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CONTENTS

ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

CRIMINAL-LEGAL SCIENCES

ЗМІСТ

ЕКОЛОГІЧНЕ, ГОСПОДАРСЬКЕ ТА АГРАРНЕ ПРАВО

КРИМІНАЛЬНО-ПРАВОВІ НАУКИ

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

HEORY AND HISTORY OF STATE AND LAW

UDC 342

V. Tatsii, Yaroslav Mudryi National Law UniversityKharkiv, Ukraine

O. Petryshyn, National Academy of Legal Sciences of Ukraine Kharkiv, Ukraine

TWO-CHAMBER PARLIAMENT: COMPARATIVE ANALYSIS AND EXPERIENCE OF CONSTITUTIONAL REFORMING IN UKRAINE

Abstract. *In the process of formation and development of the institute of parliament, there is a need for timely improvement of the organisational and functional basis, constitutional and other legislation, which contributes to the effective functioning of this institution. The existing legal non-regulation, both at the level of the Constitution and at the level of current legislation, do not allow the parliament to fully exercise its functions. According to many experts, bicameralism is a serious factor in reducing political tensions in the country, as there is usually less conflict between parties in a bicameral parliament, which leads to stabilisation of parliamentary activity based on a system of checks and balances. Taking into account the actualisation of the chosen topic of the article, its purpose is to comparatively study the experience of constitutional reforming of the countries in the field of bicameral parliament introduction, generalisation of positive practice and finding opportunities for its testing in Ukraine. The peculiarity of the article has been the combination of scientific-theoretical and empirical levels of studying the issues of constitutional-legal fixing of the institute of parliament, its structure and activity, interaction with other branches of a single state power within the framework of the constitutional principle of separation of powers. The author, in view of the stated purpose, has solved the following issues: the multivariate scientific and practical approaches to the studied problems have been considered; a comparative legal analysis of the experience of forming chambers in the parliaments of the states has been conducted; conclusions and proposals on the possibility of establishing a bicameral parliament in Ukraine have been substantiated. An analysis of the role of parliaments has made it possible to come to a more thorough picture of the system of separation of powers in a particular country, about the existing restraints and counterbalances in order to further adapt the positive experience in the territory of*

our country and justify the relevant reforms. In addition, the analysis made it possible to state that such a reform is urgent and necessary, but it must be carried out, provided that the proposed copyright concepts are fully correlated with the vector of European integration chosen by our country.

***Key words**: bicameralism, European integration, reform of Ukrainian legislation, Chamber of Deputies.*

Introduction

One of the most pressing issues of constitutional reform is the change in the institutional structure of state power, in particular through the possibility of establishing a bicameral parliament [1]. According to many experts, bicameralism is a serious factor in reducing political tensions in the country, as there is usually less conflict between parties in a bicameral parliament, which leads to stabilisation of parliamentary activity based on a system of checks and balances. This is especially true for the current realities of Ukrainian politicum, when the confrontational style of behaviour of political parties leads to the destabilisation of many state institutions, first of all, the Verkhovna Rada of Ukraine.

Indeed, if to look at the constitutionally mandated powers of the upper chambers of parliament and the practice of their activity in the countries of Europe and North America, it can be concluded that this chamber is intended to block the questionable enough in terms of the benefits for the state and public development decisions of the lower chamber that is by its nature more prone to politicisation of approved decisions [2–4]. That is, the upper chamber is an institutional element that is able to subdue political passions and add stability to public policy processes.

The introduction of a bicameral parliament in Ukraine would reduce the level of conflict in the mechanism of exercising state power, strengthen the representative function of the parliament, increase the authority of local self-government, promote the better development of regions, and ensure the stability of Ukraine's political course. In general, bicameral parliaments provide a more sophisticated system of national representation than unicameral parliaments. They are better at overcoming law-making mistakes and making more balanced decisions.

In addition, the point of view is very spread that the upper chambers are carriers of a particular type of knowledge, depth of political thought and sound conservatism [5]. Thus, joining the upper chamber in Italy is associated with outstanding services in the social, scientific or artistic fields. Thus, during the construction of the building of the Brazilian Parliament, architect O. Niemeyer chose a quiet dome for the meeting room of the upper chamber, the Senate, while the dynamic "bowl" crowns the hall of the lower chamber, the Chamber of Deputies [6].

In the context of public debate, it should be emphasised that a bicameral parliament is not a mandatory affiliation of a federal state. Given the number of

unitary countries with bicameralism on the European continent, a bicameral parliament can function harmoniously in states with a simple administrative and territorial structure. Thus, at least 10 such countries can be found on the map of Europe, namely: Belarus, Ireland, Spain, Italy, Netherlands, Poland, Romania, France, Croatia and the Czech Republic (although in some cases the ambiguity of the "simplicity" of the territorial structure of these countries should be taken into account, such as Italy and its autonomous regions).

At the same time, it should be noted that not all representatives of science, practice and experts support the idea of establishing a bicameral parliament in the territory of our country. In particular, constitutional law expert B. Bondarenko argues that the implementation of the bicameral parliament concept can take ten years, and such a reform will not lead to a projected positive impact on the effectiveness of the Verkhovna Rada of Ukraine. In addition, the presence of paramilitary conflict and partial occupation on the territory of Ukraine will facilitate, in the context of delineated reform, the creation of regional parties that will produce a negative impact on the constitutional reform of the state as a whole [7].

The alternative outlined approaches substantiate the chosen purpose of the article, which consists in a comparative study of the experience of constitutional reform of countries in the field of bicameral parliament introduction, generalisation of positive practice and finding opportunities for its testing in Ukraine. With this purpose in mind, the following tasks were set: 1) to consider the multivariate scientific and practical approaches to the studied issues and to substantiate the feasibility of establishing a bicameral parliament in Ukraine; 2) to conduct a comparative legal analysis of the experience of forming chambers in the parliaments of the states; 3) to summarise the positive foreign experience of the existence of a bicameral parliament, to formulate sound conclusions and proposals regarding the possibility of establishing a bicameral parliament in Ukraine.

1. Materials and methods

The article uses general scientific and special scientific methods of research, in particular. General methods that define philosophical and worldview approaches that express the most universal principles of thinking. Among them are dialectical and phenomenological methods that have made it possible to analyse the nature, concepts and meanings of constitutional reform and the introduction of a bicameral parliament.

General scientific methods have also come in handy, where empirical research has played an important role: observation, comparison, description. Widely used theoretical and logical methods: deduction, induction, systematic approach, methods of analysis, synthesis, statistical method, the use of which allowed to obtain reliable knowledge about the processes and features of the formation of the parliamentary institution in Ukraine and its reforming.

Special scientific methods have been used in the study of the evolution of the

Institute of Parliament in Ukraine and in other countries of the world. Chronological and comparative methods were also used. The latter, divided into synchronous and diachronic methods, contributed to the development of a number of proposals based on foreign experience in optimising the functioning of the Parliament of Ukraine and the introduction of the bicameral Parliament. The article also used the historical method of enquiry, which allowed analysing the institute of parliament from the position of the past, present and future.

The peculiarity of the article was the combination of scientific-theoretical and empirical levels of studying the problems of constitutional legal fixing of the institute of parliament, its structure and activity, interaction with other branches of a single state power within the framework of the constitutional principle of separation of powers.

The method of analysis allowed us to determine that the fatal event in the development and formation of the idea of bicameralism was the holding of an all-Ukrainian referendum on April 16, 2000, in which 26 million citizens of Ukraine (or 89.91%) who voted in favour of forming a bicameral parliament in Ukraine. At the same time, it is worth paying attention to the direct formulation of the question that was put to the referendum, "Do you support the necessity of forming a bicameral parliament in Ukraine, *one of the chambers of which would represent the interests of the regions of Ukraine and promote their implementation,* and make appropriate amendments to the Constitution of Ukraine and electoral law?" Thus, the people of Ukraine unanimously supported the establishment of a top-level regional representation body. The reasoning behind the stated people's decision as the basis for reforming the system of representative institutions during the further implementation of the planned vectors of transformation of the national parliament, while simultaneously amending the Constitution of Ukraine, is considered to be sufficiently substantiated. At the same time, it should be emphasised that the attempts to implement the results of the all-Ukrainian referendum have not been implemented. The most significant reason for this phenomenon was the presence of a multivariate viewpoint on the feasibility of such a reform. Unfortunately, these positions are still preserved. The Constitutional Court of Ukraine in the case of amending the Constitution of Ukraine on the initiative of the People's Deputies of Ukraine No. 2-in / 2000 of July 11, 2000, expressed quite negatively about this. In particular, the court found in its opinion that the draft proposal was not compliant with the requirements of Articles 157 and 158 of the Constitution of Ukraine regarding the establishment of a bicameral parliament. The following argument was put forward in the argumentation of the mentioned position, "*An analysis of the current constitutional practice of foreign states shows that the creation of a bicameral parliament in a unitary state is a matter of expediency. The content and scope of the rights and freedoms of a person and a citizen by itself is not directly influenced by the structure of*

parliament (single or double chamber). However, they may be influenced by the procedure for the formation of chambers and the distribution of powers between them" (paragraph 3.1 of the reasoning part of the Opinion). As a consequence, given the fragmentation and inconsistency of changes in the field of implementation of the bicameral parliament in Ukraine, the Constitutional Court found it impossible to pursue constitutional reform in this part. At the same time, the contents of the institution of the upper chamber, which was proposed in the draft, did not raise any objections and objections from the body of constitutional jurisdiction.

The theoretical basis of the study is the work of foreign and domestic authors on issues of statehood, institutions of state power, constitutional reform, including parliament.

2. Results and discussion

2.1 Features of creation of a bicameral parliament in Ukraine

In the modern period of development of national statehood, a bicameral parliament building system is observed by many countries with a prosperous economy, a stable political system and high standards of civil and social rights. More than 70 states have opted for bicameralism [8]. It seems quite reasonable that the parliamentary structure of any country is distinctive and unique, but most of the other chambers of the parliaments of the world have one thing in common – they are the specialised representations of the regions (entities) that make up the territorial units of the country (state). This is typical not only for all federal states, but also for many unitary states (France, Italy, Spain, Poland, Romania, Japan, etc.).

Turning to the practice of introducing bicameralism on the territory of our country, it should be noted that after independence, Ukraine faced the problem of defining the path of its further state development and the creation of new institutions of government, including the parliament. Even in the process of drafting the current Constitution of Ukraine, the creation of a bicameral parliament was repeatedly considered as a way of arranging a higher representative institution.

In particular, the draft Basic Law submitted for national discussion in 1992 envisaged the creation of a bicameral parliament (the National Assembly) in Ukraine, which was to consist of a Council of Deputies (lower chamber) and a Council of ambassadors (upper chamber). The developers of this project sought to bring to life the idea of a "strong" upper chamber, "The Council of Deputies and the Council of Ambassadors exercise the powers of the National Assembly on the basis of equality and division of functions" (Article 139 of the project). In view of the proposed principle of equality of chambers, it was assumed that they would be endowed with identical powers in the legislative process, in particular, that both chambers would have to approve it for the adoption of the law. In order to remedy the differences, it was proposed that a conciliation committee of chambers be set up, which was responsible for developing a universal bill capable of meeting the require-

ments and observations of both chambers. The procedure for further "newly developed" draft law was also regulated in detail (Part 4 of Article 161 of the draft).

The idea of a bicameral parliament also found its place in the draft Constitution of Ukraine, developed by the Constitutional Commission and submitted to the Verkhovna Rada on March 11, 1996. In particular, it was anticipated that the upper chamber, the Senate, would consist of 80 members representing regions in following proportion – 3 each from the oblasts, the Autonomous Republic of Crimea and the city of Kyiv, and 2 representatives from the city of Sevastopol. The Senate's competence in the draft was to include the appointment on the submission of the President of the Supreme Court, the members of the Central Election Commission, the Prosecutor General, as well as the issue of administrative and territorial organisation.

It is worth pointing out that the idea of bicameralism has also been supported by certain political forces that have promulgated their own constitutional projects. Thus, in particular, the draft of the Ukrainian Republican Party proposed the creation of a bicameral parliament, whose term of office would be 6 years. Nominal (personnel) powers were assigned to the upper chamber, including the appointment of diplomatic representatives and judges of the Constitutional Court. In the draft of the Christian Democratic Party of Ukraine, the Senate consisted of 150 members who were to be elected for 6 years in single-member constituencies, 3 from regions (including the capital) and 3 from the Crimean Tatar people.

Another significant event on the way to the endorsement of bicameralism in our country was the submission by the Head of State to the Parliament on March 31, 2009 of the draft Law of Ukraine "On Amendments to the Constitution of Ukraine", which provided for the creation of an upper chamber – the Senate in the structure of Parliament. The draft of this regulatory act regulated in detail the composition and powers of the newly created Senate, the election procedure and the mechanism for exercising the assigned competence. However, this bill has not been implemented and has been criticised by various representatives of theory, practice and law-making [9].

Subsequently, the idea of introducing a bicameral parliament has repeatedly emerged in the drafting activity. Thus, a particular issue was highlighted at the beginning of the Constitutional Assembly, approved by the Decree of the President of Ukraine of May 17, 2012 [10]. In its turn, the introduction of the bicameral parliament was not a priority for reform and had a rather substantial temporal framework, but was not finally rejected.

Today, after a long process of ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand (dated March 21, 2014 and June 27, 2014)[1], our state

[1] A plea for an association between Ukraine, from one side, that of the European Union, the European Union from the atomic energy and

is at the stage of intensification of reformation and transformation processes. In addition, the election of the new President of Ukraine has led to a special actualisation of the introduction of a bicameral parliament in Ukraine. At present, it is possible to speak about the active preparation of the relevant bill and lively public discussion.

Thus, it can be stated that bicameralism remains a subject of close attention and a subject of debate in the theory and practice of national state formation. At the same time, the process of implementation of the proposed idea in the practical plane requires a comprehensive analysis of foreign experience, its unification and finding of good practice in order to further test it in Ukraine.

2.2. Analysis of foreign practice in the sphere of formation of parliament chambers

In the context of debating the issue of complication of the structure of the Ukrainian Parliament, it is quite reasonable to carry out a comparative analysis of foreign experience in the field of similar constitutional and legal reforms. Thus, L. T. Kryvenko stresses that the bicameral parliament is a fairly widespread structure of the highest legislative body of the state. Moreover, for a long time, most parliaments of the countries of the world had a bicameral (two-chamber) structure [11]. In particular, the basis for comparison is the formation of the upper chamber and its competence.

Let us first turn to the formation order, which envisages two main ways – direct election of senators and the formation of the upper chamber by regional (regional) structures. According to experts, direct election of members of the upper chambers is used in 27 out of 66 cases, in 21 cases the chambers are formed with the help of regional and municipal representative bodies, and in 16 countries other ways of appointing members of such chambers are used. An example of the latter is the order of formation of the upper chamber of the National Parliament of Ireland, the Senate. It is made up of 60 members, 11 of whom are appointed Prime Ministers, and 49 are elected (43 by professional groups, 6 by universities) through a proportional representation system and secret ballot by mail. In turn, the lower chamber is also elected on a proportional basis. The cadence of both wards is 5 years [12].

Among the forms of direct elections, it is advisable to note the use of a mixed system of elections to both chambers of parliament. Thus, after the constitutional reform of 1993 in Italy, instead of a purely proportional one, a mixed electoral system was launched: from then, 75% of deputies are elected by majority, 25% by proportional system. At the same time, the outlined approach is identical for both the lower chamber and the upper chamber of parliament.

Another approach to direct elections is demonstrated by Czech and Polish parliamentarians. For example, the Chamber of Deputies of the Czech Parliament is elected on the principle of proportional representation, whereas the upper cham-

member states, from the other side: the Law of Ukraine. (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1678–18

ber, the Senate, on a majority basis, is updated with a third of the composition every two years. The Polish Parliament has a more "regional" colour. Of the 460 members of the lower chamber, the Sejm, 391 are elected by district lists of candidates in multi-member constituencies using preferences, and 60 deputies by the All-Polish list of candidates. As for the upper chamber, the Senate, the elections to it are held on a majority basis. At the same time, the majority district coincides with the territory of the voivodship, the largest territorial unit of the state. Thus, 100 senators are elected to the Senate by two from 47 voivodships and by three from the two largest voivodships – Warsaw and Katowice [13]. It is advisable to emphasise that at the level of the Polish Constitution, the term "parliament" is not used in the sense of a single legislative body. Instead, under Article 95 (1) of the Basic Law, it is stipulated that the legislature is exercised simultaneously by two institutions, the Sejm and the Senate [14–16].

Turning to the side forms of formation of the upper chamber, it is worth noting the procedure of formation of the upper chamber of the German Parliament – the Bundesrat, which consists of representatives of the governments of the lands that appoint and withdraw them. The number of members of the Bundesrat that may be delegated by a particular country depends on the population of the land: each land has the right to delegate three representatives; land with a population of more than 2 million has four votes, land with a population of more than 6 million – five votes, land with a population of more than 7 million – six votes. It should be emphasised that the position of the land must be fully agreed on a particular issue. More complex, but more effective in terms of regional representation, the method of forming the upper chamber (Senate) was introduced in France. For example, the Senate is elected by departments (regions) of colleges consisting of elected in the department of lower chamber deputies, regional advisers, general advisers of this department, delegates of municipal councils and their deputies. The number of delegates from municipalities depends on the size of the population.

Also, the study should take into account the classification of bicameral parliaments developed by the science of constitutional law. In particular, there are parliaments with a weak upper chamber and parliaments with a strong upper chamber [17–19]. It is advisable to expose their differences and problem speculations. The tendency for the upper chamber to be strong is quite widespread; the competence of both chambers is completely or overwhelmingly equal, and under such conditions the special powers of the upper chamber are generally less significant than those of the lower chamber; vice versa. Otherwise, in the presence of a weak upper chamber, the powers are divorced and subject to jurisdiction, moreover, the lower chamber usually has advantages [3]. In most cases, chambers have the same rights to review and adopt laws. Perhaps that is why in the US the bill is allowed to enter any of the chambers of congress. The lower chambers, as a rule, have special

powers in the field of finance (budget adoption), while the upper chambers are more likely to ratify international treaties. In the US and Ecuador, the upper chamber is vested with the power to approve government members and other officials appointed by the president [20].

Here are some examples. Thus, a strong upper chamber in a unitary country is the upper chamber of the Italian parliament – the Senate of the Republic. The "power" of the Senate lies, first of all, in the fact that at the level of the Constitution it is recognised as equivalent to the lower chamber by the legislature: Article 70 of the Italian Constitution provides that "the legislative function is exercised jointly by both chambers". This, in turn, means that the bill can be submitted to any of the chambers and is considered approved when deputies of both chambers vote for its adoption. It is also significant that the budget must also be approved by both chambers of the Italian Parliament (Article 81 of the Constitution) [21]. An example of a weak upper chamber is the Polish Senate. At the level of the Constitution of Poland (Part 1 of Article 95), it is stipulated that the Sejm and the Senate shall exercise legislative power. In view of the above, it is advisable to express doubts about the possibility of 100% characterisation of the two designated institutions as chambers of parliament. In particular, the content of Article 95 and other norms of the Polish Constitution shows that both the Sejm and the Senate act as separate bodies of the legislature. Moreover, as a single body called the National Assembly, the Sejm and the Senate act only in cases clearly defined by the Constitution (Part 114, Article 114 of the Constitution of Poland). It should be noted that the powers of the Senate are not equivalent to the powers of the Sejm, especially as regards the adoption of laws.

In some cases, there are situations where it is not possible to clearly attribute Parliament to a particular group. The "mixed" nature of the competence of the upper chamber of parliament is manifested in the fact that the law can be adopted only after approval by both chambers. In this, unlike the procedure of passing a bill in parliaments with a strong upper chamber, in the event of a dispute between the fees on the bill, the Government is allowed to interfere with the law-making process by requesting the final approval of the bill by one of the chambers, as a rule, by the lower chamber. A striking example of such an intervention is France. Pursuant to Article 45 of the French Constitution, any draft law or legislative initiative is being progressively considered in both Chambers of Parliament for the adoption of an identical text. If, as a result of disagreements between the two chambers, a bill or legislative proposal has not been adopted after two readings by each chamber, or if, after one reading in each of them, the Government declares the need for urgent consideration, the Prime Minister has the right to convene a meeting of the mixed commission that is obliged to propose new text on controversial issues. The text prepared by such a committee may be submitted by the Government for approval to both Chambers. Moreover, none of the amendments can

be adopted without the consent of the Government. If the mixed commission fails to adopt the agreed text or if the text is not adopted on the terms provided earlier, the Government may, after a new reading in the National Assembly (lower chamber) and the Senate (upper chamber), require the National Assembly to take a final decision.

The outlined procedure in science is called the "legislative shuttle", which means the transfer of a bill from one chamber to another in a bicameral parliament to overcome differences between them before adopting a mutually agreed legislative text [22]. In some cases, a very detailed "legislative shuttle" procedure is envisaged at the Constitution level. In this regard, we will note the constitutional regulation of this issue in the Basic Law of Belgium (which in many respects is similar to French rules). First of all, it should be noted that the Belgian Constitution sets out the specific joint legislative competence of the lower chamber of Parliament and the King, as well as the joint legislative competence of both chambers. As a general rule, a bill passed by the lower chamber of parliament is referred to the Senate, which may consider it if at least 15 of its members so request. Over the next 60 days, the upper chamber may either decide that the bill does not need to be amended or adopt the bill after it has been amended. In the first case (as well as in a situation where the Senate did not consider the bill within the specified period), the passed bill is passed to the lower chamber of the King for signature. The Constitution also provides for the possibility of creating a mechanism for overcoming conflicts between the chambers. This is a typical institution such as the parliamentary conciliation committee, which is composed on a parity basis of members of the Chamber of Representatives and the Senate, which is empowered by its decisions to resolve conflicts between the chambers in the sphere of their legislative competence, including to extend the terms of consideration of the bills. In this context, the approach of the Romanian legislators to resolving conflicts arising when the conciliation commission mentioned by us does not unanimously in its decision is quite interesting. In such a case, the variant texts are presented for discussion by the Chamber of Deputies and the Senate at a joint sitting, which will adopt the final text by a majority vote (Part 2 of Article 76 of the Romanian Constitution).

On the whole, it can be concluded that in the vast majority of cases at the present stage of state-building, the Chambers of Parliaments are endowed with almost equal powers in the field of law-making. Only in some cases it is possible to find that there is a certain advantage of the lower chamber, especially in the fiscal area. For example, the Senate of the Irish Parliament has no right to change the financial laws passed by the lower chamber. The exclusive competence of the lower chamber of the Austrian Parliament is the adoption of budgetary and financial laws.

The powers of the chambers in other spheres show some unevenness. For example, in the area of scrutiny, when considering parliaments with a strong upper

chamber – the Government is accountable and controlled by two chambers at once. In Romania, the Chamber of Deputies and the Senate may withdraw the confidence of the Government expressed in a joint meeting by passing a resolution of no confidence by a majority of the votes of the deputies and senators. A similar norm is enshrined in the Italian Constitution (Article 94). An example of the variability of the competences of the chambers is the provision of Article 30 (1) of the Czech Constitution, according to which only the lower chamber of parliament is empowered to set up commissions of enquiry to investigate matters of public interest.

The presented and analysed variation approaches of different countries to the formation of the parliament and its competence show that the adaptation of the tried and tested foreign models should be carried out with due consideration of the realities of a particular state, its territorial structure, and the peculiarities of the legal system. In addition, the experience of countries with "strong" and "weak" chambers of parliament must be taken into account and agreed. At the same time, the readiness of the state for such reforms should be a special factor on the way to introducing a bicameral parliament.

Conclusions

An analysis of the role of parliaments, including the upper and lower chambers, gives a more thorough picture of the system of separation of powers in a particular country, of the existing constraints and counterbalances in it, in order to further adapt the positive experience in our country and substantiate the relevant reforms. The very task of preventing the usurpation of power by a majority that ignores the interests of the minority, and of ensuring the stability of the government, was put before politicians by the authors of the theory of separation of powers, S. Montesquieu and J. Madison, as well as their followers, who pointed out the need for a bicameral parliament. The problem of separation of powers, the formation and consolidation of checks and balances, and securing a stable government remain quite pressing issues for modern Ukraine. Studying the role of the chambers of parliament in the decision-making and implementation of political decisions (including in the sphere of foreign policy) has allowed broadening of understanding of the specifics of the political system and political regime of Ukraine, the prospects of its democratic development, taking into account the introduction of the bicameral parliament.

In addition, the analysis made it possible to state that such reform is urgent and necessary, but should be carried out with the following concepts:

1) it is desirable that upper chamber to be a true expression of regional interests, and therefore, the most optimal way of forming the upper chamber – the Senate, is to elect its members at general meetings (colleges) of deputies (or their delegates) of local councils of one or another region, cities of Kiev and Sevastopol, as well as the Autonomous Republic of Crimea. A similar method is used in France, and it has proven effective in taking into account the regional

sentiments of parliament when making important decisions. The lower chamber, as an expression of the interests of the Ukrainian people, in this case, should be elected on the basis of universal, equal and direct elections in a proportional election system with open lists, although openness of the lists is no longer critical.

2) it is necessary to take into account the successful American experience of the transformation of the order of formation of the upper chamber, the Senate, equal number of representatives from the state at the beginning, with the transition to the number of representatives depending on the population, – allows to consider with optimism the modernisation of the national model of bicameralism in the future. It is also advisable to involve in the electoral process through the direct participation of representatives of the doctrine, providing representation from the National Academy of Sciences of Ukraine and branch academies of science of Ukraine, other reputable institutes of civil society (one representative each).

3) in Ukrainian realities, it is advisable to introduce a mechanism for recalling the representatives of the upper chamber by the colleges of deputies who have delegated them. This will allow the senators to liaise with their own regions and strengthen their accountability for their responsibilities.

4) to ensure the quality of law-making, it is permissible to introduce a model of "equivalent chambers", following the example of Italy. Ability of the upper chamber to participate actively in law-making, the use of a kind of veto on the acts adopted by the lower chamber, as a consequence, the need for conciliation procedures that can significantly improve the quality of laws and other decisions by a single legislative body in Ukraine.

The above proposals are completely correlated with the vector of European integration chosen by our country and the intensification of the comprehensive reform of the legal system as a whole and the practice of law-making in the realities of today.

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W. Butler, School of Law University of Pennsylvania Philadelphia, USA

V. Yermolaiev, National Academy of Legal Sciences of Ukraine Institute of Postgraduate Education Yaroslav Mudryi National Law University Kharkov, Ukraine

TOWARDS THE COURSE OF UKRAINE (TO THE 100TH ANNIVERSARY OF THE ACT OF UNIFICATION OF THE UPR WITH ZUNR)

Abstract. *In the history of the state and law of Ukraine there are immemorial events, legal monuments, the significance of which is fully realized only with time, especially in modern times. Such an event and attraction is the Act of reunification of the Ukrainian People's Republic and the West Ukrainian People's Republic on January 22, 1919. This article attempts to make a short historical and legal analysis of the processes of state-building on the way to the unification of the Ukrainian people and their lands with the beginning of the Ukrainian revolution. It began after the February bourgeois-democratic revolution of 1917 in Petrograd to create in Kiev in early March, public organizations and political parties, emerged from the underground, the Ukrainian Central Rada (hereinafter – UCR). The latter was created as a "parliamentary organization". In order to provide her with the "nature of the present representation of the entire organized Ukrainian people," in April 1917 a crowded National Congress was convened. He determined the form of the state structure of Ukraine – national-territorial autonomy as part of federal democratic Russia, with the main principles of autonomy. The Congress replenished the composition of the UCR, elected its Chairman – Grushevsky. Subsequently, at its V and VI sessions, as a result of the new reorganization and replenishment of membership in territorial and party representation, as well as at the expense of elected members from military, public, trade union organizations, national minorities, the UCR already had 643 deputies. The activity of the Central Rada was determined by political parties of the socialist direction: from 19 parties (Ukrainian, Russian and Polish), 17 called themselves socialist. This led to the direction and content of the state implemented by the Ukrainian Central Rada and its government – the General Secretariat.*

Key words: *Ukrainian People's Republic, Ukrainian Central Rada, Act of Reunification.*

Introduction

In the history of state and law of Ukraine there are memorable events, legal monuments, the meaning of which is comprehensible only in course of time, especially in the current period of active state formation. Such event and monument is Act Zluky of the Ukrainian People's Republic with West Ukrainian People's Republic on January 22, 1919. The Presidential Decree "On Measures to Celebrate the 100th Anniversary of the Events of the Ukrainian Revolution of 1917–1921" contemplates "To determine the commemoration of events and prominent participants of the Ukrainian Revolution of 1917–1921 as one of the priorities of the state authorities in 2017–2021" [1]. The Decree mentions, in particular, the necessity to prepare and publicize scientific works, to contribute comprehensively to scientific, ethnographic researches on history of Ukrainian state formation and liberation movement.

The article attempts brief historical and legal analysis of processes of state formation on the way to uniting Ukrainian people and lands with the beginning of the Ukrainian revolution.

It began after February revolution of 1917 in Petrograd with public organizations and political parties emerged from underground, Ukrainian Central Rada (hereafter referred to as UCR), started formatting at the beginning of March. UCR was created as "parliamentary-type organization" [2]. To make it "the true representation of all organized Ukrainian people", in April, 1917 the National Congress was convened [3]. The Congress defined the structure of state in Ukraine as national-territorial autonomy in the federal democratic Russia, with the main principles of autonomy. The Congress joined the composition of the UCR, chose its head – M. Hrushevsky. Subsequently, at V and VI sessions, as a result of a new reorganization and replenishment of the composition of the territorial and party representation, as well as at the expense of elected members from military, public, trade union organizations, national minorities, the UCR already had 643 deputies [3]. In reality, significantly fewer deputies were involved in its work. Political parties of social nature determined the activities of Central Rada: among 19 parties (Ukrainian, Russian and Polish) 17 considered themselves socialist. This shaped the direction and content of state formation was being made by the UCR and its government. V. Vinnichenko recalled: "This was the center to which all the springs of the awakened national energy flooded; all the pities, all injustices, all hopes, expectations, plans, calculations, and arguments flooded here. "[4].

Despite counteractions and neutral policies of Russian Provisional Government, the UCR gradually was taking over the management of all affairs in Ukraine. Rada's activists tried to defend interests of Western Ukrainians. Reporting at the meeting of its Committee in April and July D. Doroshenko, appointed by the Territorial Commissioner of the Parts of Galicia and Bukovina occupied by Russian troops, spoke about the frightening situation of "humanity deprived of rights", his unproductive at-

tempts to restore economic and cultural life in the country. Rada outlined the priority measures in helping Galician emigrants and prisoners in Siberia [3].

However, the desire of Central Rada to legitimately gain Ukrainian autonomy in the federal democratic Russia reflected in I and II Universals of Rada faced a decisive opposition from Provisional Government. The principle of state formation declared by activists in I Universal "without separating from whole Russia, without breaking up with the Russian state" [3] negatively affected its pace, hampered solutions of very important social and economic issues. It may seem strange for today, but the matter of future prosperity of the Russian state in plans and events of Rada's activists overpowered a search for solutions. In September 8, 1917 in Kyiv, there was the congress of representatives of peoples and regions of Russia, convened by the Central Rada. Its delegates strived for "federate reorganization of Russian republic", planned to end "excessive centralization of legislative and executive power" [5]. For further work, even the Council of People was elected. However, Russian Provisional Government in Petrograd did not respond to this event, and hopes about democratic reorganization of Russia and democratic solution to the Ukrainian issue remained an illusion.

1. Features of formation of upr own legal system

October Rebellion under the leadership of Bolsheviks and overthrow of Russian Provisional Government accelerated processes of state formation in Ukraine. The adopted Third Universal of UCR proclaimed the Ukrainian People's Republic, the total authority of Central Rada and its General Secretariat [3]. In such way, the Ukrainian statehood was restored.

The formation of UPR own legal system started. Rada issued laws in the name of UPR; the government had the right to "issue orders in the scope of government on the basis of laws". The final delimitation of UPR, the accession of "adjacent provinces and regions, where the majority of population is Ukrainian-speaking" should be "established in agreement with the organized will of people" [3; 5]. The leaders of Ukrainian revolution did not see close prospects for the collapse of the Austro-Hungarian Empire and the unification of the Ukrainian people in one state. In addition, political events at Naddnipranschina became more complicated.

At the Congress of Workers 'and Peasants' Deputies of Donbass and Kryvorizhya in Kharkiv in December 12, 1917, delegates proclaimed the authority of Soviet in Ukraine. The Central Executive Committee of the Soviets was elected, and the Soviet government was formed. In resolutions "On the organization of power in Ukraine", "On self-determination of Ukraine", the Congress of Soviets instructed the Provisional Central Executive Committee "to extend to the territory of the Ukrainian republic all decrees and orders of the workers and peasants government of the Russian Federation." USSR was recognized as the part of Russian Republic [6].

The last Ninth session of the UPR was on January 15–25, 1918 in the con-

ditions of Bolshevik troops attack on Kyiv and the Arsenal factory workers' uprising organized by the Bolsheviks. Under the influence of these events, the leadership of the Central Council finally lost the illusion of the possibility of establishing a Russian democratic federal republic and UPR joining it. Peace negotiations in Brest and Ukrainian delegation desire to sign a peace treaty with the countries of the Quadruple Alliance made necessary constitution of the Ukrainian People's Republic as a subject of international law. That is why the session adopted the last Forth Universal, stating in it "From now Ukrainian People's Republic is independent, free, sovereign state of Ukrainian People". M. Hrushevsky hoped that proclaimed independence "would become the solid basis of our statehood and social building" [3; 5]. It was indeed crucial state step on the way to the unity of Ukraine.

The ninth session of the UPR empowered the Ukrainian delegation to sign in Brest the peace treaty with Germany, Austro-Hungary, Turkey and Bulgaria. It was signed on January 27, 1918. It was the first peace treaty in the First World War. It consolidated (art.1) the desire of the parties "to live in peace and friendship" [3]. Agreements on the exchange of prisoners, the establishment of diplomatic relations, the exchange of "remnants" of products, etc. were reached. The additional terms of the Brest Treaty were armed assistance to the UPR to fight the Bolsheviks and loan in the amount of 1 billion rubles in exchange for 1 million tons of food, coal and other supplies from Ukraine. [3]. This was the price Central Rada paid for peace and return to power.

For the UPR delegation in Brest it was important question concerning perspectives of joining all lands inhabited by ethnic Ukrainians in the West. However, the delegation had to agree on a secret agreement with Austria-Hungary "on the case of Eastern Galicia and Bukovina," according to which the Austrian side promised to ensure the cultural development of Western Ukrainians, and by July 31, 1918, to unite the West Ukrainian lands "in one single crown edge "[3].

As we see, the UCR activists for a unjustifiably long time were trying to gain the legal status of Ukrainian autonomy within the Russian Federation, which delayed and slowed down the democratic state formation in Ukraine, the solution of urgent social and economic issues. Attracting German and Austrian military aid led to the actual occupation of Ukraine, its robbery and, as a consequence, to the final loss of public confidence in the Central Rada. The promise of the Austro-Hungarian government on the unification of Western Ukrainian lands remained weak consolation.

Under the foreign and Soviet domination, when Central Rada was in Volyn', predominant amount of adopted acts did not come into force. Its last legal act, adopted on April 29, 1918 after Rada returning return to Kyiv, was the Constitution of the UPR – "The Statute on the State System, the Rights and Freedoms of the UPR". The Constitution proclaimed the UPR State as a sovereign, independent, whose territory is indivis-

ible [3]. The Basic Law generalized the annual state formation experience, took into account its achievements and disadvantages.

The existence of the Ukrainian state in the conditions of the hetman regime and the German occupation, and then the appearance of "Federal Diploma" by P. Skoropadsky on November 14, 1918 in a certain way compromised the idea of Ukrainian unity. But she revived and gained strength among the opposition political parties, Western Ukrainians.

2. West ukrainian people's republic under the authority of state secretariat

In the middle of October 1918, the association of political parties Ukrainian National Union unveiled "Statement on the Internal and External Situation of Ukraine", in which it called it quite natural and necessary to "unite in the one state Ukrainian organism all the inhabited by Ukrainians lands that, by this time and international circumstances, did not form part of the Ukrainian state, that are Eastern Galicia, Bukovina, part of Hungarian Ukraine, Kholmshchyna, Pidlyassya, parts of Bessarabia with the Ukrainian population, part of the ethnographic Ukrainian Donschyna, Montenegro and Kuban "[7]. Believing in a close perspective on the implementation of the communist idea, they gave a sense of the immortal unity of Ukrainians among intellectuals, the democratic wing of political parties, and the rapid development of dramatic political events in Western Ukraine.

On October 18, 1918, Ukrainian deputies of both chambers of the Austrian Parliament, regional districts, representatives of Ukrainian political parties, clergy and students came to Lviv. At the meeting, the Ukrainian National Rada was established, its Charter was approved, its membership was determined, its head was declared – E. Petrushevich [8]. The next day, the "Proclamation of the Ukrainian People's Republic" (Manifesto) was published, which established the territory of the republic, constituting the Ukrainian state [8].

With the collapse of Austria-Hungary on November 1, 1918 Sich Riflemen led by D. Vitovsky handed over power in Lviv, while the deputy governor of Galicia and the delegation of Rada signed an act on the transfer to her full authority in the country. This decision of November 1918 was also supported in Chernivtsi, but by the end of November, Romanian troops occupied the territory of Bukovina [8]. In November 9, Rada formed State Secretariat (government), and also defined the official name of the state – the West Ukrainian People's Republic. The next day, Rada adopted a resolution mandating the State Secretariat to take measures to begin negotiations on "the unification of all Ukrainian lands into a single state" [9]. Three days later, she adopted the First Provisional Basic Law, initiating state formation on a constitutional basis. The main task of state formation was the leaders of WUPR considered an association with Naddnipranschina, the unity of the Ukrainian lands.

In November 24, 1918 State Secretariat of WUPR decided to start negotiations about uniting with the Directorate

of the UPR, which headed the uprising against the Hetman's regime. On December 1, 1918 delegation of the Ukrainian National Rada of WUPR and Directorat, whose troops were attacking Kyiv, conducted in Fastov the Pre-accession agreement on the unification of 2 parts of Ukraine "into one indivisible state unit" [8]. It was assumed that the WUPR would receive territorial autonomy, and the "joint commission" will determine the boundaries of this autonomy and the detailed conditions of the unions of the two republics. Thus, the real prospect of the reunification of most of the Ukrainian lands, mutual support and assistance has become real.

In the unifying movement, the Ukrainians of Transcarpathia took an active part. On the basis of the initiative of the public association "Ruska Narodna Rada", a congress of delegates of its branches (about 500) was convened in Budapest on December 10, most of whom were in favor of joining the region to Ukraine [10]. The same decision was adopted by the Nationwide meeting in Khust on January 21, 1919. [8] The Hutsul republic was even proclaimed in Hutsulschina, and a parliament of 42 deputies was elected. However, the proclamation of the Hungarian Soviet Republic in March of the same year put an end to democratic processes in Ukraine [11].

In January 3, 1919 in Stanislav at the meeting of Ukrainian People's Council, the Decree on the unification of the WUPR and the UPC.was unanimously approved. By declaring their unification unanimously "in one uniform, sovereign People's Republic" the Council made a final decision on this matter at the forthcoming All-Ukrainian Constituent Assembly [8]. Before their convocation in the WUPR, UP Council had the legislative power, the State Secretariat had the executive power, an independent command of the Army was kept. The decision of the UP Council was supported by thousands of manifestations in many cities of the region – in Drohobych, Ternopil, Stryi, Zolochiv, Zhovkva, Kolomyia, Kalush and others. Even the elections to the Central People's Rada (Parliament) of 100 deputies were held [8]

Act Zluky had to be proclaimed in Kyiv. In order to do this, to the capital, where the Directorate of the UPR already had control, a delegation was sent from representatives of Galicia, Bukovina and Transcarpathia.

On January 22, 1919 on the decorated Sofia square of Kiev, in the presence of tens of thousands of people member of the UN Council on behalf of the western Ukrainians L. Bachinsky congratulated people of Kyiv. State Secretary of the WUPR L. Tsegelsky solemnly unveiled the Council's decision on the unification, powers of the Western Ukrainian delegation and handed over the documents to the Head of the Directorate, V. Vinichenko who welcomed the delegation of the brothers and accepted the statement-decision of the Council. The Universal of the Directory was read, in which it was proclaimed: "From now two parts of Ukraine, which for centuries were separated, are joined – the Western-Ukrainian Republic (Galicia, Bukovina, Hungarian Rus) and the Great Naddnipryanska Ukraine" [8; 12; 13; 14].

Eternal dreams, for which the best sons of Ukraine lived and died, came true. "…From now there is the only independent Ukrainian People's Republic. From now Ukrainian people, liberated by the powerful impulse of their own forces, have the opportunity by united, friendly efforts of all sons to build an inseparable, independent Ukrainian state for the good and happiness of all of their labor people "[8]. This "holiday of unification", according to V. Vinichenko, became a significant event in the history of the native state formation [4]. It was truly a majestic national holiday of reunion, the unity of the Ukrainian lands, which were for the long centuries uncovered by neighboring states.

The next day, a session of the Congress of Labor People of Ukraine, elected in January, was opened, and the Western Ukrainian delegation as a representative from Western Ukraine participated in the work [15]. The first question heard by the Congress was the question of unity. It approved the whole package of the unity documents by adopting the Act of Association and the Universal "To the Ukrainian People". WUPR, in accordance with the Law "On the Form of Government in Ukraine", became known as the Western Region of the UPR. The Congress instructed the government to prepare a draft electoral law for the future national parliament of the independent Ukrainian republic [8].

Conclusions

Therefore, the Congress as authorized representative body, "pre-parliament" embodies sovereign Ukraine. In this legal way, the historical problem of uniting both parts of Ukraine was solved. The Labor Congress expressed protest on attempts against integrity, sovereignty and independence of Ukrainian People's Republic. It proclaimed: "Ukrainian people want to be neutral and in friendly relations with all other nations." and pointed out the threat from the side of "imperialists and Soviet Russia". Historical Act Zluky was devoted to the anniversary of the proclamation of the UPR Unity by the Fourth Universal. That is why in January 24, 1919 the Council of People's Directors of Directorate decided to set in January 22 annual celebration of the Day of Unification of Ukraine. In such way, the unity of Ukrainian people and its lands since Kievan Rus' was proclaimed and consolidated.

Act Zluky clearly demonstrated the impotence of attempts to separate Ukrainian nation, to turn parts of Ukraine against each other in the First World War, to force to serve alien purposes [16]. However, further, tragic for Ukraine, events and consequences of Second World War consolidated by the Treaty of Versailles of 1919 for a long time delayed actual process of uniting all Ukrainian lands. Another separating factor, which should be remembered, is functioning of two systems of power in UPR and WUPR. That is why in the most difficult moments of struggle against the invaders, representatives of both powers often could not understand each other, give up own regional interests for the benefit of all Ukraine. In such way, the history of Ukraine is instructive: it is the constitutional duty of every citizen to strive for unity, unanimity in relation to

the Motherland, to protect it, especially, in the context of the war with foreign aggression. Historical experience warns that national interests are much more important that interests of party or corporation, the development of a legal, social, democratic state in Ukraine requires the political and spiritual unity of all citizens.

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O. Zaichuk, Doctor of Law, Professor, Academic of the National Academy of Law Sciences of Ukraine

Yu. Zaichuk, LLM, Ph.D., ILO Research Scholarship

BREXIT – AN OPPORTUNITY FOR ENGAGEMENT? A CASE FOR SMART REFERENDA

The European Project, overall, with or without Brexit, is a success. It is true that the EU experienced a fair share of political and economic challenges. However, it would be unfair to attribute the is- sues only to the EU – the world economy experienced a slowdown as well. Overall, "the Europe", as a political, cultural and economic phenomenon has never been more successful.

As described by Henry Kissinger in his World Order, in some sense, the EU was a reunification of Westphalia. Yet, the EU can also be interpreted as Europe's return to the Westphalian system. The EU has combined aspects of both the national and the regional approaches without, as yet, securing the full benefits of either. The EU diminishes its Member States' sovereignty and traditional government functions, such as control of their currency and borders. On the other hand, European politics remains primarily national, and in many countries, objections to the EU policy have become the central domestic issue. The result is a hybrid, constitutionally some- thing between a state and confederation, operating through ministerial meetings and a common bureaucracy. EU states have surrendered significant portions of what was once deemed their sovereign authority. Because Europe's leaders are still validated, or rejected, by national democratic processes, they are tempted to conduct policies of national advantage and, in consequence, disputes persist between the various regions of Europe – usually over economic issues.

Especially in times of crises such as that which began in 2009, the European structure is then driven toward increasingly intrusive emergency measures simply to survive. Yet when people are asked to make sacrifices on behalf of the "European project", a clear understanding of

its obligations may not exist. Leaders then face the choice of disregarding the will of their people or following it in opposition to Brussels.[1]

The Lindy Effect or the survivorship bias, as formulated, among others by Benoit Mandelbrot and Nassim Taleb, states that things (phenomena) that existed for a long time are more likely to survive than things that have not passed the test of time.[2] As Winston Churchill once famously said, democracy is "the worst form of Government except for all those other forms that have been tried from time to time". The referendum, a direct vote in which an entire electorate is invited to vote on a particular proposal, has been in use under various names since, at least, the days of the Roman Republic as a Decree of the Concilium Plebis (Plebeian Council). The Westphalian system of public international law which is based on the principle of the state sovereignty over its territory, can be traced to the Peace of Westphalia (1648). In other words, the referendum, under various names, is likely to remain in use within the EU and elsewhere in the future. On top of having the survivorship bias on its side, it is hard to imagine anything more democratic than a direct vote of all the voters. Then, the question is if whether this ultimate expression of democracy would work in favour of the European project or against it.

According to a famous piece of political wisdom, "perception is reality". Depending on the point of view, Brexit can be viewed as a dramatic event, as an opportunity or as a continuation of an old trend. Let us not forget that the UK has never adopted the Euro or the Shengen Zone. Let us not forget as well that the European Constitution has been defeated by a wide margin in a referendum both in France and the Netherlands in 2005, not in the UK. Arguably, the UK has never been fully integrated in the "European Project" in the first place. Perhaps, at some point, there was a hope that, over time, the UK would "join in the spirit of the European Project". However, a combination of factors, such as the economic crisis of 2008, mass migration and other, led to Brexit which is not a "cessation from the European State" which never existed in the first place.

Although the use of referenda varies widely from country to country, in general, it can be said that they are viewed as risky, "lumpy" and unpredictable or something which is exploited by "populists". After a number of failed attempts to pass the European Constitution in 2005, the referendum, as an instrument of direct democracy which can be used for the advancement of the European Project, was dis- carded in favour of passing "constitution-like-treaties" through national parliaments which alienated a large number of voters toward the project.

Votes tend to question un-elected bureaucracies, whether officials do a good job or not, because, among other

[1] World Order, HENRY KISSINGER, Penguin Press, 2014, page 59.

[2] Unlikely Timeless Relics Explained by the Lindy Effect by PATRICK MURPHY, 2017, https://trig.com/tangents/2017/9/21/unlikely-timeless- relics-the-lindy-effect

things, as observed by Nassim Taleb, "they have no skin in the game". The EU, which existed for a much shorter period of time than any of the European states, is exceedingly viewed as a bureaucratic entity which is trying to impose its will without democratic representation on the citizens of the European Union which, at the same time, happen to be voters in their sovereign European States.

Reported in the news, in a 2018 poll, a third of the Polish voters feel "hostility" towards EU bureaucracy and would back "Polexit" from the EU3. A somewhat earlier survey by Pew Research Center in 2017 showed that while most EU citizens do not want their countries to leave the EU they would support a referendum on member- ship while Greece and Italy recorded the highest level of support (35%) for the actual departure from the EU.[1] Interestingly, the same poll showed that in Britain, after the 2016 Brexit vote, more than a half of respondents (54%) said that they were positive about Europe compared to 44% in the 2016 survey.[2]

Under the "anti-EU-bureaucracy" perception of the European reality, Brexit is not a sign of something new but rather a reminder of an ever growing need to have a critical look at the European Project. The question is not so much what would happen to the UK after Brexit but about the future of the European Project with or without the UK which would remain a key member of the "European Family" in the future but on its own terms.

Is there an opportunity to use the referendum, as an instrument of direct democracy, for the advancement of the European Project? Historically, representative democracy appeared on the scene as a practical way of governance where politicians act as "policy specialists" akin of any other profession. Casting a vote was and still is accompanied by a complex ritual of going to a special location to cross a circle on a special piece of paper. The whole process was created in the pre-Web Age to prevent electoral fraud and ensure each voter's right to safely cast a vote. As a result, each referendum is a complex and expensive process making referenda relatively rare and limiting them to a few "grand issues" such as passing the European Constitution or leaving the EU.

The Age of the Internet has yet to change this ritual process but, in principle, after 2005, a combination of technological advancements made it possible and inexpensive to eliminate a traditional voting machinery from the loop by providing each owner of a smart- phone with an option to vote directly in a referendum at her or his convenience from anywhere and at any time. All or almost all smart- phones are linked to individual owners. A growing number of smart-

[1] "Time to get out" Will Poland leave the EU? Third of Poles demand EU Polexit by SEBASTIAN KETTLEY, March 22, 2018, https://www.express.co.uk/news/world/935620/Poland-EU-exit-Polexit- will-Poland-leave-European-Union

[2] Support for EU and exit referendums up across Europe: survey by CYNTHIA KROET, June 16, 2017, https://www.politico.eu/article/eu- support-increases-in-europe-continent-but-also-exit-referendum-support/

phones have a fingerprint scanner. An overwhelming majority of voters in the European Union have at least one smartphone. As the wide use of banking apps shows, it is easy enough to have a safe connection to each and every client. In other words, offered for consideration, is an idea of using direct democracy to remediate voter disengagement, whether real or perceived, resulted from a relatively complex political structure of the European Union via the use of contemporary technology linked to an almost universal adoption of smartphones by the EU citizens.

Reported by www.GMSA.com, at the end of 2017, there were 465 million mobile phone subscribers in Europe, equivalent to 85% of the total population of the EU.[1] An extremely high cell phone penetration in the EU coincides with the first ever use of smart- phone voting software by US military personnel stationed abroad. Developed by Voatz, a Boston start-up, an app uses a face recognition software and block chain to secure the voting process.[2] While, in practice, it would be impossible to guarantee a 100% penetration on smartphones among voters in the EU, it is easy enough to dis- tribute a limited number of basic smartphone and/or provide voters with a "back-up alternative".

The Age of the Internet made it possible, for each and every user, to access a wide range of sources of information on any conceivable subject. An argument about a highly qualified "political class" does not hold for any informed voter anymore. For example, politicians are not known to understand meteorology and computer generated climate models while actively participating in various climate related forums. Granted they would argue that they rely on the opinion of the experts. However, so does any user of the Internet. The same applies to each and every conceivable issue other than a few classified matters of national security, which can be left to a few individuals with proper training and security clearance.

Once referenda on the EU level becomes cheap and easy to organize it would allow voters in various countries to participate in the European Project themselves. Thus, over time, it would help to eliminate a "Brussels bureaucracy imposed from the top" image of the European Union.

Once referenda becomes a common tool of the European Democracy, it would also eliminate a need for "once in a time all-or- nothing" referenda. For example, rather than having a referendum on an "all-or-nothing creation of the European State", a number of simple referendums can be conducted on the individual aspects of such a state. Perhaps, turning this process from a "once in lifetime Brexit-like" to a fluid process would help to guide the European Project toward a higher level of integration. It is equally possible that the EU-level "smart referenda" would

[1] https://www.gsma.com/mobileeconomy/europe/

[2] https://money.cnn.com/2018/08/06/technology/mobile-voting-west-virginia-voaz/; https://voatz.com/

demonstrate that, at the moment, the European Project is not ready for deeper integration. Perhaps, as pointed by Henry Kissinger, the most important goal of the EU-level smart referenda would be creating a clear understanding of the citizen's obligation toward the European Project outside various rights and benefits created by the European Union as "an in- tangible something" which distinguishes a legal construct from a proper state.

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N. Onishchenko, Doctor of Legal Sciences, Professor, Honorary Lawyer of Ukraine, Fellow of Ukraine Law Sciences Academy, Chief of the Theory of State and Law Department of V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine

CODIFICATION: CLASSIC IDEAS AND NEW APPROACHES

Summary. *The article is devoted to the modern understanding of the category of codification (recodification) and consideration of their substantive content, a separate vector is a description of the types and varieties of codification, as well as the tasks facing scientists in the specified plane.*

Key words: *codification, recodification, systematization of legislation, the task of codification, features of codification.*

Formulation of the problem. With regard to legal scientific developments, it is hardly possible to complain about the small number of publications concerning the codification category. However, even a cursory analysis of such publications indicates more about determining the instrumental (technical) component of this process than its substantive content. It should be noted that a new impetus for the debate on this category is stimulating, including, processes related to the recoding of civil law. We would like to emphasize that much attention was paid to this issue at the III International Legal Forum in Kharkiv. However, it was primarily about civilistic principles and foundations. The theoretical aspect of codification remains, unfortunately, beyond the present scientific focus. We want to state that, as a rule, in the historical retrospect (not an exception and the modern context), the need for codification was linked to the need to regulate new social relations, with the new dominants of legal life, new priorities in it, and also – the human factor of perception and carrying out codification works was taken into account.

To put it briefly, the purpose of codification is always focused on the legal

certainty of both the form and content of the presented, updated legislation.

The main presentation of the material. Today, you can meet the thesis that codification is an indicator of the maturity of the national legal system. Agreeing on the whole, we would clarify this position somewhat and point out that the level of codification reflects the level of maturity of the national legal system.

Given this context, we would like to highlight the following codification tasks:

a) appropriate "clearing" related to the elimination of obsolete standards;

b) substantial updating of the regulation of a certain sphere;

c) deep comprehensive revision of the current legislation and making the necessary changes to it;

d) modernization of the current legislation, etc.

In addition, a number of factors can be cited that also "provoke" codification, including: departmental; the conflict and complexity of the texts of legal acts, which makes them unclear to the subjects of legal implementation; the politicization of content as a result of the rule of political expediency rather than objective necessity; the absence of promising programs for legislative development, monitoring of the legislative array and legal analytics; low level of legislative technique; complicated categorical conceptual apparatus, a small number or absence of encyclopedic and other legal publications with clearly defined definitions (doctrinal gaps) in scientific studies, etc.

According to modern researchers in the law-making process, the authorized subjects of law-making make systematic mistakes, not fully taking into account structural links in the system of legislation, which leads to conflicts and duplication of the normative array, disparities in the development of certain branches of legislation, etc.

Understanding the reasons that stimulate the codification work of today, it should be said that more than 40 codes have been published in the history of Ukraine since 1960. First of all, the rules of law in the field of criminal and criminal procedural law (1960) were systematized, later the rules of civil and civil procedural law (1963). Subsequently, the Marriage and Family Code of Ukraine, the Land Code of Ukraine were adopted. It should be noted that there was a simultaneous codification of the rules of substantive and procedural law in a particular field, which certainly contributed to the improvement of the level of effective regulation of the relevant social relations, and consequently – to overcoming conflicts, inconsistencies and gaps in legal regulation.

Following the dynamics of codification of national legislation, using the relevant data of legal analysis and legal monitoring, it should be noted that since 1991, on average, one codified act has been adopted every year. In 1994 there were two: the Code of Ukraine on subsoil and the Forest Code of Ukraine, in 1995 – two: the Water Code of Ukraine and the Code of Merchant Shipping of Ukraine. From 1995 to 2001 no code was adopted. In 2001, there were two: the Land Code of Ukraine and the Criminal Code of Ukraine, and in 2002, two, in-

cluding the Customs Code of Ukraine and the Family Code of Ukraine. In 2003, the following three acts were adopted: the Criminal – Executive Code of Ukraine, the Civil Code of Ukraine, the Economic Code of Ukraine. It should be noted that no code is adopted from 2005 to 2010. In 2010, two were adopted again: the Tax Code of Ukraine and the Budget Code of Ukraine, in 2011 – the Air Code of Ukraine.

To date, 23 codes are in force in Ukraine, of which three (the Labor Code of Ukraine of December 10, 1971, the Housing Code of the Ukrainian SSR of June 30, 1983, the Code of Administrative Offenses of December 7, 1984) are "obsolete" from a legal and moral point of view, which requires immediate codification and action to address this problem..

It should be noted that the opinion that the relations in the sphere of information, culture and cultural heritage are insufficiently regulated today is repeatedly and not alone on the pages of our legal editions. In view of the latter, we would like to point out that proposals for the creation of separate codes are not always supported by scientists and practitioners. Yes, quite polar opinions are expressed about the need to adopt the Code of Information Law. We suggest dwelling on this in more detail.

Yes, today it is safe to say, and this is noted by some scientists, about the formed global information society, in which the processing of information and its higher form of knowledge – employ more people than for the processing of raw materials. At the same time, scientists predict that in the future the entire world space will become a unified computerized and information society.

At the same time, everyone is well aware that "a medal always has two sides". The information society, which conceals a number of dangerous trends, is not an exception, in particular: 1) the real likelihood of destruction of privacy of individuals and secret activities of organizations due to the impact of penetrating information technologies; 2) the problem of selecting reliable information; 3) the "difficulty" of preventing the circulation of "harmful" information, including that which contains elements of violence, public calls for terrorist activity, other extremist material, as well as material contrary to public morality; 4) the growing threat of being able to manipulate people's consciousness due to the increased simultaneous influence of various forms of media, especially its electronic form; 5) the need to ensure the proper adaptation of people to the specific environment of the information society, which is becoming more technically more difficult every year, etc.

"Internet", "cyberspace", "virtual reality" – these are concepts that over the last decade have firmly entered not only the daily circulation of our compatriots, but also actively began to "capture" the scientific sphere of human activity. However, unfortunately, we must acknowledge that almost all relationships related to the collection, processing, transmission and other use of information in electronic form not only are not regulated by law, but at the normative level, not even definitions of many basic concepts are

defined, on the formally determined basis of which legal regulation should be built (eg cyberspace, cybercrime, data protocol, gateway, proxy, etc.).

It should be noted that when it comes to cyberspace, it is the space itself is meant, not the territory that is always linked to national geographical boundaries, which in turn affect the competence of states, clearly defining its limited jurisdiction. Against this background, it is worth agreeing that erroneously consider cyberspace a territory of mixed international legal status. However, it should be considered an international planetary space, which has its own specific features.

Given the above aspects of the stated problem, we can draw some conclusions:

1) the active development of the virtual information space and the Internet as a central part of it has significantly complicated the mechanism of bringing perpetrators to justice for offenses in the information sphere. At the same time, this complication is objective in nature and is related, first of all, to the technical and communication nature of cyberspace and the specific properties of storing and disseminating information in it in various forms;

2) the solution of the issue of combating information offenses only by improving the norms of the current legislation is quite difficult. In this context, it is necessary, first of all, to emphasize the need for combining legal and organizational and technical means of combating information offenses (for example, creating and implementing secure protocols for storing and transmitting information in electronic networks). It should be noted that the positive law in this case has in some way started to depend on technical innovations related to the virtual information space;

3) the gradual development of the global information society requires that it be properly regulated at both international and national levels. In view of the above, in our opinion, ensuring the effective legal regulation of all information space at the national level in Ukraine can be achieved, in particular, by adopting a codified legislative act (for example, the Code of Laws on Information in Ukraine or the Code of Information Law of Ukraine), which would take maximum account of rights and legitimate interests of the whole subject structure of the respective legal relations and would provide uniform approaches and principles to the regulation of relations in cyberspace and legal liability for unlawful acts by clearly identified entities. Observance of these conditions could greatly contribute to the security of development of the information sphere of Ukraine, the protection of the national information space, the market from information terrorism and the information war etc [1]. However, let us reiterate that there are also many opposing opinions in the scientific community that have not only the right to existbut also their justification.

Consequently, codification (ordering) processes are not always uniquely understood so far.

So, going back to the need for codification work, we can say that codification can be considered in two interrelated planes:

1) as an independent field of scientific research.

2) as a type of legal activity.

Taking into account the theoretical component of the article, it should be reminded that codification refers to the activity of law-making bodies of the state in the creation of a new, systematic regulatory and legal act, which is carried out by deep and comprehensive revision of the existing legislation and introducing significant changes to it, in the process of codification, the draft act creates the existing rules that have not lost their meaning, as well as new rules that make qualitative changes in the regulation of a certain sphere of social relations.

Among the features of codification are usually the following:

– only competent law-making bodies are engaged in codification activities on the basis of constitutional or other legal powers;

– as a result of codification, a new regulatory act is created, which includes norms that are significantly different from those previously in force;

– a codification act is essentially a consolidated act, since it integrates the norms previously contained in various acts but regulated the same sphere of social relations;

– the codification act is the main one among the acts that operate in a certain field of public life;

– legal acts created as a result of codification, calculated for a long time regulation of social relations.

They take into account possible changes in life and are able to regulate social relations that will arise in the future.

Codification is the most complex and perfect form of systematization of legislation that is law-making character. With its help, a single legally and logically integral, internally harmonized regulatory act is created. In its structure, as a rule, it has a general part, which reflects the sectoral principles that determine the nature and content of this area of law as a whole. There are three main types of codification acts:

– the basics of legislation – regulations that set out the most important provisions (basic principles) of a particular branch of law or public administration. This form of codification is believed to be in use in the federal states.

– Code is the most common type of codification acts in the main spheres of public life that require legal ordering.

– statutes, regulations – codification acts of special action issued not only by the legislature but also by other law-making bodies (for example, by the government).

Some codification acts in modern countries do not have a special name. These are different laws, such as: property, local government, retirement benefits, etc.

Codification is the process of law-making, reworking of all legislative material and creating new rules.

Often codification in scientific research is characterized as a creative process. The creative role is to consolidate the systematic nature of the legislation, strengthen legal unity and coherence. Thus, codification includes “old with new shades” of legislation, new rules,

and – promotes the formation of enlarged blocks, which indicates the achievement of the necessary stability.

From this it follows that the codification act should contain stable norms, calculated for a sufficiently long period of time, for a certain perspective. The effectiveness of a codification act will largely depend on how accurately and clearly the legislator takes into account trends in the development data of social relations.

In addition, it should be noted that more "moving" areas of social relations are governed by regulations created in the process of current lawmaking, and the "drivers" of choice for static or dynamic factors in the law are precisely the groups of public relations that need to regulate.

Among the varieties of codification, modern scientists distinguish: a broad and narrow understanding, where a narrow – a " technical processing ", and a broad – the processing, supplementation, alignment of existing and new rules.

Some scholars distinguish among the types of codification:

a) minimum (identical incorporation without changing the content);

b) medial (combination of new and old legislation);

c) maximum (creation of a Code) [2].

There is also an unofficial codification conducted by individuals, an illustrative historical example being the "Book of the Old Master from Rosenber" (Czech Republic, 13th century).

They also distinguish: general codification – provides for a series of regulatory acts; sectoral codification – refers to one branch of law; special codification – it is a separate legal institute.

At the very end, I would like to emphasize the role of legal doctrine in codification processes, in particular, legal monitoring and legal analytics for this segment.

Scientific and methodological and legal support is of great importance in the preparation of these codified acts. First of all, it is necessary to ensure such provision at the level of the law (this may be the law "On Regulatory Acts" or "On Laws and Legislative Activities", possible and other names of acts) regarding the consolidation of the notion, legal force of the code, exclusive list of homogeneous spheres of public relations that require legal regulation through the code. It should be emphasize on systematization by industry principle, no possibility of mixing norms of public and private, substantive and procedural law with the simultaneous coherence and application of the same techniques of legal technology to the presentation of rules of law (for example, need consistency and providing system connections the Criminal and Criminal Procedure Codes, Civil and Civil Procedure Codes). The codification of the narrow spheres of homogeneous social relations should be avoided, where the use of common law is objective and justified. It is these and other factors that predetermine strengthening the impact of legal science on the process of systematization of law in general and codification in particular.

Interesting in this doctrinal context is the opinion of E. Kharitonov and O. Kharitonova on "saturation" and un-

derstanding of the term "recodification". They note that processes related to codification, and, moreover, recodification, have always been accompanied by discussions, due to the fact that some of the society remained committed to the former values, while the other was ready to accept the updated values [3].

Conclusions

To sum up, we would like to point out that, in our view, modern scientific "to master" of codification, as a process, needs solving the following tasks:

a) study of the correlation of objective and subjective factors during the codification work;

b) grouping of static and dynamic factors necessary for normative ordering of social relations;

c) isolation of functions of codification, in particular, integrative, defectological (elimination of defects of the previous legislation), system-forming, stabilizing, optimizing, etc.

In addition, carrying out codification work always requires a clear understanding of the goal of achieving a higher (compared to existing) legal certainty, both in terms of content and form of legislation.

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STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

V. Kostytsky, LLD, academician of the National Academy of Legal Sciences of Ukraine, doctor of legal sciencies

LOCAL SELF-GOVERNMENT AS A SEPARATE BRANCH OF POWER IN UKRAINE: THEORETICAL AND METHODOLOGICAL ISSUES

Annotation. *The author once more raises the issue that though the theory of Charles de Montesquieu is brilliant, it yet deals with the problems of the state power organization and is dedicated to the state power separation into branches. However, Montesquieu's studies have not covered the issue of the people's power separation. The people's power is to be considered a separate branch of power, combining the state power and the self-governance power. Exploring the problems of the local self-government reform in modern Ukraine, the author thus defines a chronological framework of work as follows: it is a modern reform in the form of decentralization of power in Ukraine, which has led to significant changes in the legal regulation of local self-government. In this regard, the author recalls that there have been several reforms of the kind in Ukraine, so the author cites scholars who have written about local government reform in recent decades.*

Key words: *civil society, system of representation, rule of law. self-governance power, the distribution of power, local self-government, the self-governing branch of power, the reform of local self-government.*

The issue of organization of power on democratic basis remains the focus of attention of both politicians and public figures, as well as scholars today. Recalling the ancient times and the Renaissance period, the ones who found the answers to the questions posed by society to the state, entered the arena of revolutionary decisions and remained forever in the memory of the people. In this regard the reforms of Solon and Cleisthenes in Ancient Athens should be mentioned [4]. These reforms ensured broader access of the people to the exercise of power through participation in the election of the Council of 400 (the Council of 500 during Cleisthenes time) and the formation of a democratic court.

