with the industrial backward recovery of extracted useful materials.[5] But this phenomenon is not natural. For instance, ants cause no problems for the environment, although the mass of their population is four times bigger than the human population of the planet, and they consume as many calories as 30 bln people. However, unlike human beings these insects do not pollute the environment, but on the contrary – enrich it with vital matter.[6] A non-waste closed cycle – biological and technical – could be organized, if desired, by the population of the planet. Meanwhile a bulk of consumed resources is spent to maintain a huge cost-consuming technogenic system outright adverse to the natural environment.[7] As a result – several decades of the industrial model development have raised an issue of *human survival*.

Historical Background

By the 1970-s, awareness came that at the turn of the millennium *the problems* determining *the global ecological situation*, such as *environmental accumulation* of toxic chemicals and radioactive waste, are of a *complex nature*. For example, for every resident of Dnipropetrovsk there is over 2,000 tons of hazardous waste.[8] Detection of such chemicals as DDT even in the animal organisms of Antarctic has shown that there are no pollution-free areas on the planet. Non-degradable toxic wastes are capable of penetrating the water-bearing strata of the Earth, accumulating in human bodies in lethal concentration. Radioactive wastes, particularly those having a long half-life period, are of special hazard.[9] Their insecure burial poses a continuous threat of large-scale catastrophes.[10]

Nature protection is complicated by the inertness of ideological mindset, strong international competition, and government funds deficit. A constantly growing waste generation has become a negative by-effect of economic development and expanding consumption. That is why even the EU has not fully coped with the trends detrimental for the environment. Thus, in 1985 every European resident produced annually 300 kg of domestic waste; in 1995–1997–400 kg; and in 1998–2000 – as much as 500 kg. However, increasingly more waste was treated (on the average 25 percent in 1998–2000) or recycled. The EU laws require that at least 45 percent of used packaging material go to recycling. In practice, 50 percent of glass breakage, 60 percent of paper litter, and about 50 percent of metal are recycled. Relatively big quantities of plastics are a challenge, too: the relevant figure slightly exceeds 20 percent[11]

Current State of EU Legislation and Ukrainian Waste Laws

The EU political approaches to the field are basically stated in the Community's Waste Management Strategy[12] and recognized legislatively by the EU Waste Framework Directive 75/442/EEC, which is supplemented by the Council Directive 91/689/EEC on hazardous waste,[13] and Regulation on shipments of waste, Regulation No. 1013/2006 of the European

Parliament and of the Council of 14 June 2006 on shipments of waste.[14] The latter Regulation replaced the Council Regulation No. 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Union. *This rational stand of the EU* makes Europe *a global environmental movement hub*. The European environmental policy is mostly *preventive* aiming not only to solve actual problems, but in the first place to prevent the appearance of new ones. Environmental priorities underlie practically all the components and lines of the EU's activity, being embodied in regional, scientific and technical, agricultural, transport, and trade policies. Since the 1990-s, the Community's programs have been directed to address complex issues of the man-nature interaction. Application of their guidelines by advanced industrial countries in the 21st century can mark the beginning of solving global environmental problems.

The ecological situation in Ukraine is characterized by pollution of vast territories with toxic, domestic and other kinds of waste due to the technogenic clutter and unreasonable structure of production and natural resource management. By the time of Ukraine's getting its sovereignty, the overall land area of the republic accounted for less than 3 percent of the former Soviet Union territory. However, it accommodated one quarter of all the production potential, which means that Ukraine was responsible for about 25 percent of the natural environment pollution. This disproportion resulted in the country's technogenic impact on the nature exceeding that of advanced countries by 4–5 times. In 1991 Ukraine accumulated 17 billion tons of waste in the territory of 53,000 ha (mostly in Donetsk and Dnipropetrovsk regions). The waste recirculation rate was very low; waste management problems were hardly addressed.

But for all that, the CIS countries (with few exceptions)[15] virtually lack specialized research on waste legislation. Individual subject-related opinions do not provide a holistic picture of this legislative aspect which necessitates exploration and development of the said state legal activity.

How to Adapt

Ukraine's aspiration to harmonize its environmental legislation with the norms of the European Union is stipulated by the country's 'European choice'. The European Union is a strategic guide, and the recent candidates for membership from Central and Eastern Europe have set a practical example of that kind of approximation. A common frontier between Ukraine and the EU provides an additional impetus for the country to act in line with the updated agreements on partnership and cooperation. Setting priorities and working on reform vectors will facilitate implementation of projects in the field, formation of incentives, financial resources and institutional potential for harmonization of the national regulatory framework with the normative legal requirements of the EU in the short- and middle-term prospects. Notably, the alignment should be aimed not at a direct transfer of the EU directives to

the national legislation of our state, as it takes place in the EU membership candidates, but rather at a gradual adaptation to the key regulatory requirements of the EU with a parallel strengthening of the institutional basis necessary for the reform implementation. It is this approach that can ensure a maximum efficiency of efforts directed to achieve the strategic priorities.

Alignment is integration of fundamental principles of one regulatory environment into another legislative framework without a full conformity, which is required for approximation. The alignment is supposed to promote the following processes:

– research of the EU regulatory acts in order to identify their main principles and specific features;

– analysis of certain parts of the national regulatory framework and institutional structure aimed to find out whether they contain the relevant principles and specificity of the EU laws;

– modification of the national legislation or elaboration of acts to introduce the basic principles of the EU legislation;

– adaptation of the institutional structure to allow for application of the modified national laws in practice.

The EU legal system is guided by the principles of motivating standards observance. Performing its regulatory functions, it applies the permitting regulatory approach (while in Ukraine that approach is still based on command and administrative enforcement actions). Therefore, the legal systems alignment will call for identification of instruments or legislative provisions, facilitating the society's and institutional structures' change-over to more up-to-date approaches, oriented to ensure law observance through economic incentives.

When determining *potential positive effects of the legal systems alignment*, it should be noted that the major inducements are an expected positive environmental result and investment volume growth, as it occurred in the Central and Eastern European countries. Advantages of sustainable development concept introduction far outweigh its costs. Even with approximate calculation, the profit from the EU environmental standard introduction is 50 percent higher than its estimated costs.[16] It is planned to reduce production and maintenance costs due to availability of pure water and cutting primary water-treatment costs, reduction of raw material consumption due to its effective use and expansion of material recovery and processing. A positive result is also expected in the social sphere with the public participation in a decision-making process and development of a responsible attitude to environmental protection (*e.g.* getting people involved in separate waste collection and processing).

As the experience of the new EU member states proves, introduction of market methods of pricing and production is likely to affect positively the emission density in Ukraine. It is also supposed to release disposable funds for new investments, since a rise in resource efficiency allows saving financial assets of production enterprises.

According to a number of research investigations conducted in the EU member states, tightening of economic policy does not hinder economic growth, although requiring a considerable restructuring of certain industries (in particular, energy-intensive ones). The methods and means to implement a new economic policy in Ukraine, as well as terms of the necessary investment can be determined in relation to the pace of general economic transformations.

Our country's commitment to alignment of its environmental standards with the EU legislation is clearly stated in the draft Partnership and Cooperation Agreement, which is to replace the 1994 PCA.[17] The key environmental aspect of the new PCA, alongside with a general furtherance of harmonious and stable development, is a reduced waste generation. Alignment provisions are included into the national program of the Ukrainian legislation adaptation to the legal environment of the EU, adopted by the Law of Ukraine on March 18, 2004; the Concept of the National Environmental Policy of Ukraine for the period until 2020, approved by Ordinance of the Cabinet of Ministers of Ukraine No. 880-p dated October 17, 2007.

At the moment, it is necessary to specify: a) which exactly waste management acts of the EU could become the most appropriate guides for Ukraine; and b) which of the regulatory acts offer concepts and approaches as to reforming the key environmental policy instruments aimed to ensure an effective solution of the country's most acute ecological problems, outlined in governmental political documents. Attention should be focused on the EU environment management mechanisms and principles, which could help forming the legal framework of reforms in the state. It is important to direct the suggested mechanisms to resolve the issues that are set as priorities by the government of Ukraine, and not by the EU government or third countries. Then the Ukrainian government is likely to make efforts and allocate resources for solving the specified problems.

Consequently, it is important to find answers to the following questions:

– Which of the political instruments and legislative acts of Ukraine need to be reformed in the first turn to solve the country's priority ecological problems?

– Which of the branches of the EU law can help to solve the problems most efficiently?

– Are there any evident barriers to the legislation alignment?

– What are the main institutional problems and financial issues that might arise during the alignment?

From the standpoint of the environmental authorities of Ukraine,[18] the key *causes of the waste problem* occurrence are as follows:

– outdated, resource-consuming or polluting technologies;

– low environmental awareness of the population and lack of effective economic mechanisms and incentives to form nature conservation commitment;

– absence of a continuous environmental monitoring of waste locations;

– insufficient financing of environmental activity «with whatever funds remain»;

– lack of an effective waste management system (separate collection, storage, and dumping).

Current Gaps and Drawbacks of Ukrainian Waste Law

The main drawbacks of the Ukrainian *political instruments and legislative acts* include a discrepancy between the theoretical environmental standard provisions, notable for large scale and a high degree of detail, and the system of their practical implementation. As a result – the regulatory authorities are unable to monitor or ensure the standard compliance in full. For the same reason, the regulating entities believe that to meet the standards is not feasible technically or entails excessive expenditures. Accordingly, they are not so eager to abide by the standards, which they regard as unjustified and burdensome. Neither technical, nor economic aspects of enterprise activity are taken into consideration. Moreover, lack of flexibility of the allowable waste system restricts severely a gradual introduction of waste-minimizing or waste elimination techniques. In practice, they use coordinated permissions – temporary, though regularly extended – to discharge waste in quantities that exceed the set standards. The permissions are issued on an individual basis by regulatory authorities having broad powers to set up permission terms at their own discretion and hence – prone to corruption.

The mechanisms for *ecological monitoring and reporting system* in Ukraine are characterized by dispersion of functions among different agencies which causes their inefficiency (as some data can be duplicated, and data bases of different authorities are uncoordinated) and absence of transparency, complicating the use of a complex approach to management of environmental activity.

When characterizing the *system for standards enforcement* it should be emphasized that a non-realistic list of standardized parameters and the complexity of the system regulating environmental activity result in a situation where regulation entities are invariably law breakers. Consequently, controlling authorities, whose duty is to ensure legislative acts compliance, face an impossible task. The difficulties are further complicated by deficit of resources, which the authorities need to have to fulfill their functions: low salaries cause drain of qualified staff (in particular, environmental law experts); lack of the simplest facilities prevents the experts from proper discharge of their responsibilities.

The efficiency of mechanisms for ensuring compliance with the active legislation is still more impaired due to the controlling authorities' scarce resources that are not enough to employ economic incentive mechanisms for observance of the requirements or to apply sanctions against law breakers. The environmental controlling agencies are often at a disadvantage compared to local authorities and industrial enterprises, as they do not get an adequate support from the judicial system, which is inept

as concerns environmental case trials. Light offenders are often fined, while the worst wrongdoers go unpunished due to political or economic pressure on the controlling bodies. At all events, the size of fines is usually too small to serve as a constraining factor.

It is also essential to identify *potential problems and legal barriers on the way to alignment* of waste management legislation. The legal barriers might be as follows:

– contradictions contained in various national legislative acts. The large-scale law-making process of the recent fifteen years has been, to a great extent, methodless, causing legislation gaps and collisions between new laws, decrees, and bylaws. As a consequence – it is not always clear, which regulatory acts apply in specific cases. Many important parts of the legislation need revision and coordination with other branches of the national legislation;

– unclear distribution of duties or powers among different agencies in regulatory acts which often makes introduction of new legislation unfeasible;

– the framework legislation of Ukraine rarely contains new law implementation procedures, which should be formulated during the alignment in subsidiary legislative acts as part of active environmental legislation;

– if a decision is made to align only a certain part of the legislation, rather than the entire legislative framework, it can lead to even greater legislative discrepancies;

– reclamation of the historically accumulated waste involves considerable expenditures and creates difficulties for setting target environment quality values, whereas stringent requirements challenge politically the application of more pragmatic and feasible standards;

– absence of a tradition of public participation in decision-making and introduction of new legal norms. Although the relevant regulatory acts have appeared in the present-day Ukraine, getting the public profoundly engaged is going to involve radical changes;

– scarcity of legal resources, necessary to make large companies pay fines for non-observance of environmental acts requirements.

The outcome of law enforcement efforts in Ukraine is not evaluated in terms of their ultimate impact on the environment condition. Instead, the major focus is placed on activity indices (number of inspections *etc*.), depriving inspectors of any motivation to demand that their accountable companies abide by law.

The framework EU directives on the quality of the natural air and water resources, as well as those on waste management,[19] comprise many useful concepts and approaches. Generally speaking, they suggest a balance between environmental priorities and a possibility of requirement enforcement. However instead a direct copying of the EU environmental quality standards, it is recommended to use them as a helpful guide attempting to set a balance between a desired ecological result and a realistic opportunity to enforce the standards with account of the current specific situation in Ukraine.

Conclusions

In summation, one of the main tasks of the Ukrainian waste laws adaptation to the EU principles and standards is to specify the *legal aspects* and methods of introducing new principles and concepts into the active legislation. This should be accomplished with due regard to discrepancies in the national law, lack of practical procedures of new legal provisions transposition, risk of inconsistencies that are likely to appear in the legal framework due to introduction of the new rules. A necessary step towards resolution of these issues would be a comprehensive analysis of gaps in the legislation by way of comparing the environmental laws, selected by Ukraine for alignment, with those of the EU. Based on such a survey, it is possible to identify the lines of future reforming the national legislative framework and adaptation of the EU legal provisions to the laws of Ukraine.

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MODERN TRENDS IN THE DEVELOPMENT OF UKRAINE'S ECONOMIC PROCEDURE

Annotation. *The article is devoted to the research of modern tendencies in the development of the economic procedure of Ukraine, since without proper analysis it is impossible to provide an adequate normative regulation of procedural mechanisms that should ensure the effective, fair, impartial and timely protection of the rights and freedoms of economic legal entities by the court. The paper defines the concept of economic procedure, stages of economic procedure, economic procedural form, highlights its features.*

Particular attention is paid to the following trends in the development of the economic proceedings, such as: a) the impact of globalization processes, the provisions of international law and the concept of human rights protection on the system of domestic justice in general, and on the economic procedure in particular (within this general tendency, we additionally highlight an individual tendency (harmonization, unification) of rules and procedures at the level of the EU countries, approximation of the economic procedural legislation of Ukraine with the EU procedural law); b) differentiation and specialization of procedural regulation (including gravitation towards specialization within the judicial system, differentiation of court procedures, tendency towards their simplification, the search for optimal procedural forms of resolving commercial disputes).

Key words: *economic procedure, tendencies of economic procedure development, the impact of globalization processes on economic procedure, harmonization and unification of procedural norms, approximation of economic procedural legislation of Ukraine with the EU procedural law, differentiation of procedural regulation, specialization of procedural regulation.*

Actuality. With the adoption and entry into force of the laws of Ukraine «On Amendments to the Constitution of Ukraine (on Justice)», «On Ensuring the Right to a Fair Trial», «On the Judicial System and Status of Judges», «On the High Council of Justice», which were adopted in 2015–2016, discussions about the expediency of preserving the economic court system, its role

and significance have stopped. Commercial courts remain an integral part of the domestic judicial system.

However, institutional changes alone are not enough to establish the right to a fair trial in Ukraine, and qualitatively new procedural legislation is necessary (including economic procedure legislation). The Strategy for the Reform of the Judicial System, Judicial Process and Related Legal Institutions for 2015–2020, approved by the Decree of the President of Ukraine dated May 20, 2015, No. 276, provides a thorough analysis of the shortcomings in the legal regulation of both the judicial system and judicial process in Ukraine, defines the main directions of reforming these fields of legislation, including improvement in the efficiency of justice and optimizing the powers of courts of different jurisdictions.

At the moment, the new draft law No. 6232 of March 23, 2017 «On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Proceedings of Ukraine and other legislative acts» became a new argument in the discussion. The explanatory note to the draft expresses the expectation that its adoption will contribute to overcoming procedural problems that impede effective judicial protection in Ukraine [1]. After October 03, 2017 the law is now adopted.

It certainly is an incentive to continue and intensify previously initiated scientific research in the field of economic procedural law.

Analysis of publications and problem definition. One of the issues which in the literature (both domestic (O. P. Podtserkovnyi [2], S. V. Vasyliev [3], Y. A. Talykin [4, 5], S. S. Borovyk, V. V. Jun [6] et al.) and foreign (V. S. Anokhin [7], A. A. Latkin [8], V. S. Kamenkov [9] et al.) have already attracted a lot of attention, is the question on the concept of the economic procedure, its essence and legal nature, stages, forms and trends of development.

The outlined issues are so complex, ambiguous and multifaceted, that they continue to attract the attention of scientists. Hence, attempts of the scientists to formulate a comprehensive and fully correct definition of the concept of «economic procedure» continue, the search for optimal procedural forms of economic legal proceedings under modern conditions, for defining their features, etc. has not stopped.

The purpose of this article is to identify and characterize the current trends in the economic procedure of Ukraine, because without proper analysis it is impossible to provide an adequate normative regulation of procedural mechanisms that should ensure the effective, fair, impartial and timely protection of the rights and freedoms of economic legal entities by the court.

Presenting main material.

From a theoretical standpoint, the economic procedure can be defined as the procedural order (a system of interconnected legal forms) of the activity of authorized agents regulated by economic procedural rules, which is manifested in the implementation of justice in economic affairs, protection

of violated rights, freedoms and interests of participants in economic legal relations. The economic procedure is not just a set of actions, regulated by the rules of economic procedural law – it is a defined system. The activities of the economic court in consideration of the cases under its jurisdiction are carried out in a certain logical sequence of the stages of the process. Procedural actions carried out by the participants of the economic procedure, depending on the content and purpose of their implementation, constitute the stages of the economic proceedings. At each stage, procedural relations are specific in nature, which is determined by the object of these relations, the composition of participating subjects at each stage, the content and purpose of procedural actions. The stage of the economic procedure is a set of procedural actions in a particular case, that share the same goal or aim at one particular goal. Each stage fulfils its special functions in the economic procedure [10, 43–44]. The complexity and number of procedural actions performed at each stage of the procedure depend on the tasks that are being set.

As one of the main categories of the economic procedure, the economic procedural form determines the general principles of functioning and development of the court's work in the consideration of economic affairs, the correlation with other types of legal proceedings and public activity in general. Therefore, by forming the unified and integrated theoretical foundations of the structure of economic procedure, the notion of economic procedural form has a general effect on the regulatory requirements governing economic justice and their application in practice. In the economic process, the court, the parties and other participants may take those actions, which are provided by economic procedural rules. The formalization of the economic procedure is not accidental. The role and significance of the procedural form resides in ensuring the protection of the truly existing rights of economic entities, as well as other participants of economic relations, and in guaranteeing the adoption of legitimate and well-founded decisions. Characteristics of the economic procedural form are that: a) the economic court and all participants in the economic proceedings are bound in their activities by the norms of economic procedural law; b) parties to the proceedings carry out only those procedural actions, which are directly defined by the norms of the economic procedural legislation; c) the procedure for applying to the court, submission and preparation of the case for consideration, the procedure for consideration of the case, the structure of the decision, the procedure for its review, as well as the execution after the enactment, are determined by law; d) the relationship between the economic court and the participants in the proceedings can not be actual relations by their nature (they can only be legal relationships); e) the procedural form provides the parties with equal opportunities for the right to defend (to compete), the right to participate in the process, to provide evidence, to use legal aid, to

challenge a decision, to participate in the enforcement proceedings.

The progressive development of the domestic economic procedure takes place under the influence of a number of objective factors and general tendencies. Understanding such tendencies is important, since, with all the external apparent originality of some or other scientific approaches in the field of economic procedural law, sectoral procedural legislation, specialists who are engaged in its development, in each case, stay within the framework of historically established approaches on legal regulation and legal procedural concepts, solutions to a particular problem, settlement of certain relations. It is difficult to find an absolutely original solution, analogues of which have not previously existed in the domestic or foreign procedural law. And there is no need for this, which has been repeatedly emphasized in the legal literature [11, 35–36]. Practical needs serve as the initial material superimposing on those ways of their solving that have historically developed in other countries, in the international legal space or in the history of our country, they stimulate creative search and result in a new solution to the existing problem. Certainly, it is possible to have completely new, absolutely original solutions to many issues, especially at the level of elaborating on a special idea in relation to a particular legal institution. Thus, at each stage of developing economic procedural law and the whole system of economic legal proceedings in general, it is necessary to choose the most appropriate and rational procedural tool, that will adequately reflect existing realities.

Modern trends in the development of the economic procedure are: the growing importance of the social functions of justice and the corresponding role of the courts (including economic courts) in modern society, and, as a consequence, democratization and humanization of the judicial process; the narrowing scope of procedural regulation and, consequently, stimulation of the use of reconciliation procedures by economic courts, introduction of alternative methods of resolving economic disputes; expansion of dispositive powers of the parties in economic proceedings; the drive to increased efficiency and quality of economic justice, improved organization of economic procedure; stimulating competition between economic and arbitration courts, etc.

Nonetheless, the following trends are also important:

a) the impact of the globalization processes, the provisions of international law and the concept of human rights protection on the domestic justice system in general, and on the economic procedure, in particular (within this general trend, as a separate trend, one can further emphasize the approximation (harmonization, unification) of rules and procedures at the level of the European Union (hereinafter – EU), approximation of the economic procedural legislation of Ukraine with the EU procedural law). This includes developing the concept of the global (absolute) supremacy of the EU law over the national law of the member states;

b) differentiation and specialization of procedural regulation (including gravitation towards specialization within the judicial system, differentiation of judicial procedures, tendency towards their simplification, the search for optimal procedural forms in resolving commercial disputes).

Undeniable today is *the impact of globalization, international law and the concept of human rights on the domestic justice system as a whole, and the economic procedure in particular.*

Unfortunately, in the modern Ukrainian procedural doctrine, there are no comprehensive studies on the place of modern economic procedural law in the global system of procedural law. Existing researches by procedurals do not sufficiently define the general tendencies in the development of European procedural law and its importance for the improvement of existing procedural mechanisms in Ukraine designed for legal protection of the rights and interests of economic trial participants. Therefore, as it is rightly noted by Y. V. Bilousov, it is extremely important to determine the general directions of harmonizing the legal regulations of procedural form taking into account national and supranational factors [12, 179–180]. At the same time, V. V. Komarov, considering globalization as a factor in the harmonization of procedural law, emphasizes that modern justice and judicial enforcement should meet the challenges of our time to ensure fair trial in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms that objectively requires the study of access to justice in the context of the fundamentalization of the right to justice and the harmonization of national procedural systems [13, 37–42].

Institutions of justice and legal proceedings must be modernized in line with the challenges of modern society, based not only on such an evident civilizational fact as the fundamentalization of human rights within the limits of national and international legal order. Undeniable is the need to develop appropriate concepts concerning continuity, traditions and innovations in the procedural sphere that reflect contemporary theoretical and practical problems of the science of economic procedural law. A fundamental condition that will increasingly determine the development of procedural law in the near future is the convergence of structures of national civil and/or economic procedural law in connection with globalization. In the modern world, national approaches to the administration of justice require the enforcement of general standards of legal security, prompt and effective resolution of disputes regarding the conduct of transnational business. As is the case with human rights, the effectiveness of judicial and jurisdictional systems, in general, is coming to the fore here.

Thus, universalism is a consequence of general globalization, it makes the procedural form understandable and acceptable for use under the conditions of economic relations, saturated with foreign element. On the other hand, the economic (as well as the civil) process of each state not only can but must have

its own characteristics, conditioned by national factors of the economic procedural form development. The unification, harmonization processes of creating a new law or upgrading a current law have different scientific assessments, because harmonization may lead to a reduction in the negative effects associated with the distinctive features of legal and legislative systems [14, 100–110], although this may lead to the leveling of national traditions of legal regulation of civil and/or economic procedural relations. Nevertheless, globalization of the procedure as a real modern tendency of its development, which determines the features of unity, should not, as V. V. Komarov notes, neutralize the identity of national procedural systems, taking into account the specifics of their historical development, doctrinal views, the status of judicial practice and other factors [13, 42–44].

As a separate trend, we can additionally identify the *convergence (harmonization, unification) of rules and procedures at the level of the EU countries, convergence of economic procedural legislation of Ukraine with the EU procedural law*.

Regarding the tendency of harmonization of procedural regulation in the domestic territories, the system of Ukrainian procedural law has for a long time developed inconsistently and disproportionately (both in the inter-system and in the internal structure dimensions). Under the prevailing conditions, substantive law is updated much faster, and this process is much easier. Only recently thousands of laws of a substantive nature were adopted. As to the procedural law, there are more than sufficient unresolved issues. Procedural activity today is regulated by the procedural laws without mutual agreement (for example, worth mentioning is the problem of the conflict of jurisdictions, the absence of common criteria for the delimitation of jurisdiction between courts of civil, administrative and economic jurisdictions). Therefore, extremely important, albeit rather painstaking, is the work of the legislator, aimed at harmonizing, balancing certain elements of the system of the procedural law in general, as well as the economic procedural law, in particular.

Harmonized legislation has to comply with the following requirements: it has to contain rules of law that are in accordance with the provisions of the international treaties in force; to ensure uniform understanding and application of the rules established by all parties to the legal relationship and contained in the concluded international treaties; to carry out legal actions that, as far as possible, exclude or minimize the need for the adoption of departmental acts, and in cases when such a necessity arises – to provide for the possibility of harmonization of by-laws; to contain real guarantees and mechanisms for the implementation of the legal norms and provisions of legal acts of the subjects of harmonization, as well as measures of liability regarding illegal activities and incentives for legitimate activities; to provide systemic and internal communication of national acts and acts of other states or international organiza-

tions – the subjects of integration [15]. This seems possible if the basic requirements of normative techniques are followed, namely: the conceptual apparatus and standard-setting techniques must have a cross-cutting nature; the terms used in the legislative acts should be well-defined; the object of legal regulation should also be clearly defined; the rules of law, in the vast majority, should be rules of direct action (blanket rules should be avoided). Particularly important for the process of harmonization of the law is the similar interpretation of the terms and concepts used in international legal documents. Correct translation of harmonized acts is a prerequisite for this, while it is important to give the translations the status of an official document.

In relations between Ukraine and the EU, there are two general stages of harmonization: voluntary and organized [16, 47–49]. It should be noted that the process of harmonization of Ukrainian legislation in general, as well as the procedural law, in particular, with the EU law, started before the entry into force of The Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine in 1994 [17]. This period can be called the stage of voluntary harmonization (it is characterized by the fact that it was carried out in the absence of specific obligations of the parties in this area, it was held under conditions when Ukraine's actions to harmonize its legislation with the EU law were not agreed with European integration organizations and were one-sided). At the same time, after the entry into force of the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine in 1994 (the relevant Agreement pays particular attention to the harmonization of existing and future legislation of Ukraine with the Community law, considering harmonization as an important condition for the strengthening of economic relations between the parties (Article 51.1)), the process of harmonization of domestic legislation with the EU law already has not only received clear legal principles, but also acquired an organized character and more diverse forms.

The Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine does not define the notion of harmonization. The same treaty operates with such traditional EU law terms as «rapprochement» (Articles 51, 76), «adaptation» (Articles 53, 77), «approximation» (Article 60), «establishing equivalent norms» (Article 67), etc. As with the constituent agreements on European integration organizations, this may mean that the Agreement refers to different ways of defining the same process, the main purpose of which is to create the same legal conditions for the subjects of cooperation between Ukraine and the EU. This is evidenced by the provisions of Art. 51.3 of the Agreement, which implies that this process should ensure «the approximate adequacy of the laws». However, in official documents, the term «adaptation» is often used. According to the provi-

sions of the National Program for Adaptation of Ukraine's Legislation to EU Legislation, approved by the Law of Ukraine of March 18, 2004 [18], the adaptation has to bring the laws and other legal acts of Ukraine in accordance with the «acquis communautaire». On the other hand, the EU – Ukraine Action Plan [19, 78–79] explicitly speaks of harmonization of legislation. As the practice of European integration associations shows, despite the application of different terms both in the EU law and in agreements between the Community and third countries, essentially, it is about the same process of bringing the national legislation in line with the requirements of the law of European integration organizations. According to V. Muraviov, the term «harmonization» most adequately characterizes the purpose of this process: to harmonize national norms in such a way that in both cases they create the same legal conditions for the activities of economic entities within the framework of the common market [16, 48]. N. Malysheva points out to this too – harmonization, declared as a target of the law-making process, should «turn on» certain mechanisms for obtaining the highest degree of coherence and compatibility of harmonized systems [20, 87–88]. The provisions on harmonization regulated in the Partnership and Cooperation Agreement and the EU – Ukraine Action Plan have a framework character and their implementation depends on the adoption of the relevant legislation, on the establishment of the necessary institutional mechanisms and the implementation of appropriate actions, both internationally in relations between parties, and in the Ukrainian legal system [16, 48–49].

For Ukraine today, the harmonization (and not only of economic procedural legislation, or procedural legislation in general) is particularly relevant in view of Ukraine's accession to the World Trade Organization (hereinafter referred to as the WTO) (on February 5, 2008, at the WTO General Council meeting the decision was made for Ukraine to join the Marrakesh Agreement establishing the WTO, and on April 10, 2008 the Verkhovna Rada ratified the protocol on Ukraine's accession to the WTO) and the existence of the EU-Ukraine Association Agreement. The political part of the agreement was signed on March 21, 2014, and its economic part – on June 27, 2014. It envisages deep economic integration of Ukraine with the EU, as well as the establishment of a deep and comprehensive free trade zone [21]. As a result of the signing by Ukraine and the EU of the Association Agreement, Ukraine faced qualitatively new tasks, which until then it did not fulfil, since the Agreement now serves as a strategic benchmark for the implementation of socio-economic policies in Ukraine. The agreement came into force on September 1, 2017, after the Council of the EU has adopted the final decision on the conclusion of the Association Agreement with Ukraine on behalf of the EU on July 11, 2017.

In the implementation process of the harmonization of both legislation

in general and procedural legislation, in particular, Ukraine faces a number of difficulties of an objective nature. Yes, it should be borne in mind that this process is one-sided, since it does not refer to mutual steps on both sides to harmonize their legal norms, but only to changes in domestic legislation in order to harmonize it with the norms of the EU law. Ukraine has practically no influence on the process of regulation in the EU system, but only acts as a destinator of the EU legal regulations.

There is some uncertainty as to the exact content of particular EU acts. The fact is that these acts can be interpreted only by the EU Court. As a result of such an interpretation, the content of certain acts may be subject to change. However, a country that harmonizes its legislation with the EU law is not in a position to follow such changes and to take them into account in a timely manner by amending the national legislation that is to be harmonized. The corresponding EU structures are not obliged to inform Ukraine about changes in their legislation. All this may lead to non-compliance of national norms with the EU norms and reduce the effectiveness of the implementation of Community law provisions in the national law of Ukraine. Ultimately, the main aim of harmonization in creating the same legal conditions for entities whose activities are regulated by basic and harmonized norms is not achieved. On the other hand, harmonization of Ukraine's legislation with the EU law must necessarily take into account the fact that the acts of the Community Institutes operate in the proper legal environment. They are part of the EU legal system. Harmonization, however, virtually leads to the transposition of the provisions of a certain part of the EU acts into the legal system of another country, which operates according to its own laws, different from those existing within the EU. In particular, Ukraine cannot always take into account all the legal nuances of the relevant EU documents, including a clear understanding of the legal technology used in these documents, the reasons for its adoption and the peculiarities of its implementation. All this can lead to the distortion of the content of national norms, which are the result of the process of harmonization [22, 104]. For Ukraine and many other European countries, issues of alignment, harmonization, unity and differentiation also have specific features of the national character. A striking example for Ukraine is the implementation of the principle of territoriality and specialization in the judiciary, which, in consequence of judicial reforms in 2010–2015, only has specialized courts in Ukraine. The creation of various branches of the judicial system entails the creation of a new procedural law of sectoral nature, the development of a scientific doctrine in the corresponding areas of procedural law, sometimes without taking into account parallel studies and the experience of existing developments, their duplication, inconsistencies in terminology, in the application of certain procedural mechanisms and institutes, etc.

In the relations between European integration organizations and third countries, harmonization of national legislation with the EU law can be carried out at different levels (at the level of international obligations, at the level of the EU obligations). At each of these levels, harmonization is ensured in different ways (through accession to international treaties, harmonization of the provisions of national legal acts with the requirements of the decisions of the EU Institutions, through recognition by Ukraine of the national standards of the EU member states). The scientific literature has already drawn attention to the fact that formation and development of modern economic procedural law takes place at several levels, which in many cases complement each other, creating a complex model of a modern economic procedure. Thus, it is possible to determine the international, supranational and national levels of such development or renewal [12, 178–181]. The international level manifests itself in the development and improvement of procedural mechanisms for the consideration of economic cases and the resolution of economic disputes with the participation of a foreign element. Supranational level indicates the formation of a special type of legal matter, a striking feature of which in the European space are the acts of the Council of Europe and the EU and its institutions. The peculiarities of this legislation lie in its supranational character, in the formation of a new unified procedural mechanism, and in the definition of the content of justice, the tasks of the court, in particular, and of the member states as a whole to ensure the effectiveness of the existing procedural form. Among the abovementioned acts are the following: Resolution No. 78 (8) of 02 March 1978 on Legal Aid and Advice, as well as No. (76) 5 of 02 February 1996 on Legal Aid in Civil, Commercial, and Administrative Affairs; Recommendations R (86) 12 of 16 September 1986 concerning Measures to Prevent and Reduce the Excessive Workload in the Courts, No. R (81) 7 dated May 14, 1981, on Measures Facilitating Access to Justice, No. R (94) 12 dated October 13, 1994 on the Independence, Efficiency and Role of Judges, No. R (95) 5 dated February 7, 1995, concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases, No. R (95) 11 dated September 09, 1995 concerning the Selection, Processing, Presentation and Archiving of Court Decisions in Legal Information Retrieval Systems, etc. Concerning the national level, the peculiarity of the procedural law formation at this level lies, first of all, in the fact that the national procedural law-enforcement system is considered to be a self-sufficient legal phenomenon within the limits of each state which, supposedly, does not depend on any external factors, and is the product of its own national law-making. At the same time, the codification of national procedural law is impossible without taking into account the experience of other countries, global trends in the development of doctrine and practice of procedural law.

Thus, there are several ways (methods) for the formation of an updated economic procedural law, as well as the European procedural law in general. One of them is reforming national legislation with the orientation to modern and effectively acting provisions of the same kind provided for in other legal systems, which, of course, leads to their convergence. So, in the continental law, it is possible to distinguish between institutions of common law: disclosure of evidence, simplified forms of proceedings, group and derivative actions, etc. And, conversely, the system of common law introduces institutions that previously have only been inherent in the system of continental law, such as the acts (codes of procedural law) that codify, intensified participation of a judge in the process. The other is the mechanism of unification, concluding of international conventions, agreements, treaties.

Although unification also creates the same legal conditions for economic entities, this is achieved in another way: through the adoption of regulations that directly regulate the behaviour of economic entities and do not require coordination with the acts of national legislation [22, 88].

In fact, the unification of procedural law in the EU is a logical extension of the processes that are being carried out in other areas, in particular the unification process of substantive law, as well as a logical continuation of the process of unifying the norms of international procedural law, which is carried out within UNIDROIT. The year 1968 should be viewed as the starting point for such a unification, when the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was adopted [23]. At the same time, some scholars argue that the need for convergence (unification) is determined by the needs of the economy and business, by the processes of unification of substantive law, which certainly require the unification of procedural law, meanwhile, other scholars believe that the main reason for convergence is the need to ensure equal and identical level of legal guarantees and protection [24, 70–72]. In general, taking into account the relationship of substantive and procedural aspects, the unification of procedural law is possible insofar as there is a possible unification of substantive (civil, economic (commercial, trade)) law.

Thus, an important trend in the development of procedural legislation is its unification, which in the legal system corresponds to the trend of integration of legal regulation. The integration of legal regulation is the establishment of a unified (uniformed) regulation within a single legal institution, the extension of the norms previously intended to regulate a certain range of relations on similar relationships, as well as the development of the new, uniformed norms that would take into account the peculiarities of homogeneous relations when they are being regulated [24, 181]. The unification processes of legal regulation concerning the economic procedure are due to objective reasons (the development of social relations – the unifica-

tion of legal regulation is the result of the increasing complexity of social life, market relations, economic conditions, and therefore serves as a manifestation of improving the very form of legal regulation and legislative technique, which, in turn, is characterized by the abandonment of casuistry and the development of general concepts) as well as subjective reasons (in case of a low quality of law-making activity and legislative errors, unification becomes an important tool for eliminating gaps and overlapping in legal regulation). Thus, for all types of litigation, there is a tendency to narrow the scope of collegiality in cases before the courts of first instance, which, in our opinion, should be viewed as a manifestation of unification. However, it is difficult to recognize this tendency as rational, because consideration of certain categories of cases by a single judge: a) significantly reduces the quality of judicial work; b) creates favourable conditions for abuse and corruption.

Another trend that has a significant impact on the development of the economic procedure – is the *differentiation and specialization* of procedural regulation (including gravitation towards specialization within the judicial system, differentiation of judicial procedures, tendency towards their simplification, the search for optimal procedural forms of settling economic (commercial) disputes).

Differentiation of legal regulation is one of the main trends in the development of the procedural law system, which is most clearly traced over the past decades. In this regard, the legal literature distinguishes *dynamic and static components of differentiation*. Thus, differentiation in the dynamic perspective is the relevant legal research, the legal policy of the state and the activity of the legislator on the structuring of the economic procedure. Moreover, all of these dynamic components are interlaced and interconnected. The static component is the result of the legislator's activities, that is, the state and structure of the economic procedural legislation and, as a consequence, of economic justice [26, 12–14]. A closer look at the system of economic justice through the prism of differentiation finds it necessary to distinguish it: from other phenomena of the same order (administrative, civil justice); from procedures not related to the sphere of legal procedure; from non-judicial procedures. In addition, the internal division of economic procedure manifests itself both vertically (the stage of the process) and horizontally (litigation, bankruptcy proceedings, etc. at the level of first instance). All this is the internal structural organization of the elements of legal proceedings as a system.

First of all, the process of differentiating normative regulation is manifested in the division of the very system of law into branches, sub-branches, institutes and sub-institutes [25, 165]. In the procedural law (including economic procedural law) the processes of differentiation cover both its system as a whole and its individual elements: branches, sub-branches, institutes and sub-institutes. Besides, differentiation

is possible at the lowest level of the legal system – at the level of the legal norm (non-binding and alternative legal requirements). In addition, the very appearance of procedural law in the legal system is also the result of differentiating legal regulations [27, 138–149]. In the system of procedural law, in particular, differentiation has already found its manifestation firstly in the formation of economic procedural law as a separate branch, and over time – in the separation of administrative procedural law with the formation of an independent system of administrative justice. Today, the issue of developing executive law as a separate branch is increasingly being discussed.

Within the framework of a separate branch of procedural law, the differentiation of legal regulation manifests itself at the level of separate stages of the process, as well as at the level of individual stages of the process and/or procedural actions. It is characteristic that the higher level of progressive differentiation of procedural regulation always covers the lower one. Differentiation of legal regulation at the level of stages, phases of the process and separate procedural actions can take place according to different criteria: depending on the essence (content) of the regulated procedural relations, the specifics of the disputed material relations, the socio-political and/or societal significance of cases of a certain category, the subjective criterion and so on. As a rule, the level-by-level differentiation of the procedural law in relation to the specific conditions is carried out comprehensively (according to several of the above-mentioned criteria simultaneously). The purpose of the level-by-level differentiation is the normative consolidation and perpetuation of additional guarantees of the participants' rights in the proceedings, of establishing truth in the case.

In the sectoral framework, it is possible to have, besides comparative, also the structural differentiation. In the economic procedure, formation and normative regulation of writ and simplified proceedings may soon become an example for such a differentiation.

The need to simplify the economic procedure is an obvious fact, recognized both in practice and in the doctrine, which is also confirmed by foreign experience. Generally speaking, «simplification» is a non-legal term, which is usually interpreted as reducing the complexity of something (accordingly, simplification can be detected only by comparing at least two phenomena). As for the simplification process in economic litigation, this is a procedural model for the administration of justice, which, given its ideal functioning in comparison with the usual (general) and also perfectly functioning model, will allow achieving the purpose of legal proceedings faster with fewer procedural actions and less financial expense. Thus, the simplification should be based on three pillars: preserving the essence of the simplified phenomenon; systemic approach; correlation and compliance of simplified procedures with the objectives.

V. Komarov notes (although, with regard to the civil procedure) that di-

versification is the result of a certain modification of legal proceedings as the supporting structure of a civil action. Designing other legal procedures is possible with regard to various factors: the substantive peculiarities of certain categories of cases, acceleration of processing time for cases, the need to balance the procedural rights of the parties with a view to preventing their abuse, introduction of simplified judicial procedures (for example, it is well-known that most procedural systems have introduced writ proceedings and proceedings in absentia), etc. At the same time, the author is convinced that the conceptual development of procedural steps should be associated with the differentiation of the procedural form as the basic structure of certain proceedings that should ensure the effectiveness of the judicial process and its fundamental value – the right to a fair trial [13, 28–32].

As a fundamental scientific resource in the study of this problem we can use the theory of legal process, instrumental value of which is not fully exhausted in the substantiation of the structures of legal processes, economic proceedings in particular, as a set of procedural actions, procedural stages and procedural regimes. For instance, one of the concepts of the theory of legal process is that legal proceedings are the main element in the structure of the legal process, it is a set of interrelated and interdependent procedural actions, which: 1) constitute a set of procedural legal relations, which is different in its subject matter and in the connection with the relevant substantive legal relations; 2) arise in connection with the need to establish, prove, and substantiate all the circumstances and facts of the legal case under consideration; 3) determine the need to consolidate, formalize obtained procedural results in the relevant procedural acts – documents [28, 80–91].

The legal literature distinguishes the following main directions of differentiation in procedural law: complication and simplification of the procedural form (in the majority of cases, these two tendencies are interwoven, interpenetrating, since the complication of procedural forms is accompanied by the interspersing of «simplified» elements and procedures, and vice versa) [27, 144–149].

Consequently, the tendency of differentiating procedural regulation is considered to be a normal, natural process of procedural legislation development, the reasons for which are: a) development of social relations; b) the need to establish additional guarantees of participants' rights in the relevant relations (economic in particular) to protect their rights and legitimate interests, including within the process itself, rationalization and optimization of the court process. Deepening processes of differentiating legal regulation are also one of the possible ways of improving the system of economic procedural legislation.

Equally important within the framework of sectoral structural differentiation are *the processes of specialization* and complication of procedural forms.

Increasing complexity of the economic turnover relations, increasing

specialization of regulations predetermines specialization of the judicial system and judicial procedures, their rationalization, the development of quasi-court procedures. In the aspect of the judiciary community, specialization of judges means learning certain special knowledge, qualifications in a certain field of law for the improvement of professional level. The specialization of courts, due to the need to ensure a qualified examination of the relevant categories of court cases, ensures, as a rule, that they are considered by specially trained judges and within the framework of such procedural forms that create additional guarantees for the protection of the rights and legitimate interests of an individual. M. I. Siryi considers as classical a different understanding of the specialization of judges and the specialization of courts for both continental and Anglo-Saxon legal systems. Under the notion of specialization of judges, the author notes, they understand the specialization of judges of a separate court for the consideration of certain categories of cases, and the specialization of courts – the presence of specialized courts in the judicial system (that is, those with peculiar features) [29]. At the same time, the author, considering the specialization of judicial activities through the prism of the need for universal and equal access to justice, notes that a higher level of access is provided exactly by a highly differentiated judicial system based on specialized courts with limited competence, special status of judges and a special simplified procedure of the case consideration [30, 27].

As is noted in the scientific literature, the tendency towards the system of specialized courts is one of the leading features of the organization of justice system in the current period [31]. Meanwhile, the lack of a legal definition of the concept of a specialized court generates a variety of interpretations around the content of this concept in legal science. For example, V. V. Serdyuk proposes the following notion of a specialized court: it is an independent judicial structure (an independent type of court) established in the system of courts of general jurisdiction whose powers are determined by law on the basis of the specialized competence for consideration of a certain category of cases, distinguished by the sectoral or subjective features, and justice is carried out according to the norms of the relevant branches of procedural law [32, 6–9]. O. O. Harkusha believes that the only characteristic of the judicial specialization is a corresponding normative provision in the law on specialization in a separate system of courts or on sectoral specialization within the framework of a single judicial institution. The author is convinced that the characteristics of specialized courts cannot be the fact of having separate premises or the autonomy of judicial self-government, or the decision of judicial administration subjects in this area [33, 37–39]. I. M. Obrizko furthermore emphasizes that any state body, and not only a specialized court, is appointed to resolve or settle a certain range of cases [34].

Consequently, these features cannot be regarded as the qualifying fea-

tures of the specialized body itself. The specificity of the object and the subject of legal regulation also does not explain the situation, because it does not answer the question, what, in fact, is this specificity, since any litigation has its own unique objective and subjective characteristics. Similarly, intepreting the concept of a specialized court through the category of specialized competence also leaves more questions than answers, since it is not clear what the «specialization» of the respective competence is. «Exclusivity of competence» is a concept that is rather broad in scope and is not defined normatively. In addition, often, even in the work of specialized courts, there are cases of overlapping and insufficient division of competences. Under such conditions, at the level of scientific theory we cannot recognize the exclusiveness of the competence of specialized courts as a distinctive feature. Moreover, ideally, it is obvious that any public authority, including the judiciary, should be given a clearly defined (absolutely definite) competence to prevent their arbitrary interference in the private life and legitimate interests of individuals and legal entities. According to I. M. Obrizko, implementation of the principle of specialization of courts through the formation of a subsystem of specialized courts embodies the functional division of powers within the judicial system. Through such a division, the judicial system seeks to concentrate efforts on the resolution of certain categories of legal disputes by the relevant state bodies within the framework of the corresponding types of legal relations. In this regard, the author is convinced that the specialization of the judiciary is the principle of its construction, which implies, as the organizational and legal form of its implementation, the creation, on the one hand, of specialized courts, and on the other – of specialized boards (chambers, etc.) within the courts themselves [34]. However, in this context, specialization of the courts (judicial system) does not necessarily involve creating of a specialized court.

D. M. Shadura believes that the specialization in the construction of the judicial system is the structural model of the judicial system and judicial jurisdiction, that is determined by the specific historical conditions and requires adequate forms of unification or differentiation of trial procedures. According to the author, correct combination of requirements for unification and differentiation allows finding the optimal balance between the efficiency and the accessibility of justice. The author also argues that the principle of specialization of jurisdiction should be reflected in the system of courts, and with regard to the differentiation of judicial proceedings, it is expedient to implement them in independent judicial processes [35, 10–12]. N. Sybelova interprets the content of specialization, as the constructing principle of the judicial system, to be the delegating of power to consider and resolve litigation, arising from a certain type of legal relationship, and a specific court as an element of this system. Under the notion of specialization, as the organizing principle

of the work of a certain judicial institution, the author understands designating particular judge who specializes in the consideration of court cases, which also arise from a certain type of legal relationship (so-called «internal» specialization) [36].

By the way, V. I. Shishkin, following the results of studying the experience of different countries in the field of specialization, concludes that it is possible to distinguish between two types of specialization: sectoral and subjective. Sectoral specialization is implemented through the formation of separate, and sometimes hierarchically arranged, judicial institutions. Subjective specialization is implemented through the organization of certain units (boards, chambers, divisions) within judicial institutions, which consider cases that distinguish legal relationships with the participation of a special subject, such as water users, tenants, taxpayers, etc. [37, 6]. Instead, O. F. Frytskyi uses the terms «internal» and «external» specialization in describing the types of specialization in the judicial system. He understands internal specialization as the judicial review of cases in all branches of law, when each court forms special bodies (panels, boards, chambers), or when individual judges specialize in the consideration of certain cases: civil, administrative, etc. The author understands external specialization of the judicial system as the forming of several independent subsystems of general (civil and criminal cases), administrative, military, maritime, social, labour, tax, financial, arbitration or economic justice [38, 411–412].

According to V .S. Stefaniuk, specialized courts are created depending on the needs and opportunities of public funding available at the various stages of the construction and development of the judicial system [39, 26]. A similar view is also observed by K. V. Shapoval, – external specialization is introduced in the countries financially capable of maintaining various specialized courts; the introduction of internal specialization is an objective necessity [40, 160–166].

According to A. O. Selivanov, specialization of courts and judges in certain categories of cases helps expand the knowledge of judges in certain branches of legislation and its application in practice, helps increase professionalism, and, therefore, promotes more reliable protection of human rights and freedoms, rights and legitimate interests of entities [41, 10]. Supporting this point of view in general, M. Y. Vilhushynskyi adds that the specialization of courts and judges is essential for improving the quality of judicial activities. The introduction of specialization (both internal and external) is the scientifically substantiated, legally stipulated imperatives of our time, and it meets the modern needs of society in order to provide more efficient and professional protection of the rights and freedoms of individuals and legal entities protected by the rule of law [42, 11].

Thus, legal science, as a rule, uses the concept «specialization» in terms of constructing an extensive system of

specialized courts or in terms of specialization of judges themselves. The huge complex of substantive legal requirements, used in practice, not only affects the specialization level of the procedural form, but also determines the workload of judicial authorities, their correctness in the administration of justice.

Conclusions. The study undertaken here allows to distinguish the following main trends of the economic procedure of Ukraine at the present stage: a) the growing importance of the social functions of justice and the corresponding role of the court; b) the impact of the globalization processes, the provisions of international law and the concept of human rights protection on the economic procedure; c) differentiation and specialization of procedural regulation; d) the approximation of the economic procedural legislation of Ukraine with the procedural law of the EU.

The improvement of both the economic procedural legislation, and the activities of courts in administration of justice in economic relations should be subject to ensuring the implementation of these trends.

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WORLDVIEW ENVIRONMENTAL AND LEGAL FUNDAMENTAL PRINCIPLES OF INTERACTION BETWEEN HUMANS AND NATURE

Summary. *The article deals with the worldview approach as well as environmental and legal fundamental principles of interaction between Human and Nature. It is proved that the Christian foundations allow dropping the confrontation between «Human and Nature». In the conclusion, the author outlines that the important role in the shaping of the worldview fundamental principles of interaction between Human and Nature belongs to education, in particular, environmental and legal education.*

Key words: *interaction between Man and Nature, environmental and law education, Christian foundations.*

The significance of the problem. In the modern world of pluralism of thoughts and approaches, the abandonment of materialism as the only true doctrine, environmental law undergoes radical, substantive structural changes related to the search for the ethical and moral basis on which the normative regulation of the protection of the environment is based, together with the use of natural resources and the provision of environmental safety.

There is no doubt, that a search of such kind is substantial not only for the environmental law but also for legal regulation in general, in the whole variety of manifestations of the legal system – branches, sub-branches, institutes, and norms.

However, in environmental law, as in the most «humanized» branch, which is associated with the most important aspects of human existence (life, health, sources of existence, etc.). This problem (the problem of finding the ethical and moral basis of legal regulation) comes as most acute in comparison with many other branches of law, the subject of

regulation of which are often only certain aspects of human life.

Since the environmental law in its subject focuses on the most important aspects of human existence, the search for the bases and sources on which the foundation of the legal regulation system is based is not empty (hollow), moreover this question relates to the so-called recession, self-reflection of environmental law and the main ways of its formation and development.

The above-mentioned stimulates the scientists (environmental lawyers) to search for moral and ethical roots (genetic basis) for the formation of an ideology on which the whole system of sources of environmental law of Ukraine is based. These searches contribute to the ability of environmental regulation to obtain self-identity and self-sufficiency, clarity in substantive certainty.

Problem statement. What are the genetic principles of social environmental self-regulation (or principles of moral and ethical roots of environmental-legal regulation) in the consciousness of the Ukrainian people?

In this part, most researchers are turning their views on the natural sciences and on the philosophy of the «Green Movement». In particular, many dissertations on specialty 12.00.06 abound with the citations of V. I. Vernadskyi, M. F. Reimers, Roderick Nash, Linna White and other prominent natural scientists. At the same time, insufficient attention is paid to the fact that Orthodox Christianity, which for centuries at the genetic level is maintained in the minds of the people, contains many answers to the questions of the formation of environmental legal consciousness. It is the ethical categories of faith, hope, goodness, love, justice laid not only in the basis of environmental legal regulation but also the law in general.

It is the orthodox doctrine that is genetically preserved in the consciousness of the Ukrainian people – the unique tool that Ukrainian lawyers possess in understanding environmental and legal phenomena, forming opinions and beliefs.

Christian foundations allow us to eliminate the «confrontation» between man and nature. After all, Orthodoxy understands a man and the world that surrounds him as the creation of the Supreme Mind, which exists in harmony. Thus, the material world was created by the Creator to meet the needs of man, in particular, environmental needs. Nothing more. And accumulation (greed) is regarded as one of the mortal sins.

One can say that the Bible is the source of the formation of the modern environmental law of Ukraine. There are norms that impose restrictions on the exploitation of nature and which prohibit the degradation of the environment, its pollution: «Do not devastate the terrain because a tree in the field is not a man that could escape from you to a safe place».

Consequently, the basis of environmental legal consciousness is laid the eternal biblical truths.

Unfortunately, in search of an ethical basis for environmental research, contemporary environmental lawyers

are missing out on a whole layer of domestic spiritual experience accumulated over the centuries. All the above mentioned, and the whole experience of the existence of mankind testify to the fact that there are close interrelationships between nature and man.

Presentation of the main material. Present, with its crisis environmental condition, makes us recognize ecological knowledge, environmental consciousness of the population for important factors of state security, because, according to experts, the survival of mankind and each person, in particular, depends on it.

It's a shame, but modern men have become inferior because they lost the ability to be holistic and harmonious. The reduction of the concept of «nature» to the «environment» as a result of human economic activity, mainly at the end of the twentieth century, led to a violation of the natural course of development while focusing on purely lucrative economic activity – to the disharmony between Man and Nature. Disharmonious was the inner world of Man, a system of values: ideas, goals, thoughts, and desires. In the end, disharmony rules over Man. The Apostle Paul wrote in his Epistle to the Romans: «For I do not do the good I want to do, but the evil I do not want to do this I keep on doing. Now if I do what I do not want to do, it is no longer I who do it, but it is sin living in me that does it.»

A Greek scholar Aristotle shared a similar view earlier: «If we go forward in knowledge, but in morality back, then we are not going forward, but backward.» Although this is an old saying, it is still quite relevant even today. We listen, and we do not hear. Confidently we consider ourselves perfect people and refuse to understand the obvious truth: without a high spirituality, without morality, environmental consciousness, man cannot be perfect. Such a man enshrines his negative qualities in the basis of the society that he builds.

In our opinion, a special place is dedicated to environmental law and legislation, environmental doctrine in resolving the problems of eliminating contradictions in the relationship between Man and Nature.

In the end, we must realize that our Earth is a living entity. She receives vital streams of cosmic energy from the Universe, which affect the lives of both her and all the inhabitants. The main energy axis of the Earth is built through the North and South poles in such a way that cosmic energy passes down the North Pole, and through the South – the «used» energy of the Earth is released. In addition, the Earth breathes with a definitive amplitude and periodicity, which depend on the time of day, season and geographical latitude. It breathes as a living entity, absorbing the life-giving energy of the Cosmos and releasing excessive internal energy.

In particular, the doctor of geological and mineralogical sciences I. M. Yanytskyi notes that the carrier of our lives – the Earth – is a living essence, an extremely energized and highly organized system, which occupies a much higher tier in the space hierarchy than man.

Consequently, Nature in the space hierarchy occupies a higher tier than Man. Let's say in the East people have never been raised above Nature, they were not proclaimed «God-identical», but they believed that the order in the Cosmos depended on its actions, rightful or wrong.

Do these views coincide with those positions that we, representatives of environmental law science and practice, confess and implement in life?

Deepening into the personal position and position that seems to me is being confessed by the representatives of the humanistic environmental law school of the Law Faculty of the Taras Shevchenko National University of Kyiv, let me say: they do not coincide. Perhaps the doctrinal positions of other environmental law schools of Ukraine are based on another foundation? «No!», – apparently.

While afraid to be misunderstood by my colleagues, I would like to express the opinion that we may have to give up the humanistic principles on which our doctrinal approaches are based now and their realization in practice in the sphere of interaction of society and nature, the usage, and protection of natural resources, regulation of social environmental relations etc.

This brings up a logical question, when and on what authority Man, by the power of his intelligence, has ranked himself higher than Nature? And is this approach not the cause of our environmental problems?

Ancient Chinese thinker Confucius believed that the world could not be changed until the correct meaning was returned to the words. Nowadays, words are used not for the explanation of the content, but in order to «darken» it, «dampen» it. And so it goes. Consequently, it is necessary to return the correct content to the words and to disconnect the intercepting nodes. It has been recently suggested to start with the well-known word «humanism».

As written by Lesia Ukrainka, it is hard to believe that a foul outfit could be worn by a good idea. And on the contrary: not a quite good humanistic idea in the sphere of the interaction of Man and Nature was dressed in a pleasant outfit.

Most of us perceive «humanism» as something good and noble (highborn). Let's take a look at the other side.

Let's recall the etymology of the word «humanism» (from Latin humanus – human, humanly) and its meaning: recognition of the value of man as a person, his right to free development and manifestation of his abilities, the affirmation of the good of a man as a criterion for assessing social relations. In a narrower sense, the secular free-thinking of the Renaissance, which resists scholasticism and the spiritual rule of the church, is associated with the study of newly discovered works of classical antiquity. Rejecting the abstract, superclass approach to humanism, Marxism, as it is known, associated it with the revolutionary struggle of the proletariat for the construction of a communist society, which seems to create all the prerequisites for the full development of man. In this sense, Marx called com-

munism «real humanism». And then humanism received a practical embodiment in the construction of a society of socialism and proclaimed its principle: «Everything in the name of man, for the good of man.»

Perhaps it is precisely from the time of the appearance of a humanistic idea that one can determine the temporal parameters when Man has set himself above Nature, proclaiming himself «God-identical»?

Thus, «humanism» is a revolutionary term aimed at destroying the outlook in the center of which is the Creator. Humanism displaced the Creator (Nature) from the central positions and placed Man on this place. Probably many people still remember the well-known words of Michurin that «we cannot expect to receive mercy from Nature, to take it is our task».

Humanism entitled man a measure of all things, rejecting the laws of the Creator, i.e. laws of nature. He proclaimed that man in itself is beautiful and good, and that man does not need any help from the Creator to be wise, generous, steady, received. Then, when this ideology rooted itself, the man quickly began to turn into something cruel, selfish, insatiable, and unbalanced.

With the removal of the Creator from consciousness, the charity was also gone. Perhaps the society did not notice this loss in time, and those who did notice did not fully understand what happened. It is the blessed humanism that in the form of its mature fruit brought global crises, including (and perhaps, above all) – the environmental (ecology) crisis – «the contemporary barbarism». However, society does not consider this word to be evil even nowadays. It is difficult for us to understand this since a man irresponsibly uses natural resources just as well as he uses his words.

Consequently, if we don't give the words their original meaning, the world, as Confucius argued, shall not stand. It is not just about the meaning of the concept of «humanism» in relation to the environmental sphere; the essence of the problem is much deeper. Let us recall how the Ukrainian science, literature, press of the early twentieth century formed the national consciousness of society and every person. The values of that stage of development of society were substantiated by the belief in the rightfulness of propagated ideas. In those days, often the word «man» was used with such epithets as conscious, cultural, educated, wise, loyal, moderate, sincere and worthy.

At the end of the twentieth century – at the beginning of the 21st century, the notion of «man», which in all periods of history was termed positively, no longer applies to high valued orientations and is used with other epithets: clogged, mutilated, trampled, stolen, labeled, impotent, faceless, excessive, disharmonious, inferior.

The above only proves that today the problem of determining the fundamental principles of interaction between Man and Nature, as it was at the beginning of the formation of environmental law, remains relevant, and therefore re-

quires the attention of various sciences, religions, philosophical concepts, directions, and schools.

It is a known fact that an important role in the formation of the most ancient philosophical concepts of this interaction belongs to religious trends. For example, Judaism, Islam, Mohammedanism, Buddhism, Christianity, and others.

Among the philosophical concepts and directions that influence the formation of modern environmental law are: animism, anthropomorphism, anthropologism, anthropocentrism, concordism, ecocentrism, eco-humanism, environmentalism (anthropocentric and ecocentric). In particular, after the UN conference (Rio de Janeiro, 1992), environmentalism is seen as the idea of combining the efforts of all countries in the fields of economy, politics, technology, science, culture, education and law to preserve the environment on an ecologically sound basis.

Environmentalism, as the newest ideology, seeks to unite political, scientific, ecological, and religious figures to preserve the natural environment of man.

Environmentalism is one of the global paradigms of modern science, based on the foundations of sustainable development.

On what conceptual-ideological principles should we build the relations between Man and Nature today? This is a complex task for many sciences and practices. Obviously, the science of environmental law, the environmental law as a branch of law and legislation cannot stand aside this problem. Here I would like to bring the opinion of our colleague, the representative of the theological and sociological theory of law V. V. Kostytskyi, who believes that «in our society, the vision of law, unfortunately, comes one-dimensional: the system of norms and rules of conduct. ” He emphasizes that «law is a system of norms within the framework of moral imperatives granted by the Almighty».

Conclusions. An important role in the shaping of the ideological foundations of interaction between Man and Nature belongs to education. In particular, on June 25th, 2013, a decree of the President of Ukraine approved the National Strategy for the Development of Education in Ukraine for the period up to 2021. In this document, based on the analysis of the current state of development of education, the goal, strategic directions, and tasks for the state policy in the field of education are outlined.

The aforementioned decree of the President stated that the key task of education in the XXI century is the development of thinking oriented towards the future.

Modern labor market requires a graduate to have not only deep theoretical knowledge (with environmental-legal knowledge being a part of it) but the ability to independently use it in non-standard life situations, the transition from a knowledge society to a society of competent citizens. Among the urgent problems that hinder the development, ceasing the opportunity to provide a new quality of education that would be necessary for the current his-

torical epoch, the presidential Decree describes as a slow implementation of «environmentalization» of the education system.

In this regard, strategic directions of the state policy in the field of education in accordance with the decree should be, in particular:

– reforming the education system based on the principle of human priority;

– «environmentalization» of education as a necessary condition for ensuring the sustainable democratic development of society, updating the goals and substance of education based on sustainable development principles.

Environmental education should become an integral part of education in general, and, more important, legal education. After all, with the help of environmental-legal education, the solution of the general task is ensured – «ecologization» of legal education, the formation of environmental-legal consciousness and culture, as well as active civilian pro-ecology position. Ecological and legal knowledge is required in order to solve environmental problems by legal means, which requires the training of highly qualified lawyers who have a solid knowledge in the areas of environmental and sustainable development.

As an indication of global concern for these problems on December 20th, 2002 the General Assembly of the United Nations adopted a Resolution 57/254 on the Decade of Education for Sustainable Development (2005-2014). In the same year, a «Strategy of the United Nations Economic Commission for Europe (UNECE) for Education for Sustainable Development» («UNECE Strategy») was adopted at the meeting of the representatives of the Ministries of Environmental Protection and the Ministries of Education (March 17–18, 2005) in Vilnius.

It is symbolic for Ukraine that one of the first steps towards the elaboration of this Strategy was the Statement of the Environment Ministers of the UNECE countries on Education for Sustainable Development, adopted at the 5th Conference «Environment for Europe», which was held in Kiev, 21–23 of May 2003.

The first of the objectives of the UNECE Strategy was to ensure that «the policy, regulatory framework and organizational foundations serve as the pillar of education for sustainable development.» This additionally emphasizes the necessity and importance of normative and legal support for activities in the field of environmental education, since it is ecological education that is the basis for education for sustainable development. Paragraph 14 of the Strategy stipulates that education for sustainable development expands the concept of environmental education, which in turn needs to be developed and complemented within the framework of an integrated approach to education for sustainable development.

Regarding the legal aspects of this problem, Section 50 of the Strategy emphasizes that legislation is one of the pillars of education for sustainable development, and the key to achieving

this goal could be the adoption at all levels of education of the basic documents on education for sustainable development. At the same time, legal instruments must be adapted to the specific conditions of each applicable state, in accordance with the legislation it has in place (paragraph 43). In particular, the scientific substantiation, development and adoption of the law on ecological education as one of the most promising acts of environmental legislation were stipulated in the national legislation in the «Main directions of state policy of Ukraine in the field of environmental protection, use of natural resources and ensuring environmental safety» (Verkhovna Rada resolution of March 5, 1998). Yet today we are forced to recognize that the UN Decade of Education for the sake of sustainable development has ended, but a corresponding law is still not adopted in Ukraine.

Unfortunately, in the «Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period till 2020» (the Law of Ukraine of December 21, 2010), the adoption of the law on environmental education is no longer foreseeable. In spite of the fact that raising the level of public ecological consciousness is recognized in this document as the strategic goal of the national ecological policy No. 1 (section 3); nor the clause 4.8 «Legislation in the field of environmental protection», not the clause 4.9»Educational and scientific support for the formation and implementation of national environmental policy» does not mention the urgent need for the legal provision of activities in the field of environmental education in a form of law. Instead, the Strategy for Environmental Education with a view to the sustainable development of the Ukrainian society and economy of Ukraine was planned to be developed before 2015.However, in our opinion, the worldview and environmental-legal principles of the relationship between Man and Nature should be featured in the corresponding Law of Ukraine «On Environmental Education».

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PROBLEMS OF THE DEFINITION OF THE SYSTEM OF LAND LAW AS A BRANCH OF THE LEGAL SYSTEM OF UKRAINE

The content of social relations in the sphere of use and protection of natural resources as an object of legal regulation is researched. It is proved that relations regarding use and protection of environment at whole and its natural complexes, in particular, have to be regulated by ecological law, but relations regarding use and protection of separate natural resources such as land, forests, water, mines and so on are to be regulated by resourced branches of law, correspondingly by land law, forest law, water law, mine law etc. The conclusion that ecological law as well as land law, forest law, water law, mine law etc. are separate and independent branches of the legal system of Ukraine is formulated. Also, it is concluded that codification of ecological law should not go out of limits of the object of its legal regulation. Finally, the structure of the system of land law of Ukraine is defined.

Key words: use of nature, system of law, environmental law, natural resources law, system of land law

In Ukraine's legal doctrine, a branch of law is recognized as the most important and the largest in volume of all the structural units of a system of law, which is not artificially created by the legislator, but brought to life by the existence of practical social needs that society is aware of, further recognized in an official form of a legal act by the legislator[4,p. 251].It is obvious that in the legal system of the country with 25 years of ongoing land reforms and intensive formation of an array of specialized legislative acts in the field of regu-

lation of land relations, the existence of land law as an independent branch of law is due to the deep objective social processes.

However, in the years of Ukraine's independence, our legal doctrine has not yet formed a clear vision of the place of land law in the domestic legal system. Nowadays, there are many ongoing discussions about the relation of land law, law of natural resources, ecological law and other (real or presumed) components of the legal system of Ukraine.

It is clear that nature (the environment) is a system whose proper functioning requires both differentiated legal regulation – the regulation of certain types of relations of nature used by specialized branches of law, and integrated legal regulation, designed to take maximum account of the peculiarities of nature as a holistic systematic formation.

In the legal system of Ukraine, integrated legal regulation in the field of use and protection of natural resources is provided by the ecological (environmental) law of Ukraine. In our opinion, with the adoption on June 25th, 1991 of the Law of Ukraine «On Environmental Protection», a new stage in the development of environmental law as an independent branch, aimed at raising the legal level for the protection and use of the environment as a coherent system, has begun. It should be noted that in general, the specified law successfully fulfills this task.

At the same time, a number of provisions of the Law eventually led to the emergence of a number of problems of a theoretical and applied nature. One of them is the problem of determining the subject of the environmental law of Ukraine. Since the doctrine of domestic law assumes that the subject of each branch of law is special social relations, the key issue in determining the features of environmental relations as subject of environmental law is their object. In Art. 5 of the Law «On Environmental Protection» three types of objects of legal protection in the environmental field are defined, namely: 1) the natural environment as a combination of natural and social conditions and processes; 2) landscapes and other natural complexes; 3) natural resources, both involved and not currently involved in the national economy (land, subsoil, water, atmospheric air, forest and other vegetation, fauna). Essentially, these objects are recognized by environmental law scientists as objects of environmental relations as the subject of this area of the legal system of Ukraine.

However, in the legal system of Ukraine, there are other branches whose task is to regulate relations in the sphere of use and protection of certain natural resources – land, water, forest, mining and other resource industries. Accordingly, the subjects of these branches of law are land water, forest, mining and other resource relations, the object of which is the same natural resources, as defined in Art. 5 of the Law «On the Protection of the Environment» as objects of environmental relations. This shows a certain interweaving of subjects of legal regulation of ecological law and pro-resource law and causes the need for their delimitation.

Analyzing the fact of such a coincidence and trying to give it a scientific explanation, a significant part of the representatives of the science of environmental law of Ukraine and other post-Soviet countries formulated an interesting statement on the relationship between ecological and pro-resource law as a general and special kind. Essentially, environmental law is a complex branch of law, and pro-resource branches generally do not have the status of individual branches of law and are covered by environmental law as its sub-branches or even institutes.

So, according to S. O. Boholiubov, the subject of environmental law, and the relations regulated can be divided into three visible parts, which combine groups of legal norms different from each other. The first part refers to the actual environmental law that regulates social relations regarding the protection of ecological systems and complexes, general environmental law institutes, and the solution of conceptual issues of environmental protection. The second part of the environmental law, according to S. O. Boholiubov is a natural resource law, designed to ensure the protection and rational use of certain natural resources – land, its subsoil, waters, forests, wildlife and atmospheric air. Finally, the third part of environmental law includes the norms of other branches of law, regulating the social relations associated with environmental protection (norms of constitutional, administrative, criminal, labor, etc.) [1, p. 10–12].

Such an extremely broad understanding of the subject of environmental law is not shared by all the experts. However, a significant part of them agrees that the land law, along with other resource branches of law – water, forest, mountain, etc. – is an integral part of the environmental law, its sub-branches. In particular, N. R. Malyshev and V. P. Nepyivoda agree with S. M. Kravchenko's position that complex genetic and structural interrelationships between land, forest, water, and mining legislation ensure their consistency and the ability to complement each other, indicate that such coherence and complementarity cannot occur on its own. To this end, in their opinion, a certain «mutual denominator» is needed, a system within which these legal entities can interact successfully. The role of such a denominator, in their opinion, is fulfilled by the environmental law [9, p. 38].

Backing up their position, these authors put forward a holistic approach according to which the environmental law should be represented as a hierarchy of values. Therefore, they believe that land, forest, water, mining law are also integral (albeit lower), sets of legal norms that have their own structure. Consequently, as emphasized by N. R. Malyshev and V. P. Nepyivoda, it is unreasonable to «dissolve» them among other norms of natural resource law, but one should consider them as sub-branches of environmental law [9, p. 39]. Essentially, these scholars deny the independence of the land law, which functions along with the environmental law, and has its own subject of legal regulation, different from the subject of the latter.

In our opinion, such an approach to the correlation of subjects of environmental and pro-resource branches is controversial. We believe that the subject of environmental law «monopolistically» covers only those social relations that consist of the environment as a whole and individual natural systems. With regard to social relations regarding certain natural resources, as both, involved and not involved in economic circulation, (land, subsoil, water, atmospheric air, forest and other vegetation, fauna), understanding them as environmental ones is permissible only in cases where such relations are formed in relation to natural resources in their inextricable ecosystematic connection with other elements of the environment. For example, relations regarding the use and protection of land under hayfields and pastures should be regulated by land law norms and relations regarding the use of hayfields and pastures as part of the ecological network – land and environmental law.

However, not all representatives of the science of environmental law share the point of view on the resemblance of land law to environmental law as a subbranch of the latter. Thus, B. G. Yerofeiev believes that the subject of environmental law are social relations of a special nature, which concern not so much the natural objects themselves, but mostly internal and external connections of these objects, their properties, state, processes occurring in them, and natural resource law only narrows the range of these relations to economic ones [3, p. 40]. Accordingly, Yerofeiev B. G.notes that the subject of environmental law differs from the subject of land law in that the land law norms regulate mainly economic land relations, arising with the provision, withdrawal of land, the order of their use and protection, while environmental law regulates relations that arise with the use of not only components of the natural environment (land, water, air, flora and fauna, etc.), but also the whole set of objects that make up the environment of human habitation and provide conditions for its life and health, as well as the protection of ecological bonds of natural objects [3, p. 50–51].

In our opinion, the modern method of nature management should become the methodological basis for solving the problem of the correlation of environmental law on the one hand and land and other pro-resource branches on the other hand. Its analysis shows that in the process of nature use social relations are formed regarding the use of certain natural resources (land, forests, waters, fauna, etc.) when there is no significant impact on the state of other components of the environment or on the environment as a whole. With such use of natural resources, their direct ecosystem connection with other natural complexes and resources does not manifest itself. In order to regulate such relations in the legal system of Ukraine, specialized branches of law – land, water, forestry, mining, etc. – have been formed and successfully operate. Each of them has its own subject of legal regulation. Accordingly, most representatives of the science of land law

consider it as well as water, forestry and mining law as independent branches of the legal system of Ukraine [12, p. 26; 6, p. 10–11; 5, p. 11].

At the same time, even in 1967, the famous Soviet lawyer V. D. Kazantsev put forward the scientific idea of the formation in the Soviet legal system of a new entity – nature resource law as a branch of law, designed to comprehensively regulate land, forest, water, mining and other natural resource relations [7, p. 35–42].Since then, in the legal science of Ukraine and other post-Soviet countries, the postulate of natural resource law as a complex, integrated branch of law that regulates the «natural resource relations» along with the resource branches of law – land, forest, water, etc. – became a scientific turn. In Ukraine, the idea of natural resource law has reached its climax in its development with the publication of the 2005 textbook «Natural Resources Law of Ukraine» [10]. However, in structure and content, it is similar to the vast majority of textbooks and manuals on environmental law. Therefore, the appearance of the manual rather refutes than confirm the fact of the formation of natural resource law as a complex branch of law. After nearly 50 years of scientific circulation, the idea of natural resource law has not attained the level of scientific theory in its development, remaining a scientific hypothesis, which has not been confirmed by practice. In our opinion, this is due to the lack of the subject of natural resource law as such – a rather clear, «vulnerable» to the legal influence of the system of social relations, which could be qualified as nature-resource relations. Instead, in practice, land, water, forest, mining and other resource relations are formed, the differentiated legal regulation of which is fully provided by the relevant separate branches of law, and in the cases of the emergence of relations with ecosystem entities, the branch of environmental law, which ensures their integrated legal regulation.

Consequently, the main task of pro-resource areas of law is to ensure differentiated legal regulation of the land and other resource relations. However, they also perform the function of integrated legal regulation of relations on the use and protection of natural resources in cases where the use of one natural object requires the use of another natural object or objects. For example, the provision for the usage of a water object involves the obligatory reception for use of the land on which the water object is located. Accordingly, the legal regulation of obtaining for use of a water object is based on the norms of two branches of law – water and land.

Consequently, the analysis of the structure of resource relations shows that not all of them can be qualified as environmental in the meaning of Art. 5 of the Law of Ukraine «On Environmental Protection». Thus, in the system of land relations, which are regulated by the land law of Ukraine, at least three of their types are clearly traced: land-civil, land, and land-protective. Land-civil relations arise when acquiring and terminating land rights on the basis of civil law. Actual land relations

are formed when forming objects of land relations – territories, localities, land plots, etc., determining their categorical affiliation and purpose. Land-protective relations arise in the course of implementation of measures for the protection of land from the unlawful encroachment upon them and from the negative human-induced impact on the state of the land.

Thus, the nature of land relations, which are governed by the land law and constitute its subject, gives grounds for the assumption that the subject of land law may be covered by the environmental law only in the part of land-protective relations. However, this assumption is controversial. The fact is that the structure of land-protective relations involves relations that are not environmental but are of a protective nature (for example, relations to counteract the unauthorized seizure of land). Therefore, we consider it expedient for such a construction of the structure of the branches of law, which are intended to regulate relations on the use and protection of natural resources, in which all land relations are integrated in a comprehensive, regulated by the norms of land law, when environmental law governs only relations regarding the use of environmental systems, namely: 1) the environment as a holistic ecosystem; 2) landscapes and other natural complexes; 3) land plots and other natural objects, if they constitute a particular ecosystem. At the same time, in the presence of contradictions between the norms of land and environmental law, priority should be given to the latter.

As noted by V. D. Sydor, the relationship of land and environmental legislation is determined by the unity of nature, role and value of land as one of the most important components of the environment [13, p. 40]. In this regard, O. L. Dubovyk notes that environmental law creates a unified theoretical basis for traditional branches of law that regulate the use of natural resources, i.e. land, mining, water, forest law, and determines the strategy of human behavior in these areas [2, p. 62–63].Together, all natural resources make up the natural environment, which, on the one hand, is a combination of all natural resources, and on the other hand, is a qualitatively new essence – the environment surrounding the person as an integral system. Therefore, as much as pro-resource branches of law regulate the relevant social relations, the object of which is, respectively, land, forests, water and other natural resources, they are unable to fully provide a complete legal regulation of all environmental relations. Ensuring legal regulation of such relations is a function of environmental law itself.

However, in order to ensure integrated legal regulation, it is not necessary for the environmental law to take over all pro-resource branches of law and deprive them of the status of certain branches of the legal system of Ukraine. We believe that the inclusion in the subject of environmental law of public relations on certain natural resources that are not environmental will «erase» the uniformity of environmental relations, and will also burden the environmental

law with the task of regulating an extremely wide range of relations regarding the use and protection of land, water, forests, subsoil, etc., integrated, that is integral, exclusively environmental legal regulation of which environmental law is unable to provide. In our opinion, the integration of the legal regulation of social relations in the protection of natural resources by environmental law can be ensured by providing the norms of this branch with a priority over the protective norms of pro-resource branches in the event of collisions between them.

The validity of such an approach to the delimitation of subjects of environmental law and subjects of pro-resource branches is confirmed by the practice of law-making. Thus, all attempts to develop and adopt in our country the Environmental Code has failed while the developers were captured by the idea of a «megacode» – a kind of environmental version of Rus'ka Pravda – that would regulate all relations arising in the field of the environment, including the relations concerning the use and protection of land, waters, forests, subsoil, etc., which are not environment-related. The experience and ambiguity of the adoption of environmental codes are evidenced by the experience of foreign countries as well. Thus, in those countries where such codes are adopted, they either coincide in their structure with the Law «On Environmental Protection» and provide for the parallel operation of resource codes – land, water, forest, etc. (Belarus), or as an act of incorporating relevant legal acts (France), or they have an extremely wide subject of legal regulation, which includes the norms of the civil law [11, p. 45–46].

Thus, the versatility of land, water, forest and other natural resource relations gives grounds for the conclusion that such relations are not in all cases environmental and therefore cannot fully belong to the subject of environmental law. Therefore, in Ukraine legal provision of use and protection of natural resources should continue to be based on the principles of unity of integrated and differentiated regulation. Accordingly, the legal system of our country will continue to operate environmental law, as well as land and other natural resource laws as independent branches of the legal system of Ukraine.

The system of land law of Ukraine consists of legal norms which, on the basis of homogeneity, are united in the legal institutes regulating certain types of land relations. In turn, institutes of land law of Ukraine form a general and special part of it. In our opinion, the general part of land law includes: the Institute of the division of land by category; the Institute of property rights and other rights to land; the Institute of guarantors of land rights; the Institute of Public Land Management; the Institute for Land Turning and the Land Protection Institute. The special part of the land law of Ukraine consists of 9 institutes, each of which defines the legal regime of a separate category of land.

The peculiarity of land relations as a subject of land law has also predetermined the peculiarity of the system of this branch of law. The land law can be categorized as a public-private branch,

in which the legal institutes that make up its structure are public-law, although they differ in different proportions of public-law and private-law norms. Thus, unlike the Institute of the rights to land included in the system of civil law which is based on the components of the «civilist triad» (possession, use and disposal), the Institute of property rights and other rights to land regulates land-civil relations for the acquisition and implementation of land rights, in the content of which, along with the elements of the «civilist triad», includes the obligation to protect land. After all, according to Art. 14 of the Constitution of Ukraine, the land is the main national wealth that is under the special protection of the State. The corresponding features are characteristic for other institutes of land law of Ukraine, which in their aggregate make up the «the letter and the spirit» of the modern land law of Ukraine.

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ECONOMIC AND LEGAL RISKS AND POSSIBILITIES OF IMPLEMENTING THE EU-UKRAINE ASSOCIATION AGREEMENT

The European Union-Ukraine Association Agreement (hereinafter referred to as the Agreement) completely came into effect in September this year, although certain, and it should be noted, significant and important parts of it have been operating in Ukraine since 2014. The provisions of the Agreement are applied in various spheres of public relations, and it is already possible to preliminary assess the process of their implementation.

It must be admitted that progress has been made, but it is not large. The unsatisfactory indicators of import and export of goods between Ukraine and the EU with growing import are the evidence of that. In particular, for the period from 2014 to 2016, the dynamics of the current balance of payments account deficit amounted to: in 2014 – $ 4.6 billion; 2015 – $ 1.7 billion; 2016 – $ 5.5 billion (Fig. 1). The situation was also disappointing in the first half of 2017, as the current account deficit in the second quarter of 2017 amounted to $ 2.1 billion (with $1.8 billion for the corresponding period in 2016).

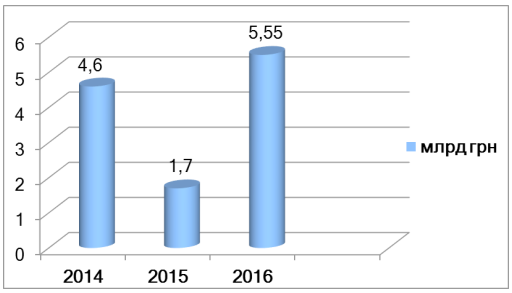

Fig. 1Balance of payments deficit dynamics

Moreover, from 2014 to the end of 2016, the amount of direct investment in Ukraine declined sharply, namely from $53.7 billion to $36.5 billion. Only 8 months in 2017 saw a slight increase in direct investment of $38.5 billion (Fig. 2).

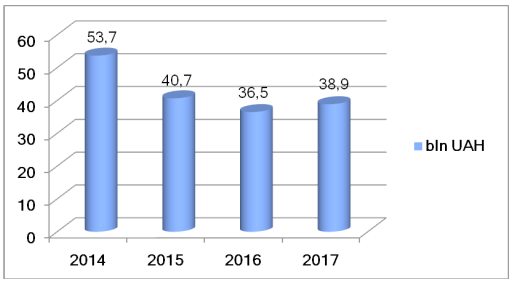

Fig. 2. Decrease in direct investment in Ukraine (share capital)

However, this growth, according to expert estimates, is explained, first of all, by administrative actions of the National Bank of Ukraine in the form of obligatory capitalization support from foreign banks for Ukrainian subsidiaries. At the same time, starting from January 1, 2016, in the regime of «temporary application», the provisions of the Agreement concerning developing a free trade zone were introduced and, as a consequence, this should have had a positive effect on the economy. The positive transformations are definitely present, but the dynamics of economic indicators show the opposite.

Disappointing statistics indicate that there are certain economic and legal factors which hold back the massive potential of the Agreement. Among such factors, one can first of all highlight the following:

the low level of legislative work on implementing the EU laws into the Ukrainian legislation;

the low number of open EU sales markets for Ukrainian domestic businesses, due to small volumes of duty-free quotas for the groups of goods which are the priority for foreign trade relations (with the simultaneous ban on access to the EU market for those groups of goods that are strategically important for developing export of domestic commodity producers);

the existence of certain provisions in the Agreement, the realization of which possess certain risks for national economic interests;

significant changes that took place in the social and economic situation of Ukraine in connection with the annexation of the Crimean territories and military actions in eastern Ukraine, with the subsequent loss of control from Ukrainian authorities over certain parts of Donetsk and Luhansk regions.

A brief assessment of the above mentioned negative factors provides an opportunity to reach a series of conclusions which are likely to lay the foundation for the development of legal measures for smoothing their destructive impact. First of all, the rates of adaptation of Ukrainian legislation to the EU law as on the whole, as well as the details of the Agreement provisions in national regulatory legal acts in particular, are unacceptable. In general, Ukraine has to implement into the national legislation about 350 acts of the EU law, and 180 acts of which 180 are to be implemented by the end of 2017. Does the state have enough capacity and resources for carrying out such a significant amount of law-making work? The reported data indicate that there is definitely not enough.

After all, the monitoring of the Agreement implementation for 2016

showed that in the relevant period only 36 of the planned 126 EU directives had been implemented into the national legislation, with only 23 of them implemented entirely [6].