Even then, Plato noted the importance of power branching as a guarantee of its democratic nature and the unacceptability of its usurpation in sole hands. It was Plato who, among the three branches of power, indicated both the legislative and the judiciary, and as well the need to separate the power of the magistracy [3].

The author of this article has numerously [20] raised the issue of necessity modern interpretation of the theory of Charles de Montesquieu: as brilliant as it is, it yet fails to cover the whole range of power execution issues, because it deals with the problems of the state power organization and is dedicated to the state power separation into branches only. The people's sovereignty and sovereign rights of the people has to be concerned though. However, Montesquieu's studies have not covered the issue of the people's power separation. The people's power is to be considered a separate branch of power, combining the state power and the self-governance power. Such approach nonetheless was obvious for the ancient philosophers. Following the principle of a systematic approach to the study of power, it should be noted that state power is not the only form of power of the people, nor is the power of the people monopolistic even if the people is supreme sovereign. At the same time, the whole system of power includes subsystems of spiritual power (the Divine power and the church power), the people's power, executed directly or within the mechanism of power, organized due to the representation system (state and self-governance), the power of the capital (in the financial meaning) and the fourth power, or fourth estate (media, TV, the Internet).

The author does not aim at researching the issue of the separation of powers in the historical and philosophical context, but mentions Aristotle as one of the oldest sources, to substantiate the idea that local self-government together with the state power form the system of representative power of the people in the last thesis context [2].

Exploring the problems of the local self-government reform in modern Ukraine, the author thus defines a chronological framework of work as follows: it is a modern reform in the form of decentralization of power in Ukraine, which has led to significant changes in the legal regulation of local self-government. In this regard, the author recalls that there have been several reforms of the kind in Ukraine, so the author cites scholars who have written about local government reform in recent decades. Hence, the number of references to the last three years' literature is limited, as the issue may be covered by the last decades' research only, and the course on decentralization of power in Ukraine, announced in 2018, has not yet collected enough publications.

Therefore, not aiming at writing a historical and legal study of local self-government, the author tried to solve a double problem: on the one hand, to prove that local self-government is a separate branch of power, and, on the other hand, to show that in such circumstances the reform of local self-government in Ukraine is required. In this context, one of the most important tasks is the organization of local

self-government on the basis of the division of functions of local self-government entities into representative bodies and executive authorities [6].

Let us reiterate that local self-government is a democratic form of self-organization and functioning of any society. At all times, society remains a complex system of communication in the economic, political and socio-cultural fields, and therefore requires a complex system of self-government to guarantees the self-development of such society.

Being used as a generic term, self-government includes any form of self-organization of the society. In broad understanding the state itself can be considered as the self-governing system, which operates on the basis of a combination of direct and representative democracy. In the narrower meaning, self-government stands for the forms of organization of fragmented social communities, which compose the society as the upmost holistic social system [7].

As legal scholars indicate, magistracy is the power of the people rather than the state power. A system of local self-government is a way of representing the interests of the whole people, but interests of a different nature than in the case of parliamentary or presidential representation of the interests of people related to economic development and social life in a particular locality. The indication on the "local" nature of self-government means that it is conducted not merely on the local level. Scholars interpret local self-government as: (1) form of power organization at the level of villages, towns, cities; (2) means of power organization at the basic territorial level (in villages, towns, cities) and at the regional level (regions, districts); (3) form of power organization at the level of certain territorial communities or within their territorially defined groups (united territorial communities) administrative-territorial units) [5]. Mistakenly local self-government of territorial communities is sometimes considered both at the basic territorial level (in villages, towns, cities) and at the regional level (regions, districts), because united territorial community is limited to the territory of the respective village, town or city.

Local self-government as a separate branch of representative power is characterized by certain dualism. On the one hand, in a legal sense local self-government is a form of management of a territorial community in the respective territory; it is a form of public authority exercised by the territorial community, both directly and by means of local governments (local councils) and officials – village, town and city mayors. On the other hand, local self-government, though not an element of state power, carries out certain functions of state power based on law, in particular in the form of delegated powers.

The municipal reform launched in Ukraine is intended to resolve the aforementioned contradictions in the development of local self-government. The above methodological observations, which are fundamental in nature, fit into the methodological foundations of municipal reform, reflecting the nature of local self-government and contributing to its improvement.

Scholars should find out the reasons for the deviation of the law from its ideal image as it has been shaped in the municipal law doctrine and in the outlook and vision on democratism of the local power arrangement [8]. Therefore, the following question should be answered: what should the Law of Ukraine "On Local Self-Government in Ukraine" (which has by now lost its relevance and needs radical changes) be like now and in the future.

Definitely, local self-government is a significant and multidimensional sociopolitical phenomenon, which it extremely difficult to limit with rigorous scientific definitions and categories. It is an extremely mobile object of research, whose content varies depending on the specific political, socio-economic, sociocultural situation and the public order presented to this institute of democracy by the society" [1].

The history of the development of local self-government as an institution of power and municipal law in modern Ukraine begins with the adoption of the Law of the USSR "On Local Councils of People's Deputies and Local and Regional Self-Government" on 7 December 1990. Since then, a lot has changed in organization of public authorities both in the center and the regions: the Constitution of Ukraine [9] has been adopted, several versions of the Law on local self-government have been passed, the mechanism of self-government "Europeanization" has been launched (in particular, in connection with ratification of the European the Charter of Local Self-Government by Ukraine in 1997) [10].

It should be noted that modern Ukraine has experienced four reforms of local government with the first one starting in 1992: (1) due to introduction of local state administrations headed by the representatives of the President of Ukraine in regions, districts, the Kyiv city, the Sevastopol city and in regions of these cities; (2) due to liquidation of these authorities and re-establishment of the executive committees of councils as bodies of local self-government; (3) due to liquidation of the executive committees of councils and re-establishment of the local state administrations headed by the heads of the respective regional, district, Kyiv city and Sevastopol city, regional in cities councils (each head of administration held the position of the head of council); (4) due to introduction of the executive committees of local councils under the Constitution of Ukraine in regions, districts, the Kyiv city and the Sevastopol city [5].

Ukrainian municipal law studies, being in a state of shaping the municipal reform methodology as a component of the doctrine of municipalities, has to take not only Ukrainian experience, but as well the achievements of the representatives of the municipal law doctrine of other countries into account. At the same time, we agree with the opinion of O. V. Batanov, a specialist in the local self-government field, that a "significant conceptual potential, both in regard to comprehension of the political notion of the prospective ways of the constitutional model of organization of local self-government and domestic municipality development, and to understand-

ing of potential scenarios in the development of municipal reform" has already been accumulated in Ukraine [11].

Municipal reform has relatively recently become the subject of research in Ukrainian legal studies. Latter is mainly explained by the necessity of a number of legal, organizational and other measures in this regard, including changes to a number of legal documents in the field of local self-government constitutional provisions to bring them in line with the Constitution, as well as systematic update of basic laws in this area, or adoption of new laws of the upmost quality.

Undoubtedly, the municipal reforms that took place in the 19th, the first half of the 20th and at the turn of the 20th-21st centuries have significant differences: different conceptual and ideological approaches to the design of the model of local self-government and its re-formation (within the commune, state or dualistic paradigms of the municipality); different level of institutionalization of local self-government (initial or mostly customary, legislative, constitutional, integrated), etc.

In other words, the fundamental question is what a qualitative point of reference for municipal reform actually is. In our opinion, municipal reform has to be indicated as a reform by its initiator. In modern conditions, the form of public identification of the commencement of a municipal reform may be the official proclamation of the goals, objectives and stages of the reform at the level of conceptual and/or strategic documents, which are usually adopted and made publicly available by the supreme bodies of state power in accordance with their powers and authority.

Undoubtedly, theoretical-methodological, political-legal, scientific-design, as well as legal-technical aspects of municipal reform are complementary, but they obviously do not exhaust the whole content of the complexity of the relevant reform process, as it also implies the use of a system of organizational measures for the implementation of planned conceptual and legal levels of implementation of reform in life [12]. Therefore, the organizational side can be considered as an independent way or aspect of municipal reform, however, derived from the theoretical, methodological and law-making ones.

Theoretical-methodological basis for the local self-government in Ukraine constitutes article 7 of the Constitution of Ukraine [9], which stipulates that "local self-government is recognized and guaranteed in Ukraine", constituting local self-government as a separate branch of power.

Latter can be proved by the following features [13,14]:

– presence of territorial communities that set up local governments to resolve local affairs;

– possibility of holding local referendums on the most important issues regarding the territorial community;

– local self-government is constituted and provided with the appropriate legal status, system of powers, rights, freedoms and responsibilities towards the territorial community;

– local self-government as branch of power is entitled to material and financial

basis in the form of movable and immovable property;

– local self-government is entitled to incomes from local budgets, other funds;

– local self-government administers land, natural resources owned by local communities;

– local self-government has certain rights in regard to objects of joint ownership, which are in the management of district and regional councils according to article 142 Constitution of Ukraine;

– there are also elements of powers division on the local level: local councils as local parliaments form executive power (executive committees) and their own control bodies (commissions).

Issues of local self-government in recent times are increasingly moving into the epicenter of scientific and political debate. Solving the problems of local self-government is often considered to be the key to solving many complex issues of today – increasing the level of efficiency in the activity of the authorities, overcoming the alienation between the authorities and the population, promoting political mobilization, shifting the center of gravity from capitals to regions, "setting hands loose" and activating a variety of local initiatives, etc.

From the theoretical-methodological perspective, peculiarities of the legal regulation of local self-government are closely related to its functional purpose and social orientation within the limits of each particular country. Local self-government is based on the fact that virtually no countries can be managed from the center only. Therefore, territory of the country is divided into certain administrative-territorial units of different levels (regions, districts, communities, etc.), which commonly have elected representative bodies simultaneously (often referred to as local self-government bodies) and such bodies are appointed by the central authorities (governors, prefects, commissars of the republic, etc.) [15]. Notwithstanding the differences in the formation of these bodies, they all form a single system of public authority performance on the local level.

In particular, current state of local self-government in Ukraine should be characterized as follows:

• lack of unified theoretical-methodological basis for legal of local self-government;

• absence of an effective system of guarantees of performance of the local self-government functions;

• lack of relevant material, financial, personnel and other resources to support them. The state has not fulfilled its obligations to establish conditions for the development of local self-government and civil society;

• crisis of housing and communal services, system of energy-, fuel- and water supply, as well as social infrastructure;

• absence of a well-organized system of financial support for healthcare at the primary level and sufficient funds from local self-government bodies to solve health problems within the territorial community;

• deepening of disproportions in the social and economic state of the territorial communities and regions;

• unsolved urgent issues of the reform of the administrative-territorial structure of Ukraine.

As an example to illustrate the current state of affairs, local self-government activities are governed by more than 80 normative legal acts of the highest legal force, all of which are adopted at different times and contradict each other.

Due to the fact that local self-government is the sphere with perhaps the most vulnerable financial base, largely dependent on the state in Ukraine, reduction of state power in the financial sphere automatically affects local self-government. Technical condition of networks and structures operated by enterprises of housing and communal services is currently extremely unsatisfactory. In particular, 30% of water supply and 27% of sewage networks, almost 14 thousand kilometers of heating networks are in state of emergency. Ukrainian housing stock is constantly deteriorating, about 40 thousand houses (consisting more than 4% of the housing stock of Ukraine) fall into the category of emergency, and every third house needs to be seriously repaired [19].

The idea of decentralization as the basis for the self-government shaping is considered as a panacea for solving all problems, a means of decentralization of the systems of administrative and territorial state organization, which would involve the "unification" of villages and cities, since "the mechanistic interpretation of the constituent parts of the territorial system as the administrative-territorial units listed in the Constitution would require such a shredding of the present village councils, which would bring the number of self-government bodies from the current 12 to 27 thousand – corresponding the number of settlements" [16].

As far as the state of things in Ukraine is now, 47% of territorial communities have population of up to one thousand people, so, therefore, the proposals for the consolidation of territorial communities not upon the decision of the relevant councils, but upon the decision of the communities (via a local referendum) are more favorable, and this way is the most democratic one. Moreover, such consolidation does not automatically lead to budget savings, but raises additional problems with the access the population to local councils, namely the access of a human to power. Discussions on the elimination of district state administrations and fulfillment of the requirements of the European Charter of Local Self-Government ratified by Ukraine regarding the division of powers of local self-government and the state are ongoing.

These circumstances raise the issue of recognition of local self-government as a separate branch of power both in legal studies and in practice of constitutional reform and state building.

Implementation of this task should lead to clear demarcation between the functions of executive power and local self-government at the constitutional level. The latter requires expansion of the functions and powers of local self-government at the district and regional levels. At the same time, it is necessary to transform local state administrations into bodies that would have executive

functions, non-transferrable to the system of local self-government. Such bodies should also have control and oversight functions.

Such organization of power corresponds to the European practice, provides a clear division of competences, organizes the budget process and eliminates the issue of the "election of governors". It is clear that the heads of district and regional self-government bodies are elected, whilst the heads of local state executive bodies power, as it is common all over the world, are appointed.

In particular, this involves implementation of the following requirements of the European Charter of Local Self-Government into Ukrainian legislation:

• any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles, territorial integrity and sovereignty in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests that it is intended to protect. (Article 8 of the Charter);

• local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law. Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility. (Article 9 of the Charter);

• local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest (Article 10 of the Charter) [10].

Under such conditions "local self-government acts as an effective element of the system of checks and balances in regard to the performance of executive power by the state at the local level, which is an additional lever for the exercise of democracy in relations with the state" [13, 14]. The relevant tendency is in line with the principles of modern constitutionalism, which, in particular, lead to "the establishment of legal means and mechanisms that are consistent with the constitution and are used to restrict (self-restraint) state power in favor of the civil society, whose functioning is an important social and legal precondition for constitutionalism.

Therefore, we are facing the necessity to reinterpret the understanding of public authorities, both state and self-government, and as well the division of public and territorial interests.

Consequently, the core characteristic of public authority, in this approach, is precisely the fact that it serves certain public interests that have a geographical attachment to a particular territorial community that is institutionalized in a public-law formation in a certain way (state, autonomous formation, territorial community or their union, etc.). In addition, public authority is characterized by the fact that it affects all social processes in society in one way or another, manages general affairs of the society, achieves its tasks and goals – serving the people as the only source of power, contributes to the formation of rule of law and a democratic state [17].

As an independent form of public authority in its subject-object structure, its nature and essence, the range of its functions, local self-government is the most socially oriented form of the exercise of public authority. This is explained by the following: (1) local self-government is the catalyst for the civil society, since the conscious participation of residents in the process of creating decent living conditions in a certain territory contributes to forming a sense of responsibility for solving local problems, increasing their overall social and civic activity; (2) territorial community (as the primary subject of local self-government, the main carrier of its functions and power) bears municipal power; (3) local self-government as a separate branch of power of the people should be built on the principle of division of functions, balance of interests and powers, representation and responsibility to the territorial community.

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M. Kucheryavenko, National Academy of Legal Sciences of Ukraine Kharkov, Ukraine

Ye. Smychok, Department of Financial Law Yaroslav Mudryi National Law University Kharkov, Ukraine

MOMENT OF EXECUTION OF THE DUTY TO PAY TAXES AND FEES: A TAX–LEGAL ASPECT

Abstract. *Formation by tax revenues of funds that ensure the implementation of state functions, brings tax legal relations to the rank of one of the most significant for the existence of the state and those who require unconditional government regulation. Therefore, the main aim of the research work is to analyse the obligations to pay taxes and fees in terms of a tax-legal aspect. The scope of the budget legislation is primarily related to the stages of the budget process, procedures for the appearance, execution and reporting of acts on budget. It is established that budget and tax legislations differ in terms of evaluation of the parties. A state, by granting a bank a licence to carry out banking operations, including transfer of taxes to the revenue parts of budgets, actually, convinces a payer that the bank is the entity through which a payer not only has an opportunity, but also a duty to pay tax.*

Key words: *budget legislation, taxpayers, platform, commercial bank.*

Introduction

Revealing the fundamentals and particularities of legal regulation of execution of the tax obligations is definitely an actual field of research, in particular, at the stage of reforming the tax legislation of Ukraine. Despite the fact that considerable attention has already been paid to the study of the legal nature of the tax obligation, the necessity for scientific and theoretical development of procedural aspects of its implementation is due to the absence of special domestic studies of tax law theory [1;2]. Since the ultimate meaning of tax relations is contained in their implementation, the clarification of the fundamentals and particularities of the execution of tax duties has both theoretical and practical significance.

A comprehensive view on the process of execution of tax duty and paying taxes sometimes leads to common views and conclusions. At the same time, the very procedure for execution of the tax duty is tried to be associated with the parcularities of regulating budgetary relations, that is, the relations connected with the turnover of funds, namely, the regulation of banking activity [3]. It goes without saying that the comprehensiveness of public relations allows to form a complete picture of the movement of a taxpayer's funds to the final recipient, a state-owner or the territorial community (depending on the type of tax or fee and the budget to which it is entirely or partly directed). At the same time, such comprehensiveness of social relations objectively implies clarification of the place of each branch of law (or sub-branch or institution) in such a regulation [4;5;6]. It is in this sense that we consider it necessary to clearly delineate these two constructions: a) relations on payment of taxes and fees at the time of execution of the tax duty in this regard; b) relations on the movement of funds from taxpayers and fees to the account of their tax liability and their receipt on the relevant treasury accounts of budgets. That is why it is advisable to pay attention to the correlation and regulation measure of budgetary and tax relations, relations on money turnover and execution of tax duty.

For proper execution of the tax duty in terms of the Tax Code, two conditions should coincide: 1) payment of tax amounts in full; 2) payment of the relevant amounts within the period established by tax legislation [7].

The first condition provides for payment of the tax amount by a taxpayer in full. The tax duty from the payment of relevant money sums can constitute the content of the legal relations, that is, to be an element of the tax obligation. The tax amount should be calculated by a payer on the basis of the provisions of the current tax legislation. This coincides to some extent with another aspect of the execution of the tax duty of a payer prior to the tax payment, namely, tax accounting. In this case, a payer has the right to turn to the tax authorities for consulting or explanations of tax legislation, in particular, regarding the calculation of tax amounts, but the state tax service authorities do not have the obligation to calculate a tax amount for a taxpayer [8]. Consequently, the responsibility for its incorrect calculation is always assigned to a payer. The execution of the tax duty in time stipulates paying off tax amounts which are payable no later than the last day of the period which is determined by the legislation in respect of a tax or fee. The beginning of this period is determined by a certain calendar date from which a payer has an obligation to pay tax. According to general rule, making the change of the tax payment term is not allowed either to a payer or the supervisory authority except for the cases specially stipulated by the Tax Code of Ukraine [7].

1. Materials and methods

The methodological basis of the research work is a set of general and special methods of scientific knowledge, the use of which allowed to achieve a set goal and ensure the scientific reliability of the re-

sults. For comprehensiveness, completeness, objectivity, correctness and consistency of conclusions, these methods were used in the interconnection.

Dialectical method allowed to reveal objective and comprehensive knowledge of legal reality and determination of the essence of the phenomena under study in the unity of their material content and legal form. Structural and functional analysis allowed to take into account such features of the system as integrativity, correlation of the whole and a part, structure and functions and singling out the elements of the tax duty construction as well as the stages of its implementation. The comparative-legal method was used in the analysis of the current domestic and foreign tax legislation that made it possible to summarise the scientific concepts of leading scientists in relation to theoretical and practical problems of execution of tax duty [9]. The use of historical-legal method helped clarify the evolution of legal thought about the nature and importance of taxes in the system of budget revenues. Special-legal (formal-dogmatic) method allowed to conduct an informative analysis of the current state of legislative provisions and develop proposals to eliminate the existing theoretical and legal contradictions as well as shortcomings in the legislation.

The methodological basis of the possibility to research a tax duty of a taxpayer as a law implementation process of adoption of the newest forms of interaction between government and taxpayers which essence is partnership and socially useful result was studied by such scholars as D. O. Hetmantsev, A. V. Holovach, P. M. Duravkin, O. V. Larina, D. H. Muliavka, O. V. Onishko, N. Yu. Onishchuk, H. V. Rossikhina, I. L. Samsin, R. V. Stetsko, M. M. Chynchyn, S. V. Shakhov and the others.

2. Results and discussion

2.1 Particularities of tax and budget regulation

When analysing the above problem, very often at the stage of law enforcement, when resolving tax disputes, the courts focus on the fact that the moment of execution of the tax duty should be associated with the receipt of a taxpayer's funds on account of his tax duty to the relevant treasury account [10;11]. So, according to para. 5 Art. 45 of the Budget Code of Ukraine, taxes and fees and other incomes of the state budget are recognized credited to the state budget from the date of transfer to the single treasury account – it is difficult to agree with it. When delimiting budgetary and tax relations, it is necessary to consider that according to Art. 9 of the Budgetary Code of Ukraine tax revenues are one of the main sources of the budget incomes formation. But this does not mean that the time of tax payment and collection ends at the time of receipt of taxes and fees to the budget.

First, crucial is the reference to para. 1.1 Art. 1 of the Tax Code of Ukraine according to which this act regulates relations arising in the field of taxes and fees, in particular, it determines a full list of taxes and fees levied in Ukraine, and the procedure for their administration as well as payers of taxes and fees, their

rights and obligations, the competence of the supervisory authorities, the powers and duties of their officials during tax administration and liability for the violation of tax legislation. At the same time, Art. 1 of the Budgetary Code of Ukraine determines that it regulates relations arising in the process of preparation, consideration, approval and implementation of budgets, reporting on their implementation and control over compliance with fiscal legislation and issues of responsibility for violation of fiscal legislation as well as the legal principles of formation and repayment of state and local debt. It is demonstrably clear that the scope of the fiscal legislation is primarily associated with the stages of the budget process and the procedures for the appearance, implementation and reporting of budget acts. This does not give grounds to assume that the Budgetary Code of Ukraine at least partially regulates the execution of tax duty. It regulates fund revenues to the profitable parts of budgets, but not the relations connected with the transfer of these funds by taxpayers to the authorized entities.

Second, the execution of the tax duty is regulated exceptionally by the tax legislation. On the basis of para. 3.1. Art. 3 Tax Legislation of Ukraine of the Tax Code of Ukraine, tax legislation of Ukraine consists of Constitution of Ukraine; this Code; Customs Code of Ukraine and other laws on customs matters in terms of regulation of legal relations arising in connection with the taxation of transaction fee of displaced goods across the customs border of Ukraine; current international treaties, consent on obligatoriness of which is given by the Verkhovna Rada of Ukraine and which regulate taxation issues; normative- legal acts adopted on the basis of and for the implementation of this Code and laws on customs issues; decisions of the Verkhovna Rada of the Autonomous Republic of the Crimea and local authorities on local taxes and fees adopted under the rules established by this Code. So, the Budgetary Code of Ukraine is not included in the legislation that regulates the execution of tax duties, namely, the tax payment. That is why one may not extend the validity of its rules regarding regulation of the payment of taxes and fees on determining the moment of such a payment [7].

Even if to imagine a situation that the execution of the tax duty regarding transferring funds to the single treasury account should occur in compliance with the norms of the Budgetary Code of Ukraine and the Law of Ukraine On Payment Systems and the Transfer of Funds in Ukraine, there will be an unconditional collision of the norms of these normative legal acts with the norms of the Tax Code of Ukraine (they lay different approaches to determining the moment of payment of taxes and fees). Also, on the basis of para. 4.1.4 Art. 4 of the Tax Code of Ukraine (legality presumption of a payer's decisions) in any case a decision should be made in favour of a taxpayer.

If to speak about the absence of legal regulation of the issue at the level of the Tax Code of Ukraine and characterise it as a gap in the legislation, overcoming this negative legal

phenomenon in public areas of law by analogy is not allowed. This follows from the content of Art. 3 and Art. 5 of the Tax Code of Ukraine. Thus, according to para. 5.2. 5 of the Tax Code of Ukraine, if the concepts, terms, rules and provisions of other acts contradict the concepts, terms, rules and provisions of this Code, for regulation of the taxation concepts relations, the terms, rules and provisions of this Code are applied. And the concepts and content of "execution of tax duty" are determined by the norms of the Tax Code of Ukraine. There is also no need to refer to para. 5.3 of article 5 of the Tax Code of Ukraine which establishes the possibility of applying the analogy of the law as a means of overcoming the gaps of tax and legal regulation. First, there is no term that would not have been determined in the tax legislation (payment, transfer, execution of tax obligations – all these categories are determined by the Tax Code of Ukraine). Second, para. 5.3 and 5.2 Art. 5 of the Tax Code of Ukraine contradict each other, thereby creating a collision of norms which in tax and legal regulation should be resolved again in favour of a taxpayer (para. 4.1.4 para. 4.1 Art. 4 of the Tax Code of Ukraine) [7].

According to para. 38.1. Art. 38 of the Tax Code of Ukraine, the execution of the tax duty is the payment in full by a payer of the relevant amounts of tax obligations within the period established by the tax legislation. That is, according to the current tax legislation there are two established requirements (quantitative and temporary) for the recognition of a taxpayer one who has fulfilled his tax duty properly:

a) payment of tax obligations in full;

b) payment of tax liabilities within the period established by law.

The norms of the Tax Code of Ukraine also prohibit the establishment of methods and procedure for the execution of tax obligations than those provided by the Tax Code of Ukraine (para. 38.3 Art. 38 of the Tax Code). Moreover, taking into account a taxpayer's status in relations with the subject of authority (supervisory authority), a payer can not have additional obligations than those provided by the current Tax Code of Ukraine. A taxpayer can not bear the negative consequences of the activity of other state authories which are obliged to control the financial institutions through which the payment of taxes and fees is settled [12]. In this case, it is the state that acts as an interested party that should take all possible measures to prevent violation of the rights and interests of bona fide taxpayers as well as for the timely and full fund revenues paid by such a payer through financial institutions. Otherwise, there will be a violation of the balance of public and private interests in the tax field, and a taxpayer will be obliged to double the execution of tax duty and the obligation to monitor financial institutions what is impossible. Such a situation is confirmed by the analysis of Art. 16 of the Tax Code of Ukraine Duties of a Taxpayer that, first, contains a full list of a payer's obligations, and second, it also establishes two criteria (quantitative and temporary) for the formation of the completion of the obliga-

tion to pay taxes and fees (para. 16.1.4 of the Tax Code of Ukraine).

Third, budget and tax legislations do not coincide in principle regarding the evaluation of the parties. Thus, the principal approach of financial-legal regulation (sub-sectors of which are budget law and tax one) regarding the existence of two parties (power and obligated) in the budget and tax regulation preserves. At the same time, if the execution of tax duty is associated, first of all, with the behaviour regulation of payers of tax and fees which are legal entities and individuals, the parties of budgetary relations radically differ from this. First of all, individuals are not the participants of the budget relations, at the same time, they are one of the main subjects of tax relations [13;14]. Besides, legal entities-taxpayers can not be automatically considered the subjects of budgetary legal relations either.

Thus, according to Art. 2 of the Budgetary Code of Ukraine Determination of Basic Terms, one can found out the approach of a legislator to the parties-participants of budgetary relations (the main holders of budget funds, recipients of budget funds and holders of budget funds), but their authorities are associated with the receipt and expenditure of funds that come from the budget. Thus, for example, a recipient of budget funds is understood as a business entity, public or other organisation that does not have the status of a budgetary institution, authorised by the disposer of budgetary funds for implementation of the activities provided by the budget programme and receives on their implementation budget funds. So, the main condition of determining a recipient of budgetary funds is connected with receiving the funds from the budget instead of their paying or receipt to the budget. Thus, if we assume that the actions of a taxpayer, in whose behaviour the time of tax payment is evaluated, is related to the execution of his duty to transfer funds to the budget, then no provision of the budget legislation can be applied to the evaluation of these actions.

2.2 Analysis of tax legislation and legislation which regulates the money circulation

When maintaining the position on the complexity of regulation in determining the time of tax payment and, actually, banking legislation applying they often try to distinguish between the relations between a payer and the bank and those between a payer and the budget. The main problem here is reduced to the situations where a payer gave money to the bank in compensation of his tax duty and that is what he considers the moment of tax payment. Having received funds from a payer, the bank did not transfer them to the relevant treasury account for various reasons (bankruptcy, etc.).

But some researchers and judges note that it is advisable to distinguish between the onset of sanctions against a payer and tax repayment [15]. They believe that a payer should not be held liable in this situation, but the duty to repay the tax remains with a payer. A clarification of the relations between a payer and the bank separates from tax relations and goes into the sphere of private regulation.

Arguing such a position, in this situ-

ation they refer to para. 129.6 Art. 129 of the Tax Code of Ukraine according to which for violation of term of tax receipt to the budgets or state trust funds because of the fault of bank or the authority which performs treasury service of budget funds in which payers' accounts are opened in the electronic administration system of value added tax, such a bank / authority shall pay a fine for each day of delay, including the day of payment, and penalties in the amounts established by this Code as well as bears other responsibility established by this Code for violation of the order of timely and full receipt of taxes, fees and payments to the budget or state trust fund. At the same time, a taxpayer is exempt from liability for late or incomplete transfer of such taxes, fees and other payments to the budgets and state trust funds including accrued interest or penalties [7].

Therefore, such a logic of the supporters of the above position proves to be artificial. It is very difficult to distinguish between the relations of a payer and the state as well as the relations of a payer and the bank at the execution of tax duty. It is unlikely that the relations between a payer and the bank at the moment of tax payment should be regulated by dispositive means. The interests of the state can not be satisfied with any (even illogical and inconsistent methods), and the receipt of funds from a payer is the main aim under any circumstances, regardless of whether such a non-receipt is connected with violations in a taxpayer's behaviour.

Moreover, it should be taken into account that the bank in these relations acts as a subject that has obtained the state legalisation. Thus, the bank's violation at transfer of funds from a payer to the budget is the circumstance to which actions of the state led, namely, unreasonable granting a banking licence and improper control over the procedure for the introduction of the tempopary administration. Since a payer can not bear responsibility for unreasonableness in the actions of the state in granting a licence of the bank and the implementation of control functions on the market of financial and banking services.

Also, one should pay attention to the additional guarantees of tax legislation which are enshrined in para. 129.7 Art. 129 of the Tax Code of Ukraine. According to the mentioned norm, the violation committed in the result of the regulation of economic standards of such a bank by the Ukrainian National Bank that leads to a lack of free balance on such a correspondent account is not considered to be a violation of the term of transfer of taxes, fees and payments through the bank's fault. If in the future the bank or its successors recover solvency, the countdown of the term of transfer of taxes, fees and other payments starts with the date of such a recovery, that is, even in Art. 129 of the Tax Code of Ukraine, a legislator confirms the duty not of a taxpayer, but, namely, the Ukrainian National Bank to act as a regulator of commercial banks.

One more reason for the impossibility of extending the regime of dual execution of tax duty to a taxpayer as well as implementation of control by supervisory authorities exceptionally for the

completeness and compliance with the terms of tax payment, but not the transfer of funds to the single treasury account is the provision of Art. 19–1 of the Tax Code of Ukraine. Thus, according to para. 19–1.1.5 para. 19–1.1 Art. 19–1, the functions of the supervisory authorities include, in particular, monitoring of compliance by the executive authorities of rural and village councils and councils of united territorial communities created according to the law and the long-term plan of formation of territories of communities, order of acceptance and accounting of taxes and fees from taxpayers, timeliness and completeness of transfer of the specified amounts to the budget. Namely, the movement of funds paid as taxes and fees within the treasury accounts (local governments, that is, state bodies) is under the control of the State Fiscal Service authorities (in the context of tax-legal regulation). In its turn, as it was noted, regarding tax payers, the supervisory authorities monitor only the timeliness and completeness of payment of taxes and fees, and, in fact, until their transfer to the bank. Control over compliance with the legislation by the bank when transferring a taxpayer's funds to the single treasury account is the subject of control of quite other authorities – the Ukrainian National Bank and the Deposit Guarantee Fund.

At the same time, the textual analysis of the provisions of the current Tax Code of Ukraine shows that the concept of «tax payment» and «transfer of taxes» are identical. For example, Art. 54 Determination of Tax and Monetary Obligations of the Tax Code of Ukraine states that «the monetary obligation which concerns the amount of tax obligations from the tax which is subject to deduction and payment (transfer) to the budget in case of charge/payment of the income in a taxpayer's favour. A similar approach of a legislator can be traced in other articles of the Tax Code of Ukraine: Art. 126 Violation of the Rules of Payment (Transfer) of Taxes»; and Art. 127. Violation of the Rules of Charge, Withholding and Payment (Transfer) of Taxes at the Source of Payment and the like. The above allows to conclude that the transfer of taxes and fees as well as the execution of the tax duty of a payer ends at the time of payment of such taxes and fees in full and within the stipulated time. In its turn, payment of taxes and fees is completed at the moment of debiting the current account of a payer or transfer of a payer's funds to the cash desk of the bank that makes impossible the reexecution the tax duty in terms of taxes and fees.

Conclusions

Tax duty is defined as the obligation of a taxpayer to calculate, declare and / or pay the amount of tax and fee in the manner and within the terms determined by the Tax Code of Ukraine. In view of the above, on the basis of system analysis of Art. 1, 3, 4, 5, 16, 38 and 129 of the Tax Code of Ukraine, one can conclude that the execution of the tax duty by a payer is regulated exceptionally by the norms of tax legislation which include neither the Budgetary Code nor special Laws that regulate the monetary circulation issues. Under such a condition, the tax legislation does not impose

any additional obligations on a taxpayer or the application of sanctions for the acts which led to the non-receipt of funds paid to them as taxes and fees, through the fault of other persons, in particular, banks. Proper execution of the tax duties by a taxpayer (payment within the period established by law and in full), but non-receipt of these funds to the single treasury account through the bank's fault can not lead to arising a duty of repayment of taxes or fees regarding such a taxpayer. Another approach of law enforcement would be the reason to impose on a taxpayer the obligation to pay taxes and fees twice. The execution of the tax duty is the payment in full by a payer of the relevant amounts of tax obligations within the period established by tax legislation.

Characterising the latest changes in the tax legislation of the country, the system of tax revenues and fees accruing eleven obligatory payments to the budget was structured, four of which, although established, accounted for and charged by local authorities and their cost level, compliance procedures are controlled by the state. The preconditions for the further productive functioning of the country's tax system are adaptation of new criteria for the collection of taxes and fees through the settlement of procedures for the calculation and payment of tax payments which are related to buiding a stable and efficient banking system in Ukraine.

Given the above, the main problems of tax system functioning in Ukraine include first, the fact that a large number of low-efficient taxes requires significant administrative expenses which exceed budget revenues; second, the contradictions and inconsistencies of certain tax laws, their instability, unsystematic provision of benefits and misrepresentation of the essence of certain types of taxes; fourth, a significant number of normative-legal acts on taxation which both taxpayers and employees of the Ukrainian State Fiscal Service should know and be guided by in practice; fifth, the lack of proper regulation of legal guarantees for participants of tax relations and the lack of transparent and effective mechanisms of rights protection of taxpayers; sixth, the tax system is now a factor of reducing the level of economic growth and investment activity and tax evasion stimulating.

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V. Pylypchuk, Scientific Research Institute of Informatics and Law of the National Academy of Law Sciences of Ukraine Kyiv, Ukraine

THEORETICAL AND LEGAL BASIS FOR THE SECURITY AND DEFENSE STRATEGIC COMMUNICATIONS SYSTEM DEVELOPMENT

Abstract. *Research of the problem of legal regulation of public relations in the field of strategic communications in the conditions of development of information technologies and dissemination of negative information influences on the person and the society is extremely relevant and demands a complex scientific study. The author aims to analyse the theoretical, historical and legal foundations of the becoming of the strategic communications system of the security and defense sector of Ukraine and the relevant practices of the United States, Great Britain and other EU and NATO Member Sstates. The paper considers the legal grounds of formation and priority directions security and defence strategic communications system development in the conditions of hybrid war and Euro-Atlantic integration of Ukraine, with application of general and special scientific research methods (dialectical, historical, system analysis, etc.). It is concluded that the legal regulation of public relations in this field in Ukraine is in the formation stage, and the special legislation on the development of the national system of strategic communications, organization of management and control and activity of the subjects of this system needs proper elaboration with consideration of practices of NATO Member Countries. According to the results of the research: 1) the key threats to national and international security in the information sphere are worded; 2) the main factors influencing the development of the strategic communications system and the components of the said system (public diplomacy and measures aimed at promoting the state goals; public relations and military relations; information and psychological operations) are identified; 3) the components of the system of management and coordination of activities in the field of strategic communications are specified; 4) the model of construction of the national strategic communications system is proposed, the legal definition of the subjects of this system, their tasks and functions, organization of interaction and international cooperation are provided.*

Key words: *national defence, personal data, confidentiality, Euro-Atlantic integration, international relations.*

Introduction

The problem of legal regulation of public relations in the field of strategic communications is quite new for Ukraine and demands systematic consideration. Therefore, let us first consider how the concepts of "communication" and "strategic communication" are applied in the modern context. Currently, communication touches practically all facets of human being, society and state – political, financial, economic, social, cultural, educational, security, etc. Even a peek into the ongoing social transformations reveals the rapid development of communication processes. Changes in communication transform the world and its integrity. The term "communication" (from Latin *communicare*) means information, transmission, conversation, exchange of thoughts, data, ideas, that is – a specific form of interaction of people in the process of their life.

There is a number of different approaches to defining the concept of "communication", in particular: a mechanism by which the existence and development of human relationships, including all thinking symbols, the means of transmitting them in space, and the preservation of time, are ensured; exchange of information between complex dynamic systems and their parts that are able to receive information, to accumulate it, to transform; social integration of individuals through language or signs, establishment of meaningful sets of rules for different purposeful activities; information connection of the subject with a certain object – human, animal, machine.

According to our opinion, communication should be understood as a form of information exchange between the social structure subjects to reach their potential, and the totality of means intended for this purpose – as systems (means) of communication [1–4].

The issue of strategic communications has become popular in recent decades. Until recently, it has been considered mainly in the political, military, scientific and commercial circles of the United States and several other countries. Since the beginning of the 21st century, the concept of *"strategic communications"* has been increasingly used in legal documents in Ukraine.

Scientists have started to draw more attention to the term of "strategic communications" since 2001, following the "*Report of the Defense Science Board Task Force on Managed Information Dissemination*" by Vincent Vitto, chairman of the Defense Scientific Council (Federal Advisory Committee for Independent Advice to the US Secretary of Defense). This report suggested that *sophisticated strategic communications* could define the agenda and create a context conducive to political, economic and military goals. Despite the repeated reference to the specified term, it's definition was not mentioned in the report. However, it was noted that the requirements for government communications during natural disasters, pre-crisis states, and hostilities differ significantly from the requirements for *long-term strategic communications* [5].

Thus, as S. G. Solovyov points out, the important difference between strategic communications and other similar

activities and processes is outlined here – *longtermness*, i.e. focus on the long-term result. Accordingly, strategic tools and means must be put in place to achieve the specified goals, which facilitate the gradual and systematic influence on the receipients' beliefs [6].

In the socio-humanistic science, as the analysis displays, there is a number of attempts to conceptualize the phenomenon of strategic communications. At the same time, there are practically no scientific developments that would provide a holistic vision of this phenomenon at the level of theoretical and legal generalization.

Modern domestic science assumes that *strategic communication* is the process that underpins national security efforts and the realization of national interests, including in the information sphere. Subjects of strategic communications and other activities are involved in this process. Another interesting opinion belongs to Daniel Gage, who understands strategic communication as a process of synchronizing actions, images and words in order to achieve the desired effect [7]. In general, it should be noted that modern information technologies, systems and networks penetrate into all activities of people, society, state and international community. Information is increasingly affecting people and society, and the use of information and information technology is becoming increasingly important upon resolving internal, interstate and international conflicts [8–12].

The development of information and communication technologies has fundamentally changed the principles and methods of governance, leading to revolutionary changes in the field of international relations, in military affairs and modes of warfare. Concequentially, it is now possible to achieve the victory in a military conflict through purposeful informational influences on the population of another state or to seize its territory without the use of military force, including by application of the components of the strategic communications system.

1. Materials and methods

The research is based on materials regarding scientific achievements of foreign and domestic scientists, the results of the analysis of historical patterns and tendencies in the formation of strategic communication systems in Ukraine and NATO Member States. In the context of the above, the scientific advances that highlight the political and legal vision and practices of the becoming of strategic communications in the USA and the United Kingdom are of particular interest. To analyse the processes and problematics associated with the formation of strategic communications in Ukraine, the scientific achievements of a number of national scientists were studied, as well as relevant legislative acts concerning the field of information and security and defence sector of the Ukraine.

The methodological basis of the study is a set of methods and techniques of scientific research – general and special: dialectical, historical, system analysis, systematic and structural, comparative law. The leading is the general scientific dialectical method of research of the processes of formation and devel-

opment of strategic communications of the security and defence sector in the EU and NATO Member States and in Ukraine. The historical method facilitated coverage of the prerequisites and processes for the formation of the conceptual apparatus and components of the strategic communication system in the late 20th – early 21st century.

The system analysis method allowed to systemize the major challenges and threats to national and international security in the information field and to identify key factors that influenced the development of the strategic communications system. The application of the system-structural method contributed to the development of a model for building a strategic communications system in Ukraine, defining its structural elements, as well as the objectives of the relevant state authorities and subjects of the security and defence sector.

Application of the comparative law method resulted in identification of systemic issues and priorities for the development of legislation on information and security and defence issues in the context of development of a national strategic communications system in accordance with standards of the EU and NATO Member States.

2. Results and discussion

Due to the rapid development of the information sphere and total informatization of the society in the development of international relations between the countries, significant changes are also taking place in connection with the latest developments in the field of information and communication technologies.

It is no accident that at the beginning of the 21st century, first in the USA, and then in a number of other countries of the world, new approaches to addressing the role of mass communications in national policy started emerging, which were specifically embodied in the concept of "strategic communications". As a number of researchers rightly points out, in particula [13–16], factors of extremely rapid development of strategic communications are the following: rapid development of informatization; increasing role of information warfare to achieve politico-military and economic goals; increasing number of forceful (armed) conflicts in the world; spreading of terrorist activity; formation of new national strategies of modern states; adjusting and changing the image of countries in the international arena; emergence and development of new forms of diplomacy (public diplomacy, cyber diplomacy, etc.).

As previously noted, the term "strategic communications" in its modern sense first appeared in US military community in 2001 [17; 18]. However, it has been used in official US documents since 2006. According to K. Vynohradova, the term "strategic communications" was interpreted as focused US efforts, directed at understanding the specifics of target audiences and cooperation with them for the US government to create, strengthen and preserve favourable conditions for the promotion of national interests and goals through coordinated information, integrated plans, comprehensive plans, action programs and synchronization with other elements of na-

tional power [19]. At the beginning of the 21st century, strategic communications have also become widespread in the United Kingdom, where military structures of the country are being actively developed and implemented. The United Kingdom is convinced that strategic communications must work to advance national interests by using all types of defence to influence the behaviour of target audiences [20; 21].

In general, strategic communications, according to British experts' opinions, should provide a decisive contribution to the development and implementation of a national strategy that is understood to be the set of ideas, preferences and methods explaining the activity (diplomatic, economic or military) and leading it to the goal. At present, strategic communication is also being actively studied and developed in the EU and NATO Member States, the PRC and the Russian Federation.

2.1 Legal bases of formation of strategic communications system in Ukraine

For the first time in Ukraine, the term strategic communication was used in the preamble to the Agreement between the Government of Ukraine and the North Atlantic Treaty Organization on the Status of NATO Delegation to Ukraine, signed on 22.09.2015 and ratified by Law No. 989-VIII dated 04.02.2016[1]. In general, it is a programmatic document on the development of international legal relations between Ukraine and NATO, which does not directly address the issue of forming and developing a strategic communications system.

Understanding of the concept of "strategic communication" in the NATO system is considered as a determined effort to identify and develop target audiences for the establishment, development and preservation of national (government) interests, policies and goals through the use of coordinated programs, plans, topics, messages and products, synchronized with all the actions and tools implemented by the authorities [22].

In Ukraine, the concept of "strategic communications" was first defined in paragraph 4 of Presidential Decree No. 555/2015 dated September 24, 2015[2] on the new version of the Military Doctrine of Ukraine as a coordinated and appropriate use of the state's communication capabilities – public diplomacy, public relations, military communications, information and psychological operations, activities aimed at promoting the goals of the state. According to this act, strategic communications are considered as the basis of crisis response to military threats and the prevention of escalation of military conflicts.

In general, the Military Doctrine of Ukraine for the first time legally defines: a) the definition of the term "strategic communications"; b) the scope of strategic communications in the activities of state authorities and subjects of the security and defence sector; c) the need for

[1] Decree of the President of Ukraine "On the Doctrine of Information Security of Ukraine". (2017, February). Retrieved from https://zakon.rada.gov.ua/laws/show/47/2017

[2] Decree of the President of Ukraine "On the new version of the Military Doctrine of Ukraine". (2015, September). Retrieved from https://zakon.rada.gov.ua/laws/show/555/2015

an effective strategic communications system in the security and defence sector; d) the need to develop a unified communications strategy in the security and defence sector and to identify a state authority responsible for coordination and control in this area.

The term "strategic communications", cited in the Military Doctrine, was also introduced in the Doctrine of Information Security of Ukraine, approved by Presidential Decree No. 47/2017 dated 25.02.2017[1]. At the same time, this Doctrine defines the term "strategic narrative" as a specially prepared text intended to be verbally narrated in the strategic communications process for informational influence on the target audience.

That is, "strategic communications" in this case can also be understood as a certain process, namely: the process of presenting the "strategic narrative", which is performed for informational influence on the target audience.

In accordance with Section 3 of the said Doctrine, the development of the strategic communications system of Ukraine is classified as vital interests of society and the state as a component of national interests in the information field.

Furthermore, "building an effective and efficient strategic communications system" in accordance with para. 1 Section 5 refers to national policy priorities in the information field regarding the assurance of information security.

The basic legislative acts in the field of strategic communications should also include the Annual National Programs under the auspices of the NATO – Ukraine Commission for 2017 and 2018, approved in accordance with the Decrees of the President of Ukraine No. 103/2017 dated 08.04.2017 and No. 89/2018 dated 28.03.2018 [18]. According to these documents, a number of measures were envisaged to develop the strategic communications system of the security and defense sector of Ukraine, namely:

– development of public diplomacy;

– development and implementation of the national strategy of Ukraine in the field of strategic communications;

– building strategic communications capabilities in national security and defence;

– creation of coordination interagency mechanism of information operations;

– development of a system of professional training of specialists in the field of strategic communications;

– intensifying interaction with partner countries in the information field and developing partnerships in strategic communications;

– providing the subjects of security and defence sector, in cooperation with NATO, with scientific, expert and practical materials on strategic communications;

– preparation of proposals regarding normalization of the strategic communications system, etc.

Comprehensive analysis of the legal bases for the formation and development of the strategic communications system of the security and defence sector in

[1] Decree of the President of Ukraine "On the Doctrine of Information Security of Ukraine ". (2017, February). Retrieved from https://zakon.rada.gov.ua/laws/show/47/2017

Ukraine enables such opinions and proposals to be made:

1) legal regulation of public relations in the field of strategic communications in Ukraine is currently at the stage of formation. Special legislation governing the key aspects of developing a national strategic communications system, the management and control organization and the activities of the subjects of this system needs to be elaborated, adopted and implemented with consideration of the experience of NATO Member States;

2) the conceptual and categorical apparatus in the field of strategic communications, implemented by current regulations, broadly complies with NATO documents, but requires systemization, clarification and proper legal definition. In particular, the use of various terms, such as "government strategic communications", "state strategic communications", "national strategic communications", etc., is debatable. Strategic communications, as an integral part of the national security and defence system, as well as government communications or communications of other public authorities, should be clearly distinguished. They differ significantly in their goals, tasks, forms and methods of their implementation;

3) the definition of strategic communications as a coordinated and appropriate use of the state's communicative capabilities – public diplomacy, public relations, military relations, information and psychological operations, measures aimed at promoting the goals of the state allows to distinguish the following basic components of strategic communications: a) public diplomacy and measures aimed at promoting the goals of the state; b) public relations and military relations (civil-military cooperation); c) information and psychological operations;

4) in seeking the role and place of strategic communications in the domestic law and legislation system, it is advisable to refer to national security and military law [23], especially since the field of "strategic communication" is directly identified (in NATO Member States) with the security and defence sector. The subject of regulation of public relations in terms of "national security and military law" may be: the legal basis and issues of national security and defence as one of the main functions of the state; the legal basis for the protection of state sovereignty, the constitutional order, the territorial integrity and inviolability of Ukraine's borders, the legal protection of state and military security and the state border security; issues of legislation and law in the field of national, collective and international security; system and state-legal mechanisms for ensuring national security and defence of Ukraine; statutory regulation of the activities of the subjects of the security and defence sector, military law enforcement and military justice bodies; legal issues of the implementation of the standards of the European Union Member States and the North Atlantic Treaty Organization into the legislation of Ukraine.

2.2 Priorities for the development of the strategic communications system of the security and defence sector in the

context of hybrid war and Euro-Atlantic integration of Ukraine

In recent years, the concept of "hybrid war" has become widespread and transcended the Russian-Ukrainian conflict, and a number of countries in the world have actually become parties to this confrontation using information, economic, energy, military and other components. In these circumstances, the problem of forming and developing a modern and effective strategic communications system for the security and defence sector, with consideration of the experience of NATO Member States, becomes extremely urgent for Ukraine.

It is noteworthy that in recent years (in the context of a hybrid war), EU and NATO Member States have paid particular attention to counteracting the use of information weapons and developing strategic communications in the security and defence sector, as evidenced by the chronology of a number of events and decisions adopted, namely [24]:

– in October 2007, the Enhancing NATO's Strategic Communications Directive was adopted, and in 2008 the strategic communications issue was included in the Alliance's policy document – the NATO Summit Declaration;

– in January 2014, the NATO Strategic Communications Centre of Excellence, or NATO StratCom COE was created. Its main objectives include coordination of NATO's strategic communications activities, exploring ways to emerge and disseminate information threats, developing information counteraction techniques, and providing training for information and psychological operations;

– in March 2015, the Council of Europe established the East StratCom Task Force, or East StratCom, and decided to entrust the High Representative of the Council of Europe, together with the relevant European Union institutions and EU Member States, with the preparation of a Strategic Communications Action Plan;

– in March 2016, the Executive Office of the President of the United States and the US Department of State reformed and expanded units that handle strategic communications;

– in November 2016, the European Parliament adopted a resolution to counteract the propaganda of third countries, including the Russian Federation. In the resolution, in particular, the European Parliament acknowledged that the Russian government was aggressively using a range of means and tools to attack democratic values, to split Europe, to ensure support within the country and to create the impression of differences between the EU's Eastern Neighbourhood countries.

The specified Resolution also recommended that the EU combat propaganda more vigorously, without forgetting the principle of freedom of speech. She also recommended that the East StratCom Task Force be strengthened, transforming it into a full-fledged EU External Relations Service. In the context of the above, it should be noted that one of the key factors of the modern hybrid war, global and regional (sub-regional) confrontation is the field of information. Therefore, to effectively ensure the information security (as well as the devel-

opment of a strategic communication system), the issues of combating information wars, cyberattacks and negative information and psychological impact on the individual, society and the state are extremely urgent. According to research performed [25–30], the following *key threats to national and international security in the information field* are now of utmost priority: global changes and transformations in the information field are creating the latest challenges that pose a real threat to human security and international law; along with the development of information and communication technologies there is a problem of unauthorized collection of personal data and violation of privacy of human life; there is a tendency in the information space to spread information aggression and violence, manipulation of consciousness of the person and the society, informational and psychological operations are being periodically performed; most countries in the world have encountered cyberespionage, cyberterrorism, cybercrime and cyberattacks on critical infrastructure; the consequences of using modern information weapons can lead to a real loss of state sovereignty and territorial integrity of the countries of the world. (The 2014 events of aggression against Ukraine clearly confirm this).

The level of modern challenges and threats in the information field confirms the validity and exceptional importance of the provisions of Art. 17 of the Constitution of Ukraine[1] that information security is one of the main functions of the state and the matter of the entire Ukrainian nation (in the context of the said constitutional provision, cybersecurity should be considered as one of the components of information security). In general, according to our opinions, the national information policy and the information security system should be aimed at the effective protection of national security objects: human and citizen – their constitutional rights and freedoms; society – its spiritual, moral, ethical, cultural, historical, intellectual and other values; the state – its constitutional order, sovereignty, territorial integrity and inviolability. In the context of the emergence of an information society, national and global information space, an extremely important objective in the field of information and national security is also to create a *strategic communications system for the security and defence sector* and to improve it with consideration of the practices of NATO Member States, as discussed in the Ukraine Security and Defence Sector Development Concept (2016).

It appears to be appropriate to relate the following to the key factors in the formation of the national strategic communications system of the security and defence sector of Ukraine: principles of the national policy in the field of strategic communications as a component of the state information policy and the policy of information security assurance; principles of functioning of the strategic communications system; subjects of the security and defence sector as defined by legislation; basic directions of function-

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

ing of the strategic communications system of the security and defence sector. Let us consider these and other aspects more substantially.

First. National policy in general, including national information and information security policy, in accordance with the Constitution of Ukraine, is determined by the Verkhovna Rada of Ukraine. The central executive authorities and other state authorities, in cooperation with civil society, take part in its formation. Accordingly, the national policy in the field of strategic communications should be developed with the participation of the NSDC of Ukraine, the Ministry of Information Policy and the State Committee for Television and Radio-Broadcasting of Ukraine, the Ministry of Foreign Affairs of Ukraine, the Ministry of Defence of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine and other subjects of the security and defence sector. According to our estimations, the national policy in this sphere should be considered as a component of the national information policy of Ukraine, and implemented by the legislatively defined subjects of the security and defence sector.

Second. The basic principles of functioning of the strategic communications system of the security and defence sector should include the following:

a) general principles: legitimacy, democracy, non-partisanship, integrity, decency, accountability and responsibility;

b) special principles: focus on the protection of national interests and national security objects – human, society and state; balance of human rights and freedoms and legitimate interests of society and the state; unity of approaches in the formation and implementation of measures in the field of strategic communications; scientific rigour, systematic approach to the formation and development of strategic communications of the subjects of the security and defence sector.

Third. In accordance with Part 1 of Art. 12 of the Law of Ukraine "On National Security of Ukraine", the security and defence sector of Ukraine consists of four interconnected components: security forces; defence forces; military industrial complex; citizens and civil groups voluntarily involved in national security assurance.

In accordance with Part 2 of Art. 12 of this Law, the subjects of the security and defence sector include the following: Ministry of Defence of Ukraine, Armed Forces of Ukraine, State Special Transport Service, Ministry of Internal Affairs of Ukraine, National Guard of Ukraine, National Police of Ukraine, State Border Service of Ukraine, State Migration Service of Ukraine, State Emergency Service of Ukraine, Security Service of Ukraine, State Security Department of Ukraine, State Service for Special Communication and Information Protection of Ukraine, Office of the National Security Council Ukraine and Defence, intelligence agencies of Ukraine, central executive authority facilitating the formation and implementation of the national military-industrial policy. In accordance with Articles 106, 107 of the Constitu-

tion of Ukraine[1], management in the fields of national security and defence of Ukraine is exercised by the President of Ukraine, and coordination – by the National Security and Defence Council of Ukraine. In consideration of the foregoing, the following list of subjects of the security and defence sector should be taken as the basis for the formation of the national strategic communications system.

Fourth. A meaningful analysis of the definition of "strategic communication" concept, provided by the statutory acts of Ukraine[2], as well as the statements of the Strasbourg-Cologne meeting of the North Atlantic Council and the Heads of State and Governments of NATO Member States[3] make it possible to classify the functions of the strategic communications system by such major directions: public diplomacy and measures aimed at promoting the goals of the state; public relations and military relations (civil-military cooperation); information and psychological operations.

Under these conditions, the organizational design (model) of the strategic communications system of the security and defence sector may appear to take the following form:

1. *General coordination and guidance* on matters of strategic communications in national security and defence, with consideration of the provisions of Art. 106 of the Constitution of Ukraine, which shall be implemented by the President of Ukraine and the NSDC. The implementation of this function may be entrusted to the Office of the NSDC of Ukraine or a specially created authority under the NSDC (for example, the National Coordination Centre on Strategic Communications). Accordingly, the role of National Coordinator on matters of NATO-Ukraine cooperation in the field of strategic communications may be assigned to one of the Deputy Secretaries of the NSDC;

2. Coordination and enforcement of the *function of public diplomacy and measures aimed at promoting the goals of the state* may be performed within the competence of the Ministry of Foreign Affairs of Ukraine and the Ministry of Information Policy of Ukraine, with the participation of other state bodies, non-governmental structures and public organizations. Organizational and other assurance of the implementation of the above may be performed by the corresponding units of the apparatus of the said ministries, as well as by the international liaison units of the central executive authorities and subjects of the security and defence sector;

3. *Public relations and military communications* should be performed by all actors in the security and defence sectors identified by law. With that, the Ministry of Defence of Ukraine may be responsible for coordinating military commu-

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] The Military Doctrine of Ukraine, approved by the Decree of the President of Ukraine. (2015, September). Retrieved from https://www.president.gov.ua/documents/5552015–19443

[3] The Strasbourg I Kehl Summit declaration. Retrieved from https://www.nato.int/cps/en/natohq/ news_52837.htm?mode=pressrelease

nications (military-civilian cooperation). The implementation of these objectives should be performed through the subjects of the security and defence sector, media and public relations units or through other units;

4. *Coordination, planning and conducting of information and psychological operations,* as the most "sensitive" sphere of strategic communications, requires complex involvement of organizational and legal, telecommunication, information, sociological, psychological, operational and other forces and means of the subjects of the security and defence sector and other state authorities and non-governmental organizations.

With regard to this matter, in the context of the provisions of the Law "On National Security of Ukraine", proposals concerning the pooling of relevant forces and resources of state and non-state subjects in the security sector for their coordinated practical engagement on these issues and possible creation of an appropriate interagency unit within the Security Service of Ukraine appear to be reasonable. At the same time, it would be worth considering the experience of legal regulation and functioning of another similar interagency association – the Anti-Terrorist Centre at the Security Service of Ukraine.

Conclusions

Analysis of the current issues of the development of the situation in the political, legal, military and information fields, as well as tendencies of international events around Ukraine, allows to single out a range of theoretical and legal issues of the formation and development of the strategic communications system of the security and defence sector of Ukraine, namely:

1. The system of national administration and coordination in the field of strategic communications is now being developed quite fragmentarily, without due consideration of the objectives, nature and content of this activity. The key issues in organizing strategic communications in the security and defence sector of Ukraine include: lack of a unified national policy, proper legal framework and a comprehensive system of strategic communications for the security and defence sector; scattered activities of the subjects of strategic communications, the necessity to introduce effective mechanisms for coordination of civil-military cooperation, information and psychological operations; inadequate level of professional training of persons involved in strategic communication functions, as well as lack of prepared personnel reserve for the deployment and development of the strategic communications system; the need to organize the development of legislative acts, analytical, methodological and scientific support in the strategic communications of the security and defence sector.

2. Priority directions for the formation and development of the strategic communications system of the security and defence sector of Ukraine should include: development of a modern model of the national system of strategic communications, legal definition of the subjects of this system, their main objectives, functions, powers, interaction and organization of international coopera-

tion; clarification of the system of governance, coordination of activities and democratic control in the field of strategic communications; addressing issues related to the development of public relations of the subjects of the security and defence sector in the context of a hybrid war, the emergence of an information society and the introduction of the latest information and communication technologies; ensuring effective counteraction to informational and information and psychological operations to the detriment of the individual, society and the state; organization of training, retraining and advanced training of the personnel of the subjects of the security and defence sector, as well as adequate scientific and technical support in the field of strategic communications.

3. At the stage of development of the strategic communications system, a duly protection of rights, freedoms and security of the individual and citizen in the information field shall be provided, first of all, in order to reform the national system of personal data protection in accordance with the EU Data Protection Package, which came into force in May 2018 and implements the following basic principles of personal data management: legality, fairness, transparency, target limitation, minimization of data, accuracy, retention, integrity , privacy. The case law of the USA and other EU and NATO Member States on the definition of privacy torts should also be considered: intrusion upon seclusion – invasion of the "personal space" of the individual; publication of private facts; representation of and individual in a false light; use of someone else's name or image for lucrative purposes (appropriation).

In general, developing an effective strategic communications system can become a significant component of the security and defence sector and the protection of vital national interests of Ukraine.

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A. Monaienko, Institute of Legislation of Verkhovna Rada of Ukraine Center for Administrative Justice Science Kyiv Regional Center of National Academy of Law Sciences of Ukraine Kyiv, Ukraine

O. Radyshevska, Administrative Court of Cassation within the Supreme Court Center for the Study of Administrative Justice Kyiv Regional Center of National Academy of Law Sciences of Ukraine Kyiv, Ukraine

Y. Dobkovski, Department of Administrative Law and Administration Science University of Warmia and Mazury in Olsztyn Olsztyn, Poland

DEVELOPMENT OF ADMINISTRATIVE JUSTICE IN UKRAINE AND GERMANY: COMPARATIVE LAW ASPECT

Abstract. *The development of administrative justice in Ukraine contributes to the improvement of protection of rights and freedoms of human and citizen. The scientific works emphasize the necessity of consideration of the national administrative and legal doctrine, state and law-making practice, national legislation of modern European and other foreign principles, standards that in their totality and interaction create a solid foundation for the effective protection of rights and freedoms, legal individuals and legal entities, collective entities, the state. Therefore, the main purpose of the paper is to analyses the development of administrative justice in Ukraine and Germany. For this purpose to be achieved, we applied the general scientific principles, methods and means of cognition of the research object. The logical-semantic method allowed to determine the scientific basis for the research of the legal foundations of the organization of administrative justice in Ukraine. The authors describe the concept and purpose of administrative justice in Ukraine and Germany in the matters of protection of violated rights, freedoms and interests of human and citizen by decisions, actions and inaction of the power entities, new procedural legislation of Ukraine,*

which more effectively facilitate the consideration of administrative proceedings in the court of law, the world models of functioning of administrative justice are considered, the system and structure of the German administrative courts, their specialization, features of consideration of some of the categories of public-law disputes and delimiting of jurisdiction of administrative courts and general courts upon resolving certain categories of cases. It was established that in Germany, institutions of the Grand Senate and the High Senate are created to exclude the possibility of a judicial error. As of Ukraine, currently the system of administrative courts has received more advanced procedural legislation allowing to faster resolve cases of minor complexity.

Key words: *administrative courts, public-law disputes, public service, public interest, administrative act, power entity.*

Introduction

Administrative justice exercises judicial control over the activities of power entities regarding the taking of unlawful decisions, the implementation of actions, inaction in the public-law field, which violate the rights, freedoms and interests of the individual and the citizen. Administrative justice provides protection against arbitrariness of public authorities and local self-government, as well as control over the correctness of the exercise of their governmental administrative functions. Administrative justice is one of the most effective mechanisms for protecting human rights and freedoms from unlawful or unjustified harassment by public authority. And the specificity of this mechanism is that the administrative courts restore the violated human and citizen rights in cases where the offender is the corresponding power entity upon the exercise of its governmental administrative functions, and the violated right of an individual is not of private, but of public nature. In Ukraine, administrative courts have been set up in accordance with Presidential Decree No. 1417/2004 dated November 16, 2004[1], which has the task of protecting and restoring the rights, freedoms and interests of an individual against violations on the part of power entities, which was a huge positive step in the development of the statehood and the establishment of Ukraine as a rule of law.

Problems of formation and development of administrative justice are covered in the following scientific works: A. Mihr [1], J. Bader [2], K. Braun, [3], J. Giesinger [4], M. Kaufman [5], R. Schmidt [6] and others. However, the functioning of the institution of administrative justice in Germany and other EU countries remain quite understudied [7–9]. Thus, in particular, I. Melnyk [10] points out that the presence of administrative justice is an indicator of the compliance of the national judicial system with international legal standards for human rights, as well as the affirmation of the principle of legality in the sphere of executive power. Implementation of administrative justice and the establish-

[1] Law of Ukraine "On the Establishment of Local Administrative Courts". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1417/2004

ment of administrative courts in this regard has the purpose of guaranteeing the right of everyone to challenge in court the decisions, actions or inaction of public authorities, local self-government bodies, officials and public figures, which, in turn, shall ensure the implementation of the constitutional principle of responsibility of the state for its activity before the human. Practices of many European countries prove that administrative courts are an accessible and effective tool for protection of human rights, freedoms and interests from violations by public authorities and local self-government [11]. At the present stage of state formation, the introduction of administrative justice as a separate jurisdictional activity of specialized courts has become not just a direction for improving the judicial system of Ukraine and a means of unloading general and commercial courts. This measure aims at realizing the objective need for the existence of a special judicial mechanism for resolving legal disputes in the field of public-legal relations [12]. Administrative justice in Germany is a special procedure for resolving public-law disputes of an unconstitutional nature between individuals and public authorities, which is implemented by administrative courts of general and special jurisdiction in a special procedural form, which is an administrative legal proceeding [5]. Unlike in Ukraine, where it is possible to appeal against acts of the authorities in administrative proceedings and to challenge them in court, in Germany an appeal to the administrative court is possible only in the event that the complaint of the individual was rejected by the power entity superior to the one that committed the contested act. Therefore, an action for objection to an administrative act can be filed with the administrative court only after reviewing this act on the basis of an administrative appeal [4].

The purpose of the article is to research the distinctive features of the functioning of the administrative courts in Ukraine after the reform of procedural legislation in the light of the amendments introduced to the Constitution of Ukraine in the part of justice, the functioning of the system of administrative courts in Germany, which may be of considerable practical interest for the domestic legislator upon the development and implementation in the current legislation of Ukraine.