However, the experience of particular EU member states proves that the process of national legislation adaptation can go on at a rather rapid pace and on a more qualitative basis. In particular, the practice of law-making work in the Republic of Poland, where the parliament and other public authorities, since 2000, have been passing about 70–90 regulatory legal acts per year [7], should be considered an illustrative one. And in 2004, when the Republic of Poland gained full membership in the EU, the volume of non-implemented acts of the EU in the national legislation amounted to 2.9%, which is an acceptable level of deviation. According to preliminary estimates, the Ukraine's lag in this direction is about 60%.

However, it must be admitted that the motivation and interest of the state in accelerating modernization of the Ukrainian legislation, taking into account the provisions of the EU acts and the Agreement, are very important factors in accelerating the law-making activity. First of all, it should be emphasized that the Republic of Poland, at the stage of associate membership, sought to accelerate the process of implementing the EU laws into national legislation, pursuing a completely specific goal, i.e.to attain the status of the EU member state. And this was clearly stated in the Preamble and in the opening articles of the Association Agreement between the Republic of Poland and the EU. The same principle for the formulating the essence of future relations was observed in the Association Agreement between the EU and the Republic of Hungary, as well as with other Eastern European countries.

Still, when it comes to Ukraine, another approach has been used, which, without exaggeration, can be considered discriminatory. In particular, the Preamble of the Agreement contains the unequivocal provision stating that «this Agreement will not prejudice and leaves open future developments in EU-Ukraine relations». The policy of certain EU member states is also inconsistent, and this puts in doubt the clarity and uniqueness of future relations with the EU. In particular, it is referred to the decision of the Parliament of the Kingdom of the Netherlands on recognizing Ukraine exclusively as an associate member and on condition that the association with Ukraine will not be linked to Ukraine's membership in the EU [9].

Certainly, these circumstances can unlikely be recognized as capable of justifying Ukraine's passivity in the implementation of the EU laws. But it does make sense to critically approach the analysis of the EU's chosen approach to building future relations with Ukraine. Additionally, the critical perception of the Agreement is aggravated by the fact that the experts acknowledged its substantial deviation from the «standard» texts of similar Association Agreements with the Republics of Georgia and Moldova in the context of more rigorous regulation of various aspects of co-

operation. Indeed, these factors do not contribute to the acceleration of the process of adjusting Ukrainian legislation to the EU laws and the full implementation of the Agreement.

Engaging Ukraine to the work of the EU institutions and informing Ukraine about the preparation of new legislative acts in the EU would help to change the situation for the better. As of now, Ukraine, not being a part of the EU institutions, can in no way influence the legislation adopted by the EU, which should be further implemented in the national context. However, this situation is not typical for all countries with the status of an associate member. For example, the EU is consulting with the member states of the European Free Trade Association (Liechtenstein, Iceland and Norway) when drafting acts of European law. As a matter of fact, the Art.1 of the Agreement on the European Economic Area contains the provision on the obligation to conduct such consultations and states that this document is the «association agreement» [12].

An important catalyst for the implementation of the EU laws and, accordingly, the provisions of the Agreement into national legislation could be the assertion of the mechanism of preliminary informing Ukraine on the preparation of new legislative acts in the EU in the text of the Agreement. It should be noted that at present time the absence of such a well-defined mechanism puts Ukraine in difficult conditions in the course of harmonizing the national legislation with the EU law. The Agreement only partly mentions informing Ukraine about sanitary and phytosanitary measures, as well as public procurements. However, in relations with the aforementioned member countries of the European Free Trade Association, the EU takes the opposite position, informing them in advance about planned changes in the legislation governing various spheres of public relations in order to enable the timely development of measures for the adaptation of national law.

It should be emphasized that the restraining of the Agreement implementation is conditioned by another equally important factor resulting from the non-systemic work of the Ukrainian Parliament and government. In particular, starting from 2012, the Cabinet of Ministers of Ukraine did not develop any yearly plan of work on the implementation of the National Program for the Adaptation of Ukrainian Legislation to EU Legislation, which had been approved by the Verkhovna Rada of Ukraine by the specific law. In connection with this, there is no report reflecting the state of implementation of the adaptation program, the results obtained, further ways of harmonizing the legislation of Ukraine with the EU law, etc. In this context, it is impossible not to agree with the words of H. Mingarelli, the head of the EU Delegation to Ukraine, that it is the parliament and the government that should play a key role in the implementation of the Agreement [13]. It should be added that the National Academy of Sciences of Ukraine should be involved in this process, as was the case, for example, in the Republic of Romania (Fig. 3). In particu-

lar, in 2000, with the support of the EU, a special institution was created – the European Institute, which gathered scientists and researchers. The main task of this Institute was to provide qualified assistance to the Parliament and government of Romania in assessing the impact of the EU legislation on various sectors of the economy, as well as developing an authentic translation of the EU legislation [14].

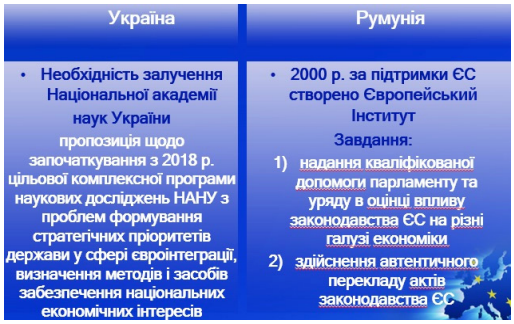

Fig. 3 Place of science in implementing the Association Agreement with the EU

It should be noted that there is an experience of cooperation between scientists from the National Academy of Sciences of Ukraine and the Ukrainian government on analyzing and assessing the Association Agreement at the project stage, but it has not always been possible to convince high officials of the need to follow a balanced approach to the wording of the content of the Agreement in such a way that it would defend national economic interests. Unfortunately, the effectiveness of the Agreement precisely for the domestic economy is insignificant, and the interests of national producers are insufficiently protected. Particularly, the terms of the free trade area, which constitute the content of the fourth section of the Agreement, should include the opening of access for domestic businesses to the sale markets of the EU member states. However, in fact, Ukraine received limited access to the European market, which was manifested in the introduction of export quotas on certain groups of goods. Domestic commodity producers can deliver a certain amount of goods at zero custom tariff rate, but they must pay a fee for exceeding this volume.

In general, such an approach in foreign trade relations is economically disadvantageous for Ukraine, since, in fact, it protects the interests of European commodity producers which are actively importing goods, the export of which from Ukraine to the EU is either limited or prohibited.

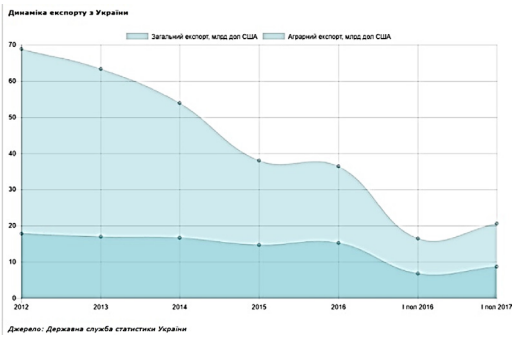

Fig. 4 Dynamics of export from Ukraine.

In particular, according to the Ukrainian Ministry of Economic Development and Trade, the access to the EU market is not available for such groups of goods as beef, milk, cream, milk powder, butter, pork, etc. However, the established annual quotas for the duty-free export of the authorized groups

of goods are depleted in almost half a year. For example, as of July 2017, Ukraine has completely exhausted the annual quotas for duty-free exports to the EU member states for nine product groups, including honey, sugar, cereals and flour, processed tomatoes, grape and apple juices, chicken, and cereals – wheat, corn and barley [15].

Of course, one cannot ignore the fact that in the summer of this year the EU Parliament voted for temporary trade preferences for Ukraine, which stipulate the increased duty-free quotas for certain product groups. However, this does not originally solve the existing problem, since such preferences are set for only 3 years and the decision is made taking into account the economic interests of the EU. In particular, Ukraine did not succeed in reaching a consensus on increasing volumes of duty-free quotas for Ukrainian wheat and tomatoes [16].

And dominance of protectionist sentiments on the part of the EU should be recognized as one of the key factors negatively affecting the trade balance between Ukraine and the EU. However, this step from the EU should not be taken as unconditionally positive. After all, the Article 4 of the European Parliament Resolution state that if goods originating in Ukraine are imported on terms which cause, **or threaten to cause, serious difficulties to Union producers, duties on such product may be reintroduced at any time** [17]. Moreover, the duration and completeness of trade preferences depend on the effectiveness of Ukraine's reforms in various areas of social relations and the degree of adherence to the democratic processes. In addition, the European Parliament Resolution states that in case of insufficient progress in combating corruption, distorting competition, introducing additional customs duties and other restrictions on imports, disrespect for democratic principles, human rights and fundamental freedoms, **preferences may be suspended or abolished**.

Thus, one can conclude that the EU unilaterally secured its own economic interests. And the dominance of protectionist sentiments from the EU side should be recognized as one of the key factors that negatively affect the trade balance between Ukraine and the EU. However, when Ukraine tries to implement protective mechanisms for its own industries, it is perceived by the EU authorities as a breach of the requirements for the inadmissibility of trade barriers. A particularly telling example is the introduction of Ukrainian moratorium on the export of unprocessed wood (in particular, logs) from November 1, 2015. Figure 5 provides the information on its positive effect.

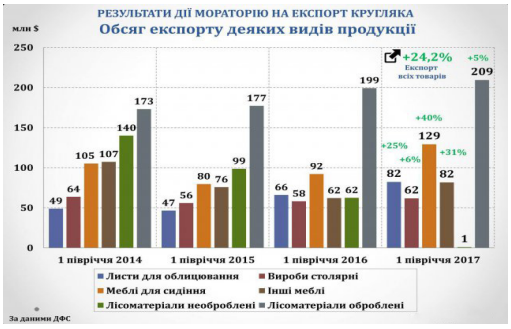

Fig. 5Results of the moratorium on log export[1]

[1] Viktor Galasyuk Why will the moratorium on timber be saved?[Digital source] Available

However, these restrictive measures were applied due to the fact that in 2015 such exports brought the Ukrainian economy only $345 million of foreign exchange earnings or 0.9% of total export proceeds. Yet this figure is absolutely non-comparable with the scale of losses: according to experts, uncontrolled forest felling has led to a decline in forest land percentage from 16% in 1996 to 11% in 2015. To achieve the optimal level of forest cover of 20%, today Ukraine needs to plant new trees on the territory of about 2.5 million hectares. Unfortunately, for unknown reasons, the EU does not take into account the experience of other countries on a similar issue. Thus, Canada, banned the export of unprocessed timber at the legislative level, and this very principle has been reflected in the Free Trade Agreement between Ukraine and Canada. It is also interesting that in the internal policies, the EU has a completely different assessment of the processes associated with the destruction of forest resources. In particular, Poland, Slovakia and Romania, having experienced similar problems, stopped the industrial forest felling in the Tatras and the Carpathians. Moreover, Hungary, Romania, Austria and Slovakia provide state support for the purchase of Ukrainian timber by providing subsidies to firms supplying unprocessed timber to their countries. In particular, such a subsidy is granted in the amount from €25 per cubic meter (in Hungary, Romania, Slovakia) up to €30 per cubic meter (Austria).

In light of aforementioned, the protection of national economic interests becomes the most important task of modern trade relations between Ukraine and the EU. In the meantime, as it was presented, the EU protective mechanisms are prevailing. Particularly, it is difficult to explain the additional example of the inequality of the parts of the Agreement, when the provision on the direct ban on any type of export subsidies for agricultural products intended for export (Article 32–1) is laid down. While the Article 40–1 of the Agreement stipulates that the EU retains some unilateral right to subsidies. Unfortunately, there are still many examples of the Agreement's hidden risks for the economic system of Ukraine to mention. One of such examples is the Ukraine's and the EU's counter-obligations to lift the restrictions on the free floating of capital within the framework of liberalization policy. In addition to positive changes, such measures can create extremely negative consequences for the Ukrainian economy. In particular, according to expert estimates, an average of $11–12 billion is annually withdrawn from Ukraine. Only about $2 billion (i.e. at the current rate amounted to 52 billion UAH) would be paid annually from this sum in the form of a tax on profit. This is almost 7% of all revenues of the Ukrainian State Budget in 2017, and about the last year's budget of the Ukrainian Ministry of Defense [20]. Figure 6 presents the information on the positive dynamics of the consolidated budget by years

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after the introduction of restrictions on capital flow starting from 2014.

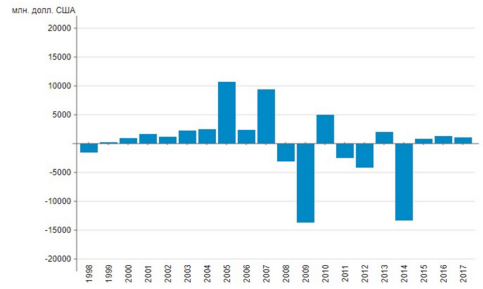

Fig. 6 Consolidated Ukrainian balance of payments

In general, more appropriate measures aimed at preventing the negative effects of capital flow liberalization should be developed within the framework of the Agreement. Particularly, we should consider the opinion of the UN experts that it is the liberalization of the capital and finance flow, encouraged by trade agreements, that contributed to the rapid spread of the 2008–2009 crisis.

It is possible that the influence of these and other circumstances makes the Ukrainian Ministry of Economic Development and Trade to consider the expediency of discussing the revision of the Agreement in the area of the free trade area with the EU. In any case, the introduction of such changes is additionally actualized by the geopolitical, economic, legal, social and other specific aspects of the current state of Ukraine, caused by the military aggression of the Russian Federation with the subsequent occupation of the Crimean territories and certain parts of the Donetsk and Luhansk provinces.

It should be noted that the Agreement provides for an opportunity to review the objectives fulfillment at any time by mutual consent of the Parties (Part 1, Article 481). This gives grounds for a more qualitative revision of the Agreement content, taking into account the need to supplement it with a separate force majeure chapter.

It is obvious that with the onset of military aggression from the Russian Federation, the Ukrainian economy is in a more suppressed state now than at the time the Agreement was signed. Accordingly, the fulfillment of commitments undertaken by Ukraine should take place taking into account the capacity of the domestic economy. After all, in the terms stated in the present Agreement, it is not possible to ensure the implementation of significant changes in the energy, industry, transport, agriculture and other sectors. All the more, the volumes and sources of financing the projects in the mentioned economic sectors should be revised with a significant increase in financial inflow from the EU funds.

It should also be assumed that the existence of a force majeure chapter in the Agreement will significantly simplify the actions of the parties in case of irregular situations that may arise in the future with the appropriate time and cost savings.

Only a comprehensive, science-based approach will allow comprehensively assessing new developments, maximizing the interests of the domestic business entities and providing proper safeguards for the protection of their rights and legitimate interests.

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HISTORICAL AND LEGAL ASPECT OF USING OF FORAGE LANDS AS THE VARIETY OF RIGHTS OF LAND USE

The genesis of the legal regulation of public relations associated with the use of land for haymaking and grazing was studied in the article. The reform of land relations in the aspect of peasant communal and public land ownership has been analyzed. It has been established that the land legislation of independent Ukraine, preserving succession, fixes practice approved and widespread use of fodder land and introduces payment in this area, which meets the requirements of modern market conditions.

Key words: *fodder land, grazing land, public pasture, communal land ownership, grazing.*

The use of hayfields and pastures is a well-known traditional kind of land use mostly by citizens, who live in rural areas and own cattle. The purpose of the relevant land plots is to provide feeds for farm animals. In this regard, this type of land use rights is often called as the use of forage lands.

In order to provide cattle with feeds, its owners need forage land, which they can use as hayfields and pastures.

The study of historical literature convinces us that the use of hayfields and pastures have always been a mandatory attribute of the rural way of life of Ukrainians who had cattle in private ownership.

The purpose of this article is to study the historical aspect of the right to use land plots for haying and grazing. This type of land use right was the subject of analysis by well-known representatives of the national land legal science: P. Kulinich, V. Sidor, G. Yasinskaya and others.

Historical sources indicate that the reform of land relations on Ukrainian Land in one way or another affected peasant land tenure. For Generally rural

communities had in their ownership not only arable lands, but also pastures and lands for hayfields. In most cases they were the object of joint use of members of the rural community [1, p. 134–138].

According to representatives of historical science, communal ownership of land was determined by national customs. It was founded on the right of equal participation in the use of land areas. In addition, it excluded out the right of one person to appeal against a majority decision of other users. In that period of time not only pastures and hayfields were in were in common use, but forests as well. Sometimes the use of communal lands was even shared between several villages [2, p. 44–49].

The peasant reform of 1861 was an important step towards reforming the legal regulation of the legal status of the peasants. It has changed the subjective composition of land ownership. The community (peasant society) began to occupy a special place in that composition. Communal ownership of land was a special kind of joint ownership of land. As a result of this reform, the two main forms of land tenure have left: communal and courtyard [3, p. 21].

The rural community, which was formed as a result of the peasant reform of 1861, had a special legal status. It has been recognized as the subject of ownership on land within its territory. The communal form of land ownership was dominant. The rules of communal land tenure established that the peasant had the right to use his part of the land of the community but was deprived of the right to dispose of it [4, p. 55].

The union of peasants in the communities was mandatory. The peasant could leave the community only according to the procedure, prescribed by the law. A special feature of the legal status of the community (peasant society) was that all obligations were considered as concluded by the community as a whole, and not by individuals.

The revolutionary situation in Russia at the beginning of the 20th century led to the implementation of a new agrarian reform, which was named Stolypin. This reform was aimed at the forced destruction of the land (peasant) community and the formation of a new system of land tenure. Since the development of capitalism has led the peasant community to lose its importance, every peasant who owned a part of common land on community law could receive a part of common land into his private ownership. Communal land use was considered as abolished. The state encouraged the construction of field holdings, which included hayfields and pastures. Such field holdings were parts of a single massif of the previous common land. This formation was called «vidruby» [5, p. 85].

The land system has undergone significant changes as a result of the October Revolution of 1917. As a result of its implementation, the nationalization of the entire land was carried out. But the communal form of land management through land communities continued to exist for a long time (until 1930).

The land communities that functioned on the basis of the Land Code of the Ukrainian Soviet Socialist Re-

public of 1922 determined the way of land use and guaranteed, among other things, equal rights for their members to participate in the joint use of hayfields and pastures for cattle. This code contained a special department VIII «On Manor and Meadow Land», which laid the foundations of the legal regime for lands used as hayfields and pastures. They were united by the only term «meadow lands». The prescriptions of this department provided that the distribution of meadow land, used by the land community, was carried out on the same grounds and with taking into account the same criteria as the distribution of arable land. The law forbade the establishment of different criteria for redistribution of arable land and meadows. Certain terms and conditions for redistribution of meadow land plots were established only in exceptional cases, subject to special local conditions (Article 132). Meadow land plots, within which users (land communities and private yards) have made soil improvements (drainage and other land reclamation works) should have been kept at the disposal of users. In the case of a partial withdrawal of land with equal redistribution or land use, the persons who received in their own use this land plot returned to the previous users the funds for their unused losses.

The Land Code of the Ukrainian SSR (Article 134) stipulated that the change in the boundaries of meadow land plots used by the land communities and separate yards could be carried out only in the manner of land administration. According to Article 135 of the Land Code, local authorities were given the right to issue binding regulations and detailed rules on measures «to encourage the massive improvement of meadow land». The Land law has considered meadow land as auxiliary land. It not only regulated their distribution, but also established special terms and conditions of its redistribution. The Law also provided the creation of a meadow fund. Art. 169 established that the funds of special purposes, including the meadow fund were formed.

Further, the resolution of June 2, 1922 «On the ordering of the use of hayfields and measures for raising the meadow economy» [6] provided that the separation of hay soil was carried out on the grounds defined in the rules on the allocation of land from the partnership. All partnerships and other agricultural associations, as well as individual land users, who have provided or were providing soil improvement of hayfield lands, that resolution has granted certain privileges and benefits, in particular: a), provided the Resolution of February 11, 1922 «On the reclamation companies» defined benefit for reclamation associations formed to improve hay lands; b) provided long-term loans through state, cooperative and mixed credit institutions; c) hayfields, where works on soil improvement were conducted, were stored by their users, regardless of their size. These land plots were neither subjects to any redistribution among the members of this agricultural association, nor the compulsory distribution during land management. The regulation prohibited cattle grazing

on hay-type soils after «snow melts or etc» (paragraph 12). The law allowed grazing not earlier than in two weeks after harvesting. At the same time, the final terms of grazing on these land plots were set depending on local conditions.

Detailed rules were issued to ensure the implementation of this resolution. They established, in necessary cases, «means of encouragement and state incentives for the massive improvement of hayland soils».

Detailed regulation of relations that were formed while using forage lands created favorable conditions for ensuring rational and efficient use of these lands.

In accordance with the resolution of the Central Committee of the CPSU and the Council of Ministers of the USSR of October 27, 1964, «On the elimination of ungrounded restrictions on personal subsidiary farming of collective farmers, workers and employees» (Resolution of the Central Committee of the Communist Party of Ukraine and the Council of Ministers of the USSR dated November 2, 1964, with the same name [7]) the local authorities were obliged to provide all-round assistance to collective farmers in acquiring of cattle. Besides, they had to provide collective farms with long-term use of pasture and hayfields on the lands of the state forest fund, state land fund, in strips of diversion of roads and other unused land. Local authorities had to provide workers, employees, specialists and other workers, who were not members of collective farms, with corresponding land plots on unused lands.

This resolution recommended collective farms of the mountainous and foothill areas of the Carpathians and the Polissya regions of the republic to give into the long-term use of the collective farmers of the hayfields that not used in the public sector and located among the forest, shrubs, swamps and other lands. In addition, pastures for grazing were provided free of charge.

The next historic milestone with which the legal regulation of the use of hayfield and pasture land is linked was the adoption of the Principles of Land Legislation of the Soviet Socialist Republics and Union Republics (1968), which provided for the provision of agricultural land plots to citizens for the conduct of personal economy without employing hired labor. Members of the collective farm used pasture for cattle, which, according to the collective farm's charter, belonged to it (Article 25 of the Principles). Workers and employees of state farms, as well as other citizens, who lived in rural areas and privately-owned cattle, were provided by land plots for grazing from state land reserves, state forest fund, urban and urban-type settlements, and non-agricultural land. In the absence of such lands, land plots for cattle grazing could be provided, in accordance with the established procedure, from lands of agricultural enterprises, organizations and institutions with the compensation by owners of cattle to land users for the costs of maintaining and improving these areas. Lands for haymaking of the named categories of citizens were allocated from the lands of the state reserve, the state forest fund, in

the strips of railways and highways and lands of other non-agricultural purposes. Provision of such land plots was carried out in the order and within the limits established by the legislation of the Union republics.

The Principles (Article 42) also regulated the relations that concerned the land plots for different services, which included plots for haying and were provided to certain categories of workers in transport, forestry, forestry, communication, water, fish, hunting, as well as some other branches national economy. Such lands were allocated from the lands that were used by enterprises, organizations and institutions of the relevant ministries and departments, and in the absence of such lands – from the lands of the state reserve and lands of the state forest fund. The list of categories of workers who were entitled to a land plot, its size, terms of provision and the procedure for their use were determined by the legislation of the Union republics.

The above provisions of the Principles were detailed and specified at the republican level. Art. 82 of the Land Code of the Ukrainian SSR (1970) established that workers, employees and other citizens, who lived in rural areas, received land plots for haying and grazing were by the decision of the executive committees of the respective district councils, and within the boundaries of settlements, by the decision of the executive committees of city, town or village councils. The sizes of such land plots were determined by the executive committees of the regional councils.

Art. 131–134 of the Land Code of the Ukrainian SSR defined the list of categories of workers who had the right to receive a land allotment, its size, procedure of its receiving and its use. The size of the plots for haying depended on the categories of workers and the industry of the economy in which they worked and ranged from 1 to 2 hectares.

Land plots for grazing and haying in the forests of the USSR were allocated to forestry and distributed among citizens in accordance with the decision of executive committees of district councils. As the legislation involved the grazing and haying for secondary use in forests, the forestry authorities issued permits for the use of the named types – orders. These orders indicated the area, the terms of use and the location of the land. Haying and grazing in forests was carried out free of charge. Grazing in collective forests could be carried out only with the permission of authorities of collective farm.

The Resolution of the Central Committee of the CPSU and the Council of Ministers of the USSR of January 8, 1981, «On Additional Measures to Increase the Production of Agricultural Products in Private Subsidiary Holdings of Citizens» [8] (and the same decision of the Central Committee of the Communist Party of Ukraine and the Council of Ministers of the Ukrainian SSR of March 10, 1981) that as an additional measure in order to provide cattle and poultry feed, some categories of citizens (citizens, collective farmers, workers, employees and other citizens who have faithfully participated in social

production, and a pensioner m, which is kept in private farms cattle, sheep and goats) were provided with plots for hay mowing and grazing of cattle for a long time. Agricultural lands of collective farms and state farms, lands of the state stock and the state forest fund, industrial, transport and other non-agricultural enterprises were used for these purposes. Enterprises and organizations were supposed to help citizens to improve the productivity of these lands.

When Ukraine gained its independence, processes for updating domestic legislation, including those in the sphere of land relations have been initiated. They touched the use of forage lands. Thus, the Land Code of the Ukrainian SSR (1990) consolidated the principle of payment for land use (Article 35).

It established that citizens who own cattle may receive land for haying and grazing. Land plots for these purposes were provided by village, settlement, city councils from the lands under these boards, as well as by agreement with collective farms, state farms, enterprises, institutions and organizations from the lands that were in their possession or use. The size of land plots gave to citizens for haying and grazing should not exceed 1 hectare (Article 59).

The Land Code defined only citizens as subjects who could claim land for haying and grazing of cattle. But other individuals, foreigners and stateless persons were given such rights if they were privately owned cattle. Other legal entities that carried out commercial agricultural production also used the land for haying and grazing, provided by projects of agricultural land management.

The Code did not exclude the possibility of providing land for haying not only from agricultural land, but also from lands of forest and water funds. Art. 77 stipulated that district and city councils, in agreement with the state forestry authorities, may provide collective farms, state farms, other enterprises, institutions, organizations and citizens with temporary use of the land of the forest fund owned or used by state forest enterprises, institutions and organizations, for agricultural purposes, including land for haying and grazing of cattle. According to Article 79 of the Land Code of Ukraine lands of the water fund that were in use by water companies and organizations could be provided by the decision of the district and city council for temporary use, including for haying. The relevant legal provisions were sealed in the Forestry and Water Code of Ukraine.

As you can see, the land legislation of an independent Ukraine preserves the lawfulness of legislation. It also introduces payment in the specified sphere that meets the requirements of modern market conditions.

The Land Code of Ukraine, as amended on March 13, 1992, has actually redrawn the provisions of the previous Land Code. Thus, emphasizing that agricultural land is provided for use by citizens (including for hay mowing and grazing) (Article 48), it proclaimed that the size of the relevant land plot should not exceed 1 hectare.

Since the launch and implementation of land and agrarian reforms, there have been some changes. They touched upon the legal regulation of relations related to the use of hayfields and pastures. According to the legislation agricultural lands available in collective agricultural enterprises, could be split up and transferred to private property to members of collective agricultural enterprises and pensioners from them by will of these citizens of Ukraine.

The Order of the State Committee of Ukraine for Land Resources No 130 of December 30, 1999 approved the Recommendations for the establishment of public pastures for grazing near settlements. Such lands had to be taken from lands of reserve fund. These Recommendations were developed in accordance with the Decree of the President of Ukraine of December 2, 1999 «On Urgent Measures to Accelerate the Reform of the Agrarian Sector of the Economy». Created community pastures for the grazing were used jointly by the owners of cattle. The organization of such use was carried out through an authorized person who was elected by the association of these citizens.

Article 34 of the current Land Code of Ukraine (2001) establishes only the right of citizens to use pastures on a lease. But the Law of Ukraine «On the lease of land» (Article 5) explicitly stipulates that not only Ukrainian citizens but also stateless persons and legal entities can lease land for haying and grazing of cattle.

Important provisions for the use of hayfields and pasture lands are provided by the Law of Ukraine «On flora», according to which the use of natural plant resources for haying and grazing is carried out without obtaining a special permit, except for the use of resources included in the Red and Green books of Ukraine (Article 10). The given law also establishes that the use of natural plant resources for grazing and provision of other livestock needs is prohibited if it can lead to degradation of land occupied by flora objects or impedes their timely natural reproduction. Restrictions on cattle grazing may be conditioned by the norms of calculating of the area of land for these purposes for 1 head of cattle. The size of the land plot is not set by the Land Code of Ukraine. It should be determined in each case, depending on the actual circumstances (local conditions, availability of free land, amount of cattle etc.). An individual can claim for temporary use of pastures only if he owns farm animals.

Transfer of land plots to citizens for haying and grazing of cattle is carried out without the use of competitive principles (Part 2 of Article 134 of the Land Code of Ukraine).

According to the current land legislation principles (Part 2 of Article 34 of the Land Code of Ukraine), public pastures created on the lands of state or communal property are an independent form of providing fodder for farm animals that were owned by citizens. This is a new provision of the current land legislation. It is a result of the reform processes that take place in the implementation of land and agrarian reform.

Creation of public hayfields and pastures at the expense of lands of state and communal property, which is a type of land of general use outside of settlements, leads to a number of issues, which have to be resolved. Thus, all citizens – owners of cattle can use public pastures at the title of general land use. However, as it rightly emphasized in the literature, the use of «public pastures» at this title is problematic [10, p. 137].

Really, haying is impossible without fixing of certain land plots by individuals. And this contradicts the essence of the law of general land use. May be, this is why in the Land Code of Ukraine (as amended on September 6, 2012), only public pastures are classified as objects destined to serve the needs of a territorial community (Part 3 of Article 83).

In addition, the presence of a legal entity – formed by the association of livestock owners in the creation of a public pastures – is required, as the judicial practice testifies, necessitates the application of competitive principles for acquiring rights to the corresponding land plots.

In addition, according to the legal practice, the mandatory presence of a legal entity formed by the association of owners of cattle, while creating some public pastures, necessitates the application of competitive principles for acquiring rights to the corresponding plots of land. These and other issues that arise in the process of using hayfields and pastures require special attention of researchers.

Summarizing the genesis of legal regulation of relations on the use of land for haying and grazing, it should be noted, that this kind of land use is in the sight of the state structures, which continue working on its improvement.

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PRINCIPLES OF JUSTICE AND THE UNACCEPTABILITY OF LOCAL ECONOMIC EFFECTS AND THEIR IMPACTS ON IMPLEMENTATION OF ECONOMIC AND LEGAL REGULATIONS IN THE PUBLIC PROCUREMENT

The article highlights the key role of public procurement in meeting the state needs and the economic growth of Ukraine as a whole. The problems of making ineffective decisions by customers during public procurements are considered, which leads to wasteful spending of taxpayers' funds and failure to take into account the needs and interests of future generations. The authors also point out the problem of using public procurements to meet the interests of individuals or groups of people, which has no general positive effect on the population of the country. In order to solve these problems, the article proposes to introduce the principles of equity and inadmissibility of local economic effects in the field of public procurement. The authors come to the conclusion that the principle of justice, as a general principle, should form the basis, be the ascendant beginning of the formation of a system of economic-legal norms governing relations that are formed during the implementation of public procurement. The principle of inadmissibility of local economic effects serves as a special legal principle for the formation of relations in the field of public procurement, the essence of which is the inadmissibility of satisfac-

tion when performing public procurements of interests only individuals or groups of individuals. Public procurement should be aimed at satisfying the needs of an uncertain range of people (the population), having a general positive economic effect.

The governments of the world spend considerable sums of public funds, buying goods, work and services to meet government needs. According to the World Bank, about 50–70% of national budgets are costs for public procurement. On average, the total public procurement volume is about 20% of GDP in the Organization for Economic Co-operation and Development and approximately 15% in non-member countries[1].

In Ukraine, about 150 billion UAH are spent annually on public purchases. So way public purchases play key role in the process pleasure state owned needs and economic growth in as a whole at the same time, ineffective customer decisions lead to wasteful spending and the imposition of consequences for short-sighted decisions for the present and future generations. The generation of funds is at present the main task, and at the same time, the burden of the people of Ukraine. The results of the work of every citizen of Ukraine are expressed in a certain monetary share, which is accumulated in the state budget. In this regard, the order of budget funds should take place not only within the formal observance of the requirements of the current legislation, which is inadmissible, but also taking into account actual, and not viable, needs of the people of Ukraine, a real positive effect from the implementation of procurements of certain goods, works, services for budget funds (funds of the people of Ukraine). Benefit from budget expenditures should be tangible for every citizen of Ukraine and ensure this is feasible if the principles of equity and inadmissibility of local economic effects are implemented in the field of public procurement. The need to achieve a balance between the interests of the state and the interests of present and future generations causes the relevance of the study of the general legal principle of justice and the special legal principle of the inadmissibility of local economic effects in the aspect of their float on public procurement relations.

The purpose of the work is to reveal the peculiarities of manifestation in the legal regulation of relations in the field of public procurement of the general legal principle of justice and the special legal principle of the inadmissibility of local economic effects, which has not only theoretical value but also practical significance. To accomplish this, the following tasks will be addressed: to propose a new approach to public procurement on the basis of the principle of justice, which is to meet the needs of the present, without compromising the ability of future generations to meet their own needs; to substantiate the necessity of introducing a new special legal principle inherent in pub-

[1] Public procurement as a tool for promoting more sustainable consumption and production patterns // Sustainable development Innovation briefs. – 2008. – Issue 5. – P. 1–12.

lic procurement, namely: the inadmissibility of creating a local economic effect from the implementation of public procurement, which consists in the need to meet the general needs of an indefinite number of individuals (population) rather than the specific interests of individuals or their groups, with an assessment of the impact of public procurement on the welfare of the population.

1. The principle of justice as the basis for the formation of a system of economic-legal norms governing relations that are formed during the implementation of public procurement.

Without deepening the study of general theoretical questions of the principle of justice, it should be noted that it is a fundamental principle of law. O. F. Skakun determines justice as a measure of moral and legal integrity of the embedded and obtained in all spheres of human activity and their legal provision. It is a balance of interests: power and citizen, producer and consumer, seller and buyer, etc.[1]. Observance of the principle of equity in the field of public procurement is especially important due to the fact that the taxpayers' money, which pays taxes awaiting the timely and qualitative provision of public services, the functioning of the state and municipal sectors of the economy, etc., is spent. It is important to ensure that the procurement process is not only fair in nature, but also perceived as just suppliers and the public. The Law of Ukraine «On Public Procurement» (hereinafter referred to as the «Law on Public Procurement»)[2] does not specifically distinguish among the objectives of legal regulation of equity in the field of public procurement. Every day the state buys goods, works and services for kindergartens, schools, universities, hospitals, armies, etc. Interruptions in the procurement or procurement of goods, works and services of poor quality, such as medicines or equipment for the military, can cost people's lives, or the purchase of fuel and other materials may cost the activities of entire factories and, therefore, workplaces. Procurement «creates» or «builds» our environment and the environment, and it may be different depending on the quality of the products being procured. In this context, the importance of the principle of equity in the field of public procurement is confirmed.

This raises the question of how public procurement should be evaluated, based on the principle of equity? For example, take this aspect of justice as a responsibility for future generations. In practice, all costs and benefits are estimated today from the point of view of the current generation. Short-term benefits almost always prevail over long-term costs. However, if we consider this issue in the context of environmental protection, in 2006 Stern's report, «Climate Change Economics,» states that if choosing not to take environmen-

[1] Скакун О. Ф. Теорія держави і права: підручн. / Пер. з рос. – Харків: Консум, 2006. – С. 224.

[2] Про публічні закупівлі: Закон України № 922-VIII від 25.12.2015 // Відом. Верхов. Ради України. – 2016. – № 9. – Ст. 89.

tal measures, the cost of combating the effects of climate change will be estimated at 20% of world GDP for a year. For comparison, the cost of immediate measures to reduce greenhouse gas emissions to address the severe effects of climate change in the future may be limited to 1% of world GDP[1]

In this context, one should turn to John Rawls, namely his theory of justice, according to which each generation must preserve not only the achievements of culture and civilization, but also the institutions that were created, and to postpone or save at each time a corresponding amount of accumulated capital. Such savings can take different forms: from investing in machinery and other means of production to investing in education and training[2]. Future generations would like to inherit the Earth in the same good condition as their ancestors did and at least with the same level of access to resources. It requires that each generation leaves the planet in no worse condition than it has received it. Future generations have no voice and cannot influence the current generation. They cannot even discuss their own position with them, putting forward any claims. But their well-being and existence largely depend on us. However, the idea of justice means that if future generations had the right to vote, they would not agree to a situation that could be described, for example, as the state of environmental degradation[3]. This would be a clear violation of justice if those who live today would use the resources that are exhausted, without regard to their consequences and without restraining themselves, and the future generations, on the contrary, would pass on a spoiled planet contrary to the norms of life[4]. The main question is: what are the ways and means of strengthening responsibility for future generations?

Conscious of such responsibility for future generations and the threats facing all of mankind, such as deforestation, overfishing, production, where hard labor is employed at very low wages, discrimination, etc. Other approaches to public procurement a means of state regulation of the economy, and countries are gradually implementing policies for the implementation of so-called «sustainable purchases» that promote development that meets the needs of the present but does not jeopardize usefulness of future generations to meet their own needs. And this does not always mean achieving maximum savings at the lowest possible prices, but also involves the use of procurement to promote social justice and human rights protection, to ensure the sustainability of the envi-

[1] Stern review: the economics of climate change [Electronic source]. – Available at: http://unionsforenergydemocracy.org/wp-content/uploads/2015/08/sternreview_report_complete.pdf.

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ronment and the future with equitable development and prosperity.

Stable public procurement is defined as the right balance between people, the planet and profits. These three elements are represented by three factors: social, environmental and economic.

Short-term benefits are currently gaining momentum in Ukraine, and public procurement is used only as a means of saving and rational use of budget funds. If we analyze the main module of business analytics of public procurement of BI-module, then one of the main indicators of the efficiency of the functioning of the public procurement system is the economy, which is calculated as the difference between the expected value of the goods and the victorious offer (the minimum price). So, in the Law on Public Procurement, the emphasis is on reducing prices through the electronic auction. By the main procurement procedures, the weight of the price criterion has been increased, if other criteria are used from 50% to 70% in order to determine the most economically advantageous tender offer, except for the price.

Realizing such responsibility for future generations and the threats facing all of mankind, such as deforestation, overfishing, production, where hard labor is employed at very low wages, discrimination, etc., other approaches to the use of public procurements are developing in the world. Countries are gradually implementing policies for the implementation of so-called «sustainable purchases» that promote development that meets the needs of the present but does not jeopardize the ability of future generations to meet their own needs. And this does not always mean achieving maximum savings at the lowest possible prices, but also involves the use of procurement to promote social justice and human rights protection, to ensure the sustainability of the environment and the future with equitable development and prosperity.

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In the context of the limited public funds in Ukraine, the approach adopted to public procurement is justified, however, it is only a tactical task for the near

future and is not intended for a long-term perspective, nor does it take into account interests and does not assume any responsibility for future generations. In this context, the question arises as to the fairness of such an approach. For example, according to the analysts at the Center for Procurement Improvement at the Kyiv School of Economics, the share of additional deals to raise the price to the public procurement contract is higher, where there was the greatest savings and competition. That is, participants use as a common practice of price dumping to win the auction, so that, through an additional deal, its results are leveled out. Every sixth over-threshold competitive procurement procedure changes over time, the basis for which becomes the article 36 of the Law «On Public Procurement». In particular, this article defines the grounds according to which the initial agreement may be changed without a new procedure. Often, an additional deal has objective reasons, for example, changes in the market situation. However, in a large number of cases, the conclusion of an additional agreement is not the result of objective and market factors[1].

At the moment, the cost of the product life cycle is not taken into account, when the basis is taken not only the initial price of the procurement object, but also the future costs of customers, for example, for maintenance and electricity for heating or lighting systems, the cost of emissions into the atmosphere, etc.[2]. By purchasing low-quality goods, for example, they are not energy-efficient, savings are initially recorded, but, as a rule, low quality has the consequence of additional costs for product support, or the purchase of new ones. One can also mention cases where a state does not commit itself to further stage of the existence of a product, for example its safe disposal, etc. It is these future costs that are being transferred to taxpayers again.

In addition, the lowest price criterion is not always fair in purchases if this price is achieved through the use of cheap low-paid labor with very low wages and socially unacceptable working conditions in so-called sweatshop factories or because of violations of competition rules, for example due to receiving unlawful state aid. The criterion of the lowest price often rejects the innovative and environmental component, and ineffective customer solutions in this case reject the development of the economy back.

Thus, Ukrzaliznytsya recently announced a tender for the purchase of 6 diesel trains for regional passenger traffic with the expected value of 1.062 bil-

[1] Грибановський О. За межою Prozzoro: додаткові угоди як результат цінового демпінгу / О. Грибановський, І. Меметова // VoxUkraine. – 2017. – 4 липня [Електрон. ресурс]. – Режим доступу: https://voxukraine.org/2017/07/04/za-mezhoyu-prozzoro-dodatkovi-ugodi-yak-rezultat-tsinovogo-dempingu/.

[2] Настанови щодо вартості життєвого циклу товару та аномально низької вартості тендерної пропозиції : Проект «Гармонізація системи державних закупівель в Україні зі стандартами ЄС» [Електрон. ресурс]. – Режим доступу: http://eupublicprocurement.org.ua/wp-content/uploads/2017/05/Guidelines-on-LCC-and-ALT_UKR.pdf.

lion UAH[1]. At the same time, the complaint was filed with the Antimonopoly Committee of Ukraine with regard to the violation of the legislation of Ukrzaliznytsya PJSC because the requirements of the tender documentation were issued by the customer in such a way that the products of the sole producer are the same: PESA (Republic of Poland), which deprives the possibility of participation in Purchases of the Ukrainian enterprise of PJSC «Kryukiv Carriage Works», which produces trains. The complaint was satisfied, and the customer was obliged to make changes to the tender documentation.

In this case, there is a violation of the principle of justice. In particular, the national interests of the state are violated, because the domestic producer removes from participation in the purchase, which deprives more than 60 domestic enterprises, working in cooperation in the manufacture of diesel trains; such procurement will lead to a shortage of budgets of different levels, loss of scientific potential and prospects for the development of export-oriented production of motor-rail rolling stock[2]. In this case, domestic producers are eliminated in this case from participating in the rolling stock update program for 2017–20121[3]. In addition, the cost of service in the future will be transferred to taxpayers, taking into account the fact that Ukraine does not have a system of service maintenance products PESA. As a result of the ineffective decision, Ukrainian taxpayers are not gaining an additional burden. In this case, the principle of justice is violated not only in the context of not taking into account national interests, but also liability to taxpayers who will bear additional costs, which in turn will have an impact on future generations in the form of general negative economic consequences.