1. Materials and methods

The methodological basis of the research was designed to ensure a comprehensive and complex study of the development tendencies of administrative justice in Ukraine as an urgent issue of modern national legal science and practice, to formulate theoretical approaches that are relevant to contemporary challenges, and to draw conclusions on the necessity of improvement of the current national legislation in the context of new regulation of the procedure of administrative litigation in the manner of the successfully tested and sustainable model of Germany. That is why the methodological basis of the paper was represented not only by the general scientific principles, methods and means of cognition of the object and subject of research,

such as systematicity, comprehensiveness, concreteness. In particular, in the context of the stated purpose of the article, both general scientific (dialectical, systemic, logical-semantic, synergistic, analysis and synthesis, formal-logical, legal modelling, instrumental, sociological, statistical, etc.) and special scientific methods were tested (historical law, comparative law, formal law, special law, etc.). The most important in this system is the general scientific dialectical method, which facilitated the consideration and research of the issue in the unity of its content and legal form, as well as the systematic analysis of the legal principles of the organization of administrative justice in Ukraine and Germany. Moreover, this method facilitated the determination of the status, tendencies and prospects of the development of administrative justice research in the context of sustainable world models.

It is prudent to underline that the greatest attention was also paid to the use of the comparative law method, which enabled a thorough research of the genesis of legal regulation in the field of administrative justice and its practice in the territory of Ukraine and Germany, which in turn became a sound basis for the author's conclusions and further scientific research. With the help of the logical-semantic method, an insight into the conceptual apparatus was furthered, the scientific basis for the research of the legal foundations of the organization of administrative justice in Ukraine was determined. The systematic method proved useful upon analysing the domestic legislation of Ukraine and Germany in the researched field. The formal-logical method was applied to identify the connections and contradictions existing in the theory and practice of the enforcement of procedural law in Ukraine and Germany. The method of analysis and synthesis allowed to explore the theoretical prerequisites for the introduction of an institution of administrative justice as a separate jurisdiction of specialized courts. The use of sociological and statistical methods facilitated the generalization of legal practice, the analysis of empirical information related to the topic of the article.

It became possible to formulate specific positions regarding the state and prospects of the system of national legislation of Ukraine through the method of legal modelling. The special legal method of research was of particular importance for the work on the paper, involving the external processing of regulatory material. The becoming of the domestic model of administrative justice is analysed in its historical retrospective using the historical law method. This method also provided an opportunity to further the insight into the becoming and development of the legal bases for administrative justice reform in the territory of our state and Germany.

It can be stated that the methodological basis of the research is, in a complex combination, represented by scientific concepts and grounded judgments, produced by the realities of the present, and qualitatively formulated by prominent representatives of the doctrine of state and law theory, constitutional, administrative and other branches of law and

judicial process. Furthermore, this foundation also has a theory of knowledge of social and legal phenomena as its component. The scientific and theoretical basis of the paper is represented by the scientific development of domestic and foreign specialists in the field of law, the references to which support the chosen research methods.

2. Results and discussion

2.1 The system of administrative courts in Ukraine

Ukrainian scientific opinion is the only one in the position that administrative justice is a system of judicial bodies (courts) that control compliance with the law in public administration by resolving in a separate procedural order the public-law disputes arising in connection with applications of individuals or legal entities to executive authorities, local governments or their officials [13]. Administrative justice is the procedure established by law for the consideration and resolution in the court of law of cases in the field of public administration between citizens or legal entities on the one hand and bodies of executive power and local self-government (officials) – on the other, carried out by courts, either general or specially created for the settlement of legal disputes [14].

In Ukraine, a proper legislative framework for the functioning of administrative justice is established, in particular, in accordance with Art. 125 of the Constitution of Ukraine[1], administrative courts operate in order to protect the rights, freedoms and interests of a person in the field of public-law relations. In accordance with Part 1 of Art. 18 of the Law of Ukraine "On Judiciary and Status of Judges" No. 1402-VIII dated June 2, 2016[2], courts specialize in civil, criminal, economic, administrative cases, as well as the cases on administrative offenses. Local administrative courts are district administrative courts as well as other courts designated by procedural law. Local administrative courts consider cases of administrative jurisdiction.

The Administrative Court Procedure Code of Ukraine, as amended in 2005, defines the procedural mechanisms of the activity of administrative courts and creates a proper legal basis for the due functioning of administrative justice and delivery of justice in administrative cases, protection of human and citizen rights and freedoms, legal interests of legal entities from violations by power entities [15]. Amending the procedural legislation of Ukraine was another step towards judicial reform. In 2016, the Verkhovna Rada of Ukraine adopted the Laws of Ukraine: "On Amendments to the Constitution of Ukraine (regarding Justice)"[3], "On the Judiciary and Status of Judges"[4], "On the High Council of Justice"[5], a new wording of the Adminis-

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] Law of Ukraine "On Judiciary and Status of Judges". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1402–19

[3] Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice)". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1401–19

[4] Law of Ukraine "On Judiciary and Status of Judges". op. cit.

[5] Law of Ukraine "On the High Council of Justice". (2019, November). Retrieved from

trative Court Procedure Code of Ukraine[1] was adopted in 2017. The constitutive essence of the reform of procedural legislation in Ukraine was to increase the efficiency of the judicial process, to more clearly differentiate the jurisdiction of courts of different specializations, to introduce effective mechanisms for the exercise of procedural rights, etc.

Thus, since December 15, 2017, proceedings in administrative courts have been carried out in accordance with the new wording of the Administrative Court Procedure Code of Ukraine[2] (hereinafter referred to as "the ACPCU").

The ACPCU has divided the administrative cases into cases of minor complexity and all others. For the first category, the ACPCU envisages simplified litigation, for the other category of cases, the ACPCU envisages general litigation. The essence of these innovations is that the consideration of cases of minor complexity shall be carried out under a simplified procedure and in a shorter timeframe, furthermore, such cases should be considered by the court of appeal as the final instance. For the Supreme Court to review the case of minor complexity, in accordance with Art. 328 of the ACPCU, the applicants must provide reasoning as to the fundamental significance for the formation of a single law enforcement practice or a considerable public interest or the exceptional personal importance of their case.

According to the ECHR, such restrictions on cassation appeal do not violate the guarantees of the Convention for the Protection of Human Rights and Fundamental Freedoms (decision dated 09.10.2018 on inadmissibility in the case of Azyukovska v. Ukraine, application No. 26293/18).

The current ACPCU defines a public-law dispute as a dispute wherein at least one party exercises governmental administrative functions, including the exercise of delegated powers, and the dispute arises in connection with the performance or non-performance by such party of the said functions; or at least one party provides administrative services on the basis of the legislation that authorizes or obliges to provide such services solely the power entity, and the dispute arises in connection with the provision or non-provision of the said services by such party; or at least one party is an electoral or referendum subject and a dispute arises in connection with violation of its rights in such a process by a power entity or another person[3].

Furthermore, the ACPCU has identified the categories of these public-law disputes, the resolution of which falls under the jurisdiction of an administrative court (Part 1, Article 17). The adoption of the ACPCU in the new wording has introduced significant innovations in the consideration of public-law disputes in administrative courts.

The Unified Judicial Information and Telecommunication System became one

https://zakon.rada.gov.ua/laws/show/1798–19

[1] Administrative Procedure Code of Ukraine. (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2147–19.

[2] Ibidem

[3] Administrative Procedure Code of Ukraine. (2017, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2147–19.

of such innovations. However, due to the lack of budgetary funding for administrative courts, the start of operation of the UJITS was postponed. A new approach to the application of the institution of proof through the electronic evidence was introduced, where the ACPCU provides the parties to a case with more means to prove their position before the court. An expert's opinion to reinforce the position of one of the parties to the dispute may be concluded to order of the party to a case. An advocatory monopoly was introduced, which was enshrined in the Constitution of Ukraine with a gradual enforcement until 2020, the essence of which lies in the representation of individuals by the advocate in all judicial authorities. The order of removal of judges was also changed to allow for the judge to be dismissed in the event that one of the parties to an administrative case doubts the impartiality of the judge. The ACPCU regulates the actions of the parties to a case, which the court may qualify as abuse of procedural rights. For such actions, the ACPCU stipulates corresponding measures of procedural coercion in the form of warning, fine, removal from the hall, etc. The current ACPCU also expands the list and requirements for procedural documents, terms and procedure for their submission. Not least important in the ACPCU is the introduction of a dispute resolution institute with the participation of a judge, which should be held prior to the initiation of the case consideration upon the consent of both parties. Deviation from preliminary opinions by the Supreme Court became possible at the stage of cassation review by the Supreme Court of decisions of courts of preceding instance on the issues of application of the rule of law in such legal relations, with consideration of the circumstances of the case, the legal nature of the public-law dispute.

It is also noteworthy that administrative justice in Ukraine is created and operates by the example of the German model, the main provision of which is that the judicial branch in Germany is divided into administrative courts of general and special jurisdiction, which are standalone judicial authorities, independent of public administration or courts of general jurisdiction.

2.2 World models of administrative justice

Ukraine is not the only country in the world where administrative justice operates. Virtually every country in the world has implemented a certain way of organizing judicial control over the activities of public administration through a system of relevant judicial authorities [16–18]. There is a number of countries using the system of courts of general jurisdiction (the UK, the US, Australia, New Zealand, Denmark, Norway, etc.) and a number of countries using the system of courts of specialized jurisdiction (Germany, Italy, Sweden, Greece, etc.).

In the first case, among countries using general courts to control public administration, the following models of administrative justice organization can be distinguished:

– a model of exclusive jurisdiction of the general courts, wherein the existence of both administrative courts

and quasi-courts is completely excluded. Judicial control is performed according to the rules of civil procedure (Denmark, Norway, Malta, Morocco, etc.);

– the Anglo-Saxon model, wherein, together with the general courts, the control of public administration is exercised by a variety of specialized quasi-judicial bodies – administrative tribunals (the UK, the US, Australia, New Zealand, India, Canada, Kenya, Belgium, Denmark, Norway, etc.);

– the model of courts of general jurisdiction with specialized administrative litigation (Japanese model). The control over the activity of the executive authority in Japan is exercised by the courts of general jurisdiction, but civil and administrative proceedings are carried out under different procedural rules established under the 1960 Civil Procedure Act and the 1962 Administrative Disputes Act;

– the model of administrative specialization within a single court system, wherein separate chambers in the matters of administrative cases exist within the single judicial system (Spain, Madagascar, Mexico, etc.). This model does not preclude the creation of administrative courts. In Spain, for example, administrative and economic courts exist along with the chambers in the matters of administrative disputes.

In the second case, countries using the system of courts of specialized jurisdiction use the following models of administrative justice:

– the dualistic (French) model. It is based on a specific interpretation of the principle of separation of powers, which prevents courts of general jurisdiction from interfering with the activities of executive bodies. This led to the formation of administrative courts within the public administration itself. Thus, in France, the general court, even upon consideration of a civil or criminal case, removes itself from the resolution of administrative disputes and submits a request to the administrative tribunal;

– the German model of administrative justice functions through the "division" of the judicial branch into separate "embranchments". In this way, the separation of justice from the public administration is achieved, and the field of public interest becomes subject to special judicial consideration. The administrative courts are completely separated from the general courts and are headed by the High Administrative Court. This model is also adopted by Sweden, Indonesia, and Mozambique;

– the model of a multiplicity of judicial bodies authorized to consider administrative disputes. This model enables the control of both administrative courts and tribunals (quasi-courts) and general courts (Switzerland, Finland, Belgium).

2.3 The administrative justice system in Germany and the specialization of administrative courts

The German model of administrative justice is characterized by the creation of specialized courts for the resolution of public-law disputes in administrative cases arising in the field of public activity of power entities. Administrative courts belong to a single judicial system and are independent in the exercise of

their functions of justice both by the power entities and the general courts. The system of administrative courts of general jurisdiction in Germany consists of three levels [1]:

– at the lower level, administrative courts (das Verwaltungsgericht) are established in the federal states, where chambers of 3 judges and two "honorary judges" are rendering decisions in the first instance (paragraph 5 of the Administrative Courts Act[1]).

– at the middle level, the High Administrative Courts of Land (das Oberverwaltungsgericht), operating in each land, are established, which in some lands are referred to simply as administrative chambers. Here, in the second instance, decisions are rendered by chambers consisting essentially of three professional judges.

– at the highest level, in accordance with para. 1 of Art. 95 of the Fundamental Law, the Federal Administrative Court (das Bundesverwaltungsgericht) is established. Senates rendering the decisions in the final instance are composed of five professional judges (paragraph 10 of the Administrative Courts Act[2]).

In the Supreme Land Administrative Courts and in the Federal Administrative Court exist the so-called Grand Senates (paragraphs 11, 12 of the Administrative Courts Act). In order to comply with the public interest in accordance with paragraph 35 of the Law on Administrative Courts, the Chief Prosecutor acts at the Federal Administrative Court, and in other courts a so-called public interest representative is appointed. The Administrative Courts Act is a legislative act that regulates the organization and functioning of administrative justice courts in the field of administrative law cases. The administrative courts of Germany settle only public-law disputes, either between public law entities or between citizens and public administration, with a large proportion of these public-law disputes arising from the adoption of the necessary administrative act and, according to the plaintiff, a valid administrative act affecting the plaintiff's rights or freedoms [3].

The Law of the Federal Republic of Germany on Administrative Courts consists of two main parts: the first part covers the matters of judicial system (Gerichtsverfassung), and the second part specifically covers the process (Verfahren). The first part consists of six sections: the first section is devoted to the administrative courts, their hierarchy and structure (Gerichte), the second section – to the judges of the administrative courts (Richter), a separate section covers the categories of honorary judges (Ehrenamtliche Richter), another one – the representatives of public interests (Vertreter des oeffentlichen Interesses), followed by the section on judicial administration (Gerichtsverwaltung), and finally, the section on the procedure for appealing to the administrative court and jurisdiction (Verwaltungsrechtsweg und Zustaendigkeit). The second part consists of

[1] Law of Germany "On Administrative Courts". Retrieved from https://germanlawarchive.iuscomp.org/?p=292

[2] Law of Germany "On Administrative Courts". Retrieved from https://germanlawarchive.iuscomp.org/?p=292

only two sections: the procedural requirements of a general nature (Allgemeine Verfahrensvorschriften) and special provisions for claims challenging the administrative acts and the obligation of public administration to adopt the corresponding administrative act (Besondere Vorschriften fuer Anfechtungs- und Verpflichtungsklagen).

The Law of the Federal Republic of Germany "On German Judges" contains basic provisions on the status, training, appointment and exercise of functions of a judge, although many provisions are duplicated in the Law on Administrative Courts itself. The Law of the Federal Republic of Germany on Administrative Courts establishes the basic requirements and general principles for building a system of administrative courts [19; 20]. A number of lands in Germany may agree on the creation of a joint judicial authority or the extension of judicial districts to a specific category of administrative cases. This provision is essential for lands with small territories and populations where there is no need for the existence of all administrative justice bodies stipulated by law. Each court creates a presidium composed of the President of a given court or judge, who performs the functions of a chief justice, and a certain number of professional judges elected from the composition of the court, with that, the exact number of judges in the presidium elected in each court is defined proceeding from the total number of judges working in the given court.

The Law of the Federal Republic of Germany "On the Judicial System" very thoroughly discloses the procedure for election to the presidium, the most important provisions of which are assigned to all judges working in a particular court, the right to elect and be elected, with an exception to this rule only for judges who have worked for over three months in another the Administrative Court. The presidium is elected for four years and is renewed by rotating half of its members every two years. The presidium of the court is the body that handles the organizational tasks that are important for the court, namely: it distributes cases admitted to the court between judges. The final decision on which judicial tasks will be resolved by the presidium of the court is taken solely by the President of the court. One of the duties of the presidium of the court is the division of cases between judges, this function is organizational in nature, but its importance is quite great, since special attention is paid to the proper determination of the specificity of the administrative case in the specialization of each judge.

Furthermore, the presidium resolves the issue of dismissing judges, changing the composition of judges, transferring them from one judicial chamber to another. All decisions of the presidium shall be taken by a simple majority of votes, and, in the event of an equal number of votes, the vote of the President of the presidium shall be decisive. Therefore, the administrative court consists of the president, presiding judges and professional judges, the number of which is determined by the needs of a particular court in each individual case.

Due to the fact that the court structure can be divided into several chambers, each such chamber of the administrative court adopts a decision on the settlement of administrative disputes in the composition of three professional and two honorary judges in circumstances where the case cannot be heard by one judge individually. Honorary judges participate in litigation at almost all stages, but their participation is excluded only in adjudication and rulings beyond oral proceedings.

The case may be heard by the judge individually. First, the case is referred by the presidium to a particular judicial chamber, and then the case is referred to one of its judges under the following circumstances: in the event that the case is not of legal concern and of considerable public interest and in the event that the case is insignificant in complexity. Thus, only administrative cases which, by their very nature and the relevant grounds under the procedural law of Germany do not require the establishment of a panel, are subject to an individual hearing.

The current legislation of the Federal Republic of Germany also regulates circumstances where a case cannot be referred for consideration to a single judge. Thus, a case cannot be heard by a judge individually in the event that it has already been heard orally, and a decision of an administrative court with a reservation or a decision on the protection of private law has already been adopted in the context of these proceedings. The judge hearing the case individually may independently refer it to the trial chamber if, after hearing the parties, the subject matter of the claim became substantially altered, or new circumstances arose in the case. In this event, the trial chamber will no longer be able to refer the case back to a separate judge for consideration [2].

Structure and organization of the administrative court of the second instance. The only difference between these courts and the administrative courts of the first instance is that in the courts of the second instance not chambers are created, but boards or senates. With regard to the composition of the judicial panel responsible for decision-making, the federal legislation of Germany provides for the presence of three professional judges as the main option, but the legislator allows the Landtags (local representative legislative bodies) of the lands of Germany, at their discretion, to provide alternative compositions of the judicial panels in the amount of five judges, two of which are honorary, or five professional judges and two honorary ones.

The Federal Administrative Court is the highest administrative justice body in Germany, consisting, same as courts of the previous instance, of the president, presiding judges and professional judges. The working bodies of the Federal Administrative Court of Germany are the Chambers, which have the power to adopt decisions of five professional judges. The decisions of this court, outside the oral proceedings, shall be adopted by at least three judges. Administrative justice in Germany has its own specificity, different from that of Ukraine. In particular, it is in the fact that administrative

courts have special courts in its composition. Thus, in the Federal Administrative Court, there are two special "disciplinary" senates that hear cases of disciplinary responsibility of federal employees as the second instance. The first instance in this category of cases is the federal disciplinary court (das Bundesdisziplinargericht). In the cities of Munich and Ulm there are disciplinary courts for servicemen (die Truppendienstgerichte), which are empowered to impose disciplinary penalties and administrative penalties on servicemen. Decisions taken by disciplinary tribunals for servicemen may be appealed to the Federal Administrative Court, wherein two special senates review the decisions on cases of army conscripts and retired servicemen (die Wehrdienstsenate) on their administrative claims. In the system of administrative courts of Germany there are also special disciplinary courts that deal with offenses committed by officials of legal entities (for example, medical workers whose actions harmed the rights and legitimate interests of citizens). These courts are called "courts of honour" or "professional courts" (die Berufsgerichte fuer Heilberufe). Their organization is within the competence of the land and is governed by the land legislation in Germany. The administrative cases in such courts are reviewed in a collegial manner [4].

The current legislation of Germany establishes that the administrative procedure for judicial review of relevant administrative cases applies to all public-law disputes that are not constitutional and legal, except the circumstances where, in accordance with the federal law, the case must be referred to court in another jurisdiction. Public-law disputes in Germany may be brought before a court of another jurisdiction on the basis of land legislation, proceeding from the legal nature of each individual dispute. Thus, property claims arising from the right to demand reparations for damages caused to a private person as a result of the exercise of governmental administrative functions by the power entities are subject to the ordinary proceeding in a court of general jurisdiction [6].

In Ukraine, however, upon resolving land disputes, for example, in the event of local governments adopting a decision to transfer land to property or lease, further contestation of the lawfulness of acquisition of the disputed land by an individual should be resolved in the order of civil jurisdiction, since a dispute on civil law arises, which is not related to the protection of the rights, freedoms or interests of the plaintiff in the field of public-law relations, and although a local government body was exercising a governmental administrative function, it is still connected with the ultimate goal – ownership or use of the land. When local government bodies as power entities exercise governmental administrative functions in the field of land relations and their decisions (for example, regarding the permit for the development of a land management project for land allotment) are not related to obtaining a right of ownership, land lease, etc., i.e. to civil law, then such a land dispute should be resolved in the order of administrative proceedings. In Germany, cases involv-

ing the civil service and compensation for property damage regarding the annulment of the unlawful decisions of the authorities are also outside the jurisdiction of the administrative courts. This provision is referred to in German legal doctrine as a general caveat and is crucial for litigation. It establishes that the administrative courts are liable for all cases of a non-constitutional nature unless otherwise determined. This provision is based on the provisions of the Fundamental Law of Germany, the principle of delivering independent justice only through judges, which gives its citizens the opportunity to defend themselves against the unlawful decisions, actions or inaction of the power entities in Germany [2].

It is quite important that the federal legislation of Germany no longer uses a simple enumeration of cases upon determining their jurisdiction, but defines that jurisdiction through common boundaries established by law at the junction of branches of law, which means that a person's legal protection is in no way dependent on the type of activities of the state that caused the violation of its rights, including those foreseen by the Convention. That is, in such circumstances we are referring to the upholding of the principle of continuous legal protection, when the situation of the insecurity of a person from illegal decisions, actions or inaction of the German public authorities is impossible.

Moreover, the aforementioned general caveat serves as a delimitation of jurisdiction between administrative courts on the one hand, and courts of general jurisdiction on the other. However, nowadays there are still some cases where some acts of the authorities may not be appealed to the administrative courts under the rules of administrative justice. Thus, there are two types of similar acts of the power entities: 1) individual law administrative acts; 2) decision (acts) on pardon. Pardon decisions affect the scope of administrative jurisdiction when their subject matter is relations governed by civil service legislation [6].

In Germany, the definition of public-law dispute is absent from the federal legislation, unlike the Administrative Court Procedure Code of Ukraine. On the basis of other provisions of the federal legislation of Germany, it can be concluded that such a dispute occurs when the subject matter or cause is contained directly in the field of public law and there is no reason to consider it as a private law. This raises another question regarding the determination of boundaries between private and public law. Both in Germany and in Ukraine, this matter has no unambiguous solution and is separately dealt with in a court of law every time, proceeding from the circumstances of the case, the subject matter of the dispute and its legal nature. German legal doctrine also leaves the solution of this issue to the discretion of judicial practice.

With regard to public-law relations, from which the aforementioned disputes arise, their main feature is that one of the participants must be in a relationship of subordination to the public authorities. The holders of public authority in Ger-

many are the federation, lands, communities and their associations, as well as various legal entities of public law, performing governmental administrative functions and activities of which are governed by public law and/or which were created by the relevant act of power entity [1]. In Germany, as well as in Ukraine, another interesting issue can be observed, the essence of which lies in the difficulty of determining when a power entity acts as a civil law entity, and by what criteria it is possible to distinguish such a case from a situation of performing governmental administrative functions. As a rule, the German legal opinion proceeds from the fact that in the event of such difficulties in determining the legal nature of the arising relations, it is necessary, first of all, to establish the existence of relations of inequality of the parties to the dispute, their administrative and legal status. With regard for the delimitation of public-law disputes from disputes of a constitutional nature, in Germany this issue is resolved much easier. Constitutional disputes refer to disputes connected with federal or land constitutional law. It should be noted that within the framework of constitutional law only such relations can exist, which occur between the power entities created on the basis of the provisions of the Fundamental Law, but in no case the relations between the citizen and the state.

Types of jurisdiction that occur in the administrative process. With regards to the substantive jurisdiction, as a general rule, all cases within the administrative jurisdiction are considered by the administrative courts of first instance on the merits. Further, in administrative jurisdiction, the administrative case is considered by the administrative courts of the second instance, which have the authority to consider administrative cases in the order of appeal against the decisions of the courts of first instance, or in the order of cassation. Within the framework of substantive jurisdiction, the German administrative courts consider two large groups of administrative cases as courts of first instance: cases of illegality (unlawfulness or incompatibility with a supreme legal act) and invalidity in whole or in part of a legislative instrument; cases relating to public buildings.

The first group includes cases, the subject of which is the judicial determination of the legality of the various instructions, rules, governmental regulations of a subordinate nature, adopted on the basis of federal laws. This also includes consideration of the claims of individuals and legal entities concerning the decisions of the power entities, the enforcement of which violated or may violate the rights of these persons. The administrative court of the second instance is obliged to provide an opportunity of expressing their position in the process to every person whose rights were violated upon application of the corresponding act of the power entity [4]. As the acts of the power entities aimed at an unlimited circle of persons are most often considered in such manner, the current federal legislation of Germany obliges the administrative body that adopted such an act to publish the court's decision on rendering the act to be unlawful (invalid) the same way

it was promulgated. This is a kind of guarantee that the information on the invalidity of such an act is communicated to all persons whom it may concern and whose rights and interests were violated by this act.

The second group includes administrative cases related to public buildings of considerable public interest. This is a fairly large category of cases, of particular importance here are the cases of construction, operation, modernization of power plants and installations of other technical purposes, stationary plants (for example, waste processing plants), operation of public roads, airports, etc. [4]. The Federal Administrative Court of Germany considers cassation appeals against the decisions of the administrative courts of the first and second instance. In some circumstances, the Federal Antitrust Service (FAC) considers cases as a court of first instance, for example, the consideration of public-law disputes between the federation and lands (or between lands), provided that the public-law dispute is not of constitutional nature.

Apart from the substantive and instance jurisdiction, there is also a territorial jurisdiction to help determine in which particular court can a corresponding administrative claim can be filed. With regard to public-law disputes on public buildings, they are considered by the administrative court of the judicial district wherein the relevant object of immovable property is located. Same rules apply when the subject matter of a dispute is a right relating to a land or property.

In the event that the claim is directed against any federal power entity, then such an administrative case is to be considered in court at the defendant's place of residence. If the claim is aimed at declaring the illegality of a regulatory act, which is not issued at the federal level, then the public-law dispute is to be considered at the place of adoption of the disputed act. Particular mention should be made of the circumstances when an administrative case on provision of asylum is being considered in court, then the dispute should be considered by the court of the judicial district where the person claimed asylum. The claim may be directed by a private person against the power entity over the resolution of a public-law dispute arising from the relations of the public service or its special types, then such dispute will be considered at the place of residence of the claimant, and in the absence of permanent residence – at the location of the defendant.

If in some circumstances it is difficult to determine which court of administrative jurisdiction should have the competence to resolve the dispute, then the jurisdiction of a particular case is to be determined by the high court.

2.4 Specialized courts in the system of administrative justice in Germany

Comparing to Ukraine, Germany has gone a long way in matters of court specialization. In particular, administrative justice in Germany is characterized by the presence of special courts of administrative justice: financial and social courts. In accordance with the Law of the Federal Republic of Germany "On

Financial Courts", there are only two instances in the system of financial courts. Administrative cases are considered by the Land Financing Courts (die Finanzgerichte) as a court of first instance. The Senate at the Financial Court of the Land carries out a hearing with three professional judges and two honorary ones. The Senate may refer the case for individual hearing to one of its judges. The second and final instance is the Federal Financial Court (der Bundesfinanzhof).

Financial courts are liable to litigate public-law disputes over claims against power entities (e.g. tax disputes or other public-law disputes arising from public financial activities of the state). The Federal Court is a revisionary instance, which considers the appeals against decisions and rulings of the corresponding financial court. The next specialization of courts is social courts (or social security courts). Their organization is regulated by the Law of the Federal Republic of Germany "On Social Courts"[1]. They are established to consider public-law disputes related to social insurance, provision of free or preferential health care, payment of unemployment benefits, etc.

The social court system has three levels unlike the financial courts. The first are the social courts (die Sozialgerichte). The second level is the social court of the land (das Landessozialgericht). Their chambers consider complicated cases as courts of first instance, and are empowered to review decisions of courts of first instance. Social courts of land are organized in 16 subjects of the federation. The third level in the system of courts for social security is the Federal Social Court (das Bundessozialgericht), which consists of 14 chambers (on the matters of insurance of the unemployed, on the violation of the insurance rights of individuals, on the social security of victims of war, on the insurance of miners, etc.). Organizationally, the structure of the court includes the Grand Senate. The courts in the social affairs include, in particular, disputes on social security: insurance of the sick, pension, care for the sick, victims of war, etc. [1]. In the social court of first instance, the decision is adopted by the chamber of social affairs, consisting of one professional judge and two honorary ones. In the social court of the land, the decision is adopted by a senate consisting of three professional judges and two honorary ones (judges on a public basis). In the Grand Chamber of the Federal Social Court, 12 professional judges and 6 honorary judges adopt decisions.

The judicial system of Germany does not rule out the possibility of a judicial error, even if a similar case was considered by another court. To avoid possible mistakes, an institution of the Grand Senate and the High Senate was established, which is composed of the senates of different courts that ensure the unity of judicial practice in Germany. The Senate acts at the Supreme Courts. The Senate, which adopts a decision different than another Senate or the Grand Senate that has decided on a similar issue, must

[1] German Law "On Social Courts". Retrieved from https://e-justice.europa.eu/content_specialised_courts-19-de-maximizeMS-en.do?member=1

convene the High Senate. In Germany, such issues are governed by a special law on the unity of enforcement. The Grand Senate decides whether the FAC Senate can move away from a decision by another FAC Senate or the FAC Grand Senate. Transfer of the case to the FAC High Senate is possible only in the event that the Senate, the decision of which the other Senate deems necessary to withdraw, responds to the request of the latter that it continues to maintain its legal position.

Otherwise, the FAC Senate has the right to bring before the FAC High Senate the issue which, in its opinion, is a matter of law that is fundamental to the formation of a uniform law practice and which may further affect the development of law as a whole, or if this issue urgently requires solution for the particular case under consideration, to protect the rights, freedoms and interests of the individual and the citizen. It should be noted that the High Senate decides only on matters of law, that is, the factual side of the case should in any event remain outside the jurisdiction of the court. The decision of the High Senate is binding on the decisions of other FAC senates.

Conclusions

Thus, the administrative justice of Germany as a standalone, independent judicial branch is characterized by internal specialization (administrative courts of general jurisdiction and special jurisdiction). But as of today, there is a debate on the necessity of reforming the judicial system of Germany, which, in addition to specialization in the fields of justice and the presence of two and three levels, is complicated by the federal form of territorial organization. In particular, an opinion is entertained regarding the practicality of having a two-tier judicial system with regard to the majority of cases of minor complexity and preservation of a three-tier judicial system solely for administrative cases that are fundamental to the formation of a unified law enforcement practice, are of considerable public interest or of exceptional importance to the party involved.

Administrative justice in Germany is the activity of administrative courts of general and special jurisdiction operating within the entire judicial system and administering justice by protecting the subjective rights and legitimate interests of individuals from unlawful decisions, illegal acts and inaction of the executive authorities and local self-government and their officials.

In Ukraine, in comparison with Germany, before the introduction of amendments to the Constitution of Ukraine in the area of justice, the four-tier judicial system operated, which to some extent caused the devaluation of the court decision as such and caused the desire and habit of individuals and economic entities to demand its review for the sake of the process itself, wasting time on adoption of the decision and its enforcement, which in some way resulted in the loss of the effect of the protection of the infringed law by the judicial system. As of today, the system of administrative courts in Ukraine has received more sophisticated procedural legislation that allows faster resolution of cases of in-

significant complexity, which has put into practice new procedural institutes and the procedure for resolving public-law disputes that allow more efficient handling of administrative cases, although not flawless; which introduced so-called cassation filters, the essence of which is to determine the exceptional grounds for cassation appeal in cases where such an appeal is really necessary, which should serve to form an effective judicial system and guarantee the person the right to a final and binding judgment. The introduction of the cassation "filters" defined in the current ACPCU evidences the implementation by Ukraine of the recommendations of the Venice Commission on improving the justice system and the administration of justice by allowing the Supreme Court to consider any case through the use of cassation "filters".

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O. Muza, Doctor of Legal Sciences, Senior Researcher, Professor Department of Criminal and Administrative Law Academy of Advocacy of Ukraine Kyiv, Ukraine

JUDICIAL LEGISLATION AND ADMINISTRATIVE LEGAL RELATIONS: SEARCH OF INTERCONNECTION

Abstract. *The article is dedicated to research of the impact of the court decisions on the process of applying the norms of administrative legislation. The author emphasised the importance of determining the newest system of administrative law sources with the aim to formulate the role of court decisions for the dynamics of administrative-legal relations. It is analysed the correlation of such concepts as ''law enforcement", ''court decision" and ''judicial legislation". It is established that complexity of the interconnection between judicial legislation and administrative-legal relations consists in the special impact of the acts of judicial bodies on the public administration functioning. The legal nature of public dispute touches upon the public order in the state, the necessity for proportional correlation of public and private interests, public administration functioning, etc. It is concluded that the efficiency of connection between judicial legislation and administrative legal relations depends on such a phenomenon as a judicial error since under such conditions the relevant impact can have a destructive nature regarding the field of public administration.*

Key words: *judicial legislation, administrative legal relations, public administration, court decision, administrative courts.*

Introduction

Modern legal practice of Ukraine is characterised by the appearance and spread of intersectoral relations in the legal regulation mechanism of social relations. The classical understanding of the branch of law is supplemented by the necessity to distinguish the latter from the branch of legislation and individual sub-branches of law that leads to the allocation of independent groups of legal relations. One of the factors which has an impact on the interdisciplinary nature of the legal system is the judicial practice which by means of certain procedural forms and means solves the

complex current matters of evaluating the problems of development of sectoral legal relations, providing with the help of judicial decisions the evaluation of legal regulation state of homogeneous legal relations. Given this fact, in legal science doctrinal views on judicial practice as a source of law and a factor of necessity to improve sectoral legislation are changing.

The development of administrative law in Ukraine is characterised by a change of theoretical views on the nature and types of administrative relations: reconsideration of general theory of administrative law; slow but gradual administrative law reforming; introduction and development of administrative court procedure; appearance of certain branches of legislation which conceptual origins are based on the subject of administrative law and the like. However, the greatest feature that determines the public power-managerial relations is the impact of judicial practice due to which a particular type of administrative legal relations along with obligatory legal regulation experiences legal changes. It is the beginning of administrative courts functioning in the 2000s that ensured the self-sufficient division of administrative legal relations into material and procedural within the framework of a single subject of administrative law, appeared new opportunities for improvement of the legal regulation mechanisms of the latter, appeared the ability to put into practice the requirements of humanocentrism principle in public administration and protect the rights, freedoms and interests of individuals from possible illegal public power-managerial impact (infringement).

Judicial decisions are not only legal acts by which the court on behalf of the state decides the question of the scope of rights of the parties to the disputed legal relations, but also in their legal positions it is possible to find a continuation of the administrative legal theory. Judicial interpretation of administrative and material norms of law eventually affects the legislative improvement of administrative and legal regulation of social relations.

At the present stage of legal science development, the problems of judicial lawmaking are investigated by V. V. Komarov [1], L. M. Moskvich [2], S. V. Prylutskyi [3], A. O. Selivanov [4], S. V. Shevchuk [5] and the others. It is the idea of creating judicial law in Ukraine that makes it necessary to analyse the interconnection between judicial and extrajudicial instruments of impact on the development of legal relations.

S. V. Shevchuk notes that "judicial practice plays a role of concretisation of laws and in this it complements the legislator, or rather it becomes a source of law in case of a legislator's "inaction" when the normative legal acts contain gaps, their textual presentation is ambiguous and contradictory for understanding as well as raises problems in law enforcement. Judicial practice fills the gaps by using the analogy of right and law, that is, the result of this analogy and the order of judicial motivation has a special weight and importance for the subsequent resolution of similar cases. Of course, a legislator can consolidate the results of judicial practice by legisla-

tive concretisation. But this can take place already post-factum, at the time when the interests of justice require the specification of laws through judicial practice in the process of hearing a particular case" [5].

A. O. Selivanov emphasizes that "the doctrinal concept of judicial law can not yet be considered an internally completed <…> judicial law is one of the branches of public law in which its main subject is judiciary power which functions independently on the constitutional principle of separation of powers, and the existence of constitutional, civil, administrative and other types of legal proceedings are the forms of the state activity (justice implementation)" [4].

T. O. Kolomoyets notes that "in the scientific community, the thesis of the expediency of so-called judicial law which would "absorb" all the procedural judicial components of the elements of the domestic legal system, is increasingly substantiated that, in its turn, would contribute to ceasing any further discussions regarding the understanding of the process content (as general concepts) and its variations and distinguish it from other legal institutions" [6].

N. Ye. Blazhivska notes that "the judicial doctrine, first of all, is intended to fill gaps in the legislation and demonstrate the directions for its improvement, and also supports the understanding of the concept of judicial doctrine as the ratio of the ideological load of the doctrine with the choice of a reasonable response to a reasonable argument in the process of applying the norms of the law in the court" [7].

The Law of Ukraine On Amendments to the Economic Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Code of administrative procedure of Ukraine and other legislative acts of 03.10.17. No. 2147-VIII (hereinafter referred to as Law No. 2147-VIII) [8] the Code of Administrative Procedure of Ukraine (hereinafter – the CAP of Ukraine) [9] is set out in a new version and came into force on December 15th, 2017 together with the beginning of the Supreme Court's functionning. It is the latest provisions of the procedural legislation that establish the necessity for the search of the interconnection between decisions of administrative courts and administrative legal relations with the purpose of harmonisation of their legal regulation.

1. Materials and methods

The scientific methodology is based on the use of general theoretical research methods: with the help of the method of analysis, the study of the legal significance of judicial practice and judicial lawmaking for the regulation of administrative legal relations was conducted; the system method allowed to draw conclusions about the place and role of court decisions in the system of administrative law sources; obtaining the results of scientific research became possible with the help of formal-legal and logical-legal methods which made it possible to come to the conclusion about the interconnection between public-managerial and judicial activities; the use of the terminological approach provided an analysis of the interconnection between the concepts of "law en-

forcement", "judgment" and "judicial lawmaking".

An important role in conducting the research was played by the comparative- legal method, with the help of which it was possible to find differences in understanding the essence of the judgment as a source of law in the continental and Anglo-Saxon legal systems. It is this approach that ensured the development of proposals for determining the place of judicial practice in the field of public-managerial legal relations and the necessity to achieve effective interaction between the bodies of executive and judiciary power. The comparative legal method of research also made it possible to analyse different various sources of theoretical understanding of the purpose and role of law in the regulation of social relations. This made it possible to develop author's statements about the role of the type of legal understanding in order to justify the importance of judicial decisions for the sphere of executive power and administrative legal relations.

One should note that when conducting the study of the interconnection between judicial lawmaking and administrative legal relations, there was a necessity to analyse scientific sources not only on administrative law, but also on theory of law (general theoretical law), theory of legal process and constitutional law and judicial law. Also, one should note the state of scientific research in the field of administrative law has no high degree of coverage of impact of the judicial bodies on the sphere of public-administrative relations.

The article provides an overview of the regulatory provisions of the administrative procedural law after a procedural law reform was passed in 2017.

2. Results and discussion

2.1 Judicial decisions in the system of administrative law sources

For a long time coverage of the issue of administrative law sources in administrative-legal science has been based on the principle of using the achievements of general theoretical law, taking into account the specific features that determine the sources of law in the field of administrative and legal relations. During a rather long transition from the Soviet legal understanding to modern approaches in legal science, scientists considered the issue of administrative law sources which are based on the approaches of the continental system of law. However, the problem of system and determination of the right sources since the early 2000s, the processes that started in the national law system have been exacerbated and especially activated after the legal registration of the Association of Ukraine with the European Union.

In General Theory of Law Textbook edited by M. I. Koziubra there is a definition of "type of legal understanding" in which it is noted that the fundamentally important theoretical category which reflects the possibilities of simultaneous application of systemic, functional, synergetic and hermeneutic approaches in the implementation of the characteristics of law.

According to the authors of the textbook, the typology of legal understanding is based on the legal and ideological

criterion (depending on what is output in understanding of law-superpower-natural, state or real-life) that that made it possible to distinguish such types as natural law, legal-positivist and sociological.

Within the framework of the legal-positivist type, any creative role of a judge is denied, reducing him exceptionally to the "voice of law", that is, formally-dogmatic application. However, the sociological type of legal understanding on the contrary increases the role of the court not so much as the "voice of the law", but as an instrument of lawmaking [10]. That is why the type of legal understanding directly affects the formation of scientific knowledge about the sources of law, their system and purpose.

In academic course of Administrative Law of Ukraine edited by V. B. Averianov, the sources of administrative law include laws, resolutions of the Verkhovna Rada of Ukraine, decrees of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, orders of ministries, central executive authorities, normative legal acts of the Verkhovna Rada and the Council of Ministers of the Autonomic Republic of the Crimea, acts of local state administrations, decisions of local councils (local self-government bodies), acts of governing bodies of state enterprises, institutions, organizations, international agreements (treaties) and international legal acts ratified by the Verkhovna Rada of Ukraine [11]. That is, the classical system of sources of law is given, taking into account the administrative nature of administrative and legal relations. Separately, the textbook presents the thesis of judicial precedents as a source of law and it is stated that the latter can not be recognized as a source of law in the legal system of Ukraine, except for the decisions of the Constitutional Court of Ukraine which "have binding force in the resolution of an unlimited number of individual disputes, that is, have a normative character" [11].

The reference to the phrase "normative character" indicates the possibility of giving the judicial authority the function of norm-setting that is still perceived by the domestic legal science quite critically. Thus, in the system of public power, the legislative function belongs to the Parliament and there is no antithesis, however, if to proceed from the general concept of lawmaking and the appointment of public power, it is unlikely that it can be argued about the "exceptionality" of Parliament as a state institution that develops rules, forms and means of regulating social relations. So, along with this, there do not exist any legal axioms regarding the impossibility of a judicial authority to be a subject of law-making.

Although judicial activity in the framework of lawmaking is limited to procedural norms, however, in the result of this activity, a legal phenomenon appears as a judicial practice in its various forms and dimensions that does not deprive the court decision of being a source of law. M. I. Smokovych notes that "when resolving cases, the court reveals the content of the principles of justice, reasonableness and good faith with the help of the laws of logic and taking into account the content of disputed legal re-

lations. That is, when formulating the criteria on the basis of which the case will be resolved, the court is guided by solely legal arguments, without resorting to considerations of political expediency. Thus, unlike the activities of Parliament, judicial lawmaking is not a political activity" [12].

The authors of General Administrative Law Textbook P. S. Melnyk and V. M. Bevzenko changed classic views on the well-established theory of administrative law of Ukraine, among the sources of administrative law there were called judicial decisions. According to the professors,"…courts and judges are often faced with gaps in the law, the inconsistency of certain provisions of legal acts, that, as a consequence, complicates the implementation of justice. Given this, there is a necessity for judges to develop certain principles (provisions) aimed at eliminating shortcomings that can be found in the existing regulations. Similar principles (provisions) can be applied by other courts (judges) in resolving analogical cases. <…> At the same time, the court (judge) can only specify or supplement legal acts by its(his) decision" [13].

From the given educational and scientific material it should be noted that judicial decisions as sources of administrative law should not be understood as all judicial decisions that can be taken or adopted by the judicial authorities, but only the decision of the Constitutional Court of Ukraine, the Supreme Court and the European Court of Human Rights. At the same time, court decisions should be divided into decisions of national courts and international judicial bodies since their legal nature, particuliarities of applying and execution are different.

2.2 Novelties of the administrative procedural law in the context of judicial lawmaking

The appearance of the concept of judicial lawmaking should be associated with the search of the existing theoretical and applied connection between lawmaking and justice. The legislative process can never fully overcome existing gaps in law. Besides, there arise gaps in legislation during the process of implementing legislative regulations. That is why the courts, along with a legislator, play an important role in filling the relevant gaps and contribute to the solution of controversial issues in law enforcement.

Taking into account the necessity to expand the powers of the court in solving the current problems of law enforcement, the administrative procedural law was updated on October 3rd, 2017. We consider it necessary to cite the following provisions of the Code of Administrative Procedure of Ukraine which increase the importance of judicial decisions as sources of administrative law and the application of administrative law:

1) the introduction of typical and exemplary administrative cases, i.e. the creation of the basis for combining the continental law system with the common law system that makes it possible to apply judicial precedents by all national courts;

2) the possibility of the court to terminate the application of the law or other legal act. If the court comes to the

conclusion that such a law or other legal act is contrary to the Constitution (para. 1 Part 4 Art. 7 of the Code of Administrative Procedure of Ukraine), it changes the established traditions of normativism about the role of the law in the regulation of public relations and gives the court the right not to be limited by the norms of legislative or even other legal acts;

3) procedural regulation of the procedure for derogating from the conclusion on the application of the rule of law in similar legal relations set out in the earlier approved decision of the Supreme Court (Art. 346 of the Code of Administrative Procedure of Ukraine) – ensures an evolutionary way of substantive and procedural law application by the Supreme Court.

In the result of the reform of the procedural legislation of Ukraine, there appeared a provision that changes management practice and makes it conditional by the court decision. It comes to provisions of the Law of Ukraine On Public Service [14] which stipulates the elements of the disciplinary offense of a public servant – a decision that contradicts the conclusions on applying the relevant rule of law set out in the decision of the Supreme Court in respect of which the court issued a separate decision (para.15 Part 1 Art. 65 of this Law).

2.3. Role of judicial decisions in solving administrative law problems

The question arises on how much Law No. 2147-VIII adopted by the Parliament changes the existing scientific views on the role of judicial decisions in solving problems of administrative law? It is important to cite the provisions of Part 5 Art. 346 the Code of Administrative Procedure of Ukraine which stipulates the right of the court to consider the case in a collegium or chamber, in cassation and refer the case to the Grand Chamber of the Supreme Court. If the court comes to the conclusion that the case contains an exceptionally legal problem, then its referring is necessary for ensuring the development of law and the formation of a unified law enforcement practice. It is this procedural rule that provides a possibility to the court to use a lawmaking function to solve the problems of administrative law. An answer to this question also lies in the framework of scientific and practical connection of the concepts of "law enforcement", "court decision'' and "judicial lawmaking".

Law enforcement as a separate independent form of right implementation reflects the content and essence of legal regulation of a certain type of social relations. That is obligatory participation of government authorities in the enforcement process that makes such an activity of legal character an important component of efficiency evaluation of applying the norms of administrative-procedural legislation.

The legal nature of the legal positions of the supreme judicial bodies, contained in the relevant judicial decisions, has a double character. If to take into account the national legal system's belonging to the system of continental law, the judicial conclusions set out regarding the particularities of the interpretation and applying of the relevant provisions of legal acts have an advisory character. If to proceed

from the procedural legislation provisions, the legal conclusions of the Supreme Court are obligatory in respect of applying both judicial practice and management practice of the power subjects. "The lawmaking activity of the higher courts of general jurisdiction is carried out at the stage of cassation reconsideration of court cases. At this stage of court procedure, the sequence of lawmaking actions of the higher courts consists in revealing the gaps in legal regulation, their filling and taking a decision on the case and its official promulgation. These lawmaking actions are united by the purpose of establishment of normative-legal prescriptions set out in precedential lawmaking acts" [15]. "In the normative-legal acts of judicial power (in the form of norms clarification or establishment of generally obligatory procedural rules), the rules of law are not the result of the decision of a particular case, but the consequence of the purposeful lawmaking activity of supreme judicial bodies. A characteristic feature of these rules is that their formulation is carried out either on the basis of the generalisation of the practice of resolving a certain category of disputes or they represent procedural rules for the consideration of disputes, the powers regarding their establishment are stipulated by the law by supreme judicial authorities" [16].

The acts of judicial lawmaking can have different legal nature and are divided into lawmaking acts, interpretative acts, law enforcement acts and organisational-judicial acts.

The normative character of court decisions defines the concept of "judicial lawmaking". A. Steinman distinguishes between the concepts of *"lawmaking"* and "*judicial legislation*", noting that judicial legislation should take place within the constitutional powers of the judiciary and reflect the interpretation of constitutional rules and regulations as well as take into account the rules of *stare decisis* doctrine which obliges lower courts to take into account the judicial reasoning of the Supreme Court [17]. A similar position on the support of judicial legislation expresses M. I. Koziubra who notes that "one of the main reasons for the necessity for judicial legislation is the need to specify the rules of laws and other regulations adopted by the official subjects of law – making or to be exact, their updating, namely, adaptation to specific situations which is the subject of the court's consideration…" [18].

Law enforcement as a result of the appearance of court decisions in which can be traced the elements of legislation (the appearance of legal rules for the regulation of social relations different from those enshrined in legal acts) remains a key category for characteristics of the court decision as a source of law. This can be justified by such a theoretical construction as *ratio decidendi* – "a court decision by itself has no special meaning, in it obligatory aspects are the norm and principle it is based on and the proof of which it serves. That is, the norm which is directly or indirectly interpreted by the judge" [19]. So, one should distinguish between *ratio decidendi* and *obiter dicta* ("said among other things") since the latter is not a part of

ratio decidendi and reflects the individual views of the court on the subject of discussion.

Given that the legal system of Ukraine belongs to the system of continental law, one should note the existence of the jurisprudence constant doctrine, that is, the established judicial practice. What does this mean in the context of our research? Judicial practice can be called "established" if it has been formed for a long time and in the formation of such a judicial practice the courts of lower instances play a role because they consider a number of court cases. And it also gives grounds to claim that legal conclusions of the Supreme Court appear not only on the basis of consideration of a certain precedent, but also as a result of reconsideration of decisions of local and appellate courts.

2.4 Search of interconnection between judicial lawmaking and administrative legal relations

The complexity of the interconnection between judicial legislation and administrative legal relations lies in the special impact of acts of the judiciary on the public administration functioning. The court, determining the features of applying substantive law should take into account the powers of the authority subject and be guided by the provision of Part 2 Art. 19 of the Constitution of Ukraine. The legal nature of a public-law dispute touches upon public order in the state, the necessity for a proportional balance between public and private interests, the functioning of a public administration body and the like. Therefore, the procedural possibilities of the court in solving the problems of law do not give it grounds to go beyond the obligatory prescriptions of organising the public administration in the state. This is one of the main features of administrative court procedure, the court can only solve specific legal problems on the example of a specific public-legal dispute, but it can not directly interfere in public power-managerial activity. Therefore, in the interconnection between judicial legislation and administrative legal relations there are boundaries conditioned by the particularities of the state power organising.

In view the above said, one should agree with the position of R. Kremton who, studying the matter of interconnection between judicial legislation and administration, emphasises that the most optimal form of such an interconnection is a model of judicial control which stipulates external verification of the activity of executive agencies, government bodies for its compliance with legal acts. However, in his opinion, the traditional court decision which is based on the analysis of specific legal facts, does not oblige public servants to take positive measures in the future in order to avoid new legal actions. R. Kremton suggests to the court to act as a public administration, complementing in its decisions the possibility of extension of administrative impact to resolve specific controversial situations [20].

In this context, A. Lehevi calls the court a "state actor" that by his decisions solves a number of matters of constitutional rights and freedoms, property, public formations, etc. The constitution-

al provisions on the power separation do not necessarily indicate the practical ways in which the judiciary participate in the exercise of powers held by other branches of government [21].

Given this, there are controversial matters: 1) does the court, using the possibilities of judicial legislation, solving specific cases and making decisions, determine/reconsider/change the procedure for the implementation of rights, freedoms and interests of individuals in the field of public administration? 2) is the role of the main actor in the field of public administration – the body of public administration – supplemented by the judicial authority thanks to the acts of judicial legislation? The matter is quite polemic, however, this time one should recall the principle of unity of state power and the constitutional boundaries of judicial intervention in the activities of the legislative and executive branches of power.

Conclusions

The matter of the judicial practice importance is actual for the domestic legal science, as it is a system-forming factor for the deepening the general theory of legal process and the possible formation of judicial law. The Ukrainian legal opinion made a way from categorical denial of judicial legislation to recognition of decisions of the supreme judicial bodies as sources of law. The reform of procedural legislation on October 3rd, 2017 introduces a combination of features of continental and common law. The result of this is a change of understanding the court decision as a source of law, that is, the court decision can contain provisions that are obligatory for participants of administrative-legal relations.

In modern administrative law there do not exist yet formed approaches which would have a correct solution of the matter of court decisions implementation in applying an administrative law, development of administrative legal relations, balanced combination of the impact of executive and judicial branches of power on the public administration field. In this perspective, by means of judicial legislation, the court should become an independent arbitrator to solve the problems of the current applying the administrative law. It is in the acts of judicial that the problematic matters of relations between individuals and public administration can be solved, however, for this it is necessary to develop high-quality judicial practice in different categories of public-law disputes in terms of new procedural legislation and determine additional conditions for the legality of the administrative-legal impact of the authority subjects on individuals in administrative-legal relations in the decisions of the Grand Chamber of the Supreme Court, the Cassation Administrative Court of the Supreme Court. So, the effectiveness of the connection between judicial legislation and administrative legal relations also depends on the phenomenon of judicial error, since under such conditions the relevant impact can have a destructive nature on the field of public administration.

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O. Kokhanovska, Doctor of Law, Professor, Professor of the Civil Law Department of Taras Shevchenko National University of Kyiv, Correspondent Member of the National Academy of Legal Sciences of Ukraine, Honored Scientist and Technician of Ukraine

NON-PROPERTY RELATIONS DOCTRINE DEVELOPMENT IN UKRAINE

Abstract. *The article deals with the problems of development of the doctrine of non-property relations in Ukraine, in particular, the state of research of the sphere of personal non-property rights, information relations, intellectual property relations. Relevance and rapid development of the theory of civil law in all these areas are associated with the author's achievements in the era of the information society and the increasing awareness of people of the importance of their personality, uniqueness, singularity, and value.*

Additional relevance of the covered issues is provided by the discussion on the possibility of full consolidation of non-property obligations at the doctrinal and legislative level, which is considered by the author from the point of view of the willingness of domestic civil scholars to perceive such a construction at the present stage within the bounds of binding (contractual) law.

The condition, the main scientific approaches, tendencies of development of the system of non-property rights on the way to the recodification of domestic private law are analyzed. The attention is focused on the importance of the phenomenon of information and creativity, individual personal non-property rights for the development of civil society in Ukraine. The article describes the obligations of non-property nature from the point of view of the main features and peculiarities of binding (contractual) relations. We try to prove the timeliness and perspective of the further research of binding (contractual) relations of non-property nature for their further legislative consolidation in the Civil Code of Ukraine.

Based on the provisions of the theory of personal non-property rights, intellectual property rights, and information rights, the further rapid development of the institute of non-property rights is anticipated, the main place in which is given to personal non-property rights of an individual. Taking into account the changes that have occurred after

the adoption of the current Civil Code in these areas, recommendations for reforming the institute as a whole have been developed, as well as arguments for reforming the institute of binding (contractual) relations, taking into account the specifics of obligations of non-property nature.

In order to solve the problems of non-property relations in the future, it is advisable to conduct comprehensive studies of all the institutes: information rights, intellectual property rights, personal non-property rights in their totality in order to take into account the mutual influence and peculiarities of each of them, as well as other civil law institutes.

Key words*: the doctrine of non-property relations, information relations, intellectual property relations, personal non-property rights, obligations of non-property nature.*

A comprehensive approach to the problems of non-property relations from a private law perspective ensures the ***feasibility*** and ***relevance*** of the analysis in civil law and civil legislation of at least three institutes that cover personal non-property rights of individuals (and, where applicable, legal entities), intellectual property rights and information rights. All of them, primarily, concern the sphere of non-property relations of individuals, both in content and form, and provide the most important rights and interests for them in the modern world.

Moreover, having enshrined information as a separate object of civil rights and the right to information as a personal non-property right, having regulated information relations including in the sphere of property rights, binding (contractual) law, intellectual property rights, corporate rights, hereditary and family international private law, etc., civil lawyers were able to unite into a single system separate norms of non-property sphere and provide them with modern interpretation and development prospects. We believe that today there is every reason to talk about the creation of a sub-branch of non-property rights in the civil law of Ukraine. This also emphasizes the ***relevance*** of the theme of this article.

Since information, information relations, and information rights play a significant role in the development of modern civil law, they also affect the binding contractual and non-contractual relations, especially when it comes to receiving, transmitting, storing, and accessing various types of information, market relations, electronic commerce, provision of information services, etc.

Consequently, the ***purpose*** of this article is to form own conclusions regarding the further development of the institute (possibly a sub-branch) of non-property rights in civil, consisting today of personal non-property rights of individuals (as well as in some cases – legal entities), information rights and non-property rights of intellectual property, predicting the ways of further development in the domestic civil law and the possibility of enshrining of obligations of non-property nature in civil legislation.

Some of the most significant works in the field of non-property relations and

non-property rights include complex monographic studies within the framework of the National Academy of Legal Sciences of Ukraine[1][2][3], as well as a number of dissertation studies on the subject of interest, which we have analyzed in detail in one of our academic publications[4].

Today, the institute of information rights is as developed in civil law as all other institutes since its development is almost as rapid as the development of information technologies and information transfer systems, and information is mentioned in almost every contract and is an essential condition for their conclusion. In this respect, domestic civil scholars have accumulated a considerable amount of experience and continue their doctrinal research and implementation of these achievements in practice.

We have repeatedly stressed that the development of information relations within the framework of civil law can be hindered only by a lack of common sense and short-sightedness. Information should remain in the Civil Code of Ukraine[5] as a separate object of civil law, and as a right to information, that is, as a personal non-property right, and as a work of art – the form represents the content of information of a high level of intellectual and creative work of the human mind in the field of intellectual property law, since virtually all objects of creativity are information with specific signs of originality, novelty, or others. The realization of the above depends on a progressive, humane, intellectually supported and harmonious way of development of the information society in which we live.

Both information and legal relations in the field of intellectual property and personal non-property rights are of a civil nature. This was confirmed not only in science but also in life, as it turned out that the most effective way to implement and protect the rights of participants in these relations is civil law. As for personal non-property rights of individuals (and legal entities), now the overwhelming majority of our compatriots are convinced that the greatest value in the world is the personality of each individual human being (person), who pays enormous attention to self-improvement, spiritual growth, while the non-material, non-property, personal are of no less importance,. Hence the rapid growth of self-esteem of modern human beings, the

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feeling of freedom and self-respect. Every person in the information society wants to show his or her self, to demonstrate it to others in the best way, but at the same time to preserve his or her uniqueness, so it demands respect for himself or herself as a supreme value. Since personal non-property rights have an absolute nature, this institute is located among the institutes of other absolute rights – property rights, intellectual property rights. In addition, civilists always emphasize that the social significance of personal non-property rights is much higher than the rights existing in the material sphere of society. These are the spiritual basis of society and serve as a prerequisite for ensuring the freedom of property, freedom of contract, freedom of entrepreneurship, etc., and therefore precede the real, binding rights. The validity of these conclusions was confirmed by practice. However, non-property rights should be analyzed along with other human rights, taking into account the fact that they are an integral part of the unified system of rights, which are administered by a person in accordance with his or her interests and which he or she possesses.

It is well known that the Civil Code of Ukraine and other laws may also provide for other personal non-property rights of an individual. For instance, part 3 of Article 270 of the Civil Code of Ukraine states that the list of personal non-property rights established by the Constitution of Ukraine, the Civil Code of Ukraine and other laws is not exhaustive, which is confirmed by international legal acts in the field of human rights. Hence, it is possible to draw an important conclusion that the Ukrainian legislation is focused not only on the modern stage of development of civil relations but also on the future.

Among the most interesting problems, which were discussed by domestic civilists in the last 15 years after the entry into force of the Civil Code of Ukraine, one should mention, first of all, the problems of combining the principles of civil society and personal non-property rights; the problems of the harmonization of the legal system of Ukraine with those of the world in the process of ensuring the rights, freedoms and legitimate interests of citizens; the problems of the objects of these rights from the point of view of their possible negotiability. In addition, it is necessary to highlight the problems of dividing non-property rights into personal non-property rights, associated with property and personal non-property rights, not associated with property, as well as the problems of classification of non-property rights and the formation of a single comprehensive view of them. It is also impossible to ignore a number of issues related to the codification of personal non-property law in Ukraine; as well as non-material goods as specific ones with their inherent features; problems of personalization of individuals; methodological problems of the system of personal non-property rights; contractual regulation of personal non-property relations, problems of personal non-property rights from the point of view of international private law and a number of others.

Along with personal non-property and information relations, intellectual

property relations continue to develop in Ukraine. An important role in this process is played by the Civil Code of Ukraine, the provisions of which have regulated these relations in detail and logically, consistently and with a view to the future. Comprehensive regulation of non-property relations within the framework of intellectual property rights is impossible now without the application of the norms of the current Civil Code of Ukraine.

Meanwhile, in the process of development of the national doctrine of civil law, among many others, the issue of admissibility of non-property obligations arose. Having been further debated, it still occupies the thoughts of Ukrainian civil scholars, but life makes its own adjustments and provides new arguments in favor of the need to recognize not only as possible but also as a necessary condition for the further development in obligatory law the recognition of obligations of non-property nature. An invaluable breakthrough in the history of codification of civil law has been made, when the developers of the Civil Code of independent Ukraine [1] enshrined the second Book on personal non-property rights of individuals in it, and virtually gave a blessing to the opportunity to actually realize and protect one' s non-property rights not only to individuals but also to legal entities. Now it is possible, in our opinion, to raise the issue of securing non-property obligations at the level of the Civil Code of Ukraine. And we should not only talk about the absence of prohibitions on non-property obligations in civil law, although this argument should be taken into account.

In the understanding of civil scholars the obligation is, first of all, a civil legal relation by virtue of which one person (debtor) is obliged to make a certain action in favor of another person (creditor), in particular: to transfer property, to do a job, to pay money, etc., or to refrain from a certain action, and the creditor has the right to demand from the debtor to fulfill his obligation. From the above definition, which is familiar to the civil law representatives of many countries, we can conclude that the obligation is usually understood as a legal relationship, which has the most important attribute – it is distinguished by its property nature. This is a classic of civil law, which became an axiomatic truth in the Soviet period of development of Ukraine, to which we are accustomed to in the process of studying civil law. This position is undoubtedly present today, as a number of authors, again and again, prove the possibility of the existence of only property obligations, mediating the movement of material assets in the form of goods from one person to another, suggesting that "…the unconditional extension of the construction of the civil liability to non-property relations threatens the invasion of "legal leverages" in the domestic and morally-ethical relations, the blurring of the clarity of property equivalents on which an obligation is based".[1]

[1] Гражданское право: учеб.: в 3-х т. Т.1 / С.С. Алексеев, И.З. Аюшеева, А.С. Васильев [и др.]; под общ. ред. С.А. Степанова. – М.: Проспект; Екатеринбург; Институт частного права, 2010. – 640 с. – С.486.

Such fears do not entail such grave threats, which are referred to by the authors. Both domestic and ethical relations will not lose anything, but rather will gain from the spread of the construction of civil law obligations on the legitimate property relations, in addition, an increasing number of examples from everyday life testifies to the readiness of society and its individual representatives – individuals and legal entities – to perceive as a good opportunity to rely on a clear legal structure of the binding law in their moral and ethical attitudes. Therefore, even recent opponents of such a construction note that "…both the freedom of contract, and the absence in the current legislation of direct bans on "non-property obligations", and the rapid development of relations not directly related to property (information, preliminary, organizational, etc.) determine the need for legal regulation of these relations, including the use of the legal structure of obligations … It seems that in the near future civil law will extend the design of obligations to non-property relations. Of course, with certain exceptions and peculiarities, in particular, on the order of compulsory fulfillment of obligations in kind.[1]

Even a brief analysis of the main arguments of the opponents of non-property obligations reveals their shortcomings, so a growing number of contemporary civilists are joining the position of the proponents of non-property obligations, while recognizing the importance and the global nature of changes in the understanding of the essence and role of intangible non-property goods in civil turnover. The elements of such positive changes are noticeable even in the sense of the articles of the Civil Code of Ukraine. For example, experts in the field of inheritance law consider the content of Article 1305 of the Civil Code of Ukraine to be another confirmation of this possibility. Many examples are also provided by representatives of the intellectual property sphere. For example, an author of works of art may oblige heirs or other rightsholders after his death to exhibit paintings at exhibitions, to acquaint the public with the content of his works and the like.

Addressing the sources of modern domestic civil science, namely the works of the outstanding civilist Yo. O. Pokrovskyi, who once taught at the University of St. Volodymyr, assures that even in the times of his scientific activity "the increasing importance of the spiritual side of the human personality could not but affect two other fundamentally important issues of civil law … Jurisprudence has recently considered that actions of a non-property nature cannot be the subject of a legally valid obligation … Although…this opinion was expressed by another one (one of the initiators is Jhering), which… requires recognition of non-property obligations as well. As a result of this, at present there are two radically opposite opinions against each other in our question; the dispute be-

[1] Гражданское право: учеб.: в 3-х т. Т.1 / С.С. Алексеев, И.З. Аюшеева, А.С. Васильев [и др.]; под общ. ред. С.А. Степанова. – М.: Проспект; Екатеринбург; Институт частного права, 2010. – 640 с. – С.486.

tween them is far from over, but, perhaps, the second idea gets the upper hand as the dispute goes on".[1]

Significant changes in our perception of the world have caused the transition of mankind to the information society in this century. The sharing of information, not just rights to information, plays a key role in all processes and economies. Today, in our opinion, it is impossible not to recognize the special role of non-property information obligations in the development of civil law, as well as in all its institutes and in the field of law in general. It is impossible to find a better construction than an obligation when it is necessary to agree on the content of particular confidential information, or when it is necessary to exchange information owned by a person for other values in order to satisfy his rights and interests in many areas of life. Information remains an intangible asset. At the same time, it is today the most valuable commodity, the equivalent of which is not a price, but a value that can be expressed in monetary terms with a number of caveats, because no personal non-property good can by its nature be adequately valued in the ordinary monetary or other economic sense. A personal non-property good, which is information in its essence, cannot be matched with an equivalent monetary equivalent, the exchange for another important value for the holder (owner) of information here is often very approximate.

Currently, non-property obligations in Ukraine are increasingly being accepted in the area of personal non-property rights, information and intellectual property rights, family relations, inheritance and medical law, corporate legal relations, as well as in a number of leading economic sectors in which civil law plays a key role, such as tourism, as well as environmental protection and a number of others.

If we look at not only the signs of a binding relationship mentioned above but also at others, we can see that there are no strong grounds for denying the existence and active development of non-proprietary obligations. As in the traditional obligation, the debtor's obligations in these obligations are mainly of an active nature, i.e., the debtor has to take a certain action in favor of the creditor: to send (forward) information through an information system, provide access to information, give advice on eating habits for effective treatment of the patient, familiarize the tourist with the sights of the city in which he stays, respect parents and so on. There may also be abstinence from action, and not even as an auxiliary duty, as in the traditional obligation, but as a basic one, for example, to maintain quietness during certain hours in a certain city. An author who has given his manuscript to a publisher and has transferred the right to publish it may be contractually obliged to refrain from concluding the same contracts with other publishers. In the contract for medical care, the parties are free to make it clear that the patient must refrain from taking certain food harmful to his or her health condition or taking

[1] Покровский И. А. Основные проблемы гражданского права. М.: Статут (в серии «Классика российской цивилистики»), 1998. – 353с. – С.134.

incompatible medicines for successful treatment.

The interest of the authorized person (creditor) in the non-property obligation, as well as in the usual obligation, is satisfied mainly not by his own actions, but by the actions of the obliged person. The creditor may also be required to be active (to accept the results, etc.), but it is the debtor who performs the main actions. For example, the obligation of an advertising agency to disseminate positive information about a person, to present his or her qualities to the media in a better light, thus improving his or her business reputation, maybe an active part of specific consistent actions.

Liabilities exist for a specified or indefinite period of time. A debate is conceivable here. If it is generally accepted in the property sector that perpetual obligations are impossible, then in non-property obligations it is possible to do so – either for a very long term or without specifying a term. For example, the obligation of a person who has acquired a painting by a well-known artist to exhibit it for inspection at least once a year may be concluded in such a way that it remains valid even if the owners of the painting itself have changed. Meanwhile, this is not so much about the property in the form of a picture – in this case, it is its non-property content that is important – the belonging of the work to the authorship of an artist, its artistic value, the reputation of the author of the work, that is, the value, not the price of the picture at auction, and so on. The same thing happens in the sphere of haute couture. Well-known fashion houses build obligatory relations with new couturiers working for a legendary house, fulfilling their obligations to take into account in their creations sometimes elusive elements of the epoch and creative style, which is inherent to its legendary founder.

Thus, the content of an obligation may constitute the right to demand the implementation of any lawful actions of a person. This can be confirmed by the approach to understanding the object of the obligation – on the one hand, the object is considered to be the actions of the obliged person (legal object), on the other hand, the object (subject of fulfillment) of the obligation is considered to be the material (and in our case, with certain reservations it is possible to say – and intangible) good, in relation to which the obligation arises (this is both an object and property, but also an information, the result of creativity, a number of elements (constituents) of personal non-property benefits, for example, individuality, freedom, business reputation, etc.) In this case, we never talk about any economic monetary equivalent, because we are not talking about price, but about value, not about indemnification, but about compensation and the like. In other words, the practice of non-property obligations uses predominantly different terminology concerning the actual objects (and legal ones too), compensation for damages, protection of rights, leaving the usual terminology in the understanding of the subjects of the obligation, its content. For example, it is an obligation to "provide", to "grant access" information, not to sell it, to transfer intellectual property rights, and not to buy and sell

the intangible object itself, which are the results of creativity in its essence, and especially valuable, original information that they contain, etc. In each specific case, a legal lexical group is formed to reinforce the distinctive features of non-property goods and obligations arising from such goods.

It should also be noted that many provisions of codes of ethics, rules, charters (of journalists, doctors, programmers, providers, experts, publishers, etc.) in various areas are rapidly moving into the sphere of law and, having become the subject of obligations, require civil law protection.

In our opinion, a special place should be given today to information binding relations in the list of non-property obligations. Following our reasoning in many publications that information legal relations include also legal relations of intellectual property rights, since we consider intellectual property rights in a broad sense as information of highly intellectual creative content and forming, in turn, a system of information obligations in civil law, we should pay attention first of all to the obligations that are aimed at creating and obtaining rights to information (the basis for such obligations is, for example, a contract for the provision of advisory and other information services), as well as information as an object of tort and other non-contractual legal relations arising from illegal activities, in particular, information as a separate non-property good and information as a result of intellectual creative activity.

Summing up, it should be noted that the efforts aimed at tracing and differentiating between property and non-property obligations, preventing the latter from entering the sphere of regulation of the binding law, as well as searching for problems that may prevent their occurrence at the level of legislation, would be quite sufficient to analyze every case in which today, in the modern society, and with a modern understanding of the importance of non-property objects, benefits, and legal relations, binding legal relations between different subjects (participants) are formed, and to create a theory of non-property obligations, thus to legally consolidate in the general part of the Civil Code of Ukraine, as well as in a separate section of the Book of obligations of the Civil Code of Ukraine entitled "Non-property obligations", and to include in the list of rules of the special part provisions on specific types of non-property obligations.

Such a task is already quite real and feasible for Ukraine today, taking into account the development of the institutes of personal non-property rights, information rights, intellectual property rights, etc. Then would be able to convincingly prove the timeliness and predictive capacity of the thought of our beloved civilist: "…The strength of a legal norm is not only based on the fact that it can be enforced. In the overwhelming majority of cases, even a simple recognition by a court…of the fact that a defendant has not fulfilled his (her) (non-property) obligation, would be of great practical importance in the sense of impulsion to fulfill such obligations."[1]

[1] Покровский И. А. Основные проблемы гражданского права. М.: Статут (в серии «Классика российской цивилистики»), 1998. – 353с. – С.136.

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N. Kuznietsova, Dr.Sc. in Law, Professor, Academician of the National Academy of Legal Sciences of Ukraine, Honoured Worker of Science and Technology of Ukraine

INSTITUTE OF CIVIL LAW LIABILITY IN DOMESTIC AND FOREIGN CIVILISTIC DOCTRINE

Abstract. *The current stage of development of society is characterized by the rapid dynamics of information relations, the consolidation of interconnections between different phenomena, significant conflicts of conceptual nature, caused by the process of globalization. Such a starting point for cognitive activity is relevant for studying of such a fundamental legal category as legal liability. In their turn, a systematic understanding of the issue of civil liability involves not only taking into account the retrospectivee and tendencies of the civilistic doctrine in conditions of legal systems integration, but also the context of the progressive aspirations of the society expressed by the idea of civil society.*

The purpose of the article is to identify the status and prospects of the development of civil law liability within the framework of scientific studying and law-making searches, which are conducted in the latest comparative legal plane.

Attention is paid to the social and instrumental aspects of the nature of the category of responsibility. The importance of carrying out a comprehensive and systematic analysis of the legal phenomenon and the main methodological problems of civil liability, including its general philosophical aspects, is emphasized. The basic doctrinal approaches to solving the problem of justification of the conditions (grounds) of civil liability are considered. The doctrine of the composition of a civil offense as a basis of civil liability is supported. Absence of basic scientific researches of the bases of bringing to civil liability and releasing from it, separate conditions of responsibility, category "irresistible force", incomplete research in the private legal doctrine of the problem of correlation of such categories as "civil liability", "protection of civil rights", "subjective civil rights abusing" is mentioned. The importance of the practical component of civil liability – its effectiveness as an element of the mechanism of legal regulation is emphasized.

The nature of qualitative changes in the substantive content of legal responsibility in the conditions of legal state and civil society formation is revealed. In this regard, it is concluded that the understanding of positive responsibility and the civil liability of its

preventive and educational function are connected. In the context of the issue of updating the civil legilation of Ukraine, the potential effectiveness of some DCFR articles, which are of general importance for the regulation of the institution of civil liability, was noted. At the same time, the high level of detail of some provisions of the DCFR, the emphasis on "legal technology" and fragmentation are recognized as features of the legal ideology of the DCFR.

Key words: *legal responsibility, civil law liability, globalization, civil society, positive liability, civil offense composition, DCFR.*

Extremely rapid development of modern society determines its dynamics, and at the same time it is characterized by the presence of internal contradictions.

The globalization processes and the formation of the principles of the information society cause the emergence of new trends in social development: a significant segment of problems loses its "national" character and transforms into global problems, which are, if not "planetary", then at least become ethnic or national. This, of course, leads to their need for comprehensive and systematic research and joint search for solution ways.

In philosophical literature, responsibility is seen as a category of ethics, which reflects "the special social and moral attitude of a person to society, humanity as a whole, characterized by the fulfillment of moral duty and legal norms. Responsibility as a category covers the philosophical and sociological problem of correlation of human capacity and ability, acting as the subject (author) of one's actions, as well as more specific issues: the ability of a person to consciously (deliberately, voluntarily) fulfill certain requirements and carry out those tasks that confront one; to make the right moral choice; to achieve a specific result, as well as the related issues of the right or guilt of a person, the possibility of approving or condemning his actions, encouraging or punishing one." [1]

It can be stated that in the philosophical dimension in general, the concept of "responsibility" is understood as the internal freedom of human, as one of the elements of the social structure that determines the degree of freedom and the main direction of human behavior.[2]

Such concept of responsibility, first and foremost as a social phenomenon, is important in view of the current state of social development, in particular the formation and development of civil society.

Although the problem of civil society has long historical roots, its research has been carried out both at the political, philosophical and legal levels since the seventeenth century, but so far there are debates on both the understanding of civil society itself and its institutional structure, it content filling, mechanisms of functioning.

The idea of civil society is the idea of human development from the imperfect to the more developed and civilized,

[1] Див. Философский словарь. – М., 1981 – С. 267.

[2] Див. Відповідальність у праві: філософія. Історія. Теорія. За заг. ред. І. Безклубого. Київ, «Грамота». 2014. – С. 105.

the society – from the despotic to the democratic one; it is the idea of a human becoming a person, a "citizen of society". It is still the idea of personal freedom – its autonomy, inviolability of the personal sphere, private property – in the concept of civil society it acts as the main parameter that determines ("programming") the quality of the internal policy of the state, state legal activity.[1]

One of the most difficult problems in ensuring the sustainable social development is determining the ratio between civil society and the state, their interaction, effective functioning.

Civil society, as a certain qualitative condition of the community of people in a state, which is formed under conditions that develop naturally, evolutionarily and develop under the influence of the individual's desire for free self-realization in society and the state, self-regulation without the intervention of the state or with its minimal participation, has the prospect of steady development only in conditions that the state is able to guarantee the fundamental rights and freedoms of man and citizen, guarantee the inviolability of private property, equality of citizens.

The principle of egalitarianism, which is on the core in civil society, determines the balance of the role of the state and civil society subjects in the realization of their tasks and interests.

One of the main factors affecting the quality of public relations in civil society is the understanding by each member of society of self-worth, personal self-realization, and their own freedom, which is based on natural inalienable rights.[2]

At the same time, the institute of responsibility for such conditions acts as an important instrument of ordering social relations and manifests itself in various forms: social, political, economic, legal.

Taking into account the leading role of law as a priority regulator in civil society, legal (judicial) responsibility plays an important role in the system of related categories.

Determining the main methodological approaches to the analysis of legal liability, we can not disagree with the point of view of D. I. Bronstein that the development of the category of legal responsibility should first and foremost be firmly focused on the achievements of philosophical science, to use them as a general theoretical basis while developing particular legal problems.[3]

At the same time, basing on general principles which are the features of social responsibility in general, legal responsibility is an important legal institution, an effective component of the mechanism of legal regulation, and therefore it is characterized by a specific legal nature, special patterns of its emergence, functioning and development as a certain legal phenomenon.

Thus, the study of problematic issues of legal (including civil law) responsibility requires consideration of both its gen-

[1] Див. Юридическая ответственность. ЮНИТИ (UNITI), Москва, 2012. С. 27.

[2] Див. Юридическая ответственность, с. 28

[3] Див. Бронштейн И. В. Правовая ответственность как вид социальной ответ-ственности и пути ее обеспечения. Ташкент, 1989. С. 21.

eral features inherent to social responsibility at the stage of civil society formation in Ukraine and activation of integration processes which are the features of the modern period, as well as the peculiarities caused by the specific nature of legal instruments to which it belongs.

In addition, highlighting the features of legal responsibility as a generic legal category, it is important to pay attention to its applied aspects, which are reflected in the sectoral features.

In view of the above, civil law liability as a legal phenomenon and legal category has been and remains the object of numerous scientific researches of both domestic and foreign jurists.

The main provisions on the concept of civil law liability, its legal nature, characteristic features and scope, as well as ratio with other civil law constructions were formed in the civilistic doctrine of the Soviet period in the papers of prominent civilians: M. M. Agarkov, S. S. Alekseev, B. S. Antimonov, S. M. Bratus, P. Varul, O. S. Ioffe, O. O. Krasavchikov, M. S. Malein, V.A. Oihenzicht, A. O. Sobchak, V. T. Smirnov, K. A. Fleischitz and many others.

Significant contribution to the development of the civil law Lliability was made by one of the founders of the Ukrainian civil school G. K. Matveev, who substantiated the doctrine of the composition of a civil offense as a necessary and sufficient basis for civil liability.[1]

With the adoption and entry into force of the Civil Code of Ukraine in 2003–2004, a new stage in studying of civil liability issues began.

One of the first attempts in the national civilistic literature to substantiate the theoretical foundations of civil law liability was the monograph I. S. Kanzafar "Theory of Civil Law Liability" (2006).

Analyzing the general methodological approaches which are used in research devoted to the scientific activity as a whole, the author rightly states that "modern lawyers, studying civil liability problems, have the opportunity to use the all the arsenal of scientific cognition, from philosophical approaches to special methods, but unfortunately they don't always do it".[2]

Fully supporting the idea by I. S. Kazanfarova that the place and role of civil liability, its importance for the further improvement of both the whole mechanism of civil law regulation and its individual components should encourage researchers of this (without exaggerating) legal phenomenon, to carry out its integrated, comprehensive and systematic analysis, as well as (and maybe first of all!) from the general methodological positions, which are offered in modern philosophical and legal literature, we should note that such a substantive analysis is actually absent in the mentioned work. The author is limited only by the abstract review of definitions of scientific activity, levels of scientific cogni-

[1] Про це більш докладно див. Кузнєцова Н. С. Інститут цивільно-правової відповідальності у цивілістичній доктрині України//5 т. Т.3: Доктрина приватного права України. – Х.: Право, 2013. – с. 330–332.

[2] Канзафарова І. С. Теорія цивільно-правової відповідальності. Одеса, «Астропринт».2006.-с. 18.

tion, science as a system of knowledge, proposed in the works of philosophers and sociologists, and concludes that review with the general conclusion that "consideration of the science of civil law from different angles of view allows to make a clear idea of the meaning of the term "civil law liability theory…".[1]

However, it remains unclear and uncertain what the author puts into this concept, as in others used in the monographic research: "logical structure of the theory of civil law liability", "methodological tools of the theory of civil law liability" and so on.

At the same time, despite the critical attitude to the certain conclusions and positions by I. S. Kanzafarova, we can quite positively evaluate the very attempt to solve an extremely difficult problem: on the one hand, to find out, through the prism of universal philosophical views, the main categories that characterize the institution of civil law liability (concepts, features, conditions (grounds), functions, principles, etc.), on the other – to form a coherent systemic consideration of civil liability in the light of current realities and, as a result, to define and substantiate the concept of civil law liability in the civil law of Ukraine.

It seems that the solution of such a scientific problem requires consolidation of research efforts, in particular, for a thorough analysis of the concept itself, the content, the importance of this important institution, its place in the system of civilistic tools.

It should be noted that civil law liability is still considered only in terms of clarifying its individual aspects.

In particular, we should admit the works by V. D. Prymak, who conducted a fairly detailed analysis of the civil law liability of legal entities and in this context, stopped at finding out the essence of civil law liability, studying it both "from the point of view of establishing a fair balance of interests of participants of the relevant legal relationship, and from view of the key characteristics of the influence on the private interests of certain categories of civil law subjects or full party of civil law liability relations, and taking into account the public interest in securing the observance of legality in the sphere of civil law and while creating conditions for sustainable development of civilian circulation."[2]

Relying primarily on the researches by Soviet-era civilians, the author substantiated the conclusion that "civil law liability is the legal result of a civil offense, and therefore a violation of another person's subjective civil law (which is the legal and factual basis of civil law liability) the responsible person, in the case of presence of the conditions stipulated by law or by the contract, has the obligation to suffer adverse financial consequences for one in order to provide recovery (compensation) to the creditor."[3] Thus, the author, taking into account the purpose of measures of civil law liability and its connection with the violated regu-

[1] Канзафарова І. С. Теорія цивільно-правової відповідальності. Одеса, «Астропринт».2006.-с. 17, 63, 71.

[2] Примак В. Д. Цивільно-правова відповідальність юридичних осіб. Київ. «Юрінком Інтер», 2007. – с. 21.

[3] Примак В. Д. Вказ. праця. – с. 63.

latory relations, considers the existing compensatory property obligation of the debtor in protective civil relations for compensation of losses caused to the injured party as a result of violation of one's subjective civil law as a legal form of existence of civil law liability.[1]

Agreeing with the conclusions by V. D. Prymak in general, regarding the general principles of civil liability, we note that they play in the mentioned paper a "supporting" role, since the author's main attention is precisely paid to the peculiarities of liability of legal entities in civil law. It is quite natural that the author did not set the task of a deep analysis of the main methodological problems of civil liability, including taking into account its general philosophical aspects.

One of these general theoretical problems is the justification of the conditions (grounds) for civil law liability. As it was already mentioned, in the 60's of the last century G. K. Matveev systematically formulated the doctrine of the composition of civil offenses as a necessary and sufficient basis of civil law liability[2], which for almost forty years was not in doubt and civilians' discussions were focused mainly on the identification and analysis of certain elements of the composition. Yes, Yu. H. Kalmykov rightly noted that in the legal literature there is no doubt that the definition of clear boundaries of the comparative concept of the composition of civil offense is of great practical and theoretical importance. The question remains on the composition itself, on the elements that should be included in the composition or left outside, on the content of categories such as illegality, causation, quilt.[3]

The concept of offense as the basis for responsibility in the 70–80 years of the last century was also accepted by the general theory of law. I. S. Samoshchenko in his paper "Concept of offense in Soviet law" conducted a detailed analysis of the category of offense and concluded that although certain crimes, civil, administrative or other offenses differ from each other by the content of the actions from which they consist, by the nature of social connections in which they occur and affect, the degree of public harm, etc., however, all crimes, civil violations, administrative offenses, etc., have common features. On the one hand, they are united by their internal unity, on another – all of them have external (descriptive) features that characterize them as a special phenomenon – offense as a whole.[4]

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[1] Примак В. Д. Вказ. праця – с. 63.

[2] Див. Матвеев Г. К. Вина в советском гражданском праве [Текст] Г. К. Матвеев. – Киев, 1955. – С. 306; Г. К. Матвеев. К вопросу о вине как основании договорной ответственности [Текст]/Г. К. Матвеев//Науч.зап. КГУ. – 1948. – Т.7. – Выш. 2. – С. 111–137; Г. К. Матвеев. О вине как основании гражданско-правовой ответственности по советскому праву [Текст]/Г. К. Матвеев//Науч.зап. КГУ. – 1952.-Т.11-Вып. 3. – С. 87–116; Г. К. Матвеев. Основания гражданско-правовой ответственности советских юридических лиц [Текст]/ Г. К. Матвеев // Науч.зап. КГУ. – 1953. – Т.12-Вып.1. – С.15–43; Г. К. Матвеев. Основания гражданско-правовой [Текст] /Г. К. Матвеев. – М., 1970- С.310/

[3] Див. Калмыков Ю. Х. Об элементах состава гражданского правонарушения//в кн. Калмыков Ю. Х. Избранное. Труды. Статьи. Выступления. М., 1998. С. 11.

[4] Див. Самощенко И. С. Понятие правонарушения по советскому праву. М., 1963. С. 7.

The set of these features of objective and subjective order is considered as an offense composition, which serves as a basis of responsibility.

However, in the literature there are other interpretations of grounds of responsibility, in particular, civil law one. Without mentioning the category of the offense composition, some authors recognize as the grounds of liability (or its conditions) unlawful conduct, harm caused, a causal link between them and the guilt of the offender. However, it is nothing more than detailing one and the only ground of offense (civil, disciplinary, etc.).[1]

At the same time, attempts were made to interpret the composition of the offense in another way. Thus, S. S. Alekseev tried to justify the proposition that the composition of a civil offense is a set of three elements: the object, the subject and the objective side. In this case, the offender's guilt was removed from the composition framework. The peculiarity of civil law regulation of relations related to property offenses shows, according to S. S. Alekseev, that it would be more correct, logical to go the other way and, abandoning the analogy with criminal law, to attribute the guilt not to the offense composition but, considering it in the negative aspect, as innocence – to the grounds of discharge.[2]

However, it should be noted that this construction was not accepted by the civil law community. As for the exclusion of guilt from the civil offense composition, so S. S. Alekseev in his subsequent studies did not so consistently uphold that position.[3]

Analyzing the above point of view, we should admit the attempt to look at the offenses in view of the general approaches used in the study of the legal relations structure, and to some extent unjustifiably approximate these categories.

The doctrine of the composition of civil offenses as a basis of civil law liability has become almost textbook character and is included in all civil law textbooks.

However, in a fundamental study on the problems of contract law, V. V. Vitransky not only questioned such a doctrine, but also severely criticized it, noting that its authors and adherents bring to civil law teachings which are not inherent, alien to it.

According to V. V. Vitransky, the ground of civil law liability (one and only common) is the violation of subjective civil rights, both property and personal non-property, since civil liability is the responsibility of one participant of property circulation to another, the liability of the offender to the victim, its the overall purpose is to restore the violated right on the basis of the principle of conformity for the amount of loss or damage caused.

During the application of civil liability, there are no legal sense of "harmful consequences" in terms of the negative impact of the violation of civil rights on

[1] Див. Самощенко И. С., Фарукшин М. Х. Ответственность по советскому законодательству. М., 1971.

[2] Див. Алексеев С. С. О составе гражданского правонарушения//Правоведение. – 1958. – № 1. С. 51.

[3] Див. Алексеев С. С. Общая теория социалистического права. Вып. 2, М., 1964. С. 225.

the public interest (among other things, as well as the public interest itself), "objective" and "subjective" parties civil offense.

Thus, the violation of the subject's right of civil relationship causes the need to restore the violated right, including through the application of civil law liability. Hence, the ground for such liability is the violation of the subjective civil right.

In order to certain types of violated subjective civil rights, as well as the subjects who have committed such violations, the legislator has formulated mandatory general requirements, the observance of which is necessary for the application of civil law liability. These set by the law requirements are the conditions of civil law liability. These include: unlawful violation of subjective civil rights; the presence of loss (damages), a causal link between the violation of subjective civil rights and loss (damages), the guilt of the offender[1].

This position requires careful and deep analysis, which can and perhaps should be the matter of separate study.

If we reject the categorically emotional tone, which outlines the absolute rejection of the doctrine of the composition of civil offense as a ground of civil law liability, and give a general assessment of the alternative proposed to this doctrine, it can be established that V. V. Vitransky tries to separate the conditions of civil liability (from the one and only ground of liability), which he understands as the general requirements, compliance with which is necessary for the application of civil law liability. He considers such a ground to be the violation of subjective civil rights (both property and personal).

But does this vision of the grounds and conditions of liability differ fundamentally from the composition of the civil offense and its elements: unlawful conduct, damage caused, a causal link between them and the guilt of the offender? It is unlikely that you can answer that question in the affirmative.

It should be noted, that such keen criticism has not yet changed the overall assessment of the doctrine of the composition of the civil offense, which is still at the forefront of all textbooks[2].

In the conditions of the rule of law and the formation of civil society, not only the role of law as an important regulator of social relations, a certain social phenomenon, but also the content of the main legal categories and legal means is changing qualitatively. There is no doubt that it also applies to the institute of responsibility too.

In contrast to retrospective liability (that is, liability for a civil offense committed), positive liability means the obligation to comply with regulations, legal norms requirements (obligation to act lawfully, the requirement to comply with legal norms)[3].

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[1] Див. Брагинский М. И. Витрянский В. В. Договорное право. Общие положения. М., 1997. С. 569–570.

[2] Див. Гражданское право. В 4-х томах. Отв. редактор – д.ю.н., проф. Е. А. Суханов. Том 1. Общая часть. М., 2006. С. 597–598.

[3] Див. Хачатуров Р. Л., Липинский Д. А. Общая теория юридической ответственности. С. 133.

In civil law, this position was supported by V.A. Tarkhov, who believed that "legal liability is an obligation regulated by law to report in one's actions … The requirement of a report is the main feature and the essence of responsibility, and whether a conviction and punishment comes after the report is another matter"[1].

If we look more broadly at the concept of positive responsibility in view of the legal and moral grounds of the formation and functioning of civil society, the central place in which is human as the owner, the creator, the personality – occupies; a society whose primary purpose is determined as the guarantees for the realization and protection of the fundamental rights of citizens, we can agree that this approach no longer causes the kind of rejection that took place during the totalitarian Soviet era.

Such understanding of positive (prospective responsibility) is closely linked to the civil liability of its preventive-educational function. If we are talking about the means of legal influence, the main component of which is the mechanism of legal regulation, it is certainly necessary to include in this process such important factors of legal influence as legal awareness, legal culture, legal education. All these legal instruments and categories are organically linked and inherently determine a broader understanding of the concept of legal (including civil law) liability, the combination of its positive and retrospective aspects, which may also ensure the prevention of civil offenses, and in the case of their commission – to provide restoration and protection of violated civil rights. In such a context, the responsibility can be seen as a significant factor aimed at stimulating, first of all, the legitimate and responsible (conscious) behavior of society members.

At the same time, the concept of "two aspects legal responsibility" has caused quite harsh criticism among representatives of the general theory of law. In particular, M.I. Kozyubra notes that "excessive grasping of different logical constructs, as well as the terminological "dressing" of legal responsibility into concepts and categories from other sciences, leads to the fact that theoretical studies of legal responsibility actually move in a closed circle; there is almost no increase of new knowledge in its understanding. Such studies distract from the analysis of legal responsibility in the context of modern European and civilizational values, relevant international legal obligations of Ukraine, in connection with domestic and foreign court practice, in particular the case law of the European Court of Human Rights".[2]

We should not disagree with such a worrying assessment of the state of general theoretical studies of legal liability problems, which can be attributed with-

[1] Див. Тархов В.А. Ответственность по советскому гражданскому праву. Саратов, 1973. С. 4,11. Див. також: Тархов В.А. Гражданские права и ответственность. Уфа, 1996. С. 64–81.

[2] Відповідальність у праві: філософія. Історія. Теорія (р. 2.1. Стан розробки загально-теоретичних досліджень юридичної відповідальності в Україні). Київ. «Грамота».– 2014.-С.2014.-С. 345.

out reservation to sectoral researches, at least to civilistic studies, as it was already noted.

Despite its theoretical and practical importance, there is still a lack of fundamental scientific researches on the issues of both grounds for civil liability and the exemption from it, certain conditions of liability, including the guilt of the offender, which has significant differences in civil law.

In modern conditions, the issue of taking into account force majeure in connection with contractual obligations violation becomes more relevant.

Although the legislator does not use the term "force majeure" neither in the Commercial Code of Ukraine nor in the Civil Code of Ukraine, in contractual practice, especially in the sphere of foreign economic relations, it is widely used.

In modern civilistics, there is virtually no fundamental research of the category of "irresistible force", at the same time a reference to the presence of "force majeure" in practical law enforcement in connection with events related to illegal annexation of Crimea, as well as military actions in the east of Ukraine, significantly updates this issue, taking it beyond the framework of foreign economic relations only.[1]

It seems that problems of correlation of such important categories as "civil liability", "protection of civil rights", "subjective civil rights abuse" have not yet been fully studied in the private legal doctrine, especially from the point of view of deep analysis of recent case law, which is being formed by the Supreme Court.

Considering civil liability as an important legal construction, an effective legal mechanism, we should not forget its practical component – it should be an effective element of the mechanism of legal regulation.

It is still this vision of the mission of civil liability which made the developers of the Civil Code of Ukraine to identify the need to include in the Civil Code of Ukraine in 2003, a separate chapter 51 "Legal consequences of obligations violation. Liability for obligation violation". In Art. Art. 610–625 of the Civil Code of Ukraine, which are included in the mentioned chapter, were fixed the basic approaches, worked out by the civilistic doctrine concerning the institute of civil law responsibility.

It should be noted that in this context, the understanding of liability is "narrowed down" solely to the extent of the obligation legal relations.

At the present stage, we are studying the institution of civil law liability much more widely, realizing that the violation of any right (not just that which arose in the field of obligations violation) should cause civil law liability.

At the same time, traditionally the most complete essence, the legal nature, the appointment of responsibility is revealed in obligation relations.

During the 15 years that the Civil Code of Ukraine has been in force, both

[1] Див. Кузнєцова Н. С. Форс-мажорні обставини як підстава звільнення від цивільно-правової відповідальності//Матвєєвські читання: звільнення від цивільно-правової відповідальності у сучасних умовах. Біла Церква. 2015.-С.5–9.

internal and external changes have taken place. Appropriate practice has emerged that has identified "bottlenecks" in the legal regulation of relations that arise in the application of civil liability measures. As before, the problems of responsibility are under the scrutiny of researchers, and their works bear new ideas that, to some extent, enrich the civilist doctrine.

Globalization processes make legal practitioners to actively work in the field of harmonization of fundamental approaches to the regulation of social relations, including (and in some cases, first and foremost) private legal ones.

If at the end of the last century – at the beginning of the present century, these processes were only an idea and were just beginning, today the legal community has high-quality guidance documents, such as the Principles of European Contract Law (PECL); Principles of international commercial agreements of UNIDROIT (Principles of UNIDROIT); Aquis Principles (ACQP); Draft Common Frame of Reference (DCFR) and others.

Certainly, in the process of updating the civil legislation of Ukraine (the "recodification" of civil law), which we have to some extent "postponed" in connection with the large-scale court reform in Ukraine, the provisions of the mentioned recommendation acts should be taken into account as much as possible, because they are the product of the generation of modern world private law thought.

We have obtained in these documents a highly concentrated result of comparative legal analysis not only of different legal systems, but also of legal mechanisms inherent to different legal families, in particular systems of continental private law and Common Law.

Conducting this analysis, it is hoped that in today's context these legal families, while maintaining common traditions, have nevertheless become closer together, and such a process is objectively conditioned.

We can agree that the recommended acts of harmonization of European law (PECL, DCFR and others) are the product of pan-European civilistic thought, which is why they provide for the regulation of relevant social relations, as much as possible, free from "national" dependence. In addition, they give an insight into modern civil law, free from the conjuncture.[1]

Many countries of the former USSR, which adopted national civil codes in the late XX and early XXIcenturies, are in the process of civil law renewing. The Civil Code of the Republic of Moldova has been recently amended. The experience of our Moldovan colleagues may be particularly interesting and useful to us, since the preparation of the changes to the Civil Code has been focused on European approaches as much as possible.

Taking into account these factors, it is important to consider the problem of improving the rules governing civil law liability precisely from the standpoint of modern European approaches, primarily

[1] Модельные правила Европейского частного права. Предисловие. М., Статут, 2013. с. 5–6.

enshrined in the DCFR.

In particular, Book III of the DCFR "Obligations and corresponding rights" contains Chapter 3 "Remedies for non-performance", which includes both the general provisions and the specific regulations relating to particular conflict situations.

While analyzing the content of certain DCFR articles, some general caveats are needed. As a result of the comparative analysis and usage of private-law sources belonging to different legal systems, this act has its own legal ideology, which differs substantially from the traditional civilistic mentality that is familiar to us, traditional for the Ukrainian (and generally post-Soviet).

Firstly, the high degree of detail of the certain provisions.

Secondly, paying significant attention to "legal technology".

Thirdly, there is a certain fragmentation that is reflected in the identification and detailing of some aspects (perhaps more precisely – of certain legal situations).

Thus, it is possible to note certain features in the content of the DCFR, but they are completely "fit" in the nature of this document: "Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)". Considering this document as one of the pan-European standards of private law, "fitting" it to our Ukrainian legal realities, it is expedient to determine what DCFR provisions, in particular in the area of civil liability regulation, can be used while the recoding of the Civil Code of Ukraine.

It should be noted that, while considering the issue of improvement of the institution of civil liability, it should be taken into account that certain **general provisions** are contained in Chapter 3 of the Civil Code of Ukraine "Protection of Civil Rights and Interests", in particular, Art. 22 and 23. In such conditions, it is advisable to analyze the rules of Section III (Chapter 3) of the DCFR "General Provisions" on non-performance protection measures, in particular Art. Art. **3: 101** "Available protection measures"; **3: 102** "Combining protection measures" and 3: 104 "Exemption from liability on obstacle"; **3: 105** "Conditions which exclude or limit protection measures".

The content of Art. **3: 105** is very close to Part 3 of Art. 614 of the Civil Code of Ukraine, at the same time the stated DCFR norm is more detailed, which will allow to apply it more effectively in practice.

Interesting in terms of possible implementation is DCFR's Section 7 (Chapter 3) "Losses and percentage", which requirements are predominantly focused on the legal consequences of obligation violations.

Thus, **Art. 3: 701** defines general approaches to determining the right to compensation for damages. In particular, it is assumed that the creditor is entitled to compensation for losses caused by the debtor's non-performance in all cases, except in those cases where liability for non-performance does not arise. Thus, based on the content of the mentioned norm, it is possible to qualify the compensation of damages as a form of liability.

Art. 3: 702, which deals with the total amount of damages compensation, corresponds with the approaches mentioned in the Civil Code of Ukraine.

Thus, the total amount of damages compensation caused by non-performance of an obligation is the amount sufficient to allow the creditor to be as far as possible in the position (condition) in which he or she was in the case of properly performing the obligation.

Such compensation shall cover the damage suffered by the creditor as well as the benefit which he has been deprived of. Interesting is **Art. 3: 703** "foreseeability", which states that the debtor for a liability arising out of a contract or other legal act is liable only for the damage which he has foreseen or can reasonably be assumed to have foreseen at the time the obligation arose, as a probable result of its non-performance, except where the obligation was violated intentionally and also due to the debtor's negligence or gross negligence.

It should be noted that the issue of foreseeable losses is also governed by the Vienna Convention on Contracts for the International Sale of Goods.

Recent decisions by the Grand Chamber of the Supreme Court (May 2018) have again paid attention to the application of Art. 625 of the Civil Code of Ukraine and intensified the discussion on liability for monetary obligations violation.

Not dwelling in detail on the content of this ruling of the Supreme Court of 18 May 2018, we note that the wording of Art. **3: 708** DCFR "Percentage on late payment" can be very useful in further improvement of Art. 625 of the Civil Code of Ukraine, concerning the payment of interest for **monetary obligations violation.** DCFR, by waiving the designation of a "monetary obligation", provides that in the event of late payment of money, regardless of whether the debtor is responsible for non-performing, the creditor is entitled to claim interest on this amount, starting from the date of payment and until the payment is made at the prevailing rate of short-term loans provided by commercial banks to borrowers in the currency used as the means of payment at the place where it should be done.

While doing it, the creditor may recover other damages**. Art. 3: 709** resolves the issue on percent capitalization by stating that percents which should be paid in favor of the creditor, also should added to the unpaid main amount of the debt every 12 months.

In our opinion, the mentioned DCFR provisions (as well as many other obligations related to the regulation of obligation relations) can be effectively used while discussing ways of improvement the requirements of the Fifth book of the Civil Code of Ukraine "Law of obligations".

They are the result of the fundamental work of highly professional private law professionals of European countries and take into account the most significant trends in the development of modern private law in different legal systems of Europe.

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V. Luts, Department of Private Law F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of National Academy of Law Sciences of Ukraine Kyiv, Ukraine

PERIODS (TERMS) IN LEGAL REGULATION MECHANISM OF CIVIL RELATIONS

The role of periods and terms as time categories at different stages of the mechanism of legal regulation of personal property and non-property (civil) relations is studied in the paper; the author's position that being a time form of development of civil legal relations, a form of existence and exercise (fulfillment) of subjective rights and duties, civil legal terms do not occupy an independent place in the general system of legal facts and produce legal consequences only in connection with of action and events is substantiated.

Key words: *legal regulation mechanism, period, term, legal facts, civil rights and obligations, statute of limitations.*

The dynamic development of economic processes and social transformations in modern Ukraine is based on the active use of time as an objective category and related concepts of "period", "term", "timely" and so on.

What place these categories occupy in the mechanism of legal regulation of civil relations – personal non-property and property, based on legal equality, free expression of will and property independence of their participants?

In legal literature different opinions have been mentioned on the nature and elements (stages) of the mechanism of legal regulation of social relations. Without analyzing these opinions, it should be noted that most researchers agree that the mechanism of legal regulation includes the following elements (stages): 1) a regulatory basis; 2) legal facts; 3) legal relations; 4) acts of realization of rights and obligations; 5) protection of violated rights of legal relations subjects.

A common prerequisite for the emergence and existence of corporate relations is the granting by law corporate legal capacity of their subjects, that is, the ability to have and exercise corporate rights and obligations.

General temporal parameters of legal relations functioning are determined primarily by legal norms. Provisions on periods are contained in the norms of the

Civil (Civil Code), Commercial (Commercial Code), Land (Land Code) of Ukraine, in numerous other normative-legal acts, as well as in the norms of other social regulators (business customs, legal practices, etc.) governing civil relations of their participants. Limited in time are not only legal relations as a whole, but also subjective rights and obligations which make up the content of these relations. The legal rights and obligations established in the legal relations provide for the possibility of their subjects to take certain actions aimed at achieving legitimate goals. Therefore, the regulation of action in time of subjective rights and obligations is an important mean of legal influence on the behavior of participants in civil relations.

The terms regulate the civil turnover, stabilize the civil legal relations, contribute to the timely and qualitative satisfaction of the needs of their participants, provide for timely protection of the violated subjective rights and interests of the participants of civil relations.

Provisions on periods and terms permeate almost all sub-spheres and institutions of civil law. The issue on periods and terms is important methodologically not only for civil law, but also for understanding the relevant time concepts while applying the rules of family, land, environmental, commercial and other fields of law.

Different levels and forms of matter's movement correspond to certain forms of time reflection. The papers by philosophers have convincingly proved the possibility of the existence in the world of various spatio-temporal forms, which differ from other forms in that they are necessary conditions for the existence of numerous classes of material objects. Such forms include social space and social time.

Social time is a form of social matter existence, a form of social being. Social processes and phenomena, human activity in general occur in time. They develop in a certain sequence and have some duration. These features are inherent to all phenomena of the material world. The specificity of social time as a form of social matter movement is that it is imprinted by the dialectical connection of existing only of objective and subjective, necessity and freedom in society. Social connections and relations, constituting the content of social time, arise on the basis of the activity that people do. Although the spatial-temporal forms determining them appear objectively, the awareness of the latter by humans in the context of society becomes one of the important factors in the scientific management of social processes.

The question on the role and place of periods in the mechanism of legal regulation can be considered in several ways: a) period as the moment of origin (beginning) or termination of legal relations; b) term as one of the conditions that determines their content; c) term as a criteria of the legitimacy (timeliness) of the behavior of legal relations participants, etc.

In civil law literature, while analyzing periods, the latter are most often identified in view of their place in the system of legal facts. Legal facts generally are considered as such facts of real-

ity that a law refers with the occurrence of certain legal consequences, such as the occurrence, changing or termination of rights and legal obligations.

Legal facts are classified according to different characteristics. One such features is the relation of law to these facts. In accordance with the specifics of the matter and method of legal regulation inherent in each sphere of law, its rules and institutions provide for certain types of legal facts. Such classification contributes to clarify the content of the spheres of law and to distinguish them. Regardless of their sphere, legal facts are divided into actions and events on the basis of their relation to the will of the subjects. If actions (inactivity) are performed according to the human's will and are acts of conscious behavior, then events are phenomena that in their development do not depend on the will of people. In addition to the traditional classification of legal facts on the basis of volition feature into actions and events, the opinion was expressed on the expediency of separating a group of legal facts-states, and depending on their duration, to distinguish: a) facts of a single action; b) continuing legal facts-states.

It should be noted that the classification of legal facts on the basis of their duration is quite acceptable, since it contributes to a deeper studyiung of them, in particular in view of their effect over time. Actions and events themselves can have different duration in time. The question on classifying states as a separate type of legal facts has its own history in science and remains debatable. Examples of frequently mentioned facts-states (marriages, family relations, etc.) are nothing but legal relationships that have arisen as a result of certain legal facts-actions or events (including marriage). Regarding the separation of activity and its results into a separate group of legal facts, it can be warned that the activity consists of individual actions of people and their collectives, some of which are given legal importance by the law, that is, recognizing as legal facts.

The list of legal facts-grounds for the emergence of civil rights and obligations (Article 11 of the Civil Code) due toe the civil law principles of analogy of law and the analogy of law (Article 8 of the Civil Code) is not exhaustive.

Legal periods are most often regarded as events, referring to the passage of time (period). For example, O. O. Krasavchikov allocated time movement in a separate group of absolute legal events, the occurrence and action of which are not caused by the willful activity of people [1]. The same assessment legal period obtained in the Ukrainian textbooks on civil law [2]. Denying O. O. Krasavchikov, who argued that over time, a person can not oppose his/her activity, because one exists in time, V. P. Hrybachev correctly emphasized that a person actively uses time in one's activity.

Given the role that time plays in the emergence, changing, exercising and protection of civil rights, V. P. Hrybanov concluded that legal periods in the system of legal facts of civil law occupy an independent place, along with legal events and legal actions and represent something in between by their nature [3].

Comparing different views on the

legal nature of periods in law, it is important, first of all, to determine the relation of periods to the will of subjects civil legal relations. A period as a predetermined time or a length of time limits the duration of the subjective rights and obligations. Because these rights and obligations are most often caused by the will of their carriers, so are the will's nature that have a period that limits their effect in time. Specific periods of implementation, and especially periods of protection of civil rights are set by the provisions of the law. However, the law itself has a willful character as a legal expression of state will. The mechanism of action of normative prescriptions is most often "switched on" (except the occurrence of legal events) through the implementation of conscious and purposeful willful actions (deals, acts of public authorities, etc.), which influence on the dynamics of civil legal relations.

The period can be determined by the parties of the legal relations themselves, established by court decision. The willful nature of this period cannot be doubted. If no period is specified through the mentioned way, the parties are guided by the time criteria set out in the law. Periods set by the law become obligatory to subjects of legal relations either because the law forbids them to change according to the agreement of the parties (such as limitation), or because the parties have not used the opportunity given to them to set the period at their own discretion (e.g. to increase warranty period).

Thus, civil law periods are a temporary form of civil law relations development, a form of existence and exercise (fulfillment) of subjective rights and obligations that make up the content of legal relations. Subjective right and obligation represent the ability or necessity to commit or withhold certain actions by their bearers. The content of the period is either an action or an event (events also occur over time, and may have a certain duration). Outside of these facts, the setting and existence of periods are meaningless. That is why the onset or expiration of the period takes on significance, not in itself, but in combination with the events or actions for which the period is set. From the mentioned above it can be concluded that the periods do not occupy an independent place in the general system of legal facts, along with legal actions and legal events. Time is peculiar to the first and the second as a form. Therefore, acting as a temporal form in which events and actions (inactivity) are occurred, periods produce legal consequences only in relation with actions and events. Taking it into account, a period is defined as the time point with the onset or end of it is associated with event or action (inactivity) that is legally relevant [4].

M. V. Batyanov does not agree with a clear position, considering that V. V. Lutz analyzes the period only as a form of existence of phenomena of real reality, which have legal meaning, and does not differentiate the course of the period and its end (onset). Period can act in law as, for example, a temporal characteristic, which can hardly be regarded as a form of any phenomenon. However, in a further statement M. V. Batyanov states that any legal period is always con-

sidered in connection with a particular legal phenomenon as a peculiar point of attachment to it. Therefore, the period cannot be regarded as a legal fact, because in the opposite approach it should be attributed to legal facts-states. However, in such a case, the legal consequences are not caused by the period itself, but by the phenomenon or process to which the period occurs. By itself, the duration of period isn't available to cause any independent legal consequences [5].

As M. D. Pleniuk rightly points out, the period is a separate legal phenomenon that is closely linked with one or another legal facts (actions or events). Unlike a legal fact, which is an independent category, the period (term) does not exist by itself, but is a temporary reflection of the existence of certain actions or events (legal facts) [6].

In Ukrainian legal terminology, along with the concept "period" (which reflects a certain period in time (e.g. year, month), the concept "term" is often used to refer to a specific point in time, such as a calendar date or a specific event that should come. Therefore, the Civil Code of Ukraine separately defines the terms "period" and "term". According to Article 251 of the Civil Code, a period is recognized as a period of time, with the end of which a certain action or event having legal significance is connected. In that case period is calculated by years, months, weeks, days or hours. The beginning or the end of a period could also be defined by an indication of an event that must inevitably occur. A concept of a term defines a moment in time that is associated with an action or event of legal significance. Term is defined by a calendar date or by an indication of an event that must inevitably come.

P. D. Guivan, analyzing the definition of the period, which is given in Part 1 of Art. 251 of the Civil Code, considers it to be imperfect, because it gives a wide range for its interpretation. The author states the position that the beginning or end of the period cannot be considered as a legal fact in the classical sense of the circumstance as such, which leads to the emergence, change or termination of subjective civil rights and obligations, and proposes to set out Part 1 of Art. 251 of the Civil Code in the following wording: "The period is a certain period of time, the onset or expiration of which determine the limits of existence (exercise) of the subjective right of a person". Accordingly, the part 2 of Art. 251 of the Civil Code also should be changed [7, p. 140–141].

However, it should be noted that, first, the period could be linked not only to subjective civil law, but also to a subjective civil obligation, which is not mentioned in that definition of the period, and, second, the onset and the expiration of the period cannot be considered as a limit of the existence or the exercise of the subjective right of the person, because, as a general rule (with the exception of truncated ones), the expiration of the period provided for the exercise of a right or of a duty, does not cause the automatic termination of that right or duty, because their ability remains for implementation and defense during a specified period of time in an expeditious, demanding or order of court hearing of a

dispute.

Emphasizing the necessity to distinguish the concepts "period" and "term", it should be noted at the same time about their interaction, combination in the regulation of certain civil relations. Thus, according to Art. 530 of the Civil Code of Ukraine, if the obligation set a period (term) for its fulfillment, it must be fulfilled within that period (term). An obligation, the period (term) of which is specified by an indication of an event which must inevitably occur, should be enforced upon the occurrence of that event. If the period (term) of the debtor's obligation has not been set or determined at the time of the claim, the creditor has the right to demand its execution at any time. The debtor must fulfill such an obligation within seven days from the date of the claim, if the obligation of immediate execution does not follow from the contract or acts of civil legislation.

The vast majority of property and personal non-property relations governed by the provisions of the Civil Code and other acts of civil legislation are relations, which ensure the proper conduct of the subjects of these relations, the normal exercise of their subjective civil rights and the fulfillment of civil obligations.

Periods (terms) in a regulatory legal relations are periods (terms) for the exercise of subjective civil rights and the fulfillment of obligations.

For some civil relations, the law provides that failure to exercise a right or an obligations during a specified period or term will result in the termination of that right or obligation. Such periods in the literature are called truncated, or preclusive (from the Latin. preaclusio – to suspend, to impede). The Civil Code of Ukraine and other acts of civil legislation provide for many different truncated periods. Thus, according to Part 1 of Art. 247 and Part 1 of Art. 248 of the Civil Code the period of the power of attorney is defined in the power of attorney itself. If its period is not specified, the power of attorney shall remain in force until terminated. Representation on the power of attorney shall be terminated if the power of attorney expires. Therefore, the period of the power of attorney is a truncated period, because with its expiration the right of the representative to act on behalf of the person he/she represents expires.

It should be noted that the peculiarities of truncated periods is that, they, while defining the limits of subjective right in time, are included in its content as an internally important limit of their existence. The expiration of the truncated period causes the termination of the subjective right or obligation, but it cannot be considered a premature termination of the subjective right. It is about premature termination or fulfillment of a duty in case it has taken place before the expiration. Instead, the right or obligation limited by the truncated period ceases at the time of the expiration of the period. But the truncated nature of one or another period should directly follow from the content of the relevant provision of the law or the contract.

The term "reasonable period" refers to evaluation concepts that are abundant in many rules of the Civil Code, but it

does not contain a general rule in which the meaning of this concept would be disclosed.

In common law countries (including the United States, England), a reasonable period is associated with an assessment of the actions and circumstances in which they are committed. Thus, according to the § 2 Art. 1–204 of the United States Uniform Commercial Code, defining of a reasonable period for commiting an action depends on the nature and purpose of the action and the circumstances surrounding it. In English law, performance within a reasonable period is considered as being made taking into account the nature of the contract and the circumstances of the case given. What is a reasonable period is an issue of fact in each case [8].

The final, optional stage of the mechanism of legal regulation is the protection of violated civil rights and obligations of the subjects of civil law relations.

According to Art. 15 and I6 (part 1) of the Civil Code of Ukraine, every person has the right to defend his/her civil right in the case of its violation, non-recognition or contestation, as well as ones interest, which does not contradict the general principles of civil legislation. However, the possibility of demanding a competent body to protect a right or an interest provided for by the law is also not infinite in time: as a general rule, it is limited by statutory limitation periods. The purpose of the latter is not only to recognize as existing, to restore a subjective right or legal obligation or to protect them in other ways, but also to ensure the realization of the subjective right and to satisfy the interests of the empowered person.

According to Art. 256 of the Civil Code *the statute of limitations* is a period within which a person can apply to the court for the protection of ones civil right or interest. The aforementioned provision is somewhat unsuccessful, since it gives reasons to believe that with the expiration of the limitation period a person cannot apply to court.

The statute of limitations should not be considered as a period within which a person can go to court in order to claim his/her violated right. According to Part 2 of Art. 267 of the Civil Code, the application for protection of civil right or interest must be accepted by the court for consideration regardless of the expiration of the limitation period. It is said that during the limitation period a person may rely on the compulsory defense of his/her violated civil right or interest by a court. The expiry of the statute of limitations, the application of which the party mentioned in the dispute, is the basis for denial of the claim (Part 4 of Art. 267 of the Civil Code). The term "statute of limitations" reflects the connection, on the one hand, with the form of the violated rights protection (lawsuit), and on the other – with the duration of the right protection in time (statute of limitations).

The statute of limitation is an institution of substantive, but not procedural civil law. The limitation period of the right to sue means only the possibility to obtain compulsory protection of the violated subjective right by a judicial authority. Since the interested person may

apply to the court or other body for protection of violated or disputed rights and interests protected by law at any time, Part 2 of Art. 267 of the Civil Code provides that claims for the protection of the violated right are accepted by the court regardless of the statute of limitations expiration. However, if while studying the dispute it is found that the statute of limitations have expired before the claim is filed and its application is declared by the party of the dispute, then it is a ground for refusing to satisfy it.

The Chairman of the Supreme Court of Ukraine Ya. M. Romaniuk has asked the Scientific Research Institute of Private Law and Entrepreneurship named after Academician F. G. Burchak of the National Academy of Legal Sciences of Ukraine to submit a scientific conclusion on the correct application of the provisions of Art. 17 of the Law of Ukraine "On Mortgage" in interconnection with Art. 266, 267, 509, 598 of the Civil Code of Ukraine in the disputed legal relations that arose in such circumstances.

A loan agreement was made between the Bank and N. according to the provisions of which the Bank provided N. money through a credit. In order to ensure the obligations under this agreement, N. transferred to the Bank a real estate object, a mortgage agreement was concluded on it between them.

In November 2013, the Bank filed a lawsuit to the debtor (mortgagee N.) to recover the amount of debt on the loan agreement, as well as to recover the mortgage. The decision of the court of first instance, which came into force, denied the Bank's claim in full due to the statute of limitations expiry. On the basis of this court decision, N. considered that his/her mortgage obligation to the Bank had ceased, and appealed to the court to terminate the mortgage.

As it can be seen from the content of the legal relations with regard to the provided loans in this case, the borrower did not repay the loan received in due time, in connection with which the Bank sued the debtor as a mortgagee to recover the amount of debt under the loan agreement and to recover the mortgage which was transferred by the debtor to the Bank in order to ensure the obligations under the contract. Due to the expiry of the limitation period, the court correctly denied the claim completely against both the main debt under the loan agreement and the claims under the mortgage agreement.

Systemic analysis of Art. 17 of the Law of Ukraine "On Mortgage" and Art. 266, 267, 509, 598 of the Civil Code of Ukraine in the context of the given case gives reasons for such conclusions. According to Part 4 of Art. 267 of the Civil Code, the statute of limitations expiry, the application of which was declared by the party in the dispute, is the basis for refusing the claim. But does the obligation with substantive-legal requirements remain valid and binding to the parties, or does it terminate? Various opinions have been expressed in literature about that issue. The main argument is the reference to Part 1 of Art. 267 of the Civil Code on the fact that the person who fulfilled the obligation after the expiration of the limitation period has no right to demand the return of the accom-

plished, even if at the moment of execution one did not know about the limitation period expiration. The so-called theory of natural obligations emerged on this basis. Natural obligations are those which do not give the creditor any right to demand their enforcement, and therefore their couty protection, but the debtor misses the opportunity to return everything that was voluntarily given or paid in connection with their performance after the expiration of the statute of limitations [9].

Therefore, the denial of the claim due to the expiration of the statute of limitations does not lead to the termination of the obligation in relation to the main requirements as well as to the additional requirements aimed at securing the main obligation. There is a certain inconsistency between the general rule of the Civil Code (Part 1 of Article 267) and the special Law of Ukraine "On Mortgage" (Article 17), which does not provide for such a rule. In that situation, it should be guided by the provision of the Civil Code of Ukraine (Part 1, Art. 267), according to which the obligation on which the statute of limitations has expired is valid but without compulsory court protection (natural obligation).

In that regard, it is necessary to note the inconsistency of P. D. Guivan's position on this issue. Thus, comparing the statute of limitations and the truncated period, the author states on one page of his book that the statute of limitations, as well as the truncated period, determines the time for realization of certain substantive legal authority, and the expiration of these periods leads to the subjective substantive law being extinguished [7, p. 200], and on another page [7, p. 213] is in solidarity with O. V. Shovkova [10] in that the violated civil right does not terminate with the expiration of the limitation period, which is confirmed by the legislative fixing of the possibility of fulfilling the obligation included in the obligation composition, after the statute of limitations (part 1 Article 267 of the Civil Code), and that only the possibility of court protection of the right is extinguished, that is, the protection obligation is terminated, the content of which includes the claim of the empowered person.

Thus, at all stages of the mechanism of legal regulation of civil relations, periods and terms as legal categories reflect their regulatory influence on the behavior of participants in these relations.

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T. Bodnar, Doctor of Law, Taras Shevchenko
National University of Kyiv, Ukraine, Kyiv

PROBLEMS OF APPLICATION OF NORMS OF THE CIVIL CODE OF UKRAINE AND OTHER NORMATIVE-LEGAL ACTS TO REGULATION OF FAMILY RELATIONS

Abstract. *The article reveals some aspects of the application of the norms of the Civil Code of Ukraine (CC of Ukraine) and other normative legal acts of the national legislation to the regulation of family relations.*

The purpose of the article is to study the problems of applying the norms of these acts on the example of individual family deals.

The author, basing on the understanding of family law as an independent sphere of Ukrainian law, shares the opinion of a number of Ukrainian scholars that the norms of the CC of Ukraine apply to the regulation of family relations in a subsidiary manner, not directly.

It is noted that court practice does not always adhere to the provision of Part 1 of Art. 9 of the CC of Ukraine, according to which the provisions of the CC of Ukraine are applied to the regulation of family relations, if they are not regulated by other acts of legislation. Such a misunderstanding of the correlation between the norms of the CC of Ukraine and the Family Code of Ukraine (FC of Ukraine), while applying their provisions to the regulation of family relations, concerns, in particular, the peculiarities of recognizing as invalid family deals due to the absence of consent in relations regarding the exercise of the joint common property of the spouses; concerning the management of the juvenile child property; regarding the conclusion of a marriage contract before registration of a marriage, if its party is a juvenile person, etc.

Particular attention is paid to the parents', other legal representatives or the child's consent, the absence of which is not recognized by the FC of Ukraine as a ground for invalidating the contracts on patronage over the child, on the placement of children to the foster family, on the organization of the activity of the family-type orphanage. The peculiarity of these treaties is that, in their legal nature and essence, these treaties are not family-law in the narrow sense, and therefore, according to the author's point of view, the can be recognized as invalid on the grounds provided by the CC of Ukraine.

The presence of a number of legal acts of family law, a large number of norms, as well as a part of the norms of the FC of Ukraine, is of a public nature. It confirms the conclusion that family law cannot be recognized as a subsphere of civil law, as a private law, but it is independent sphere of Ukrainian law, which contains both private law (predominantly) and public law (serving family relations) norms.

Key words: *Civil Code of Ukraine; Family Code of Ukraine; subsidiary application of norms; invalidity of family deals.*

Formation of modern views of Ukrainian legal scholars on the application of the norms of the Civil Code of Ukraine and other normative legal acts to the regulation of family relations was in some way influenced by the last codification of civil law, during which the norms of family law were planned to be codified in Book 6 of the Civil Code of Ukraine under the name "Family Law" but later Book 6 was withdrawn from the Civil Code and on January 10, 2002, the Family Code of Ukraine was adopted, which was originally planned to be put into force on January 1, 2003. However, since the Family Code of Ukraine was to some extent related to the Civil Code, which at that time had not yet been adopted, the Law on December 26, 2002 transposed its coming into force and provided that the Family Code of Ukraine would come into force at the same time as the Civil Code of Ukraine (hereinafter – CC of Ukraine).

That paper is aimed at studying the problems of applying the norms of the CC of Ukraine and other normative-legal acts of national legislation to family relations.

Due to the deletion of Book 6 from the draft of the CC of Ukraine and the adoption of a separate Family Code, it is quite natural a question arisen on filling the vacuum in the legal regulation of family relations that was caused by it.

Not all personal non-property and property relations between spouses, parents and children, other family members and relatives have been sufficiently fully regulated by the Family Code (hereinafter – FC of Ukraine).

The legislator found a way out of the situation through predicting in Art. 8 of the FC of Ukraine the possibility of subsidiary application of the relevant norms of the CC of Ukraine to the mentioned relations, however, in the case if such regulation does not contradict with the essence of family relations.

The inclusion of this article to the FC of Ukraine has caused ambiguous commentary on its provisions in the legal literature.

According to Yu. S. Chervonyi, Z. V. Romovska points of view, it is about subsidiary application of the norms of the CC of Ukraine to individual family relations regulation, in particular, in connection with the enlarging of the sphere of their regulation through the contract, as well as for the purpose of legislative economy[1].

However, according to I. V. Zhilinkova point of view on the subsidiary ap-

[1] *Науково-практичний коментар Сімейного кодексу України: пер. з рос.* / С. В. Ківалов, Ю. С. Червоний, Г. С. Волосатий та ін.; за ред. Ю. С. Червоного (Юрінком Інтер 2008) 24–25

plication of the norms of the CC of Ukraine to family relations, it could be spoken only in the case of recognition of family law as an independent sphere of law. If family law is recognized as a subsphere of civil law, the array of civil law norms is recognized as the only one with internal division into separate subspheres[1].

It is difficult to agree with such a statement, if we are basing on the content of Part 1 of Art. 9 of the CC of Ukraine, according to which, the provisions of the CC of Ukraine are applied to the family relations regulation, *unless they are regulated by other acts of legislation.*

Thus, the recognition of the institution of custody and guardianship as a civil law institution caused the application of the provisions of Chapter 6 of the CC Ukraine (Articles 55–79 of the CC of Ukraine) to custody and guardianship relations. Other examples of subsidiary application of the CC of Ukraine to family relations can be given.

Subsidiary application of the CC of Ukraine norms to the personal non-property and property family ones, some scholars explain by the fact that civil and family law refer to private law. In particular, such an opinion was expressed by Yu. S. Chervonyi[2]. In our view, such an argumentation is not undoubtable and convincing, since the question on the private-law nature of family law cannot be recognized as uniquely solved and accepted. Moreover, as it can be explained, for example, provided for in Art. 9 of the CC of Ukraine the possibility of applying the provisions of the CC of Ukraine to relations arising in the areas of natural resources usage and environmental protection, as well as to labor relations or in the sphere of commerce. It is unlikely that the relevant spheres of law can be recognized as private law ones.

The literature suggests that the subsidiary application of the provisions of the CC of Ukraine to family relations does not mean that it is possible in regard to all types of family relations. In particular, V. I. Borisova believes that such application is possible only to *property* relations of family members and relatives. As for the personal *non-property* relations of family members, it is impossible to apply the norms of the CC of Ukraine for their regulation[3]. In this regard, it is quite reasonable a question arises on the right to family life, the right to choose a place of residence and to freedom of movement (Part 1 of Article 270 of the CC of Ukraine), to exercise personal non-property rights in the interests of juvenile, minors by parents (adoptive parents), caretakers?

It should be noted that in a number of cases, the FC of Ukraine contains a direct link to the CC of Ukraine. For example, Art. 12 of the FC of Ukraine

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[1] Ромовська З. В. *Сімейний кодекс України: Науково-практичний коментар* (Правова єдність 2009) 461

[2] *Науково-практичний коментар Сімейного кодексу України: пер. з рос.* / С. В. Ківалов, Ю. С. Червоний, Г. С. Волосатий та ін.; за ред. Ю. С. Червоного (Юрінком Інтер 2008) 97

[3] *Сімейне право України: підручник* / Л. М. Баранова, В. І. Борисова, І. В. Жилінкова та ін.; за заг. ред. В. І. Борисової та І. В. Жилінкової (Юрінком Інтер 2011) 44

stipulates that the periods established by the FC of Ukraine calculated in accordance with the Civil Code of Ukraine. According to Part 2 of Art. 20 of the FC of Ukraine in cases of statute of limitation usage to claims arising from family relations, the statute of limitations shall be applied by the court in accordance with the CC of Ukraine, unless otherwise is provided by the FC of Ukraine.

Application of the FC of Ukraine to family relations is also provided for in Part 1 of Art. 9 of the CC of Ukraine, according to which "the provisions of this Code shall be applied to the regulation of… family relations, unless they are regulated by other acts of legislation". Therefore, it is difficult to agree with the statement that the norms of the CC of Ukraine are applied to the regulation of family relations not subsidiary, but directly[1]. It is enough to read again carefully Part 1 of Art. 9 of the CC of Ukraine to make the opposite conclusion.

It would seem that the determination of the procedure of application of the CC of Ukraine to the family relations regulations in Art. 9 of the CC of Ukraine should serve as a benchmark aimed at ensuring optimal legal regulation of family relations, but the court practice shows some misunderstanding of the norms of the two codes while applying their provisions to the regulation of family relations.

In particular, this concerns the peculiarities of recognizing as invalid family deals on the grounds of consent's absence.

In the FC of Ukraine the term "consent" is used in many cases for different legal relations: marriage (Art. 24, 40 of the FC of Ukraine), personal non-property rights and responsibilities of spouses (Article 54 of the FC of Ukraine), rights and obligations of spouses maintenance (art. 77 of the FC of Ukraine), personal non-property rights and responsibilities of parents and children (art. 145, 146, 148, 149, 160, 161, etc. of the FC of Ukraine), adoption (art. 201 , 217–222, etc. of the FC of Ukraine), custody and caretaking (Art. 244 of the FC of Ukraine), etc.

In this case, the absence of consent in some cases causes the invalidity of certain actions (for example, the invalidity of adoption – Art. 236, 237 of the FC of Ukraine), in others – serves as an obstacle to the conclusion of the relevant agreements (on patronage over a child – Art. 253, 254 of the CC of Ukraine, on setting of children to foster family – Articles 256^3 , 256^4 of the FC of Ukraine, on organization of activity of family type orphanage – Articles 256^7 , 256^8 of the FC of Ukraine).

The consent on the exercise of some rights is of particular significance in the context of the issue of our study: the right of joint common ownership of spouses (Article 65 of the CC of Ukraine) on the management of the property of the child (Article 177 of the CC of Ukraine), as well as in other legal relations, the basis of which is relevant

[1] Жилінкова І. В. Регулювання майнових відносин у сім'ї: тенденції розвитку цивільного та сімейного законодавства, *Правова система України: історія, стан та перспективи: у 5 т. – Т. 3: Цивільно-правові науки. Приватне право* / за заг. ред. Н. С. Кузнєцової (Право 2008) 461

contract (for example, marriage contract – Article 92 of the FC of Ukraine).

A common feature that unites these types of legal relations is a contract (deal) concluded (done) by one person with the consent of another, which is one of the conditions for the validity of these contracts (deals).

It would seem that a common feature that unifies these deals should also determine the common (the same) for each deal legal consequences of failure to comply with the requirement of consent presence. However, in reality, these legal consequences are different.

Let's take a closer look at them.

1. As established by Art. 63 of the FC of Ukraine, the wife and the husband have equal rights to ownership, usage and disposal of property belonging to them on the right of joint common ownership, unless otherwise is provided for by the agreement between them.

Taking it into account, Part 1 of Art. 65 of the FC of Ukraine establishes that the wife and the husband dispose the property, which is the object of joint common ownership of the spouses, by mutual consent.

Basing on it, while concluding contracts, one of the spouses is considered to be acting with the consent of the other spouse (Part 2 of Article 65 of the FC of Ukraine).

The norms given almost exactly coincide with the provisions of Part 1 and 2 of Art. 369 of the CC of Ukraine on the exercise of the right of joint common property, but the main difference is that, as it is set by Part 2 of Art. 68 of the FC of Ukraine, the disposal of property, which is the object of the right of joint common ownership, is carried out by the co-owners only by mutual consent, according to the CC of Ukraine *after the dissolution of marriage* [emphasis added. – T. B.]. Thus, the provisions of Art. 369 of the CC of Ukraine cannot be applied to relations concerning the exercise of the right of joint common ownership of spouses.