Ukraine has already experienced a violation of the principle of equity in the field of public procurement, namely: purchase of 10 Korean trains produced by Hyundai for one partner of 307 million dollars. USA, which at that time were more expensive than similar trains of domestic production of PJSC «Kryukiv Carriage Works» (hereinafter – KIBB). In addition, Ukraine spent considerable amounts on infrastructure construction for these trains and com-

[1] Дизельний поїзд для регіональних пасажирських перевезень у трьохвагонному складі: оголошення про проведення відкритих торгів // Prozorro. – [Електрон. ресурс]. – Режим доступу: https://prozorro.gov.ua/tender/UA-2017-03-07-000885-b.

[2] Приходько В. Польская «поддержка» «Укрзалізниці» и национального производителя / В. Приходько // Зеркало недели. – 2017. – № 10 [Електрон. ресурс]. – Режим доступу: https://gazeta.zn.ua/promyshliennost/polskaya-podderzhka-ukrzaliznici-i-nacionalnogo-proizvoditelya-1-_.html., Дизель-поїзди – вітчизняні чи польські? // Залізниця без корупції. – 2017. – 16 березня [Електрон. ресурс]. – Режим доступу: http://zbk.org.ua/2017/03/16/vitchiznyani-dizelni-po%D1%97zdi-ukra%D1%97ni-nepotribni/.

[3] У 2017 році Укрзалізниця на оновлення рухомого складу планує спрямувати 12,5 млрд грн. – Іренеуш Василевський // Укрзалізниця [Електрон. ресурс]. – Режим доступу: http://www.uz.gov.ua/press_center/up_to_date_topic/448552/.

mitted to repay loans and interest on this purchase, as 85% of financing for the purchase of high-speed trains was carried out at the expense of a loan from the South Korean Export-Import Bank in the amount of 261 million US dollars for 10 years under the guarantees of the Ukrainian government and 4.5% per annum, the rest – at the expense of PJSC «Ukrzaliznytsya». During the cold season, frequent malfunctions and trains collapsed, which made Ukrzaliznytsya PJSC, as of 2013, paying compensation for delayed and canceled flights to the passengers of high-speed inter-regional electric trains «Ukrainian Express» for a total of UAH 800,000[1]. Only in December 2012, the Hyundai trains in the flight failed 10 times[2]. For example, trains had problems with autonomous power, when the power of the electric train fell quickly due to the weak batteries in the trains which stopped in the field, and the cars became cold[3]. Under the contract, the Korean company took maintenance of electric trains and undertook to fulfill all the warranty requirements for maintenance and repair quality for 5 years. However, after the expiration of this period, these commitments have been transferred to the Ukrainian side.

It is in this case that it would be expedient to take into account not only the initial price but also future costs, such as «cost of ownership» by the subject of procurement, including maintenance, repair, number of downtime due to malfunctions, etc., when deciding on procurement.

Consequently, the ineffective economic decision of the state to procure these trains in the presence of a domestic analogue has led to a violation of the principle of equity. A national producer who could take part in the procurement, and who specializes in the manufacture of trains, including high-speed, delivers its products to 20 countries of the world. Due to the implementation of such procurement, significant investments were made at the expense of the state budget for the economy of South Korea, and not Ukraine. By buying instead of imported, 10 trains of domestic production, this would be at least $ 300 million. The balance of foreign trade of Ukraine has been reduced[4]. Such an ineffective economic decision leads to the imposition of additional taxpayer costs and negative economic consequences for future generations, when the domestic industry does not have incentives for development, and thus no new jobs are created, salaries and deductions are reduced to the corresponding budgets.

Thus, the principle of equity in the

[1] Проблема потягів Hyundai відома [Електронний ресурс]. – Режим доступу: http://ukurier.gov.ua/uk/news/problema-potyagiv-hyundai-vidoma/.

[2] Зняті поїзди Hyundai можуть повернути вже у лютому – Укрзалізниця [Електронний ресурс]. – Режим доступу: http://www.bbc.com/ukrainian/entertainment/2014/02/140213_hyundai_update_dt.

[3] На що «хворіють» Hyundai? – 2013 [Електронний ресурс]. – Режим доступу: https://day.kyiv.ua/uk/article/ekonomika/na-shcho-hvoriyut-hyundai.

[4] Коханець Л. Миготлива аритмія «серця Вітчизни» / Л. Коханець, С. Лавренюк // Голос України. – 2012. – 6 липня (№ 121(5371). – С. 8 – 9.

aspect of ensuring responsibility for future generations can be realized in sustainable procurement that requires the implementation of such procurement in Ukraine, as well as changes to the procedure for evaluating bids and awarding procurement contracts by applying an approach based on an analysis of the life product cycle.

2. Principle of inadmissibility of «local economic effects» and its influence on the implementation of economic law in the field of public procurement

In this study, we are talking about responsibility not only to future generations, but also to the present, before taxpayers. The financing of public procurement is mainly due to taxes. Accumulated state funds are returned to the population and economic entities during the distribution of contracts for the purchase of goods, works and services.

Proper understanding of public procurement is important for customers in terms of awareness of limiting the rights when using public funds for public procurement purposes, which should not be aimed at achieving personal gain or in favor of specific groups, but rather to meet the interests of society in a broad sense. It is in this case that the importance of the principle of justice is reflected in the restrictive function of the state.

Quite often in practice, through public procurement at the expense of public funds, the interests of individuals or their groups are met, which creates a local economic effect from procurement, and contradicts the interests and needs of taxpayers, as well as the nature and purpose of public procurement.

An example of creating such a local economic effect is the public procurement that was carried out by the Office of Information and Communications of the Mykolayiv Regional State Administration. According to data provided on the official site of Prozorro, an agreement was signed on 2 million 192 thousand UAH with the «South Ukrainian Media Holding» for advancement in social networks and Internet resources[1]. Within the framework of the contract, the winner of the bidding undertakes to ensure the dissemination of information on the actual issues of socio-economic and socio-political life of the region on the nationwide Internet resources and in the public social networks Facebook and YouTube. For this, the performer undertakes to post 576 informational messages on UNIAN, Ukrinform, Ukrainian News, Interfax-Ukraine and 218 social networking sites on Facebook and YouTube. The price of placing a single message on all-Ukrainian resources is 2800 UAH. The price of one message in social networks Facebook and YouTube – 2659.41 UAH. Is there such a cost for public funds for residents of the Mykolaiv region, as for taxpayers? How much does this purchase meet the real needs of residents of the Mykolaiv region and have a positive effect?

[1] Миколаївська ОДА заплатить більше 2 млн за просування в соцмережах [Електрон. ресурс]. – Режим доступу: http://www.pravda.com.ua/news/2017/05/9/7143345/.

Another vivid example of the creation of a local economic effect from procurement that does not meet the needs of taxpayers is the purchase of goods, works and services that have superfluous consumer qualities, that is, qualities that are not conditional on their suitability for exploitation and consumption for the purpose of providing public services, execution works, etc. In May 2015, the Prosecutor General's Office of Ukraine, according to the results of the tender, entered into agreements for servicing and repairing cars for UAH 1.96 million. The services were ordered for 26 cars, including three SUVs (Toyota Land Cruiser, Ranger Rovers and Lexus), four Toyota Business Class cars and two Mercedes-class representatives, as reported in the State Procurement Bulletin[1]. At the same time, the engine volume, such as the SUV Rendor Rover, was 4170 cm cubic meters, and Lexus LX 570–5693 cm cubic. Do these models and technical specifications of cars need to meet their state needs and the performance of their functions by the employees of the General Prosecutor's Office of Ukraine? After all, the maintenance of vehicle data is translated specifically to taxpayers. In this context, the principle of the inadmissibility of such local economic effects should play an important role in the field of public procurement.

The essence of this principle should be that public procurement should be evaluated as the ratio between the public funds invested in the procurement and the objectives of the procurement. These targets should be measurable, defined by the functions of the customer who manages the public funds. Central and local government bodies are empowered, and in this sense, the benefits they receive during the procurement process, mean and express a direct benefit to the population that it represents. In the above case, the customer's benefit from using such a vehicle fleet is unilateral and does not represent a benefit for the population.

Investigating the issue of the inadmissibility of local economic effects in the field of public procurement, it is necessary to refer to the definition of «customer», which expresses the main purpose of their creation and functioning, and therefore the purpose of procurement, since public procurement serves as one of the main means to achieve the goals and objectives of the customer. For this purpose, it is expedient to consider such a definition in the legislation of the European Union (hereinafter – the EU) in the field of public procurement due to the processes of adaptation of Ukrainian legislation to the requirements of the EU, including concerning the concept of the customer.

According to Art. 2 EU Directive 2014/24 and Art. 3 of the 2014/25 Directive, the customer is a state, regional or local administration; bodies governed by public law by their activities; associations formed by one

[1] Автопарк Шокіна з'їсть 2 мільйони на ремонтах та обслуговуванні // Наші гроші. – 2015. – 26 травня [Електрон. ресурс]. – Режим доступу: http://nashigroshi.org/2015/05/26/avtopark-shokina-zjist-2-miljony-na-remontah-ta-obsluhovuvanni/.

or more administrations or one or more bodies governed by public law by their activities. One of the mandatory requirements of a body governed by public law is its purpose, namely the satisfaction of general needs that are not of an industrial or commercial nature. Moreover, what exactly falls under the notion of «general needs» is uncertain. According to the scientific literature, such needs are understood as requirements of the whole community (local or national), which should not be intersected with the specific or exclusive interests of a well-defined person or group of persons[1]. In paragraph 65 of the Opinion of Advocate General Leger in Mannesmann Anlagenbau Austria AG v. Strohal Rotationsdruck GmbH (C-44/96), it is stated that the concept of «general interest» can be considered in the context of «general economic interests» under Art. 90 (2) of the EU Treaty in terms of «activities that have a direct benefit to society, and not to the interests of individuals or groups.» At the same time, General Advocate Leger refers to the work of one researcher, according to which needs in the general interest can be defined as requirements of the community (local or national) in the interests of its members as a whole. In addition, there are general interests in the case if they do not coincide with the specific interests of a well-defined person or group of individuals[2].

The Law on Public Procurement also distinguishes one of the signs of the conspirator as providing the needs of the state or a territorial community. According to some researchers, public needs are social needs, the satisfaction of which is aimed at the benefit of the entire population of the country, or residents of a municipality or region[3]. In order to meet these needs, public procurement should be carried out. Even the purchase of goods, works and services for material and technical support of the customer indirectly will have an impact on the interests of the population, since such procurement is carried out for the proper performance of the functions of the customer, and therefore the realization of the purpose for which it was created.

Consequently, such procurements cannot be aimed at satisfying the interests of individuals or groups of individuals, thus preventing local economic effects and affecting the welfare of society as a whole. For example, in the field of state aid in the EU, the principle of pre-assessment is used, according to which the need for state aid is

[1] Bovis C. EU public procurement law / Christopher H. Bovis. UK : Edward Elgar, 2007. 488 p. C. 4, Bovis C. Public Procurement, State Aid and Services of General Economic Interest / C. Bovis [Electronic source]. – Available at : http://www.era-comm.eu/UNCRPD/kiosk/speakers_contributions/111DV67/Bovis_paper.pdf.

[2] Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH (Case C-44/96): Opinion of Advocate General Leger: 16 September 1997 [Electronic source]. – Available at: http://curia.europa.eu/.

[3] Евсегнеев В. А. Собственность на землю в фокусе интересов / В. А. Евсегнеев [Электронный ресурс]. – Режим доступа : https://www.lawmix.ru/comm/2583.

being assessed, the effectiveness of its use, and the impact on society's welfare and competition[1]. The special «balance sheet» analyzes the impact of state aid on the welfare and conditions of the activities of all stakeholders, including the recipient, its competitors, consumers, and others[2]; to achieve objective goals of mutual interest both in terms of efficiency (correction of market failures), and in relation to equity (distribution of welfare)[3]. A preliminary assessment of the impact on the welfare of society (population) is also appropriate for public procurement.

Based on the foregoing, the following conclusions can be drawn:

1. The principle of justice, as a general principle, should form the basis, be the starting point for the formation of a system of economic-legal norms governing the relations that are formed during the implementation of public procurement. The principle of equity in its aspect of responsibility for future generations can be realized in constant public procurement, where a significant role in improving the quality of procurement is given to stimulating measures to comply with the three principles of government: cost effectiveness, environmental friendliness and social benefits of procurement. Ensuring better conditions for such purchases does not necessarily have to provide the lowest price. When making a purchasing decision, account should be taken of the purpose of public procurement and the real public need for the functioning of the public procurement system. The principle of justice plays the role of a peculiar indicator, which gives a concrete idea of the correspondence of the system of public procurement to its purpose, purpose and real social necessity in its functioning. In this context, it is proposed to consolidate the principle of equity in defining the purpose of the Law on Public Procurement, stating the second preambular paragraph in the following wording: «The purpose of this Law is to ensure, on the basis of fairness, an efficient and transparent procurement, the creation of a competitive environment in the field of public procurement, prevention the manifestations of corruption in this area, the development of fair competition».

2. The principle of inadmissibility of local economic effects serves as a special legal principle for the formation of relations in the field of public procurement, the essence of which is the inadmissibility of satisfaction in the conduct of public procurements of interests only individuals or groups of individuals. Public procurement should be aimed at satisfying the needs of an uncertain

[1] Колосова О. Керівні принципи надання державної допомоги суб'єктам господарювання / О. Колосова // Юридичний вісник. – 2014. – № 6. – С. 322–328.

[2] Common principles for an economic assessment of the Compatibility of state aid under article 87.3 // European Commission. Competition. 2004 [Electronic source]. – Available at: http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf.

[3] Бугаєнко Н. Базові принципи політики регулювання державної допомоги суб'єктам господарювання в рамках ЄС / Н. Бугаєнко // Держава та економіка. – 2010. – № 6. – С. 14–22.

range of people (the population), having a general positive economic effect. In addition, this principle should ensure that products, works and services that are procured meet the objectives and requirements for which they are purchased, as well as the functions and objectives of the customer who procures goods, works and services.

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LICENSING LEGAL CONDITIONS OF ECONOMIC ACTIVITY RELATED TO THE PRODUCTION OF PARTICULARLY HAZARDOUS CHEMICALS (OBJECTS)

Abstract. *The peculiarities of licensing in the system of state regulation and maintenance of economic activity related to the production of particularly hazardous chemicals are revealed in this paper. Special attention is paid to the compliance with licensing legal conditions for the implementation of economic activities burdened with the risks of hazardous substances.*

Key words: *license terms; license requirements; license for the conduct of economic activity related to hazardous substances (objects); objects of high risk; sources of high danger; risky business activity.*

Problem statement. Licensing and provision of certain types of economic activity in accordance with Part 1 of Art. 14 of the Economic Code of Ukraine (hereinafter referred to as the ECU) is a means of state regulation in the field of economic activity, which is aimed, in particular, at ensuring a unified state policy in this area and protecting the economic and social interests of the state, the people and individual consumers.

The legal basis for the licensing of certain types of economic activity is determined by the constitutional right of everyone to engage in entrepreneurial activity not prohibited by law and the principles of management established by the ECU (Article 6). The license is defined as a document of a state standard, which certifies the right of a business entity – a licensee for the execution (implementation) of a specified type of economic activity for a specified period, provided that the license conditions are fulfilled within the framework of the relevant legal relations regulated by law. Therefore, licensing is attributed to

the main means of regulating the state's influence on the activities of economic entities by the ECU.

Analysis of recent research. General issues of licensing of economic (entrepreneurial) activity were fragmentarily investigated in the works of scientists of administrative law – V. B. Averianov, Ye. V. Dodin, V. K. Kolpakov, V. I. Tkachenko and economic law – A. G. Bobkov, O. P. Vikhrov, N. O. Saniakhmetova, V. S. Shcherbyna. However, special studies on licensing issues and the peculiarities of licensing legal conditions for the implementation of economic activities on the production of highly hazardous chemicals (objects) in the economic legal literature are still lacking, although the legal framework (base) in this area is under consistent development at the national and transnational levels. This is the ***focus*** of our article.

It should be noted that the Law of Ukraine «On Licensing of Types of Economic Activities» of March 2, 2015, No. 222-VIII [3] establishes a list of types of economic activities subject to licensing, in particular in handling of especially hazardous substances and hazardous waste listed by the Cabinet of Ministers of Ukraine. The Licensing conditions for the conduct of economic activity on the production of highly hazardous chemicals listed by the Cabinet of Ministers of Ukraine [1] and other regulatory acts in this area followed its development [2].

Note that in the theory of administrative law, some authors distinguish organizational managerial functions into supervision, control and regulation [4, p. 101]. Other authors specify the function of management – regulation, allocating a group of managerial functions in the field of legal regulation [6, p. 53].

V. K. Kolpakov considers licensing of entrepreneurial activity as an integral part of state regulation of entrepreneurship in Ukraine [7, p. 646].

We support the position expressed in the economic-legal literature that the licensing of economic activity should be considered as a means of state regulation of economic activity [11, p. 29–34], based on the legislative assignments of the ECU (Article 12).

Main material presentation. Other regulatory requirements for licensing as a special management function should also be mentioned, for example, Licensing conditions for conducting business activities for the carriage of passengers, dangerous goods and hazardous waste by motor transport: Decree of the Cabinet of Ministers of Ukraine dated 2 December 2015 No 1001 [2]; Licensing conditions for conducting business activities for the carriage of passengers, dangerous goods and hazardous wastes by rail: Decree of the Cabinet of Ministers of Ukraine dated December 9, 2015, No. 1168 [12]; Licensing conditions for conducting commercial activities for the production of explosive materials of industrial purpose: Decree of the Cabinet of Ministers of Ukraine dated July 22, 2016, No. 604 [13]; The criteria for assessing the degree of risk associated with the conduct of economic activities related to the handling of hazardous waste subject to licensing

and the frequency of implementation of planned state supervision (control) by the Ministry of Ecology and Natural Resources of Ukraine: Decree of the Cabinet of Ministers of Ukraine dated July 9, 2016, No. 804 [14].

As a management function in the relevant branch of law [5, p. 17], licensing is considered in the eco-legal literature.

Undoubtedly, doctrinal approaches of scientists regarding the legal nature of the licensing of economic activity have the right to exist, and this leads to the expediency of a more thorough study of this problem as a diverse legal phenomenon, which does not exclude the regulatory and legal approach, from the point of view of the law-regulating and state-regulating means of economic activity with dangerous objects (hazardous substances, objects and factors) – sources of increased danger, which stipulate the legal form of regulation the state implementation of risky economic activity through the mechanism of state regulation of economic activity, as rightly noted in the economic-legal literature, is determined by the constitutional right of everyone to engage in entrepreneurial activity not prohibited by law and the principles of such, set forth in Art. 6 of the ECU.

However, as pointed out by scholars, one cannot consider successful two laws, one of which provides for the licensing of economic activities, and another establishes a permit system in the field of economic activity, both identified by researchers as measures of preventive nature of the permit system of provision of environmental safety [9, p. 115]. Along with this, the delineation of the role and purpose of each of the above-mentioned means of state provision of economic activities related to the production of especially hazardous substances remains open, while a license and a permission are identified by many scholars as similar notions [8, p. 24].

Firstly, the licensing and permission system documents have different titles and contents, their designation is appropriate in the licensing and permission system of economic activity.

Secondly, in accordance with the Licensing Conditions for conducting economic activity for the production of especially dangerous substances, listed by the Cabinet of Ministers of Ukraine, the application for a license must be accompanied by information on the availability of documents of permissive nature in the established form, in particular, the positive conclusion from the state sanitary and epidemiological examination, positive conclusion of the state environmental expertise, permission to use the works of exposed danger and operation of machinery, mechanical equipment, i.e. sources of high hazard, permits for special water usage, permits for emissions of pollutants in atmospheric air by stationary sources as well as numbers and dates of their issue, a list of particularly dangerous chemicals, the production of which received the conclusion of the relevant examination, the address of the facility examination and who issued a permit document signed and stamped by the licensee.

The same requirements are put forward by the Licensing Conditions of Entrepreneurial Activities on the Management of Hazardous Wastes approved by the Decree of the Cabinet of Ministers of Ukraine of July 13, 2016. No. 446 [1].

Thus, the licensing of the economic activities related to the production of especially hazardous chemicals and the handling of hazardous waste is preceded by documents of permissive nature. It is not established that the permit system is a means of ensuring environmental safety or a means of state regulation of economic activities in relation to the handling of hazardous objects, etc.

It is logical that according to Part 5 of Art. 1 of the Law of Ukraine «On Licensing Types of Economic Activity» of March 2, 2015, licensing is defined as a means of state regulation of the conduct of types of economic activity subject to licensing aimed at ensuring the implementation of a unified state policy (Article 307).

In the field of licensing, *the protection of the economic and social interests of the state, society and individual consumers* is ensured. According to the above, it is possible to conduct controversy about the logic of the typical range of subjective composition and protecting the interests of the state as an authorized entity, a society that is not provided for by the current legislation as a subject of protection and a generalized «consumer» entity, which takes place only in relation to specific subjects in the legal relationship of consumption of the relevant resources and services.

The main purpose of the licensing of economic activity as a means of state regulation of certain types of economic activity is to ensure the implementation of a unified state policy in the process of fulfilling the economic and social functions of the state through the legalization of certain types of economic activity, especially those related to dangerous objects, that is hazardous substances that are produced, processed, stored, etc. in relevant facilities, technical and technological systems as sources of high hazard for humans and the environment.

Consequently, licensing is an appropriate established procedure ensuring a unified rule of law for the conduct of economic activity and the implementation of the competence of economic entities within the legal and uniform requirements established by the state, legalized by a state document in the form of a license capable of ensuring the economic and social interests of the state, the Ukrainian people and other subjects as consumers of the corresponding products (goods) from the point of view of guaranteeing their safety in the process of usage and other forms of handling of hazardous and objects.

The Law of Ukraine «On Licensing Types of Economic Activities» defines the categories «license applicant» and «licensee». In the first case, it is an entity that applied for licensing to the licensing authority with the necessary documents provided for, in accordance with the requirements of the Licensing Terms. Accordingly, a licensee is an entity that has a license for the ex-

ecution (implementation) of a statutory type of economic activity and is obliged to fulfill the licensing requirements of the licensing conditions of the corresponding type of economic activity, when a license applicant must ensure the compliance of his business with the licensed conditions provided by the central executive body and approved by a specially authorized body on licensing issues and approved by the Cabinet Minister s Ukraine.

At the same time, the Law of Ukraine «On the Permit System in the Sphere of Economic Activity» of September 6, 2005, which logically should be based on the norms of the ECU, provided for the functioning of the permit system in the sphere of economic activity as a set of regulated relations that arise between permit authorities, state administrators and business entities in connection with the issuance, reissue, issue of duplicates and cancellation of documents of a permissive nature. However, the said law lists the types of such permits, particularly: conclusions, decisions, approvals, certificates, and other documents, but the license is not included among these (Article 1).

Objects that require the permission documents may include buildings, building premises, equipment, machinery and mechanisms that are being designed or put into operation, economic activity of a certain type, etc., which causes duplication and the need for business entities to apply to the permit authorities systems and, respectively, licensing bodies of certain types of economic activity, especially those related to objects of increased danger, which is obligatory in accordance with The Law of Ukraine «On Licensing Types of Economic Activities» of March 2, 2015 concerning the handling of particularly hazardous substances and hazardous wastes according to the established list.

The mere fact of existence of these laws shows the inconsistency of legal provision of economic activity associated with objects of increased danger and requires urgent correlation by eliminating the contradictions in the mechanism of legal regulation and ensuring of the activities, bringing them in line with the requirements of the ECU, which provides only for the licensing of economic activity as a type of state regulation, and does not provide for any sort of permits.

Adherence to the Licensing Requirements is a compulsory license condition in accordance with the Decree of the Cabinet of Ministers of Ukraine «License Conditions for the Implementation of Economic Activities for the Manufacture of Highly Dangerous Chemicals, enlisted by the Cabinet of Ministers of Ukraine» of July 13, 2016, No. 445 [1].

Licensing conditions are mandatory for all economic entities, regardless of their organizational and legal form of ownership, which to a certain extent or in part carry out or intend to carry out economic activity on the production of highly hazardous chemicals, the list of which is determined by the Cabinet of Ministers of Ukraine.

The analysis of these Licensing Terms allows us to distinguish between the three main groups of licensing le-

gal requirements that are put forward for the conduct of economic activity for the manufacture of highly hazardous chemicals:

1) professional qualification (personnel) requirements;

2) organizational-legal requirements;

3) technological requirements, the totality of which constitute the legal basis for specified economic activity.

The professional qualification requirements include several obligations of the licensee, which ensure the ability of qualified economic activity to produce especially hazardous substances, in particular:

a) availability of full-time specialists (performers of works depending on their types and level of provision of material and technical basis) of the corresponding level of training and educational-qualification level;

b) ensuring that a head of the production, a head of a department and a shift supervisor has the corresponding high education in the field of chemistry (master, specialist);

c) the presence of a person who is responsible for the production of a business entity in compliance with the requirements of its environmental legislation, higher education in the relevant field of training (master, specialist);

d) the obligation of a license applicant and a licensee for the employment of personnel through an employment contract in accordance with the requirements of Art. 24 of the Labor Code of Ukraine (in a written form etc.)

Organizational-legal requirements include a deliberate process of economic activity on particularly dangerous chemicals, characterized by the unity of the set of properly executed documents for its implementation in accordance with the procedure established by law in this area, which provides:

a) providing timely information, in accordance with the procedure established by law, on the identification of sources of increased danger regarding the handling of hazardous substances and wastes in the prescribed form;

b) providing a plan for localization and liquidation of a possible accident while using the sources of high hazard and supplementing it to the State Register of high-risk objects;

c) providing information on the existence of a permit for special water use;

d) provision of information on the existence of permits for the emission of pollutants into the air by stationary sources;

e) safekeeping of the copies of documents submitted to the licensing authority in accordance with the requirements of the current Law, as well as documents (copies) confirming the authenticity of the data indicated by the licensee in the documents submitted to the licensing authority for the period of validity of the license;

e) safekeeping of the original document of payment for the issuance of a license, a bank receipt, a payment order with a mark of the bank and receipts from the payment terminal and token (check) from the post office for the period of validity of the license;

e) notification of the licensing authority on any data changes, including information on the narrowing of the list of especially dangerous substances produced by the licensee, indicated in the documents attached to the application when obtaining a license;

h) ensuring compliance with the conduct of economic activity for the manufacture of highly hazardous chemicals exclusively within the locations of carrying out of this activity, specified in the corresponding documents, submitted to the licensing authority as well as the usage of these locations in the conduct of the said economic activity;

g) ensuring compliance with the conduct of economic activity for the manufacture of highly hazardous chemicals solely using the means of their production, specified in the corresponding documents, submitted to the licensing body in accordance with the requirements of these Licensing Terms;

h) ensuring the presence of specially authorized officials during the licensing body's audit of compliance by the licensee with these Licensing Terms;

i) ensuring compliance with the plan for localization and liquidation of an accident at the facility for the production of highly hazardous chemicals in the event of a planned or unscheduled termination of this activity due to impossibility of using the facility, the emergence of force majeure circumstances, etc., and ensuring written notification on this events to the licensing authority on the day these circumstances arise.

In addition, a conclusion of the state environmental review on the relevant documentation of the licensing body should be provided in case of reshuffling of economic activity, or conservation and liquidation of existing enterprises, separate structural subdivisions, which can negatively influence the environment.

The licensee is responsible for ensuring the organization and conduct of medical examinations in accordance with the procedure determined by the Ministry of Health of Ukraine during the preliminary recruitment of employees and periodically, as well as providing the employees with free special clothing and personal protective equipment.

At the same time, the licensee is responsible for the implementation of measures aimed at the prevention of diseases, poisoning, pollution of the production environment and the disposal or removal of various hazardous wastes from the production of highly hazardous chemicals by their own means, or by transferring them to economic entities issued with an appropriate license for the conduct of economic activity in dealing with hazardous waste.

The adherence to the technical legal requirements for the conduct of the said economic activity by the relevant economic entities associated with the production of particularly dangerous chemicals is a part of the licensing terms, which provide for the following:

I. Compliance with the material and technical base with the technical regulations, which establishes:

a) technological parameters of the process and its individual stages by au-

tomated control with the help of warning and blocking systems, operating in case of exceeding the limit parameters of this process and preventing accidents;

b) control of the content in the raw materials of impurities, which cause a violation of the technological process or deterioration of the quality of products;

c) specific features of the production of highly hazardous chemicals, which is characterized by an increased risk for workers and other citizens within the zones of the production area, as well as for the environment and other material or intellectual property requiring special protection;

d) purification of gas emissions, collection of liquid and solid wastes in the process of the said production;

e) control of the state of the technological process; the efficiency of technological equipment; the condition of control devices; isolation of pipelines and equipment; ventilation, grounding, firefighting equipment.

Licensing conditions for conducting economic activity on hazardous waste management, approved by the Decree of the Cabinet of Ministers of Ukraine of July 13, 2016, No. 448 [1], establish certain requirements for the collection of waste:

1. Such collection and sorting of waste are carried out according to the types and classes of danger, to further determine the most optimal ways of handling them. Waste collection is not allowed unless otherwise provided by the technological regulations.

2. Extremely hazardous waste of the first class is collected in hermetically sealed containers.

3. Highly hazardous waste of the second class, considering its physical state, is collected in polyethylene bags, packages, etc., which prevent the spread of harmful substances in the natural environment.

4. Moderately hazardous waste of the third class is collected in a container, which ensures its localization, which allows the facility to carry out loading, unloading and transport activities and prevents its negative impact on human health and the spread of harmful substances to the environment.

5. Special platforms must be allocated and equipped for the collection and temporary storage of hazardous waste at an enterprise, labeled containers are marked with a clear indication of the type of waste, and the class of their hazard. The dimensions and design of the containers should ensure easy filling and shipment of waste, preventing their mixing, contamination, and damage to the wastes.

Waste collection should be ensured by means of their removal from the location or object of the formation. Its concentration is allowed only in a specially equipped location or facility. It is prohibited to carry out other activities not related to hazardous waste in the territory designated for their placement;

6. Locations designated for the temporary storage of hazardous waste must be covered with a non-destructive and impenetrable material with an autonomous drainage system. It is prohibited

to drain the surface runoff from the sites into the general drainage. Effective protection of waste from atmospheric precipitation and wind should also be provided. In temporary storage locations for hazardous waste, stationary or mobile loading/unloading mechanisms should be made available.

7. Each location or object of storage of hazardous wastes must be provided with a legal document – a special passport, which defines:

– name and code of hazardous waste, according to the state classification of waste;

– the quantitative and qualitative composition of waste, its origin;

– technical characteristics of the location or object of storage of hazardous waste;

– information on methods of control and safety of operation of these locations or objects;

– characteristics of warehouses, areas for its temporary storage;

– information about the waste owner and its locations.

II. The issuance by a licensee to a consumer of a quality certificate and data card of a danger factor for each batch of particularly dangerous chemicals that are being sold.

III. The obligation of a licensee to notify the licensing authority of all changes in the data indicated in the documents attached to the application for a license. In case of such changes, the licensee is obliged to submit in writing to the licensing authority within a month.

The foregoing makes it possible to formulate appropriate ***conclusions*** about the legal significance of the Licensing Conditions and their constituent elements in ensuring the safety of economic activities in the production of hazardous chemicals during licensing such activities in order to ensure the safety of the economic activity and fulfill the established requirements of the qualification, organizational and technological normative-legal direction.

Firstly, the Licensing conditions in terms of the content of their legal and regulatory mediation form a complex of imperceptibly regulated requirements for the compliance of the subjects of economic activity associated with the production of especially dangerous chemicals (objects) aimed at preventing the possible danger and its escalation, the occurrence accidents at enterprises operating such substances and sources of increased danger for workers and other persons in the risk zone of hazardous economic activity, natural environment, other material and intellectual values.

Secondly, the Licensing conditions are of legal significance for economic entities involved in the manufacture of particularly hazardous chemicals, since they form a combination of obligations specifically foreseen by the regulatory framework for licensing and obtaining a special right to conduct business activities, related to the manufacture of especially dangerous chemicals and the emergence of special legal standing in the relevant legal-natural entrepreneurs.

Thirdly, compliance with the Licensing conditions is an important legal basis for the implementation of the

licensing procedure by a specially authorized state body to ensure the safety of economic activities for the manufacture of highly hazardous chemicals, to identify the readiness of applicants to conduct such activities and to fulfill the established security requirements in the process of such activity, correction of possible risks for the prevention of negative consequences for a person, environment and other social material and spiritual values.

Fourthly, the compliance with the Licensing conditions is a mandatory obligation for persons who legalize economic activity in this area and those who intend (plan) to carry out economic activities related to the manufacture of particularly hazardous chemicals, handling hazardous wastes of such production and have the right to own or use (lease) appropriate means of production of the specified products (sources of high danger).

Fifthly, the establishment of legal requirements is an important legal tool of state regulation and ensuring the implementation of economic activities associated with the production of particularly dangerous chemicals, the handling of hazardous waste, ensuring the safety requirements of the activities, the prevention of possible risks, sustainable development of the national economy, satisfaction of social interests in modern conditions.

Sixthly, compliance with the system of qualification (professional), organizational, and technological-legal requirements is a real legal fact for the implementation of the licensing procedure by the specially authorized executive body of economic activity for the production of particularly hazardous chemicals and the handling of hazardous waste, the granting of the right to exercise it within the established term, or refusal to grant a license in case of non-fulfillment of obligations established by the regulatory legal order.

Finally, the licensing legal conditions that determine the system of regulatory requirements for the implementation of economic activities for the production of particularly dangerous chemicals and handling of hazardous waste, are an important preventive, state-legal means of regulating hazardous economic activities and guaranteeing the safety of these industries in conditions of sustainable development of the national economy.

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CRIMINAL-LEGAL SCIENCES

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A VICTIM OF A CRIME AS A SOCIAL SUBJECT OF CRIMINAL AND LEGAL PROTECTION

Summary. *In the article the problem of the definition of victim in criminal law is highlighted. Doctrinal approaches to understanding of this concept are given. Its author's definition is formulated. The place of a victim in the system of elements of corpus delicti is considered. The content of significant harm caused by a crime as sign of victim is defined.*

Key words: *criminal law, victim of a crime, corpus delicti, significant harm.*

Along with improvement of traditional punitive and repressive measures of fighting against crime, the contemporary Criminal Law of Ukraine is actively developing alternative methods of influence on people who have committed crimes. Among the further, attention was paid to scientific achievements and legal solutions aimed at increasing the role of a victim in the mechanism of ensuring criminal accountability of perpetrators of socially dangerous acts under the Criminal Code of Ukraine (hereinafter – the CC of Ukraine); promotion of protection of rights, freedoms and legitimate interests of a victim by criminal remedies; improvement of their recovery; timely compensation for a harm caused, etc. However, despite the amendments in the criminal liability legislation, criminal procedure and correctional legislation, the role of a victim is still under a subsidiary control of criminals, used for the sake of public interest as bringing a person to criminal liability and punishment. That is why a victim (as individual) is the most «ill-fated» person of the criminal proceedings. From one side, the victim is harmed, sometimes irreparably, and from the other – the state, which is represented by its competent authorities and legally guarantees the protection of rights, freedoms and legitimate inter-

ests, defines a victim only as the defendant in the case, considering which certain procedural actions, required for the criminal proceedings and application of criminal liability to the perpetrator, must be carried out [1, 31].

The current CC of Ukraine uses a «victim» term both in the General (e.g., Art. 46), and in the Special Part (e.g., Part 3 of Art. 321–2). Quite often the provisions of this Code use words, dividing victims into different types: a politician, a public person, a law enforcement officer, a judge, a journalist, a juvenile, an afflicted person and so on. Although, criminal liability legislation gives no general definition of a victim. This definition is given in the Criminal Procedure Code of Ukraine (hereinafter – the CPC of Ukraine). According to Art. 55 of this Code, a victim in criminal and procedural sense – is a person, to whom a criminal offense caused moral, physical or material harm, and a legal entity, to which a criminal offense caused material harm. However, the definition of a victim given in the CPC does not fully meet the needs of the criminal law. Thus, Part 2 of Art. 55 says that the rights and obligations of a victim in criminal proceedings arise after the person files an application for the crime committed against him or her or involvement of the person in the criminal proceedings as a victim. In this case, the person becomes the subject of criminal proceedings, provided with a set of procedural rights and obligations. According to the CPC of Ukraine, such a state is procedurally provided by an appropriate decision; the person shall be considered to be a victim from the moment of a crime commissioning against him/her (his/her rights, freedoms and legitimate interests), not withstanding if the criminal proceedings on that case have been started or not [2, 159]. At that moment there appears a number of criminal law issues, solution of which is also associated with a victim of a crime (particularly as of qualification and differentiation of criminal liability, discharge from criminal liability, etc.). We would agree with V. A. Maslov, stating that «a victim of a crime, its characteristics and content» term – is the subject of primarily material rather than procedural law, and therefore must be provided by the criminal liability legislation [3, 46]. This approach makes putting «a victim of a crime» term to the CC of Ukraine quite important.

We should note that the theory of criminal law gives no single approach to the definition of «a victim of a crime». The main difference in the wording concerns the types of social subjects (participants) of the social relations, suffering from crime. At that, it should be noted, that a victim of a crime as well as the results thereof, inherent to any type of crime as a socially negative phenomenon under the CC of Ukraine. The analysis of a mechanism of a crime and the nature of the harm caused to the object of the offense can help defining a social subject (participant) of the social relationships that ultimately suffers from the crime [4, 297]. The legal literature gives several positions as of such subjects –from their narrow un-

derstanding to extremely wide. First of all, a victim of a crime is an individual whose rights, freedoms and legitimate interests, protected by the criminal liability legislation, have been violated or compromised. [5, 91–96; 6, 65, 82; 7, 67–70]. The supporters of other views say that such an approach does not cover all the subjects. Indeed, if property is stolen from a legal entity – a corresponding legal entity shall be the victim of such crime. Therefore, the position of scientists considering other social subjects, including a legal entity, to be a victim of a crime, seems more convincing. [8, 105–106; 9, 144, 145]. It should be taken into consideration that after the new CPC of Ukraine has passed in 2012, the positions of scientists in recognition of legal entity of a victim became more widespread [10, 6]. We should note, that in addition to legal entities, there is also a wide variety of associations of persons and institutions, that perform legally normalized tasks without creation of legal entity and that, as well as a legal entity, may be causing a material harm through the crime. Causing harm to such a social subject does not exclude the view of it as of a victim of a crime [11, 191].

The issue of recognition of a state [12, 13], humanity [13, 88], society in general [10, 6; 14, 84–85] as a victim of a crime still remains a debating point. As for the state, declaring it as a victim of a crime should not cause essential objections. M. Tagantsev insisted on treating the state as a victim, he noted that is has various rights and interests [12, 13]. Both then and now, criminal liability legislation gives full attention to protection of rights and interests of the state, in particular to its constitutional arrangement, sovereignty and inviolability of territory, national defense capability, information security, property, authority, and proper functioning of public authorities [12, 13; 14, 82–83]. Indeed, if we look, for example, at Part 3 of Art. 110 of the CC of Ukraine, indicating such a circumstance, particularly aggravating criminal liability as «other grave consequences», then, obviously, setting them in relation to the victim will be mostly connected with the state of Ukraine as a whole. At the regional level, the social subjects, affected by crime, can be local governments or their structural subdivisions. For example, as a result of acts committed under Art. 341 of the CC of Ukraine «Takeover of state or protected buildings or structures».

As we have already noted, many scientists think society to be a victim. It is difficult to agree with this approach, at least from the point of formal logics. Thus, if we share the point of view as of the possibility of recognition of the society as a victim of a crime, then the accent in the crime legislative formula on its social danger, allows for the conclusion, that a victim of any crime is always a society. This way, a victim of a crime is a necessary formal element of a crime definition. This approach to a victim problem is too broadside, as, for example, a murder of a certain individual does not require recognizing the society as a victim every single time 2, 161. Perhaps the harm caused by the

crime in this case is still incompatible with the scale of the whole society. For the same reason, it is difficult to consider humanity as a victim. Despite the fact that the title of section XX of the Special Part of the CC of Ukraine uses «humanity» term, it does not allow asserting that humanity as a whole can be a victim of a crime. Obviously, for the purpose of this section, a victim issue should be solved on the basis of features, characteristic for certain types of crimes against the world, human security and international legal order. Thus, in committing such a crime as genocide (Art. 442 of the CC of Ukraine), an intentionally committed act directed at full or partial destruction of any national, ethnic, racial or religious group by taking life of members of such group or causing debilitating injury etc., victims are large groups of individuals belonging to certain communities, mentioned in this article. In this regard, we should recognize the judgment of S. Anoshchenkova, as reasonable. She connects a social subject – an individual, not only with individually defined characteristics (a victim, for example, Ivanchuk A. V. man, 36 years, worker, etc.), but also with certain communities of individuals, for example: religious groups, races, nations, nationalities, families [15, 101], which is a specific component of the generalized «humanity» term. A certain quantitative totality of representatives of these groups can be considered as victims and an issue of genocide as a crime against humanity can be brought up.

Thus, the social subjects, which can be considered a victim of a crime, shall include an individual, a certain population of individuals, a legal entity, and an association of citizens or organizations performing legally regulated tasks without a creation of a legal entity, a state and bodies of local governments.

An essential feature of «a victim of a crime» term in the criminal law is an accent on causing significant harm. At that it concerns not the actually caused harm (real harm), but the threat of causing thereof (potential harm). Therefore, there is a victim of a crime in the case of both a completed and incomplete crime [16, 20; 17 41]. This conclusion is based, in particular, on Art.16 of the CC of Ukraine, which stipulates criminal liability for incomplete crime. In this case the legislator recognizes that the creation of conditions to cause significant harm and incompletion of the harm is a fully socially dangerous harm caused to the object, which is protected by the criminal law [18, 49]. Thus, for defining a social subject as a victim of a crime it does not matter if a criminal act has caused an actual harm or only real threat of harm has been created [8, 106].

As of the nature and type of harm, which is caused or can be caused to a victim, the General Part of the CC of Ukraine contains no generalized definition of this component of a crime, and only specifies the nature, describing the crime consequence. As well as the act (action, inaction), the consequence should be socially dangerous (see Art.24 and 25 of the CC of Ukraine). Obviously, this legislative matrix form must fully correspond to the nature of the

harm. Typically, researchers, concerning the issues on generalizing definitions in criminal law, note that the harm is a social concept [13, 9], and it should be defined as a result of offense against public relations, as a result of offense of rights, freedoms and legitimate interests of individuals, society and the state, protected by the criminal law. Besides, the real or expected (potential) harm should be qualitatively determined – to be substantial, as provided by Part 2 of Art.11 of the CC of Ukraine [10, 6]. Regarding the types of harm, they are generalized in the CPC of Ukraine. Regarding an individual, it is moral, physical or material harm, regarding a legal entity – a material harm (Part 1 of Art.55 of the CPC of Ukraine). However, if we turn to the definition of the harm, given in the disposition of norms of the Special Part of the CC of Ukraine, we can count over ten types thereof: physical, material, moral, mental, social, economic, organizational, political, ideological, cultural and historical, humanitarian, environmental and others [15, 86; 18, 49]. As we can see, the list of types of harm is quite extensive, and therefore, the construction of the «victim of a crime» term should be limited to indicating only the most typical types of significant harm and leaving this list «open» [18. 50].

An essential feature of the «victim of a crime» term in criminal law is an accent on harming a social subject or a threat of harming by the criminal act [18, 151]. A victim and a crime correlate in the Criminal Law. If there is no crime, there is no victim in the criminal and legal sense [16, 20]. It should be noted that some scientists believe that in the criminal and legal sense a victim is also a person to who harm may be caused not only by a crime but also by any other socially dangerous act, provided however by the criminal liability legislation [9, 144, 145]. For instance, as a result of an unintentional harm (accident), or act of a person who did not reach the age of criminal responsibility, or act of a person who was not answerable for his/her actions at the time it was committed. They can also be lawful actions under the CC of Ukraine: causing harm to an individual in case of self-defense (Art. 36), or to an entity due to causing harm in a state of extreme necessity (Art. 39), etc. Regarding this view, we should emphasize that subjects suffering from these actions cannot be defined as victims in a strict sense of «victim of a crime» term, as they cannot have the regulated set of rights and obligations of a victim of a crime. For instance, they have no right for peaceful settlement with an offender as provided by Art. 46 of the CC of Ukraine. Such subjects in the theory of criminal law, unlike victims, are called «affected» [11, 197; 18, 5][1], their legal status is essentially different from the one of a victim of a crime. The harm, caused to them as a result of the commission of actions under the CC of Ukraine, is compensated within the civil proceedings. It should be noted that

[1] The ability to implement the «affected» term in the criminal procedural legislation due to socially dangerous action, has been proposed, in particular, by L. Shapovalova [19]

the legislator, by putting certain types of actions, implementation of which can cause socially-hazardous results to the CC of Ukraine, not only imposes an obligation as of banning such actions on individuals, but imposes such an obligation on the state, through its relevant law enforcement agencies, which must do everything possible to prevent their performing, including by persons who cannot be considered as criminals. It is therefore important, that the legal status of a person, suffering from actions, which cannot be considered crimes, but provided by the CC of Ukraine as those, which can cause the consequences of criminal and legal nature, is put in the criminal liability law, along with the definition of the criminal and legal status of a victim of a crime.

The said above confirms the obligatoriness of the presence of a victim in the crime mechanism. Such a conclusion, however, does not turn a victim, a crime element, into a mandatory sign of its composition. It is therefore hard to concur with the statement of A. Voznyuk, that recognition of «any social subject as a victim automatically turns him into a mandatory element of the crime» [7, 67]. As for the crime elements, most scientists refer to a victim of a crime as a feature of a crime within the system of its elements [14, 110–111; 20, 98]. According to the general doctrine of the crime elements, this sign of the object is optional [18, 77; 20, 98]. In particular, T. Prysyazhnyuk states, that a victim «may not be a crime element» [20, 97]. The legislator, when putting the typical and most common signs of a socially dangerous act, which determine the state of crime in the CC of Ukraine, not always requires from the executor of law setting of some features specific to a particular act, in our case – a social subject (participant) of social relations, who is caused or could be caused substantial harm through a crime. A victim shall become a mandatory element of a particular type of a crime only if the victim presence results from the crime definition given in the Article of Special Part of the CC of Ukraine [2, 160].

According to the requirements of the criminal law, the said above allows determining a victim of a crime as a social subject (participant) of public relations, protected by the criminal liability law, whose rights, freedom and legitimate interests are affected by a criminal act (action, inaction) by causing substantial material, physical, moral or other damage, or a threat of causing such damage.

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CRIMINLAISTIC STRATEGY AND TRENDS OF CRIMINLAISTICS

Abstract. *The paper is devoted to the problems of criminalistic strategy and trends of criminalistics. These problems are decided by analysis criminal policy in connection with criminal law, penitentiary, criminal procedural, criminological policies and criminalistic strategy. Concept of criminalistic strategy is formulated as a field of knowledge connected with counteraction to the crime with the help of criminalistic means in the long term. Authors are also paid special attention to function of criminalistics in different ways: 1) the function of science development (scientific); 2) the function of ensuring practice (investigative, prosecutorial, judicial, lawyer) (practical). The functions of criminalistics are differentiated depending on their focus: 1) cognitive; 2) prognostic; 3) educational (or didactic); 4) preventive.*

As a result of this research authors are formulated some trends of criminalistics: 1) criminalistics started to support not only investigator and prosecutor by criminalistic means, but also judge, barrister and other participants of judicial proceeding; 2) criminalistics has to turn from studying the traditional materially recorded traces to the investigation into sonic (acoustic), electronic and genome ones; 3) expansion of the criminalistics' limits.

Key words: *Criminal Policy, Criminalistics, Criminalistic Strategy, Function of Criminalistics, Trend of Criminalistics.*

INTRODUCTION

The formulation of criminal policy is affected by the political vector and international position of the state, maturity of civil society, conditions for the commission of crimes, intellectual, technical, tactical, methodical and legal possibilities of representatives of criminal justice agencies to counteract crime, the availability of qualified specialists in the sphere of combating crime, volition of representatives of criminal justice agencies to counteract crime, understanding of

the objectives of the criminal justice agencies and the purposes of punishment. These factors also explain why there are different approaches to the formulation of criminal policy in different countries and historic periods. Because of this idea, we started to find connections between criminal policy and criminalistic strategy, and among criminalistic strategy, function and trends of criminalistics.

CRIMINALISTIC STRATEGY AND CRIMINAL POLICY

Anselm von Feuerbach (1775-1833) was the first scientist to use the term «criminal policy»[1]. He understands it as a branch of science, which should give the criminal legislator guidelines for better organization of the matter of justice. A similar definition was suggested by Franz von Liszt (1851-1919) – a systematic complex of reasons, based on scientific research into the causes of crime and the effects produced by the punishment – grounds, in accordance with which the State, by means of punishment and related institutions should deal with crime. Therewith he clarifies his position by stating that science-based criminal policy requires that criminal biology (anthropology) and criminal sociology (statistics) data should be taken as a basis of it. This approach turns criminal policy into a «broad» inter-branch and interdisciplinary concept for criminal law sciences, criminal procedure, criminalistics and other related sciences[2].

Currently, criminal policy can be defined as the sphere of knowledge, based on the study of the causes and effects of crime, aiming for strategic crime prevention by means of social and political impact on the reforming of criminal justice system in the long term. For criminal policy it is important not only to set strategic goals, but also to draw conclusions as for reaching them.

Criminal policy formulates strategic objectives for the sciences of criminal justice and differs in the following areas: 1) criminal law policy; 2) penitentiary policy; 3) criminal procedural policy; 4) criminological policy; 5) criminalistic strategy.

Criminal law policy should solve the problems of formulating the tasks of criminal law; principles of criminal law; strategy of its variability; the number of penalty types and their understanding; the purpose of punishment, exemption from criminal liability, punishment and enduring it. The primary objective of the criminal law policy is a strategic, long-term impact on the criminal law through the accurate knowledge of the cause and effect of the crime.

Criminal law policy can formulate the problems of the Criminal Code, the basis of criminal liability, the formation of general criminal law principles (for example, *non bis in idem*; *omnis indemnatus pro innoxis legibus hab-*

[1] Чубинский М. П. Очерки уголовной политики: понятие, история и основные проблемы уголовной политики как основного элемента науки уголовного права. – Москва: ИНФРА-М, 2010. – XII – С. 55–56.

[2] фон Лист Ф. Задачи уголовной политики, в изложении Бориса Гурвича. – СПб.: Типо-Литография К. Л. Пентковского, Екатерин. кан., уг. Казнач., 6–71, 1895. – С. 2.

etur), the purpose of punishment, etc. This is why criminal law policy can not exceed the bounds of formulating strategic prospects of legal groundwork, which of course considerably narrows the criminal policy in comparison with the concept of criminal policy. Criminal law policy is also influenced by international treaties, conventions, strategic development of the state.

The penitentiary policy of the state is also connected with the realization of laws and by-laws in this sphere. It is realized by means of creating conditions for correction and resocialization of convicts, the prevention of the commission of new criminal offences both by convicts and by other persons and also the prevention of tortures and inhuman or humiliating treatment of convicts. Cesare Lombroso (1835-1909) points out that criminals should be treated in conformity with individuality of each of them and his/her character should be taken into account if they want to achieve any satisfactory results[1]. The joint of the criminal law and penitentiary policies is important because the criminal law policy forms purposes of the punishment which influence the formation of the purpose of the whole penitentiary legislation.

The problems of criminological policy are also of some interest in researchers. Anatoly Zakalyuk (1930-2010) singled out the tasks which are set with respect to this science and the ways for their realization[2]. One of such vectors was the development of the modern strategy of counteraction, first of all, to organized, economic, corruption-related crime, crime connected with illicit drug turnover and violent crime, including contract, acquisitive and violent and acquisitive crime and also among persons who were previously convicted and among minors. Taking into account these tasks which are set with respect to criminology, one can assert the presence of the common vector for the criminal law sciences, the common purposes and tasks and also the strategy of counteraction to crime. In other words, in the context of the criminal policy, one can also speak of the criminological policy (strategy).

The information about the contents of the criminal procedure policy can be found in the provisions of the Criminal Procedure Code concerning the tasks of criminal proceedings, the principles of criminal proceedings, etc. They include the protection of a person, the society and the state from criminal offences, the protection of rights, liberties and legal interests of the participants of criminal proceedings and also ensuring a quick, comprehensive and unbiased investigation and judicial examination so that each person who committed a criminal offence could be brought to responsibility within the scope of his/her guilt, no innocent person could be accused or

[1] Ломброзо Ч. Новейшие успехи науки о преступлении // Преступный человек / Пер. с итальянского. – Москва: Эксмо; Санкт-Петербург: Мидгард, 2005. – С. 219.

[2] Закалюк А. П. Курс Сучасної української кримінології: теорія і практика: У 3 кн. – Кн. 1: Теоретичні засади та історія української кримінологічної науки. – Київ: Ін Юре, 2007. – С. 34–35.

convicted, no person could be subject to ungrounded procedural compulsion and so that a proper legal procedure is applied to each participant of the criminal proceedings. The presence of a real mechanism connected with the achievement of a goal and the supervision of the bodies of criminal justice is crucially important for the successful realization of the criminal procedure policy.

The interest in the strategy has increased greatly in criminalistics in the XXI century. The newly published works with respect to this problem (O. Bayev[1], R. Belkin[2], V. Bernaz[3], H. Malevski[4], M. Shepitko[5]) are worthy of attention. According to H. Malevski, the existing approaches to the place of the criminalistic strategy in criminalistics differ – 1) a certain instrument which shows tendencies and directions of the development of the science; 2) an independent part of the science; 3) a certain model or program of the investigation of a certain crime[6].

At present the criminalistic strategy has already formed as a category and a separate direction. The development of the criminalistic strategy as a separate category in criminalistics has not reached the level of a separate branch of the science. The criminalistic strategy cannot be realized in the investigation of a certain crime either as it contradicts the realization of the criminal policy of the state. That's why the criminalistic strategy is the field of knowledge connected with counteraction to the crime with the help of criminalistic means in the long term.

FUNCTIONS OF CRIMINALISTICS

Criminalistics in realization of its strategy can be considered in three aspects: as a science, as a taught course and a practical activity in the fight against crime. Traditionally, criminal-

[1] Баев О. Я., Баев М. О. О конечных целях деятельности участников уголовного судопроизводства и стратегиях их достижения (к проблеме криминалистической стратегии) // Криминалист первопечатный. – 2012. – №4. – С. 8–18.

[2] Белкин Р. С. Криминалистика: проблемы сегоднешнего дня. Злободневные вопросы росстйской криминалистики. – Москва: Норма, 2001. – С. 78–80.

[3] Берназ В. Д. Криминалистическая стратегия в расследовании преступлений // материалы межд. науч.-практ. конф. «Криминалистика XXI века». – Харьков: Право, 2010. – С. 203–209

[4] Малевски Г. Криминалистическая стратегия, стратегия в криминалистике или стратегия криминалистической политики? // материалы IX межд. науч.-практ. конф. «Криминалистика и судебная экспертиза: наука, обучение, практика». – Вильнюс, Харьков, 2013. – С. 17–31; Малевски Г. Проблема соотношения понятий тактики и стратегии в криминалистике и деятельности правоохранительных органов // Криминалист первопечатный. – 2014. – №9. – С. 99–120.

[5] Шепитько М. Место криминалистической стратегии в связи с изменчивостью понимания уголовной политики // Криминалистика и судебная экспертиза: нау- ка, обучение, практика. – Х.: Сб. науч. трудов в 2-х т. – Харьков: Видавнича агенція «Апостіль», 2014. – Т. 1. – С. 154–164.

[6] Малевски Г. Криминалистическая стратегия, стратегия в криминалистике или стратегия криминалистической политики? // материалы IX межд. науч.-практ. конф. «Криминалистика и судебная экспертиза: наука, обучение, практика». – Вильнюс, Харьков, 2013. – С. 31

istics serves the purposes of disclosure, investigation, legal proceedings and prevention of crimes.

Every crime should be promptly and fully solved. To solve the crime – means to identify all its features and the offender. A crime can be solved by means of activities based on scientific methods, techniques and procedures of criminalistics. The solution and investigation of crimes involves the use of scientific and technical means, technical and tactical methods, and methodological recommendations.

Judicial proceedings are also not possible without the use of criminalistic expertise (knowledge). Tactical techniques of court proceedings, application of scientific and technical means (such as audio and video recording, videoconferencing), guidelines for considering certain categories of cases are required in court. It is actually about judicial criminalistics or criminalistics of judicial activities.

Hans Gross (1847-1915) considered criminalistics accessory in relation to criminal law and defined it as the study of realities of criminal law. According to the «father of criminalistics», the essence of the new science consists in: 1) revealing the truth in every criminal case (practical aspect); 2) in the study of the criminal and the criminal offense (theoretical aspect)[1].

Criminalistics is continuously expanding the object of its research. Criminalistic expertise (knowledge) is useful not only for investigative activities, but also for forensic intelligence, prosecutorial, judicial, lawyer, expert etc. activities. Therefore, the functional orientation of criminalistics and its means is important for various types of legal activities.

Criminalistics as a science performs important functions: 1) the function of science development (scientific); 2) the function of ensuring practice (investigative, prosecutorial, judicial, lawyer) (practical). These functions are related to each other and are interdependent, reflecting the unity of theory and practice.

The functions of criminalistics can also be differentiated depending on their focus. In this respect, it is expedient to distinguish between the following functions: 1) cognitive; 2) prognostic; 3) educational (or didactic); 4) preventive.

The cognitive function lies in the fact that its methods and means promote knowledge, insight into the unknown. Criminalistic expertise (knowledge) is aimed at obtaining objective information, identifying certain patterns and relationships. Knowledge is acquired in scientific and practical directions. The cognitive function of criminalistics is carried out in the context of activities of various subjects, applying criminalistic expertise (knowledge). The pragmatic side of cognitive function of criminalistics shows in investigative, judicial, prosecutorial activities and advocacy.

[1] H. Gross's views on the content of forensic science are described in his works on the problems of crime disclosure (See: Гросс Г. Руководство для судебных следователей как система криминалистики. Новое изд., перепеч. и изд. 1908 г. –Москва: ЛексЭст, 2002. – 1088 с.)

The prognostic function of criminalistics promotes making projections, models, long-term planning of activities, development of its strategy and tactics. The prognostic function can be also carried out in the context of scientific research, analysis of the trends of scientific advancement, general and sub theories.

The educational (didactic) function of criminalistics focuses on academic aspects, the problems of studying criminalistics. Educational (didactic) function – supplies the content for the learning process, provides learning with the educational product, and offers the best forms and methods of teaching criminalistics. The target audience of criminalistic knowledge is prospective lawyers, practicing professionals in the process of retraining and professional development. The educational (didactic) function of criminalistics is to provide lawyers depending on the lawyer's specialization and his/ her future profession (investigator, prosecutor, notary, legal counsel, judge, lawyer, etc.) with criminalistic knowledge of different range.

The preventive function of criminalistics – is to prevent crimes or reduce their number. Criminalistics is aimed at the prevention of crimes. But this area is in some sense limited. Many sciences that comprise the criminal law cycle contribute to the prevention of crimes. Criminalistics facilitates the development of special preventive measures (mainly technical) (for example, improving locking devices, alarm systems, creation of special paper (or protective nets) for documents and etc.).

TRENDS OF CRIMINALISTICS

Research of criminalistic strategy and formulation of criminalistics' functions are permitted to pay attention to trends of criminalistics development. The criminalistics trends are mainly dependent on the methodological grounds thereof. The criminalistics' methodology is in need of new researches. The role of the methodology lies in counteracting the emergence of criminalistic «phantoms», anti-scholar concepts and theories, false ways for the development of the science. Recently the emphasis, somewhere on the pages of criminalistic editions, has been given to the potential of applying new (non-conventional) methods. They suggest using astrology, palmistry, kinesics, criminalistic hypnology, etc. The said offers provide for no scientific ground, they contradict the positive development of criminalistics, distract the attention from the topical problems of nowadays.

The contemporary advance of criminalistics is featured by the formation of the general theory thereof, elaboration and implementation of modern scientific and technical facilities and information technologies into the crime fighting practice, improvement of the criminalistic tactical techniques, proposals of individual methods to inquire into the new types of crime.

The criminalistic knowledge in criminal proceedings is used at various stages of the process. This problem becomes even more acute as it is crucial to harmonize the procedural criminal mechanism in regard to the International and European standards, to intro-

duce adversary principle, to provide the due balance of public and private interests. The specialized scientific sources provide for an active discussion of the «judicial criminalistics», «judicial proceedings criminalistics», «tactics and methods of judicial investigation». Currently we face dramatic discussions of the «criminalistic attorney studies», «criminalistic provision for the prosecutor's activity», «criminalistic constituent of the court». Various approaches to the solution of the problem of the application «criminalistic knowledge in court» indicates to the fairness of the point on attributing the regularities of «trial examination of crimes» to the subject of criminalistics»[1].

Reforming of the criminal justice authorities is intended to change their structure and functional orientation with the purpose to augment the efficiency and quality of their activity. Critical changes refer not only to the organizational work of court and prosecution offices, but also to the pre-trial investigation bodies. Alongside, there are controversial (and even colliding) proposals to centralize the pre-trial investigation bodies (for instance, through the formation of the respective investigation committee) or further to have a complete refusal from the pre-trial investigation institution and to assign some of its functions to another stage of the process, i.e. the court one. Democratizing of the criminal court proceeding is also connected with a drive for transformation of the pre-trial investigation authorities and implementation of adversary principles, reasoning of the necessity to let the conflicting social structure «prosecution-defense» exist. The role of the self-dependent and procedurally independent investigator who performs the major function of collecting and recording evidence (crime investigation function) is materially restricted by the procedural mechanisms (court control, criminal indictment on the part of the prosecutor, etc.). Under such conditions, the subjects applying the criminalistic knowledge shall be altered as well. The solution of reformation problems should provide replies to the questions: Who is the subject of collecting and recording the evidence? What are the ways to achieve the goal in the settlement of the criminal legal conflict? Which means can be used for this purpose? Will the changes facilitate the efficiency of the crime detection and investigation, court proceedings on a criminal case, and finally lead to the settlement of the conflict and restoration of justice?

The problem of specifying the goal and ultimate result of investigation, inspiration to *ascertainment of truth* in a case is currently under discussion. There are opinions that negate the opportunity to ascertain the impartial truth in a criminal proceeding or propose to replace it with another category: the formal truth (procedural, judicial and inquiry ones). Such opinions are erroneous from the methodological point of view.

Truth in a criminal process may not be probabilistic or be restricted by the

[1] Белкин Р. С. Курс криминалистики в 3-х т. Т. 1: Общая теория криминалистики. – Москва: Юристъ, 1997. – С. 84, 147.

type or subject of activity. The impartial truth shall be ascertained as a result of an investigation or court proceeding, otherwise the inquiry activity will become ill-defined.

Elimination of the truth from the goals of the criminal process will indeed affect the essence of criminalistics as it is. The point at issue is which regularities will be studied by criminalistics then? Criminalistics is designed through its provisions to facilitate the activity of law enforcement agencies on the ascertainment of the truth.

Reformation of the pretrial investigation authorities shall be scientifically-grounded, systemic and well-scaled. It is far from admissible to make nonpondered or chaotic steps and doubtful offers to change the procedural criminal area. One may not «break» the foundations without knowing the things to place instead and the consequences that such «breaking» will give a rise to. The modification of the procedure will cause the changes of criminalistics' means too. Such reforms must impartially show the existing situation and actual opportunities to put such changes into practical activity of the investigator or other subjects.

Variance of criminalistic knowledge is in the first line connected with the scientific and technical progress of the modern society. Informational support of the social environment has led to «technological support» for criminalistics, development and implementation of information, digital, telecommunication technologies. Information technologies are the new category of criminalistics purporting to stand on a due place in its structure. The technological approach is used not only in the criminalistic engineering, but also in criminalistic tactics and methods (technology to make specific investigation actions, inquiry or criminalistic technologies).

CONCLUSION

Under the new conditions, criminalistics has to turn from studying the traditional materially recorded traces to the investigation into sonic (acoustic), electronic and genome ones. Also, the methods, ways and approaches to work with such traces and the procedure of collecting and recording them are being changed. In modern conditions, revolutionary scientific and technological changes lead to the fact that the established criminalistic methods are not satisfying us any longer. From discussing the need for universal fingerprinting, we turn to the need for adoption of a special law «On Fingerprinting» to offering the new biometric methods of identification: DNA fingerprinting registration, identification by iris or retina of the eye, venous map scan method, videocomputer recognition of man by the image of his face, etc. Objective reasons for the development of science and technology lead to the formation of new areas in criminalistic technology: criminalistic study of explosives, forensic acoustics or criminalistic phonoscopy, polygraph examination, criminalistic engram examination.

Thus, the expansion of the criminalistics' limits is an objective process. Alongside one may not have a mechanical transfer of criminalistic guidelines,

approaches and methods as offered for crime investigations into other areas. The contemporary tasks of criminalistics are specified through new conditions for the society development, a new phase of the science and engineering development.

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OBJECT AND SUBJECT OF CRIMINALISTICS

Scientific views on the object and subject of criminalistics are examined in the article. It is noted that the definitions of the object and subject of the research are regarded to the most significant areas of criminalistical doctrine. Aspiration of the scientists to offer optimal, benchmark definitions of these categories of criminalistics stimulated the appearance in literature of different points of view on the indicated subject. It is proved that criminalistics has a dual object of research – criminal activity (behavior) and its consequences, that appear in the sources of information (material and ideal traces) and activities of identifying, investigating and prevention of criminal offences and judicial review of criminal proceedings (cases). According to this structure, the object of criminalistics, its subject of study is a system of interrelated patterns of the two following levels: 1) regularities of the emergence, existence and disappearance of information about criminal activity (behavior), which finds its realization in the mechanism of a crime and appears in the relevant sources (the pattern between the identity of the perpetrator and his behavior; the pattern between perpetrator's behavior and the identity of the victim; dependence of criminalistical activity and its elements on the conditions, in which the perpetrator exists; presentation, repeatability and constancy of the elements of criminal activity (behavior) in the material world; the pattern of perception of the circumstances of the criminal event by perpetrator, witness, victim, etc.); 2) the patterns of acquisition, research, evaluation and use of information on criminalistical activity (behavior) and its consequences in the evidence (the dependence of the content and the system of evidentiary material on criminalistical tools and methods concerning the detection, recording, removal and storage of the sources of this information; patterns between behavior and activities of participants in the investigation (professional and amateur) from their personal characteristics, investigative situations, etc.). This is the paradigm that is consistent with the nature, purpose and tasks of criminalistics. It determines the specificity of relations with other Sciences,

gives the opportunity to understand the scope and nature of object and subject, structure and research method. Taking the above into account extension of object and subject areas of criminalistics currently does not seem appropriate. And attempts to «blur» the subject of criminalistics – seem to be unproductive and false, such that give rise to unnecessary discussion and distract the attention of scientists from the intelligent support of implementation of the main goals and tasks in the field of criminalistics.

Key words: *object and subject of criminalistics, the structure of the object of criminalistics, classification of objects of criminalistical knowledge, subject area of criminalistics, criminalistical determinism.*

Target setting. Objective law for science development, needs for investigation of new sides, properties of recognizable items stipulate for the change in scientific concepts of the object and subject of forensic science. The scientists strive to suggest the best possible reference definitions of these categories of forensic science contributed to different viewpoints on the problematics appeared in the literature. Scientific discussions revolved around the object and subject of forensic science do not die off. At the same time, a clear presentation of object and subject research of forensic science is of key importance for the purpose of forensic doctrine formulation. In addition, definition of the object and subject of forensic science is a prerequisite for clarifying the boundaries of scientific research, specifying the purpose, assigning and appointing this field of knowledge, methods and means of conducting relevant research.

Urgency of the research. Determination of the object and subject of the research is referred to the most important areas of forensic doctrine. The state of scientific paradigm maturity in relation to the object and subject and firmness of the scientists' views on this issue reflect the current level of forensic science development, possibility of its functions and tasks realization, and therefore, needs for this issue investigation.

Analysis of recent studies and publications. Significant contributions to definition of the object and subject of forensic science were made by such scholars as R. S. Belkin, A. N. Vasiliev, A. I. Wienberg, T. S. Volchetska, V. G. Goncharenko, A. A. Eysman, A. A. Exarhopulo, G. A. Zorin, V. V. Klochkov, V. Ya. Koldina, V. A. Konovalova, V. E. Kornoukhov, Yu. I. Krasnobaev, I. F. Krylov, I. M. Luzgin, G. A. Matusovsky, V. A. Obraztsov, N. A. Selivanov, A. V. Chelysheva, V. Yu. Shepitko, M. P. Yablokov and others. It should be noted that, despite the research carried out, a number of issues is left unresolved, whereas judgments made by scholars are diverse, uncoordinated or even contradictory. There are hardly ever any publications on this issue in domestic forensic literature.

Purposes of the article. The purpose of the article is to analyze modern scientific views on the object and subject of forensic science, to consider the

discussion issues, to provide author's suggestions in regard to possible ways for these problems solving, and to formulate consistent approaches to understand these defining forensic categories.

Presentation of the main material. Forensic specialists generally agree with the fact that the object of science is a distinct part of the revealed world, which is the object of scientific knowledge within the framework of a specific science and offer different options for defining the object of forensic science. Thus, A. A. Eysman refers the following to the object of forensic science: interrelationship and interaction of material objects (forensic technology), interaction and relationship of people (tactics and private methodology) [1, p. 7]. V. A. Obraztsov strongly disagrees with this idea and believes that «the object of forensic science is search and cognitive activity of investigators, experts, operational staff, and their practical investigation in criminal proceedings. There is not and could not be any other object in forensic science. To deny this fact during the objective analysis means to remain at the positions of yesterday» [2, p. 13].

Most scholars, taking into account that forensic science is referred to criminal law sciences and keeping in mind its official function, argue that this field of knowledge has a twofold object of research: 1) criminal activity (behavior) which finds its implementation in the crime mechanism and is reflected in information sources (material and ideal traces); 2) activities to detect, investigate and prevent crimes [3, p. 45; 4, p. 19–34].

In the proposed understanding, the object of forensic science is considered as a system formation with a differentiated number of elements with a different set of features and qualities, qualitative and quantitative. The system has the following elements: way, mechanism, environment, tools, circumstances, motive of criminal activity; ideal and material traces as a result of interaction of the offender with the environment in the context of a crime commission and beyond it; means and methods of circumstances investigation constituting a crime; behavior of professional and nonprofessional participants in criminal proceedings, and etc. This list can be extended, because the object of forensic knowledge has a complex structure which is composed of numerous interconnected heterogeneous elements [5, p. 31]. In this regard, G. A. Matusovsky noted that forensic science studies objects, natural process occurrence of which is determined by such a social phenomenon as crime [6, p. 26].

The question of forensic cognition object classification is still a debating point and one of the least developed in the theory of forensic science. Thus, V. A. Obraztsov distinguishes between complex and simple (single-element), general and separate objects [7, p. 27]. According to V. V. Klochkov, the objects should be classified into general, direct and individual [8, p. 16, 17].

Consequently, understanding of structural and component composition of forensic science object stipulates for the fact that it is a unity of interacting and interdependent components: on the

one hand, criminal activity (behavior), on the other hand, activities aimed at detecting, investigating and preventing criminal offenses.

It should be noted that with the expansion of the scope of forensic research and it extension to the judicial stage of the criminal process, scholars suggest to change the ideas about the object of its knowledge. According to some of them, it is currently not limited to a pretrial investigation, but should also include judicial proceedings in criminal matters and such aspects as support for public prosecution and exercise of professional protection [9; 10; 11; 12].

Various, sometimes very contradictory representations about the object of forensic science also determine the diversity of views on the subject of research in this field of knowledge. The last forty years have been marked by the emergence of numerous definitions of its subject in the forensic literature. Characterizing this feature of the science development, P. V. Kopnin aptly noted that the subject of various sciences is constantly undergoing changes in connection with the growth of knowledge, the progress of social development in general [13].

In the light of such positions, the current state of forensic science is characterized by the presence and coexistence of a number of paradigms focused on the study of its subject. These include:

a) traditionally pragmatic concept according to which forensic science is defined as the science of methods and ways for disclosure, investigation and prevention of crimes;

b) Theoretical evidence-based concept as a consequence of intensive development of theoretical and methodological foundations of forensic science. The emergence of this concept is associated with the proposal of R. S. Belkin to consider forensic science as a science «about the laws of origin, collection, evaluation and use of evidence and based on the knowledge of these laws, methods and ways of judicial investigation and prevention of crime» [14, p. 9]. Subsequently, he clarified the stated concept, and in recent works he considered forensic science as a science «about the laws of the mechanism of crime, information emergence about the crime and its members, collection patterns, study, evaluation and use of evidence and based on the knowledge of these laws, special methods and means of judicial investigation and prevention of crimes» [15, p. 42];

c) informational and cognitive conception, which represents a synthesis and further improvement of theoretical and evidence-based concept and proceeds from the fact that the subject of forensic science is the laws of criminally relevant information movement and associated methods for disclosure, investigation and prevention of crimes [16, p. 4, 25];

d) investigation concept, according to which forensic science is a science about technology and means of practical investigation (search and cognitive activity) in criminal proceedings [2, p. 5].

The above paradigms, being in the totality of objectified knowledge about

forensic science, complement each other and create real prerequisites for perspective development of a unified and holistic methodological concept. The latter, obviously, cannot be considered an end in itself, but is a task conquered by the interests of forensic science development. Currently, the number of paradigms shows not only a relative «youth» of forensic science, but also possibilities of different approaches to its subject definition which reflect the complex dialectics of development both of forensic science and the object of its knowledge.

It should be noted that in recent years there has been a desire of some scholars to significantly expand, «wash out» the subject of forensic science. Thus, T. S. Volchetska defines forensic science as a science «about the laws of the mechanism of the legal fact, emergence of information about a legally significant situation and its participants, specific character of collection, study, evaluation and use of evidence» [17, p. 44]. V. G. Goncharenko believes that «forensic science is an interdisciplinary legal applied science about the laws of emergence of evidence information about a crime or any phenomenon in a society that requires legal settlement by means of evidence, and about the system of technical means, tactical techniques and methods of collection, research and use of this information for the most effective solution of the tasks relating to operational search, investigation, legal proceedings and establishment of facts of legal significance» [18, p. 13]. V. S. Kuzmichov holds a similar view and states that «forensic science is an interdisciplinary legal applied science about the laws of emergence of information about any legal phenomenon in a society that requires to be found, collected, investigated and used (by means of technical means, tactical methods and techniques) in order to effectively address the problems of legal significance» [19, p. 61, 62]. These trends have led to the fact that some scholars proposed a «concept» about the existence of a megascience of «judicial knowledge», which is a certain superstructure over forensic science, and the value of the latter was reduced to the security function [20, p. 34–37; 21].

According the opinion expressed by V. Yu. Shepitko, it appears that «means, methods and practices of forensic science are successfully used in other spheres (operational search, judicial, prosecutorial, expert, advocacy) or allow establishing the facts beyond criminal and legal phenomena (use of forensic knowledge in civil, arbitration (economic) or administrative processes). The need for forensic science, the use of its data in various spheres, certain processes of integration and differentiation of scientific knowledge could not lead to a significant change in the subject of forensic science which remains the science of the laws of criminal activity and its reflection in information sources» [22, c . 43].

Indeed, in recent years the scope of forensic knowledge application has considerably expanded and is currently not limited to criminal proceedings but extends to social relations that re-

quire a specific legal settlement. But the scope of certain forensic knowledge (means, techniques, guidelines) and the subject of forensic science are different things, they cannot be identified and do not form the basis to assert that forensic science investigates the laws of emergence of information of any legal phenomenon in society. Forensic science still has a twofold object of research, and namely, criminal activity (behavior) and its consequences (reflection in information sources) and activities on detection, investigation, prevention of criminal offenses and judicial examination of criminal proceedings (cases). It is this paradigm that corresponds to the nature, purpose and tasks of this field of knowledge, determines the specific character of relations with other sciences, makes it possible to immediately understand the scope and nature of the object and subject, structure and method of research. Therefore, it is questionable and even unacceptable to propose including lawyers' and prosecutors' professional activities in forensic investigation objects (except for possibility of personal investigation (search) and proceeding activities according to p. 4 Cl. 2, Art. 36 CPC of Ukraine) and allocation of such subsystems as advocacy in the forensic system [23, p. 15–21] and state prosecution tactics [12].

Thus, when it comes to the object of forensic science, it means submission of relevant subjects of knowledge about the allocated part of the revealed world, which is studied or should be studied by this science directly and purposefully with a clear understanding of the goals and viewpoints of such study, that is, it is referred to the knowledge of the object which is formed on the basis of the data about the laws of objective reality and is reflected in the general theory of forensic science. This objectified knowledge is an ideal model, a copy, a reflection of that objective reality that is relatively realized in cognition [24, p. 9]. In this regard, the object of forensic science is clarified and determined by its subject. «For each science, – V. V. Kosolapov notes, – its subject of research is limited to the action of those objective laws that are reflected in the content of scientific discipline» [25, p. 50]. Therefore, transition from the study of phenomena to the study of the essence of the subject, to study of the corresponding laws is important for development of any science [26, p. 240].

As it is known, the laws are manifested and formed mainly in theory on the basis of empirical studies of the whole subject area of a science. Two-element structure of the forensic science object as well as results of viewpoints analysis set forth in the literature form the grounds to consider in the most general form the forensic science subject as a system of interconnected laws of the two following levels.

1. Laws of occurrence, existence and disappearance of information on criminal activity (behavior) which finds its implementation in the crime mechanism and is reflected in the relevant sources:

a) the law between the offender's personality and their behavior. The offender's behavior, like any individual,

is the unity of their internal and external aspects. Forensic science focuses on the latter, because the nature of the offender's actions, traces left on the scene really facilitates collection and evaluation of the evidence, introduction of versions of the perpetrator's identity. At the same time, description of forensic characteristics of a criminal incident without taking into account its psychological mechanisms as conscious and voluntary regulators, which determine the person's choice of the object of the offence, the method, situation and other circumstances of its commission, cannot be considered sufficiently complete. Thus, correct establishment of the motive enables to identify the number of persons involved in the crime, among whom the offender should be searched (based on the «who benefits it» principle). In all cases, the method of crime commitment should be analyzed in the context of its connection with the motive (and purpose) of the crime. Herewith, in some cases, there are some dependencies from the data on the criminal event (and its traces) to establishment of the motive of its commission, and from the motive to identification of the suspect. Unfortunately, it should be noted that the named dependencies have not yet found a proper empirical confirmation, which negatively affects the content of investigation methods of certain types of crimes. In this regard, a proposal to include this issue in the field of forensic research is worth noticing and supporting [27, p. 52–60];

b) the law between the offender's behavior and the affected party (forensic victimology). The victimologic approach in crime investigation provides that the source point for collecting information about a person who can commit a crime is the face and behavior of the affected party. Such information is important not only for crime prevention, but also for correct construction of a method for their detection and investigation, since only exact reproduction of the situation and circumstances of the event, behavior of the offender and the affected party, the nature of their relationship contributes to rapid detection, detention and disclosure of the perpetrator [28];

c) the law of criminal activity and its elements in regard to the conditions which the perpetrator experiences. Certain goals of perpetrators' activities correspond to certain objects of the offence, certain objects correspond to certain methods of crime, etc. Pursuant thereto, this law allows us to judge about the possibility or impossibility of a crime commitment in a certain way, in a certain place and at a certain time, facilitates construction of a crime model, creates prerequisites for predicting new ways of preparing, committing and concealing crimes, allows to learn unknown elements of the system by reference to known ones;

d) display, repeatability and stability of criminal activity (behavior) elements in the material world. The action of such law determines structural community of criminal activity, repeatability and continuity of reflection forms of its elements in the environment, is objective for construction of typical crime

models and investigation programming, helps to diagnose one or another type of crime, facilitates implementation of the constructive function of the investigation methodology, forensic tactics and technology, allows the investigator to predict the unknown elements of the criminal system;

e) the law of perception of criminal event circumstances by a criminal, an eyewitness, an affected party, etc. The process of evidence formation, perception, memorization and reproduction, is subjected to various subjective (perception threshold, apperception, focus of attention, temperament, emotional state, types of memory, intelligence, etc.) and objective (external conditions and circumstances of perception, features of the observed and etc.) factors. The knowledge of the regularities of the evidence formation process makes it possible, when analyzing a particular investigative and judicial situation, investigation process or judicial examination, to identify typical mistakes, to distinguish between conscientious misconceptions and deliberate reporting of false information [29].

2. Laws of obtaining, researching, evaluating and using information about criminal activity (behavior) and its consequences in proving:

a) the law of evidence information content and system in regard to forensic means and methods for detecting, fixing, extracting and storing sources of this information;

b) the law of behavior and activities of the investigation participants (professional and nonprofessional) in regard to their personal qualities, investigative situations and other factors, etc.

The proposed system is not exhaustive, but only shows the specific character of emergence and functioning of laws different in directions, and also suggests the existence of connections both within each of the selected levels and between the laws of different levels. In this case, it is referred to forensic determinism, that is, the dependence of forensic means and methods of working with information on criminal activity (behavior) on the nature of the criminal event and its consequences. At the same time, the laws of the emergence process of information about criminal activity (behavior) and its consequences are one of the objectively existing prerequisites for establishing the truth in the judicial investigation and serve as the basis for the evidence law group.

In addition, the named laws are situationally depending on specific criminal and investigative situations, individual properties and features of research objects, ambiguity of interconnections forms between them. Herewith, situations being complex and multidimensional formations, at the same time, are flexible structures that are dynamically developing. That is why, as R. S. Belkin argued, «any objective law manifests itself as a tendency, that is, it puts its way through random deviations from it, when the result of these or other objective and subjective evidence moments remain undetected, despite the objectively existing possibility of their detection in all cases» [25, p. 73].

Therefore, forensic determinism and situational conditionality can be defined as the most common forensic laws that reflect the essence of forensic science and determine the possibility of scientific search conducting in this area of knowledge.

Conclusions. The object and subject domain of forensic science includes a twofold object of research that is criminal activity (behavior) and its consequences, which are reflected in information sources (material and ideal traces) and activities on detection, investigation, prevention of criminal offenses and judicial examination of criminal proceedings (cases). In accordance with this structure of the forensic object, the subject of its study should be regarded as a system of interconnected laws of the following levels: 1) the law of emergence, existence and disappearance of information on criminal activity (behavior) which finds its implementation in the crime mechanism and is reflected in the relevant sources; 2) the law of obtaining, researching, evaluating and using information about criminal activity (behavior) and its consequences in proving. Extension of the object and subject domain of forensic science at the present time is seen as inappropriate and attempts to «wash» the subject of forensic science is hopeless and false, creating an unnecessary debate and distracting the attention of scholars from intellectual support of the main goals and objectives of forensic science realization.

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LAW OF CRIMINAL PROCEDURE OF UKRAINE: ACQUISITIONS, THREATS, EXPECTATIONS

The summary. *In the article the current state and development tendencies of criminal procedure law of Ukraine are analyzed. Both limitation of criminal procedure regulation, and positive qualities of the domestic model of criminal proceedings are considered. The attention is paid both to threats of implementation of the Ukrainian Criminal Procedure Code norms and to carrying out of the judicial-legal reform in whole. The main directions of Ukrainian criminal procedure law development are defined.*

Key words: *law of criminal procedure, proving, adversarial nature of the judicial process, procedural compulsion.*

November 20, 2017 is the fifth anniversary of the Criminal Procedural Code of Ukraine (hereinafter – the CPC) coming into force. This codified act replaced the previous Soviet Code, which, despite the radical amendments (in particular, due to the so-called «small» judicial reform) exhausted its possibilities a long time ago under socio-political, socio-economic and cultural transformations in public and social life. The previous domestic model of criminal justice had significant shortcomings, including: insufficient providing of the rights of criminal proceedings participants; location of the adversarial principle; limited judicial control in the stage of pre-trial investigation; lack of restorative procedures and equal access to expert knowledge; declarative existence of the jury; the institute of the criminal case return for the additional investigation; impossibility of conducting pre-trial and judicial proceedings

in absentia; excessive formalization of certain criminal procedural proceedings, which serve neither the guarantee of the rights and freedoms protection of the participants of the criminal process, nor the guarantee of justice; insufficiency of the summary criminal procedural proceedings; excessive activity of the court; the higher instances courts abuse of the authority to cancel the first instance judicial decision with the return of the criminal case for a new trial; excessive and unjustified application of the preventive measure in the form of detention; a small amount of non-guilty verdicts in relation to the indictments.