However, the inconsistency of Art. 65 of the FC of Ukraine and Art. 369 of the CC of Ukraine does not end, because the wife, the husband has the right to appeal to the court to recognize the contract as invalid due to be concluded by the spouse without one's consent, if this agreement goes beyond the limits of small household one (Part 2 of Art. 65 FC of Ukraine).

Thus, the ground for invalidation of a contract on the disposal of property that is the object of joint common ownership rights concluded by one *spouse is the absence of consent of the other spouse*. The invalidation of the said contract due to other grounds should be carried out in accordance with the provisions of Art. 215 of the CC of Ukraine.

Without paying attention in that paper to the question on the form and notary verification of such consent, we note that if the concept of small household contract by analogy of the law the definition can be used of the concept of small household deal, contained in Part 1 of Art. 31 of the CC of Ukraine, then the question on what contract can be considered as a contract on valuable property, neither the CC of Ukraine nor the FC of Ukraine gives an answer.

Court practice, ignoring the direct reference in Part 2 of Art. 65 of the FC of Ukraine on the invalidation of a contract concluded by one spouse without the consent of the other, proceeds from the fact that "the disposal of joint property without the consent of the other spouse can be a ground for invalidation of such a contract only if the court finds that the spouse who concluded the joint property contract and the third party counterpart of such contract acted in bad faith, in particular that the third party knew or should have known, according to the conditions of the case, that the property was owned by the spouse under the joint common ownership right, and a spouse who concluded the contract, has not received the consent of the other spouse".

Thus, the reference by the Supreme Court of Ukraine to the principle of integrity while hearing cases of invalidation of contracts concluded without the consent of another spouse, is characteristic of a number of its resolutions (on 07.10.2015, on 30.03.2016, on 07.09.2016, on 22.02.2017 etc.).

In our view, such a motivation is no longer tenable since the spouse who concludes the agreement without the consent of the other spouse can no longer act in good faith. Regarding the behavior of the counterparty of the contract, the legislator does not take it into account at all while determining the basis for the contract's invalidation in accordance with Art. 65 of the FC of Ukraine.

Therefore, the court's reference to integrity, as one of the principles of civil law (although such a basis is set by Article 7 of the FC of Ukraine is also inherent to family law), according to which the parties to the contract should act, in this case is groundless.

To this we should add that, basing on the content of Part 3 of Art. 202 of the CC of Ukraine, it can be stated that the consent of one spouse to conclude a contract by the other spouses on the disposal of property that is the object of their joint common ownership, causes only the right of another person to conclude such a contract, but does not result in any obligations for him/her. Such consent may create obligations for the other spouse only in cases provided for by the law or by an agreement with those persons.

It should be noted that the mentioned in that paper provisions and conclusions also cover the exercise of the right of joint common ownership of property acquired during the cohabitation of a man and a woman who live as unified family but are not married to each other or to any other marriage.

2. According to the general rule established by Part 1 of Art. 177 FC of Ukraine, parents manage property belonging to a juvenile child without special authority.

While committing a deal by a parent of a minor child, it is considered that he/she acts with the consent of the other parent. We believe that there is every reason to qualify such consent as a unilateral deal as in the previous case.

The second parent has the right to appeal to the court for a recognizing of invalidity of the deal as concluded without one's consent, if this deal goes beyond the limits of small household one

(paragraph 1 of Part 6, Article 177 of the FC of Ukraine).

Attention should be paid to the inaccuracy of the wording of the norm on invalidation of deal, since *a concluded deal* means a bilateral or multilateral deal – a contract. If we keep in mind all the deals, so it means that they are being *done*. Therefore, the language in paragraph 1 of Part 6, Article 177 of the FC of Ukraine should refer to the invalidation of a *deal which was done* without the consent of one of the parents.

Art. 177 of the Civil Code of Ukraine does not answer the questions on the legal consequences of the commission by parents of the minor children deals, provided for in Part 2 of the mentioned article, regarding ones property rights without the permission of the guardianship and custody bodies.

Obviously, in that case the deal may be recognized as invalid on the claim of the guardianship and custody body on the grounds provided for in Art. 215 of the CC of Ukraine, in particular, basing on the fact that the deal done by the parents (adoptive parents) cannot contravene the rights and interests of their juvenile, minor or disabled children (Part 6 of Article 203 of the CC of Ukraine).

3. Of particular interest in the context of the issue of our research is the conclusion of a marriage contract before the registration of marriage, ifs party is a minor person. The conclusion of such an agreement requires the written consent by ones parents or guardian, verified by a notary (Part 2 of Article 92 of the FC of Ukraine). In our opinion, this consent should also be considered as a unilateral deal.

Considering the marriage contract as a family legal agreement, we believe that the provisions of Art. 103 of the Civil Code of Ukraine, which provides for the possibility of recognizing a marriage contract at the request of one spouse or other person, the rights and interests of which are violated by this contract, as invalid on the grounds established by the CC of Ukraine, should not extend to the cases of lack of written consent, which is set in Part 2 Article 92 of the FC of Ukraine.

In this regard, we consider it appropriate to supplement Art. 92 of the Civil Code of Ukraine with part 3 of the following content:

"3. The parents (one of them) or the guardian have the right to apply to the court to claim the recognizing of the marriage contract as invalid, which was concluded before the registration of the marriage by a minor without the written consent of one's parents or guardian verified by a notary."

4. Separately, it is necessary to pay an attention to the consent (of parents, other legal representatives or the child), the absence of which is not recognized by the FC of Ukraine as a ground for invalidation of agreements on patronage over a child, on setting children for a foster family, on organizing activities of a family-type orphanage.

However, such a consent, as a unilateral deal, is aimed at acquiring by the parties of the said agreements the right to conclude them.

The peculiarity of these agreements is that, despite the placement of norms

on them in the FC of Ukraine, by their legal nature and essence, these agreements (despite the contrary statement[1]) are not family-law in the narrow sense, because are concluded: a patronage agreement for a child – with the participation of the guardianship authority and the patronage educator (participation in the specified contract of parents or legal representatives of the child, which is stipulated by the Model agreement on patronage over the child, is not provided by the FC of Ukraine, and therefore we are considered only as a fact of confirmation of their consent in accordance with Part. 2, Art. 254 Code of Ukraine); the agreement on the setting a children into foster family – with the participation of foster parents and the body that made the decision on establishing a foster family; agreement on the organization of activities of a family-type orphanage – with the participation of the caregivers and the body that has decided to establish a family-type orphanage.

Therefore, it is quite justified the absence in the FC of Ukraine of norms regarding the recognition of these contracts as invalid. It is obvious that such contracts can be recognized as invalid on the grounds provided by the CC of Ukraine.

While adopting the CC of Ukraine, the legislator declared that the Code on Marriage and Family of Ukraine had lost its validity, except for Section V "Acts of Civil Status", which retained its validity in the part that did not contradict the CC of Ukraine until the adoption of a special law.

Adoption of a special law, according to which the registration of acts of civil status is provided, including – marriage, divorce, adoption, deprivation and restoration of civil rights – is also provided for by Art. 49 of the CC of Ukraine.

Such a special law – the Law of Ukraine "On State Registration of Civil Status Acts"[2] was adopted on July 1, 2010. According to Part 1 of Art. 1 of this Law, it regulates the relations related to the state registration of civil status acts, amending civil status records, their updating and annulment, defines the principles of activity of state registration bodies of civil status acts.

Studying the issue on the application of the norms of the CC of Ukraine to the regulation of family relations, we can not ignore the question on the application to the regulation of these relations and a number of normative acts other than the Law of Ukraine "On State Registration of Civil Status Acts". Thus, a plenty of norms aimed at family relations regulation are contained in the Laws of Ukraine on November 15, 2001 "On Prevention of Domestic Violence"[3], on November

[1] Борисова В. І. Договір у сімейно-правовій сфері, *Актуальні проблеми приватного права: договір як правова форма регулювання приватних відносин: матеріали наук.-практ. конф., присвяч. 95-й річниці з дня народження д-ра юрид. наук, проф., чл.-кор. АН УРСР В. П. Маслова (Харків, 17 лют. 2017 р.)*, (Право 2017) 14–15

[2] Про державну реєстрацію актів цивільного стану: Закон України від 1 липня 2010 р. №2398-VI. URL: http://zakon.rada.gov.ua/laws/show/2398–17 (дата звернення: 12.11.2018).

[3] Про державну реєстрацію актів цивільного стану: Закон України від 1 липня 2010 р. №2398-VI. URL: http://zakon.rada.gov.ua/laws/show/2398–17 (дата звернення: 12.11.2018).

21, 1992 "On State Aid to Families with Children"[1], on April 26, 2001 "On the protection of childhood"[2].

With the entry into force of the Law of Ukraine on June 23, 2005 "On Private International Law"[3], Articles 275–281 were excluded from the FC, and now the peculiarities of the application of the rules of family law to foreigners and stateless persons are determined by the provisions of that law, in particular, by Articles 55–69 of Section IX "Conflicting norms of family law", which allow the regulation of marriage and family relations by the foreign law norms.

The family law acts also include resolutions of the Cabinet of Ministers of Ukraine, in particular:

– on April 26, 2002, No. 564 "On Approval of the Regulation on Family-Type Orphanage"[4];

– on April 26, 2002, No. 565 "On Approval of the Regulation on Foster Family"[5];

– on November 10, 2010, No. 1025 "On Approval of Model Civil Acts Records, Descriptions and Model Forms of State Registration Certificates of Civil Status"[6], etc.

According to the Decree of the President of Ukraine on August 4, 2000 No. 958/2000 "On socio-economic support for the formation and development of the student family"[7], by the decree of the Cabinet of Ministers of Ukraine on March 14, 2001 "Measures of supporting the formation and development of the student family"[8] was approved.

Certain normative legal acts have been approved by the Ministry of Justice of Ukraine, for example, the Rules of state registration of civil status acts in Ukraine, approved by the order of the Ministry of Justice of Ukraine on 18.10.2000 (in the version dated 24.12.2010)[9].

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[1] Про державну допомогу сім'ям з дітьми: Закон України від 21 листопада 1992 р. №2811-XII. URL: http://zakon.rada.gov.ua/laws/show/2811–12 (дата звернення: 12.11.2018).

[2] Про охорону дитинства: Закон України від 26 квітня 2001 р. №2402-III. URL: http://zakon.rada.gov.ua/laws/show/2402–14 (дата звернення: 12.11.2018).

[3] Про міжнародне приватне право: Закон України від 23 червня 2005 р. №2709-IV. URL: http://zakon.rada.gov.ua/laws/show/2709–15 (дата звернення: 12.11.2018).

[4] Про затвердження Положення про дитячий будинок сімейного типу: постанова Кабінету Міністрів України від 26 квітня 2002 р. №564. URL: http://zakon.rada.gov.ua/laws/show/564–2002-п (дата звернення: 12.11.2018).

[5] Про затвердження Положення про прийомну сім'ю: постанова Кабінету Міністрів України від 26 квітня 2002 р. №565. URL: http://zakon.rada.gov.ua/laws/show/565–2002-п (дата звернення: 12.11.2018).

[6] Про затвердження зразків актових записів цивільного стану, описів та зразків бланків свідоцтв про державну реєстрацію актів цивільного стану: постанова Кабінету Міністрів України від 10 листопада 2010 р. №1025. URL: http://zakon.rada.gov.ua/laws/show/1025–2010-п (дата звернення: 12.11.2018).

[7] Про соціально-економічну підтримку становлення та розвитку студентської сім'ї: Указ Президента України від 4 серпня 2000 р. №958/2000. URL: http://zakon.rada.gov.ua/laws/show/958/2000 (дата звернення: 12.11.2018).

[8] Про заходи щодо підтримки становлення та розвитку студентської сім'ї: Розпорядження Кабінету Міністрів України від 14 березня 2001 р. №92-р. URL: http://zakon.rada.gov.ua/laws/show/92–2001-р (дата звернення: 12.11.2018).

[9] Про затвердження Правил державної реєстрації актів громадянського стану: наказ Міністерства юстиції України від 18 жовтня 2000 р. №52/5 (в ред. наказу від 24 грудня 2010 р. №3307/5). URL: http://zakon.rada.gov.ua/laws/show/z0719–00 (дата звернення: 12.11.2018).

The presence of these and other normative legal acts of family law, a significant number of which norms, as well as part of the norms of FC Ukraine, has a public character. That confirms the conclusion that family law cannot be recognized as a branch of civil law as a private law, but it is an independent sphere of Ukrainian law that contains both private law (mainly) and public law (which serve family relations) norms[1].

Z. V. Romovska states that transferring from the Civil Procedure Code of Ukraine to the FC of Ukraine the norms on the analogy of law and the analogy of the law is one of the achievements of FC Ukraine. Obviously, that transferring from the Civil Procedure Code of Ukraine is explained by the fact that at that time the CC of Ukraine, which today also contains an article on the analogy of law and the analogy of the law, had not yet been accepted, although the draft of the CC of Ukraine had already contained it.

According to Art. 10 FC of Ukraine, if certain family relations are not regulated by that Code, by other normative legal acts or agreement (agreement) of the parties, the rules of that Code governing such relations (analogy of the law) shall apply to them.

If the analogy of the law cannot be applied to the regulation of family relations, they are regulated in accordance with the general principles of family legislation (analogy of law).

The inclusion of the provisions on the analogy of the law and the analogy of law to the FC of Ukraine confirmed that these categories are not procedural, but primarily material. Therefore, if there is no certain norm in the FC of Ukraine, then it is possible to apply an analogy of the law or an analogy of law. That legal instrument regulates relations that are not directly regulated by the FC of Ukraine.

However, it should be understood that the analogy of the law and the subsidiary application of the norms of the CC of Ukraine on family relations regulation are different legal means of overcoming the gaps in family law, since the analogy of the law applies the rules of one sphere of the law (family one), and in the case of subsidiary application of the norm one sphere of law (civil one) is applied in addition to the norms of another, related sphere of law (family one).

Conclusions. The conducted research of problems of application of norms of the CC of Ukraine and other normative-legal acts of national legislation on family relations regulation allows to formulate such conclusions.

1. Subsidiary nature of the norms of the Civil Code of Ukraine in relation to the FC of Ukraine, despite its importance for the regulation of private relations, should be taken into account in court practice, basing on the imperative norm of Part 1 of Art. 9 of the CC of Ukraine.

2. Recognizing as invalid the agreements on patronage of a child, on setting

[1] Боднар Т. В. К вопросу о месте семейного права в системе права Украины, *Актуальні проблеми цивільного, сімейного та міжнародного приватного права (Матвєєвські цивілістичні читання). Матеріали міжнародної науково-практичної конференції, Київ, 16 вересня 2010 р.)* 37

a children to a foster family, on organization of activities of family-type orphanage, which, in our opinion, do not relate to family-legal agreements, should be carried out on the grounds stipulated by the CC of Ukraine.

3. The presence in the FC of Ukraine and in other normative-legal acts of family law of a significant number of norms of a public character confirms the conclusion that family law cannot be recognized as a sub-sphere of civil law as a private law, but it is an independent sphere of Ukrainian law, containing both private law (mainly) and public law (serving family relations) norms.

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V. Borysova, Ph.D. in Law, Professor, Head of Civil Law Department № 1 Yaroslav Mudryi National Law University, Corresponding Member of National Academy of Legal Sciences of Ukraine Kharkiv, Ukraine

PROBLEMATIC ISSUES RELATED TO THE FORMS OF FAMILY PLACEMENT OF CHILDREN DEPRIVED OF PARENTAL CARE UNDER UKRAINIAN LEGISLATION

Abstract. *Childhood is a special period in a person's life, characterized by the child's dependence on adults, and especially on parents. The fact of the loss of parental care due to various circumstances, which endangers the life, health, and upbringing of a child, also changes the child's status and the child acquires the status of an orphan child and a child deprived of parental care, which in turn entitles the child to full state support and benefits provided for by law. The placement of such children is the responsibility of the competent State bodies for their placement in the families of citizens or in residential institutions of the education, health and social protection system.*

The purpose of the article is to analyze the approaches developed in the legal doctrine to understanding the forms of placement of children deprived of parental care and upbringing, and also to outline a vision of how to overcome orphanhood in Ukraine through the introduction of both legalized family forms of placement of such children, which are prioritized over residential forms of upbringing and the unregulated ones.

It has been established that the forms of family placement of a child who finds himself or herself in difficult living conditions, and which are regulated by law, are not exhaustive. There are other forms, such as the actual upbringing of an orphan child or a child deprived of parental care in a given person's family without the appropriate legal basis. In the actual upbringing of a child, all parental competences are exercised, except for parental rights protection competence, and therefore, as a socially valuable phenomenon, it requires certain legal regulation.

The article substantiates the assertion that each of the legalized forms of family upbringing (patronage, foster family, family-type children's home) has its own peculiarities,

but unifies them by the fact that one of the elements of the actual structure of their emergence is the corresponding agreement: on patronage; on the placement of children in a foster family for upbringing and joint residence; on the organization of the activities of a family-type children's home. These agreements are part of the group of family legal agreements on social assistance for children in difficult circumstances due to orphanhood, homelessness, conflicts, domestic abuse, etc. The purpose of these agreements is to overcome the difficult life circumstances in which a child, parents or legal representatives have been involved by means of social assistance, e.g. by giving consent for patronage. Although these agreements do not constitute legal facts in their own right that give rise to the respective legal relations, when determining the legal nature of these agreements, one should take into account the specifics of the agreement as a legal fact, which is formed under the influence of the relations that they mediate.

***Key words**: actual upbringing of children deprived of parental care; forms of family placement of children; family law agreement on social welfare; child patronage agreement; agreement in favor of a third party.*

In Ukraine, the problem of orphanhood is still one of the most acute social problems, and therefore the current state of life retains not only the need for the existence of practical forms of family placement of children deprived of parental care but also does not exclude the possibility of the introduction of other forms and revision of those that were considered sustainable.

Under article 20 of the Convention on the Rights of the Child, to which Ukraine is a party, a child who is temporarily or permanently deprived of his or her family environment or who, in his or her own best interests, cannot remain in such an environment, is entitled to special protection and assistance provided by the State. Participating States shall, in accordance with their national laws, ensure the substitution of parental care. Such care may include, inter alia, foster care, adoption or, where appropriate, placement in the appropriate childcare facilities.[1]

The Family Code of Ukraine[2] (hereinafter referred to as the Family Code), based on the diversity of legal forms of placement of orphans and children deprived of parental care, constantly simulates and introduces new and viable forms of care. If initially the placement of such children was regulated exclusively within the framework of tutelage and guardianship, adoption and patronage, today it is also possible in such legal forms as family and family-type children's home, as well as with the help of the already updated institute of patronage, which we will focus on in the following.

However, this does not mean that the list of legal forms of placement of

[1] Конвенція про права дитини прийнята Генеральною Асамблеєю ООН 20 листопада 1989 року, ратифікована Постановою Верховної Ради Української РСР № 789-ХП від 27.02.91. URL: http://zakon.rada.gov.ua/laws/show/995_021 (дата звернення 10.11.2018).

[2] Сімейний кодекс України: Закон України від 10 січня.2002 р № 2947-Ш. Відомості Верховної Ради України, 2002. № 21–22. Ст 135.

children deprived of parental care is exhaustive. An analysis of the provisions of articles 261, 269 and 271 of the Family Code, as well as the procedure for the implementation of activities related to the protection of the rights of the child by the guardianship and custody bodies (para. 31)[1], makes it possible to assert that they provide a legal mechanism for the placement of a child deprived of parental care, including a child separated from his or her family, in a foster care setting that differs from those already legalized at the level of the law. Such a mechanism is not explicitly referred to as a form of family upbringing, but is, in fact, a form of actual upbringing, which, like adoption, guardianship, and custody, is a form of family placement of a child.

Under article 261 of the Family Code, a person who has taken an orphan child or a child deprived of parental care into his or her own family (actual tutor) has the same rights and obligations with regard to his or her upbringing and protection as the rights and obligations of a guardian or custodian, sister, brother, stepmother, stepfather or other family members of the child. Given that guardianship and custody is one of the legal forms of placement of children deprived of parental care, actual upbringing can be classified as such.

It is necessary to agree with the scholars who believe that in the actual upbringing of children all parental competences are realized, except for the protection of parental rights, and therefore as a socially valuable phenomenon, it requires a certain legal regulation.[2]

Actual upbringing can be characterized as an acceptance by a person – the actual caregiver – of the voluntary duty of permanent upbringing and maintenance of a child who has lost parental care – a foster-child, which is not connected with the legal registration of adoption, guardianship or custodianship, patronage, the creation of a foster family or family-type children's home.

If a child loses his or her parents or one of them, it is possible that close relatives may keep the child in their care. This is typical of families in which the relationship between relatives is of close, intimate nature, although it is not excluded that such a relationship may arise between persons who are not in a relationship of kinship. In such cases, the question of who the child will live with if he or she is surrounded by the care and attention of people close to him or her may not arise, but the problem of the qualification of such a relationship arises anyway.

Taking into account the requirements of the legislation in force, a child deprived of parental care should be monitored by the guardianship and custody authorities. These bodies are obliged to inspect the living conditions of such a

[1] Порядок провадження органами опіки та піклування діяльності, пов'язаної із захистом прав дитини: затв. постановою Кабінету Міністрів України від 24 вересня 2008 р. № 866. URL: http://zakon.rada.gov.ua/laws/show/866–2008-%D0%BF#n136 (дата звернення 10.11.2018).

[2] Короткова Л. П. Правовой статус фактических воспитателей детей. Правоведение. 1983. № 3. С. 83–84;

child by comprehensively analyzing the relations between the child and the persons the child lives with, and to reflect not only the fact of loss of parental care, but also the result of the analysis of the inspection, with the obligatory indication of the persons replacing the parents in the primary records of such children. The analysis of the relations between the child and the persons in whose family he or she lives will enable the tutorship and guardianship authorities to decide on the advisability or, on the contrary, on the inadvisability of applying such a method of protection of the child's interests as adoption, tutorship or guardianship, transfer to a foster family or family-type children's home or patronage.

Actual upbringing as a legal form of placement of children deprived of parental care should be referred to as one of the forms of family placement of a child. This point of view is not undisputed, but it is supported both in the doctrine of family law and in the legislation in force. In the 1960s, some scholars, in particular, A. Y. Perhament, proposed to provide for the possibility of establishing the fact of adoption in court in order to recognize the right of the tutor to receive alimony from the foster-child, provided that the adoption was not formalized in a timely manner for valid reasons.[1] Thus, not singling out the actual upbringing as an independent form of family placement of children deprived of parental care, A. Y. Perhament compared the actual tutor to an adopter.

Indirect confirmation of the fact that the actual upbringing is a legal form of placement of children deprived of parental care is contained in the provisions of Art. 271 of the Family Code: if a person before reaching the age of majority (actual foster-child) lived with relatives or other persons (actual caregivers) of the same family for at least five years, it will be obliged to provide them with material assistance if they become incapable of work, and if the persons who by virtue of the law were obliged to do so in the first place, will not be able to provide them with material assistance for valid reasons. At the same time, such a duty comes if the former foster-child is able to provide material assistance to the former actual tutors.

However, in some cases, the relationship between a person deprived of parental care and a child living in his or her family may not always be brought under the legal form of actual upbringing. Thus, N. Dyachkova believes that when a child is adopted by one of the spouses, the second spouse, without expressing a desire to become his adoptive parent, however, by giving a written notarized consent to this adoption, (Part 1 of Article 220 of the Family Code), is recognized as the actual tutor of the child while maintaining the legal relationship of the child with his father (mother)[2]. In this case, it is considered that it is possible to speak only about separate competences of an actual tutor of the other

[1] Пергамент А. И. Опека и попечительство. Москва. Юрид. лит-ра, 1966. С. 108–109.

[2] Сімейний кодекс України: Науково-практичний коментар /За ред. І. В. Жилінкової. Харків: Ксілон, 2008. С. 221.

partner. Therefore, written notarized consent to the adoption of a child shall not give rise to those legal consequences that occur for the actual tutor, in whose family the child deprived of parental care lives and is brought up, and who voluntarily assumed the responsibility to replace him/her with such a child.

Returning to such legalized forms of family upbringing as patronage, foster family, family-type children's home, family upbringing is traditionally considered to be the most effective since it is characterized by continuity, longevity, perseverance and the possibility of providing an individual approach to such a child.[1] It should be noted that each these forms have its own peculiarities, but they are united by the fact that an element of the actual composition of their emergence is a corresponding agreement: on patronage, on the placement of children in a foster family for upbringing and general living, and on the organization of the activities of a family-type children's home. These agreements are not separate legal facts that give rise to the respective legal relations.

In modern conditions, an agreement as an initial civilistic category has acquired the features of a universal legal form, through which various social relations are regulated. This also applies fully to family relations, since the Family Code has established general provisions for their contractual regulation. As a general rule, family relations can be regulated by agreement between the participants of these relations themselves (Article 2 of the Family Code) provided that it does not contradict the requirements of the Family Code, other laws and moral foundations of society (Part 2, Article 7; Part 1, Article 9). Thus, the contract acquires the features of a family relations regulator.

At the same time, the consolidation of the dispositive method of regulation of family relations, as well as the possibility, subject to certain conditions, of application of the Civil Code of Ukraine for their regulation (hereinafter referred to as the CCU), revived not only the discussion of the legal nature of the family legal agreements, but also renewed the interest in the problem, which has a long history, namely, the problem of the place of family law in the system of law, which, as before, is of a controversial nature.

Without delving into the discussion of the position of family law in the system of law and the legal nature of the contract in the family sphere[2], we believe that in determining the legal nature of

[1] Татаринцева Е. А. Реформирование системы институциональной заботы о детях, оставшихся без попечения родителей в России, Англии и Японии. Проблеми цивільного права та процесу: матеріали наук.-практ. конф., присвяч. пам'яті профес. О. А. Пушкіна (Харків, 22 травн. 2010 р.). Харків: ХНУВС, 2010. С..32–35.

[2] Див. про це: Борисова В. І. Договір у сімейно-правовій сфері. Актуальні проблеми приватного права: договір як правова форма регулювання приватних відносин: матер. наук-практ. конф. Харків: Право, 2017. С.12–16; Боднар Т. В. Роль договору в регулюванні сімейних відносин. Сімейне право України: підручник /за заг. ред. Т. В. Боднар та О. В. Дзери. К Юрінком Інтер, 2016. С.45–50. Розгон О. В. Договори у сімейному праві України: монографія. Київ: Ін Юре. 2018. 301 с.

these contracts it is necessary to take into account the specifics of the contract as a legal fact, which is formed under the influence of the relations that are governed by it. Therefore, let's try to characterize the legal nature of the patronage agreement, which, along with the agreements on the placement of children in foster families and on the organization of the activities of the family-type children's home, is included in the group of agreements on social assistance to children in difficult circumstances due to orphanhood, homelessness, conflicts, cruel treatment in the family, etc.

It should be noted that such a form of family placement as the patronage of a child has recently been significantly updated. Currently, patronage of children is temporary care, upbringing and rehabilitation of a child in the family of a patronage tutor for the period when the child, his parents or other legal representatives face difficult life circumstances (part 1 of Article 252 of the Family Code). The term "child in difficult circumstances" in the current legislation (in particular, the Law of Ukraine "On Protection of Childhood"[1], as well as the Procedure for cooperation between public authorities, local governments and institutions in providing social protection for children in difficult circumstances, including those that may threaten their lives and health)[2], is understood as a child who is in conditions that adversely affect his or her life, health and development in connection with disability, serious illness, homelessness, being in conflict with the law, involvement in the worst forms of child labor, dependence on psychotropic substances and other types of dependence, cruel treatment, in particular domestic violence, and evasion by parents or persons in loco parentis from fulfilling their obligations, if such a fact has been established on the basis of an assessment of the needs of the child.

According to the legislation in force, which is not only the provisions of Chapter 20 of the Family Code, but also the provisions of the Law of Ukraine "On Social Services"[3], as well as the provisions of other legal acts, in particular, the Procedure for the creation and operation of the patronage caregiver's family, the placement and stay of the child in the family of the patronage caregiver[4], the Model Agreement on the patronage of

[1] Про охорону дитинства: Закон України від 26.04.2001 р. №2402-ІІІ Відомості Верховної Ради України. 2001, №30. Ст. 142.

[2] Порядок взаємодії органів державної влади, органів місцевого самоврядування, закладів та установ під час забезпечення соціального захисту дітей, які перебувають у складних життєвих обставинах, у тому числі таких, що можуть загрожувати їх життю та здоров'ю, затв. Постановою Кабінету Міністрів України від 3 жовтня 2018 р. №800. URL: http://zakon.rada.gov.ua/laws/show/800–2018-%D0%BF#n9 (дата звернення 10.11.2018 р.)

[3] Про соціальні послуги: Закон України від 19.06.2003 р. №966-!У. Відомості Верховної Ради України. 2003, №45. Ст.358.

[4] Порядок створення та діяльності сім'ї патронатного вихователя, влаштування, перебування дитини в сім'ї патронатного вихователя, затв. Постановою Кабінету Міністрів України від 16 березня 2017 р. №148 URL: http://zakon.rada.gov.ua/laws/show/148–2017-%D0%BF (дата звернення 10.11 2018 р.)

the child (hereinafter referred to as the Model Agreement[1]; the Procedure for payment for the services of the patronage caregiver and the payment of social assistance for the maintenance of the child in the family of the patronage caregiver)[2], as noted above, patronage is based on the actual composition, which includes: (a) recognition of a child under difficult circumstances; (b) a patronage contract; and (c) transfer of the child to the patronage provider's family.

The specific features of this form of placement of a child include the following: a) the patronage is not considered to be the basis for the creation of a family and therefore does not constitute an obstacle for the adoption of the child; b) the basis for the emergence of relations between the child and the patronage provider is the agreement between the child and the body that made the decision on the placement of the child, which is to be concluded in writing; c) this form does not entail any parental rights; d) the placement of the child requires the child's consent if he or she has reached such an age and level of development. However, the child, regardless of his or her age, does not participate in the conclusion of the contract. His or her consent is not an element of the actual composition of the emergence of a patronage, since in certain cases the placement of a child under patronage is carried out without his or her consent, in particular when he or she has not reached the age at which he or she may express his or her wish; e) the placement of the child is carried out with the written consent of the parents or other legal representatives, and if the mother or father of the child is a juvenile, in addition to their consent, the consent of their parents is required. At the same time, without the consent of the parents or other legal representatives, the placement of a child is carried out in the event of the child's separation from them or in the absence of information about their place of residence, as well as in the event of a direct threat to the child's life or health; (f) closer ties are formed between the child and the patronage tutor than between the child and the tutor or guardian; (g) however, no alimony obligation arises between the patronage provider and the child, as parents are not exempt from the obligation to support such a child; (h) the child shall retain the right to alimony, pension, other social payments and compensation for the loss of the breadwinner, which he or she had before joining the family, for the duration of her or his foster caregiver's stay in the family; i) the child has the right to maintain personal contacts with parents and other relatives; j) the period of stay of the child in the family of patronage caregiver may not exceed six months; k) patronage provider is paid for his parenting.

[1] Типовий договір про патронат над дитиною, затв. Постановою Кабінету Міністрів України від 16 березня 2017 р. № 148. URL: http://zakon.rada.gov.ua/laws/show/148–2017-%D0%BF {дата звернення 10/11 2018 р.)

[2] Порядок оплати послуг патронатного вихователя та виплати соціальної допомоги на утримання дитини в сім'ї патронатного вихователя, затв. Постановою Кабінету Міністрів України від 16 березня 2017 р. № 148. URL http://zakon.rada.gov.ua/laws/show/148–2017-%D0%BF дата звернення 10.11. 2018 р.)

It should be noted that prior to the introduction of amendments to Chapter 20 of the Family Code, the legislation did not regulate the question of whether a child with siblings who were raised together could be placed under patronage. In this regard, the researchers noted that, although forms such as adoption and patronage are different, they share the same goal – raising a child. That is why, based on the analogy of the law, namely the provisions of Art. 210 of the Family Code, underage brothers and sisters can not be separated when they are transferred under patronage. And only in the presence of substantial circumstances (for example, the impossibility of their joint residence and upbringing for health reasons), the tutorship and guardianship authority concludes a contract and transfers under the patronage of one of the brothers (sisters)[1]. This problem has now been solved since according to part 5 of article 252 of the Family Code, only children who are siblings or who have been brought up in the same family can be placed with the family of a patronage tutor at the same time.

The content of a patronage contract consists of the obligations and rights of the parties to the contract, which are set out in the Model Agreement and are aimed at improving the living conditions of a child who finds himself in difficult life circumstances, although the contract may be supplemented by other obligations by consensus.

Thus, patronage caregivers are obliged to: ensure the provision of care, upbringing and rehabilitation services for children; provide care for their moral and physical condition; bear responsibility for their life and health; create appropriate conditions for the child's living, education and physical and spiritual development in accordance with his or her age, needs and individual characteristics; represent, within the limits of their authority, the interests of a child in the relevant institutions and organizations; use, in full and as intended, all social assistance for the maintenance of a child in their family in order to ensure the child's full nutrition, maintenance, upbringing, education and development in accordance with their needs; ensure the child's access to social, educational and medical services; to organize medical examinations; and, if necessary, to provide emergency medical assistance; immediately inform parents or legal representatives (if the child is placed with their consent), the children's affairs office of any changes in the child's health status, the child's abandonment of the patronage caregiver's family and other important facts that may adversely affect the child's needs; interact with the staff of the children's affairs office, social welfare institution, and implement the activities provided for in the child's individual social protection plan; cooperate with parents/legal representatives in order to overcome difficult life circumstances within the limits and in the manner determined by the guardianship and custody authority; facilitate, in coordination with the child welfare service, the meeting (contact) of the child with the parents/legal represen-

[1] Сімейне право: підручник /за заг. ред. В. І. Борисової та І. В. Жилінкової Харків.: Право.,2012. С.271.

tatives, relatives, to ensure the contact of the orphan child and the child deprived of parental care with potential guardians (custodians), adoptive parents, step-parents and parent-educators; keep a monitoring log of the child and, after his or her removal from the family, hand it over to the children's affairs service; coordinate with that service the travel of the patronage tutor's family, accompanied by the child, outside the community for more than two days; respect the confidentiality of information about the child and his or her family; at the time of the removal of the child from the patronage family, ensure that he or she undergoes a medical examination and receives an appropriate health certificate; cooperate with the parents / legal representatives to whom he or she has returned after the departure of the child from the foster care provider's family within seven calendar days, to provide advice on child care, upbringing and rehabilitation.

The patronage caregiver has the right: to receive information about the health, mental and physical development of the child placed in the family; in case of placement of the child, to use methods of communication that have a positive impact on the emotional state of the child in accordance with the recommendations of the parents/legal representatives (in case of placement of the child with their consent) and specialists involved in the patronage of the child; to obtain consultations from teachers and psychologists of the educational establishment attended by the child, specialists of health care and social protection institutions for children and families with children, other institutions and establishments providing social services to children and families with children, consultations on issues related to the upbringing and development of the child, specifics of the child's care and the daily routine; to address the relevant bodies, institutions and organizations to ensure the observance of the rights of the child, satisfaction of his/her needs, and the functioning of the patronage caregiver's family; to initiate the consideration by an interdisciplinary team of issues related to the protection of the rights and interests of the child and his/her family.

Under a patronage agreement, not only the patronage provider but also the relevant body (the district administration, the executive body of the city or district in the city (in case of its creation)) has obligations and rights. Such body is obliged to 1) ensure, with the participation of relevant structural subdivisions and institutions of health care, social protection of residents and families with children and educational institutions the provision of: educational services in accordance with the age of the child, his/her development and special needs; initial medical examination of the child and provision of medical assistance; provision of social services to the child and his or her family or legal representatives in accordance with their needs; and resolution of issues related to the child's social protection and personal, property and housing rights; cooperation of corresponding structural divisions for development and performance of the individual plan of social protection of the child; social support of the family of the child for the purpose of overcom-

ing of difficult life circumstances which have led to its arrangement in a family; monitoring the child's maintenance and upbringing, ensuring his/her rights; timely decision-making on the child's return to his/her parents/legal representatives, placement in other family forms of upbringing; 2) carry out through the respective structural subdivisions the payments for patronage services and social assistance for the maintenance of the child; 3) to co-ordinate, through the participation of the Children's Affairs Service, the activities of the relevant structural units, institutions, and organizations related to the protection of the rights of the child; 4) determine the modality of cooperation between the patronage caregiver and parents/legal representatives, as well as the conditions of such cooperation.

As far as rights are concerned, these bodies have the right to make decisions, within the limits of their powers, in the best interests of the child.

It should be noted that if a child's patronage agreement was concluded with the consent of the parents/legal representatives, they also acquire certain rights and obligations under such an agreement. Thus, they undertake: to provide the patronage caregiver with information about the needs, specifics of child care, nutrition and daily routine and other important information that should be taken into account when exercising patronage; to provide the child with clothing, shoes and personal belongings and to hand over the child's available medical documents (medical records, conclusions and recommendations of specialists); to maintain contact with the child in a way that takes into account the best interests of the child, to follow the recommendations of the children's affairs office on contact with the child during his or her stay in the family of the patronage caregiver; to inform the children's affairs office of the circumstances that led to the placement of the child in the family of the patronage caregiver, and other important circumstances about him or her and the family; to cooperate with the patronage caregiver, the staff of a social institution, and the children's affairs service on issues related to the protection of the rights and interests of the child and the overcoming of difficult life circumstances; and not to hinder the patronage caregiver in the performance of his or her duties and the realization of the rights set forth in the agreement.

Parents/legal representatives have the right: to receive information about the child during his/her stay in the family of the patronage caregiver; to take part in solving the issues of education, medical examination, treatment, recovery and rest of the child; to initiate the issue of termination of the child's stay in the family of the patronage caregiver or extension of the term of stay.

Disputes between the parties on the implementation of this agreement are resolved through negotiations, and in the event of failure of the parties to reach an accord, these disputes are resolved in court.

Such an agreement is terminated: if a tutorship and guardianship authority or a court decides that the patronage caregiver has failed to perform his or her duties or has improperly performed his

or her duties, in a situation of the emergence of conditions or circumstances unfavorable to the child's upbringing and care, as set out in article 212 of the Family Code; if the guardianship and custody body decides to return the child to his/her parents/legal representatives, to adopt him/her, to establish guardianship, trusteeship, custody, placement in a family of citizens (foster family or family-type children's home) or in an institution for children, health care, educational or other institutions; if the child reaches the age of majority or dies, or if the patronage caregiver dies, or by the termination of the agreement.

The above suggests that a child's patronage agreement is a form of family law social assistance agreement for children in difficult circumstances that they are unable to overcome on their own. The purpose of this agreement is to overcome the difficult circumstances through social assistance to the child, the parents / legal representatives, if they have consented to patronage, in which they have found themselves.

The following should be included in the specifics of a child's patronage agreement: 1) the special subjective composition and limitations of the freedom of contract are associated, first of all, with the deep ingress of public principles into family law; 2) the contract is not an independent legal fact generating, changing or terminating family legal relations, but it is one of the elements of the actual composition of patronage as a form of family upbringing of a child in difficult life circumstances; 3) the contract is concluded in favor of a third party, namely a child who finds herself in difficult life circumstances; 4) the contract is of a personal nature; 5) in addition to the preventive function (overcoming difficult life circumstances in which the child or the parents/legal representatives found themselves), the contract performs an equally important regulatory function, as the existing family legal relations are being transformed for the term of its validity: a) if the parents/legal representatives have given their consent to the patronage (this is a multilateral agreement), this agreement redistributes the non-proprietary obligations of the parents between them and the patronage provider, which corresponds to part 5 of Article 150 of the Family Code: the placement of a child in foster care does not exempt the parents from guardianship. The parents are obliged to support the child, but they are deprived of the right to a personal upbringing of the child; 2) if the parents/legal representatives have not given their consent to the patronage (in the case of a bilateral agreement), the patronage provider supposedly substitutes the parents for the duration of the patronage.

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I. Spasibo-Fateeva, Doctor of law, Professor
of Civil law department of Yaroslaw Mudryi
National Law University, Kharkiv

LEGAL REGIME OF PROPERTY OF UKRAINIAN LEGAL ENTITIES

Abstract. *This article examines existing legal regime of property of legal entities under Ukrainian legislation. Various titles to property are analysed by the author: ownership, right of economic and operational management, right to use and other real rights and rights of obligation (rights in personam). Most of existing titles are controversial both from theoretical and practical standpoint. From theoretical standpoint, it is rather hard to distinguish them one from another and to point out their peculiarities. This is especially true about rights of economic and operational management which were designed in Soviet period for the purposes of Soviet economy, but somehow remained in modern Ukrainian legislation. As existing case law shows, this leads to numerous legal disputes in practice which reveal, in particular, the problems of liability of a legal entity and its property independence. The most notorious among these disputes are analysed in the paper, e.g. the dispute between Ukrainian state and Ukrainian trade unions on property transferred to them by the former USSR, the dispute between certain Ukrainian companies and Russian Federation on property expropriated in Crimea. Based on the analysis the author suggests certain ways of solution of existing problems. First, the author insists on recognizing legal entities as property owners. Second, the author proves that public companies need more detailed regulation and are to be provided a clear legal status. It is preferable to stipulate these issues in the Civil Code of Ukraine thus providing comprehensive regulation on all types of legal entities.*

Key words: *legal entities, property, ownership right, other real right, right of economic management, public companies, liability, seizure.*

Introduction

The legal bases for legal entity property ownership are essential both theoretically and practically, because they determine the possibilities the legal entity has in relation to its property. These are important for economic transactions and for identifying the liability to creditors.

The difficulty is that in Ukraine legal entities may be owners and non-owners. Their property rights were stipulated in

the Soviet law and they have survived till today, despite considerable reforms of the civil law. These are the rights of economic and operational management. The controversial nature of these property rights is especially visible in private enterprises that are not referred by law to business companies, but judicial precedents have recognized them as such.

There are a number of problems regulating the rights of a legal entity (usually a corporation) to the property, transferred by a member of the entity as a contribution to the share capital, though not to ownership but to possession (use). Therewith, it is hard to identify the value of the contribution and, respectively, member's share in the corporate share capital. It is also unclear, whether the state registration of the legal entity's rights to this property is required, provided it is real estate.

A separate group of problems is determined by the fact that in the Soviet times property was frequently transferred by the state to non-state-owned legal entities (for example, Trade Unions) without specifying their legal title. At that time it was generally accepted to be limited to the term "property transfer", due to which in the modern legal situation there arise legal disputes regarding the rights to this property.

It is also important to identify public corporations' property legal regime, which would facilitate the solution of the issue whether the state may be held liable for corporate debts as a founder.

1. Models of legal entities' property rights in Ukraine

1.1. General remarks

One of the prerequisites for the participation of legal entities in property relations is the very existence of their property. For that matter, it is important to determine the legal bases for their property possession.

As a rule, it is the *ownership right*: when establishing a legal entity, founders normally transfer their property to the legal entity under the ownership right, and during its activity after the registration the legal entity purchases property on the contractual basis or creates it (e.g. it manufactures products).

Ukrainian legislation also provides that the founder or founders may transfer their property to the legal entity for *use* only. In this case, it is important to identify its legal title of using the property, which is related with serious difficulties. Firstly, it may not be analogous to contractual use of the property (rent or use without any consideration), since the relations between the founders and the legal entity are fundamentally different from contract ones – these are corporate relations. Secondly, if a legal entity has a sole founder who transferred his/her property to the legal entity's use, there emerges an issue of whether the property, purchased by the entity on other grounds, may be considered the entity's ownership. Thirdly, Ukrainian laws still include some atavisms of the Soviet law represented by economic and operational management – these were the rights under which property belonged to state-owned enterprises[1] in the USSR. Despite

[1] The term 'state-owned enterprise' is unknown to the European legislation. However, it is familiar for Soviet legislation and legislation of some post-soviet countries, particularly, for Ukrainian legislation. This term identifies commercial legal entities founded by the state.

the reforms, these rights have been preserved, and they may apply not only to state-owned enterprises and foundations[1], but also to private companies.

Thus, in Ukraine there are legal entity that are owners and non-owners, which entails certain specifics in the civil transactions with their property and the property liability of their members.

1.2. Property ownership rights of legal entities

The ownership right provides the owner with maximum opportunities to dispose their property and effect various transactions and other legal acts (para. 1 of Art. 316 and paras. 1 and 2 of Art. 319 of the Civil Code of Ukraine). Hence, it is primarily important to identify the person who determines the legal entity's will and, thus, whether there are any restrictions for those legal entities that are owners of the property contributed to their capital in terms of the rights to their property.

If the legal entity is the owner of its property, its will is formed and expressed in a specific way depending on the type of the legal entity. Provided it is a corporation, then, consequently, its will is formed and expressed depending on the model of corporate governance. It is exactly for the sake of formation of the corporation's will that its shareholders seek to concentrate in their hands the respective stock of shares, which enables them, directly or indirectly, to influence profit distribution, the corporation's property formation and disposal. Therefore, it is more important to know who the beneficiary is rather than whether the legal entity is the owner.

However, the concept of the beneficiary is not defined in detail in the Ukrainian company law (in the respective Civil Code articles, Law on Joint-Stock Companies and on Limited and Additional Liability Companies), but is given in the Law On preventing and counteracting to legalization (laundering) of the proceeds of crime, terrorist financing, and financing proliferation of weapons of mass destruction. It is the definition from this Law that is used in other laws, e.g. On State Registration of Legal Entities, Individual Entrepreneurs and Public Organizations etc. It was suggested that the data on beneficiaries should be published on the Unified State portal of public data, which was announced by the Prime Minister and the Minister of Justice of Ukraine in 2017[2]. However, this portal does not currently include these data.

The aforesaid shows that in Ukraine the issue of the beneficiary is more relevant for criminal than for civil law, which does not contain regulations of the correlation of the owner and beneficiary powers.

Restrictions of rights of legal entities that are owners of the contributed property to the free disposal of their property may be represented by the prohibition for some types of legal entities to distribute commercial proceeds among their members (shareholders). This mainly

[1] The term 'state-owned' foundation' also is frequently used in some post-soviet countries, particularly, in Ukraine, and identifies foundations created by the state.

[2] According to the Prime Minister's announ cement, the data was to be disclosed and placed on the web-site https://data.gov.ua

applies to non-for-profit organizations (according to the Ukrainian law, non-entrepreneurial corporations[1]). However, the prohibition also refers to some entrepreneurial corporations. For example, in case a stock exchange is established as a joint-stock company (hereinafter – JSC), its shareholders are not paid dividends (part 1 Art.21 of the Law on Securities and Stock Market), though the very legal nature of JSC implies the distribution of profits as dividends paid to the shareholders.

1.3. Other property rights of legal entities

There are several models of a legal entity's rights to the property that it does not own[2].

1.3.1. Sometimes this right is considered a *right of claim* (a right of obligation*, in personam* right), since under Ukrainian legislation the property may be transferred by a member to the legal entity to use, and, hence it is to be subsequently returned to the member. In this case, the challenge is to determine the value of the contribution and, accordingly, the value of the shareholder's share in the share capital. Since a shareholder's contribution is not the property but the right to use it, then it is to be evaluated. Nonetheless, the Ukrainian law does not provide any outline thereto. In practice, the evaluation of this contribution involves the value of the property transferred by the shareholder to the corporate use to determine the remuneration for the use thereof, the period of use and the other parameters.

Since the use of the shareholder's property will not be remunerated to the shareholder, it will be regarded as this shareholder's contribution and will accordingly determine the shareholder's share in the share capital.

In these cases, the legal regime of this property is rather ambiguous: it is transferred to the corporation for gratuitous use, although the amount of money which is not received by the shareholder from the corporation for such use forms another kind of the shareholder's property– his or her share in the share capital. Hence, this shareholder both retains the ownership of the property transferred to the company and acquires share in the share capital, which provides this person with the right to claim for returning this property within the time and on the terms stipulated by the respective property transfer agreement. Apart from that, this property cannot be seized for the corporate debts as it is not in its ownership, but is its shareholder's ownership.

1.3.2. In Ukraine there are also legal entities – non-owners that have *real rights* (rights *in rem)* to their property either transferred to them by the founders, when establishing these legal entities, or purchased by the entities on dif-

[1] According to the Civil Code of Ukraine (article 83, para2) all the corporations are divided into entrepreneurial and non-entrepreneurial ones. These terms are analogous to 'commercial' and 'non-commercial' corporations, or 'for-profit' and 'non-for-profit' corporations which are common for European law.

[2] In this article legal entities which do not have ownership rights to the property contributed by their founders (shareholders) are called 'non-owners'. These legal entities may hold property transferred to them by their founders (shareholders) on various grounds, except for ownership right.

ferent grounds in the course of their operations. The owner of the property is the legal entity's founder. This model was typical for public (state-owned) enterprises and foundations under the Soviet law. It was based on the concept of a single and indivisible right of state ownership (Venediktov, 1948), which did not allow for its fragmentation among state-owned enterprises and foundations which were entitled to *operational management* (Tolstoy, 1986). That was also impossible due to the Soviet law rejection of split ownership and unacceptability of trust ownership.

Despite the fundamental change in the economic relations in the country that gained independence in 1991 and the corresponding legislative reforms, instead of renouncing the "dioecious" state ownership, this model evolved even further. There emerged another clone of the ownership right– the *right of economic management*. Nowadays it is regarded as a basis on which property is assigned to state-owned enterprises (Kryazhevskikh, 2004), while the operational management right is assigned to state foundations only.

Though it may seem strange, the generation of non-owner companies in Ukraine did not terminate there. The matrix of Soviet law continued sculpting them. With the adoption of the Commercial Code of Ukraine in 2003, the legal community faced a very wide variety of types of legal entities and their rights to property. This Code provided for the existence of private non-owner companies possessing property under the right of economic management or operational management, e.g. legal entities, founded by public organizations and consumer cooperatives. A rather complicated situation is with the property rights of the so-called private enterprises[1], which will be discussed below.

All these testify to the fact that there has been a rather controversial situation regarding regulation of legal entities' rights to property in the Ukrainian law (Spasibo-Fateeva, 2007 and 2014). Preserving the rights developed by the Soviet science and adapted only to the economic and legal realia of the complete dominance of state property, the Ukrainian law-makers further expanded the horizons of quasi-ownership rights (operational and economic management). Therewith, there have been no attempts taken to perform fundamental reforms of the property rights of legal entities. In addition, the law-makers did not use the trust as a special type of ownership introduced in the Civil Code of Ukraine (part 2 Art. 316), which could in fact replace retro-Soviet law, though it was criticized by academics and practitioners (Maidanyk, 2014). Thus, the trust property did not supplant the Soviet models of real rights, but actually remained nondemanded in the Ukrainian realities in respect of the legal entity property right.

1.3.3. A possible variation is the complex model of a legal entity's property rights where it is the owner of a part of

[1] Private enterprise is a special form of corporation provided for by the Commercial Code of Ukraine, which resembles limited liability company in many respects. The essence of this form will be further described in more detailed way.

the property and not the owner of the other part of it. This applies to gas supply and gasification companies (Naftogaz, in particular), which, being owners of some of their property, hold some state property under the right of economic management, which is the property constituting the Unified Gas Transportation System of Ukraine ('On Principles of Natural Gas Market Functioning', 2010; Decree of the Cabinet of Ministers of Ukraine No. 770 of 20 August 2012).

A model represented by the mixture of both real rights *(in rem)* and obligation rights *(in personam)* is also possible. For example, in case of leasing a state-owned uniform property complex (UPC), the leasing company, not being its owner, gains all the income from its operations (Art. 23 of the Law of Ukraine On Leasing State and Municipal Property) and is also the owner of all other property besides the one it leased.

1.3.4. Finally, it is also important to note that there are cases where the rights under which a legal entity possesses its property are *uncertain and vague*. This uncertainty arose due to the use in the Soviet legislation of the term *transfer* of state property to non-state legal entities without determining legal implications for such transfer, i.e. the right under which they own the property in question. At times the law indicated that the state property is transferred to management, and sometimes that it is transferred to *gratuitous exclusive possession* (Resolution No. 66 of 12.12.1921; Resolution On Labour centres 05.04.1922)

A fine example of the above mentioned is the transfer of property by the state to trade union organizations as far back as the early 20th century, by which the state transferred numerous properties (premises, holiday houses and other facilities). Neither the 1922, nor 1964 Civil Code of the Ukrainian SSR provided for the clear legal mechanism of the state alienation of its property to non-state organizations[1] (collective farms, cooperatives and NGOs). This approach of the Ukrainian legislator of the time revealed its intention to avoid turnover of real estate.

For quite a long time the state did not manifest itself as the owner of the property previously transferred to the trade unions, but in 1992 and 1994 two resolutions ("On Property Complexes and Financial Resources of Public Organizations of the Former USSR Located in Ukraine" and "On Property of All-Union Public Organizations of the Former USSR"), and in 2007, the Law On Moratorium on Alienation of Property Owned by the Trade Union Federation of Ukraine wer adopted by the Verkhovna Rada of Ukraine. These legal acts were aimed at reserving the state ownership of the property transferred by the state to the trade unions more than 70 years before: first, by temporarily recognizing the state ownership rights and subsequently by finally vesting the Ukrainian state with the free disposal right, including privatization.

[1] In Soviet law all the legal entities which were not created by the state were called 'non-state organizations'. They were represented by some types of non-commercial corporations only, as trade unions and non-governmental organizations.

That entailed numerous legal disputes, including those relating to the property that had already been alienated by the unions – contributed to the share capital of private companies established by trade unions and further sold by these companies to third parties. The state claimed for returning its property from the illegal possession by third persons. Therewith, case law showed different approaches to resolving these disputes. From the late 1990s till the mid-2000s the state vindicatory actions were dismissed. However, since 2007, these suits have been satisfied by courts on the grounds that the state did not transfer its property to trade unions granting them ownership right in such property[1]. Nevertheless, courts did not answer the question under which right trade unions possessed and used the property transferred to them by the state for such a long time. It appeared that being owners of some property, trade unions also had had other property on other grounds (suppose, real rights, similar to operational management of state-owned enterprises) and that was obviously nonsense (Spasibo-Fateeva, 2007, 2019)

This is not the only example that demonstrates the challenges arising from the use of the term "transfer of property" without indicating under what right it is transferred. A similar situation was observed with the social, cultural, and welfare facilities (premises used by state-owned enterprises as canteens, clubs, kindergartens, children's recreation camps etc.), which were *"transferred"* gratuitously during privatization provided that the rest of the state property was privatized by the workers (para. 2 of Art. 24 of the 1992 Law of Ukraine On Privatization of Property of State Enterprises). However, after some time (already in 1997 and 1999) the state passed regulations aimed at securing the ownership of this property (Resolution of 15 July 1997 No. 757; Order of 19 May 1999 No. 908/68).

2. Certain issues of regulation of legal entities' property rights under Ukrainian law

While for the Civil Code of Ukraine it is essential for all legal entities to be owners, the opposite approach is observed in the Commercial Code of Ukraine where Art. 133 provides for three types of legal entities' property rights: 1) ownership; 2) other real rights provided for by the Commercial Code of Ukraine (these include economic management and operational management) and the Civil Code of Ukraine (the right of possession and use, which should be understood as servitude, emphyteusis, and superficies); 3) other rights under the

[1] See, for example: Resolution of the Supreme Court of Ukraine dated 22.11.2007 in case 3-416k07, retrieved from: http://reyestr.court.gov.ua/Review/1291052; Resolution of the Supreme Court dated 13.03.2018 in case 5002–22/3237–2011, retrieved from: http://reyestr.court.gov.ua/Review/72863325; Resolution of the Supreme Court dated 10.05.2018 in case 17/5007/98/11, retrieved from: http://reyestr.court.gov.ua/Review/74025136; Resolution of the Supreme Court of Ukraine dated 04.11.2014 in case№ 3-166гс14, retrieved from: http://reyestr.court.gov.ua/Review/41479727; Resolution of the Supreme Economic Court of Ukraine dated 26.11.2014 in case 47/296, retrieved from: http://reyestr.court.gov.ua/Review/41578545

contract with the property owner. Thus, according to the Commercial Code of Ukraine legal entities may not be considered owners of their property which will be owned by them under rights of obligation (contractual rights) or real rights different from the ownership right.

Although the current legislation attempts to make a certain distinction between the above two types of property rights under which legal entities may possess their property without having ownership right to it (i.e. real rights and rights of claim), in some cases these types mixed with each other. That was the way in which *hybrid* rights having both real and obligation (contractual) nature appeared. Despite the fact that economic management is positioned as a real right (in rem) (Sherbyna, 2018), in practice, economic management contracts came into use, and in 2013, even a standard economic management contract for the parts of the unified gas transmission system of Ukraine (between the owners and gas transmission or gas distribution entities) was developed. It was approved by the Resolution of the National Energy and Utilities Regulatory Commission (NEURC) No. 226 of 7 March 2013, and registered in the Ministry of Justice of Ukraine on 27 March 2013 under No. 494/23026.

It should be noted that this symbiosis of real and obligation rights is fundamentally different from the regulation of such real rights as servitude, emphyteusis, and superficies (Articles 402, 407 and 413 of the Civil Code of Ukraine), which may also stem from a contract. Apparently, legal entities' rights to the property they do not own, but which is in their economic or operational management, significantly depend on the property owner.

2.1. The aspects which demonstrate full dependence of holders of economic and operational management rights on the owner of the property.

i) If there is an economic management contract, then it must be properly executed by the legal entity being the holder of the right of economic management in the first place. Therefore, the owner of the property is entitled to observe the compliance of such legal entity's actions with the contract, and consequently – the exercise of property rights by the entity. Moreover, this observation is continuous.

ii) The property owner establishes the scope of the user's (the legal entity's) rights, and not only in the law and by-laws, but also in its charter.

iii) The owner exercises its powers in respect of the property transferred to the legal entity by managing the entity through the appointment of its manager and entering into a contract with him (her).

Therefore, through these legal mechanisms, the owner retains full control over its property during the entire period of such property being in the legal entity's possession. All of this is not possible in the case of other real rights in the property (rights in the property of others, *jura in re aliena*) as provided for by the Civil Code of Ukraine (right of possession, servitude, emphyteusis, superficies),[1] where

[1] The Civil Code of Ukraine provides for four types of real rights in the property of others: the right of possession, servitude, emphyteusis,

the total control over the person to whom the property was transferred by the owner for use is excluded.

2.2. In addition to the above, it is reasonable to note other differences between the real rights (particularly, real rights in the property of others, or *jura in re aliena)* regulated by the Civil Code and the Commercial Code of Ukraine which are determined by the nature of these rights.

i) One can agree with the *absoluteness* of the rights of economic and operational management. However, the absoluteness extends only to relations between the holders of these rights and all the other persons, but doesn't extend to the relations between the entity and the property owner that transferred that property to it. The civil relations between the property owner and the holders of economic management and operational management rights are relative.

Different are the real rights in the property of others provided for by the Civil Code of Ukraine (servitude, emphyteusis and superficies). Their absolute nature has no exceptions. The holder of these rights is opposed by an unlimited number of obliged persons who only have to refrain from actions that impede the exercise of these rights. That is, their obligation, including that of the property owner, is passive in nature. This is not thwarted by the fact that certain real rights in the property of others are established by contract.

ii) *Independence* from the right of ownership is seen in the fact that the real rights in the property of others are exercised independently, irrespective of the exercise by the owner of its right. That is, the owner possesses uses and disposes of its property at their own discretion, taking into account, however, the existence of certain burdens that limit their capabilities, which are the rights in the property of others.

The holders of the rights in the property of others (servitude, emphyteusis and superficies) also exercise their rights at their discretion. However, the scope of their powers is narrower than that of the owner whose right to the property is burdened with their rights.

The holders of the rights of economic management or operational management are far from being always able to exercise their rights independently. On the contrary, they often require the consent of the owner or have to comply with the respective legal mechanisms established by the owner.

iii) The *resale right* is an inherent characteristic of real rights and one of the manifestations of their absolute nature, which fundamentally distinguishes them from the rights of obligation (contractual rights). The essence of it lies in the fact that the transfer of ownership of the property to another person does not lead to the termination of the *jura in re aliena* in this property.

This is not typical for the rights of economic and operational management which are not transferred to other persons in the event of a change of the owner.

superficies. Although the right of possession is frequently determined as a separated real right in the European legislation, the Ukrainian legislation recognizes it as the one.

As a rule, in case of privatization of the property assigned to a state enterprise, the state ceases to be the owner of such property, but at the same time, the right of economic management terminates. It is transformed into the private property right. Consequently, in such a scheme of change of ownership, two real rights are subject to termination at a time – the state's ownership right and the right of economic management. By the way, it is not perfectly clear in this case which right is succeeded to by the private owner who privatized the state property.

iv) The *transferability* of the rights in the property of others characterizes them as objects that can be alienated. This applies to emphyteusis (para. 2 of Art. 407 of the Civil Code of Ukraine, except for the cases contemplated by para. 3 of that Article) and superficies (Art. 413 of the Civil Code of Ukraine). However, the Civil Code of Ukraine does not provide for transferability of the right of possession and the servitude is not subject to alienation (para. 4 of Art. 403 of the Civil Code of Ukraine). That means that two out of four rights in the property of others stipulated in the Civil Code of Ukraine are *non*-transferable.

The rights of economic and operational management are also non-transferable. These rights may not be sold, whereas alienation is allowed for the property being in economic or operational management. Here is a definite similarity of these rights and the ownership, where the right cannot be alienated itself.

v) It is important to also compare *in whose interest* real rights are established. Whereas the rights in the property of others are established for the benefit of the person who becomes their holder, the rights of economic and operational management are established for the benefit of the property owner. The state assigns property to state-owned entities to make profits from their operations.

It is important to mention the difference in the way the issues related to competing interests of the owner and the holder of the rights in the property of others are addressed. Therewith, while the emphyteuta and the superficiary have priority compared to owner, the economic management or operational management rights holders, vice versa, cede to the owner.

The aforesaid testifies to the fundamental differences between the rights of the property of others and those of economic and operational management, as well as to rather controversial legal regulation of the property rights of non-owner legal entities, which does not always agree with the regulation of real rights (ownership rights and rights in the property of others).

3. Problems of the legal regime of property of particular types of legal entities under Ukrainian laws

3.1. The legal regime of private enterprises' property

The Civil and the Commercial Codes of Ukraine contain numerous controversies as to the regulation of the types and forms of legal entities and their property rights (*Civil and Commercial Codes,* 2014). The Civil Code of Ukraine provides for two incorporation forms of private legal entities only – corporations

and foundations whereas the Commercial Code provides for more variety making it impossible to understand in which way they differ from the corporations (first of all, business corporations[1]). This may be clearly illustrated by the example of the so-called *private enterprises* (hereinafter – PE). Neither theorists nor practitioners have been able to explain the differences between these companies and limited liability companies (Spasibo-Fateeva *et al.,* 2007).

According to Art. 113 of the Commercial Code of Ukraine, a PE "*operates under the private property rights*" of one or more persons (apparently, founders), which makes it impossible to identify the legal grounds on which the property is transferred to this legal entity. Therefore, it is impossible to determine whether the PE itself is the owner or not. Thus, some PE articles of association stipulate that they are owners, while others, vice versa, that they are not owners of the property transferred to them by their founders. This paradoxical situation reflected on the PE founders, too.

If a PE is the owner of the property, the founder may not be the owner, because property may not be owned by two persons simultaneously. Founder's rights are similar to corporate ones while the legal position of the PE's founder is virtually the same as that of a business corporation member. However, since the PEs are regulated separately from business corporations in the Commercial Codes of Ukraine (PEs – in part 11, whereas business corporations – in part 9, where Art. 80 does not include PEs as business corporations), they were considered a special form of legal entities, different from business corporations for a long time. Therefore, PE founders' rights were not identified as corporate ones, which were deemed inherent in the shareholders of business corporations only.

All that brought out significant problems in the resolving of disputes between a PE and its founder, as under the procedural legislation of Ukraine corporate disputes (disputes between a business corporation and its shareholder) were within the jurisdiction of commercial courts (p. 4 para. 1 Art. 12 of the Commercial-procedural Code valid till 2013 – The Law of 10.10.2013 No. 642-VII amended this Article respectively), whereas disputes between other legal entities and their members (founders) were within the jurisdiction of general courts. One of the reasons was the uncertainty in the PE founders' rights and the formal lack of the ground to consider them corporate. Secondly, it also appeared problematic to establish the object of PE founder's rights, since this issue was inevitable provided the founder of the PE died and his/her heirs needed to understand what they could inherit (Spasibo-Fateeva, 2014), as well as in case of dividing the property between spouses, one of whom is a PE's founder

[1] According to the Civil Code of Ukraine (article 84) all the entrepreneural corporations are divided into two types: manufacturing cooperatives (vyrobnychii kooperatyv) and business corporations (hospodarski tovarystva), represented by limited and additional liability companies, joint stock companies, full and limited partnerships. Thus, business corporations are a kind of commercial corporations.

(Spasibo-Fateeva, 2012). In addition, it was the case if the founder intended to sell his or her questionable property.

Currently, this problem cannot be solved based on any specific legal ruling. Therefore, the practice (generally notarial practice when documenting agreements and notarizing them) followed the way of identifying the PE founder's rights with those to the share in the share capital of business corporations (corporate rights). A similar approach has been observed since 2012 in precedents – courts commenced equaling PEs to business corporations, while disputes between founders and the PE have been referred to as corporate. That was directly confirmed by the Plenum of the Supreme Economic Court of Ukraine in its Resolution No 4 of 25.03.2016 'On Certain Practical Issues, Arising from Corporate Disputes'. It is evident that the Ukrainian law-maker reacted to the case law and altered the Commercial-procedural Code, where Art. 20 explicitly provided for these disputes to be referred to as commercial courts' jurisdiction. Nevertheless, no alterations were made in the Commercial Code of Ukraine, which entailed an atypical situation for the legislation, when the problem was solved in the procedural, but not in substantive law. It has remained nearly unchanged in terms of PE regulation since 1991[1]. For over 20 years all persons who encountered issues with the PE, including their founders, experienced significant difficulties in legal relations with them.