The above-mentioned provisions also determined the principal vectors of the reforming of the criminal-procedural legislation in Ukraine. First of all, it is the emergence among the principles of criminal proceeding of the rule of law principle and the rule of reasonable terms. Legislative establishment of the possibility to apply criminal-procedural law by analogy, as well as ensuring remote court proceedings are positive changes beyond doubt. Criminal proceedings were also changed in the direction of adversarial development and the reduction of the judicial activism. For this purpose, the system of rights and guarantees for criminal proceedings participants, in particular a suspect, an accused, a victim, has been substantially expanded. One of the key novations is the deepened judicial control of pre-trial proceedings. For this purpose, an investigating judge is foreseen as a new subject. The undoubted achievements of the CPC of Ukraine include the development of the preventive measures system, the purpose determination, the grounds and conditions for the application of the procedural coercion measures, aimed at preventing their excessive use, in particular regarding detention, and protection of the people who might be the subject to such measures. The emergence of the institution of inadmissibility of evidence obtained as a result of a significant violation of human rights and freedoms, as well as an order for the full fixation of court proceedings by technical means are valuable advantages of the new criminal procedure. Moreover, the possibility to interrogate the witness who has suffered during the pre-trial investigation, if there is a reason to believe that such an interrogation may not take place in the future during the trial, deserves a positive assessment. New provisions foresee the unification of procedural actions and operational-search activities within the criminal proceedings and as a result, creation of the institute of secret investigative (search) activities. This change greatly expanded capabilities of the pre-trial investigation bodies in the disclosure of grave and especially grave crimes. An extremely positive step is the appearance in the CPC of Ukraine of the chapter regulating the appeal and review of decisions, actions or inactivity of pre-trial investigation bodies and the prosecutor during a pre-trial investigation. Among the legitimate steps of the legislator should be the clear wording of the limited number of grounds for the annulment of court decisions by the appellate court and the appointment of

a new trial. Another important amendment is the simplification and acceleration of the criminal procedure through the introduction and use of consensual methods for the criminal proceedings termination (criminal proceedings regarding misdemeanors and proceedings on the basis of agreements).

In general, the CPC of Ukraine implemented a number of provisions of the Concept of Criminal Justice Reform, approved by the Decree of the President of Ukraine of April 8, 2008, No. 311/2008[1].

The CPC of Ukraine reflects the criminal procedure of the protective type, which establishes rather a high level of the protection of the individual's rights, freedoms and interests. This type complicates greatly activities of the operational units' staff, of the investigator, of the head of the pre-trial investigation body and the prosecutor, who find it difficult to perceive the norms that tangle their work.

At the same time, for the sake of justice, we note, that the 2012 Criminal Procedural Code of Ukraine did not fully meet expectations, relied on this codified act.

In particular, as in the 1960 CPC, if the prosecutor completely refused to hold a public prosecution, the court closes the criminal proceedings and does not endorse the acquittal. The question of the evidence admissibility is still resolved only during the trial. The provision is kept that in exceptional cases criminal proceedings may be submitted for consideration to another court, where the accused resides, or to the place of the majority of victims or witnesses in order to ensure the efficiency and effectiveness of the trial, that bears subjectivity in deciding which court will consider the criminal proceedings. The number of acquittal sentences did not change significantly – does not exceed 1% of the total number of sentences. Remained only one type of the appellate court verdict – accusatorial. There is no full jury trial in Ukraine, as the latter participate in the adoption of a judicial decision only on the matters of law, along with professional judges. Special procedure for juvenile justice is absent.

In addition, a number of difficulties were noted in the implementation of criminal procedure norms in the process of law enforcement. It turned out that the CPC of Ukraine does not fully meet the needs of practice. And, conversely, practice sometimes goes against the provisions of the criminal procedure law.

Thus, in 2013 a monitoring report was published, in which the problems of practical implementation of a number of provisions of the criminal procedure law were identified. Among them: barriers for the registration of applications and reports about criminal offenses; re-registration of criminal cases, closed in the past years in the Unified Register of Pretrial Investigations; disproportionately frequent application of criminal

[1] Концепція реформування кримінальної юстиції, затверджена Указом Президента України від 8 квітня 2008 р. № 311/2008 [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/311/2008

procedure in the form of temporary access to things and documents; seizure of a significantly greater number of documents or things than indicated in the decision of the investigating judge, in the result of the search in the dwelling or other personal property; abuse of the mechanism for things and documents withdrawal during their inspection; the practice of automatic continuation of detention at the stages of pretrial and trial proceedings[1].

During 2014–2015, within the framework of the European Union project «Supporting reforms in the field of justice in Ukraine», a survey of investigative bodies of the internal affairs, prosecutors, lawyers and judges was conducted on the issues of the criminal justice system reform in Ukraine. Law enforcement subjects focused their attention on the following key issues: significant restrictions on freedom of decision-making and initiatives restriction of investigators; statistical indicators planning at the prosecutor's office and other law enforcement agencies; accusatorial bias of criminal justice; the necessity to adopt the Law of Ukraine «On Criminal Infrections» and the implementation of the simplified procedure for criminal misconduct investigation[2].

It might seem that after the CPC of Ukraine adoption in 2012, the criminal procedural legislation reform has come to the completion. However, first amendments and additions had already been made before this codified act came into effect. This trend continues to this day. To the great extent, it is largely caused by the implementation of provisions of the Strategy for the judicial system, justice and related legal institutes reform for 2015–2020, approved by the Decree of the President of Ukraine of May 20, 2015, No. 276/2015[3]. This process leads to numerous debates among law enforcers, scientific community and the public about the scientific reasonability and practical necessity for continuous legislative amending, its ability to improve the effectiveness of criminal procedural rules, as well as the practice of their application.

It is worth noting that a significant number of changes to the CPC of Ukraine have positive innovations. However, some of them do not contain constructive ideas, are adopted without broad discussion (or even without any discussion) with the legal community and without prior scientific evaluation. As a result, theoretically unreasonable, practically unnecessary law appears,

[1] Реалізація нового КПК України у 2013 році (моніторинговий звіт) / О. А. Банчук, І. О. Дмитрієва, З. М. Саідова, М. І. Хавронюк. – К.: ФОП Москаленко О. М., 2013. – С. 7–10.

[2] Реформування кримінальної юстиції в Україні: погляди учасників кримінального процесу. Результати всеукраїнського опитування адвокатів, суддів, слідчих та прокурорів. – К.: Проект ЄС «Підтримка реформ у сфері юстиції в Україні», 2015. – С. 9–94.

[3] Стратегія реформування судоустрою, судочинства та суміжних правових інститутів на 2015–2020 роки, схвалену Указом Президента України від 20 травня 2015 р. №276/2015 [Електрон. ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/276/2015

that is not upheld from the standpoint of legislative technique.

For example, according to the amendments introduced in Part 9 of Art. 31 CPC of Ukraine, criminal proceedings against the President of Ukraine, whose powers have been terminated, the Prime Minister of Ukraine, members of the Cabinet of Ministers of Ukraine, first deputy and deputy ministers, members of the National Council of Ukraine on Television and Radio Broadcasting, the National Commission that carries out state regulation in the financial services market, the National Securities and Stock Market Commission, the Antimonopoly Committee of Ukraine, the Chairman of the State Committee for Television and Radio Broadcasting of Ukraine, the Chairman of the Foundation of the State of Ukraine, its first deputy and deputies, members of the Central Election Commission, national deputies of Ukraine, the Commissioner of the Supreme Council of Ukraine for Human Rights, Director of the National Anti-Corruption Bureau of Ukraine, members of the National Agency for the Prevention of Corruption, the Prosecutor General, his first deputy or deputy, Chairman of the Constitutional Court of Ukraine, his deputy or judge of the Constitutional Court of Ukraine, the Chairman of the Supreme Court of Ukraine, his first deputy, deputy or judge the Supreme Court of Ukraine, heads of the Higher Specialized Courts, their deputies or judges of the Specialized Courts, the President of the National Bank of Ukraine, his first deputy or deputy, persons whose positions are in the category «A», as well as the criminal offenses referred to the competence of the National Anti-Corruption Bureau of Ukraine, are carried out in the extended panel, and the judges included in this composition, are subject to additional requirements regarding the experience of their work.

In our opinion, this provision is nothing more than a violation of the principle of equality before the law and the court. It's known, that the essence of this principle lies in the fact that any norm regulating the conditions and procedure for criminal proceedings does not impose the implementation of this procedural activity depending on the social, property and official position of a person, his nationality, race, religion, gender, and other peculiarities. However, in S. 9 of Art. 31 CPC of Ukraine, obvious advantages of certain officials in contrast to all other accused who do not occupy such position are established.

Section IX-1 «Special regime of pre-trial investigation in conditions of military or martial law or in the area of conducting an anti-terrorist operation» of the CPC of Ukraine causes a significant concern. Art. 615 of the CPC of Ukraine permits to apply measures of procedural coercion by the prosecutor instead of the investigating judge. It is obvious that sanctioning procedural actions related to the restriction of the constitutional rights and freedoms of the individual by the prosecutor is unacceptable. In fact, the prosecutor conducts a pre-trial investigation, carries out procedural guidance for him, and also acts as an «independent» arbitrator between himself and the suspect.

Also, the CPC of Ukraine was amended by Art. 269–1 «Monitoring of bank accounts». Analysis of the content of this article raises a number of questions. Why does the legislator associate this investigative action only with activities of the National Anti-Corruption Bureau of Ukraine, despite the fact that in criminal proceedings carried out by other bodies of pre-trial investigation, it may also be necessary to obtain from the banking institution information about current operations carried out on one or more bank accounts in order to fix the criminal and illegal activities? Why only the prosecutor, and not a detective of the National Anti-Corruption Bureau of Ukraine, may ask for carrying out this investigative action?

Section 3 of Art. 314 of the CPC of Ukraine establishes a new provision, under which judicial decision that instructs the representative of the probation body to prepare a pre-trial report is foreseen. The necessity of the establishing such a decision is rather controversial. It seems that it should be an integral part of the decision appointing the court hearing.

Under Art. 314 S. 5 of the CPC of Ukraine, the court decides on the order to prepare a pre-trial report both on its own initiative and at the request of the accused, his counsel or legal representative, the prosecutor in the interests of national security, economic prosperity and human rights. It is hard to determine what security and economic well-being are, because these terms are evaluative.

Under the Art. 2 S. 1 ss. 2 of the Law of Ukraine «On Probation» of February 5, 2015, the pre-trial report is written information for the court characterizing the accused. Under the Art. 9 S. 3 of this law, the pre-trial report shouldn't include: a) the socio-psychological characteristics of the accused; b) the assessment of the risks of repeated committing a criminal offense; c) the conclusion about the possibility of correction without limitation of liberty or imprisonment for a certain period of time[1]. Such information is foreseen by Art. 91 S. 1 ss. 4 CPC of Ukraine, where the court is the subject of proving. At the same time, from the content of Art. 368 S. 1 of the CPC of Ukraine it is clear that the pre-trial report has a recommendatory character for the court.

The purpose of the report in accordance with Art. 314–1 S. 1 of the CPC of Ukraine is to provide the court with information characterizing the accused, as well as adopt the judicial decision on the measure of punishment. At first glance, it goes about the need to follow the principle of the punishment individualization. However, under Art. 314–1 S. 2 of the CPC, a pre-trial report is made only with respect to the person accused of committing a crime of small or medium gravity or a serious crime with the lower limit of sanction not exceeded five years' imprisonment. This rule does not apply to a juvenile prosecution, where the pre-trial report is made regardless of the gravity of the offense.

[1] Закон України «Про пробацію» від 5 лютого 2015 р. № 160-VIII [Електрон. ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/ show/160–19

Article 314–1 s.4 of the CPC of Ukraine stipulates that the pre-trial report isn't necessary : a) regarding a person in respect of which the prosecutor has made a request for exemption from criminal liability, the application for compulsory measures of the disciplinary nature, the use of compulsory medical measures, b) if during the preparatory judicial hearing, the court rendered a decision on the approval of an agreement; c) against a person who is already serving a sentence in the form of restraint of liberty or imprisonment; d) against the person who is a subject to parole, but he has committed a new crime during the unserved part of the punishment. It is not clear why the pre-trial report does not arise in the case of the appeal of the prosecutor to the court with a petition for the use of compulsory measures of disciplinary and medical nature, since the application of these criminal-law measures is subject to individualization.

One of the latest amendments to the CPC of Ukraine provides the possibility of concluding a guilty plea agreement in criminal proceedings concerning particularly grave crimes committed by a group of persons, organized by a group or a criminal organization or a terrorist group under preliminary conspiracy. Subject to disclosure by a suspect who is not the organizer of such a group or organization are criminal actions of other group members or other crimes committed by a group or the organization, if the reported information is supported by evidence.

In our opinion, the above provision is in conflict with the interests of society, may lead to violation of the rights, freedoms or interests of the parties or other persons, that is, does not correspond to paragraphs. 2, 3 S. 7 Art. 474 CPC of Ukraine. The discussed provisions create conditions for abuse by the bodies of pre-trial investigation and the prosecutor. They might illegally protect the accused from prosecution for other crimes, through masking the guilt recognition agreement. Moreover, except of organizing particularly grave crimes, a person may play another role as perpetrator (or accomplice). It should be emphasized that these are particularly grave crimes against the foundations of Ukraine's national security, against the life and health of a person, against sexual freedom and sexual integrity of a person, against public safety, in drugs, psychotropic substances, their analogues or precursors trafficking and other crimes against the health of the population, war crimes, against peace, the security of mankind and international rule of law.

Therefore, in recent amendments introduced by the legislator, it is increasingly difficult to find the best balance between public and private interests, to protect both the person who is harmed by a socially dangerous act and the suspect, accused, and assure justice. The reason for this, in our opinion, is the legislators' desire to situationally satisfy the interests of certain political forces, state bodies and agencies.

The described tendencies, the attempts of the legislator to formally reproduce in the Criminal Procedure Law of Ukraine for any cost the provisions, for which the obligation has been taken

before the international community, mistakenly chosen way of application of the relevant criminal-procedural norms in practice, as well as the controversy (if not erroneousness) of the legal regulation of a number of institutions of domestic criminal procedural law, creates threats not only for the implementation and improvement of legal norms, but also the implementation of judicial reform in general.

In our opinion, it's expedient to single out the following threats:

First, the formal and actual dependence and subjection of the investigator in conducting a pre-trial investigation. The procedural status of an investigator entrusted to the CPC does not promote his activity, binds him, makes him dependent on the prosecutor and the head of the pre-trial investigation body.

Second, the aforementioned factor, as well as the expansion of the list of the bodies of pre-trial investigation, interference in their activities of officials who do not have the status of the subject of the criminal proceedings, gradually transforms the pre-trial investigation into the mechanism of persecution and repression.

Third, the existence of the system of indicators for the disclosure of crimes leads to the indictment inclination, violation of the rights, freedoms and interests of the individual, of the presumption of innocence, as well as violation of comprehensive, complete and impartial clarification of the circumstances of the criminal proceedings.

Fourth, the described situation in pre-trial proceedings is aggravated by the fact that the prosecutor's office exercises the function of a pre-trial investigation. For example, at first S. 20–1 of the Chapter XI, «Transitional Provisions», the CPC of Ukraine established an expiry date – April 15, 2017, to which investigatory prosecutors are authorized to carry out a pre-trial investigation in accordance with the provisions of Chapter 24–1 «Peculiarities of the special pre-trial investigation of criminal offenses» of the CPC of Ukraine. However, recently this date was reserved by the legislator for an indefinite period, not later than the day of the activity commencement of the State Bureau of Investigations.

Fifth, the lack of regulation in Art. 216 of the CPC of Ukraine and as a result investigating various crimes by the military prosecutor's office, not only those related to the activity of military formations and the defense-industrial complex of the state. It seems that such an approach contradicts not only Article. 1 CPC of Ukraine, but also S. 14 of Art. 92 of the Constitution of Ukraine, according to which exclusively the laws of Ukraine determine the judicial process, organization and activities of the prosecutor's office, not the branch orders of the Prosecutor General.

Sixth, the absence of a sole anti-corruption body and a number of bodies that struggle against corruption, whose authority includes the investigation of corruption. Now, in fact, each of the pre-trial investigation bodies in S. 1 of Art. 38 CPC of Ukraine are engaged in such activities.

Seventh, the lack of genuine inde-

pendence of judges, one of the indicators of which in criminal proceedings is the number of approved acquittal sentences. Despite the amendments to the Constitution of Ukraine, the adoption of the Laws of Ukraine «On the Judicial System and the Status of Judges», «On the High Council of Justice», in the part of the judiciary formation, the independence of judges is a fiction, since appointment to a post of judge is carried out by the President of Ukraine on the submission of the High Council of Justice. In essence, judges are empowered by the highest official in the state, under whose control there is the creation of the majority in the parliament, the formation of a government that affects the composition of the High Council of Justice.

Eighthly, preserving the approach to assessing the judge's activity by the number of their decisions that have been annulled. Such an indicator is taken into account when a judge passes a qualification assessment, raises doubts as to his proper professional level, makes him agree on his future decision with a higher court.

Ninth, the low level of the judicial practice stability and unity. The Supreme Court of Ukraine, being the supreme body in the system of courts of general jurisdiction, at the same time, is not a court of cassation and cannot review the decisions of the courts of the first and appellate instances in cassation, except in the case stipulated by S. 4 of Art. 445 CPC of Ukraine. Hence, within the limits of chapter 33 of the CPC, it is actually limited in ensuring the unity of judicial practice, since the practice of the courts of the first and appellate instances remains beyond its control.

In addition, such a form of judicial practice expression, as newsletters, used by the High Specialized Court of Ukraine for civil and criminal cases, is not foreseen by the current legislation of Ukraine on the judiciary and the status of judges, and also at some point considerably lowered the level of judicial interpretation. As a result of the implementation of this kind of abstract activity, the imperfections and contradictions in the provisions of such newsletters and their non-compliance with the criminal-procedural law are found.

In the tenth, «blind» borrowing of the elements of the foreign criminal process models (especially Anglo-American) without taking into account the features of the legal system of Ukraine, historical traditions of the national state building, the level of professionalism and legal awareness of law enforcers, the mentality of the population and other factors. The legislator should not copy the foreign experience, and before the introduction of the relevant norms it is necessary to understand what a purpose of particular legal institute operation in the criminal procedure law of other states is. Only under this approach, based on its own experience, it is easier to integrate innovations into the domestic model of criminal justice, to reconcile them with existing procedural institutions, to substantiate the feasibility of changes to the criminal-procedural legislation.

The definition of the main development directions of the criminal-procedural law of Ukraine is an important and, at the same time, challenging for the criminal process science.

In our opinion, this process should be evolutionary, without radical innovations. Changes to the criminal procedure legislation should be scientifically grounded, conceptual and systematic, aimed at solving current problems of law enforcement, meeting the requirements of time and taking into account the perspective development of public relations in the field of criminal justice.

The mixed model of the criminal process seems to be optimal in modern political and legal, socio-economic conditions of the functioning of our state.

Pre-trial investigation is becoming increasingly adversarial. To this end, the rights of the lawyer will be specified and expanded as regards the collection and submission of evidence to the investigator, prosecutor, investigating judge and court, and the use of the services of entities engaged in private detective (search) activities. The tasks of pre-trial proceedings will be changed, and will not serve for comprehensive, full and impartial detection of the circumstances of the criminal proceedings as it is now but will provide the accumulation of information that will serve the foundation for the final decision of the pre-trial investigation body. The protection of the person from unjustified and excessive procedural coercion measures will also be strengthened, and the procedure for selecting such measures by an investigating judge will be improved. One of the effective means for the investigator independence guarantee and preventing punitive and repressive methods during pre-trial proceedings is the creation of a single pre-trial investigation body that would unite all departments of the investigative units.

Instead, judicial proceedings will gradually acquire the features inherent in an ideal adversarial model of criminal justice. To this end, it would be advisable to introduce the Anglo-American model of a jury trial, in which the panel of jurors is separated from the professional judge, as well as to determine the model of appeal and review of its decisions.

Legal positions of the Supreme Court will play an increasingly important role in the system of sources of the criminal procedural law, among the elements of the mechanism of criminal procedural regulation. The highest judicial body in the judicial system of Ukraine will create models for resolving legal situations in conditions of ambiguity, conflict or lack of criminal-procedural regulation of social relations.

At the same time, it is important to remember, that regardless of the legislative technique, scientific validity, practical demand, and taking into account the emergence of new social relations, significant adjustments to the application of criminal norms are made by the public authorities and officials who conduct criminal proceedings. The current level of legal awareness of investigators, prosecutors, judges, legal culture of other subjects of criminal proceedings leads to a tendency of speci-

fying the procedural form. However, in the longer term, the abstracting of the procedural form, the departure from the formal rules of proof, the use of so-called «free evidence», and the extension of the judicial discretion will be inevitable with the changes in population mentality and the emergence of a new generation of law enforcers.

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SOURCES OF CRIMINAL LAW: CONCEPTS, TYPES, LEGAL SIGNIFICANCE

Criminal law as a branch of public substantive law is a system of legal norms established by the state that determine which socially dangerous acts are recognized as crimes and which penalties and other measures of a criminal law nature are subject to application for their commission. The key characteristic of criminal law is the ability to regulate legal liability for committing acts (actions or inactions) that pose increased social dangerousness, to qualify them on this basis as crimes and provide for their execution with the most severe form of state coercion – punishment. In addition, criminal law, based on the fundamental principle of recognizing the limits and the amount of criminal liability, provides an exhaustive list of socially dangerous acts (and characteristics that define them), which are recognized as crimes (Part 1, Article 3, Part 1 Article 11 of the Criminal Code of Ukraine (hereinafter – the CCU)). In this regard to ensure the implementation of the constitutional principle of the rule of law and legality in criminal proceedings, as well as to ensure the rights and freedoms of persons subject to criminal liability, the criminal law of Ukraine, based on the generally accepted, progressive and humanistic principle – nullum crimen sine lege (no crime without law), legally prohibits the application of its norms by analogy (Part 3, 4 of Article 3 of the CCU). Given this, the problem of sources of criminal law comes to mind, since the response to an extremely important and principled question largely depends on its resolution: in what particular acts of the state do criminal law norms that establish criminality and the punishability of socially dangerous acts be prescribed (legally enshrined) and which should be applied when establishing the grounds, content and limits of criminal liability in each specific case?

The sources of criminal law («source» – in the lexical sense – something that gives rise to something, from where something originates, de-

rives; the basis, the initial beginning of something) [1, 218], as well as every branch of law, represent a lineup of circumstances (factors) that objectively condition (cause) the emergence and establishment of criminal law and determine the essence, content and form of a certain branch of law [2, 212–213; 3, 107–115]. All of them can be studied in different ways and meanings, in particular: 1) material (socio-economic conditions of society); 2) ideological (legal and political culture and consciousness); 3) state-political (the presence of relevant political and state institutions that determine and implement criminal law-making); 4) retrospective (historical records of criminal law, the cognition of which allows to reveal the essence and content of the law of the past, its legal norms and their influence on modern law-making); 5) formally legal (methods, means and legal forms by means of which a state establishes in the relevant legal acts the prohibition of certain types of socially dangerous behavior (acts) of individuals, recognizing them as criminal and punitive) [4, 7–74].

Indeed, the central issue in this article is the question of the formally-legal definition of sources of criminal law. Depending on which legal (normative legal) acts criminal law prohibitions and regulations, that is, the norms of criminal law are foreseen, it is possible to draw a conclusion on the legal force of these sources, to find out the effect of these in time, space and in the list of persons, etc. The legal form and content of the sources of criminal law largely determine the content and essence of criminal law and the relevant legal relations of their formation and implementation based on democratic and humanistic principles. A priori, we build on the fact that the source of criminal law in its legal (formal) meaning should be recognized as a legal act adopted by the established legal procedure and form, containing criminal law norms – the primary and fundamental units of criminal law prohibiting under the threat of punishment or other criminal-law measures a certain type of socially dangerous behavior of a person (the subject of a crime) – an act or inactivity – and defines them as a crime. These normative acts regulate criminal legal relations in the state and on this basis belong to the domain (branch) of criminal law. Criminal-law norms can be established, changed or canceled by the specified normative legal acts (sources). Therefore, they fulfill a twofold and extremely important function: 1) the function of the legal source of criminal law and 2) the function of the form of law, that is, they play the role of the legal form of existence and expression (functioning) of the norms of criminal law. Based on such constituent provisions we define the meaning of the concept of a «source of criminal law».

Types of sources of criminal law. Scientific and educational literature shows different views on the definition and typology (division into types) of formal-legal sources of criminal law. Mostly these sources refer to only one type of normative legal acts – the law on criminal liability [5, 14–16]. In other

cases, in addition to various types of laws, other legal acts, which set forth the legal positions of the Constitutional Court of Ukraine in the decisions adopted by it; the legal position of the European Court of Human Rights (hereinafter – the ECHR), set forth in its decisions containing the interpretation of the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms; the legal positions of the Supreme Court of Ukraine (hereinafter – the SCU), set forth in his decisions, adopted on the basis of the results of consideration of applications for review of judgments on grounds of unequal use by courts of cassation of the same norms of the law on criminal liability for such socially dangerous acts, etc. [6, 25–41]. Quite peculiar to the science of criminal law is the view that the norms of criminal law do not directly prohibit the commission of a crime. These prohibitions, as considered by the supporters of this view, are set by the norms of other branches of law. The norms of the criminal law determine exclusively the criminal-legal consequences of the violations [7, 117–124; 8, 14, 19–21]. It is sometimes argued that such elements of criminal law as a hypothesis and disposition are formed by regulatory norms of law (civil, financial, economic, etc.), but the sanction for the violation of the relevant norms and rules are established by the norms of criminal law [9, 33]. In this way, the question of the sources of criminal law is virtually eliminated, since it is impossible to conclude from the above positions what exactly is formally and legally considered as a source of criminal law. In the science of criminal law, the following approaches to the definition of sources of criminal law are distinguished: the first (narrow context) – the recognition of the source of criminal law as only a law on criminal liability; the second (broad context) – the recognition of such a source not only as laws, but also other legal acts, the third – leads to the leveling (and even ignoring) the sources of criminal law.

These approaches are very different and even contradictory in some sense. The solution of this problem situation should, in our opinion, be based on the fundamental and introductory provisions of the Constitution as the Fundamental Law of Ukraine. In particular, paragraph 22 of Part 1 of Art. 92 stipulates that only the laws of Ukraine recognize acts as crimes and establishes the responsibility for their commission. This initial constitutional position is further developed and specified in Part 3 of Art. 3 of the CCU, which establishes an extremely important, fundamental provision of criminal law, according to which the criminality of a specific act, as well as its punishment and other criminal consequences, are determined only by this Code. Consequently, there is every reason to assert that a criminal norm as the first principle of criminal law and its basic element has the law on criminal liability as for its legal source. Therefore, the norms of criminal law can be established, changed or abolished only by a law on criminal liability. In this way, the law is recognized as the only form of a source of criminal law.

From this, it follows that the norms of criminal law are the content of a law on criminal liability. However, the specified definition of sources of criminal law, although having proper arguments, is still too broad in scope, and therefore is not sufficiently specified. All sources of criminal law should, in our opinion, be divided into two categories: basic and subsidiary. The basic (primary) sources of criminal law – these are sources that have a constitutive and decisive nature, that directly determine the norms of criminal law, affect the essence and content of its norms, underpinning the recognition of certain types of socially dangerous acts by criminal and punitive, or act as the only possible form of legal determination and fixing of criminal-law norms. Subsidiary sources (from the Latin subsudiym – aid, support) are the legal provisions of other branches of law – their norms, notions, terms included and applied in criminal law only in connection with the formation and definition of content (and forms) of the main sources of criminal law and as ancillary to them. The subsidiary sources do not contain any criminal-legal norms themselves [10, 34–49].

The main sources of criminal law

The Constitution of Ukraine, first of all, is the prime example of the main sources of criminal law. The defining and initial in this case is the provision of Part 2 of Art. 8 of the Fundamental Law of Ukraine, according to which «the Constitution of Ukraine has the highest legal force. Laws and other normative-legal acts are adopted on the basis of the Constitution of Ukraine and must correspond to it». Consequently, the norms of the Constitution regarding the norms of criminal law (regardless of the normative legal acts the latter are enshrined in) are of decisive importance, and relations between them can be characterized as relations of subordination, in which the rules of the constitution are dominant and show higher significance. In accordance with this, the norms of criminal law as a branch of law are based, in particular, on the principles and provisions of the Constitution of Ukraine, enshrined in Art. 3, part 1 of Art. 8, parts 1 and 2 of Art. 19, Articles 60, 61, 62, 66, 67 and 68, paragraph 22 of Art. 92 of the Fundamental Law of Ukraine and should conform to them. This provision is clearly enshrined in Part 1 of Art. 3 of the CCU, which states that the Ukrainian legislation on criminal liability consists of the Criminal Code of Ukraine, which is in turn based on the Constitution of Ukraine. Thus, norms and other elements of the criminal law (and the Criminal Code of Ukraine), which do not correspond with the content of the Constitution, its principles, and provisions on which it is based, should be declared unconstitutional in full or in part by a court decision. Such decision can be approved by the Constitutional Court, which acts as a body of constitutional jurisdiction in Ukraine. The epitome of this is the decision of December 29, 1999, on the recognition of death penalty as a form of punishment in the 1960 Criminal Code of Ukraine (Article 24) as unconstitutional, as well as from November 2, 2004, regarding the recognition of

the provisions of Art. 69 of the CCU of 2001 unconstitutional in the part that made it impossible to appoint persons who committed a minor crime a milder punishment than prescribed by law. As can be seen, constitutional norms do not directly contain criminal law in their «classical» context but determine the content and essence of such norms in the legal acts (laws), which later become the sources of criminal law. It should be remembered that according to Part 3 of Art. 8 of the Constitution of Ukraine its norms are of direct action and can be applied in cases where, for example, the norms of criminal law contradict with the Constitution or do not resolve a particular life situation that worsens the legal status of a person. Consequently, we have every reason to recognize the Constitution of Ukraine as the main source of criminal law.

A decision of the Constitutional Court of Ukraine also acts as a basic source, since it defines the relevant criminal norm of a legal act unconstitutional through amending or abolishing criminal legal acts, thus changing and (or canceling) action and legal force these norms. Consequently, the above decisions, which change the content of criminal law or abrogate it, are binding because they affect the content or scope of criminal law regulation. This gives grounds for acknowledging a decision of the Constitutional Court of Ukraine regarding the unconstitutionality of a norm of criminal law as its main source. The sources of criminal law of institutional nature also include international legal agreements, deemed legally binding by the Verkhovna Rada of Ukraine, and thus acting as a part of the national legislation of Ukraine. This is substantiated by the provision of Art. 9 of the Constitution of Ukraine, according to which «valid international treaties agreed upon by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine». This constitutional norm has been consolidated and developed in parts 1 and 5 of Art. 3 of the CCU, which establish that the legislation of Ukraine on criminal liability is based, in particular, on universally recognized principles and norms of international law, and that the laws of Ukraine on criminal liability must comply with the provisions contained in the existing international treaties, deemed legally binding by the Verkhovna Rada of Ukraine.

The main (primary and basic) sources of criminal law are the laws of Ukraine on criminal liability. This fundamental decision is based, as indicated, on the provisions of paragraph 22 of Part 1 of Art. 92 of the Constitution of Ukraine. They include, as follows:

1) The Criminal Code of Ukraine of 2001, which came into force on September 1 of the same year and is currently in force. It is the only codified normative legal act, which includes all laws (and criminal-legal norms) about criminal liability. Other (and all) laws of Ukraine on criminal liability, adopted after its entry into force, are included in its contents after their entry into force (Part 2 of the Criminal Code of Ukraine). Therefore, the basic, foreseen in Part 1 of Art. 3, is a rule according

to which «the legislation of Ukraine on criminal liability consists of the Criminal Code of Ukraine…». This legal act as a source of criminal law combines and streamlines norms of criminal law in accordance with the institutes of criminal law in the logically-structured system that has a harmonious structure and a relatively complete nature;

2) Law of Ukraine dated October 1, 1996 No. 392/96-VR «On the Application of Amnesty in Ukraine» (as amended on May 6, 2014), separate (active) laws of Ukraine on amnesty, Regulation on the procedure for the pardon from April 21, 2015 number 223/2015, as amended on May 14, 2016, No. 211/2016. These normative acts develop and detail the legal and regulatory provisions enshrined in the relevant articles of the current Criminal Code of Ukraine – Art. 85 «Exemption from punishment based on the law of Ukraine on Amnesty or an act of pardon»; Art. 86 «Amnesty»; Art. 87 «Pardon»;

3) The Criminal Code of the Ukrainian SSR in 1960 (in terms of extending the legal force of its norms to crimes committed before September 1, 2001, provided that the provisions of this Code mitigate the criminal liability for these crimes in comparison with the Criminal Code of Ukraine of 2001).

Thus, the law on criminal liability (in all its variants) is the main source of criminal law in Ukraine. This law performs two functions simultaneously: 1) acts as a legal source of criminal law and criminal-legal norms (acts as their «bearer»); 2) is a way of functioning and expression of the legal force of the legal norms of this branch of law (acts as a form of law).

Subsidiary sources of criminal law. These are legal acts – laws and regulations (rules, regulations, instructions, etc.) belonging to the so-called regulatory branches of law: civil, economic, environmental, labor, etc., and in some cases also to the domain of public branches: administrative, financial law, etc. Each of these branches of law has its own special, inherent only to it subject and method of legal regulation, which are not directly related to the subject and method of criminal law. Consequently, these sources do not contain criminal-legal norms as such, do not establish the criminality and punishment of socially dangerous acts.

However, when establishing criminal-legal prohibitions and orders in criminal-law (and relevant major sources) that perform the protective function of various spheres of social relations regulated by certain regulatory branches of law, the legislator uses (so to speak, borrows) separate norms (or their elements: concepts, terms), which belong to the normative legal acts of the specified regulatory branches of law and are contained in subsidiary (in relation to criminal law) sources. On this basis, formate dispositions of criminal-law norms, which are the majority of the current Criminal Code of Ukraine, are formed. The peculiarity of such dispositions is that the norms of criminal law include the norms (or their elements) of other branches of law [12, 79–129]. At the same time, blanket norms of crimi-

nal law «assimilate» elements of other branches of law, «subordinate» them to themselves as auxiliary and use them for the fulfillment of the tasks of criminal law regulation. This, commonly, is carried out in determining the features of the signs of a socially dangerous act, the subject and the socially dangerous consequences of the crime, etc. Moreover, the specified norms (or their elements) of other branch are included in the content of criminal-legal norms only if they are explicitly stipulated in the law on criminal liability or clearly derive from its content in the interpretation. For example, rules of road safety or operation of transport (Article 286 of the CCU); rules of forensic medical assessment of the severity of bodily injuries (Articles 121 to 128 of the CCU); rules of environmental safety (Article 236 of the CCU); safety rules during execution of works with increased danger (Article 279 of the CCU); rules of the Border Guard Service (Article 419 of the CCU); rules for carrying out combat duty (Article 422 of the CCU), etc. But the criminal-legal norms of the main sources of criminal law in these cases do not lose their essence, content, and affiliation to this branch of law. They act as the norms of criminal law, contained in the main sources, when the norms of other branches of law, perform their «subsidiary» and «concretizing» functions, ensure the completeness and clarity of criminal law, which provides the law on criminal liability with greater dynamism, flexibility, conciseness, and completeness [13, 47–55].

Thus, interpretative acts, which provide an interpretation of criminal-legal norms cannot be recognized sources of criminal law. They only provide an explanation of their content, the determination of the scope and content of criminal-law regulation, defined in these norms. Based on this, it is impossible to define a decision of the Constitutional Court of Ukraine as a source of criminal law, which according to Art. 147 of the Constitution of Ukraine until recently, namely, until June 2, 2016, carried out an official interpretation of the laws of Ukraine, in particular, those belonging to the domain of criminal law, acting as its main sources. In this sense, there is no reason to recognize resolutions of the Plenum of the Supreme Court of Ukraine as sources of criminal law which provide separate explanations to the courts of general jurisdiction on matters of criminal law. The specified interpretative acts do not create, change or cancel norms of criminal law. They themselves do not establish criminal-law prohibitions or regulations, are not capable of generating, altering or abolishing these norms and the corresponding criminal-legal relations. Therefore, the actual carriers of these norms (and criminal law in general) are only their basic (primary) sources. At the same time, interpretative acts are essential to clarify the content of criminal-legal norms – their prohibitions and requirements established in relevant key sources, the measure of the scope and content of criminal law regulation, the correct application of criminal law. Therefore, the consideration of these interpreta-

tions and explanations is an important guarantee of the implementation of the principle of the rule of law and legality in criminal proceedings. In this case, the acts of the Constitutional Court of Ukraine concerning the interpretation of laws on criminal liability are their official interpretation, which was carried out on the basis of the Constitution of Ukraine. These decisions are always linked to a specific law and its norms, specify or detail their content, and therefore the use of these decisions (and references to them) is appropriate and necessary in the application of the relevant law on criminal liability as a source of criminal law.

Based on the above grounds, one cannot attribute acts of application of criminal law (law enforcement acts) to the sources of criminal law. Their essence lies in the implementation of the content of legal norms regarding specific subjects and life situations. They have a personified and specific procedural nature, legal significance for the relevant actors and are adopted on the basis of legal norms. As we can see, acts of criminal law, in particular, judicial decisions, by themselves, do not contain criminal law as such. In view of this, to recognize the sources of criminal law (in the strict sense of the word) the legal position (practice) of the ECHR set out in its decisions, as well as the decisions of the Supreme Court of Ukraine, adopted on the grounds provided in Art. 445 of the Criminal Procedure Code of Ukraine, concerning the unequal application by the court of the cassation instance of the same norms of the law of Ukraine on criminal liability for similar socially dangerous acts (except for the issues of imposing punishment, exemption from punishment and criminal liability), which led to various court decisions. These decisions are made on the basis and within the limits established by the norms of criminal law, the source, and form of existence of which is a law on criminal liability. These decisions do not contain, do not create or change the criminal law, but are a means of specifying and implementing the rules on criminal liability, which constitute the content of the norms of criminal law, defined in the law on criminal liability. Consequently, the said decisions cannot be recognized as a source of criminal law.

However, the legal positions of the ECHR and the Supreme Court of Ukraine, set forth in their decisions on criminal cases, are a form (and means) for the specification of criminal law, especially in cases where the latter in terms of generalization is too broad, is a kind of «means» for interpreting the law, orienting the judiciary practice on uniform and correct application of criminal legislation taking into account the fundamental principles of criminal law. Therefore, they become essential and should be considered when applying the norms of criminal law. In addition, these decisions are often grounds for improving the criminal law, making it de lege ferenda in accordance with the relevant changes and additions.

The proposed interpretation of the concept and types of sources of criminal law is essential for criminal-legal regula-

tion: in criminal law and in law enforcement activities. Thus, clear and complete notions about the sources of criminal law lead to a conclusion that their content is the norms of criminal law, which should be legally defined (fixed) in the normative legal act at the level of the law on criminal liability. Therefore, no other legal acts (except for the specified laws) cannot contain norms of criminal law, because they are not sources of this branch of law. Enforcement activities, especially the qualification of crimes, are closely linked to the definition of sources of criminal law – both the basic and subsidiary – as a clear operation and a precise reference to them. In establishing the existence of a crime in a socially dangerous act committed as a legal basis for criminal liability, the official applying the law must determine which norm of criminal law (its prohibition or prescription) is violated by this act and by what source of criminal law it is provided for. In other words, in such cases, the law enforcement act should specify not only the objective and subjective features of the committed socially dangerous act but also an article or part of the article of the Special Part (or clause of Article) of the Criminal Code of Ukraine – the main source of criminal law. Such an approach should also be taken in cases when the norm of criminal law relates to the use of subsidiary sources (with blanket disposition). The legal applicant should check the legal validity of these sources – the effect of their norms in space, time and in the list of applicable persons, to specify exactly what norm of another branch of law (law, instructions, regulations, rules of the statute, etc.) is violated in this case. The presence of such a violation relates to the statement of violation of the criminal law in general. Another approach would mean a possible mistake in the application of criminal law.

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SOCIAL ROLE OF CRIMINAL LAW

Summary. *Reveals the social role of criminal law in connection with the exercise of its functions. It emphasizes the need to correlate the function of criminal law with international standards to address social and economic problems and to promote the rule of law. It is alleged that the criminal law should provide for the possible crime, make recommendations to the legislator regarding the timely establishment of the criminal liability for acts that in the near or distant future, should be recognized as crimes.*

Key words: *criminal law, the function of criminal law, crime, the rule of law and society.*

Reforms in Ukraine and their imitation, which have been going on for 25 years, have led to radical changes in society, contributed to the emergence of a systemic crisis that covered the economy, the public sphere, banking, financial and foreign exchange markets. Poverty, injustice, and corruption have become the realities of our day. The situation is complicated due to deformed legal consciousness, low equality of the legal culture of the population, reduction of moral requirements in society. The consequence of these circumstances is unlawful conduct, crime, which poses a real threat to the socio-economic and political development of Ukraine. The need to eliminate such a threat makes modern science review the tasks and functions of the entire Ukrainian legal system, including one of the main branches of law – criminal law. The criminal law itself must directly protect life, health, rights, and freedoms of citizens, which is directly enshrined in the current criminal law of Ukraine.

Modern criminal legislation undergoes constant changes. At the same time, the process of combating crime is not always an offensive, it does not always outrun crime and take into account the previous experience, analyz-

ing the mistakes and shortcomings, deploying the countermeasures to eliminate them. Changes in legislation and law practice are extensive, quantitative. Substantial qualitative changes, forged with many years of domestic and foreign experience, are practically non-existent. Taking into account the realities of the modern world, criminal law should focus on international standards and international experience in combating crime. The success of such work largely depends on how well it will be carried out. The correct interpretation of such fundamental, basic concepts of the science of criminal law as the functions, aim, and objectives of criminal law play the key role in this process.

As is known, the functions of law as a social institute – are the key directions of the legal impact of the law on social relations, which reveals the essence and social purpose of law in public life. Functions of law are divided into social (often they are called social-general) and special legal.

Social functions of law express the role of law as a social regulator of relations in various spheres of social life. They directly reflect the significance of law for society as a whole. These are as follows: economic, political, cultural-historical, educational and social control functions.

Special legal functions of law determine the means and methods of regulation of social relations. Such functions are regulatory and security.

There are also functions of each of the branches of law. Accordingly, the functions of criminal law are objective, relatively stable, specific properties of this branch of law as the legal regulator of social relations, due to the peculiarities of the subject matter and the method of criminal-law regulation, which provide problem-solving opportunities of criminal law. The social role of criminal law manifests itself precisely in its functions. We can say that the functions of criminal law – is its mission in accordance with public needs. The criminal law carries out five main functions: guarding, regulating, preventive, educational and political. The last two at the same time are the general social functions of law. Some other functions that can be performed by criminal law, such as the function of ensuring justice, renewal, prognostic and others, are derived from the core functions.

The extent of implementation of each of these five main functions in a particular criminal law system depends on the subject matter of this system, which, in turn, is determined by the stage of the historical development of the legal system. Historically, the primary function is security, the implementation of the educational function is an indicator of the democratic nature of society.

The further development of criminal law does not exclude the theoretical possibility of the introduction of new functions, but the subject matter of these functions is unforeseeable at present time. Consequently, the basic functions of criminal law are relatively stable in their substance and are only to a small extent determined by the content of the particular historical system of law.

Therefore, the answer to the question of what functions does the modern criminal law of Ukraine perform coincides with the answer to the relevant question regarding criminal law functions in general. These are the above five main functions, as well as derivatives from them. The tasks of criminal law – are the imperatives, which are formulated and established in the form of norms of the criminal law by the legislator in the assumption that the observance of these imperatives ensures the achievement of the objectives of the criminal law. The system of criminal law objectives is hierarchical and is substantiated by its main goal, subordinated by the other lesser goals. The main objective of the criminal law of Ukraine at the present stage is the enforcement of the constitutionally established duty of the state, defined by Art. 3 of the Constitution of Ukraine, namely the establishment and safeguarding of human rights and freedoms.

The criminal law primarily carries out a protective function, it protects particular values and social relations, including those regulated by other branches of law.

No less important is the regulatory function. The basic regulation of social, political and economic processes in the country is carried out by other branches of law (constitutional, administrative, civil, economic, etc.), the criminal law promotes the development of social relations in a certain direction, according to policy of the state, prevents the emergence and ceases the existence of undesirable relations and phenomena.

The essence of the protective and regulatory functions of law taken separately is much broader than the subject matter of each of the general social functions since they are manifested in all areas of social reality within the scope of legal regulation.

The preventive function has two aspects: general and special crime prevention. The general prevention is implemented through the threat of punishment, this threat is addressed to all citizens. A special (separate) prevention is the prosecution, punishment, and enforcement of other criminal-law measures against the perpetrators.

Criminal law also carries out an educational function, promotes the development of legal awareness of the population. The educational function of the criminal law is aimed at forming in all citizens the belief that the commission of crimes is internally unacceptable.

The political function establishes that criminal law is the normative basis of the state's activity in the field of criminal-law policy. The strides or failures in the field of combating crime respectively increase or decrease the authority of the state power in general.

When talking about the functions of criminal law in the light of international standards, one should first turn to the recommendations of the United Nations (UN). The UN is a recognized center for coordinating international cooperation between states and international organizations in combating crime. The UN Congresses on Crime Prevention and Criminal Justice, which develop conceptual provisions aimed at improv-

ing national legislation and expanding cooperation between law enforcement agencies from different countries, play a special role in coordinating activities, formulating the international legal framework for combating crime, developing international standards in this area etc. The XIII United Nations Congress on Crime Prevention and Criminal Justice, held from April 12 to 19, 2015 in the capital city of Qatar, Doha City was no exception.

The main outcome of the forum was the Doha Declaration on the inclusion of crime prevention and criminal justice on a wider UN agenda to address social and economic issues and promote the rule of law at the national and international levels, as well as public participation [1]. In this declaration, the heads of state and government, ministers and representatives of the UN member states have declared their commitment to apply comprehensive approaches to combating crime, violence, corruption and terrorism in all its forms and manifestations, to adopt comprehensive and inclusive national strategies and programs in the area of crime prevention and criminal justice, which fully take into account the roots of crime, as well as the conditions relevant to its occurrence. The Declaration emphasizes that education for all children and young people, including the elimination of illiteracy, as well as raising public awareness, is a prerequisite for preventing crime and corruption and promoting a culture of law-abidingness that supports the rule of law and human rights respectful to all cultural identities. For this purpose, it is proposed to take a number of measures addressing a set of problems, including the issue of crime prevention, criminal justice and other aspects of the rule of law in the internal educational systems of the participating states.

Addressing the problem of terrorism, Congress participants expressed their concern over the scale of the activities of organized crime groups involved in terrorism, strongly condemned the spread of terrorism and violent extremism and called on states to cooperate at the regional and international levels, including cooperation in the field of law enforcement and the exchange of operational information for the purpose of combating terrorism in all its forms and manifestations, for observance of international norms in the field of human rights.

The attention of the participating states to such types of criminal behavior is not accidental. 2016 was rich in resonant events: the terrorist act on July 14 in Nice (France) killed about 90 people (the terrorist organization «ISIS» assumed responsibility for this terrorist act); On July 22, in Munich, an 18-year-old (of Iranian origin who had dual citizenship – Germany and Iran) attacked a mall, killing nine people, injuring another 20; Three militants of the terrorist group ISIS on July 23, 2016, in an Afghan capital, Kabul, committed a terrorist attack in which 80 people were killed, more than 230 injured; On December 19, a truck rampaged through a crowd of people at the Christmas Fair in Berlin (Germany). 12 people were

killed, more than 50 injured. According to The Washington Post, responsibility for the attack was also assumed by the terrorist organization of ISIS [2]. All this reaffirms the significance of immediate counteraction to such crimes.

The participating states of the Congress have expressed their urge to increase the capacity of national criminal justice systems, particularly, through: the renewal and strengthening of domestic legislation, the provision of the effective measures at the national and international levels to prevent the accumulation of resources by terrorist groups by ransom, the expansion of cooperation counteracting the threat of foreign terrorist militants, by preventing terrorist movement through and inside the United Nations' countries, as well as preventing the funding, mobilizing, recruiting and organizing foreign terrorist fighters; intensification of the efforts to ensure that any person involved in the financing, planning, preparation or execution of terrorist acts or in support of terrorist acts has been brought before a court in accordance with obligations under international law, as well as domestic law.

The declaration stated that the parties were obliged to take effective legislative, administrative and judicial measures to prevent, prosecute and punish all forms of torture and other cruel, inhuman or degrading treatment or punishment. It is emphasized that the eradication of impunity is of paramount importance.

Member States have recognized their responsibility for responding adequately to the threats that appear and change in relation to the crime that has become possible due to economic, social and technological progress. Accordingly, Member States seek to develop and implement comprehensive crime prevention and criminal justice responses, including those aimed at strengthening the capacity of the judiciary and law enforcement agencies, and, if necessary, take legislative and administrative measures to effectively prevent the emergence and shifting of the forms of crime and combat them at the national, regional and international levels. In this regard, first of all, to prevent and stop the criminal activity carried out with the help of the Internet; strengthen and apply comprehensive measures in the area of crime prevention and criminal justice in relation to the illicit trafficking of cultural property; to investigate more closely the links between urban crime and other manifestations of organized crime in some countries and regions, including gang crime, in order to expand social inclusion and employment opportunities for the social reintegration of adolescents and young people; take effective measures to prevent and tackle the serious problem of environmental crimes, such as the illegal circulation of wildlife, including flora and fauna; ensure that law enforcement and criminal justice authorities have special knowledge, experience, and technical capabilities to counteract emerging forms of crime, to provide these bodies with the necessary financial and structural support. The Member States established that new forms of transnational

organized crime may include smuggling of oil and petroleum products, illicit trafficking of precious metals and jewelry, illegal mining, counterfeiting of trademarked goods, illicit trafficking in human organs, blood and tissues, and as well as piracy and transnational organized crime at sea.

While discussing the strides and challenges of implementing integrated crime prevention and criminal justice policies and strategies to promote the rule of law at the national and international levels and support sustainable development, the participating states have defined the correlation between the rule of law and sustainable development. It was noted that the rule of law is simultaneously a result and an indispensable condition for the development process.

Almost all of these problems that were in the focus of the Congress participants are relevant to us as well. Currently, the problem of criminal legal action against corruption and fraud is particularly acute in Ukraine. Recently, the Washington Post has published an article stating that Western money helped the Ukrainian elites to avoid the implementation of further reforms, only to continue cleaning out, that «modest successes of economic reforms have been washed away by the impunity of the «tops» and lack of progress in the public service reforms» [3]. The global rating of Transparency International (non-governmental international organization for combating corruption) for 2016 has not yet been drawn up. In the ranking for 2015, Ukraine ranks 130th out of 168. Ukraine was recognized as the most corrupt country in Europe and Central Asia [4]. Currently, Ukraine has come to a dangerous edge, in which the absence of real day to day anti-corruption measures can lead to the collapse of the state or the illegitimate change in the state system.

No less important is terrorism. The survivability of terrorism and its dangers poses an increasing threat not only to the security of Ukraine but also to the whole world community because terrorism strikes at the very essence of the values that determine human existence: rights and freedoms, democracy, rule of law, stability. The term «terrorism» is used to denote many types of violent actions aimed at achieving economic, social, religious, political and other goals. The purpose of modern terrorism is the forcible change of state policy and the state system, as well as the discrediting of power in the eyes of one's own people and the world community; discrediting and suppressing the state's efforts to counteract crime; discrediting and disrupting the measures taken to address social and economic challenges, in establishing and strengthening a democratic system capable of integrating into the world community; the problem of material, moral and political harm to a person, society, the state.

The problem of terrorism in Ukraine has escalated since the beginning of the aggression by the Russian Federation in Crimea and eastern Ukraine. But these events are not always associated with terrorism. The term «terrorism» is not very popular in Europe when it comes to Ukraine. Usually, the other terms are

used: «separatism», «militia», «parties to the conflict», etc. Padraig Belton, a British journalist who works for the BBC and often visits the conflict zone, including the occupied territories, explains that the British media uses the term «terrorists» as a narrow definition: «This is actually a legal term. Whether to call someone like that or not – should be decided by a court – as with the term «killer» [5]. Probably this problem should be addressed not only by the court but also by the legislator.

In the 2015 annual report of the international non-governmental organization Amnesty International, a global attack on human rights and freedoms in Ukraine was proclaimed. The section on the situation in Ukraine focuses on investigations of crimes against Maidan, armed conflict, «prisoners of conscience,» freedom of expression (refers to media activities), LGBT rights and human rights violations in the Crimea. «The biggest problem in Ukraine is impunity. This applies both to war crimes committed by both sides of the conflict in the eastern part of the country, and to violations and abuses during Euromaidan,» said Tetiana Mazur, Amnesty International's Executive Director in Ukraine [6].

The issue of fraud and economic crime is very topical for Ukraine. Take the recent offshore scandal for example. On the 8 of June 2016, the European Parliament approved the creation of an investigative committee on the so-called «Panama Papers» that contain details of off-shore companies and their end beneficiaries. The committee will investigate possible violations of the EU legislation on combating money laundering and tax evasion. As you know, the results of a global investigation on the offshore companies and their beneficiaries were released on April 3, 2016. More than 400 journalists from around the world conducted investigations on behalf of an international consortium of investigative journalists. 12 current and former prominent politicians, more than 120 and 29 Forbes rated businessmen were found among the persons involved in the Panama Papers. The Papers also listed citizens of Ukraine, including officials [7].

The problem of illegal extraction of minerals was raised in the Congress as well. Currently, measures are being taken in Ukraine to minimize the illegal production of amber – a natural organic compound, fossil resin of coniferous trees used in the production of jewelry, perfumery, folk medicine and electricity. Moreover, the illegal extraction of amber has reached such proportions that in order to combat this phenomenon in the Rivne region the National Guard, and in Zhytomyr region – special police units had to be used.

The changes in the legislation of modern Ukraine are often slow and they do not always reach the desired result. The changes, which worsen the crime situation in the country do not contribute to increasing the authority of state power. In November 2015, the Verkhovna Rada of Ukraine adopted the law initiated by an MP Nadiia Savchenko, which provides for the counting of one day of pre-trial detention for two

days of actual imprisonment. By mid-November 2016, 8,500 people were released under the Savchenko Act, and every tenth of them was convicted for committing grave crimes. The liberated have supplemented the already huge army of the unemployed. In Ukraine, as of December 16, 2016, 337.9 thousand unemployed persons (without taking into account the temporarily occupied territory of the Autonomous Republic of Crimea, the city of Sevastopol and part of the zone of the anti-terrorist operation) were officially registered [8]. According to the National Police, 941 people released under this law were re-arrested, and 403 of them were sent back to jail. At the same time, the Verkhovna Rada has already failed two bills amending this law [9]. The political function of criminal law, in this case, is executed with a largely negative impact.

I would like to note that domestic scientists have long insisted on the adoption in Ukraine of the law on criminological expertise. The draft law was created and submitted to the Verkhovna Rada 20 years ago, but it has not been adopted yet. If such a law was adopted, there would probably be no such miscalculations brought by the «Savchenko Act». By the way, the corresponding laws are active in Belarus, even in Russia today.

It must be recognized that the problem of the growth of crime arose not only because the prisoners were released ahead of time, but also because there are no conditions for the re-socialization of convicts in modern Ukraine. Last year the Verkhovna Rada adopted the Law of Ukraine «On Probation» [10]. Probation is a system of supervisory and socio-educational measures that are used by the court and according to the law to convicts, the execution of certain types of criminal punishment, which is not related to imprisonment, and providing the court with information characterizing the accused. The law provides for a series of measures aimed at behavior correcting the convicts and preventing them from repeating criminal offenses. This law should have been a step in the area of alignment of Ukraine's justice to international standards and the introduction of a fundamentally new system of criminal-law measures designed primarily to ensure the safety of society. But in reality, this law does not work as intended since testing programs are not being developed.

There are some changes in the structure of the state machine as well. It should be noted that, during the reform of the law enforcement agencies, the system of educational institutions that trained specialists for law enforcement agencies was almost completely obliterated in Ukraine. As a result, those who are obliged to protect the law, firstly, the police, have the appropriate professional training only if they had graduated a special school and acquired the profession of a lawyer before the reform of the Ministry of Internal Affairs of Ukraine. If not, a policeman, instead of being a professional, turns out to be essentially a «political figure» that embodies the «existing power» but is unable to protect human rights and free-

doms. Thus, while declaring the respect for European values, Ukrainian state makes it virtually impossible to achieve those in real life.

More and more calls to arms and engagement in radical people's self-defense can be heard in Ukraine recently, essentially bringing up lynching. Such a call often happens when the state cannot or does not want to protect its citizens. People do not believe that the perpetrator will be punished because they observe «double standards», «selective» justice, impunity for serious crimes for some, and cruel punishment for others for any trifle daily. The political will of the authorities and the laws that implement it, people who are willing and able to enforce these laws and our civic activity is all we need for the reform of our criminal justice.

Thus, criminal law is intended to perform not only specific branch functions, but also general social ones. Only in this case will it fulfill its social purpose. At the same time, criminal law should predict possible crimes, make recommendations to the legislator on the timely establishment of criminal liability for acts that in the near or distant future should be recognized as crimes. Society can, if not prevent, at least mitigate negative changes. The question arises regarding the latter: can a crime be foreseen? The answer to this question was sought by many scientists. The worthy opinion of the German professor, sociologist, economist and researcher of the genocide, Gunnar Heinsohn was substantiated in 2003 in his book «Sons and World Power: Terror in the Rise and Fall of Nations». G. Heinsohn warned: one of the main threats to the West in the first quarter of the nineteenth century is the so-called «demographic priority of youth» in the Middle East and sub-Saharan Africa (more than 20 percent of the population are young people aged 15–24). This contrasts with the priority of working-age people in East Asia and Latin America, the priority of elderly people in Japan and Europe. For only five generations (1900-2000), the population in the Muslim world has grown from 150 million to 1200 million, that is, more than 800 percent. G. Heinsohn explains the phenomenon that generates (at first glance) an unpredictable and obscure wave of terrorism and violence that is destroying the world today, calling it a «malignant demographic priority of youth.» Violence is a predictable and inevitable result in those cases where young people live in an overpopulated society where they present claims to society since they understand that they are not able to fulfill their needs.

This was the main reason why the immigrants from the Arab-African world flooded Europe in recent years. The full inflation of the «youth bubble» (worded by Gunnar Heinsohn) will hit Africa and the Middle East until 2025. The global threat that it will create over the next few decades can make the XXI century even more bloody than the 20th century. The professor writes: «The surplus of young people almost always leads to bloodshed and to the creation or destruction of empires. The tendency of violence increases in those societies

where youths aged 15–29 make up more than 30 percent of the general population. It is not essential, in the name of what the violence is spilled: religion, nationalism, Marxism, fascism … The main thing is the surplus of youth. The very powder barrel with only a match being absent» [11]. This is despite the fact that young people are willing to accept an ideology that forgives and frees it from any responsibility. G. Heinsohn believes that the prospects of the «Old World» are dismal. By the middle of the century, Europe will be buried under the wave of refugees from the East [12]. By 2040, according to demographers' forecasts, half of the Earth's population under the age of 25 will consist of Africans. The old world will surrender this gigantic army without a single shot fired… In order to halt the rapid flow of refugees, Guinness Heinsohn proposes to urgently withdraw the financial assistance they receive as the general welfare of migrants while being a grave burden on the state budget.

One can unequivocally agree with G. Heinsohn's theory when it comes to the young people of the Arab and African world who remain in their countries of residence. But if they migrate to Europe, they fall into countries where the overwhelming majority of the population are elderly people. Why do they show aggression not only in their homeland but also in Europe, where they seem to be able to realize their interests? Apparently, the point is that their worldview was formed under the conditions described by G. Heinsohn. Consequently, the worldview formed in childhood and adolescence determines human behavior in the future, when the change in the conditions of his existence or social environment cannot significantly affect this outlook.

Most of our people are elderly people, their outlook was formed in a totalitarian regime. But it comes as even worse when it comes to youth: young people's consciousness was formed in the conditions of corruption, contempt for a human being, the inability to legitimately implement their interests. Therefore, consciousness, including legal consciousness, is deformed. This means that both cannot reasonably dispose of the unlimited freedom that they are promised during each election campaign. Aggression and violence are inevitable here. This circumstance should be considered by the legislator when it determines criminal acts that constitute a crime. It is necessary to expand the list of such acts. This will facilitate both the deterrence of crime within certain limits and the creation of conditions for the realization of freedom by everyone, including the potential aggressor.

Thus, the crime must be prognosed for, predicted. The magnitude of the problems of criminal legal counteraction to crime, the dynamism of the situation, the diversity of processes and phenomena associated with the reproduction of crime and its manifestations in social life, determine the relevance of the comprehensive forecasting of the situation. Without this it is impossible to achieve accuracy and timeliness in defining goals and objectives in the field of combating crime, their relation-

ship, and priorities; it is impossible to establish the necessary amount and intensity of measures of prevention, criminal law, penitentiary, as well as criminal-political influence on crime. The urgency of forecasting in the field of combating crime is substantiated by, firstly, a pronounced social need for improvement of the criminal-law, penitentiary and criminal-procedural foundations of combating crime; and secondly, it became apparent that the current scale of crime determines the creation of a state system for comprehensive monitoring, analysis, and forecasting in the field of crime prevention.

Crime, being a product of the life of society as a whole, is a socially mediated phenomenon that contains the socially dangerous consequences for it. The social genesis of crime allows us to make another methodological conclusion, according to which crime as a social phenomenon is one of the characteristics of the state of society at a historical stage of its development. However, the simple declaration of the principle of the social predisposition of crime does not provide for the clear explanation on the existing differences in crime, which are manifested through a variety multidimensional phenomenon. The conflict between human personality and «inhuman» social order has many prerequisites. Not every person can reasonably dispose of his freedom, therefore, in the pursuit of freedom and equality for all, it is necessary to remember the consequences, first and foremost, of a law-abiding person who, in a free society, often becomes a victim.

Criminal law plays a necessary, yet subordinate role in the field of combating crime. Political, economic and social reforms and measures that increase the standard of living of the population, the level of education and medical services, that promote the development of culture in the country, which raise the level of public morality, social protection of the population, opportunities for action – these are the crucial ones in preventing and reducing the number of crimes. Society can protect itself from offenders not because of their isolation with the help of repressive institutions, but by eliminating, blocking the causes of unlawful behavior.

Society stands for stability and order. Fear of the future generates uncertainty, loss of social guidance. Under such conditions, the law must become a dominant factor in the stabilization of social development. Legal science, including the science of criminal law, must clearly formulate the notion of the role of law in the management of society. The impact of the legal factor in the stabilization processes in society is determined, on the one hand, by the quality of the current normative legal acts, and, on the other hand, by the moral and ethical attitude of the society towards the law. Law can be regarded as a value that is designed to form new ideals of public consciousness of the population, and as a means of transferring the will of power, aimed at the formation of social order. A new social order requires a new paradigm of criminal law, where the key to the dynamics of its development should be based on empirical

knowledge of the crime. At the same time, it is necessary to consider the dynamics of the historical time of the development of social processes that have almost reached their limit of one generation, that is, forty-five years. Scientific and technological progress and new technologies have changed almost radically over the course of ten years. According to Academician S. Kapitsa, many of the hardships we are experiencing now are unexpected occurrences of the transitional period. Our morals, social settings, values have adapted to the tempo of development that has not changed for centuries, and now it is in constant dynamic change [13]. All of us are still under the influence of such living systems, while reality requires constant changes, which would not only have managed but also envisaged the development of social processes.

Consequently, a high level of legal consciousness of people, constituting the so-called ruling elite, is a necessary condition for solving the problem of increasing the role of law in society. The government establishes certain rules of conduct that members of society must follow under the threat of adverse consequences. At the same time, the authorities need to make the necessary steps in order to build the population's respect for the law, so that the moral value of law would be recognized by each and every one. In the absence of stability both in society and in the state, it is the state that must fulfill the role of such an organizing force that is called upon to protect and express the interests of the whole society and of every person. It is no accident that the XIII United Nations Congress on Crime Prevention and Criminal Justice noted that sustainable development and the rule of law are closely interrelated and mutually reinforcing. It is the state that must regulate social processes based on the rule of law to ensure the sustainable functioning and development of society.

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THE PROBLEMS OF DETERMINING THE LEGITIMATE CRITERIA FOR A LONG-TERM SEARCH

Annotation: The article deals with the topical for today's law enforcement practice problems connected with determining the legitimate criteria for a long-term search. The focus on the problems is defined by a significant increase in the number of long-term searches conducted within preliminary investigations of crimes committed in the sphere of economy, so-called «computer crimes» at large enterprises, industrial premises, logistics centers, warehouses, offices of financial institutions, customs terminals, food and consumer goods market places, etc. At the same time, the law does not contain instructions on the specifics of carrying out such kind of searches and the order of their recording in the protocol. The necessity to ensure the legality of long-term searches, as well as the rights and legitimate interests of citizens have stipulated the development of criteria, the conformity of which gives grounds to consider the search lawful and to use its results as evidence in the criminal case.

Key words: preliminary investigation, investigative procedure, search, long-term search, protocol of investigative procedure.

The search is one of the investigative actions, the procedural order and tactics of which, as a rule, do not cause special difficulties for law enforcement officials. Scientists long ago developed recommendations, considering and following which investigators and prosecutors can legitimately conduct a search, observing the rights and legitimate interests of the searched and other present persons, in order to find the material that can later be used as evidence and can become the basis for the verdict. However, the changing

socio-economic conditions of life, technological progress, new inventions, and qualitatively changed criminality have created new problems for investigators and prosecutors.

One of these problems is the length of the search. The fact is that recently in law enforcement practice there has appeared a tendency to increase the number of lengthy searches. Such searches are mainly carried out during the preliminary (pre-trial) investigation of crimes committed in the sphere of economic activity, the so-called «computer crime». Long-term searches may be caused by the need to find items concealed from accounting in a rather large warehouse area, or documents showing or confirming the performance of financial and business operations related to accounting and payment of taxes or other objects with the help of which the crime has been committed and concealed (seals, stamps, forms of documents, etc.); letters, diaries, unofficial documentation, draft notes and other documents relevant to criminal proceedings, disclosure of the committed crime, and identification of perpetrators. Expansion of the field of application of modern information technologies is connected with the fact that information on illegal financial transactions, databases, electronic correspondence, and information prohibited for dissemination by law, software used for committing crimes, etc. may be contained on electronic media. All this complicates the conduct of searches, prolongs the time of their carrying out significantly.

Legal literature study makes us think that even 10, 20 years ago, when economic relations and technological progress were not so developed, scientists mainly focused their attention on the development of recommendations concerning the procedural order and the tactical and psychological bases of the search. The question of the length of the search was only discussed in connection with the human rights, possibility of a search at night and tactical peculiarities of determining the time of its conduct.

In particular, Professor A. R. Ratinov suggested that the search should be carried out mainly in the early morning from 6 am to 9 am[1]. I. L. Bednyakov, summarizing the practice of conducting 224 searches, gave such data: from 6 to 9 a.m. 15 searches (6.7%) were conducted; from 6 to 10 p.m. – 37 searches (16.5%). The scientist came to the conclusion that the investigators were guided rather by reasoning of their own convenience, than taking into account the factor of surprise[2]]. In this example, however, we deal with short-term searches. If there is a necessity to conduct a lengthier search that can last 5, 8 or even more than 20 days, law enforcement officers face problems not only of organizational and tactical character, but they also need instructions as

[1] Ратинов А. Р. Обыск и выемка: монография / А. Р. Ратинов. – М.: Госюриздат, 1961. – С. 47.

[2] Бедняков И. Л. Обыск: проблемы эффективности и доказательственного значения: монография / И. Л. Бедняков. – М.: Юрлитинформ, 2010. – С. 99.

for proper procedural formalities, possibility of a break during the search, etc.

Undoubtedly, long-term searches are not so frequent both in the investigative practice of Ukraine and the Republic of Belarus. However, Ukraine's law enforcement practice faced with an unprecedented case when an investigator was searching the premises for 24 days (from August 7 to August 30). In this case, the investigative action was started at 8 o'clock a.m. and stopped at approximately 12 p.m. every day. At night, the room was locked, sealed and guarded. The investigators did not report about the breaks during the search in the protocol. In connection with the unjustified duration of the investigation, violation of all reasonable time, improper recording in the protocol, repeated «penetration» of the investigator into the premises where the search was conducted (which is prohibited by Article 235 of the Code of Criminal Procedure of Ukraine), the prosecutor in the Unified Register of Pre-Trial Investigations (ERDR) represented the information about the offense, committed by the investigator provided by Part 1 of Article 162 of the Criminal Code of Ukraine «Violation of the inviolability of housing» and initiated a pre-trial investigation.

In order to solve the problem, in our opinion, it is necessary to answer a number of practical questions: should the search be a continuous investigative procedure, what is its maximum duration, is it possible to take breaks during a long-term search, how to record them in the protocol, how to determine the objectively necessary time for carrying out a search, as in each specific situation it is an assessed concept?

Professor A. R. Ratinov once noted that the search, as a rule, is a continuous investigative procedure, and therefore it can be very long. Lengthy searches, conducted in two, three or even five days have been outlined by jurisprudence. In these cases, the person conducting the search faces a serious problem of organizing his work on the spot[1]. Thus, we can conclude that the investigator should predict the approximate duration of the search, foresee it, as he carefully prepares for carrying out this complex investigative procedure, collects guidance information, applies with a petition to the investigating judge (Articles 234–236 of the Code of Criminal Procedure of Ukraine) or after the sanction to the prosecutor (clause 14, part 5, Article 34 of the Criminal Procedure Code of the Republic of Belarus), plans tactics of conducting a search, chooses a specific time. Such a planning will allow the investigator to take organizational and tactical measures aimed at preventing an unjustified delay in the investigative procedure.

Legal literature gives a point of view of some researchers that if there is a need for a lengthy search in premises with a large area, production facilities, workshops, workshops, warehouses, offices and administrative offices, offices of credit and financial institutions, customs terminals, bank vaults and de-

[1] Ратинов А. Р. Обыск и выемка: монография / А. Р. Ратинов. – М.: Госюриздат, 1961. – С. 48.

positories, food and consumer goods market places, supermarkets, shops, searches of large vehicles (road trains, convoys, sea and river vessels), it is advisable to conduct a search in the form of a special operation. The essence of such a search is that it is a specific form of organization and conduct of an investigative procedure that is characterized by a large number of subjects and is associated with the collection and research on a large territory of numerous objects that carry criminally significant information[1].

In order to conduct a complex search quickly, it is expedient to create investigative and investigative-operational groups. This is usually the case for law enforcement practice. However, it is not always possible to predict in advance the actual need for such groups. The search may be delayed due to objective circumstances that suddenly arise.

At the same time, we emphasize that professor A. R. Ratinov notes that the search is a continuous investigative procedure, as a rule. Thus, the scientist points out that a situation where the investigator can and should make a break during the search is quite possible in the investigative procedure. «Many hours of search should be accompanied by breaks for rest and food. At the same time, it is necessary to ensure the security of the place of search and monitoring of the searched persons in order to exclude the possibility of concealment»[2]. A. A. Levi and A. I. Mikhailov, supporting the view of the well-known criminalist, noted in this connection that the success of the search depends to a large extent on the correct assessment, when it should be done, at what time to start, and how long (approximately) it can last. With long-term searches, breaks for rest and food are possible[3].

As it is known, the law provides that the protocol of the investigative procedure indicates the place and date of its carrying out, the time of its beginning and termination to the minute, the position and surname of the person who has made the report, and the surname, first and patronymic name of each person participating in the investigative procedure, and, if necessary, his address and other personal data. The protocol also sets out the actions in the order they take place, the circumstances revealed and relevant for the case, as well as the statements of the persons who participated in the investigation (Article 104 of the Criminal Procedure Code of Ukraine, Article 193, part 2, article 212 CCP of the Republic of Belarus). In our opinion, the lack of instructions in the criminal procedural laws on the maximum duration of the search, the rules for fixing breaks in the time-sheet, the possibility of stopping the search dur-

[1] Россинский С. Б. Обыск в форме специальной операции: учебное пособие для вузов / С. Б. Россинский. – М.: Юнити-Дана, Закон и право, 2003. – С. 11.

[2] Ратинов А. Р. Обыск и выемка: монография / А. Р. Ратинов. – М.: Госюриздат, 1961. – С. 49.

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ing its conduct, is a special silence of the legislator who, having no opportunity to provide for all the variety of investigative situations, trusts the investigator, who takes into account the specific circumstances, to ensure not only the legality of its conduct, but also the legality of recording the course of the investigative procedure.

Legal practice knows the cases of forced many-hour breaks during the search, when the investigator encounters opposition from the owner of the office or warehouse premises where the search is being conducted. Such breaks can be made due to power outages, lighting and the impossibility in this connection to examine computer equipment and to carry out the search generally. The investigator has to be distracted to solve organizational issues, in particular, to provide the area with lighting, electric energy, to take measures to safeguard information, etc. Breaks are also possible due to the need to bring a specialist to the scene of the investigative procedure as well as the necessary technical means, instruments, etc., if the investigator has not predicted the investigative situation in advance or it arises unexpectedly.

It seems that if it is necessary to conduct a lengthy search, the investigation team has not been created, and then breaks while carrying out the investigative procedure are possible. They should not necessarily become part of searches but can be caused by need. It should also be added that during the lasting investigative procedure, it is essential to provide the opportunity for the rest of witnesses, specialists, other persons participating in the investigative procedure, or those present at its conduct.

The Criminal Procedural Code of Ukraine as well as the Code of Criminal Procedure of Belarus does not restrict the conduct of a search by a certain time of period, as it is done, for example, for questioning (Part 2, Article 224 of the Criminal Procedure Code of Ukraine, Part 2, Article 215 of the Criminal Procedure Code of the Republic of Belarus). In addition, Part 5 of Article 236 of the Code of Criminal Procedure of Ukraine contains a requirement that «The search on the basis of the decision of the investigating judge must be conducted to the extent necessary to achieve the purpose of the search.» Thus, the legislator gives the law enforcement official the opportunity to decide that the investigative procedure may be, in particular, long-term. This depends on many factors: the size of the area where the search will be conducted; the volume of documents; the number of employees participating in the conduct of this investigative procedure, etc.

Undoubtedly, it is unacceptable to delay the search intentionally. We must not forget that the search violates the course of normal life on the searched object, entails serious inconveniences for citizens, and sometimes blocks the financial activity of the enterprise. However, the shortening of the search time should not take place at the expense of haste and not at the expense of completeness and thoroughness of the search, but due to the

planned and correct organization of the search[1].

Consistently recording the actions in the protocol, the investigator should indicate the time of a break, short-term or connected with the night time, fixing the exact time of breaks. In addition, the investigator should declare to the persons participating in the conduct of the investigative procedure, and all the present as well, that the investigative procedure is not completed, it is only a break in the course of its conduct. At the same time, the investigator is to take measures to protect the premises in order to exclude the possibility of penetration into it and concealment of the items being searched for. After achieving the aim of the search or its completion, the investigator informs the participants of the investigative procedure that the search is over. A copy of the search protocol in accordance with the law is to be handed to the person in whose premises the search was carried out (Part 4, Article 212 of the Criminal Procedure Code of the Republic of Belarus).

Summarizing, it can be stated that the conduct of a lasting search does not contradict the criminal procedural legislation, provided that the following conditions are observed:

1) existence of legal and factual grounds for conducting the search;

2) the activity of the investigator during the conduct of the investigative procedure;

3) absence of abuse of the procedural rights by the investigator;

4) enforcement of rights and legitimate interests of persons whom the search may concern;

5) observance of reasonable terms for carrying out the investigative action, the criteria of which are contained in the judgments of the European Court of Human Rights, and also specified in the legislation of some countries. For example, in Article 28 of the Criminal Procedure Code of Ukraine it is provided that the criteria for determining the reasonableness of the terms of criminal proceedings are: a) the complexity of criminal proceedings, which is determined by the number of suspects, accused and crimes for which criminal proceedings are being carried out, the scope and specificity of the procedural steps necessary to carry out pre-trial investigation, etc. .; b) the behavior of participants in criminal proceedings; c) the manner in which the investigator, the prosecutor and the court exercise their powers.

6) legality of registration (recording) of the conduct of the investigative procedure.

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CRIMINAL CODE DRAFTING METHODOLOGY

Summary. *A joint concept of criminal responsibility creation that constitutes mutual rights and obligations between state (legality and justice), offender (punishment), victims (fair treatment) and third persons (cognitive control) on crime commission is analyzed as a basis for Criminalization methodology. It is stressed that harmony between actors and mutual legal and contractual responsibility should be analyzed in common while forecasting a new dangerous behavior to criminalize.*

Key words: criminal responsibility, crime, criminalization, criminal policy.

Overall objectives: Drafting Byzantium Criminal Code Theoretical approach. Noting that Byzantium legal family differs from Roman-German by its relationships with the Rule of Law and Justice one should point out that new Criminal law is a fundamental tool to protect human rights. New Criminal Code Draft creation needs to understand how global and regional imbalances and conflicts affected the Rule of Law. To understand how stable Criminal legal form has to be in a dissonance with developing public and social relations and processes one should challenge social control schemes from the field of State, perpetrator, victim and civil society attitudes.

It is the fact that the diversification of Criminal law enforcement understanding at the auspices of civil society cognitive mood, unifying sustainable or global development, has a chance to be resulted in a situation when political union or party assumes the right to abuse opponents, forming armed groups, with a tolerance of local restrictions on the freedom of movement that, as a basis for the right to revolt during the revolution, undermining the idea of the legitimacy of power and widespreading corruptive practices in the transitive development period.

Global and regional, political, social and cultural imbalances and conflicts, communication stuffing affecting the Rule of Law, disorganize it and create a situation where essentially stable Criminal legal form has to be in a dissonance with developing public and social relations and processes.

The notion of criminal law differs at the levels of citizens, media, social groups and networks and law enforcement officials.

Moreover, it differs between victims and perpetrators, civil society and the State, media and social networks at post-truth society. The aim of this issue is to develop on abovementioned background a theoretical model of New Criminal Code.

Formulating theoretical contemporary methodology of legal dynamics analysis and comparative approach. In modern social democratic societies Criminal justice system reflects organizing and stimulating role of deviations control. The concept is quite simple: criminal justice shows the transition from absolute forms of public-law relationships to postmodern approach of nowadays with holistic system that essentially based on human rights primacy concept and basic human values landscape protection ideology[1].

«Justice» was identified with the understanding of truth and justice. Now this extends to post truth concept of misuse of law erosive interpretation. Moreover, it gives theoretical background to mass misuses and abuses of Criminal law reflecting corruptive practices and political interests, peoples' attitudes, communicative and religion values. «Color revolutions» misuses and terrorist states' abuse through Criminal law formation approach are of the same scheme: Criminal Law ensured crime trends prevention determined more by political interests and processes than by the true needs of society. That is connected with certain processes.

First, the actual destruction of normative tensions of criminal-law institutes is not an appropriate consequence of the influence of the postmodern philosophy of the 21st century. It was just a catalyst. The principle of additionality in state regulation, the virtuality of the hierarchy and the unlimited possibilities of non-criminal response to deviation, led to a significant reduction of the force of criminal law. Criminality is becoming more latent, its combatting – highly ideologized. So, since 2014, certain types of crime (in particular violent, juvenile delinquency), according to statistics, are constantly decreasing in Ukraine, but the population's fear of crime is on the contrary increasing. We are told about the decrease of homicides but not informed about rapid increase of violent deaths. The significant difference between victimization and state reaction is offset by routine preventive measures (more street robberies – less going out on the street). The purely preventive function of the new law enforcement agencies is replaced by the ceremonial functions of the post-truth society (civil servants).

Secondly, in the post-truth situation, there is a certain positive development in society, as it opposes the development of healthy forces of civil society. True, in this way we (the whole world) faced with another problem. Network communication and other types of communications have led to information explosion and neglect while filtering in-

[1] Креативність загальнотеоретичної юриспруденції – О.: Юрид. літ., 2015 – С.13.

formation. The recipient focuses on its own platform, which has its own rights and its sanctions, its values and priorities, which do not always (sometimes) do not coincide with the national ones. People generally have a rather typical deviant action, especially when this action is supported / catalyzed by the reference group. Along with this modern methodology of metamodern involves the synergy of the individual components of a certain phenomenon, interaction and the transition of each other attitudes.

In times of transitivity of the ideologies of criminal law in the countries of common and continental law, when convergence of meaning becomes a central component, we see the emergence of a precedent in Europe and statutory law in America.

The world is becoming more uniform on the surface and more fragmented in real sovereign politics. Hence, the benefits of criminal-law regulation in the balance of state legitimation of the prohibition of the past are replaced by the spread of disciplinary practices and abuse of power.

In this regard, modern Criminal law is a tool to enforce policy shift from obsolete forms of social relationships to the new legal framework of public government and society. It is more dynamic and flexible, it is in constantly change and contributes to breaking the legal forms and outdated stereotypes at the same time.

The doctrine of crime and punishment is complemented by a separate misconduct simulacrum, developing the idea of municipal Criminal law that blurs the field deviations, from one side, and transitional and Integrative Criminal law from other side.

Unity and sovereignty mode is changed to the legality of International Criminal law virtual relationships, where the production of certain types of Criminal offenses is given to international society's universal jurisdiction scheme.

However, the last creates the possibility of non-governmental transnational authorities and other supra-national actors influence on local legislative level by protection of their own interests.

So, Criminal norms in Transition countries should be analyzed, interpreted and constructed from the point of view of international societies, governments, local experts, law obedient citizens, law enforcement professionals and judiciary, victims of crime and perpetrators.

We argue that complex holistic approach based on mutual recognition of all parties' rights and obligations should give positive effort in combatting crime and new law constructing. Thus, new criminal legislation structure and its theoretical background based on multidisciplinary matrix approach had to be analyzed and formulated on different than Western European Transitional approach.

From our point of view, *criminal responsibility constitutes mutual rights and obligations between state (legality and justice), offender (punishment), victims (fair treatment) and third persons (cognitive control) on crime com-*

mission. Mutual rights mean that one should construct criminal norms in order to effectively modify forbidden human behavior only respecting all actors needs.

It seems that we have not to make a choice between the law in force, the law in media, the law in minds, and the law in communications, but to find out a common portrait of Criminal law system in Byzantian (Slavic), Common Law, Roman, German, Scandinavian, Muslim, Customary and Mixed Law families in comparison with International Criminal Law Model via all these faces of Criminal Law.

Primary activities to be carried out while programming Criminal Code Draft are including:

1. Formulating Human rights oriented theoretical approach of Criminal law means (concepts of legality, crime and punishment)

2. Comparative analysis of modern legal families through common indicators (concepts of legality, crime and punishment)

3. Structural analysis of state, social, communicative and cognitive approach to criminal law's common indicators (dimensional approach).

4. Formulating the Theoretical Matrix as a tool for Law Constructing (dynamic model).

5. Preparing of Questionnaires through common indicators cognitive understanding (pilot survey).

6. Developing Common Part of Criminal Code of Ukraine Draft through above mentioned theoretical approach.

7. Preparing a Theoretical Bilingual Model of CCU Draft

8. Conducting survey (academia, law enforcement officers, politicians, members of the bar, judges, perpetrators, members of criminals' families, victims of crime, householders).

9. Interpreting the Analysis.

10. Preparing a unified drafting mechanism for criminal legislation.

11. Preparing a new cognitive CCU Common Part Draft.

Formulating Human rights oriented theoretical approach of Criminal law concept should be based on comparative research of human rights generations' comparison with table of crimes gravity. So, we could construct a ladder of human rights due to their significance, i.e.:

1. The right to life (incl. The Right to life, the Right to privacy, Prohibition of torture and inhuman or degrading punishments, Prohibition of slavery and forced labor). 2. Freedom and security of a person and the Right to a fair trial. 3. The right to property of the person or of a legal person. 4. Freedom of mind, of thought and religion. 5. Freedom of expression and information. 6. Freedom to free elections.

2.The right to be employed in just and favorable condition, right to education, learning, rights to food, housing and health care, to social security, to unemployment benefits.

3. Group and collective rights, the Right to self-determination, the Right to economic and social development, the Right to a healthy environment, the Right to natural resources, the Right to communicate and communication

rights, the Right to participation in cultural heritage, Rights to intergenerational equity and sustainability, the right of sexual minorities, ethnic, religious, etc.

4. Rights of future generations.

After that one should compare table of crimes gravity with the abovementioned ladder to define the «points of power», where state and legislators' opinion corresponds international standards. The same should be done with the help of social polls to these points, verified by state officials, victims, perpetrators and civil society.

Expected outcomes and impact. Harmonization of national legislation, the development of universal mechanisms of control over new kinds of criminal practices, unification of sanctions and the system of criminal legal response in the system of interstate formations on ordinary crimes and crimes with higher expectancy of being organized will have to be done due to sustainable development model. For this reason, future Criminal laws should be deprived of politicking opportunities. It is obvious that the effectiveness of the law is not only connected with the consistency of its fundamental human rights and freedoms aim to protect, but also with legist formal definition of norms and principles reeducated and approximated on international supranational, national, group and individual levels of Criminal law understanding.

Today, however, the need to create and design a new model of Criminal legal relations in the holistic triad of «offender-victim-state» based on the basis of public-law changes and the primacy of human rights, is necessary to recognize.