It is also very complicated if the PE is not the owner. Then, following the logic, the owner of its property is the founder, and if there are several founders, they are co-owners. In this model, the legal status of the PE's property is identical to that of the state enterprises that is owned by the state and economically managed by enterprises. However, the meaning of this legal status is unclear since it is not based on the concept similar to the one developed in the Soviet times for the state property.

However, if the PE's founder is the owner, in the event of his/her death, it is clear what will be inherited – it is the property being in possession of a PE. Moreover, in case of dividing the property of the spouses, if one or both of them are a PE's founders, they may divide the PE's property, because it is owned by them.

Nonetheless, it should be mentioned that in practice the legal status of the PE's property and the rights of spouses to the property have long been destabilizing the positions of the supreme judicial authorities of Ukraine. Thus, in 2007, the position of the Supreme Court of Ukraine was as follows: the property of the PE is not a part of the joint property of the spouses. The second spouse is only entitled to a share in the profit received from the activities of the PE (Resolution of the Plenum of the Supreme Court of Ukraine No. 11 of 21/12/2007, para 29).

However, in 2012, the Constitutional Court of Ukraine took the opposite position by ruling that the property of the PE

[1] PEs as a form of legal entity was initially introduced by the The Law on Enterprises in Ukraine adopted in 1991. It then was repealed, but the provisions about PEs moved to the Commercial Code of Ukraine.

is subject to the joint property of the spouses (Decision of the Constitutional Court of Ukraine No. 17-rp/2012 of 19/09/2012, 2012).

Accordingly, the Supreme Court of Ukraine also changed its approach and in 2013 it ruled that even if the spouses contribute their joint property to the capital of the PE founded by one of them, the ownership of that property is transferred to the PE, and the ownership right of the other spouse (i.e., a real right) is transformed into a claim right (a right of obligation), the essence of which is the right to claim payment of half the value of the contributed property in the event of division of the joint property (and not the ownership of the property itself), or the right to claim a half of the profit received from the activities of the enterprise, or half of the property that remains after the liquidation of the PE (Resolution of the Supreme Court of Ukraine dated 02.10.2013 in case 6079цс13).

The cases related to succession of a PE's property are resolved in the same way. Therefore, if the PE's property was formed upon the PE's founding out of the contributions of one of the spouses, then the other spouse may demand recognition of his/her right to a half of the property rights of the deceased spouse (rights in the PE's property). However, the other half will be inherited as per the standard procedure.

The confusion as to the legal regime of the property of PEs and similar companies of uncertain legal status was done away with after the adoption by the Supreme Economic Court of Ukraine (2016) of the legal position according to which by their essence and legal nature these companies are business corporations (Resolution of Plenum of the Supreme Economic Court of Ukraine No 4 of 25.03.2016, 2016). In concluding so, the Court relied on the approach expressed by the Constitutional Court of Ukraine, which established the criterion for classifying legal entities as business corporations – the existence of a share capital.

Thus, undoubtedly, the PE was a legal error, which the courts attempted to remove, and they managed to do that. In any case for the case law based on the procedural law and on the legal positions of the supreme judicial authorities the issue of property and corporate rights of the PE's founders has already been settled. Still, it has not been solved generally in terms of establishing these legal entities and entering into contracts with their property and the property of their founders as long as the provisions of the Commercial Code has not been altered with regard to PEs. It appears that the best option to solve these problems is the cancelation of Art. 113 of the Commercial Code. Even this would merely confirm what was already adopted in the procedural legislation – equaling PEs and business corporations.

3.2 Legal regime of the consumer cooperatives' property and legal entities established by them

The legal status of these cooperatives is regulated by the Civil and Commercial Code of Ukraine as well as the Laws On Cooperation and On Consumer Cooperation, whose provisions contradict each other. For example, according to

para. 1 Art. 9 of the Law On Consumer Cooperation consumer cooperatives, their associations, and the legal entities established by them are owners. However, the Commercial Code of Ukraine (para. 5 of Art. 111) does not recognize them as owners.

There is a certain contradiction in the definition of the holders of the consumer cooperatives' ownership rights. Para. 6 of Art. 9 of the Law provides that these include *members* of a consumer cooperative, *personnel* of cooperative enterprises and organizations (that is legal entities established by a consumer cooperative), as well as *legal entities* whose "share in the share capital is determined by the relevant charters". Without focusing on the obvious flaws in the wording of this article, we note the fact that the members of a consumer cooperative are named as the holders of the ownership rights in the property. Consequently, the consumer cooperative itself cannot be the owner, because otherwise there would be two owners of the same object – the property of the cooperative.

However, if we consider the members of a legal entity to be the owners in the entity's property, then it follows that this property will belong to them on the basis of joint ownership. Then it is not clear what the company itself will be to its property (Kucherenko, 2005). However, it is uncommon for the members to be recognized in the charters of consumer cooperatives as co-owners of the cooperative's property.

It should be noted that the situation was the same for the rights in the property of peasant farms (farming enterprises). To date, it has been rectified, and such farms are now recognized as the owners of their property. For unknown reasons, no changes have been made in the legislation on consumer cooperation yet.

As for the rights to the property of the companies created by a consumer cooperative, due to the contradictions in the legislation of Ukraine, a very strange situation has arisen where such companies registered in the Western part of Ukraine are, as a rule, owners of their property, and those registered in the Eastern part of Ukraine are non-owners. In most cases, these companies possess their property under the right of economic management, and in Dnipro Region – the right of operational management.

It is obvious that these ambiguities in legislation must be removed and the regulation of the rights in the property of the cooperatives, including consumer ones, as well as legal entities established by them, must be unified – all of them must be recognized as owners of their property. It is also unnecessary to regulate cooperatives in numerous laws. It is sufficient to have one law on cooperation.

4. Effects of the members' obligations on legal entity's property

4.1. Legal entities' property as the object of seizure for the obligations of their members (founders), and regulations on financial liability

4.1.1. As regards the seizure of a person's property, it is the consequence of certain obligations which have not been fulfilled. These may be obligations of

either legal entities or of their founders (members or shareholders) which involve their liability.

One of the features of a legal entity is its independent liability. It means that neither its members (founders or shareholders) are liable for its debts, nor the legal entity is liable for the debts of its members. This is provided for in Articles 80 and 96 of the Civil Code of Ukraine. However, there may be exceptions. For example, the law provides for the liability of members of full and limited partnerships, additional liability companies and the liability of the state or local communities for the obligations of the state-owned and municipal[1] enterprises and foundations.

The members (founders or shareholders) of legal entities may also be held liable under court decisions. An example of this is the application by the courts of the "corporate veil piercing" doctrine, which proves the unlawful/unscrupulous actions of the persons who form or influence the decisions of a legal entity's body, as a rule, a joint-stock company, that caused damage. Nonetheless, this issue goes beyond the subject of this paper.

The problem of the liability of legal entities and their members is multi-faceted and is to be considered within a separate article. Therefore, we will touch upon the issues of admissibility of seizure of the property of legal entities of different legal status for the debts of their members, since the response to it depends on the legal status of the property.

So, our first point will concern the independent liability of a legal entity regardless of its rights in property and taking into account only the diversity of the types of legal entities, some of which involve liability of their members for their obligations. This is a provision of the doctrine of legal entities.

When it comes to the seizure of the legal entity's property:

(i) this may or may not be related to the actions of its members;

(ii) these actions may constitute a violation of law, or may be viewed in the context of corporate governance, in particular, from the bona fide perspective;

(iii) it may generally be determined by other legal relations among the members of the legal entity, i.e. they may be unrelated to his/her activities.

In this respect, since liability in corporate relations deserves a dedicated study, we will limit our work to the possibility of seizure of the legal entity's property for its member's obligations which is not related to the operations of this legal entity. Therewith, we are to consider the above issues regarding the legal regime of property of different legal entities, i.e. owners and non-owners.

The key point that we may proceed from is the provision that "the owner is liable to the extent of all of his/her property". Having become a debtor, the property owner must repay the debt, and provided he/she fails to do so, then there are enforcement mechanisms through which the debt will be recovered. In particular,

[1] The terms 'municipal enterprise' and 'municipal foundation' are frequently used in Ukrainian legislation and comes from soviet legislation. They identify corporations and foundations created by local authorities.

those include seizure of the debtor's property (para. 5 of Art. 48 of the Law of Ukraine 'On Enforcement Proceedings'), owned by him/her but may be held by other persons (Art. 53 of the same Law). In the latter case, it is necessary to prove that the property held by such other persons is indeed owned by the debtor.

Hence there arises the problem of whether or not the property transferred by the debtor, a member of a legal entity, under the ownership or any other real right should be considered the debtor's property. This problem becomes especially acute when it comes to a public legal entity founded by the state or a local community (Spasibo-Fateeva, 2017; Kucherenko, 2007; Posykaliuk, 2015).

4.2. The possibility of seizure of public companies' property

In the Ukrainian legislation the legal status of public companies[1] is regulated inconsistently and contradictorily. The status of *public* may refer to different companies:

i) So-called national joint-stock companies – NJSCs (NAK) that are fully owned by the state.

ii) other companies referred to in the Commercial Code of Ukraine as "public-sector enterprises", which include various business corporations, whose share in the share capital is at least 50% owned by the state;

iii) state and municipal enterprises, performing commercial activities, whose property is owned by the state or community, but economically managed by these enterprises;

iv) joint-stock companies whose shareholders are legal entities of public law of other countries (for instance, public joint-stock company Prominvestbank, whose major shareholder (over 99% shares) is public corporation of Russian Federation named Vnesheconombank, established by the the Russian Federation);

v) state enterprises engaged in commercial activities, whose property is owned by the state and assigned to these enterprises under the right of economic management.

For various types of public companies, the procedure of seizure of property for the obligations of their founders is significantly different, but still this process involves difficulties in identifying object and subject of ownership to their property. It is reasonable to provide a case illustrating the issue.

In Ukraine a joint-stock company, whose shares are state-owned, is referred to as a national joint-stock company (NJSC, or NAK). Its legal status is not regulated in the unified manner. According to the common rule, being a joint-stock company, these entities are owners, while their shareholder (the state) owns the shares. Therefore, the shares are sub-

[1] The concept of public company in Ukrainian legislation is very different from the concept of public company in the European one. If in European legislation (particularly, in British legislation), public company means a company who offers its shares to public through a stock exchange, in Ukraine public company is a joint stock company, whose controlling block of shares belongs to the state, or a state-owned or municipal enterprise whose property is owned by the state or local society and given to the company under the right of economic or operational management etc.

ject to seizure for the state obligations.

However, in Ukraine there are NJSCs that possess other property rights: a part of the property is owned by them, while the rest is in their economic or operational management, use or control. The controversy is not only in the fact that the same legal entity has property under different real rights, but also in the way it affects the seizure of the property. On the one hand, according to the Ukrainian laws, both the owner and the company having the right of economic management are liable with all their property, and therefore, the kind of right under which NAK holds its property doesn't have any legal impact on the seizure of NAK's property. However, on the other hand, legislation established considerable limitations of NAK's rights to its property and liability: (a) Art. 7 of the Law of Ukraine 'On Pipeline transport' prohibits alienating and encumbering real estate, main pipeline transport (fixed assets) and the NAK's shares etc.; (b) following para. 13 of the NAK's Charter (approved by the Resolution of the Cabinet of Ministers of Ukraine of 14 December 2016 No. 1044) NAK is not liable for its obligations with state-owned property, transferred to it for economic management, use of control.

Thus, the situation is not simple: the liability of average joint-stock companies, national joint-stock companies and even their particular types varies significantly and it is not always clear who and to what extent will be liable for the debts of these joint-stock companies: the JSC *per se* or its shareholder – the Ukrainian state.

This uncertainty also involves the liability of state-owned enterprises and their founder – the Ukrainian state, which is represented by a particular state body and its officials. For instance, once the Ukrainian state strongly objected to seizing aircraft An-124–100 "Ruslan", which was in possession of the state-owned enterprise Antonov Aeronautical Scientific-Technical Complex (Antonov ASTC). The aircraft was arrested by the sheriff of Canadian province Newfoundland for the enforcement by the Canadian authorities of the final decision of the Arbitration Institute of the Stockholm Chamber of Commerce of 30 May 2002 made in favour of the TMR Energy Ltd. in the dispute initiated by the latter against the State Property Fund of Ukraine.

In this case the Ukrainian party to the dispute (i.e., the State Property Fund of Ukraine) was arguing that a state enterprise possessing (under the right of economic management) but not owning state property is not obliged to forfeit that property for the debts of the state ("PACTA SUNT SERVANDA", 2003).

However, in 2018 in a similar dispute, where the number of Ukrainian companies as plaintiffs claimed for the seizure of the property of the Russian Federation to enforce the decision of the Hague Court of Arbitration (under case PTS No. 2015–36). According to the decision, the amount of 139 million US dollars and 20 million US dollars was seized from the Russian Federation represented by the Ministry of Justice as the compensation to the Ukrainian companies of their losses for the real estate,

expropriated in the Crimea after its unlawful annexation. The Ukrainian companies claimed that the decision of the Hague Court of Arbitrations could be enforced by the seizure of the shares of public joint-stock companies Prominvestbank and Sberbank of Russia, owned, respectively, by the public corporation Vnesheconombank and the RF Central Bank. The plaintiffs considered the shares as the property of Russian Federation, but not the property of particular Russian companies.

The problem, however, lies in the fact that according to the Law of the Russian Federation "On the Bank of Development" (adopted in 2007), Vnesheconombank is a state corporation and the owner of its property which may not be seized so as to recover the debts of the Russian Federation. Nevertheless, the Supreme Court of Ukraine delivered the judgment to seize the shares of these banks, though the grounds for this decision which come down to the conclusion that it is the Russian Federation who is the true owner of the shares, but not Vnesheconombank despite the provisions of its Charter, are disputable and unconvincing. In particular, para. 98 of the judgement is especially ambiguous: it merely indicates that while enforcing a court judgment it is merely required to identify that the property arrested and seized, according to the law of Ukraine is owned by the Russian Federation, but not by other foreign or Ukrainian persons (Resolution of the Supreme Court in case No. 796/165/18, 2019). Therefore, only one conclusion may be made: that the Supreme Court of Ukraine did not identify whether the Sberbank and VTB shares are in the RF ownership and whether they may be subject to seizure. In this way the Supreme Court in fact left the resolution of this issue to the state enforcement officer (Spasibo-Fateeva, 2019).

In this context it is reasonable to recall the approach of the European court, which decided that unitary enterprises and foundations do not have institutional independence from the state and act as their bodies, thus making the state itself liable for their activities (2007). The analysis of these cases testifies to the fact that the European Court of Human Rights solved the problem of holding the RF liable for the debts of state-owned enterprises / foundations.

Meanwhile it is still an open issue whether it is possible to apply this approach to holding a state corporation liable for the state debts (NJSC or a joint-stock company, where 100% shares are owned by the state), especially, if its charter includes the provision stating that the corporation itself is the owner.

Conclusions

The aforesaid shows that in Ukraine the legal regime of the legal entity's property is highly varied, at times being insufficiently defined, at times – controversial and contradictory. Thus, it requires fundamental reviewing. We believe that the existing variety of organizational and legal forms and types of legal entities in Ukraine is unjustified. Many of these entities have no special legal status. In this respect, it appears that certain unification would be reasonable to allow certain legal entities, pro-

vided for in the Commercial Code of Ukraine, to be classified as business corporations, cooperatives, or foundations. This refers to private enterprises, which are in fact business corporations and, therefore, it would be logical to repeal the legislative provision determining their legal status, while obliging existing private enterprises to be reregistered in compliance with one of the types of business corporations. Before private enterprises are reregistered, it would be correct to consider them as limited liability companies in practice and thus to apply provisions on limited liability companies to them. It is necessary to cancel such rights as economic and operational management. Legal entities, having these property rights, must be recognized property owners. In case founders (members) of legal entities intend to set the limit to the execution of rights to some of the property which belongs to the legal entity, it may be stipulated in the charters, while for some legal entities it may be specified by law (e.g., for joint-stock companies, whose shares are owned by the state).

The public companies need more detailed regulation and are to be provided a clear legal status. It is preferable to stipulate these issues in the Civil Code of Ukraine thus providing comprehensive regulation on all types of legal entities.

These reforms will also lead to the clarity as to the property liability of a legal entity, since if it is the owner of its property, then all this property may be subject to seizure. This way it will be possible to terminate disputes regarding the possibility of seizing the property of public enterprises for the state debts, as well as vice versa – when the claims are to hold the state liable as a founder of the enterprise, which transferred its property but not ownership to the enterprise.

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E. Kharytonov, Doctor of Legal Science. Professor of Civil Law Department and Head of same Department at National University "Odesa Law Academy" (Ukraine), Corresponding Member of National Academy of Law Sciences of Ukraine, Honored Science and Technology Worker of Ukraine

O. Kharytonova, Doctor of Legal Science. Professor of Intellectual Property and Corporate Law Department and Head of same Department at National University "Odesa Law Academy" (Ukraine), Corresponding Member of National Academy of Law Sciences of Ukraine, Honored Science and Technology Worker of Ukraine

HUMAN RIGHTS, CIVIL SOCIETY, PRIVATE LAW: CORRELATION PROBLEMS

Abstract*. The category of "human rights and freedoms", the problems of protection and protection of such rights have repeatedly been the subject of research, but the question of their correlation with concepts such as "civil society", "private law" has not been studied yet. This circumstance determines the expediency of a special study of this issue. Several methodological techniques have been used in the process of exploring issues related to this article. The main ones were civilization and conceptual methods. With the help of the "civilization" method, we explored "law" as a category inseparably related to civilization. The "concept" method helps to consider law in general, and private law as a concept (conceptus from the Latin: thought, representation, concept), that is, as a set of verbal expressions of a social phenomenon denoted by a particular term. In the conclusion, the authors state that there is a conflict in the field of human rights and the conflict of interests of members of civil society, the state resorts to a positive legal regulation of human behavior (taking into account the national mentality and influencing the formation and transformation of justice in the desired direction). The study reveals that there are no grounds for excessive concern about the "infinity" of human rights. This boundary is usually defined naturally, in the face of the rights and interests of other members of civil society.*

Key words: *Civil Law, Concept of Human Rights, European Law, Human Rights, Protection of Human Rights*

I. Introduction

The challenges of the 20th Century, the largest of which were the First (Great) and Second World Wars, influenced many traditional values. The Second World War was the impetus for the constitution of "sovereignty of the individual", "the status of the individual." With the adoption of the United Nations Universal Declaration of Human Rights in 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, there were grounds to call human rights the "fundamental value of the concept of European private law" (cfr. Kharytonov, Kharytonova, Kharytonova, Kolodin & Tolmachevska, 2019). But if the understanding of the category of "human rights and freedoms", the problems of protection and protection of such rights have repeatedly been the subject of research (Janice, Kay & Bradley, 1997; Paliyuk, 2003 and 2010; Rabinowitz, 2006; Shevchuk, 2006; Savchin, 2015; Jaskiernia & Spryszak, 2016), then the question of their correlation with concepts such as "civil society", "private law", etc., has not been studied so far. This circumstance determines the expediency of a special study of this issue.

II. Methodology

Several methodological techniques have been used in the process of exploring issues related to this article. The main ones were civilization and conceptual methods. With the help of the "civilization" method, we explored "law" as a category inseparably linked to civilization. From this point of view, the law is an element of socio-political order, as well as an element of social and individual consciousness. In this way, the concept of "right" is understood as a civilizational category that simultaneously acts as an element of socio-political system and an element of social consciousness, is a component of the spiritual world of man and his worldview, and reflects the idea of individuals and society as a whole about justice, good, humanism, etc. This makes it possible to use in the process of research the "concept" method, considering law in general, and private law, in particular, as a concept (conceptus from the Latin: thought, representation, concept), that is, as a set of verbal expressions of a social phenomenon denoted by a particular term. That the definition of a concept is based on an analysis of the concept itself, while the definition of a category is repelled by another category is characteristic. Therefore, the definition of a concept is to convey the meaning of the word to which this concept is designated by the elements that the concept forms (Bergel, 2000). This approach is suggested to be taken as the basis for understanding private law, which is the concept of European civilization, with its methodological basis, above all, liberalism. At the same time, the consideration of law as a concept does not deny the legislative content of this concept but eliminates the necessity of obligatory evaluation of it as a system of legal norms that form the field of law,

relevant legal institutions, etc. In this regard, we have the opportunity to move away from a positivist approach based on the recognition of the leading role of "positive" law and to choose the "naturalness of law" as a methodological imperative. The laws of natural law must be embodied in positive law, or in religious precepts, or in the form of customary law. The rule of law should be interpreted as a principle of the rule of law. According to legal naturalism, the primary sources of law are the laws of social nature that are actually existing and in force in the society, which should be opened by people and implemented in the form of positive legislation. Based on legal naturalism, law is a real and socially existing laws in the society, and in particular the laws of natural law, open by humans and embodied by the legislator in the form of positive legislation.

While agreeing with the priority of natural law in the field of human rights protection, we emphasize that this approach is reflected in the modern vision of the essence of law, especially concerning the concepts of "human rights" and "private law" in European civilization (Kharytonov, Kharytonova, Kharytonova, Kolodin & Tolmachevska, 2019).

III. Presentation of key research findings

The expediency of considering matters of private law as a European concept is due to the fact that this category originates and characterizes European civilization, and thus contains axiological guidelines for those who wish to join the European Union.

Considering the fact that European interstate legal systems and the problems of integration with them of the legal system of Ukraine have been the subject of special study (Lutz, 2003), it is inappropriate to dwell on their characteristics. Instead, one should establish the essence of the term "European law", which is used in jurisprudence and as a general concept (that is, as a verbally formed, rational and emotional perception of human rights as part of the world in which this person exists, feeling part of this world) (Anners, 1996; Entin, Naku & Vodolagin, 2001; Topornin, 1998) and in respect of particular areas of European legal systems (Tolstopyatenko, 2001; Janice, Kay & Bradley, 1997).

In doing so, we distinguish between the general concept of "European law", which is an element of European civilization as a whole, and the concept of "European law", in its special meaning, which relates to the regulation of relations arising from the creation and activity of European international organizations. Provided that the former has a common civilizational, "cultural" meaning, we proceed from the fact that it is, by definition, broader than "European law in a special sense", the sphere of which is only the activity and policy of the European Union. The characterization of European Union law as a sui generis phenomenon seems justified (Topornin, 1998), since it is, although closely linked to both international law and the law of different Member States (Tatam, 1998), but constitutes a separate, third system of law which operates alongside with international and domestic law (Muraveiv, 2011).

We support the understanding of European law as a system of legal rules that have arisen in connection with the formation and functioning of the European Communities and the European Union[1] applied within their jurisdiction on the basis of and in accordance with the founding treaties and the general principles of law (Entin, Naku & Vodolagin, 2001). At the same time, we consider it worthwhile to pay attention to the final part of the mentioned definition, which refers to the general principles of law, according to which (along with the founding treaties) the rules of European law apply. The Treaty of 1992 provides that «the Union shall respect the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they derive from the general constitutional traditions of the Member States as general principles of Community law» (Art. F).

Thus, the general principles of European Union law are based on the priority of the rights of the individual enshrined in the European Convention, which also derives from the constitutional traditions of the European states. The same traditions determine the further development of the national law of the Member States of the European Communities.

The above applies to "European law" and "European Union law" in general, but does not fully take into account the particularities of the "private sphere" of the existence of law. Therefore, there is a need to clarify the nature and characteristics of the concept of "private law", which can be considered in an objective (as a public phenomenon that determines the legal status of a private person in society) and subjective sense (as a right belonging to an individual).

The central figure of private law (the existence of which is conditioned by the existence of private law) is a private person whose defining characteristics are: (i) is not a person in the state; (ii) is not in the relations of power, neither in subordination to other private persons; and, (iii) is equal and freely, based on the dispositive method of legal regulation, determines for itself the rights and obligations in the relations arising from its initiative (Kharytonov, 2006).

At the level of national legal systems, an individual is (or should be) the main figure of national constitutions and civil law, which is a set of rules and norms concerning the determination of the status and protection of the interests of individuals (private) persons who are not party of the state, which are not found in power or subordination relations, equally and freely establish their rights and responsibilities in the relations arising from their initiative.

In terms of civil law, a human is the main content of the key concept of a "person's status". This makes it desirable to characterize this concept. Therefore, the characterization of this concept is appropriate.

In Latin status means "status" and "state" and denotes (in its original meaning) the position of an individual in soci-

[1] As a rule, we assume that the terms "European Union law" and "Community law" are interchangeable. Cfr. Kernz, 2002.

ety, and the totality of all (or part) of its legal rights and obligations (Bartoshek, 1989). According to this interpretation, the status of a legal entity is usually understood to mean its legal status, which is characterized by the presence of a complex of legal rights and obligations. In doing so, they sometimes equate the notions of "legal status" and "legal state", explaining this to the reason that the category "legal status" covers all types of legal relationships (Halfina, 1974). However, the equation of these notions is undesirable because it eliminates the differences that exist between the concepts of "the subject of law" and "the subject of legal relations". It is therefore advisable to use different terms to refer to the legal status of the abstract subject and the legal status of a real person, which enters into legal relations.

The notion "status" includes a stable, fundamental in the legal status of the subject, which, together with legal personality, also contains an indication of the existence of a certain range of fundamental rights and duties. Instead, specific rights and duties reflect the specifics of a person's real legal position, which is mainly related to the presence of certain legal facts, not the basis of the subject's general position in that legal system.

Thus, the legal status of a person can be characterized as a set of fundamental subjective rights and duties, that belong to the subject of the objective law and determine in the most general form of its relationship with the state, based on the provisions of relevant legal rules. It is possible to distinguish the initial legal status of a person in a state established by the Constitution.

Therefore, the legal status is associated with the stable legal position of the subject, and the legal state changes depending on the legal relationship in which it enters.

The characteristic features of the legal status are:

(i) It reflects the state's (society's) determination of the place of the individual in the social communication system. This place is enshrined through the appropriate procedure and in the appropriate legislative form.

(ii) Its content, which has certain stability and changes not because of the will of individuals, but because of the public-legal order as a result of expressing in some way the will of the legislator.

(iii) Elements of legal status: general rights and duties of the subject of the objective law. Its legal responsibility is formulated and exists in the form of legal prescriptions.

(iv) Elements of legal status have the qualities of scale, generality.

They define the boundaries within which a person's legal position, subjective rights, and duties are formed. The presence in the legal status of these attributes allows acting as a legal measure of social freedom (Kuchinskyi, 1978).

The status of a person is not only enshrined in the Constitution but also reflected in the principles of civil law (legislation), by which we understand the fundamental ideas according to which the relations constituting the subject of civil law are regulated. In each of these principles, the vision of the essence of

these relations are manifested, certain requirements are put forward for the practical provision of the legal status of an individual.

In this regard, civil law refers to the fundamental ideas according to which the regulation of civil relations is carried out. At the same time, subjective civil rights (including human rights) refer to fundamental ideas that determine the content, limits, and order of exercising such a right.

It may also refer to the "general legal status" and "special legal statuses" of an individual. These concepts are in this case understood as defining a person's position in terms of preference for private or public interest. At the same time, both statuses of the person are stable, they are changed not by the will of the subject, but in public law order. They are the totality of the fundamental rights and obligations stipulated by the legal acts in the form of legal abstraction.

It follows that, since acts of legislation can determine both general and special legal statuses, the question arises about the methodological basis for establishing the principles of legislation, which determine the general and special private (civil) status of a person and ensure the differentiation of special statuses.

In our opinion, the primary criterion for the determination should be the consideration of the legal sphere in which the individual resides. After all, the definition of the status of an individual depends on the subject of the relationship in which sphere (private or public) it acts in one way or another. The bases for determining one's status in the aforementioned areas are not and cannot be the same, which is caused by different conceptual approaches to determining one's status in both systems.

As K. F. von Savigny (2011) noted, in public law, the whole (state) is the goal and the individual is subordinate, while in private law, each individual is in itself a goal, and any legal relation to its existence or special position is just a means. In the field of private law, an authorized person defends his or her own interests, the protection is initiated by the subject of interest by filing a civil claim, and thus private rights can be defined as "self-defense of interests". In other areas, the protection of violated interests is initiated by state authorities (Petrazhitskyi, 2000).

In terms of defining the differentiation criteria between private and public legal status of a person, it is important to take into account the provisions of the "willpower theory" of Jellinek, the essence of which is that the right in the subjective sense is understood as a priority of human will, aimed at a particular goods or interest. This priority is recognized and protected by the rule of law. Will is a formal element, and goods (interest) is a material element in subjective law. In turn, individual interests are divided into those that are set primarily for individual purposes (the goals of individuals) and those that are set primarily for social purposes. Recognized mainly for the public interest, the individual interest is the content of public law. Subjective public law (on its material side) is such a right that belongs to an individu-

al based on an individual's status as a member of the state.

Concerning the formal element of rights, the priority of the will, Jellinek distinguishes two types: dürfen (desire, aspiration) and können (opportunity). Dürfen literally translates from the German as «having the desire to do something». Jellinek (2004, p. 376) explains that in this case, «the rule of law recognizes the corresponding actions of the individual as permissible, that is, it allows the individual will to exercise his freedom in certain directions». Können means «to be able» and here

«law and order can add to the actions of an individual that something does not belong to an individual by nature (…) namely, to give him or her the right that some of his or her actions will be recognized as legally valid and have legal protection» (Jellinek, 2004, p. 376).

Private subjective law contains both dürfen and können, while public subjective law contains only können. Therefore, in private law, there is always the aspiration (dürfen) and in public law, there is only the possibility (können). Public rights are not based on those allowed, but only on those granted by the authorities. Therefore, they are not part of the natural (regulated by the right of liberty) but are an extension of the rights of natural freedom (Jellinek, 2004).

"Natural" human rights, which are the most important element of its universal status, belong to private law and exist regardless of whether they are recognized as an objective right or not. In other words, they are objective because of their naturalness, inalienability from a person, and can be characterized as being provided by God. Human rights, as a concept of private law, are based on the principles inherent in the branches of the private legal sphere. Such principles include autonomy, voluntariness, legal equality of participants, dispositiveness, coordination, general authorization, legal protection of private interest, etc. (Kolodyi, 1998).

We propose to add to this list the principle of recognition of the crucial importance of humanitarian values, which is a priority for the European mentality. In this approach, human rights are recognized as paramount, while for other types of legal systems, the responsibilities of the individual are the focus. It is only possible to speak of the decisive role of legal obligations concerning the legal system with a public-legal dominant since it is precisely the existence of effective means of public coercion that ensures the fulfillment of obligations by the parties to the legal relationship. Its general principles of European private law are based on the priority of individual rights enshrined in the European Convention. Such traditions define the vector of the development of the national law of the European Union Member States against the background of the growing share of the moral-axiological component of the concept of private law, the unconditional value of which is recognized by human rights and freedoms.

It is worth noting that the concept of private law, as well as the related concepts in the field of human rights, are criticized for "excessive" democracy, the ambiguity of the boundaries of freedoms

and human rights in the private sphere, abuse of rights, etc. Liberalism is most criticized (Weller, 2007; Pronko, 2014). At times, the expediency of recognizing as a leading criterion the idea of the primacy of human rights in characterizing the tradition of law is called into question, because «from a global perspective, it appears that the only civilization (which is based on the rights of the individual (personality) as the dominant principle) is Western civilization» (Medushevskyi, 2014).

Understanding private law as a concept, which is a set of representations, rules and norms that determine the status of a person (private person) and provide protection of his subjective rights and interests, let us further explore how real it is possible to consider the danger of uncertainty of the boundaries of the rights of the individual criticized by critics of liberalism and individual liberty. In this regard, it should be noted that recognizing a person's right to freely choose a behavior (which does not harm another person) does not in itself pose a threat, since human behavior is moral in nature and moral behavior is one of the most violent sociobiological demarcations (Omelchuk, 2011). However, in cases where there is a conflict in the field of human rights (as well as in the conflict of interests of members of civil society), the state resorts to normative regulation of human behavior. The state takes into account the national mentality and influencing the formation and transformation of consciousness in the desired direction. This approach was reflected, for example, in the conflict decision that emerged when Finland refused to recognize same-sex marriage as legitimate. The European Court of Human Rights explained that while «some countries have expanded the concept of marriage to include a partnership of persons of the same article», European laws granting the right of men and women to free marriage «cannot forcibly extend this concept.» The Grand Chamber of the European Court of Human Rights has found that a State's refusal to recognize same-sex marriage does not violate the European Convention on Human Rights. The Court stated that, although the convention recognizes the possibility of marrying and having a family «as a right of every individual», the document cannot be interpreted as requiring marriage to be transformed into a completely different concept, encompassing same-sex "marriages." The Court also explained that the European Convention on Human Rights «establishes the traditional concept of marriage, which can only exist between a man and a woman.» The applicant cannot claim that such a conclusion does not correspond to «European values that allow same-sex marriages» since there are only 10 in the European Union of these countries and most of the European Union members interpret marriage only as a union between a man and a woman (Gennarini, 2014).

In this sense, examples of rigid censorship are also interesting, especially in the field of cinema, where the grounds for restricting the right to marry were determined by considerations for the protection of the human values (Souva, 2008).

Therefore, we can conclude that Western (European) civilization does not abandon traditional "universal" values, although it tries to define their boundary limits. Therefore, concerns about the "boundlessness" of human rights are exaggerated, largely driven by socio-political speculation. This boundary exists and is defined naturally. It is determined by taking into account the rights and interests of other members of civil society. Therefore, let us further consider the relationship between the concepts of "human rights" and "civil society", the emergence of which is associated with the formation of the postulates of humanism and enlightenment (Giro, 2006).

It is worth mentioning here that civil society is sometimes defined by the lens of private law. Thus, Chicherin (1998) believed that civil society is a set of private relations between persons governed by civil or private law. Such an understanding of the essence of civil society, in general, reflects its dominance: the focus on private relations and their regulator.

There is an opinion that civil society (acting as a phenomenon of culture and obeying the common pattern of a culture that defines its structure and development) should reflect its peculiarities. Every civilization, despite the increasing influence of globalization, lives its own life and realizes the cultural potential embedded in it in various spheres, including politics. Each socio-political system corresponds to a specific basic model of civil society, which in each country is manifested in a national-specific form since in the formation of national consciousness, the political culture of the people involved both universalistic and purely national-cultural and historical elements (Trebin, 2013).

In our opinion, in the above position there is a shift of emphasis: the presence of "purely national-cultural and historical elements" does not mean the creation of a "special basic model of civil society". When considering such phenomena, it is necessary to take into account the presence of not only universal and national – special but also separate, "specific". If the universal applies to all socio-political categories, then the individual defines inherent in only certain types of them – one that can be taken as a basis by other systems (serve as "basic" for them) but does not lose its genetic essence. Therefore, it may become "basic" here for borrowing and be accepted by recipients (adapted), but it does not become "special basic". Thus, Roman law does not cease to be a "Roman right" because of its reception, and civil society cannot become a "special basic model" in a society where there are no democratic relations, and which does not recognize the existence of private relations.

Therefore, civil society is a phenomenon (force) that exists in a democratic system (the space of democratization). Along with him, there are such forces in the space as the political elite, the economic community (business), the sphere of legislation and the state bureaucracy. The last two components (which are based on general principles of government) constitute the essence of every modern democratic system. All others are certain organizations and groups of

people who give the democratic system a specific character. At the same time, when economic and political communities are made up mostly of actors and institutions to gain power or profit, civil society is the sphere of action of ordinary people who unite to express their interests, protect and fulfill everyday needs. Civil society is a collection of independent and constitutionally protected civic organizations, groups and associations voluntarily created by ordinary citizens in various fields (Howard, 2009). It also refers to relations between groups of people, but not all groups, only those based on general liberal principles closely linked to the development of civil society (Howard, 2009) and those which serve as the basis for the concept of private law.

These circumstances make it advisable to consider civil society through the lens of liberalism and the market. From this perspective, civil society is understood as a sphere of social interaction between the economy and the state, consisting primarily of the areas of closest communication (in particular, families), associations (in particular, voluntary), social movements. and various forms of public communication. Modern civil society is created through certain forms of self-constitution and self-mobilization. It is institutionalized and generalized through laws and subjective rights that stabilize social differentiation. Self-creation (independent activity) and institutionalization do not necessarily imply one another, they may exist independently of each other, but in the long run, both of these processes constitute an indispensable condition for the reproduction of civil society (Dzhyn, 2003).

From the point of view of liberalism, the assessment of the meaning of the concept of "human rights" makes it necessary to take into account the peculiarities of the human component of civil society (Zaichuk, Kopilenko & Onischenko, 2009; Bilenchuk, Gvozdetsky & Slivka, 1999).

It should be noted that in this case, it is a matter of a new type of person (Bilenchuk, Gvozdetsky & Slivka, 1999), given that he was formed based on the division of labor (thanks to his regulator, the market; cfr. Smith, 2001). Gellner (2004) proposed the category of "modular person", the introduction of which emphasizes that the creation of civil society provides a unique opportunity to achieve individualization and, at the same time, create political associations that balance the state but do not bind their members. The lack of modularity eliminates the possibility of choosing technology based on the principle of efficiency. Instead, every human activity has to be viewed in the light of the many elusive and extremely complex relationships that make it an organic, indivisible cultural entity. But in reality, only the political implications of modularity are relevant. A modular person can enter into effective institutions and associations, which need not be total, ritualized, connected with many connections with other elements of the social whole, entangled in these relationships. It may leave these unions if it does not agree with their policies, and no one accuses it of treason. A market society lives not only

in the face of fluctuating prices but also of unions and changing opinions. There is no single price, and there is no single way of dividing people into certain categories: all of this can and must change, and moral standards will not prevent it. Public morality does not come down to a set of rules and regulations; beliefs can change, and this is not considered a sin. The essence of civil society is seen in the formation of effective connections, which, at the same time, are flexible, specialized, instrumental. A significant role here was played by the transition from status relationships to contractual ones: people began to adhere to the contract, even if it did not correlate with the established position in society or belonging to a certain community group. Such a society is still structured, it is not some sluggish, inert mass, on the contrary, its structure is mobile and easily amenable to rational improvement. Consequently, institutions and associations that balance the state but, at the same time, do not bind together at the hands and feet of their members, coexist mainly because of human modularity. The emergence of a modular person made possible the emergence of civil society (Gellner, 2004).

An important clarification should be added to this conclusion: we also take into account that the market determines the emergence of a modular person, and the aggregate of modular individuals forms a civil society. Civil society (as a certain social reflection of the market system) "transcends" the imperatives of the market into formulas of freedom, and formulas of freedom "transcodes" into the social imperatives of democracy. Although a much more rigid determinism prevails in a market society, the fundamental difference of the market is that it allows one to overcome one's personal dependence on the other. Human relations, social relations are impersonal. Probably, they can be interpreted as distorted, alienated forms of human being, forms in which things rise above and rule over people, but it cannot be denied that this governance is rationally prudent. At the same time, civil society is not a mere reflection of the market, but rather its "isomorphic reflection". For, as the market is a system of division of labor, so is civil society as a system of distribution (division) of thoughts, ideas and associations; as free-market prices prevailing in the market, so in civil society opinions are expressed freely, public associations that are not subject to the state are formed; as the market lives in the face of changing prices, so in civil society ideas are spontaneously born and die, public opinion changes, people's associations are reformed. And just like in the market, in civil society the decisive lever of reconciling the diversity of supply and demand, pluralism of views and positions, bringing them into system unity (equilibrium), is consent (social contract, consensus) (Pasko & Pasko, 1999).

Therefore, it seems reasonable to believe that the secret of the phenomenon of civil society is that there is an awareness of market determinants. Since the reflection of market imperatives in civil society is carried out across the spectrum of diverse social groups through the

prism of their needs and interests, it becomes impossible for the solidarity of public consciousness and the unanimity of public opinion. Instead, the pluralism of ideas, thoughts and the diversity of political, cultural, professional, and denominational associations that are called upon to identify and form these ideas and thoughts are natural. No longer does the state impose its ideas on society, but on the contrary, civil society expresses its demands to the state. However, such pluralism is not a chaos of ideas. All of these ideas reflect the demands of a market economy in terms of the interests of a particular group. The taboo only imposes on political programs that call for the violent destruction of the social order itself. In such a society, everyone is given the choice within a market paradigm. Thus, civil society becomes an area of spiritual and social freedom. One can talk about the limits of this freedom, but there is no doubt that civil society creates an atmosphere of a subjective sense of freedom in each individual, a sense of choice of thoughts, associations, unions, forms of activity (Pasko & Pasko, 1999).

Although some researchers believe that the historical process of the twentieth century revealed the inadequacy and danger of the concept of economic liberalism (Afanasyev, 2007), however, the proposal for limited state intervention to alleviate social problems of society does not mean concessions to the ideas of civil society. Thus, defining the essence of civil society as a result of the harmony of a diversity of interests and relationships formed between individuals (and associations created by them) existing and operating in a market environment, we can distinguish the features of such a society:

(i) Its emergence as a result of a contract (consensus) between individuals who meet the notion of a "modular person";

(ii) The emergence and existence of it based on liberalism;

(iii) Its existence in the conditions of the developed civilized market;

(iv) The formula of freedom in it is expressed as the social imperatives of democracy;

(v) The basis of relations between people is the activity of a democratic and liberal character;

(vi) It is viewed primarily as a behavioral and institutional phenomenon (unlike "social capital"; Howard, 2009); and,

(vii) The state does not govern civil society, but, after its establishment as a rule of law, is obliged to provide conditions of its functioning and life (Kuznetsova, 2014), since the principle of priority functioning of civil society in relation to state power is becoming more characteristic of the general dynamics of development of modern world civilization (Onishchenko, 2014; Kolodyi, 2014).

However, this concept needs clarification related to the expediency of moving away from a simplified binary vision of elevation: the civil society and the state. Instead, the three-component model in which civil society is separated from both the state and economic structures seems more reasonable, allowing it not only to play an oppositional role under authoritarian regimes but also to

revive its critical potential in a liberal democracy. In this case, the rigid "linking" of the concepts of "civil society" and "state" to one another disappears, and thus the opportunity to consider the latter component as a variable that promotes or impedes the development of civil society.

There is no doubt that the possibility of state interaction with civil society is more ensured through public law than through private law. But this is a natural state of affairs since private law and civil society are one- of-a-kind concepts that not only cannot exist without each other, but cannot be sufficiently characterized beyond their interconnectedness, which is related to the homogeneity of the basis of their origin and existence. The need for government intervention in regulating their relations arises because of the divergent interests of people and their groups; civil society – as Hegel noted – resembles a battleground where one private interest is constantly at odds with another. Since civil society cannot cope with these conflicts alone, reconcile disparate interests, it shapes the state to achieve this goal by establishing legal relationships and relationships that create governing structures and determine the procedures for their activities and cooperation. Thus, the state power must create optimal conditions for the proper functioning of civil society, protect it, and help to overcome conflict situations. The state that serves civil society is the rule of law (Bilenchuk, Gvozdetsky & Slivka, 1999) and the basis of their relations is an ideology that can be called "human-centric" (Lotyuk, 2014). In some version, these relations are characterized as follows: «A democratic state power is an effective and active guide to the freedom, physical and spiritual beauty of humans» (Onishchenko, Stoetsk & Sunyegin, 2014).

This applies not only to the protection of human rights and freedoms but also to the functioning of the market, without which neither civil society nor private law is possible. As Friedrich Hayek emphasized, market society is vainly condemned by anarchy and the non-recognition of a common goal. This is its merit because it makes people free because everyone chooses a goal. When people can live peacefully (without setting imperative goals and subordination), it leads to the creation of a Great Society. Therefore, there is a general problem of choice between the private-legal approach (humanitarian approach) and the public-legal approach (public-regulatory approach) (cfr. Hayek, 1999). The prospect of choice is that replacing the market with a planned economy takes away human freedom. The power that manages all resources controls all aspects of people's lives and activities. There is a single employer, any job, the will of the boss is not discussed. The monarch determines the quantity and quality of what consumers have to buy (Mises, 1999).

Thus, in respect of all these concepts, the state acts as a regulator on demand, and these concepts are guidelines that complement each other in a democratic society, mediating areas: socio-political (civil society), economic (market), legal (private law).

IV. Conclusions

Summarizing the results of the study (using civilization and conceptual scientific methods) of the problems of interaction between the categories of "human rights", "private law" and "civil society", we can make the following conclusions.

1. Human rights are the basic value of modern European civilization, which is reflected in the proper definition of the legal status of the person (personality). Legal registration of a set of basic natural human rights is usually enshrined in national constitutions, the norms of which in this field are inherently embodying the provisions of natural law at the level of national legislation.

2. In their essence, human rights belong to the private legal sphere. At the same time, the separation of private-law and public-law aspects of human rights has the nature of scientific abstraction, since the issue of the exercise and protection of such rights concerns the sphere of action of both private and public law. This separation is appropriate for scientific analysis, but to find out the real situation of the individual, this approach is not correct, since in practice there is a combination of public-law and private-legal human rights.

3. Public-law remedies are used to protect human rights in the rule of law, as well as in cases of conflicts in the field of human rights, in the event of a conflict of interests of members of civil society, when the state is forced and justified to resort to positive-legal regulation of human behavior, national mentality and influencing the formation and transformation of consciousness in the desired direction.

4. One of the vulnerabilities of the modern concept of private law is the indeterminacy of the boundaries of the rights of the individual, which is often criticized by supporters of "traditional" orthodox values that intimidate the average citizen from the destruction of family values, and the like. In this case, the shortcomings are a continuation of virtues: recognizing a person's right to freely choose behavior that does not harm another person.

5. It should be emphasized that Western (European) civilization does not abandon traditional "universal" values, although it tries (sometimes empirically) to define their boundary boundaries in the event of a conflict with the latter with the rights of the individual.

However, there is a conflict in the field of human rights, as well as the conflict of interests of members of civil society, the state resorts to a positive legal regulation of human behavior, taking into account the national mentality and influencing the formation and transformation of justice in the desired direction. Thus, in our view, there are no grounds for excessive concern about the "infinity" of human rights. This boundary is usually defined naturally, in the face of the rights and interests of other members of civil society.

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A. Hrynyak, Doctor of law, Professor, the Head of the Department of issues of private law of the Institute of Private Law and Entrepreneurship named after the academician F. G. Burchak of the National Academy of Sciences of Ukraine

DEBATABLE ISSUES OF THE CONTRACTUAL REGULATION OF PROPERTY RELATIONS UNDER THE MARRIAGE AGREEMENT

The article focuses on the research of issues of contractual regulation of property relations under the marriage contract. The author criticizes the general comparative approach to the regulation of property status of individuals in the USSR, the simplified imperative regulation of property relations, when property acquired by spouses in marriage belonged to them only on the right of common property, and in case of divorce the property was subject to the division between the former spouses in equal shares.

The status and prospects of the development of the institution of marriage contract in Ukraine are reviewed separately. The article deals with the investigation of legal nature, the peculiarities of the subjects, the content of the marriage contract. Attention is focused on solving such controversial issue as the inability of the conclusion of marriage contract by a representative of spouses.

Key words: *a marriage agreement, contractual regulation, marital relations, notarization, contractual regime, marital property, form of contract, invalidity of the contract.*

Socio-economic development in Ukrainian society, evolution of family relationships and attitudes to marriage entirely objectively and naturally necessitate the existence of the institution of marriage contract in the family legislation of Ukraine. The vast majority of the countries have long recognized the expediency of the existence of the institution of marriage contract in their national laws. In different countries this institution is different, but the purpose of its existence is one – to give spouses enough opportunities for independent determination of property relations in marriage, so that they can, if necessary, change the mode of possessions established by law, which automatically becomes effective upon marriage. Fortunately the legal system of Ukraine is not an exception in

solving this issue.

With the adoption of the Family Code of Ukraine scholars subjected to detailed analysis a number of relatively new institutions of family law, such as foster family institution, alimony, marriage contracts etc. We should immediately note that due to setting up such an institution as a marriage contract married couples have got an opportunity to establish the legal regime of their property both during the marriage and at its dissolution. Legal consolidation of a marriage contract is related primarily to the fact that the transition to a market economy caused a need for the development of property relations between spouses.

A marriage contract under the Code on Marriage and Family of USSR in 1969 was not possible because the rules of the Code were imperative and installed regime of joint ownership of marital property. In the Soviet period the need for the existence of a marriage contract as a tool for regulation of property relations between spouses was absent. Property component in marital relationships assigned a minor role and legislation, as it was stated in the comments of that time, "was to promote actively the final purification of family relationships of material payments and the creation of communist family in which the deepest personal feelings of people will find their full satisfaction" [1, p. 4]. Total egalitarian approach to the regulation of property of individuals provided simplified imperative regulation of property relations, when the property acquired by spouses in marriage belonged to them only on the right of common property, and in case of divorce property was subjected to division between the former spouses in equal shares. Thus any deviations from this egalitarian distribution of marital property were seen as an exception to the general rule and required court approval.

Instead of it in European countries the institution of marriage contract has become widespread at the beginning of the XIX century. It should be noted that the first marriage contract was enshrined in civil legislation of France in 1804, in which it was defined as notarized agreement defining the mode of property relations of spouses, and in its absence so-called "legal unity" of marital property was installed, the regime of which was applied to their premarital property and movable property acquired by them in marriage [2].

A similar approach for consolidation of the institution of marriage contract was reflected in the German civil code in 1886, in which a common mode of the unity of property with the right of man to use and manage was fixed. Other systems of the organization of property relations weren't prohibited by the legislator at that time, but for that married couple had to conclude a special marriage contract (art. 1432, 1436 of the German Civil Code).

[1] Кодекс о браке и семье РСФСР: С изм. и доп. на 30 апр. 1982 г. / М-во юстиции РСФСР. – М.: Юридическая лит., 1982. – С. 4.

[2] Історія держави і права зарубіжних країн: навч. посібник / О. О. Шевченко. – Київ: Атіка, 1998 / [Електронний ресурс]. – Режим доступу: http://ukrkniga.org.ua/ukrkniga-text/707.

Civil legislation of Italy also contains provisions concerning a marriage contract. Thus the main peculiarity of a marriage contract in Italy is that the contract may stipulate rights and obligations of third parties. In this case, you must enter into a contract full personal data of third parties (such as a creditor of one spouse), otherwise the contract will be considered invalid in this part. In contradistinction to Italian legislation domestic family law excludes the possibility of establishing the rights and obligations of third parties in a marriage contract.

The peculiarity of contractual regulation of marriage relations in most states of the USA is the opportunity to regulate both property and personal immaterial relations (the choice of names of children, the fulfilling of parental duties regarding the upbringing of children, housework etc.). We should immediately note that provision of p. 3 of the art. 93 of the Family Code of Ukraine prohibits categorically such an opportunity; in our opinion it needs adjustment towards lifting the forbiddance on the possibility of a regulation personal relationships of spouses and relations between them and their children in a marriage agreement.

Despite the fact that a marriage contract has a long history, but only from 23rd of June 1992 the Code of marriage and family was supplemented by article 27–1. In other words only after the Soviet collapse this institution received its consolidation in the national legislation. However until now the attitude to this contract both in science and in practice is controversial. Unfortunately quite often even nowadays a marriage contract is considered as an instrument by which the richest segments of society protect themselves from the distribution of their property in case of dissolution of marriage. But in many European countries, USA a marriage contract is seen as a mandatory condition of marriage.

Despite the constant attention to a marriage contract of many domestic scientists a number of problems today remain unresolved. For example, the possibility of the conclusion of a marriage contract through representatives of spouses remains debatable even today; in legal literature there is no consensus regarding the branch identity of a marriage contract; residential relations of former spouses are unresolved; the attitude to the possibility of the conclusion of a marriage contract by persons living as one family, but not married to each other, by underage persons is ambiguous etc.

In the legal literature the question of the legal nature of a marriage agreement evokes a lively discussion. Most of scientists agree with the idea that although a marriage agreement has some specific features but refers to civil agreements and general rules on transactions are applied to it [[1], p. 33–34; [2], p. 5]. However in the domestic legal literature the position about family legal nature of a marriage agreement is equally widespread

[1] Жилинкова И. В. Брачный контракт / И. В. Жилинкова. – Харьков, 1995. – С. 33–34.

[2] Ульяненко О. О. Шлюбний договір у сімейному праві України: автореф. дис. … канд. юрид. наук: 12.00.03 / О. О. Ульяненко. – К., 2003. – С. 5.

given that only married couples are its subjects. As Yu. Chervonyy has noticed entry into force of a marriage agreement that regulates property relations between spouses should precede a conclusion of marriage; in this case we can see derivative nature of the regulation of property family relations of the regulation of personal immaterial relations that is typical for the relations regulated by family law [[1], p. 17].

To our mind a detailed analysis of forms of a marriage agreement, the conditions for its validity, the grounds for declaring it invalid, and the procedure for concluding the agreement allows us to make a conclusion that in this case general civil construction of contract law are used. Therefore it is necessary to agree with the opinion of the scientists who refer a marriage agreement of civil contracts.

However a marriage agreement can't be referred to classic civil law contracts at least because the specificity of the marriage contract is determined by its subjective component. Legal equality, free expression of will, property autonomy of the participants in relations regulated by civil legislation are applied to the parties of the marriage contract not to the degree to which they are applied to participants of civil turnover between which commodity-money relations are composed, because in the family relationships not only property but also domestic, psychological, emotional components are present. These components play an important role in the property relations of spouses; they differ from traditional civil relations between legally equal, materially independent participants of civil turnover.

However a marriage agreement is intended to regulate property relations between spouses. And from this point of view it is a kind of civil contracts, which are free of charge and may not provide payment or meeting material satisfaction. On the basis of it we can conclude about the possibility of subsidiary application of civil law to the property relations of the spouses regarding gratuitous contracts, by including civil law provisions in a marriage agreement. If spouses need to resolve some compensatory property relations with each other requiring immediate meeting granting they may use the following civil agreements as purchase and sale, gift, exchange etc. in which they will act not as a married couple but as individuals – members of civil relations.

A marriage contract is endowed with such a specific feature as subject composition clearly determined by law. According to Art. 92 of the Family Code of Ukraine subjects of a marriage contract can be two categories of people: 1) persons who submitted an application about registration of marriage; 2) persons who have already registered marriage (marriage). Immediately we want to notice farsightedness of developers of the Family Code of Ukraine that named engaged persons as "persons who submitted an application about registration of marriage". Such a determination is much

[1] Червонный Ю. С. Понятие и особенности семейных правоотношений / Ю. С. Червоний // Цивільне право. – 2002. – Вип. 1. – С. 17.

more correct than, for example, term "persons entering into a marriage" used in the Family Code of Russian Federation. It seems that the developers used in the domestic family legislation the term "person who submitted an application about registration of marriage (engaged persons)" to avoid such controversial issues as finding out from which date the parties shall enter into a marriage relationship. Moreover this period of time between the conclusion of a marriage contract and the conclusion of marriage can last long. Hence a need to clarify certain contractual requirements will appear. Instead according to family legislation of Ukraine (Art. 32 of the Family Code) marriage is registered after the expiry of one month from the date of application for registration of marriage. As an exception marriage can be registered on the day of submitting a corresponding application in case of bride's pregnancy, birth of a child, as well as the existence of a threat to the life of someone of engaged persons. If there is information about the presence of impediments to of registration of marriage, the head of body of civil registration may postpone the marriage for a period of three months. Considering of the above we can state that by defining engaged persons as persons who submitted an application for marriage registration the developers of the Family Code of Ukraine thereby clearly defined time frame for enactment of a marriage contract.

European legislation also contains radically different approaches to the regulation of property and personal relations by a marriage contract. Thus, according to the French civil legislation agreement on property relations between spouses should be concluded before marriage registration, but it takes effect only from the date of the registration of marriage (Art. 1395 of the Civil Code of France). Instead, according to the German Civil Code the couple can regulate their property relations in marriage contract necessarily to of registration of marriage, but after marriage a married couple has the right to correct these contractual conditions or at all to cancel the marriage contract at their discretion.

It is interesting to study a legislative approach to these issues in Japan, where the marriage contract is valid only if it is concluded until the time of submitting the application for marriage (Art. 755 of the Civil Code of Japan). The agreement that was concluded after the of registration of marriage subjects to cancellation, and then the property relations between spouses are regulated by the Civil Code; it means legal regime comes into effect. Moreover, according to Japanese law after the submitting an application for marriage a marriage contract can not be changed. The change of it is allowed only if the agreement itself contains provision on the procedure of its change (Art. 759 of the Civil Code of Japan) [[1], p. 217].

In our opinion, approach to the subject composition of the marriage contract

[1] Вагацума Сакаэ., Ариидзуми Тору. Гражданское право Японии: в двух книгах / Вагацума Сакаэ, Ариидзуми Тору; пер. с японского В. В. Батуренко; под ред. и со вступ. ст. Р. О. Халфиной. – М.: Прогресс, 1983. – Кн. 2. – 1983. – С. 217.

reflected in the Family Code of Ukraine is the most reasonable, because, according to recent observations, in Ukraine a marriage agreement is used just by the persons entering into marriage (engaged persons), namely the young persons. It appears that it can be explained by the desire to identify and harmonize positions on the most significant issues of material nature. And this is fully justified considering the statistics of divorce within the first five years of marriage. After all if during the so-called "coordination" between those who plan to enter the marital relationship it will become apparent that the system of family values and views on common life is very different, it allows once again comprehending the decision on expediency of entry into marriage relationship. Judicial practice in such types of cases as divorce also shows that marital disagreement that led eventually to divorce usually occur precisely because of such aspects of family life as "children", "money", "career", "family", "belief", "emotions" [1, p. 90].

Special attention should be paid to the possibility of the conclusion of a marriage contract by persons living as one family, but not married to each other, that is, when a man and a woman live together without of registration of marriage. Answering this question it should be understood that the legislation does not recognize persons living as one family, but not married to each other, as the spouses regardless of the duration and stability of relationships that bind them. Considering it in case of the conclusion of a marriage agreement by such persons a general rule of pt. 1 the Art. 95 of the Family Code of Ukraine will be valid: if a marriage contract is concluded before marriage registration, it shall enter into force on the day of registration of marriage. So if two people do not intend to register the marriage, then a marriage contract is deprived of both practical and legal sense, because it will never comes into force, and the costs of drafting the agreement and its notarization will be paid in vain.

Family legislation defines the form of the marriage contract. Thus according to Art. 94 of the Family Code of Ukraine a marriage contract is concluded in writing and certified by a notary. Notarization of the contract is carried out by making on the document which is a contract a certifying notarial inscription. For receiving the certification of a marriage contract person may appeal to any notary that works as a notary in public and in private practice. A notary may also assist in the drafting the project of a marriage agreement.

However it is expedient to note that in practice many notaries relate to a marriage agreement with caution, often perceiving them as a protocol of intent, not as a transaction. As a result for the certification of appropriate legal relations these notaries require the conclusion of other agreements forcing individuals who wish to enter into a marriage contract bear considerable costs in its arrangement.

In addition we must admit that very small number of marriage contracts is

[1] Павек Франтишек. Развод глазами судьи / Павек Франтишек. – М., Изд-во «Прогресс», 1976. – С. 90.

concluded in Ukraine. The lack of such demand from the population leads to a lack of desires of notaries to develop and to improve fully the projects of such agreements. Unfortunately legal ignorance of citizens nowadays is frequent phenomenon in our society. And of course it can be used to the detriment of citizens. This is especially possible at the conclusion of a marriage contract, because you can not ignore its special legal nature and complex character.

To prevent such abuse notaries are obliged to assist citizens in the implementation of their rights and protection legitimate interests, clarify their rights and duties, to warn about the consequences of the exerted notarial acts for the purpose of that legal ignorance could not be used to their detriment (Art. 5 of the Law of Ukraine "On Notariat"). In particular during the certification of a marriage agreement a notary is obliged to clarify to the parties the content of certain conditions and check compliance of contents of the agreement to the law and to the real intentions of the parties.

At the same time we'll try to answer the question whether the powers of a notary are finished after the certification of such an agreement, inasmuch as it is consensual, and relations between the spouses are in constant dynamics. First of all we should notice about an urgent need for more detailed regulation of procedures of notarial proceedings concerning the certification of a marriage contract as several phases phenomenon – from the certification to its termination in p. 2 Ch. 5 Provision on the procedure of notarial acts by notaries of Ukraine. This, in our opinion, will allow couples in the future provide themselves with the guarantees of the realization of property rights and duties of the entire period of married life; it certainly will avoid litigation with this category of cases. This "unloading" of the courts in its turn will lead to better and faster considering other types of cases, as courts are now unable to make timely consideration of cases that result in violation of Art. 157 of Civil Procedural Code of Ukraine regarding the timing of consideration.

Secondly, in case of death of a spouse it will allow to move from the certification of a marriage contract to the proceedings for issuance of the certificate of inheritance with the documentary ensuring of property rights of a legator which will determine what share of personal property he owns [[1], p. 1156]. Significant differences between the proposed approach of the modern notarial proceedings are seen in the fact that today one of the spouses who lived through the other during the issuance of a certificate of ownership to the share of the marital property personally determines which property remains to him and which passes to the heirs of the deceased. This contractual approach allows not only make easier the notarial and judicial (in the case of a dispute between the heirs and those of spouses who lived through other) practices, but also significantly reduce the cost of notarial services.

[1] Договірне право України. Особлива частина: навч. посіб. / Т. В. Боднар, О. В. Дзера, Н. С. Кузнєцова та ін.: за ред. О. В. Дзери. – К.: Юрінком Інтер, 2009. – С. 1156.

Analyzing foreign practice concerning the procedure and form of the marriage contract it should be immediately noted that in most countries there are strict requirements failure of which may result in the recognition of the marriage contract invalid. As a rule the conclusion of a marriage contract must be made in a written form as a special act or the other document at organs authorized to commit such actions. Thus, in France the conclusion of a marriage contract is in the competence of notaries. Instead, the Italian legislation contains a provision on compulsory registration of researched agreement in local authorities, and if an agreement of people relates to real estate – also in organs, that register real estate transactions. In addition in the legislations of most of the European countries a special form of registration of marriage contracts is provided that allows any interested person to know the fact of signing an agreement. Moreover in France a marriage contract must be published if the spouse is an entrepreneur (Art. 1394 of the Civil Code of France).

The issue of the conclusion of a marriage contract through a representative is equally interesting and deserves a special attention. A marriage contract is a transaction signed by the parties, incidentally as any other agreement. Inasmuch as the vast majority of contracts are allowed to be concluded by the signatures of the representatives on the basis of a contract of agency or a power of attorney duly executed, the question arises: can a marriage contract be signed by representatives of the parties? In the Family Code of Ukraine there is no response to this question.

According to pt. 2, Art. 238 of the Civil Code of Ukraine representative cannot commit the transaction which according to its content can be committed only by the person he represents, but whether that provision refers to a marriage contract?

First of all it should be noted that a marriage contract is not an everyday transaction that is concluded quite often by the same people (as the sale, delivery etc.). It is concluded between persons connected with special personal and trusting relationship, and maybe – once in a lifetime (with further changes). Such features allowed I. Zhylinkova identify such an agreement as a personal or even intimate [1, p. 39].

However in the legal literature we can find the arguments on defense of the possibility of concluding a marriage contract by representatives of the parties. The representative's authority is the range of rights and responsibilities that are relied on him/her [2, p. 177]. In our case these powers are strictly defined by the person represented. The representative is imputed into a clear framework and is entitled to exercise only those actions that are entrusted to him within his representation. Thus O. Ulyanenko notices that the ideal variant is when the parties develop the conditions of a marriage contract together with their law-

[1] Жилинкова И. В. Брачный контракт / И. В. Жилинкова. – Харьков, 1995. – С. 39.

[2] Цивільне право: підручник для студентів юрид. вузів та факультетів. – К.: Вентурі., 1997. – С. 177.

yers; on the basis of it the researcher assumes the possibility of concluding a marriage contract by representatives of parties (or representative on the one hand and party on the other hand) [1, p. 129]. However during the analyzing of the theoretical question the author does not include some aspects of notarization of contracts.

Firstly, there is no doubt that following the requirements of current legislation the lawyer is obliged to use all the permitted means of protection of the rights and legal interests of the represented person and cannot use his powers to the detriment of the person in whose interests he accepted the assignment. However, the vast majority of notaries elaborates the projects of marriage contracts, develops and improves their conditions. Secondly we should not forget about the responsibility of notaries for the certification of such agreements. So in any case (whether the project of an agreement is being developed by a notary or representative of parties) notary shall verify the perception and compliance of the parties with the terms and conditions. Therefore it seems more appropriate personal presence and coordination of all conditions exactly by the spouses (engaged persons) than the development and coordination of such issues with a representative. S. Fursa notes that even the process of drafting the terms of a marriage contract can be regarded as a test of characters and true intentions of the parties, that's why the possibility of drafting such a treaty is a positive thing [2, p. 1155]. Considering the above in our opinion a marriage contract is personal in its nature, and therefore the possibility of the conclusion it through a representative seems inappropriate.

So a marriage contract occupies a special place among marital agreements. Firstly, this agreement has the most complex character and can contain a variety of conditions relating to marital property or providing maintenance of one of them. Secondly, a marriage contract unlike all other agreements may be concluded concerning future marital property. Thirdly, the subjects of the marriage contract can be not only the spouses but also persons who applied for marriage registration.

Proceeding from the above it can be concluded that the reasoning of benefits of a marriage contract compared to the legal regime of marital property and detailed elaboration of the procedure and conditions of the conclusion of it is essential for the development of the institution. Therefore, an important goal today is to develop skills for concluding such agreements in practice, applying different regulatory framework concerning them inasmuch as incorrect application of the legislation that regulates other contractual relationships can significantly violate the rights of the agreement.