A joint concept of criminal responsibility creation that constitutes mutual rights and obligations between state (legality and justice), offender (punishment), victims (fair treatment) and third persons (cognitive control) on crime commission. Mutual rights mean that one should construct criminal norms in order to effectively modify forbidden human behavior only respecting all actors' attitudes and needs. The second point of interest is connected with the development of contemporary methodology analysis based on multipolar understanding of criminal norms and usage of such Dimensional Matrix while constructing disciplinary and criminal punitive norms.

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MODERN APPROACHES TO THE DEFINITION OF LAW BRANCHES NAMES, WHICH REGULATE THE EXECUTION OF THE PUNISHMENT IN UKRAINE

The article analyzes different approaches to the definition of law branches names, which regulate the execution of the punishment in Ukraine. It was proved that the use of the term «penal law» is impractical and unreasonable. It is noted that a presumption of understanding Criminal Executive law in natural law provides grounds for the assertion of the possibility of broad interpretation.

Key words: Criminal Executive law, Penal law, Criminal Executive legislation.

The problem statement. The desire to introduce some cosmetic changes in legislation sometimes pushes scientists and practitioners in an attempt to substitute the term «Criminal Executive law another term – «Penal law». Without going into the debate on the definition of the content of last category, we consider it necessary to note that such innovations are very dangerous and do not reflect the essence of the real needs basic knowledge of science categories.

In particular, practitioners evoke that they are serving it in the Penitentiary service, and the system has a name – the Penitentiary, cadets and students of specialized educational institutions are taught in courses like «Theory of Penitentiary», «History and the Theory of Penitentiary», «Penal law». There are theses «Staffing of the penitentiary system in Ukraine», «Legal problems of reforming the Penitentiary system», a monograph on the Ukrainian «Penitentiary science» and so on.

It is alleged that the prison department name change is only a question of terminology, the practical value of

which should not be exaggerated, and some scientists refer that the statutory (or rather – «legalization») the term «Penitentiary» Decrees of the President of Ukraine for 2010–2011 is starting to recognize the existence of penal science as a separate branch of scientific knowledge[1].

Such transformation Criminal Executive law in the Penitentiary, in our view, requires detailed analysis of the arguments that are supporters of the modern understanding changes the name of law, which regulates the process of execution of punishment. This issue is devoted to our article.

Literature review and the research statement. The term «Penal law» occupies a central place in the scientific knowledge of penal procedure, to determine the content of the concept and therefore always caused heated discussion representatives of science. The concept of «Penitentiary law» began actively discussed only in recent years, although the foundations that were laid by the Kiev school back in the mid 90's, before the adoption of the Criminal Executive Code of Ukraine. A significant contribution to this discussion, made by such Ukrainian scholars, V. Badyra, A. Gel, T. Denisova, A. Dzhuzha, O. Kolb, A. Lysodyed, G. Radov, A. Stepaniuc, V. Trubnikov, V. Filonov, O. Frolov, I. Yakovets and others. However, recent legislative changes and the current penal reform necessitate a comprehensive study of this issue in order to determine whether or not grounds for name change in law, which regulates the process of execution of criminal penalties.

Important for disclosure of selected subject is address to the history of the prison department. Before the revolution of 1917 and the beginning of 20 years of the twentieth century, science was used the term «Penitentiary» and derived from it. The word «Penitentiary» comes from the Latin word «poenitentiarius», which translated into the Ukrainian language means repentance, internal self-cleaning»[2]. In foreign concepts XVIII and in the Russian Empire was a common view that the meaning of being sentenced to imprisonment is the religious influence on him, which means the guilty repentance and forgiveness of his sins. Later the term «Penitentiary» has acquired the meaning of «corrective». In other words, the prison system is understood as a system focused on the process of repentance and amendment. However, the main point corrections said, and said all the classics penitentiary direction in such a system is precisely the prison in the classic sense of its construction.

Thus, the name «Penitentiary system» can be used to describe the total-

[1] Лучко С. В. Методологія дослідження пенітенціарної системи України / С. В. Лучко // Вісник Дніпропетровського університету імені Альфреда Нобеля. Серія «Юридичні науки». – 2013. – №2. – С. 151.

[2] Становлення та розвиток пенітенціарної системи України : посіб. / [С. О. Богунов, О. А. Дука, І. М. Копотун та ін.] ; за заг. ред. канд. юрид. наук, заслуженого юриста України О. В. Лісіцкова. – К. : Державна пенітенціарна служба України, Ін-т крим.-викон. служби, 2013. – С. 38.

ity of the prisons of different types or species, as do other countries. In this respect it is important to note that the basic Law of Ukraine «On the State Penal Service of Ukraine» in Art. 6 fixes: The State Penal Service of Ukraine under the law carries enforcement and law – enforcement functions, and consists of a central executive body that implements the state policy in the sphere of execution of criminal penalties, its local authorities, criminal executive inspection of penal institutions, detention centers, paramilitary groups, educational institutions, health care institutions, penal institutions of enterprises, other enterprises, institutions and organizations established to ensure that the objectives of the State penitentiary service of Ukraine.

Thus, the Penal Service in addition to penal institutions, include other elements, including penal authorities (Ministry of Justice of Ukraine, interregional administration, probation). This is important because the implementation bodies never ever not named prison and standards in which the term «penitentiary» refer exclusively sentence of imprisonment.

Ukraine rejected the punishment in the form imprisonment, Ukrainian prisons eliminated or converted in the colony, with a completely different way of staying in them prisoners. Given this disappeared and reason to believe the existence of base in Ukraine to implement the idea of the prison, which requires holding in the cell (in the classical form alone). This does not provide any argument in favor of its return, but even subject to availability – hardly limited budget and a difficult economic situation will make it possible to rebuild colony in prisons or build new facilities. Therefore, we can assume that the return to prison has a very abstract term. But now a number of experts stubbornly try to revive the term «penitentiary», trying to artificially fill it with some other content.

In our opinion, the allocation of the so – called Penitentiary law or transformation Criminal Executive law is ill – founded attempt to create an artificial idea of initiating progressive changes in scientific approaches. The first institution for the punishment was a prison and, as already mentioned, precisely because of this fact penitentiary system became known as the prison as other institutions was not simple. And researchers studying this phenomenon have identified a new area of scientific knowledge as the science of prison[1].

For allocation this field of scientific knowledge as «Penitentiary law» it is not to hold a simple renaming Criminal Executive law in the Penal Law. It should first find out the need and the possibility of removing Penitentiary law as a separate branch of law in Ukraine, distinct from the existing Criminal Executive law, and to identify its subject and method of legal regulation, other reasons allocation separate branch of law. And this cannot be done, because

[1] Яцишин М. Проблеми визначення поняття «пенітенціарна система» в сучасних умовах / М. Яцишин // Теорія, історія, філософія держави та права. – 2014. – № 1(3). – С. 3.

in Ukraine is still not even made clear isolation and common understanding of the term «penitentiary». Also keep in mind that scientific field does not occur spontaneously, it is quite a complicated process. The need for and feasibility of isolating new branch of law in the legal system of Ukraine is very important and requires close attention of scientists.

The researchers rightly noted that in the classification of branch of law should guide features areas of public life, which is characterized by a pronounced specificity quality and social significance and a large number of regulations that do not fit into any of the traditional branches of law[1]. And what are the rules now, not only concerning Penitentiary law, and not fit into to Criminal Executive law? We did not find such rules.

In fact, all possible emergence of new branches of law can be reduced in two basic: 1) the spread of legal regulation on the part of social reality, which had not previously been the subject of legal regulation; 2) separation of one or more branches of law interconnected set of rules (legal institutions), which acquired a qualitatively new property. And it is important to clearly and specifically answer the question of when and why we can assume that generated new branch of law actually occurred. For this you must first determine whether the stock some intermediate (transitional) forms, whose presence could indicate the possibility of a new branch of law. In the first case such intermediaries shall be considered as the emergence legal institution (which sometimes join the existing branches of law), in which novelty, the specificity of the subject of regulation led to the emergence of new properties in terms of method, principles and mechanisms of legal regulation. If there is a new branch of law by separation from one or more existing branches of law given set of rules, which acquired qualitatively new features, such intermediate (transition) shall be considered as the emergence of integrated cross – sectorial «boundary» Legal Institute[2]. Regarding the penitentiary direction (even if proof of its feasibility isolation) none of the provisions has no a place. Thus, one could argue that the reasons for the emergence of such a law, penitentiary Law as currently defined.

It should be emphasized that the main objectives of the science Criminal Executive law define as A. Stepanyuk are: a) research of the objective laws Execution of Punishment that govern the activities of and penal institutions, and b) formulation of certain expressed in generalized form requirements of drawn to execution and serving sentences, as well as the participants of this

[1] Опанасюк, Н. А. Туристичне право України в національній правовій системі / Н. А. Опанасюк // Тези Міжнародної науково – практичної конференції. «Туристичний, готельний і ресторанний бізнес: інновації та тренди».(м. Київ, 7 квітня 2016 р.) – К.: КНТЕУ, 2016. – С. 331.

[2] Поленина, С. В. Комплексные правовые институты и становление новых отраслей права / С. В. Поленина // Правоведение. – 1975. – № 3. – С. 72.

activity[1]. It is this, and not to attempt to justify the expediency of changing names, and have directed efforts of scientists.

Based on the goal of this article and the very definition of modern approaches to the name of the law, which regulates the process of execution of criminal penalties, it seems appropriate to apply the provisions of the Constitution of Ukraine and its official interpretation. Important in this context is the judgment of the Constitutional Court of Ukraine in the constitutional petition of the Supreme Court of Ukraine on the constitutionality of Ukraine (constitutionality) of the provisions of Article 69 of the Criminal Code of Ukraine (the case of the more lenient penalty) number 15 – rp of 02.11.2004[2], which particularly says that Ukraine is a legal state (Art. 1 of the Constitution of Ukraine). According to the first paragraph of Article 8 of the Constitution of Ukraine is recognized and effective rule of law. The rule of law requires the state to its implementation in law – making and law enforcement activities, including laws that its content should be first soaked with ideas of social justice, freedom, equality and so on. One manifestation of the rule of law is that the Law is not limited legislation as one of its forms, and includes other social regulators, including morality, traditions, customs, etc., which are recognized by the society and due to historically achieved cultural level of society. All these elements combined right quality that corresponds to the ideology of the validity idea of law, which largely was reflected in the Constitution of Ukraine.

Such understanding of law not give rise to his identification with the law, which can sometimes be unfair, including restrict the freedom and equality of individuals. Justice – one of the basic principles of law is critical in defining it as a regulator of social relations, one of the human rights dimensions. Normally justice considered as property of law, as expressed in particular in the scale equal legal behavior and proportionality in legal responsibility infringement.

In the area realization of the right principle of justice is manifested, in particular, equality before the law, compliance with crime and punishment, purposes and means of the legislator, elected to achieve them (p. 4.1. of said decision).

As a result, the above is confirming the thesis that the law is a phenomenon much broader than normative (legislative) its component. Regarding the place of law in this concept, it should give the idea some scientists who do not identify Law with the rules and noted that

[1] Степанюк А. Х. Актуальні проблеми виконання покарань (сутність та принципи кримінально-виконавчої діяльності: теоретико-правове дослідження) : автореф. дис. на здобуття наук. ступеня д-ра юрид. наук : спец.12.00.08 «Кримінальне право та кримінологія; кримінально-виконавче право» / Степанюк А. Х. – Х., 2002. – 33 с

[2] Рішення Конституційного Суду України у справі за конституційним поданням Верховного Суду України щодо відповідності Конституції України (конституційності) положень статті 69 Кримінального кодексу України (справа про призначення судом більш м'якого покарання) // Офіційний вісник України, – 2004, – №45 – ст. 2975.

Criminal –Executive law has a special system of law, created to regulate the activities of bodies and penal institutions and social relations certain type[1]. In other words, the rules and their system – only a single element of Criminal Executive of law and it is not exclusive.

In the science Criminal Executive law and in practice execution of punishment constant is the idea that Criminal Law regulates not only the direct order and conditions of execution and serving sentences, but also to some extent the special education process, where provisions and categories of pedagogy, psychology and economics[2]. And if you do not consider this factor when determining the meaning of the considered branch of law – we again get a definition that does not reflect all the essential characteristics of this legal phenomenon.

Thus, analyzing the problem of understanding the concept Criminal Executive law, given the lack of a unified definition and ambiguity of the characteristics of this phenomenon, we consider it appropriate to outline its basic epistemological characteristics, namely the need to distinguish between right and law; Law to be regarded as a social phenomenon related category such as justice, freedom, equality, humanism; Law should be seen in close connection with human rights[3]. At first glance, the thesis expressed by supposedly cannot be clearly perceived in the context Criminal Executive law, especially given the specificity of the method of legal regulation Public relations – imperative order or method that does not allow for objections. V. Badyra notes in this regard that, although convicted and staff are in a constant state of interdependence, but it in no way be regarded as equal partnership, because there is unequal legal status for prisoners have almost no right to vote, they are dependent on other prisoners, and even to a greater extent from employees of the colony, so that the problems of food, health care, labor and all other aspects of life in prison is dependent on the staff[4]. However, in the course execution of the sentence may use other methods, including the method of persuasion, discretionary method (these methods are specific to the process of realization of natural rights, regardless of the industry in which it occurs).

Specific features of individual rights and freedoms of persons serving a criminal sentence mainly include: 1) they are inherently inalienable, natural rights of every human being, and therefore not

[1] Кримінально – виконавче право України: навч. посібник / За ред. проф. А. Х. Степанюка. – К.: Юрінком Інтер, 2008. – С. 23.

[2] Кримінально-виконавче право України [Текст] : курс лекцій / Г. С. Семаков, А. П. Гель ; МАУП. –Київ : МАУП, 2000. – С. 10.

[3] Козюбра М. І. Принцип верховенства права і права людини / М. І. Козюбра // Права людини і правова держава (До 50-ї річниці Загальної Декларації прав людини): тези доп. та наук. повідомлень (10–11 грудня 1998 р). – Х., 1998. – С. 47.

[4] Бадира В. А. Виправлення засуджених як opinio moralis // Науковий вісник Юридичної академії Міністерства внутрішніх справ: Зб. наук. праць. – Дніпропетровськ, 2005. – № 1 (23) – С. 82.

directly follow from person belonging to the citizenship of the State; 2) these rights and freedoms are inalienable and belong to everyone from birth; 3) that such rights and freedoms that are necessary to protect life, liberty, dignity as human beings, as well as other natural law, is closely related to its individual, private life; 4) they are particularly important for each person, so in case of their infringement is always negatively affects a person[1]. From here – formalization of these rights and freedoms of prisoners in the regulations is not always required, and their presumed existence independent of the will of the legislator, people or other entities. At the same time, they are covered by the notion Criminal Executive law. A presumption of understanding Criminal Executive of law is natural law provides grounds for the assertion of the possibility of broad interpretation.

Summarizing all the above, we can state that this definition should include the following principal provisions: penal law – a system of general concepts, regulations, rules, codes of conduct and other regulators relations arising in the process and on the execution of criminal penalties, based on natural rights and freedoms, and guaranteed by the state and socially active members of society.

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[1] Кушніренко О. Г. Слінько Т. М. Права і свободи людини і громадянина: навч. посіб. – Х.: Факт, 2001. – С. 60.

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KEY ASPECTS OF THE IMPLEMENTATION OF COMPLETE RECORDING OF COURT PROCEEDINGS THROUGH TECHNICAL MEANS

Summary. *The article is dedicated to examination of the current state of legislative regulatory actions, introduction of full-scale recording of judicial proceedings through technical means into the law enforcement practice of Ukraine, and formulation of universal criminalistic recommendations regarding implementation of this constitutional principle of judicial proceedings based on introduction of modern information technologies designed to record both verbal and non-verbal information.*

Key words: information technology, full-scale recording of judicial proceedings through technical means, video recording, video conference, broadcasting in real time.

Formulation of the problem. In accordance with Part 1 of Art. 55 of the Constitution of Ukraine, the rights and freedoms of a person and a citizen are protected by the court. In a legal state, legal proceedings are based on the principles defined by a constitution. These principles ensure the rights of the participants in the trial, guaranteeing their implementation in such a way that each interested person has a real opportunity to exercise its constitutional right to judicial protection. Consequently, in a constitutional state, the basic principles of legal proceedings have democratic features and a general human rights orientation [1, p. 11]. The effectiveness of the implementation of the right to judicial protection directly depends on the level of real-life implementation of this principle. In particular, the publicity of the trial and its complete recording by technical means, stated among the basic principles of judicial proceedings by the Constitution of Ukraine, adopted at the fifth session of the Verkhovna Rada of Ukraine on June 28, 1996 (the Constitution of Ukraine, 1996).

Further legal regulation of the principle of transparency and openness of

the trial (proceedings) has been consolidated in the essentially identical and currently active versions of Part 3 of Art. 11 of the Law of Ukraine «On the Judiciary and Status of Judges», Part 2 of Art. 27 of the Criminal Procedure Code of Ukraine (CrimPC), Part 1 of Art. 6 of the Civil Procedural Code of Ukraine (CivPC), Part 1 of Art. 4–4 of the Economic Procedure Code of Ukraine (EPC), Part 3 of Art. 12 of the Code Of Administrative Procedure Of Ukraine (CoAP) and Part 1 of Art. 249 of the Code of Ukraine on Administrative Offenses (CoUAO). In accordance with the legislative requirements, established by these documents, the general rule is that cases in all courts are open, that is, conducted (carried out, proceeded) openly, regardless of the territoriality, specialization, and level of a court.

In post-Soviet and in many European countries, the recording of court proceedings by technical means does not stand out as an independent constitutional basis of legal proceedings and is often viewed as an integral part of such a legal basis as publicity (openness). Often, such a position is respected by Ukrainian scholars. However, the Constitutional Court of Ukraine in the case regarding the recording of the trial by technical means from December 8, 2011, No. 16-rp / 2011 [2] has decided that the complete recording of the trial by technical means is an independent principle of legal proceedings [1, p. 12].

The importance of such a principle as the recording of court proceedings by technical means, according to the Verkhovna Rada of Ukraine Commissioner for Human Rights, V. Lutkovska, is an important condition for the impartial resolution of the case by the court, observance of the ethics of relations between the participants in the process and the non-abuse of the procedural rights by the participants in the proceedings [3, with. 32]. However, the legislative regulation of the complete recording of the trial by technical means is still limited and inconsistent in Ukraine, as well as its practical implementation being subpar to the current state of scientific and technological progress.

State of the research. Separate problems of recording by technical means of court proceedings of various types were highlighted in the scientific works of V. A. Dem'ianchuk, O. V. Krykunov [4], V. M. Kampo [1], N. M. Maksymyshyn [5], M. M. Serbin, K. S. Ozerova [6], V. S. Stefaniuk [7] and other Ukrainian scientists. In our opinion, despite the significant and diverse contribution of these scientists, their work does not cover all the important aspects of the research topic.

Therefore, the purpose of this article is to study the current state of legislative regulation and the introduction into practice of Ukraine of complete recording of the trial by technical means and the formulation of universal forensic recommendations regarding the implementation of this constitutional principle of legal proceedings based on the introduction of modern information technologies designed for recording (registering) both verbal, and non-verbal information.

Presentation of the main research material. The systematic analysis of the provisions of corresponding acts of national law leads to the conclusion that it took domestic lawmakers almost five years from the entry into force of the 1996 Constitution of Ukraine in order to carry out the first attempt to introduce the full recording by technical means of the criminal process by adopting of the Law of Ukraine «On Amendments to the Criminal Procedure Code of Ukraine» dated June 21, 2001, No. 2533-III, which supplemented the acting 1960 CPC of Ukraine with Art. 87–1 – the recording of the trial by technical means. According to its provisions, the complete recording of the trial with the help of sound recording equipment or other technical means is carried out at the request of at least one participant in the trial of the case in the court of first instance in the consideration of the merits, either in the court of appeal or at the initiative of the court. The complete recording of the a is carried out by the secretary of the court session or another court employee under his supervision. A record of the court session specifies the fact that technical means were used to fully record a trial, as well as general information on their technical characteristics. A report is attached to the recording by the secretary of the court session, which holds information about the procedural actions executed in the court session minutely. The reproduction of a technical record of the trial is carried out at the request of the parties or at the initiative of the court. An audio cassette or other media containing a trial recording is stored within the case.

At the same time the Law of Ukraine «On Amendments to the Civil Procedural Code of Ukraine» of 21.06.2001 No. 2540-III, amended the Chapter 21 of the acting CivPC of Ukraine of 1963, which provided for the court to enforce the complete recording of the trial by technical means (Part 1 of Article 198). The Law of Ukraine «On Amendments to the Arbitration Procedural Code of Ukraine» dated June 21, 2001, No. 2539-III stipulated that an economic court may carry out verbatim, as well as audio or video recording of a court session (p. 7, Article 81–1).

Even though it has aged, such legal regulation of court proceedings recording by technical means, despite its apparent superficiality and the lack of unified rules for such actions was, in our opinion, best suited to reflect the constitutional principles in terms of full recording of the trial by technical means compared with the current legislation, since it: 1) did not establish an exhaustive list of technical means for recording of a trial (except for the economic ones) and the list of related physical storage sources; 2) took into account the promptness of scientific and technological progress, the inevitability of modernization of existing and the creation of new technologies and means of recording and did not limit the possibility of their timely introduction into law practice without passing through the time-consuming procedure for amending the legislation. (According to the deputy head of the Presidential Admin-

istration of Ukraine D. Shymkiv, the average time it takes for a law to be adopted in Ukraine is 6 to 9 months, however, it can often reach up to one and a half years [8]).

We should note the negative practice inherent in domestic law-making, which is the implementation of effective reforms (including judicial) only under the maximum possible pressure from civil society, with the obligatory subsequent mitigation of the achieved results as the pressure on this subject is reduced and the legislators' subsequent adaptation to new socio-political conditions.

Thus, the Orange Revolution of 2004 became an impetus to:

1) The enactment of the Civil Procedural Code of Ukraine dated March 18, 2004, No. 1618-IV, which identified fair, impartial and timely consideration and resolution of civil cases to protect violated, unrecognized or challenged rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the state as main tasks of civil justice in general. A set of provisions of this Code introduced the complete recording of a trial during a court hearing by means of a sound recording equipment by a secretary of a court session or an another employee of the court apparatus if instructed by the chairman (Part 10 of Article 6, Clauses 3 and 4 of Part 1, Article 48, Part 1 and Part 2 of Article 197, Part 1 of Article 198), while imposing logging responsibilities on a court secretary in particular. The persons involved in the case received the right to listen to the recording of the court session, make copies, submit written claims about its incorrectness or incompleteness (Part 1 of Article 27, Part 5 of Article 197, Article 199), the legal consequence of the non-consideration of such was the return of the case to the court of the first instance for correction (Part 4 of Article 297). A person involved or the court on its initiative was enabled to request full or partial reproduction of the technical record of the court session; obligatory inclusion of the recording on physical carrier in case materials after the court session (on cassette, floppy disk, etc.) as an annex to the log records of the court session; full or partial printing of the technical record of the court session upon the request of the person concerned provided by the chairman for a fee set by the Cabinet of Ministers of Ukraine (see Articles 3–6, Article 197).

2) To the enactment of the Code Of Administrative Procedure Of Ukraine of July 6, 2005 No. 2747-IV, which proclaimed the protection of the rights, freedoms and interests of individuals, the rights and interests of legal persons in the field of public-legal relations from violations by state authorities, bodies of local self-government, their officials and other subjects in the exercise of their power and administrative functions provided by the legislation (and delegated ones) as its main tasks and priorities (Part 1 of Article 2). Even though both codes came into force simultaneously (on September 1, 2005), the latter became the most progressive among the existing codes at the time in Ukraine on the issues of regulation

of trial recording by technical means. In addition to the verbatim reflection of the overwhelming majority of the aforementioned norms of the CivPC in the provisions of Part 6 of Art. 12, parts 1 and 2 of Art. 41, part 1 of Art. 42, arts. 43, 44, 63, etc., this Code also contained a number of innovations. In particular: only the technical record, carried out by the court in accordance with the procedure established by this Code (Part 7 Article 12) can be identified as official; persons present in the courtroom may use the portable audio equipment. Conducting photographic and cinematographic works in the courtroom, video and audio recording with the use of stationary equipment, as well as broadcasting of court sessions on radio and television, shall be allowed on the basis of a court order, subject to the consent of the persons involved in the case, except those who are subjects of authority (part 8 of Article 12); the court secretary announces the fact of the ongoing recording of the court session, as well as the necessary technical information (the location of microphones and the need for a speaker to speak into a microphone, the inadmissibility of simultaneous speeches of participants in the administrative process, observance of silence in the courtroom) (Part 1, Article 126); the carrier of information, which can be used to store a technical record of the court session may be not only a cassette or a diskette, but also a CD, etc. (Part 3 of Article 41).

However, a week after the aforementioned legislative requirements came into force, the legislator acknowledged the lack of readiness for the introduction of such progressive norms and showed backsliding, amending in accordance with the Law of Ukraine «On Amending Certain Legislative Acts of Ukraine» of 08.09.2005 No 2875-IV Section XI of the Civil Procedure Code and Section VII of the CoAP with paragraph 2–1, according to which, until January 1, 2008, the full recording of the court session with the help of a sound recording equipment should be carried out by a court only on the request of the person involved in the case or by the court initiative. In all other cases, the course of the court session was subject to traditional registration in the court session log (protocol).

However, the Law also introduced certain progressive changes to other active procedural codes. In particular, the Law amends arts. 87 and 87–1 of the CrimPC of 1960, which specify that the main means of recording the trial of a case is in session minutes, which is formed during each court hearing of the court of the first, appellate and cassation instances, as well as at each separate procedural action, committed outside the permanent seat of the court of the first instance. At the same time, in the criminal proceedings, the complete recording of the trial by means of a sound recording device is carried out at the request of at least one participant in the trial or on the initiative of the court in the court of the first or appellate instance, indicating, in the protocol of the court session, the technical characteristics of the recording equipment and media, as well as the inclusion of the carrier of in-

formation, which holds the recording of the trial, within the case. New edition of Art. 88–2 of the CrimPC of 1960 regulated the playback of a technical record of a trial by a court of the first instance, in appellate and cassation proceedings, as well as a necessity while considering the observations on the minutes of the court session at the request of the parties or at the initiative of the court. The extraordinary nature of the issuance of a copy of a technical record to a party or its reproduction outside the court session was evidenced by the fact that these issues were authorized by the chairman separately in each case. At the same time, art. 81–1 of the EPC was supplemented with identical provisions.

Following the Revolution of Dignity 2013–2014, in order to increase the national standards of the judiciary and legal proceedings and to ensure the right to a fair trial, the Law of Ukraine «On ensuring the right to a fair trial» of 12.02.2015, No. 192-VIII, introduced the new wording of the Law of Ukraine «On the Judiciary and Status of Judges» dated 07.07.2010, No. 2453-VI. In this regard, par. 2 of part 3, part 5 and part 6 of the art. 11 of the latter specified that during the consideration of cases the trial process is recorded by technical means in accordance with the procedure established by the law, as well as established new progressive provisions according to which the participants of the trial, other persons present in the courtroom, representatives of the mass media may hold a photo, video and audio recording in the courtroom with the use of portable video and audio equipment without a separate court authorization, but such actions are still subject to restrictions by the law. Broadcast of the court session is carried out with the permission of the court. Conducting in the courtroom of photography, video recording, as well as the broadcasting of a court session, must be carried out without impeding the conduct of the meeting and the implementation of their procedural rights by the participants in the court proceedings. Participants in the court proceedings, based on a court decision, shall have the opportunity to participate in the court session via video conference in the manner prescribed by law. The duty to ensure the holding of a video conference rests with the court that received the decision on the holding of a video conference, regardless of the specialization and the tier of the court that made the decision.

However, one and a half years after the entry into force of this Law, driven by the above-mentioned regressive tradition the legislator adopted the new Law of Ukraine «On the Judiciary and Status of Judges» of 02.06.2016, No. 1402-VIII, par. 2 of part 4 of art. 11 of which, against the background of verbatim preservation of the above progressive norms, established the provision that the court may determine the place in the courtroom from which a video or photo recording can be managed. In our opinion, in this way, additional restrictions were imposed on holding photographs and video recordings in the courtroom by persons present in the courtroom and media representatives.

According to Part 1 of Art. 18 of the currently valid Law of Ukraine «On the Judiciary and Status of Judges», the courts specialize in the consideration of civil, criminal, economic, administrative cases, as well as cases of administrative offenses. Note that in accordance with clause 1 of Part 4 of Art. 17 of this Law, the unity of the judicial system is ensured by the unified principles of the organization and activity of courts. However, systematic analysis of the current legislation allows us to reach the unequivocal conclusion that there are no uniform principles for the organization and activity of courts in the part of the complete recording of the trial by technical means that would not depend on the territoriality, specialization and instance of a particular court, as well as the place of conducting of certain procedural actions (in the meeting room or outside it). This is confirmed by the following.

1. Contrary to the fact that among the important tasks of the current CoUAO are: the protection of the rights and freedoms of citizens, property, the constitutional system of Ukraine, the rights and legitimate interests of enterprises, institutions and organizations, the established law and order, strengthening of the rule of law, prevention of offenses, education of citizens in the spirit of accurate and steady observance of the Constitution and the laws of Ukraine, respect for the rights, honor and dignity of other citizens, to the rules of cohabitation, diligent performance of their duties, responsibility to society, the provisions of this Code fail to recognize recording by technical means cases of administrative offenses at all. Despite the fact that this category of cases is dealt with by the same courts that deal with civil cases and criminal proceedings and are fully equipped with systems for the technical recording of the court sessions, in many cases the absence of appropriate special rules in the CoUAP makes it impossible for the court to record cases of administrative violations by technical means in the light of the provisions of Art. 19 of the Constitution of Ukraine, according to which the legal order in Ukraine is based on the principles under which no one can be compelled to do what is not provided for by law. Also, bodies of state power and their officials are obliged to act only on the basis, within the limits of powers and in the manner provided for by the Constitution and laws of Ukraine.

2. In accordance with Part 4 of Art. 55, part 1 of the article. 147, art. 151–1 of the Constitution of Ukraine, everyone is guaranteed the right to file a constitutional complaint to the Constitutional Court of Ukraine on the grounds established by this Constitution and in the manner prescribed by law. The Constitutional Court of Ukraine shall decide on the compliance of the laws of Ukraine with the Constitution of Ukraine and in cases of other acts provided for by this Constitution, shall carry out an official interpretation of the Constitution of Ukraine, as well as other powers in accordance with this Constitution. The Constitutional Court of Ukraine decides on the compliance

of the Constitution of Ukraine (constitutionality) with the law of Ukraine on the constitutional complaint of a person who believes that the law of Ukraine used in the final decision in this case contradicts the Constitution of Ukraine. A constitutional complaint may be filed if all other national remedies have been exhausted. Provisions of Part 2 of Art. 147 of the Constitution of Ukraine and Art. 4 of the Law of Ukraine «On the Constitutional Court of Ukraine» one of the main principles of the Constitutional Court of Ukraine is the principle of publicity. As explained above, this principle is inextricably linked with the principle of the complete recording of the trial by technical means. However, there is no provision for the constitutional complaint to be fully documented by the technical means of the consideration of the Constitutional Court of Ukraine.

3. Complete recording by technical means of the economic process, unlike civil, administrative and criminal, has not become obligatory. After all, against the background of the provisions of Part 3 of Art. 4–4 of the Economic Procedure Code of Ukraine (EPC) that the trial is recorded by technical means and is reflected in the minutes of the court session in accordance with the procedure established by this Code (Part 3, Clauses 4–4), provisions of Part 7 of Art. 81–1 of the EPC stipulates that recording of a court proceeding with the help of a sound recording equipment shall be carried out only upon the demand of at least one participant in the court proceedings in the court of the first or appellate instance in the course of consideration of the case on the merits or at the initiative of the court. In addition, the Supreme Economic Court of Ukraine as a court of cassation, literally guided by the provisions of Part 7 of Art. 81–1 of the EPC does not provide for the recording of court proceedings by technical means because in accordance with these provisions, the recording of a trial by means of a sound recording device is carried out in the merits of the case only in the court of the first or appellate instance. The aforesaid caused the need for official interpretation of the provisions of paragraph 7 of Part 3 of Art. 129 (now Clause 6 Part 2 Article 129) of the Constitution of Ukraine. The systemic analysis of the corresponding provisions of the EPC allowed the Constitutional Court of Ukraine to conclude that these provisions did not regulate the issue of recording the trial by technical means in the cassation instance. In this regard, in the decision of the Constitutional Court of Ukraine dated 08.12.2011 № 16-rp / 2011 [2] it is noted that based on Part 3 of Art. 8 of the Constitution, provisions of par. 7 of Part 3 of Art. 129 of the Constitution of Ukraine regarding the complete recording of the trial by technical means is a direct-action rule and should be applied directly. Thus, complete recording of court sessions by technical means in the Supreme Economic Court of Ukraine should be ensured directly on the basis of clause 7 of Part 3 of Art. 129 of the Constitution of Ukraine.

4. Proclaimed by clause 6 of Part 2 of Art. 129 of the Constitution of

Ukraine, the completeness of recorded court proceedings by technical means in practice is ensured only in one separate characteristic of the court process – the length of separate court sessions or procedural actions. After all, as the above-mentioned legislative requirements provide, the documenting process begins «from the moment the court hearing is opened, or the start of a procedural act conducted by an investigating judge during a pre-trial investigation in a criminal proceeding and ends by the time of the termination of that hearing or procedural action». In this regard, it should be noted that the meaning of the adjective «complete» in paragraph 6 part 2 of Art. 129 of the Constitution of Ukraine is not limited to «submitted in full, not reduced; ended; intact». It is much broader and covers: «taken in full volume; whole, all; which consists of everything necessary, contains all the required elements, detailed, exhaustive; turns out completely; not partly; complete; not limited; final; fully developed, is the highest degree of something; maximum» [9, p. 1000].

5. It should also be emphasized that in all the cases listed above, obligatory recording by technical means concerns only court sessions or procedural actions that take place in specially equipped premises of the court – meeting rooms. At the same time, the recording of the review of evidence by photographing, sound and video recording in the civil process (Part 3 of Article 140 of the Civil Procedure Code) or the on-site inspection by technical means in a criminal proceeding (Part 5 of Article 361 of the CrimPC) are not obligatory. This contributes to the complete lack of realism in the clause 6 of Part 2 of Art. 129 of the Constitution of Ukraine on complete recording by technical means of the trial, rather than separate court sessions or procedural actions.

6. The recording of court proceedings by technical means is successfully used in many foreign countries, whose experience reveals the following means used: 1) stenographic equipment with further decoding, registration of the contents of transcripts in the protocol; 2) special stenographic and computer technology, which provides interpretation of transcripts content in real time; 3) audio recording of the court session; 4) video recording of the court session; 5) others, including combined means of mechanical or electronic recording of the course of a court session [6, p. 145]. However, in Ukraine, in the applicable court proceedings, the list of these means is limited only to sound recording equipment (Part 5 of Article 27 of the CrimPC, Part 1 of Article 197 of the CivPC, Part 7 of Article 81–1 EPK, Part 6 Article 12, Part 1 Article 41 CoAP). The only procedure for working with sound recording equipment for court session recordings, storing, copying, duplicating and using information that reflects the course of the court session in the courts of general jurisdiction (except for the Supreme Court of Ukraine and the higher specialized courts) is regulated by the «Instruction on the procedure for working with technical means for recording the court session», approved by the decree of the State Ju-

dicial Administration of Ukraine dated 09/22/2012, No. 108. This Instruction establishes: a court session as a procedural form of consideration of a case by a court in the order of civil, administrative, criminal, economic justice; recording a court session by technical means, as a technical record of a court hearing by means of a sound recording equipment, which includes the creation of a phonogram of the court hearing; recording procedural action by technical means, as a technical record of procedural action with the help of a sound recording equipment, which includes the creation of a phonogram; sound recording equipment (sound recording complex) – a set of software and hardware devices that ensure proper recording, storing, copying (duplication) and using information that reflects the course of the trial («Triton», «Reyestrator», «Oberih», «SRS Femida» [10], «Camerton» [11, p. 117]); a phonogram of the court session (phonogram), as a sound recording, which is formed during the direct recording of the court session with the help of sound recording complexes and transformed into an electronic data form.

The critical analysis of the foregoing suggests that current provisions of law provide for the recording of solely audio (verbal) information. There is no doubt that a sound recording opposed to a protocol more precisely reproduces the peculiarities of the process of obtaining factual data in the form of testimony during interrogation in the court, it captures not only the content of the testimony but also the general conditions in which the trial is conducted, the tempo, the voice features and emotional color of the language. Unlike the protocol, which contains a transformed, that is, compiled by the secretary of the court hearing, the message of the interviewee, a sound recording directly captures exactly what the interviewee said in the same expressions and sequences. Therefore, along with the content of the testimony, other sound attributes (intonation, accents, pauses) become significant and substantially complement their content [12, p. 109–110].

However, there remains a wide range of non-verbal communication tools: facial expressions, gesticulation, posture, articulation of participants in the hearing – all hidden beyond the scope of sound recording equipment for objective reasons. O. P. Vashchuk devoted many scientific works to the research of the high forensic significance of these [13–16]. The urgency of recording non-verbal information is caused by the rapid development of technology used in criminal proceedings and its current capabilities [14, p. 298], and according to our belief, the possibility of a comprehensive recording of verbal and non-verbal manifestations of all parties of the hearing can only be provided using technical means of video recording.

Cases of compulsory use in the trial of technical means of video recording by the current legislation of Ukraine were established only to record the progress and results of procedural actions conducted in the video conferencing mode (Part 7 of Article 336, Part 5 of Article 567 of the Criminal Procedure

Code, part 7 of Art. 158 CivPC, Part 7 of Article 74–1 of the EPC, Part 7 of Article 122 CoAP). The only procedure for working with the technical means of video recording of the course and the results of procedural actions conducted in the video conferencing mode during the court session (criminal proceedings) was established by the «Instruction on the procedure for working with the technical means of video recording of the course and the results of procedural actions conducted in the video conferencing mode during the judicial session (criminal proceedings)», approved by the decree of the State Judicial Administration of Ukraine dated November 15, 2012 No. 155. This Instruction defines: ***videoconference*** as a telecommunication technology of interactive interaction between two or more remote participants in court proceedings with the possibility of exchanging audio and video information in real time with the account of data management; ***technical means of video recording of the course and the results of procedural actions (technical means of video recording)*** as a set of software hardware and devices that ensure proper recording, storing, copying (duplication) and usage of the information that reflects the video conferencing process; ***a video phonogram***, as a video and audio recording, created directly during a videoconference and recorded using technical means of video recording and acting as a source material for making working and archive copies.

7. The above-mentioned Instructions establishes the following definitions: **phonogram of the court (phonogram)** – a sound recording, which is formed during the process of direct recording of the court session with the help of a sound recording complex and transformed into an electronic data form. **Video phonogram** is a video and audio recording created directly during a video conference and recorded using technical means of video recording and serves as a source material to produce working and archive copies. **Archive copy of the phonogram** – recording of a copy of the phonogram from the built-in carrier of the audio recording system to a compact disc (media carrier), which has the status of the original and is intended for long-term storage in the archive. **An archive copy of a video phonogram** is a recording of a copy of a video phonogram from hardware on a video recorder preserving the original status and intended for long-term storage. An archive copy can be used to create working copies in case of their insufficiency, damage, destruction, etc. **Working copy of the phonogram** – recording a copy of a phonogram from the integrated sound recording system to a compact disc (media) used to reproduce or make copies of the technical record of the trial for to the judges and parties (participants) of the court session, etc. **Working copy of a video phonogram** (hereinafter referred to as a working copy) – transferring a copy of a video phonogram from technical means of video recording to a video-holding carrier.

Thus, as carriers of information in all cases: 1) of both audio and video re-

cording; 2) for the preservation of both working and archival copies of phonograms and video phonograms, current regulatory acts only provide discs for laser reading systems, which record the corresponding audio or video phonograms. The use of such carriers for storing audio and video information, in our opinion, poses a serious risk of irreversible loss of the results of the recording of the trial by technical means. At the same time, in no way does it answer the question of what copy should the court use to reproduce the records in the case of simultaneous reduction of the quality of reading data from both archival and working copies? How to identify information and software contained on computer media, without examination of computer hardware and software products? How to restore completely or partly the video record (phonogram) from the removable media without conducting video recording expertise?

Conclusions. All of the foregoing allows us to conclude that the actual, and not the declarative fullness of the recording of the trial by technical means, should not consist in recording solely audio information related to separate court sessions or procedural actions of a certain court, but in the continuous video recording of all the actions held without exception during the court meetings and any court procedural actions, irrespective of the territoriality, specialization and judicial nature of the court, as well as the location where certain procedural actions are being held (meeting room etc.) longing from the very first meeting in the court of first instance and ending with the consideration of the constitutional complaint after exhausting all other domestic remedies. The primary technical basis for this can be the existing components of stationary video conferencing systems for holding court sessions in a video conference mode, which were provided for by the State Judicial Administration of Ukraine. Thus, according to the data of the High Qualification Commission of Judges of Ukraine, the State Judicial Administration of Ukraine, the Supreme Administrative Court of Ukraine, the Supreme Economic Court of Ukraine and the Supreme Court of Ukraine, received on our official request, by the beginning of 2017, the network of courts in Ukraine consisted of 765. For conducting court sessions in accordance with the requirements of Part 8 of Art. 11 Law of Ukraine «On the Judiciary and Status of Judges» the premises of appellate and local courts are provided with 2879 courtrooms (324 – in appeals and 2555 – in local courts). Thirty-nine percent of these, 1134 courtrooms, are equipped with stationary video conferencing systems for conducting court sessions in a video conferencing mode. The number of courtrooms specially equipped for conducting court hearings in the Supreme Administrative Court of Ukraine is 6, in the Supreme Economic Court of Ukraine – 10, in the Supreme Court of Ukraine – 6. Of these, the video conferencing system for holding court sessions in the mode of video conference is installed in 2 courtrooms of the Higher Administrative Court (33%), 5 courtrooms of the Supreme Economic

Court of Ukraine (50%) and 5 courtrooms of the Supreme Court of Ukraine (83%).

Modern cloud services can serve as the basis for automated collection, storage, protection, recording, search and provision of electronic copies of video phonograms for relevant cases, which are appropriate to the realities of the XXI century. For example, the Unified State Register of Court Decisions, which is supported by the State Judicial Administration of Ukraine in accordance with p. 1 of Article 3 of the Law of Ukraine «On Access to Court Decisions» and p. 10 of part 1 of the Article 152 of the Law of Ukraine «On the Judiciary and Status of Judges».

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