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O. Kot, Doctor of Law, Senior Research Associate of the Department of Private Law Problems at the Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine, Honored Lawyer of Ukraine, managing partner of Antika Law Firm

THE DEVELOPMENT OF PRIVATE LAW DOCTRINE IN THE FIELD OF PROTECTION OF SUBJECTIVE CIVIL RIGHTS

Abstract. *The protection of subjective civil rights was the subject of the close attention of civilists for many decades. At the same time, the accents of doctrinal substantiation acquire unique expression due to the nature of private legal policy, expressed in the principal act of civil legislation. The adoption of the Civil Code of Ukraine in 2003 as the constitution of private law for the future of civil society with a developed market economy has led to a significant intensification of scientific research in the field of the relevant issues. The provisions of the current Civil Code of Ukraine, which to a large extent formed the modern institute for the protection of subjective civil rights, became a significant factor in the development of national civilist doctrine in the post-Soviet period.*

The purpose of the article is to analyze and define the general vector of the private law doctrine development in the sphere of subjective civil rights protection taking into account the changes that took place in the legal regulation of the institute of subjective civil rights protection following the adoption of the current Civil Code of Ukraine and reforming the procedural legislation of Ukraine within the framework of the judicial reform.

Emphasis was placed on the need to differentiate the right to remedy from the protection of rights as tangible actions directly aimed at protecting the violated right. The conclusion on the necessity of considering the category of protection of rights, first of all, in the system of the mechanism of realization of civil rights is reached. At the same time, the stage of protection of rights is recognized as an optional stage of the mechanism of realization of subjective civil law and is separated from other stages, because it has inherent

features that make it impossible to combine it with the stage of formation of subjective law, as well as its realization. The relationship between the protection of rights and other civilistic categories, such as legal safeguard, legally protected interest and civil liability, has been elucidated. Within the framework of the study of the institute of protection of rights, the legal phenomenon of the misuse of a right has been analyzed. We propose an approach to the legal consequences of qualifying the method of protection as general or special in the context of law enforcement practice. The general vector of private law doctrine development in the sphere of subjective civil rights protection at the present stage is recognized to be ensuring the effective protection of subjective civil rights. It has been established that the relevant changes permeate the whole Institute of the protection of rights, starting from its doctrinal interpretation and interaction with other related institutions, up to the influence of the doctrine on the formation of new legislative approaches and actual judicial practice, since the prevailing task of court proceedings under the new procedural legislation is to ensure effective protection of the rights of the person filing a lawsuit.

Key words: *the right to remedy, protection of rights, civil liability, legal abuse, general and special remedies, the principle of effective human rights protection.*

With the adoption of the Civil Code of Ukraine in 2003, the protection of subjective civil rights became one of the most frequently discussed issues in Ukrainian civil law science. We need to mention a number of monographic studies of general problems of civil rights protection prepared by Ukrainian scientists: «Safeguard and protection of rights and interests of individuals and legal entities in civil legal relations»[1], «Peculiarities of subjective civil rights protection»[2] and others. Certain issues of civil rights protection were studied by famous Ukrainian civilists N. S. Kuznietsova[3], O. D. Krupchan[4], S. O. Pohribnyi[5], I. O. Dzera[6] and many others. It should be emphasized that recently the problem of protection of rights has been actively researched during the development of dissertations for the degrees of doctor and candidate of legal sciences, which again emphasizes the relevance of

[1] Охорона і захист прав та інтересів фізичних та юридичних осіб в цивільних правовідносинах / За заг. ред. академіка НАПрН України Я. М. Шевченко. – Х: Харків юридичний, 2011.

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[3] Див., зокрема: Кузнєцова Н. С. Цивільно-правова відповідальність і захист цивільних прав // Вісник Київського університету ім. Т. Шевченка. – Юридичні науки. – 2009. – Випуск 81. – С. 100–106.

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legal research in the field of civil rights protection.

It is necessary to agree with the thesis stated by N. S. Kuznetsova that «legal regulation of any social relations, connected with the process of transformation of legal prescriptions in the plane of actual social relations, provides that each subjective right in case of its violation is guaranteed by the possibility of its forced restoration or protection»[1].

This function was executed by the new Civil Code of Ukraine of 2004, which, unlike the previous codifications of civil legislation of Ukraine, provided a rather detailed regulation of the institute of implementation and protection of civil rights. Therefore, there are good reasons to assert that the provisions of the new Civil Code (some of which were, at the time of its adoption, if at least, very progressive for the post-Soviet society) gave a significant impetus to the development of fundamental civilist research in Ukraine, in particular, to the doctrine of protection of subjective civil rights.

The purpose of the article is to analyze and define the general vector of private law doctrine development in the sphere of subjective civil rights protection taking into account the changes that took place in the legal regulation of the institute of subjective civil rights protection as a result of adoption of the current Civil Code of Ukraine and reforming the procedural legislation of Ukraine within the framework of the judicial reform.

But what new developments have emerged in the regulation of the institute of protection of subjective civil rights with the adoption of the new Civil Code and how do these regulations work now?

Part 1 of Article 15 of the Civil Code of Ukraine stipulates that every person has the right to remedy his or her civil rights in case of its violation, non-recognition or challenge (emphasis added – *O. K.*). There are grounds to believe that the right to protection in the context of this article is considered as a subjective right of a person participating in civil legal relations, which arises in the event when: 1) the civil rights and interests belonging to it are violated (in particular, non-fulfillment or untimely fulfillment of an obligation, preservation or acquisition of property without a sufficient legal basis, etc.); 2) these rights are not recognized (for example, non-recognition of a person as the assignee of a reorganized legal person, non-recognition of the property right to certain property); 3) the civil rights (in particular, contest of the property right to inheritance, etc.) are challenged.

As O. D. Krupchan points out, the right to judicial protection of civil rights and interests is a key element in the construction of civil law, which is characterized by the absolutism of character, the ability to independently address issues of protection or self-protection through the universality of protection methods[2].

[1] Див.: Кузнєцова Н. С. Вказ. твір. – С. 100.

[2] Див.: Особливості захисту суб'єктивних цивільних прав: Монографія / За заг. ред. академіків НАПрН України О. Д. Крупчана та В. В. Луця. – К.: НДІ приватного права і підприємництва НАПрН України, 2012. – С. 7.

However, what is understood by the right to protection in legal science?

V. P. Grybanov, one of the most famous researchers of this problem in Soviet times, noted that the civilist literature does not contain an exact answer to this question[1]. There is no unambiguous answer to this question even now – neither in Ukrainian civilism, nor in the science of civil law of other former Soviet republics.

Despite the fact that the right to protection in practice is most often realized through procedural rules, there is no doubt that in its essence it is primarily a substantive category, not a procedural one, although very closely related to procedural rules. Taking into account the legislative regulation of the institute of protection of rights in the civil law of Ukraine, there are grounds to believe that the methods of protection of civil rights established in Art. 16 of the Civil Code, the human right to self-protection against offenses and unlawful encroachments provided for in Art. 19 of the Civil Code, the right of a person to protect his or her rights at his or her own discretion, enshrined in Art. 20 of the Civil Code of Ukraine, certainly testify to the fact that the protection of rights can be carried out both with the involvement of authorized bodies (in the manner prescribed by the procedural legislation) as well as independently by the rights holder without the participation of such bodies under the relevant provisions of civil law (substantive law). V. P. Grybanov noted in this regard that it is hardly appropriate to reduce the content of the right to protection only to the possibility to address the demand for protection of the right to the relevant state or public bodies. The right to a remedy in its material sense represents the possibility of applying coercive measures against the violator. At the same time, the possibility of applying coercive measures against the violator should not be understood only as putting into effect the apparatus of state coercion[2].

Analyzing the legal nature of the right to defense, M. K. Suleimenov singles out three main views on the essence of the right to protection: the right to protection as one of the components of subjective civil law – along with the right to their own actions and the right to demand certain behavior from the obligated persons; the right to protection as an independent subjective right that arises at the moment of violation of a right, but not within the framework of the regulatory (legal) relationship that already existed at the time of the violation, but within the limits of the new protective relationship; and a compromising view that the right to protection is one of the entitlements of a subjective right, but it is transformed as a result of an offense into a separate subjective right[3].

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[1] Див.: Грибанов В. П. Осуществление и защита гражданских прав. – М.: «Статут», 2000. – С. 105.

[2] Див. Грибанов В. П. Вказ. твір. – С.106.

[3] Див.: Сулейменов М. К. Субъективное гражданское право и средства его обеспечения в Республике Казахстан // Субъективное гражданское право и средства его обеспечения. Материалы Международной научно-практической конференции, посвященной памяти Ю. Г. Басина (в рамках ежегодных цивилистических чтений). Алматы, 13–14 июня 2005 г. / Отв. ред. М. К. Сулейме-

It seems that such a diversity of scientific views on the legal nature of the institute of protection of rights has become the basis for the existence of a number of definitions of the right to protection, which, although not contradictory, are in different planes and patterns.

For instance, E. O. Krasheninnikov believes that the right to protection is a possibility, established by the rule of law, of certain behavior of a person in a conflict situation, given to him/her in order to protect a regulatory subjective right or a legally protected interest[1].

O. I. Matsegorin considers the protection of rights as a possibility given to a person empowered to use law enforcement measures to restore the violated right. Developing this thesis, the scholar points out that legal protection should be considered in two main planes: law enforcement regulation of civil relations and human rights installation of legal means aimed at the implementation of subjective civil law and prevention of its violation[2].

Yu. D. Prytyka, referring to the scientific works of V. P. Grybanov, notes that the substance of protection of subjective rights is to remove obstacles to the implementation of their rights by subjects. Therefore, he believes that the traditional definition of the protection of rights can be slightly modified, based on the category of activities, which will better reflect the qualities inherent in this legal phenomenon. Thus, the protection of rights, according to Yu. D. Prytyka, can be defined as a legal activity aimed at removing obstacles to the exercise by subjects of their rights and termination of violations, restoration of the situation that existed before the violations[3].

The analysis of the given definitions provides the grounds to assert that the terms "right to a remedy" and "protection of rights" or "legal protection" in civil law science are sometimes unjustifiably equated. Even going deep into the discussion about whether the right to protection is an independent subjective right, a secondary right or one of the powers of the subject of civil rights, it is necessary to separate it from real actions directly aimed at the protection of the violated right. Therefore, it seems reasonable to conclude that the right to protection is a possibility provided by law to apply coercive measures established by law or contract, aimed at termination of the offense and restoration of the violated right or if it is impossible to restore it, at compensation of the damage and moral harm caused by the offense. At the same time, the protection of rights is the actions of the empowered person aimed at achieving the said goal.

The position expressed in due time

нов. – Алматы: НИИ частного права КазГЮУ, 2005 – С.31–32.

[1] Див.: Крашенинников Е. А. Структура субъективного права и право на защиту // Проблема защиты субъективных прав и советское гражданское судопроизводство. – Ярославль. – 1979. – С. 79–80.

[2] Див.: Мацегорін О. І. Поняття та зміст захисту цивільних прав // Часопис Київського університету права. – 2011. – № 3. – С.144.

[3] Див.: Притика Ю. Д. Поняття і диференціація способів захисту цивільних прав та інтересів // Вісник Київського університету ім. Т. Шевченка. – Юридичні науки. – 2004. – Випуск 60–62. – С. 16–17.

by H. Ya. Stoiakin, who asserts that legal protection includes: the publication of norms establishing rights and obligations, determining the ways of their implementation and protection and threatening with the application of sanctions; the activities of subjects to exercise their rights and protect subjective rights; the preventive activities of state and public organizations; the activities to implement legal sanctions, is not indisputable[1].

In this context, it should be noted that the category of protection of rights, in our opinion, should be considered, first of all, in the system of the mechanism of implementation of civil rights, which generally includes the following main stages: formation or establishment of a right; implementation of the right and protection of the right. The protection phase is an optional phase of the mechanism for the exercise of subjective civil rights. If there are no grounds for protecting the right, the right to protection is not transformed into actual activities of the subject aimed at terminating the infringement and restoring the violated rights.

Thus, legal protection, as one of the stages of the mechanism for the implementation of subjective right, must be separated from other stages, since it has features that make it impossible to combine it with the stage of formation of a subjective right, as well as its implementation.

In order to best illustrate the existing approaches to the definition of the institute of protection of rights, it is also worth analyzing its relationship to such categories of civil law as a safeguard of rights, legally protected interest and civil liability.

The relationship between the categories «protection of a right» and «safeguarding of a right» has been the subject of extensive discussion in the legal literature. L. O. Krasavchikova's approach to the differentiation of these concepts, according to which the safeguarding of rights are the measures applied to the violation of rights and obligations, and the protection is the measures applied after the violation to restore the violated rights, a separate type of the safeguarding that is applied in case of an existing violation, should be considered successful and legally balanced[2].

The most common view is that the notion of legal safeguarding is broader than that of protection. Historically, this view has been supported for a long time by representatives of the procedural law discipline, who regarded the right of protection only as the actions of the competent state authorities aimed at protecting the violated right. Among Ukrainian civilists, this position was consistently taken by Ya. M. Shevchenko. Such views are expressed by some representatives of the St. Petersburg school of civilism, who believe that the safeguarding of a right in the broad sense includes not only legal, but also economic, political, orga-

[1] Див.: Стоякин Г. Я. Понятие защиты гражданских прав // Проблемы гражданско-правовой ответственности и защиты гражданских прав. – Свердловск, 1973. – С. 34.

[2] Див.: Красавчикова Л. О. Гражданско-правовая охрана личной жизни советских граждан: Автореф. Дисс.… канд. юрид. наук. Свердловск, 1979. – С.7.

nizational and other measures aimed at creating the necessary conditions for the exercise of subjective rights, so this concept is broader than the concept of «protection of rights»[1].

In addition to this position, there were ideas that the concepts of legal safeguarding and legal protection were identical, or the latter is broader than the concept of the first. At the same time, some scholars generally believed that «legal protection» was not a legal category and was devoid of any legal weight.

In his time, V. P. Grybanov emphasized that the importance of the study of the correlation between the subjective right and the interest is due to the fact that the exercise and protection of civil rights are inextricably linked, on the one hand, with the problem of legal protection of the interests of society as a whole, and on the other hand, with the problem of ensuring the correct combination of individual interests with the interests of society[2].

Analyzing the question of correlation between the categories of protection of rights and protection of interest, the scholar notes that safeguarding of interests should be understood as the whole system of norms, guarantees, principles, opportunities, and permissions that constitute the mechanism of realization of legally protected interests. Protection of interests, in turn, is defined as a spectrum of actions (not only possible but also, according to the law, admissible), which are directed on the elimination of obstacles in the realization of interest protected by the law.

Some Ukrainian researchers believe that the correlation between safeguarding and protection should be considered in the form of a certain system of counterweights, in which, on the one hand, safeguarding is provided exclusively to legitimate interests, and on the other hand, protection of legitimate interests is provided exclusively by legal methods[3].

The relationship between the protection of rights and civil liability is somewhat different. Most academics agreed that civil liability cannot be considered separately from the institute of protection of rights.

At first glance, the difference between the institute of civil liability and the institute of protection of rights is ostensibly on the surface, because civil liability always has a proprietary nature, and the protection of rights is carried out in a way that most effectively will restore the violated right (and such methods are not always property-oriented).

At the same time, the institute of civil liability, as well as the institute of protection of rights, despite the constant attention of researchers, is one of the institutes of civil law over which the debate continues. This applies to the concept of civil liability, its grounds, conditions of occurrence and the like. Therefore, it is worthwhile to dwell on the issue of the relationship between the institute of protection and the institute of civil liability in more detail.

[1] Див.: Гражданское право. Ч. 1 / под ред. Ю. К. Толстого, А. П. Сергеева. – М. : Проспект, 1996. – С.240.

[2] Див.: Грибанов В. П. Вказ твір. – С.234.

[3] Див.: Венедіктова І. В. Захист охоронюваних інтересів у цивільному праві: Дис… докт. юрид. наук:12.00.03. – К., 2013. – С.149.

It is worth to agree with the existing position in the science of civil law, the essence of which is that in case of violation of the regulatory legal relationship, the content of which is positive subjective rights and obligations, it is transformed into a protective legal relationship, within which the restoration or protection of the violated rights should be carried out through the application of civil liability measures[1].

In order to determine the relationship between liability measures and ways of protecting civil rights, it is necessary to analyze in more detail the ways of protecting subjective civil rights enshrined in Ukrainian legislation.

Part 2 of Article 16 of the Civil Code provides that the following methods of protection of civil rights and interests may be used:

– recognition of a right;

– recognition of a transaction as invalid;

– termination of an action that violates a right;

– restoration of a position that existed before a violation;

– enforcement of an obligation in kind;

– change of legal relationship;

– termination of legal relationship;

– compensation for damages and other ways to reimburse property damage;

– compensation for moral damages;

– recognition of decisions, actions or inactivity of a public authority, authority of the Autonomous Republic of Crimea or local government, their officials and officers as illegal.

Taking into account the fact that the legislator has secured the possibility to protect civil law or interest in other ways established by contract or law (part 2 of Article 16 of the Civil Code), this list of remedies to protect rights and interests is not exhaustive. Therefore, under the new Civil Code, the parties, concluding an agreement, have the right to provide for special methods of protection of their rights in case of their violation by the counterparty. In practice, this normative clause may be implemented by including in the contract certain measures of operational impact, which are agreed by the parties and acquire the status of binding for the parties of the contract.

Moreover, given the reform of the procedural law as part of the judicial reform, which began in late 2014, substantive changes have also taken place, in particular, the provisions of the Civil Code of Ukraine, which regulate the right of a person to the protection of its subjective civil rights.

In the new procedural codes, the principle of effective protection of the rights of a complainant has been established as the predominant objective of legal proceedings.

In making procedural decisions and applying any procedural rules, the court must be guided first and foremost by the main task of legal proceedings, which is the effective protection of human rights and interests. The same principle is also the basis for the right of the court to apply, at the request of the person applying to the court, a method of protecting his or

[1] Див.: Кузнєцова Н. С. Вказ. Твір. – С.102.

her right, which is not provided by law or contract, if the methods provided by law or contract do not provide effective protection of such right. The provisions of the Civil Code of Ukraine have also undergone changes with the changes in the procedural codes.

Henceforth, according to Article 16 of the Civil Code of Ukraine, a court may protect a civil right or an interest in other ways established by a contract or by law or a court in cases determined by law.

Pursuant to part 1 of Article 2 of the Economic Procedural Code of Ukraine in the version that gained legal force on 15.12.2017. (provisions similar in content are also contained in the new Civil Procedural Code of Ukraine), the task of economic court proceedings is a fair, impartial and timely resolution of disputes related to business activities and consideration of other cases under the jurisdiction of the economic court in order to effectively protect violated, unrecognized or disputed rights and legitimate interests of individuals and legal entities, the state.

At the same time, the court and participants of the court proceedings shall be guided by such task of economic court proceedings, which prevails over any other considerations in the process (part 2 of Article 2 of the EPC of Ukraine).

Art. 5 of the new version of the EPC of Ukraine provides that in administering justice the court shall protect the rights and interests of individuals and legal entities, state, and public interests in the manner determined by law or contract.

If the law or the contract does not determine the effective way of protection of the violated right or interest of the applicant, the court in accordance with the claim of such a person may determine in its decision such a way of protection that does not contradict the law.

Para. 4 p. 3 of Art. 162 of the EPC of Ukraine provides that the statement of claim shall contain, in particular, the content of the claim: a method (methods) of protection of rights or interests provided by law or contract, or other method (methods) of protection of rights and interests that do not contradict the law and which the plaintiff asks the court to determine in its decision.

It is important that the court takes into account the method of protection chosen by the plaintiff when deciding whether to consider the case in a simplified or general procedure (paragraph 3 of Part 3 of Article 247 of the EPC of Ukraine).

In other words, the court may not use an effective method of judicial protection on its own initiative if it is not specified in the statement of claim.

There are grounds to believe that a party may insist on a remedy not provided for by law or contract only if the law or contract does not define an effective remedy for the infringed right or interest of the complainant.

Returning to the issue of correlation between the methods of protection of rights and civil liability measures, there is every reason to agree with N. S. Kuznietsova's conclusions. Thus, the civilist reasonably believes that both responsibility measures and methods of protection of rights and interests should be considered as certain legal instruments

of influence on the corresponding public relations. Besides, both measures of responsibility and remedies are aimed at localization of consequences of violation of rights. However, while the two legal instruments have a clear human rights purpose in common, the means of redress are broader in scope, as they not only provide for the restoration of the violated right or compensation for the loss caused by it, but also for the prevention, repression, and elimination of violations of a civil right. N. S. Kuznietsova argues that accountability measures provided by law are an integral part of the methods of civil rights protection[1].

Since the analysis of the institute of protection of rights revealed that the methods of protection of civil rights are quite different in their orientation, content, actors that can apply them, we consider it necessary to highlight the main doctrinal approaches to the classification of forms and methods of protection of civil rights.

As O. I. Matsegorin notes, there are no unified approaches to understanding the procedural form of protection in the theory of civilist science. Some scientists recognize under the procedural form a special legal construction, which is characterized by a certain set of procedures for the implementation of the relevant rights. Others believe that this legal construction is an element of the procedural form, and the procedural form itself is a form of law enforcement, which is embodied in the process of solving legal cases in the course of justice[2].

We support the point of view expressed by Yu. D. Prytyka, according to which «means» and «forms» of protection should not be confused with the notion of «method» of protection of rights. In the strict sense, all of them mean different actions aimed at the protection of rights, i.e. different elements (types or parts) of activities for the protection of subjective rights, although there are a close relationship and interdependence between them, which often leads to a juxtaposition of these concepts[3].

Ye. O. Kharytonov suggests classifying the forms of protection depending on the nature of the jurisdictional body performing the protection, such as judicial protection, administrative protection, notary protection, self-protection, protection with the help of other public, state and international institutions and their bodies[4].

A similar point of view is expressed by Yu. V. Bilousov, who, commenting on the provisions of Chapter 3 of the Civil Code of Ukraine, states that the legislator «carries out the classification of types of protection (*apparently, the forms of protection – O. K.*) depending on the subject of its implementation: by a court (Article 16 of the Civil Code of Ukraine), by public authorities, ARC authorities (p.17 of the Civil Code of Ukraine), by notary (Article 18 of the Civil Code of Ukraine), independently (Article 19 of the Civil Code of Ukraine)[5].

[1] Див.: Кузнєцова Н. С. Вказ. твір. – С.105.
[2] Див.: Мацегорін О. І. Вказ. твір. – С.145.
[3] Див.: Притика Ю. Д. Вказ. твір. – С.17.
[4] Цивільне право України: Підручник / Є. О. Харитонов, Н. О. Саніахметова. – К.: Істина, 2003. – С.183.
[5] Див.: Цивільний кодекс України: нау-

In our opinion, there are reasons to believe that the main approach to the classification of forms of protection of rights should be their differentiation on the subjective basis depending on whether the activity aimed at protection of the right is jurisdictional or not.

Classifying the methods of civil rights protection, researchers, first of all, distinguish between the substantive legal (compensation for damages, restoration of the position that existed before the violation, cancellation by a public authority of its act, termination of a contract by the parties, etc.) and procedural legal (actions of jurisdictional authorities aimed at protecting the violated right)[1].

Depending on the source of origin of the remedies, it is possible to identify the remedies directly established in the legislation and those established by the parties to the contract, as provided in Art. 16 of the Civil Code of Ukraine.

The remedies can be differentiated by taking into account the purpose of their application. Thus, we can distinguish the methods of protection aimed at stopping the violation of a right, at its restoration or at the compensation of material losses caused by the violation of a right (civil liability measures).

However, it is necessary to admit that no classification, as it is known, can be ideal, but it is extremely useful for obtaining a systematic view of the legal phenomenon being analyzed.

The research of the institute of protection of rights suggests the necessity to analyze such legal phenomenon as **abuse of law (legal abuse)**.

In the academia of civil law, the debate on the interpretation of the notion of «abuse of law» continues. As O. O. Porotikova emphasizes, «in the long discussion on the problem of proper exercise of subjective rights the main accents have shifted from the study of specific features of abuse of law as a civil law tort to the fundamental question whether the word «abuse of law» has a semantic weight or is something far-fetched, groundless»[2].

Two perspectives on abuse of law are most prevalent today: the abuse of law is considered to be the exercise of subjective law contrary to the principles of good faith and other moral and ethical criteria, or it is regarded as a tort.

The term "abuse of law" is new for the civil law of Ukraine and appeared only in the new Civil Code – according to part 3 of Article 13 of the Civil Code acts of a person committed with the intention to harm another person, as well as abuse of law in other forms, are prohibited. The wording of the said provision suggests a new rule for the Ukrainian civil legislation prohibiting the abuse of subjective law by performing certain actions with the intent to harm another person, as well as the abuse of law in other forms. In this case, the abuse of law should be understood not only as acts committed by a person in the exercise of his or her subjective right with

ково-практичний коментар: у 2 ч. / За заг. ред.. Я. М. Шевченко. – К.: Концерн «Видавничий дім «Ін Юре», 2004. – Ч.1. – С.28.

[1] Див.: Притика Ю. Д. Вказ. твір. – С. 18.

[2] Див.: Поротикова О. А. Проблема злоупотребления субъективным гражданским правом. 2-е изд., испр. и доп. М.: Волтерс Клувер, 2008. – С. 126–127.

the exclusive intention of causing harm to another person. In exercising their rights, including while protecting their subjective rights, a person has the obligation to refrain from actions that might violate the rights of others. After all, any subjective civil rights have their limits. As Y. O. Pokrovsky aptly pointed out, «it feels like modern civil law is telling a person: if you are allowed to be egotistical within certain limits, it does not mean that you can be evil»[1].

There are grounds to assert that the legislator consciously extended the term for abuse of law and deviated from the definition of a person's intent to harm another person in the exercise of civil rights as a necessary condition for qualifying such actions as an abuse of law. It seems that in this way the principle of justice, good faith and reasonableness in civil law is implemented since the harm caused by the abuse of law must be compensated regardless of the existence of the respective intention of the person who exercised his rights.

There is no doubt that part 3 of Article 13 of the Civil Code of Ukraine reflects the general legal principle of the inadmissibility of abuse of law. According to Ye. V. Vavilin, this principle is a requirement for subjects not to exceed the limits of the right in the process of performance of duties and exercise of rights, to exercise their rights properly[2].

At the same time, the very appearance and existence in the civil law of Ukraine of the principle of the inadmissibility of abuse of law along with the principles of justice, good faith, reasonableness are primarily related to the objective impossibility to establish at the legislative level-specific limits of the exercise of civil rights. In our opinion, this is the main meaning and function of the principle of the inadmissibility of abuse of subjective right: to create the necessary prerequisites for responding to the actions of persons who violate subjective civil rights or legally protected interests not prohibited by law.

Summing up the analysis of the legal relationship between the institutes of protection of rights and abuse of law, we believe it is necessary to emphasize that the establishment of the fact of abuse of law in the exercise of the right to protection, among other consequences provided by law, is an independent and sufficient basis for refusing a person abusing his or her own right to protect the violated right in the way chosen by that person (Part 3, Article 16 of the Civil Code of Ukraine).

Analyzing the modern doctrine of protection of subjective rights, it is impossible to avoid the study of the **relationship between general and special remedies**.

In the science of civil law, there is a constant tendency to approach, according to which the practical significance of division of protection methods into general and special is that the establishment by law of a special method of protection of certain subjective rights or specific cases of their violation should exclude the ap-

[1] Покровский И. А. Основные проблемы гражданского права. М.: Статут, 1998. – С. 119.

[2] Див.: Вавилин Е. В. Осуществление и защита гражданских прав / Российская акад. наук, Ин-т государства и права. М.: Волтерс Клувер, 2009. – С. 275.

plication of general methods of protection for these cases. The simultaneous application of the special and general remedies is recognized by the Supreme Court of Ukraine only on the condition of their identity. Obviously, we are talking about cases when the general method of protection, for example, the recognition of a right (para. 1, part 2, article 16 of the Civil Code of Ukraine) finds its normative fixation in special norms, in particular, the possibility of recognition of the property right (article 392 of the Civil Code of Ukraine).

At the same time, the analysis of the above position gives grounds to question its universality. In this context, it is advisable to take into account the legal findings of higher judicial institutions when considering individual court cases. Thus, the courts have repeatedly noted that the choice of the way to protect personal non-property rights belongs to the plaintiff. A person whose right has been violated *may choose both general and special remedies for the protection of his/her right* determined by the law regulating specific civil legal relations[1] (italics are mine. – A. K.).

There are grounds to assert that in these cases, the Supreme Court of Ukraine (and later – and the new Supreme Court) held an opinion that does not exclude the simultaneous application of general and special methods of protection by an authorized person and does not provide general methods of protection exclusively subsidiary nature.

Similar ideas were also expressed in the scientific literature. Thus, Ya. M. Romaniuk and O. Ye. Burlai noted that «a claim for recognition of property rights may be combined in one suit with other claims. A vindication claim may be cited as an example. To satisfy it, the plaintiff must prove that he owns a disputed item that he does not possess. There may be a dispute over ownership of the disputed item, so the plaintiff often has to combine his claim for the item with a claim for recognition of ownership. In such a case, in order to decide on the question of vindication, the court must find out whether there are grounds for the recognition of ownership of the object by the claimant»[2].

At first glance, the above statements are fully consistent with the position of the court on the possibility of joint application of the methods of protection enshrined in Art. 16 of the Civil Code of Ukraine with the identical methods of protection provided by special rules (in this case, Art. 392 of the Civil Code of Ukraine). At the same time, it is unlikely that Ya. M. Romaniuk and O. Ye. Burlai would change their opinion in case if Art. 392 of the Civil Code of Ukraine did not

[1] Ухвала Верховного Суду України від 20 жовтня 2010 року по справі № 6-21843св09 [Електронний ресурс]. – Режим доступу : http://reyestr.court.gov.ua/Review/11970735 ; Рішення Верховного Суду України від 23 грудня 2009 року по справі № 6-23541св07 [Електронний ресурс]. – Режим доступу : http://reyestr.court.gov.ua/Review/8036412.

[2] Романюк Я. М. Позов про визнання права власності, віндикаційний та негаторний позови: деякі проблеми практичного застосування / Я. М. Романюк, О. Є. Бурлай // Вісник Верховного Суду України. – 2012. – № 8. – С. 35.

exist, and the requirement to recognize any right by an authorized person was based on the provisions of para. 1 p. 2 Art. 16 of the Civil Code of Ukraine.

The mere absence of Art. 392 in the current Civil Code of Ukraine would not eliminate the need to claim the recognition of property rights, along with a special remedy, which is vindication, if it was necessary due to the circumstances of the case and the nature of the violation of property rights, which may consist in the defendant's refusal to return the thing precisely because of the non-recognition of the claimant's property right.

Moreover, the rules of the civil law in force sometimes provide, or at least suggest, the joint application of general and special remedies. Thus, under the prescriptions of Part 1 of Art. 216 of the Civil Code of Ukraine an invalid transaction does not create any other legal consequences than those related to its invalidity. In the event of invalidity of the transaction, each party is obliged to return to the other party in kind everything that it received in the execution of the transaction, and in the event of impossibility of such return, in particular, when the received is the use of property, work performed, rendered service – to compensate the cost of what is received, at prices prevailing at the time of compensation. So, in the context of disputed transactions, the provisions of Part 1 of Art. 216 of the Civil Code of Ukraine put the application of a special remedy (restitution) in direct dependence on the satisfaction of the claim for recognition of the transaction null and void. The Law does not contain a requirement that both these methods of protection should be used in a single court case, but it is obvious that even if an authorized person brings two separate claims, both will be aimed at protecting one violated right. In addition, it should not be overlooked that, in addition to the requirement that the transaction be declared void and restitution applied, the law provides the authorized person with another general remedy, as provided for in paragraph Para. 8 p. 2 Art. 16 of the Civil Code of Ukraine, namely – to claim damages if they were caused in connection with the commission of an invalid transaction through the fault of the second party (Part 2 of Art. 216 of the Civil Code of Ukraine).

Summarizing the results of the analysis, we can conclude that two approaches have been formed in modern law enforcement practice. According to the first, general remedies have an auxiliary (subsidiary) nature and are applied only in the absence of a special remedy set forth in the law. According to the second approach, regardless of the nature of the protection as general and special, they may be applied simultaneously.

However, both approaches have their own concerns. Thus, the former does not take into account the many cases in which general and special remedies are applied simultaneously (in particular, as already noted, invalidation and restitution of a contract, recognition of a right in combination with special remedies, both contractual and non-contractual, etc.). The second approach is not sufficiently justified in cases where both general and special remedies can be applied

by nature, but the special remedy should be preferred. These cases are illustrated by the above conclusions regarding the application of such special remedy as the transfer to an authorized person of the buyer's rights and obligations under the concluded transaction.

In the light of the above, the following approach to the legal consequences of qualifying a method of protection as general or special in the context of law enforcement practice may be proposed:

1) the nature of a remedy, whether general or special, is relevant and should be used only in resolving a particular dispute and affects the identification of the appropriate remedy for the infringed right. The purpose of identifying these methods is to determine, among several possible or chosen by the authorized person, the appropriate and effective remedy for the protection of a specific infringed subjective right, taking into account the peculiarities of specific disputable substantive legal relations, and serves as a criterion for this classification;

2) an authorized person may apply any remedy for the protection of his or her right, provided that the application of a special remedy does not exclude the simultaneous application of a general remedy;

3) If there is a competition of special remedies due to the fact that for the protection of a specific subjective right the use of several remedies is possible, the one which corresponds to the peculiarities of the disputable substantive legal relations shall be applied.

The above rules, in our opinion, give grounds for the reasonable solution of practical legal conflicts.

Conclusions. The analysis of the doctrine of private law in the sphere of protection of subjective civil rights at the present stage gives the grounds to consider that the general vector of its development is to provide effective protection of subjective civil rights. Corresponding changes permeate the whole institute of protection of rights, starting from its doctrinal interpretation and interaction with other adjacent institutes, and ending with the influence of the doctrine on the formation of new legislative approaches and actual judicial practice, as the prevailing task of legal proceedings under the new procedural legislation is the provision of effective protection of the rights of a person appealing to a court.

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M. Pleniuk, Doctor of Law, Professor, Head of the Contract Law Sector of the Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine

CUSTOMARY DUALISM: NORMATIVE PRESCRIPTIONS AND LEGAL FACTS

Abstract. *The article is devoted to the analysis of the custom in the private Law of Ukraine as a normative prescription and legal fact. It has been established that the practice of dualism manifests itself in the fact that in the mechanism of legal regulation of civil relations, the custom, on the one hand, can act as a regulator of these relations, and on the other – a prerequisite, sometimes the basis for the emergence, change or termination of civil legal relations.*

Key words: *custom, legal conditions, customary conditions, legal fact, normative prescriptions, normative-legal act, civil relations.*

Custom – typically a stereotype – is characterized by constant, familiar behavior of a social group of people, communities, individual citizens, etc. These are the rules that, through a repeated application, enter into the habitual circulation of people and thus regulate the behavior of society. Custom is always attached to the requirement of tradition and is expressed in a formula: «Do so because others have done so before you» [1, p. 113].

Today, the doctrine knows more than enough examples of customs in law, including their transformation into a legal form. It is believed that the conditions for the sequence of transformation of customs into law are religion-morality-custom-law.

Exactly on the basis of such approach, on the basis of generalizations of the transformation of custom in the legal system at the end of XVIII century at the beginning of XIX century in Germany under the influence of doctrines of G. von Hugo, C. Savigny, G. Puchta and others the relevant historical school was formed.

On Ukrainian soil, in particular in Western and Eastern Galicia, in the second half of the XVIII century, there was a legal act, which was based on a number

of customs in force in Galicia. Those customs became the basic act for further improvement of the civil legislation in accordance with the style of presentation and taking into account natural law.

In his time, E. Ehrlich wrote that law is a set of established, everyday customs and principles of justice to which all members of society must adhere. At the same time, the law should not be understood as a set of orders and norms emanating from the sovereign power, because the main guarantor of the law is the force in the form of state power. The custom takes the form of public opinion, but it does not always harmonize with politics [2, p. 208]. In turn, Ed. B. Tylor draws attention to the normativity of custom and concludes that the emerging social relations are first regulated by traditions, customs that evolve depending on economic, national, political, religious factors of life and are transformed into norms [3, p. 396].

The modern understanding of customs in the legal space, its normative feature is not a new challenge in scientific discussions. Law regulates relations – this is an axiom. It is also known that the law cannot regulate any emerging social relations. The regulator of such relations, starting from Roman law to the present day, is a social institute in the form of customs, traditions and the like.

According to Article 7 of the Civil Code of Ukraine, civil relations can be regulated by customs, in particular by the customs of business circulation. According to R. A. Maidanik, the custom is the primary or basic source of Ukrainian law, from which all other sources have come, and which is the critical point of all other sources of law [4, p. 44].

According to the above rule of Art. 7 of the Civil Code of Ukraine, the following features of custom are highlighted in the legal literature: 1) it serves as a rule of conduct, i.e. a social norm establishing necessary, desired or possible conduct of participants of social relations under certain conditions; 2) a customary rule of conduct should be adopted in a certain area of civil relations, i.e. in order to obtain the status of custom, this rule should «work» towards regulation of civil relations in a certain area for a certain, relatively long period of time; 3) this rule should not be established by acts of civil law. [5, p. 98].

In our opinion, civil law custom as a source of law has a legally subordinate role in the system of sources of civil law in Ukraine. After all, customary law as a form of law fills in legal gaps, if necessary. However, customs are queued up for the use of forms of law after regulations and agreements. For example, in the sphere of sports, an example of legal custom as a basis for private legal relations is the «Laws of the Game» (1997), which were adopted by the International Football Association Board (IFAB) [6]. There are other documents that set out customs, including business customs. They have been in force in Ukraine for a long time; there are also those that are " pending" ratification.

As for international customs in the field of sports, it should be noted that, unlike international treaties, taking into account all the variables, and since the

introduction of a unified practice, they are formed over a long period of time and are mainly of verbal nature. A characteristic feature of international custom is the recognition of custom as a source of law by subjects of sporting legal relations. Such an approach, as well as the characterization of the concept of international custom as a source of law, are provided in Article 38 of the Statute of the International Court of Justice of the UN. In particular, it refers to the fact that international custom is the proof of general legal practice which is recognized as a legal norm [7].

From the above, it is possible to underline that the legal custom, including international, takes a special place in the hierarchy of sources of law for private legal relations in the area of sports. Despite the fact that by its weight and importance legal customs are inferior to domestic legislation, international treaties and other sources of law, we believe that in some cases they are the basis for the emergence of private legal relations in the field of sports and the source for the legal regulation of these relations. At the same time, it must be noted that the application of customs, including international ones, in the field of sport is restrained. This partially leads to problems concerning the non-recognition of existing private legal relations in the sphere of sport in Ukraine.

As for the customs in the business sphere, it should be noted that the list provided by the authors [8, p. 77] includes: simple trade customs, classic well-established customs of trade activity, customs of business activity, which are reflected in corporate codes of conduct, and the like. In Ukraine, the most common is the International rules of interpretation of commercial terms (*Incoterms*), which are used both in the conclusion of foreign trade agreements (contracts) and in domestic civil circulation.

Thus, the importance of customs as a form of law and social regulators, in general, is evident. However, we would like to draw your attention to the fact that the possibility of their application in everyday business activities today is most likely constrained due to the lack of relevant experience.

The Chinese model is appealing to us with regard to the relationship between law and custom. According to Chinese jurisprudence, it is important that the custom «li» does not conflict with the positive law «fa». The disharmony between these categories is considered to be a public and state affliction [9, p. 250].

It is worth noting that in Ukraine, for example, in corporate relations, not only the principles of corporate governance are taken into account for their effectiveness regulation, but also the effectiveness of social regulators, in particular, customs (business customs) and others. Corporate custom, as a rule, is understood to be a custom, the application of which is ensured by corporate action, incentives or sanctions. Corporate custom should be distinguished from those that represent a moral norm, as a corporate custom is a rule developed through the constant uniform repetition of actual relationships. For example, it is customary to wait for 20 minutes for all mem-

bers of a general meeting and, if the majority of the members fail to appear, to take certain actions in accordance with the statutes. On the other hand, the customary rule, or legal custom in the system of sources of law, is characterized by a number of features that distinguish it from other civil law regulators.

In T. V. Kashanina's opinion, the theoretical definition of corporate custom should be interpreted taking into account the application of rules, which are provided by measures of influence on the part of the corporation (encouragement, sanctions, etc.). Therefore, a corporate custom is a rule based on the constant and uniform repetition of any actual relations. It is characterized by the following features: 1) connection with long and uniform observance of known rules that have become a habit; 2) mass enforcement; 3) the requirements of this rule are extended not only to others but also to oneself; 4) it rarely contradicts the norms of morality and state law and order [10, p. 90].

Today it is indisputable that customs, in particular, business customs, are widespread, but most of them are concentrated in the sphere of private international law. Custom is local in nature since it always refers only to a certain area of civil relations (subjects, location, type of activity, etc.), e.g., business customs – sphere of business activities, port customs – port activities, maritime customs, etc.

Unfortunately, we have to admit that the codes of corporate governance (referred to in the Article 33 of the Law of Ukraine «On Joint Stock Companies» [11], which is understood as a set of principles, standards or rules of conduct relating to the issues of company management and control) are hardly applied in Ukraine. On the other hand, the practice of their implementation, initiated by the United Kingdom back in early 1990, has been actively supported by other countries for many decades [12, p. 366].

In the informational letter dated April 7, 2008 No. 01–8 / 211 the Supreme Economic Court of Ukraine clarified the custom (the custom of business activities). It is specified that in case if a custom is recognized by the economic court as generally known based on part 1 of article 35 of the Commercial Procedural Code of Ukraine (CPC) it does not require proving. Otherwise, the presence of custom, its application in a certain sphere of civil relations, on a certain territory, etc. according to Article 33 of the CPC of Ukraine shall be proved by the party that refers to custom as a basis for its demands and objections. The established practice of the parties at the performance of the obligatory reinsurance contract on sending of messages on the occurrence of an insured event by e-mail is given as an example [13]. Without delving into the discussion of the distinction between legal customs, business practices and the practice of established relations, we should note that business practices and/or customs, which play the role of additional regulators of corporate relations, are introduced within a certain professional group or a certain type of professional activity. At the same time, in case of the formation of business practices, participants try to fix them in ap-

propriate documents, introducing their binding effect in the practical activities of the organization. For example, the Principles of Corporate Governance approved by the State Commission on Securities and Stock Market dated July 22, 2014 No. 955 [14], which have no effect of a regulatory act but provide a guideline for the management of a joint-stock company in accordance with international standards. The content of the said principles discloses the essence of the procedure for the joint-stock company's management bodies to exercise their powers of the system of control over their financial and economic activities, information disclosure, observance of the shareholders' rights, exercise of their rights in relations with the relevant bodies of joint-stock companies and the like.

However, given the positive attitude towards customs in the private law doctrine, it is necessary to note the ambiguous approach of the legislator. Thus, in the previous version of Part 4 of Art. 265 of the Commercial Code of Ukraine it was noted that the terms of supply contracts should be laid out by the parties in accordance with the requirements of the International rules «*Incoterms*». Obviously, such mandatory prescription did not stand the test of time, and therefore, in 2012, amendments were made, according to which the parties have the right to use well-known international customs, recommendations, rules of international bodies and organizations to determine the terms of supply agreements unless it is not expressly or exceptionally prohibited by the Code or the laws of Ukraine. In our opinion, such approach of the legislator is appropriate, because there are no grounds to declare an agreement invalid or not concluded only if no reference to Incoterms rules is made (Clause 3 of the Information Letter of the Supreme Economic Court of Ukraine dd. 07.04.2008 No. 01/8/211 «On some issues of practice of application of the Civil and Commercial Codes of Ukraine»).

Hence, it can be summed up that the fixation of certain rules of conduct in corporate relations by itself is not proof that particular rules represent a custom (a custom of business activities), etc. After all, according to Article 630 of the Civil Code of Ukraine, standard terms and conditions of a certain type of contract, promulgated in the established order, may be applied as business practices only if they meet the requirements of the Article 7 of the Civil Code of Ukraine. In corporate legal relations, a custom, including the custom of business activities, etc., is provided as an additional regulator. After all, most of the provisions of the Civil Code of Ukraine, in particular Articles 526, 527, 531, 532, 538, 539, 613, 627, 652 and others, do not determine the imperatively appropriate rules of conduct but only indicate their existence among the usual rules. In most cases, the parties are given the opportunity to regulate their relations independently. And only if such an opportunity is used independently, and if there is no regulation by the law of the contract, etc., the usual rules apply.

The above approach of applying customary rules is retained in foreign legis-

lation. For instance, Polish corporate law provides that principles of soft law, i.e. provisions which are not generally binding (customs, corporate governance rules, court practice, legal doctrine, as well as the law contained in contracts, provisions of contracts on the application of companies, charters, acts of bodies) should also be considered as sources of company law [15, p. 125].

Considering a custom as a form (source) of law and as a legal fact, we come to the conclusion that custom is formed on the basis of its recurrence, mass performance within the limits of moral norms, rather than «as prescribed». On the other hand, customary conditions, for example, in corporate governance, are considered to be generally accepted rules that facilitate the accumulation of collective experience, experience in conducting interviews, cooperation agreements and the like. Such customary rules may not be considered legal facts and may not serve as a basis for the emergence, modification or termination of civil law relations.

Given this, we conclude that the duality of custom in private law is manifested primarily in the fact that in the mechanism of legal regulation of civil relations, custom, on the one hand, can act as a regulator of these relations, and on the other – a prerequisite, sometimes the basis for their emergence, change or termination. Non-observance of customs, i.e. any action (inaction) or event reflecting socio-individual, concrete and actually existing circumstances of reality, will be considered a legal fact, the occurrence of which will result in legal consequences for the subjects.

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ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

A. Getman, Yaroslav Mudryi National Law University, Doctor of Legal Sciences, Professor, Pro-Rector **for Scientific Work**, Ukraine, Kharkiv

Y. Hetman, National Academy of Legal Sciences of Ukraine, Doctor of Legal Sciences, Senior Research Fellow, Ukraine, Kharkiv

V. Lozo, Gregory Skovoroda Kharkiv National Pedagogical University, Doctor of Legal Sciences, Professor, Ukraine, Kharkiv

CLIMATE PROTECTION LAWS: EUROPEAN REALITY AND UKRAINIAN PROSPECTS

The global problem of climate change, originally manifested in the air pollution and ozone layer depletion,[1] is evolutionary and anthropogenic in its nature, while its scale affects the interests of the entire humanity, with its present and future, calling for scrutiny and coordination of all the planetary efforts,[2] as the regional activity alone is no longer enough for the purpose.

The society and nature are open interacting systems; a continuously growing exchange of substances, energy, and information between the environment and man may cause an inexorable scaling-up and aggravation of environmental challenges. "Domestication" of the environment by man brings about a change in intensity and even directivity of the natural exogenous processes. According to V. I. Vernadsky's noosphere concept, from biological entities people evolved into planetary beings, which is why they should think and act not only as individuals, but also in the planetary aspect; moreover, they can exist exclusively within the environment – a biosphere, a shell of the Earth, with which they are connected naturally and inseparably, and which they are not able to leave.[3]

In accordance with a classical concept, climate is a years-long weather pattern, typical of a particular global region, which is one of its geographic characteristics. By the middle of the twentieth century, climate got to be characterized as a statistic ensemble of states, through which the 'ocean – land – atmosphere'

system goes over several decades. To build a climatic system pattern at the existing level of scientific and technical progress is virtually impossible. However, the task can be simplified to one parameter – the global (i.e. average annual) temperature of the surface air of the planet[4]. Yet a rise in temperature, being a sort of "a sick person's cough", may well be caused by an increased concentration of CO_2 and other greenhouse gases in the atmosphere. As a result of fossil-fuel combustion, the atmospheric concentration of CO_2 increased by one third compared to that of 50 years ago – something that has never occurred in the human history.[5] And while the World ocean level may rise by 80 cm over the twenty-first century, the global catastrophe or extinction of men as a biological species is not threatening the humanity as yet.

Background Information

The start of global climate regulation of the climate was marked by the Vienna Convention for the Protection of the Ozone Layer adopted on 22 March 1985, and the attached 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. One of the co-authors of this Convention became the European Community.[6]

Under the Convention, the Parties' obligations are as follows: cooperation by means of systematic observations, research and information exchange in the said sphere; adoption of the appropriate legislative or administrative measures and harmonization of environmental policies; formulation of agreed measures, procedures and standards for the adoption of protocols and annexes; and cooperation with competent international bodies to implement effectively the Convention. The Parties undertake to facilitate and encourage the exchange of scientific, technical, socio-economic, commercial and legal information, and to protect its confidentiality. Fulfillment of the obligations should be facilitated by the Conferences of the Parties annually convened by the Secretariat for coordination of procedures and financial rules, continuous review of the implementation of the Convention, and harmonization of appropriate policies and strategies in the relevant sphere. Thus, the international environmental law established an institutional structure to regulate the Earth's climate by means of intergovernmental bodies, conferences of the parties, and NGOs.[7]

The Annexes to the Convention regulate the procedure of systematic observations over the ozone (radiation level, ozone distribution, physicochemical parameters of the atmosphere), and that of information exchange (collection and distribution, criteria of selection and completeness, evaluation of results).

The scientific and technical progress and the entailed anthropogenic impact on the natural environment, including the global climate, have motivated significantly the world community to join together efforts to create the conditions for ensuring climate protection. A meaningful outcome of those efforts to control the global climate was the UN Framework Convention on Climate Change (UNFCCC),[8] signed at the UN Conference on Environment and Devel-

opment (UNCED) on 9 May 1992, and Kyoto Protocol to the UNFCCC dated 11 December 1997. The ultimate goal of the Convention was stabilizing the atmospheric greenhouse gas concentration level to the value that would prevent hazardous anthropogenic intervention in the climate system, safeguarding sustainable development.

The Convention binds all the Parties to develop, periodically update and report to the Conference of the Parties the national data on anthropogenic emission of all the greenhouse gases that is not covered by the Montreal Protocol, using compatible methodologies, approved by the Conference. Additionally, the Convention binds the Parties to elaborate, implement, and update periodically national and regional programs that include measures aimed at climate change mitigation.

The Convention established a number of principles:

1. The Parties must protect the climate system in the name of the present and future generations, acting in accordance with common, yet differentiated, obligations and possibilities. Developed countries are to become initiators of dealing with the climate change and its unfavorable consequences.

2. It is necessary to take into complete account the special needs and particular circumstances of developing countries, vulnerable to adverse impact of the climate change, and those Parties, which would have to assume, consistent with the Convention, inadequate burden.

3. The Parties should take measures to prevent or minimize the causes of climate change and mitigate its adverse effects. In case of an outbreak of a major hazard or unpreventable environmental threat, lack of complete scientific certainty cannot be used as a pretext for postponement of such measures.

4. The Parties must cooperate with the aim of facilitating creation of a favorable and open international economic system, which would lead to sustainable economic growth and development of all the convening Parties, in particular developing countries, allowing them to better respond to the climate change problems, without any discrimination.

In terms of the undertaken obligations, the Convention specified that the convening countries will:

– cooperate in the course of adaptation to the climate change impact, in an integrated planning for management of coastland, water resources and agriculture, as well as protection and restoration of areas that suffered from droughts, desertification or floods;

– consider climate change in social, economic and environmental policies; aiming to mitigate the negative impact on economy, healthcare and the quality of the environment, to apply the relevant national methods in order to understand the reasons for, consequences, scope and time of climate change, as well as economic and social effects of different global response strategies.

The Sixth Environmental Action Programme of the European Community (6^{th} EAP) adopted in 2002 (presently in force) updated the tasks and priority spheres of action on climate change. It was planned to attain the set objec-

tives through fulfillment of the following tasks:

– ratification and bringing into effect of the Kyoto Protocol to the UN Framework Convention on Climate Change by 2002, as well as fulfillment of the European Community obligations as to cutting down emissions by 8% in 2008–2012 compared to 1990, as implied by the Council of the European Community conclusion dating 17 June 1998;

– achievement of a demonstrative progress in fulfillment of the Kyoto Protocol commitments;

– a productive stand of the Community, defending the international agreement on a greater emission abatement at the second stage of fulfilling the obligations of the Kyoto Protocol. The agreement in question aimed to cut emission significantly, considering the necessity for a fair distribution of greenhouse gas emissions.

These tasks were planned to be fulfilled by effecting of the following priority arrangements:

1) meeting international commitments on climate, including those of the Kyoto Protocol, by way of:

– reviewing the output of the European Climate Change Programme, adoption of general and coordination policies and the relevant measures, and additionally – those for various sectors of engagement of the member states;

– establishment of a structure in the European Community aimed to develop an effective trade in CO_2 emissions, with a possibility of its extension to other kinds of greenhouse gases;

– upgrading the monitoring of greenhouse gases and progress toward meeting the commitments of the member states on the internal burden-sharing agreement;

2) reduction of greenhouse gas emissions in the energy sector by way of:

– providing, to the extent possible, subsidies encouraging the efficiency and a stable use of energy with a tendency to a gradual general reduction;

– encouraging the use of renewable and low-carbon fuels for generation of energy;

– promoting the use of renewable energy sources;

– stimulating the use of heat and energy up to 18% of the total electrical power generation;

– reducing methane emissions in energy generation and distribution;

– contributing to energy-saving;

3) reduction of greenhouse gas emissions in the transport sector by means of:

– encouraging transfer to more effective and cleaner modes of transport;

– creating a stable transportation system;

– contributing to development and use of alternative fuel and fuel-saving transport means;

– taking environmental indicators into account when calculating transport rates, and in case of inconsistency between traffic growth and its impact on the environment;

4) reduction of greenhouse gas emissions in industrial production by:

– promoting environmentally-efficient industrial practices and technologies;

– supporting small and middle businesses in the field of innovations;

– encouraging environmentally significant and technically feasible alternatives, including reduction of fluorine-containing gases: HFC (hydrofluorocarbons), PFC (acid fluorocarbons) and SF_6 (sulfur hexafluorides);

5) reducing greenhouse gas emissions in other sectors due to raised energy efficiency, particularly for heating, cooling and hot-water supply in designing buildings as well as through reduced emissions in common agricultural policies and waste management strategies;

6) application of such tools as:

– fiscal measures, including energy taxation schemes, encouraging transfer to effective use of energy, clean engineering and transport, and introducing technological innovations;

– creating incentives for reduction of greenhouse gas emissions in industrial sectors;

– ensuring the priority of climate change research and technological development.

Alongside with preventive measures, the European Community regulates adaptation to the climate change effects by means of:

– revision of the European Community policies related to climate change so that the adaptation was adequate in terms of investment decisions;

– incentives for regional climate simulation and evaluation with a simultaneous preparation of such regional adaptation measures as water resource management, preservation of biological diversity, prevention of desertification and flooding, and raising the awareness of population and business circles.

The climate problems are considered when it comes to enlargement of the European Union. The candidate countries are supposed to apply the Kyoto mechanism with higher standards of reporting and monitoring of emissions, more stable transport and energy sectors, and activation of joint research in the climate change field.

Combating climate change became an integral part of the European Community policies in the sphere of foreign relations and one of the priorities of sustainable development policy. It required intense coordination on behalf of the European Community when providing assistance to developing countries and countries in transition, e.g. through support for projects related to implementation of The Clean Development Mechanism (CDM), defined by the Kyoto Protocol, and its joint implementation; ensuring a transfer of technologies, and rendering assistance in adaptation to climate change results.

In 2005, the Kyoto Protocol at last turned into reality.[9] The entry into force of the Agreement became possible only after the document had been ratified by the countries with a minimal 55% share of greenhouse gas emissions.[10] That minimum was reached after ratification of the document by Russia, whose industry is answerable for 17% of all the world greenhouse gas emissions. Kofi Annan the Secretary-General of the United Nations emphasized that it was a huge step forward in fighting against one of the major dangers of the twenty-first cen-

tury, and called climate change a global problem that requires a coordinated global answer.[11]

The Protocol determined that 39 developed countries of the world and countries in transition must cut emission of carbon dioxide and five more substances, the presence of which in the atmosphere affects the global climate change.

According to the World Bank, by 2050 developing countries will need about $100 bln per year to protect their population against grave consequences of global climate changes: natural calamities, hurricanes, tsunamis, and floods. If the necessary measures are taken timely, it can help to save funds in the future and to reduce the risks of the worst scenario development in those countries. Financing of the said measures should be effected by industrial countries, because it is these countries that produce a lion's share of hazardous emissions to the atmosphere.[12]

The Role of Ukraine in Prevention of Climate Change on the Globe

Ukraine is one of the world leaders in implementation of joint environmental projects within the framework of the Kyoto Protocol, which provided for reduction of CO_2 emissions by 53 mln tons before 2012,[13] since the main task of our country, according to the Protocol, was stabilizing emissions, while the USA would have to reduce it by 36%.[14]

At the same time, unbalance of the climate system threatens Ukraine with natural disasters, extreme temperatures, climate belt shift. For the southern and eastern regions, there is a risk of drinking water problems. And in Western Ukraine, the Transcarpathian region, there is a threat of frequent storm rainfalls and precipitation. In this view, there exists a possibility of malaria transmitters spreading. Thus, climate change is a socio-economic problem that affects people's health and life. Ukraine being an agrarian country, climate change will have an adverse effect on the productivity of its lands and agricultural crop capacity.

According to the Climate Change Expert Group (CCEG), the humanity will be able to adapt to a temperature rise on condition that it does not exceed 2°C. In the last hundred years it grew by 0.8°C. Thus, the remaining 1.2°C do not give the humanity much ground for optimism. Providing that the industrial countries of the Kyoto Protocol cut their greenhouse gas emissions by 25–40% before 2020, the humankind will fit with the 2°C threshold value with a probability of 50%. However, presently the world expects a temperature rise of 3–4°C by 2050, i.e. the human race is heading stubbornly towards self-destruction. This testifies to the lack of willpower, including in Ukraine, which is planning a gradual increase in emissions, declared at the international level.

The Present State of the Ukrainian Legislation on Climate Protection

For a long time, the national environmental laws left unaddressed the legal issues of climate protection. Scientific research also stayed out of examining environmental problems, basically being engaged in the legal aspects of environmental social relations. Considerable changes occurred after adoption of the UN Framework Convention on Climate

Change of 9 May 1992 and the Kyoto Protocol to the Convention dating 11 December 1997. The Framework Convention was signed on behalf of Ukraine on 11 June 1992, ratified by the Law of Ukraine on 29 October, 1996, and came into effect in Ukraine on 11 August 1997.[15]

The ultimate objective of the Convention and of all the related legal documents consists in stabilizing, through implementation of its provisions, the concentration of greenhouse gases in the atmosphere at the level, which would prevent a dangerous anthropogenic impact on the climate system. This should be achieved within the time limits, necessary for a natural adaptation of ecosystems to climate change, without threatening food production, and providing further economic growth on a stable basis (Article 2 of the Framework Convention).

Among the principles, which guide the activity of the Parties on fulfillment of the Convention goals, one can highlight the following: climate system protection for the benefit of the present and future generations on an equity basis; taking prevention measures to forecast, prevent, or minimize the causes for climate change and mitigate its negative consequences; policies and measures aiming to protect the climate system against anthropogenic changes must comply with the specific conditions of each Party and be integrated into the national development programmes; cooperation with a view of establishing a favorable and open international economy.

Adoption of the UN Framework Convention on Climate Change and the Kyoto Protocol gave a mighty impetus to essential transformations within the environmental legislation of Ukraine and launched scientific research of the relevant sphere. In particular, the Decree of the Cabinet of Ministers of Ukraine "On the Climate Programme of Ukraine" of 28 June 1997 defines climate as one of the main natural resources, which determines the living standards and vital activity of people, the direction and level of economic development. One of the first scientific publications on this problem was a paper by V. Komarnitsky titled "Ukraine in international legal cooperation on climate change", published in 2005. In the author's opinion, the Kyoto Protocol covered a variety of trends, aimed at a global solving of economic and environmental problems, and is a component of sustainable development i.e. a harmonious economic, environmental, and social development of the society. Besides, Ukraine's joining the Kyoto Protocol called for fulfillment of certain national commitments: establishment of a national system for assessment of anthropogenic emissions from sources and absorption of greenhouse gases by absorbents; creation and keeping of the national record of the set amount of greenhouse gas emissions; encouragement of public involvement in climate change decision-making.[16]

Later on the problems of legal regulation and protection of climate change have been elucidated in a number of scientific works by such authors as A. Hetman and V. Lozo,[17] S. Kuznetsova,[18]

A. Miroshnichenko,[19] A. Surilova.[20] A specialized dissertation research on climate as an object of legal environmental protection in Ukraine was conducted by K. Prokhorenko.[21]

The legal literature regards the concept of climate (in the environmental legal aspect) as an integral total (system) of natural conditions and processes that are in a continuous interaction, exchange, and distribution of energy among natural objects, subject to legal protection as a prerequisite for, origin, and indicators of a safe, stable, and quality condition of the natural environment – an integrated object of environmental law,[22] or as a natural object, which is characterized by a climate system condition (atmosphere, hydrosphere, biosphere, and geosphere in their interrelation and interaction), recognized by the norms of international environmental law as an object, on which a dangerous anthropogenic impact is exerted in the form of legally ascertained activities, related to greenhouse gas emissions, and requires taking of special international and national legal measures to stabilize the concentration of greenhouse gases in the atmosphere at the level, which does not allow unbalancing the climate system, with a resulting lowered quality and safety standards of the natural environment.[23]

The legal literature shows some skepticism towards the legal framework that regulates climate change, qualifying it as understudied. Specifically, according to S. Kuznetsova, the regulatory system existing in Ukraine is inadequate and needs a considerable improvement, mostly with regard to legal regulation of climate change issues. The author believes that it is necessary to adopt strategic documents on global climate changes and their influence over the natural environment, economy and people, which will shape the state policy in the said sphere for the next few years (political programmes, state strategies for industrial development, power industry, transport, public utilities sector, agriculture, waste management, land use and forest management and other economic branches).[24]

However, in view of the recent trends in international and national legal regulation and protection of climate, it is essential to look at the climate problem from a new perspective. In the first place, it is referred to the UN session that was held from 30 November to 11 December 2015 where the Paris Agreement to the UN Framework Convention on Climate Change was adopted (ratified by Law of Ukraine dating 14 July 2016).

The Paris Agreement, supporting the implementation of the Convention and accomplishment of its goals, aims to strengthen the global response to the climate change threat, in the context of sustainable development and efforts to eradicate poverty, including by the following means: curbing the growth of average global temperature, keeping it much lower than the set figures, with a view to reduce the risks and consequences of climate change to a large extent; enhancing adaptability for adverse impacts of climate change, and fostering resilience to climate change and low greenhouse gas emissions development,

in a manner that does not threaten food production; ensuring coordination of financial flows making the consistent with the pathway towards low greenhouse gas emissions and climate-resilient development (Article 2 of the Agreement). Part 2 of Article 5 of the Agreement recommends the Parties to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: strategic approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches.

Acknowledgement by Ukraine of its commitments under the UN Framework Convention on Climate Change was the Order of the Cabinet of Ministers dated 7 December 2016 "On approval of the Concept for implementation of the state policy in the sphere of climate change for the period till 2030".[25]

The purpose of the Concept is improvement of the state policy in the sphere of climate change for attainment of the country's sustainable development, laying the legal and institutional groundwork to ensure a gradual conversion to low greenhouse gas emissions development in the conditions of economic, energy and environmental safety, and raising the well-being of the people.

The Concept emphasizes that the urgency of addressing climate change problems is connected with: the need for improvement of the legal environment in this sphere; unclear distribution of functions, low level of action coordination and insufficient institutional capacity of public authorities for planning and pursuing activities in the said field; inconsistency of climate change policy with legal and other regulatory acts in various socio-economic spheres; lack of systemic approach to scientific capacity building related to climate change activity; low awareness of the civil society and public authorities of all the aspects of the climate change problem and the country's low greenhouse gas emissions development.

The main lines of the Concept implementation are as follows: enhancement of the institutional potential for forming and promoting implementation of the state climate change policy; climate change prevention due to reduction of anthropogenic emissions and increased absorption of greenhouse gases, providing for a gradual transfer to low greenhouse gas emissions development of the state; adaptation to climate change, strengthening of resilience and lowering of climate change risks.

Conclusions

Thus, Ukraine undertakes commitments and is building its climate policy in terms of harmonization of the national legislation to the existing international climate protection standards. The first harmonization stage was marked by the country's adoption of the Concept for the implementation of the state policy in the

sphere of climate change for the period till 2030, which envisaged a number of measures on strengthening institutional capacity, forming and implementing the state climate change policy; prevention of climate change due to reduction of anthropogenic emissions and increased absorption of greenhouse gases, ensuring a gradual transfer to low greenhouse gas emissions development; adaptation to climate change, enhancing resilience and reducing risks resulting from climate change. The Concept acknowledges that its realization will make it possible: to improve the state climate change policy and enhance the institutional capacity for the policy implementation; to guarantee the observance of all the obligations of Ukraine under the UN Framework Convention on Climate Change and other international agreements in the field of climate change, Association Agreement between Ukraine and the European Union, the European Atomic Energy Community and its member states; to ensure legal and normative regulation of market and non-market tools for reducing anthropogenic emissions and increased absorption of greenhouse gases, including introduction of an internal system for the sale of greenhouse gas emission quotas and upgrading environmental laws with regard to greenhouse gas emissions; strengthen the capacity of local executive bodies and local governments for designing and implementing measures on climate change prevention and adaptation to it; to enforce legislative regulation of market and non-market tools for reduction of anthropogenic emissions and increasing greenhouse gas absorption, including the introduction of an internal system for selling greenhouse gas emission quotas and improvement of the eco-tax system with regard to greenhouse gas emissions; to enhance the capacity of local executive authorities and local governments for development and implementation of actions on climate change prevention and adaptation to it; to provide a systemic scientific, methodological and educational support for all the aspects of the climate change activity; to raise the level of public participation in administrative decision-making in the sphere of climate change, etc.

In the future, Ukraine should focus its attention on international cooperation with the participants (Parties) of the UN Framework Convention on Climate Change in the following spheres: deepening scientific knowledge of climate, including research, regular observation of the climate system and early-warning system, in the manner that creates an information background for delivery of climate services and support of decision-making processes; strengthening of institutional mechanisms for consolidation of the relevant information and expertise for providing the Parties with technical support and guidelines; other areas, mentioned in the Framework Convention.

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V. Andreitsev, Doctor of Law, Professor, Academician of the National Academy of Legal Sciences of Ukraine Honored Lawyer of Ukraine, State Counselor of Justice III Class, Professor of Civil, Commercial and Environmental Law Dnipro University of Technology of the MES of Ukraine

THE DEVELOPMENT OF CONSTITUTIONAL-AXIOLOGICAL, SOCIAL AND ENVIRONMENTAL–LEGAL SAFETY IMPERATIVE IN UKRAINIAN LEGISLATION AND STRATEGIC DOCUMENTS

First, I would like to note that the term «*axiology*» is of Greek origin and it originates from the words «*axio*» – value and «*logos*» – study, meaning a study of a value [1, 22], i.e. it is a philosophical theory of universally significant principles that determine the directions of human activity, motivation of human behavior.

The above-mentioned imperative inscribed in Article 3 of the Constitution of Ukraine [2] determines that a human being, his or her life, and health, dignity, inviolability, and security are recognized in Ukraine as the highest social value; in my opinion, this is the basic and fundamental imperative for the functioning and activity of the state, its development as independent from other jurisdictions; a democratic, socially-oriented and juridical country.

Therefore, it is logical that ensuring human rights and freedoms and human security is the main duty of the State in accordance with part two of article 3 of the Constitution of Ukraine, and according to article 16 of the Basic Law, such duty is imposed on the State to ensure environmental security and maintain ecological balance on the territory of Ukraine, to preserve the gene pool of the Ukrainian people, which is in line with the content of the Declaration on State Sovereignty of 16 July 1990 [3].

Given the above, the Law of Ukraine «On Environmental Protection» of June 25, 1991 [4] among its objectives predicted the provision of environmental

safety, prevention and elimination of the negative impact of economic and other activities on the environment, preservation of the genetic pool of living nature, etc., while the composition of the principles of this sphere of legislative regulation provides for the priority of requirements of environmental safety, ensuring an environmentally safe environment for the life and health of people, the proactive nature of environmental protection of the environment. (article 1, 3).

Article 5, paragraph 3, provides that the health and life of people shall be protected by the State against adverse environmental conditions and also declares the right of every citizen to an environment that is safe for life and health (art. 9), which was subsequently enshrined in the Constitution as everyone's right to an environment that is safe for life and health and to compensation for damages caused by violations of this right (Constitution, art. 50), while other environmental rights in this area are guaranteed.

However, as it follows from the content of the National Human Rights Strategy approved by the Decree of the President of Ukraine dated August 25, 2015 No. 501 [5] – its approval is conditioned by the necessity to improve the activity of the state on assertion and provision of human rights and freedoms, creation of an effective mechanism of protection of human rights and freedoms in Ukraine, solution of systemic problems in this sphere taking into account experience of human rights institutions of Ukraine, UN, Council of Europe, Organization for Security and Cooperation in Europe, practice of the European Court of Justice.

This applies, in particular, to ensuring the right to life, the right to a fair trial, the right to liberty and security of person, the right to health, work and social protection and security, and other categories of human and civil rights in Ukraine.

The National Human Rights Strategy notes that the existing problems in this area do not contribute to ensuring the right to life, in particular: the lack of an effective system of national notification of the population about the emergence of threats and emergencies; as a result, it is necessary to create an effective system that would ensure: counteraction to major acts against human life; compliance with international law for its protection in the temporarily occupied territory; compliance with the norms of international law for their protection within the temporarily occupied territory; compliance with international standards for the protection of the right to life; creation of prerequisites for reducing risks to life and health and ensuring access to medical care for vulnerable segments of the population, as well as ensuring quality care for persons with socially dangerous diseases.

The Law of Ukraine «On National Security of Ukraine» dated 21 June 2018 [6] defines it as the protection of state sovereignty, territorial integrity, democratic constitutional order, and other national interests from real and potential threats, i.e. this Law affirms the protection of the above mentioned legal values, although the realities show that this is not the case at all when Russia's jurisdiction is extended to the territory of Crimea,

part of Lugansk and Donetsk regions of Ukraine.

Thus, it is not a question of virtual, but of real protection of the above-mentioned values contained in the definition.

If security is guaranteed, then why the Concept of Security and Defense Sector Development, approved by the Decree of the President of Ukraine as of March 14, 2016, No. 92 [10], among its main tasks, focuses on protection of state sovereignty, territorial integrity, and inviolability, protection of state border, constitutional system, economic, scientific and technical, defense potential of Ukraine, legal interests of the state and rights of citizens from external and internal encroachments.

Other separate official documents in force in Ukraine refute that certain national interests and social values enshrined in the Basic Law of Ukraine remain unprotected by the social and legal order. For example, the Poverty Reduction Strategy approved by the Cabinet of Ministers of Ukraine on March 16, 2016 No 161 [7] states that the poverty level in Ukraine remains consistently high. In the first nine months of 2015, 23.8% of the population was below the relative poverty line in terms of expenditure.

There are many obstacles to the enforcement of the rights of people with disabilities, numbering 2.6 million people at the beginning of 2016. Therefore, there is a need to ensure the rights of people with disabilities in accordance with Ukraine's obligations under the UN Convention. It is obvious that the rights of these people are not protected as a component of the national interests of the Ukrainian people.

In connection with the above, it is expedient to specify the definition of the national security of Ukraine as the state of development of public legal relations, in which the State of Ukraine directs its activities towards the implementation of sectors of the national policy of Ukraine regarding the implementation of the rights and freedoms of citizens in various spheres of socio-economic, ecological, scientific and technical sustainable development in accordance with Ukraine's international obligations, the implementation, and maintenance of constitutional and sectoral rights and freedoms of the citizens of Ukraine.

As noted in the Concept of Development of Public Health System approved by the Cabinet of Ministers of Ukraine on November 30, 2016, № 1002, [8] public health is one of the greatest values, a prerequisite for socio-economic development.

According to the Concept of Development of Public Health System the preservation of health and ensuring full life of people is one of the most important goals of the international community, reflected in the basis of the European policy "Health 2020: a European policy framework supporting action across government and society for health and well-being".

The current state of public health in Ukraine is critical owing to the socio-economic crisis, the unfavorable environmental situation, the high level of tobacco smoking, alcohol and drug use, the lack of physical exercise, unhealthy

nutrition and the impact of military aggression by the Russian Federation in eastern Ukraine.

Therefore, a comprehensive reform of the health-care system, including the public health sector, is becoming a pressing problem, providing for a system of measures, procedures, and tools to strengthen health care, prevent diseases, increase the length of active and working age and promote a healthy lifestyle by combining the efforts of society as a whole and the State.

In accordance with the provisions of the aforementioned Concept, the right to health and health care is a basic human right irrespective of race, color, political, religious and other beliefs, sex, age, sexual orientation, gender identity, ethnic and social origin, wealth, residence, language, and other characteristics, including health status.

The health of the population is one of the main factors of national security, the welfare of the State, and the state of individual and public health is a guarantee of harmonious relations in society.

It is therefore important to respect certain principles in this area:

1. the priority of public health preservation in all areas of activity of state bodies, which strengthens the responsibility of the Ministry of Health as a coordinating center for conducting and improving the system of health protection, preventing negative processes of impact on public health, in particular, the harmful impact of the environment on human health;

2. the principle of achieving health equity as a guarantee of the creation of an enabling environment for everyone to enjoy the right to health, access to health care, healthy eating habits, physical education and economic opportunity; and the manifestation of the initiative of the Ministry of Health in introducing innovative approaches to decision-making processes with a positive impact on human health;

3. the principle of accountability and economic activity in managerial decision-making to improve public health and ensure citizens' right to health and its protection at present and in the future, taking into account international experience and best international practices for their effective economic support;

4. the principle of shared responsibility makes territorial communities, associations, and individuals mutually dependent, legitimate and responsible for actions (omission) to achieve and maintain high levels of health indicators.

Other principles provided for in the legislation of Ukraine (the comprehensive approach to health care and organizational and legal ideas for the formation of a public health system, legality, priority of measures, effectiveness of accountability, continuity, coordination of inter-sectoral cooperation, etc.) are to be implemented in order to achieve the goal of protecting the health of the population and the realization of the subjective rights of citizens to health and its protection.

To this end, a system of measures, mechanisms, and tools, in particular, organizational and legal support, is expected to be implemented:

1. strengthening of the powers of the Ministry of Health as a coordinating body

for the provision of health care, specifically to deal with the threats and consequences of emergencies and prevent their negative impact on public health;

2. harmonization with EU legislation on the implementation of citizens' right to health and its protection;

3. settlement of procedures for risk assessment and solving public health problems on these grounds;

4. introduction of organizational, legal and economic mechanisms to encourage those concerned to ensure a high level of protection of citizens' health at local and regional levels;

5. improving the existing legal framework in the field of public health protection, bringing the state policy in this field in line with the socio-medical, preventive, health care and treatment needs of the population;

6. bringing sanitary norms and regulations to the level of international legal regulation of the EU, and especially with regard to the safety of machines, mechanisms, equipment, foodstuffs, etc.;

7. introduction of normatively defined legal procedures for participation in the procurement of goods, provision of services, implementation of projects and programmes to ensure their high quality and safety, the involvement of a wide range of public.

The Sustainable Development Strategy «Ukraine 2020», approved by Presidential Decree No. 5 [9] of January 12, 2015, which aims to implement European standards of living in Ukraine and to bring Ukraine to the leading positions worldwide, provides for health care reform among other social reforms, as well as the development of security vector in Ukraine.

In particular, the said Strategy stipulates that the goal of the state policy in the health care system is fundamental, systemic reform aimed at creating a patient-centric system capable of providing medical care to all citizens of Ukraine on par with developed European countries. The key directions are to increase citizens' personal responsibility for their own health, to ensure their free choice of medical service providers of appropriate quality, to provide targeted assistance to the most vulnerable segments of the population, to create a business-friendly environment in the health care market with a focus on the European Union program «European Health Strategy – 2020». However, the Strategy does not explicitly answer the question of what measures and sources of investment should be used to implement it, and this needs to be clarified in the relevant Action Plan for the implementation of the Strategy.

According to the Strategy, the security vector aims at ensuring the security of the state, business and citizens, investment and private property. Ensuring clean and unbiased justice, purification of power at all levels, effective anti-corruption measures, the safety of human life and health, protection of vulnerable segments of the population, safe environment, access to quality drinking water, safe and quality food and industrial goods should become the defining basis of security. We can only hope that the renewed authorities will translate the provisions mentioned in the paper into real activities for the benefit of Ukrainian citizens.

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A. Bobkova, Doctor of Law, Professor, Academician of the National Academy of Legal Sciences, Acting Dean of the Faculty of Law at Vasyl' Stus Donetsk National University, Vinnytsia, Ukraine

A. Zakharchenko, Doctor of Law, Assistant Professor at the Department of Commercial Law of Vasyl' Stus Donetsk National University, Vinnytsia, Ukraine

ESTABLISHMENT AND DEVELOPMENT OF DONETSK SCIENTIFIC SCHOOL OF COMMERCIAL LAW AND ITS UNIT IN VASYL' STUS DONETSK NATIONAL UNIVERSITY

Abstract. *The article deals with the main stages of the formation and development of Donetsk Scientific School of Commercial Law and its unit in Vasyl' Stus Donetsk National University. The authors present the leading conceptual ideas that have been substantiated in the scientific works of the representatives of the scientific school while naming the representatives of the first generations of the Donetsk Scientific School of Commercial Law (the School), who founded and co-created the commercial-legal concept. Thus, the way of formation of the School in Vasyl' Stus Donetsk National University is considered, along with commercial scholars, who were involved in the development of the unit.*

The current state of scientific achievements and the composition of representatives of the organization of the School at Vasyl' Stus Donetsk National University are described. Special attention is given to continuity of scientific researches of representatives of different generations of the School considering modern economic, political and legal realities.

The authors provide an outlook of activities of the team of the School at Vasyl' Stus Donetsk National University, which is manifested as the achievement of the goal of strengthening the system of legal means, aimed at ensuring equal conditions, stability and efficiency of management for all participants of business relations, satisfaction and pro-

tection of interests of such participants to ensure the growth of business activity of business entities, ensuring the coherence and coordination of actions of business entities, their interest in the development of entrepreneurship and, on this basis, ensuring the effectiveness of social output, its social orientation.

Key words: *Donetsk Scientific School of Commercial Law, Scientific School Unit, Vasyl' Stus Donetsk National University.*

1. Introduction

Successful implementation of the tasks of modern legal science largely depends on the functioning of scientific law schools – teams of legal scholars of different generations, united by a commonality of scientific views, under the guidance of recognized scientific leaders who conduct fundamental and applied scientific research in the legal field, the results of which are embodied in the normative and law enforcement practice. Among such scientific schools, a prominent place is occupied by the Donetsk Scientific School of Commercial Law, one of the units of which is formed in Vasyl' Stus Donetsk National University. The developments of this scientific school have significantly influenced the development of economic and legal thought in our country and beyond, became the basis for the codification of Ukrainian legislation and further improvement of individual acts of such legislation. With this in mind, it is worthwhile to refer to the history of the formation of this scientific school, to highlight the main ideas of its representatives, the state and directions of their scientific research.

2. Literary review

References to the Donetsk Scientific School of Commercial Law are contained in many literary sources. Among them, it is necessary to note, in particular, the monograph of V. I. Andreitsev «Scientific and scientific-legal schools: state and problems of legal regulation» in which the significant influence of this scientific school on increase of the role and prestige of the law in the solving of economic-legal researches is noted [1, p. 144–145]. A number of interesting facts about the history of formation of the School are presented in one of the articles of the founder of this scientific school – academician of the National Academy of Sciences and the National Academy of Legal Sciences of Ukraine V. K. Mamutov [2], the achievements of this scientific school also drew attention abroad [3]. Some information about the results of the unit of this scientific school, created in Vasyl' Stus Donetsk National University, are given in the review publication, prepared on the occasion of the 30th anniversary of the Department of Commercial Law at the University [4]. At the same time, there have been no separate publications specifically devoted to the statement of the main provisions for the establishment and development of this scientific school and its university center.

3. Purpose and objectives of the study

The purpose of this article is to acquaint the scientific community with the

history of the formation and development of the Donetsk Scientific School of Commercial Law, the state and directions of research of the School's unit functioning under Vasyl' Stus Donetsk National University.

For this purpose, the following tasks are considered:

1. The provision of characteristics of the main stages of formation and development of the mentioned scientific school and its unit at Vasyl' Stus Donetsk National University.

2. The analysis of the current state of activity of the above-mentioned department of this scientific school.

3. The identification of perspective directions of scientific research of the organization of Donetsk Scientific School of Commercial Law at Vasyl' Stus Donetsk National University.

4. Analysis of establishment and development of Donetsk Scientific School of Commercial Law and its unit in Vasyl' Stus Donetsk National University

The formation of the School began in the late 50s of last century, and its founder, as noted above, was Valentyn Karlovych Mamutov (30.01.1928–15.03.2018) – a scholar, whose name is associated with the revival of the science of commercial law in the USSR (after its unofficial prohibition during 1938–1955), the further development of this branch of scientific knowledge, and later – the formation of basic principles of legislation in independent Ukraine [5].

Along with V. K. Mamutov – the founder and leader of this scientific school, the first generation of its representatives includes Doctors of Law I. Ye. Zamoiskyi, H. L. Znamenskyi, S. Z. Mykhailin, Yu. S. Tsymerman, O. O. Chuvpylo, Candidates of Legal Sciences D. Kh. Lypnytskyi, O. M. Novoshytskyi.

The leading conceptual ideas that have been grounded in scientific works of V. K. Mamutov and have determined the overall orientation of the research of the representatives of the scientific school that he founded throughout its existence include:

– legal support for the organization and implementation of economic activities and placing it in the basis of the Commercial Code of Ukraine;

– creating legal conditions for a reasonable combination of state regulation of the economy and market self-regulation, the coexistence of different forms of ownership in a market economy;

– ensuring equal business conditions and equal subordination of participants in business relations to the legal economic order;

– existence of commercial law as an independent branch of law, legislation, and science.

The initial stage of formation of the School covered the period from 1958 to 1983. During this period, the foundation of the commercial-legal theory was laid, in particular, during the defense of doctoral dissertations of V. K. Mamutov («Regulation of the Competence of Economic Bodies of the USSR Industry in Solving Economic Issues», 1965), Yu. S. Tsymerman («Economic and Legal Aspects of the Organization and Activities of Industrial Ministries», 1980),

S. Z. Mykhailin («Problems of Ensuring the Safety of State Socialist Property», 1981). The scholars also prepared and issued a number of monographs and other scientific papers that influenced further developments in this field. The spread of ideas of Donetsk commercial scholars in this period was promoted by the establishment of the Donetsk branch of the Institute of Economics of the Academy of Sciences of the Ukrainian SSR in 1965 (named the Institute of Industrial Economics of the Academy of Sciences of the Ukrainian SSR since 1969), the participation of these scholars in the preparation of the draft of the basic provisions of the Commercial Code of the USSR, the hosting of a number of scientific-practical conferences of republican and cross-Union level on topical issues of commercial law in Donetsk [2, pp. 5–7].

Realizing the need for personnel support and improving the quality of legal work in the field of commercial activity, V. K. Mamutov was one of the initiators of the establishment of the Department of Economics and Law at the Donetsk State University (1983), where the training of lawyers was focused primarily on commercial and legal specialization.

The next stage in the history of the development of the Donetsk Scientific School of Commercial Law (1984-2000) was characterized by the strengthening of the institutional foundations of its activities and human resources. Thus, in 1984 the defense of doctoral dissertations of I. Ye. Zamoiskyi («Commercial Bodies in the System of Legal Regulation») and H. L. Znamenskyi («Methods and Means of Increasing the Efficiency of Commercial Legislation») took place. In the same year, at the Faculty of Economics and Law of Donetsk State University established the Department of Commercial Law, which at that time became the second department in Ukraine, which graduated law students of commercial and legal specialization. The department was headed by Doctor of Law, Professor, WWII veteran Serhii Mykhailin – a prominent commercial law scholar of the Donetsk region, who successfully headed the department for 10 years straight (1985-1995). Precisely from 1984, the unit of Donetsk Scientific School of Commercial Law in Donetsk National University begins its history.

Cooperation with the Institute of Industrial Economics of the National Academy of Sciences of Ukraine (named the Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine since 1992), whose scholars from the beginning have actively participated in the educational and scientific work of the Faculty of Economics and Law and the Department of Commercial Law, in particular, contributed to the conduct of commercial and legal research at the Donetsk University. V. K. Mamutov, H. L. Znamenskyi, D. Kh. Lypnytskyi, which for many years have taught at the Department of Commercial Law, made a significant contribution to the formation of the School at the University.

Conducting scientific research under the ideological guidance of V. K. Mamutov, the staff of the Department of Commercial Law and some professors of sister departments of the faculty became

representatives of the first and second generations of participants of the created unit of the scientific school.

During this period, professors and graduates of the Faculty of Economics and Law of Donetsk State University defended a number of dissertations on commercial law specialization (candidate dissertations of S. M. Hrudnytska (1997), O. O. Ashurkov (1999), O. P. Zahnitko (1999), O. R. Zeldina (1999), N. Ye. Kosach (1999), V. A. Malyha (1999), R. A. Petrov (1999), S. A. Kuzmina (2000), O. S. Yankova (2000), O. V. Zvierieva (2000), etc.). Separately worth mentioning is Oleksandr Oleksandrovych Chuvpylo's doctoral dissertation «Trends of Legal Regulation of Commercial Activity in Foreign Countries» (1996), which was the first time when theoretical foundations of commercial law in foreign countries were considered and generalizations of relevant foreign experience were presented [6].

Within the same period, representatives of the Donetsk scientific school of commercial law were actively involved in the preparation of the draft Commercial Code of Ukraine. This work was directed and coordinated by V. K. Mamutov, who was appointed by the Cabinet of Ministers of Ukraine as the head of the working group on preparation of the draft, and H. L. Znamenskyi, thanks to whose efforts the work on adoption of the Code was finalized. They provided scientific support for the draft law during its review in the Verkhovna Rada of Ukraine.

The period of 2001–2014 was a stage of further growth of the Donetsk scientific school of commercial law, strengthening of its authority, and its unit in the Donetsk National University. The adoption of the Commercial Code of Ukraine by the Verkhovna Rada of Ukraine, which entered into force on January 1, 2004, contributed to the recognition of achievements of this scientific school at the state level, in academic circles in both Ukraine and other countries.

This stage of development of the Donetsk unit is characterized by a significant intensification of commercial legal research. Doctoral dissertations were prepared and defended by in-house and assistant faculty members – A. H. Bobkova (2001) B. N. Poliakov (2003), A. H. Zeldyna (2007), V. A. Ustymenko (2007), S. S. Valytov (2010), H. D. Dzhumaheldyeva (2012), Y. F. Koval (2014). At the same time, a new generation of its representatives joined the activities of the scientific school: postgraduate students and teachers of the faculty prepared and defended more than 30 candidates' dissertations on commercial legal specialization. The school published a scientific-practical commentary on the Commercial Code of Ukraine, a number of scientific monographs, as well as organized and held several large-scale international scientific and practical conferences on topical issues of legal support of economic development.

Starting from October 2014 and up to now it is possible to distinguish one more stage of development of Donetsk scientific school of commercial law, when the majority of its representatives continued their work in different cities of Ukraine,

resulting in the school's geographical division into two powerful units: one was formed on the grounds of the Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine, headed by Corresponding Member of the National Academy of Sciences of Ukraine, Professor, Doctor of Law V.A. Ustymenko, while the second one – on the grounds of the Law Faculty of Vasyl' Stus Donetsk National University, relocated to the city of Vinnytsia (hereinafter – Vinnytsia Branch), headed by Academician of the National Academy of Legal Sciences of Ukraine, Professor, Doctor of Law A.H. Bobkova.

An important indicator of the development of both the Donetsk Scientific School of Commercial Law in general and its unit at the Donetsk National University is the preservation of continuity in research by representatives of different generations of the scientific school.

The abovementioned refers to the legal support of recreational activities as an area of scientific interest. At the time, the development of this topic was initiated by V.K. Mamutov (in particular, in the work «Recreation: Socio-Economic and Legal Aspects») and A.M. Serebriakov («Problems of Legal Regulation of the Use of Recreational Resources»), later developed in the doctoral dissertation of A.H. Bobkova («Legal Support of Recreational Activities»), and now followed in the works of K.A. Kalachenkova et al.

The theoretical ideas featured in the selected works of V.K. Mamutov («State Bodies Competence in Solving Industrial Economic Issues», «Enterprise and the Higher Commercial Body», «Public Property: Problems of Theory and Practice») received further development in the studies «State Property Management (Commercial Legal Aspects)» by A.M. Zakharchenko and «Problems of Securing State Socialist Property: Legal Aspects» by S.Z. Mykhailin.

The legal status of the various participants of relations in the sphere of commercial activity has been systematically studied during the whole period of existence of the scientific school. In particular, in addition to the above-mentioned scientific works of V.K. Mamutov, the relevant issues have been developed in the candidate dissertations of O.O. Chuvpylo («Administrative Legal Status of Business Associations», 1971), O.S. Yankova («Legal Regulation of the Authorized Fund of Commercial Organizations», 2000), R.F. Hryniuk («Legal Status of Communal Enterprises in Ukraine», 2001), N.V. Shcherbakova («Legal Regulation of Mergers and Acquisitions of Commercial Entities», 2006), A.M. Zakharchenko («Economic Competence of Local State Administrations», 2007), I.A. Shcherbak («Legal Regulation of Commercial Relations with Participation of Separate Subdivisions of Enterprises», 2009), I.M. Liubimov («Legal Status of State Enterprises», 2010).), L.N. Doroshenko («Legal Grounds for Forced Liquidation of Commercial Entities», 2012), Yu.S. Alekseieva («Commercial Legal Status of Private Enterprise in Ukraine», 2012), V.V. Manziuk («Legal Status of Tourist Entrepreneurship», 2013), Ye.O. Lipnytska («Legal Status of Foreign Invested Enterprises», 2015), D.O. Lisova

(«Securities Traders as Subjects of Commercial Legal Relations», 2016), and others.

Donetsk commercial legal academics made a significant contribution to the formation of the theory of commercial liability. This line of research was founded by representatives of the first generation of the scientific school – V. K. Mamutov (« Enterprise and Material Liability», 1971), O. N. Novoshytskyi («Compensation Function of Monetary Sanctions», 1971), who, among other things, has developed the Methodology of evaluation of the amount of the damages (losses), caused due to infringement of commercial contracts, D. H. Lypnytskyi («Basic Directions of Unification of Economic Sanctions», 1998) and subsequently expanded by A. H. Bobkova («On the Issues of Determining Economic and Legal Liability», 2008), Z. F. Tatkova (candidate thesis «Fundamentals, Types and Forms of Economic and Legal Liability», 2010), V. I. Novoshytska (candidate thesis «Indemnification of Losses in the Commercial Sphere», 2017).

Today, the sphere of scientific developments of Vinnytsia Branch of Donetsk Scientific School of Commercial Law covers a wide range of issues of commercial legal support of the economic development of Ukraine. In recent years, under A. H. Bobkova's initiative, a new framework of scientific research was established – «Legal Support of Environmental Entrepreneurship». A number of proposals to improve the legal basis for the organization and implementation of such entrepreneurship, which covers various types of innovative activities of commercial entities ranging from production, works, and services of special (environmental) purposes aimed at ensuring environmental safety, rational use of natural resources, improving the level of environmental protection for profit is justified within the framework.

Another original line of research of the Vinnytsia Branch of the Donetsk Scientific School of Business Law – «Commercial and Legal Regulation of Relations in the Sphere of Industrial Property» is based on a doctoral dissertation and other scientific works by I. M. Koval, who substantiated the concept of commercialization of industrial property rights [7].

In total, the participants of the scientific school, who now work in Vasyl' Stus Donetsk National University, have prepared and published nearly 890 scientific and about 250 educational and methodical materials. Among the most significant scientific works, the authors (co-authors) of which were representatives of Vinnytsia Branch of the scientific school, we should mention the collective monographs «Commercial and Legal Aspects of Ensuring the Development of Ukrainian Economy» [8], «Legal Support for the Development of Environmental Entrepreneurship («green» economy)» [9], A. M. Zakharchenko's monograph «State Property Objects Management (commercial legal aspects)» [10], A. H. Bobkova's separate sections in the monograph «Legal System of Ukraine: History, State and Prospects: in 5 volumes», v. 4 «Methodological Bases of Development of Ecological, Land, Agrarian and Commercial Law», «Ukrainian Legal

Doctrine: in 5 volumes», v. 4 «Doctrinal Issues of Environmental, Agrarian and Commercial Law", articles of the scholars of Vinnytsia Branch in Volume 14 «Ecological law» and Volume 15 «Commercial law» of the «Great Ukrainian Legal Encyclopedia» and many more.

Following the results of the conducted researches, representatives of Vinnytsia Branch of Donetsk Scientific School of Commercial Law carried out a number of developments in the sphere of legislative activity. In particular, the Concept of Legal Support for the Development of Environmental Entrepreneurship («Green Economy Concept»), draft laws «On Environmental Entrepreneurship («Green Economy»), «On Amendments to Certain Acts of Ukraine in Connection with the Adoption of the Law of Ukraine «On Environmental Entrepreneurship («Green Economy»)» have been developed. Proposals have been prepared for improving the existing legislation: the Civil Code, the Tax Code, the Laws «On Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period up to 2020», «On Environmental Protection», «On Priority Guidelines for the Development of Science and Technology», «On State Property Management», «On Tourism», «On Innovative Activities» and many others.

After the relocation of the Donetsk National University to Vinnytsia, the postgraduate course was resumed. Over 30 postgraduate students are currently working on their theses on specialty 12.00.04 – commercial law, arbitration process. Doctoral studies in this specialty were launched in 2014 and a Special Scientific Council for the defense of candidate dissertations was created (K 11.051.12), the majority of members of which are involved in the Vinnytsia Branch of the Donetsk Scientific School of Law.

Particular attention is paid to students' work, educating the future generation of commercial lawyers. The results of such work are manifested by active participation and achievements of students in various all-Ukrainian and international contests, olympiads and competitions. For more than fifteen years, the Department of Commercial Law in cooperation with the Council of Students' Self-Government has been holding all-Ukrainian contests on commercial law and process named after S. Z. Mykhailin attended by representatives from all regions.

Representatives of the Vinnytsia Branch of the Donetsk School of Commercial Law are members of the Scientific Advisory Council at the Supreme Court, members of the editorial boards of a number of scientific professional publications, specialized scientific councils for dissertations, they maintain close communication with the staff of the relevant specialized departments of other higher educational and scientific institutions.

5. The research results

The above shows that the Donetsk Scientific School of Commercial Law and its unit in Vasyl' Stus Donetsk National University have come a long way of formation and development, during which they made a significant contribution to the development of commercial law science, ensuring the codification of

Ukrainian legislation, further improvement of such legislation and its application practice. Theoretical developments of the representatives of this school are used in law-making activities of legislative and executive authorities, law enforcement activities of executive authorities and local self-government, the Constitutional Court of Ukraine and the Supreme Court, other judicial bodies, in notarial and advocacy practice, in legal work of economic entities.

6. Conclusions.

1. The establishment of the Donetsk Scientific School of Commercial Law and its unit at Vasyl' Stus Donetsk National University was carried out in several stages, each of which is characterized by relevant achievements and contribution to the concept of commercial law as a science, branch of law, legislation.

2. The current state of activity of Vinnytsia Branch of Donetsk Scientific School of Commercial Law is characterized by the continuation of traditions in scientific search and introduction of new directions of commercial legal research.

3. The staff of the Donetsk Scientific School of Commercial Law (Vasyl' Stus Donetsk National University unit) associates the perspective of its activities with the achievement of the goal of strengthening the system of legal means aimed at ensuring equal conditions, stability, and efficiency of business for all participants of commercial relations, satisfaction and protection of interests of such participants to ensure the growth of economic activity of business entities, the coherence, and coordination of actions of commercial entities, their interest in the development of entrepreneurship and, on this basis, the improvement of the efficiency of social production and its social orientation.

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V. Shcherbyna, Professor head of the department of economic law of the faculty of law of Kyiv national Taras Shevchenko university, doctor of law, professor Kyiv

COMMERCIAL LAW LIABILITY IN THE DOCTRINE OF COMMERCIAL LAW OF UKRAINE AND ITS LEGISLATIVE ASSIGNMENT

Abstract. *Legal liability is a cornerstone of any field of law. Commercial legal liability is not an exception as an institution of commercial law, which, despite its importance in the field of protection of the rights and interests of participants of commercial relations, has not received an adequate coverage in scientific researches.*

The purpose of the article is to reveal the features of commercial law responsibility and to apply commercial, operational-commercial and administrative-commercial sanctions to participants of commercial relations.

The peculiarities of commercial law responsibility are revealed, the main of which is the sphere of its usage, which determines both the basis of application of measures of the specified liability (commercial offense) and the range of subjects of commercial law responsibility, which are participants of relations in the sphere of commerce.

Distinctive features of commercial law responsibility are: the suffering of a participant of commercial relations of adverse commercial consequences not only of property, but also of organizational character; application to the offender, in addition to commercial, operational-commercial and administrative-commercial sanctions, as well as the possibility of determining the amount of penalties in domestic commercial relations; establishment of types and sizes (in case of their definition) of commercial, operational-commercial and administrative-commercial sanctions mainly (and for the latter – exclusively) by law; extrajudicial order (procedure) for the implementation of certain types of commercial law liability.

It is concluded that the norms of the Commercial Code of Ukraine generally reflect the peculiarities of commercial law liability as a type of legal liability and the peculiarities of applying such measures of commercial law liability, as operational, commercial and administrative-commercial sanctions, as well as the recognition of the debtor as a bankrupt.

At the same time, it is emphasized that the Commercial Code of Ukraine in terms of regulating the relations of commercial law responsibility requires certain changes and the main ones are proposed.

It is noted that the problems of commercial law responsibility require further scientific research in order to create a modern theory of commercial law responsibility on the basis of the best practices of domestic and foreign legal science and practice, which should be adequate to the existing conditions of a market economy.

Key words: *commercial law responsibility, commercial sanctions, operational-commercial sanctions, administrative-commercial sanctions.*

Legal liability issues have always been the subject of attention of both legal scholars and practitioners. There is no exception to the problem of commercial law liability, the expressions of increased attention to which are connected with the formation of commercial legislation of the market direction and, in particular, with the adoption of the Commercial Code of Ukraine[1], which not only enshrined, but also developed provisions on general principles of commercial law responsibility, regarding administrative-commercial and operational-commercial sanctions, regarding pre-trial order of realization of commercial law responsibility, regarding recognition the debtor as a bankrupt and others.

Despite the large number of scientific papers studying commercial law responsibility, only a few PhD theses were defended during the years of independence in Ukraine (Shumilo I.A. – 2001, Tatkova Z.F. – 2010, Zayarnyi O.A. – 2011, Novoshitska V.I. – 2017), dedicated to certain aspects of commercial law responsibility, which indicates the need for deeper theoretical studies of problems of commercial law responsibility, commercial and administrative-commercial sanctions, etc., and to determine the effectiveness of the application of these sanctions by courts, empowered state authorities and local governments, parties of commercial contracts.

Many issues related to the responsibility of participants in commercial relations have arisen due to certain differences between the rules of the Civil Code of Ukraine[2] and the Commercial Code of Ukraine, which is mainly due to the misunderstanding of the peculiarities of the application of commercial law liability measures to the participants of commercial relations and to their special kind as subjects of commerce. However, some discrepancies are the result of imperfect legal technique used in the drafting of the Commercial Code of Ukraine and inaccurate translation of the terms of the draft Ukrainian Commercial Code from Russian into Ukrainian.

The purpose of the research is to author's attempt to reveal the features of both commercial law responsibility and

[1] Господарський кодекс України: Закон України від 16 січня 2003 р. №436-IV. URL: https://zakon.rada.gov.ua/laws/show/436–15 (дата звернення: 30.05.2019)

[2] Цивільний кодекс України: Закон України від 16 січня 2003 р. №435-IV. URL: https://zakon.rada.gov.ua/laws/show/436–15 (дата звернення: 30.05.2019)

the application of its measures to subjects of commerce and other participants of commercial relations.

Commercial law responsibility is an instrument of coercion to comply with legal requirements (provisions of normative-legal and other legal acts, terms of commercial agreements and other rules of conduct), however, unlike the Soviet period, when many scientists considered state coercion as a feature of legal liability measures, today it is controversial to say so. For example, legal liability measures applied by a party to an commercial agreement in the form of operational and commercial sanctions, or voluntary payment of penalties or voluntary compensation of damages in some cases directly, in others – indirectly unrelated to state coercion. That is why V. V. Lutz when he disagrees that voluntary discharge of a legal responsibility cannot be[1].

Commercial law responsibility is in many respects similar to civil law liability, but it also has certain features that distinguish it not only from the latter but also from the commercial law responsibility of a planned economy period with certain features[2].

The main feature of commercial law responsibility is the sphere of its application – the sphere of commerce, which determines the basis of its application and determines the range of subjects of commercial law responsibility.

Taking that into account, it seems not entirely correct to refer to the grounds for the occurrence of commercial obligations on such grounds as damaging the subject or commerce, the acquisition or preservation of property of the subject or by a subject of commerce at the expense of another person without sufficient grounds (paragraph 5 of Part 1 of Article 174 of the Commercial Code of Ukraine). In essence, it is about nothing other than the grounds for the occurrence of non-contractual obligations and relations for compensation, which are regulated by the rules of the Civil Code of Ukraine, and therefore it is advisable to exclude paragraph 5 of part 1 of Article 174 from the regulatory act.

According to Part 1 of Art. 218 of the Commercial Code of Ukraine the basis of commercial law responsibility of the participant of commercial relations is an offense committed by one in the sphere of commerce. Thus, this provision clearly defines the sole basis for the appearance of a protective legal relationship committed by a participant of commercial relations offense in the field of commerce.

The content of a protective commercial relationship caused by commercial offense is the obligation of the obliged party (the offender) to restore the violated right and the right of the empowered party (the victim) to demand the restoration of the violated, unrecognized or contested right. To the parties of such legal relationship (however, as to the parties of the protective legal relation-

[1] Цивільне право України. Особлива частина: підручник / за ред О. В. Дзери, Н. С. Кузнєцової, Р. А. Майданика. – 3-тє вид., перероб. і допов. – К.: Юрінком Інтер, 2010. 194

[2] Хозяйственное право. Общие положения / Под ред. члена-корреспондента АН СССР В. В. Лаптева. – М.: Изд-во «Наука». 1983. 223.

ship caused by property commercial obligation violation), it is possible to use the terms (which were used above) "empowered party" and "obliged party" which are connected with organizational-commercial obligations in the Commercial Code of Ukraine. That, however, does not exclude the possibility of using the mentioned terms in relation to the protective relationship, in which the obliged party is the offender and empowered one – is the victim.

It should be mentioned that the existence in the Commercial Code of Ukraine rules on organizational-commercial obligations, concept and types of which are defined in Art. 176 of the Commercial Code of Ukraine, became one of the important reasons for the inclusion into the Commercial Code of Ukraine of a number of general rules on the liability of participants of commercial relations and caused the autonomous legal regulation of the measures of liability for violation of these obligations application. That is why such a circumstance does not give any reasons to conclude on the duplication of the provisions of the Civil Code of Ukraine in the articles of the Commercial Code of Ukraine and the proposals on removing certain rules regarding liability from the Commercial Code of Ukraine or on transferring them from the Commercial Code of Ukraine to the Civil Code of Ukraine.

However, it should be noted that commercial law liability is a concept narrower than the concept of liability offense in the sphere of commerce (if based on a broad understanding of commerce and the relevant range of subjects involved in it, then the liability in this area may also be civil, both administrative and criminal). Therefore, commercial law liability should be regarded as a separate, special type of liability applicable to commercial offenses as one of the types of offenses in the sphere of commerce.

However, the subjects of such responsibility may be exclusively participants of commercial relations, regardless of whether they are the a subjects of commerce, consumers, state authorities and local self-government bodies with commercial competence, or other participants of commercial relations defined in Art. 2 of the Commercial Code of Ukraine.

A significant distinguishing feature of commercial law responsibility is the fact that commercial law liability is the suffering by a participant of commercial relations (in particular by a subject of commerce) of unfavorable economical consequences not only of property, but also of organizational nature (the latter are, in particular, the consequences of operative-commercial sanctions usage and sanctions of administrative-commercial nature), which is confirmed by a wider range of sanctions (unlike the Civil Code of Ukraine) which can be used against the subjects of commerce and other participants of commercial relations for commercial offenses committed by them. These are commercial, operational-commercial and administrative-commercial sanctions, of which only commercial sanctions in the form of liquidated damages, fines, penalties and damage recovering more or less co-

incide with civil law sanctions. In regard with operative-commercial sanctions, such measures of liability are unknown in civil law. Similarly, the mentioned legislation does not provide for the possibility to determine the amount of penalties applicable in domestic commercial relations for violating of obligations, since the parties to domestic commercial obligations are recognized as subjects of law neither by civil law nor by the science of civil law, as well as the existence of domestic liabilities is not recognized.

The differences between commercial and civil sanctions are, in particular, that: a) Part 1 of Art. 549 of the Civil Code of Ukraine, using the term "liquidated damages (fine, penalty)", qualifies the fine and the penalty as varieties of liquidated damages, which in its "pure form" does not exist, while used in part 1 of Art. 230 of the Commercial Code of Ukraine the term "liquidated damages, fine, penalty" gives reasons to consider each of these types of sanctions, including liquidated damages, as an independent, although in further articles of the Commercial Code of Ukraine the term "liquidated damages" is not used. In our time, we noted that such technical, in our view, error could well be corrected by making editorial (technical) changes to Part 1 of Art. 230 Commercial Code of Ukraine; b) Part 1 of Art. 551 of the Commercial Code of Ukraine establishes that the matter of liquidated damages be a sum of money, movable and immovable property, whereas, according to Part 1 of Art. 230 of the Commercial Code of Ukraine as fine sanctions are recognized commercial sanctions in the form of monetary amount. In our opinion, such a restriction of the form of a liquidated damages in the Commercial Code of Ukraine can be explained by preventing the change of the owner of state or communal property bypassing the privatization legislation, however, we believe that the Commercial Code of Ukraine unreasonably restricts the right of subjects of commerce to set a liquidated damage in the form of property in the contract (for example, securities), because of the fears of possible violations while transferring such property equally apply to the payment of liquidated damage in cash. The establishment in the commercial agreements of the property form of liquidated damage will allow the offending subject of commerce to quickly maneuver its property and financial resources, and in some cases – to avoid possible bankruptcy proceedings. At the same time, the establishment of liquidated damages for commercial obligations violation will significantly reduce the time for restoration of the infringed property right of the victim; c) according to the Civil Code of Ukraine (Part 1, Art. 624), the main type of liquidated damage is fine one, whereas, according to Part 1, Art. 232 of the Comercial Code of Ukraine – offsetting one. The position we have expressed in this regard was to establish in the Commercial Code of Ukraine as a general rule of application of fine type of liquidated damages for commercial obligation violation, since these are participants of commercial relations, many of which are professionally engaged in independent, initiative, systematic,

at their own risk activity. Instead, the main type of liquidated damages for the members of civil relations could be the offsetting one.

It distinguishes commercial law liability from civil one and the fact that the types and sizes (if any) of commercial and operational-commercial sanctions are predominantly established by law. Only the law establishes the grounds and types of administrative-commercial sanctions, which is caused by a range of subjects of their application (state authorities and local self-government bodies) and meets the requirements of Part 2 of Art. 19 of the Constitution of Ukraine.

A distinctive feature of commercial law responsibility is also the order (procedure) of its application (judicial and extrajudicial), established by law. In this case, the court procedure for the application of commercial sanctions may be preceded by the so-called pre-trial procedure for the implementation of commercial law liability, which in accordance with Art. 222 of the Commercial Code of Ukraine consists in addressing by the victim to the offender with a written claim and in a written notice by the latter to victim about the results of consideration of the claim.

According to the general rule established by Part 2 of Art. 222 of the Civil Code of Ukraine, in the case of compensation for damages or application of other sanctions, a subject of commerce or other participant of commercial relations whose rights or legitimate interests were violated, in order to resolve a dispute directly with the offender of these rights or interests, has a right to make a written claim to one, unless otherwise provided by law.

Thus, provided for Art. 222 of the Civil Code of Ukraine the pre-trial procedure for the realization of commercial law liability, in essence, concerns only the application of such types of commercial sanctions as compensation for damages and fine sanctions. The right (but not the obligation) of the victim to make a claim is enshrined, in particular, in Chapter 2, "Claims", of Section XI, "Claims and lawsuits", of the Merchant Shipping Code of Ukraine, which set the possibility of claiming and, in particular, specifying the terms of the claim and consideration of the claim (art. 383–387 MSC of Ukraine). Similarly, paragraph 130 of the Charter of the Ukrainian Railways states that a lawsuit may be preceded by a claim to it, and paragraphs 131, 133, 134, and 135 identify the subjects of the claim and the consideration of the claim, cases of its claim and terms of application and consideration.

At the same time, the Charter of Road Transport of the Ukrainian SSR, which generally requires bringing its provisions in line with the modern needs of regulating road transport activity, including goods transportation, establishes a mandatory claim, regulating the related relations in art. art. 159–166.

Similarly, the mandatory filing of a claim is established in the case of violation of the terms of the contract of carriage of goods by air. Thus, paragraph 21.1.2. of The rules of air transportation of goods, approved by the order of the State Service of Ukraine for Supervision of Security of Aviation No. 186 of

March 14, 2006, stipulates that in case of damage, the person entitled to receive the cargo must send the carrier a claim immediately after finding the damage, but not later than 14 days from the date of receipt or from the date of signature by the consignee of the relevant delivery document. In case of delay, the claim must be sent no later than 21 days from the date when the cargo was given at the disposal of the person entitled to receive it. In case of loss, the claim must be submitted within 120 days from the date of issue of the air waybill.

It should be noted, however, that according to Part 1 of Art. 100 of the Air Code of Ukraine the procedure for filing claims and lawsuits is determined by the rules of the air carrier, not by state bodies. According to it, the Regulation on the Ministry of Infrastructure of Ukraine, adopted by the Cabinet of Ministers of Ukraine on June 30, 2015 No. 460, does not include among the powers of this Ministry, which provides for the formation and implementation of state policy in the field of aviation transport and use of Ukrainian airspace, approval of rules air freight.

The State Aviation Safety Supervision Service did not have such authority. Regulation on that Service was approved by the Decree of the Cabinet of Ministers of Ukraine No. 709 of May 23, 2006, lapsed under the resolution of the Cabinet of Ministers of Ukraine of November 2, 2006, No. 1526.

Therefore, the Rules for the carriage of goods by air which was mentioned here, must be abolished and the procedure for the filing of claims for the carriage of goods by air must be governed by the rules of the air carrier, as provided for in Part 1, Art. 100 of the Air Code of Ukraine.

Extra-judicial procedure also takes place in the case of operative-commercial sanctions by a party who has suffered an offense without first submitting a claim to the offender (part 1 of Article 237 of the Commercial Code of Ukraine). In this case, operative-commercial sanctions are applied irrespective of the fault of the subject that violated the commercial obligation (Part 3 of Article 235 of the Commercial Code of Ukraine).

Similarly, in extra-judicial order administrative-commercial sanctions are applied by empowered state authorities or by local self-government bodies to the subjects of commerce for violation of the commercial activity rules established by legislative acts. However, on administrative-commercial sanctions, according to the order of application and legal nature of the latter, the pre-trial procedure for the implementation of commercial law responsibility, established Art. 222 of the Commercial Code of Ukraine does not extend, in our opinion, it is expedient to provide it in the Commercial Code of Ukraine, supplementing it with Article 238 Part 3 of the relevant content.

Part 1 of Art. 223 of the Commercial Code of Ukraine requires an alignment with the provisions of the Civil Code of Ukraine, which refers to the "general and shortened limitation periods", which are used while the implementation in court of liability for offenses in the field of commerce. First, the Civil Code of Ukraine quite rightly abandoned the phrase "limi-

tation period", defining in Art. 256 statute of limitations as a period within which a person may apply to the court for the protection of his civil right or interest. Therefore, the use of the phrase "limitation period" is incorrect both in legal and grammatical sense. Secondly, Art. 223 of the Commercial Code of Ukraine unreasonably limits the possibility of application of statute of limitations with the duration specified by the Civil Code and Commercial Code of Ukraine, depriving the parties of the right to prolong the statute of limitations, established by law, by agreement (Part 1 of Article 259 of the Civil Code of Ukraine).

Based on the above, we propose to set out part 1 of Art. 223 of the Commercial Code of Ukraine in the following wording: "1. In case of judicial liability for commercial offenses in the form of compensation for damages and fine sanctions, the statute of limitations established by the Civil Code of Ukraine shall be applied, unless other terms are established by this Code."

Conclusions. Summarizing the above, it can be stated that commercial law liability, which, although it has certain similar features with civil law liability, is an independent type of legal liability and cannot be considered as a special type or component of civil liability. For example, the presence of similar elements, such as the fact of the offense, casual link, guilt are in no way a basis for the equation of criminal law and civil law liability. These elements are the features of legal liability in general and, as a general rule, extend to its specific sectoral types.

In general, the Commercial Code rules reflect the peculiarities of commercial law liability as a type of legal liability, and the peculiarities of applying such measures of commercial law liability, such as operative-commercial and administrative-commercial sanctions, as well as the recognition of the debtor as a bankrupt.

At the same time, the Commercial Code of Ukraine needs some changes regarding the regulation of commercial law liability relations. First of all, it concerns the structure of the Commercial Code of Ukraine, namely: a) Section V of the Commercial Code of Ukraine is appropriate to be called "Liability for Commercial Offenses" because its current name is too broad and creates the prerequisites for the inclusion into it the rules on administrative, criminal, civil and other liability for committing an offense in the field of commerce, which is certainly unacceptable; b) it is appropriate to exclude Chapter 23 from Section IV of the Commercial Code of Ukraine and to include (having previously brought its provisions into conformity with the Bankruptcy Code) as the last chapter in Section V, since the debtor's bankruptcy is, in our view, the most severe sanction; c) Chapter 28 of the Commercial Code of Ukraine, the rules of which are not in line with the provisions of the Law of Ukraine "On Protection of Economical Competitiveness", as it was indicated in scientific publications, it is advisable to exclude from the Code. However, the main reason for the exclusion of the said chapter from the Code is the uncertainty of the

criterion, according to which Chapter 28, the rules of which regulate the relations of responsibility in a particular sphere, (no matter how important for the economics it is), is included in Section V of the Commercial Code of Ukraine, the rules of which establish general provisions for commercial offenses and types of sanctions.

Rules that determine the basis for the application of administrative and commercial sanctions (such a basis can only be a violation of the rules of commercial activity) require more explicit wording in the legislation and the number of persons to whom such sanctions can be applied (subjects of commerce – legal entities and individual entrepreneurs) needs it too. However, the responsibility of commercial subjects, as persons who, on a professional basis and at their own risk, carry out commercial (entrepreneurial) activity, should come regardless of guilt, regardless of what types of sanctions – commercial or administrative-commercial – should be applied. In addition, the provisions of those laws that use the term "financial sanctions" in cases of administrative-commercial sanctions should be brought in line with the terminology of the Commercial Code of Ukraine.

In our view, the practice of applying the provisions of Art. 625 of the Civil Code of Ukraine on monetary obligations of participants of commercial relations requires to be significantly changed. The peculiarities of establishing fine sanctions for violation of monetary obligations by the participants of commercial relations are provided for in Part 6 of Art. 231 of the Commercial Code of Ukraine. With regard to the inflation index and percent annual, they cannot be considered as fine sanctions in the truest sense, they perform a compensation function (inflation index), which is mostly a feature of damages recovering, or is a charge for using someone else's money (percent annual). In any case, there are no reasons for qualifying them as measures of liability (along with payment of the amount of debt) that can be applied to participants of commercial relations in the form of sanctions, basing on the provisions of Art. 625 of the Civil Code of Ukraine.

As for other "differences" between the norms of the Civil Code of Ukraine and the Commercial Code of Ukraine on the responsibility of the subjects of civil and commercial relations, while the assessment and characterization of each of them should it should be taken into account the peculiarities of the legal regulation of civil and commercial relations, which should be purely objective and justified.

It is a question neither on "loosening" the positions of Ukrainian civilistics by representatives of the science of commercial law, nor on their "destruction", as it was mentioned by some representatives of civilistic science[1]. The realities of a market economy, while maintaining the unanswered need for regulatory in-

[1] І Спасибо-Фатєєва, Міркування про українську цивілістику в Спогади про Людину, Вченого, Науковця (до 60-річчя від Дня народження професора Ірини Володимирівни Жилінкової) / за заг. ред. Р.О. Стефанчука (Право 2019) 207

fluence of the state on the activities of commercial subjects in order to perform by it, in particular, social function, require the creation of new mechanisms of legal liability, including – the commercial law responsibility, which rules should find their place in The Commercial Code of Ukraine, which, despite trying to give him a label of "anti-market act"[1], to a greater extent than the Civil Code of Ukraine, regulates relations in the sphere of economics, taking into account their specificity.

It is time to realize that no field of legislation (law) can be a monopolist in regulating public relations in a particular sphere. An example of it is the land, water, environmental, family and other fields of law governing personal property and property relations, which have certain features that make them independent and different from civil relations.

In any case, the problems of commercial law responsibility require further scientific research on the basis of broad, truly scientific discussions between representatives of different law schools, with appropriate arguments (without distorting the scientific positions, views and conclusions of the representatives of commercial law, without attributing "merits" to them to which they have no regard, which unfortunately are made by certain civil scientists), so that, basing on the best practices of domestic and foreign legal science and practice to create the modern theory of commercial law liability that would meet current market economics conditions.

In particular, due to the updating of the legislation on joint stock companies, limited liability and additional liability companies require in-depth theoretical analysis of the problem of commercial law liability of participants of corporate and related relations. Despite the efforts of representatives of civil science to substantiate the relevance of corporate relations to the subject of legal regulation of civil law, we have not seen convincing arguments. Instead, the combination of corporate and organizational elements in corporate relations gives every reason to consider them as internal commercial relations, which are included in the sphere of commercial relations, and, therefore, is the subject of regulation of the Commercial Code of Ukraine, which, in fact, was reflected in the legal ensuring of corporate relations in Art. 167 of the Commercial Code of Ukraine and the absence of such norms in the Civil Code of Ukraine.

The existence of organizational-commercial (Article 176 of the Commercial Code of Ukraine), socio-communal (Article 177 of the Commercial Code of Ukraine) and public obligations (Article 178 of the Civil Code of Ukraine) objectively implies responsibility for their non-performance or improper performance, but the issue of such responsibility today is beyond the field of scientists' view

The results of scientific studies of the problems of commercial law responsibility should find appropriate setting in the normative-legal acts of commercial legislation.

[1] А Довгерт, Рекодифікація Цивільного кодексу України: основні чинники і передумови старту (2019) 1 Право України 38

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H. Baliuk, Doctor of Law, Professor of the Department of Environmental Law of Taras Shevchenko National University of Kyiv, Corresponding Member of the NALS of Ukraine

Yu. Vlasenko, Candidate of Law, Associate Professor of the Environmental Law Department of Taras Shevchenko National University of Kyiv

T. Kovalchuk, Candidate of Law, Associate Professor of the Department of Environmental Law at Taras Shevchenko National University of Kyiv

ENVIRONMENTAL RIGHTS OF UKRAINIAN CITIZENS: INTERNATIONAL AND EUROPEAN STANDARDS AND DOMESTIC PROBLEMS

Abstract. *The paper deals with modern problems of improving the consolidation, implementation, and protection of environmental rights of citizens of Ukraine; it analyzes the system of formation and development of international, European and national legal norms on the implementation and protection of environmental rights of citizens and Ukraine's commitments to the international community to consolidate, guarantee the implementation and protection of environmental rights of citizens. Theoretical and legal analysis of the mechanism of realization of environmental rights is carried out on the basis of concrete examples at the level of national legal proceedings and cases that have been considered by the European Court of Human Rights.*

Key words: *environmental rights; human rights; mechanism of realization of environmental rights; guarantees of realization of rights.*

The purpose of this article and its tasks are dictated by the topicality of modern problems of improving the consolidation, enforcement, and protection of environmental rights of citizens of Ukraine, taking into account the require-

ments of international European law and Ukraine's commitments towards the international community (in particular, towards the Council of Europe).

The study of environmental rights as a complex legal phenomenon in terms of concept, features, system, mechanism of realization and protection, ensuring and implementation, formation, and development in Ukraine was conducted in the professional literature by such scholars as Andreitsev V. I. [1; 2], Anisimova H. V. [3], Baliuk H. I. [4], Bredikhina V. L. [5], Vlasenko Yu. L. [6], Hetman A. P. [7], Hrytskevych S. H. [8], Kobetska N. R. [9], Kovalchuk T. H. [10]; Kostytskyi V. V. [7], Kostiashkin I. O. [11], Krasnova M. V. [12;13;18], Malysheva N. R. [14;18], Medviediev K. V. [15], Pozniak E. V. [16], Reshetnyk L. P. [17], Tretiak T. O. [19], Cherkashyna M. K. [20] and many others.

The International Bill of Human Rights defines that human life is only fulfilled when it is illuminated by human rights.

Presently, one of the major problematic issues in international, European and national law is the issue of strengthening, ensuring the implementation and protection of environmental rights of human beings and citizens, as it is closely linked to their right to life and health care itself.

Harmonization of domestic legislation in this area of public relations should be carried out with mandatory consideration of provisions and principles of both international and European law, in particular, environmental law.

Traditionally, the international standard in the field of human rights is the Universal Declaration of Human Rights of 1948 and the International Covenants on Economic, Social, Cultural Rights and on Civil and Political Rights of 1966. However, none of these documents mention environmental rights. However, the Universal Declaration of Human Rights emphasized the right to life. The reasons for this state of things are related to the fact that in the mid-twentieth century the problems of environmental protection, ensuring the environmental security of human beings were less acute than today. These problems of the global community attracted attention only in the early 70s of the last century. For the first time at the international level, the right to life in a healthy environment was fixed in the Declaration on Environment adopted at the UN Conference in Stockholm in 1972 [21].

The first principle of the UN Stockholm Declaration proclaims that human beings have the fundamental right to enjoy a healthy environment, which allows them to live in dignity and well-being. The Rio Declaration on Environment and Development, adopted at the UN Conference held in 1992 in Rio de Janeiro [22], established the right to a healthy and productive life in harmony with nature and formulated the rights of access to information on the state of the environment, participation in decision-making, access to justice in environmental matters.

Environmental human rights are more comprehensively reflected in the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted in Aarhus on 25

June 1998 and ratified by the Verkhovna Rada on 6 July 1999 [23]. The Convention proclaimed human rights to a favorable environment; environmental information; participation in environmental decision-making; and development of environmental programmes, plans, policies, and draft regulations. The Aarhus Convention has become an important mechanism for the development of democracy and human rights. The Convention's preamble links environmental protection with human rights, raising environmental rights to the level of other fundamental human rights.

The international community is known to celebrate Human Rights Day on December 10 annually. Celebrating this event is an excellent occasion to address the problems of consolidation, implementation, and protection of human and civil rights in Ukraine.

It is worth noting that over the years of independence, Ukraine has adopted a number of legislative acts aimed at strengthening the rights and freedoms of citizens. First of all, it is the Constitution of Ukraine, which states that human rights and freedoms determine the content and direction of the entire state [24]. To affirm and consolidate the exercise of human rights and freedoms is its main duty. Several international conventions have been ratified, including the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms already mentioned above [25]. By the way, its ratification became a determining factor, from which the transfer of European legal values to the domestic legislative field began.

However unfortunate it may be, it is also a fact that the development of the legislative framework and institutional mechanisms to consolidate, ensure the implementation and protection of human rights under the standards of international and European law noticeably outstrips Ukraine's performance. Ukraine should not only recognize this lag but also come to the realization of the need to intensify work to bring domestic legislation in this area into full compliance with European and world standards.

At the same time, despite the above, it is internationally recognized that in some areas of Ukrainian legislation the bar for strengthening human and civil rights even exceeds international standards. One such branch of legislation is the environmental legislation of Ukraine.

In particular, for the first time in domestic legislation, the environmental rights of citizens as currently understood have been enshrined in article 9 of the Law of Ukraine «On environmental protection» dated 25 June 1991 [26]. The preamble to the law states that the protection of the environment, the rational use of natural resources and the environmental safety of human activity are essential conditions for the sustainable economic and social development of Ukraine.

In accordance with article 9 of the law, every citizen of Ukraine has the right to: an environment that is safe for his or her life and health; to participate in the discussion and submission of proposals for draft regulatory and legal instruments and materials concerning the placement, construction and reconstruc-

tion of objects that may have a negative impact on the environment; to submit proposals to State and local government bodies and legal entities that participate in decision-making on these issues; to participate in the development and implementation of measures for the protection of the natural environment, rational and complex use of natural resources; to implementation of general and special use of natural resources; association in public environmental formations; to free access to information on the state of the natural environment (environmental information) and free acquisition, use, distribution and storage of such information, except for restrictions established by law; to participate in public discussions on the impact of planned activities on the environment; environmental education; to the submission to court of claims to state bodies, enterprises, institutions, organizations and citizens for compensation of damage caused to their health and property due to negative impact on the environment; to appeal in court on decisions, actions or inaction of state bodies, local authorities, their officials on violation of environmental rights of citizens in respect of Ukrainian legislation; to participate in the strategic environmental assessment process. The laws of Ukraine may also define other environmental rights of citizens [26].

One of the most significant in the domestic system of environmental rights enshrined in article 9 of the law is the right of citizens to a natural environment that is safe for life and health [26]. In 1996, the right to a safe environment for life and health was enshrined in the Constitution [24]. This right is also set out in sectoral and special legal and regulatory instruments. In particular, the right of citizens to a safe environment is addressed in Chapter 4 of the Fundamental Health Law [27]. Article 26 of this Law provides that the state provides protection of the natural environment as an important prerequisite for human life and health through the protection of living and non-living nature, protection of people from negative environmental impact, through achieving harmonious interaction between individuals, society and nature, rational use and reproduction of natural resources [27]. Article 293 of the Civil Code of Ukraine contains a list of rights, among which is the right to demand the cessation of activities that harm the environment; the right to safety of food products and household items; the right to safe living conditions during education, work, and residence [28].

The rights enshrined in the following laws are also of an environmental nature: «On Ensuring the Sanitary and Epidemic Well-being of the Population», «On Waste», «On the Use of Nuclear Energy and Radiation Safety», «On Protecting Human Beings from Ionizing Radiation» and a number of others.

The conditions for ensuring citizens' right to a safe environment for life and health are detailed in numerous by-laws, standards, regulations, sanitary and hygiene rules, building regulations and other norms and rules. These instruments provide for specific actions to be taken in order to minimize the impact of harmful factors on the environment. For example, such acts may include, in particular, SOS

360–92 «Urban Planning. Planning and Development of Urban and Rural Settlements» of 17 April 1992 [29]. Norms of maximum permissible discharge of pollutants are developed according to the Resolution of the Cabinet of Ministers of September 11, 1996 No. 1100 «Procedure for Development and Approval of Norms of Maximum Permissible Discharge of Pollutants». [30] and others. However, in the context of quality and identity of the regulatory framework for strengthening, ensuring implementation and protection of the right of citizens to a safe environment for life and health, it is necessary to agree with the opinion that Ukrainian environmental legislation on these issues is currently neither systematic nor consistent. However, it is also true that the adoption of even an absolutely perfect regulatory act from the point of view of implementation and protection of human rights is not yet a guarantee of the elimination of all obstacles in the use of certain rights.

Unfortunately, there are few constitutional human rights and freedoms left in Ukraine, which are not simply violated but cynically trampled.

However, in our opinion, the need to ensure the environmental rights of Ukrainian citizens is more acute than in many other areas. There are a number of reasons for this.

In particular, one of them is a massive violation of these rights for a long period of time. Environmental human rights in Ukraine have been and continue to be a kind of hostage to the complex processes of the state, the object of systematic political speculation on the part of almost all political forces, which largely levels out the very value of environmental rights in the public consciousness.

During the years of Ukraine's independence, the principles of implementing and ensuring the protection of environmental human rights enshrined in the Constitution and international legal instruments have often remained the image of the Ukrainian State, concealing behind it a not quite decent facade and «the kitchen» of the State apparatus.

We will give one of the examples that confirms the above. It is known that among the first environmental laws of the new generation were the Laws of Ukraine «On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster» [32] and «On the Legal Regime of the Territory Contaminated by the Chernobyl Disaster» [33]. These acts have been amended on several occasions for various reasons, one of which is the constant desire of the Cabinet of Ministers to reduce State budget expenditure by «cutting back» the rights of these categories of persons. In addition, among the reasons for this are the need to take special measures to protect the environmental rights not only of the victims or their children (born or unborn at the time of the Chernobyl disaster) but also of descendants of subsequent generations. This means that a large number of Ukrainian citizens are in need of protection of their rights to a safe environment and to compensation for damage to their health and property caused by violations of the requirements of environmental law.

It is known that Ukraine has had to make great efforts and commitments to

eliminate the consequences of the Chernobyl disaster, but the problems associated with the protection of the health of all victims remain and are aggravated by the lack of financial, medical and social security.

In recent years, the situation in Ukraine has been alarming with regard to the implementation of measures to reduce the risk of morbidity in areas affected by radioactive contamination as a result of the Chernobyl disaster. Despite the fact that there are direct requirements for the implementation of these measures in accordance with articles 17 and 19 of the Law of Ukraine «On the Legal Regime of the Territory Experiencing Radioactive Contamination as a Result of the Chernobyl Disaster» [33], the measures specified in the Law to reduce the risk of morbidity among the population, which include, for example, radiation monitoring and medical supervision, are not implemented.

Targeted state funding under the law for research into the radiation situation, exposure of the population and foodstuffs in the areas affected by the Chernobyl disaster is not being provided, and the facilities of the sanitary-epidemiological service are known to have been destroyed.

Investigations of radiation conditions, contamination of basic foodstuffs, doses to the population in recent years are carried out only in some settlements of Kyiv, Rivne and Zhytomyr regions (only 12 settlements are surveyed) that is explained by lack of financing of this direction of radiation protection of the population. This is despite the fact that results of radiation hygienic studies in the period of 2015–2017 indicate individual cases of exceeding the limits of radiation exposure of the population in Rivne and Zhytomyr regions. The content of Cs-137 in cow's milk in the Rivne region is 84%, and in the Zhytomyr region, it is 4 times higher than the permissible levels of this radionuclide according to the requirements of DR – 2006. The situation is not much better with respect to the forest products, which, under environmental conditions in the state, are often one of the main sources of food for the inhabitants of Polissia, who have suffered radioactive contamination [34].

For example, dried mushrooms in almost 100% of cases exceed the permissible levels of this radionuclide according to the above requirements. And the contamination of Cs-137 in dried mushrooms collected in the Kyiv region in 28% of cases in the Zhytomyr region in 84% and in the Rivne region in 52% of cases gives reason to classify them as radioactive waste. However, through spontaneous trade, these dangerous products are spread throughout the country and, consequently, the number of potential Chernobyl victims in Ukraine is increasing [34].

A separate important issue is the status of the Chernobyl Disaster victims living in the enhanced radiological monitoring zone (Category 4B). In accordance with paragraph 4 of the Law of 28 December 2014 «On Amending and Determining the Voidance of Certain Legislative Acts of Ukraine», 837,111 citizens of Ukraine (as of 1 January 2015), who were affected by ionizing

radiation as a result of the Chernobyl Disaster unwillingly, were deprived of medical and social protection due to the loss of their status as victims of the Chernobyl Disaster. As of 1 January 2018, this figure had been reduced to 796,934 persons. On July 17, 2018, the Constitutional Court of Ukraine decided to restore social guarantees to the victims of the Chernobyl disaster (including category 4B victims) [35]. However, this issue is still unresolved and leads to increased social tensions in society. In addition, the decision of the Cabinet of Ministers of 11 July 2018 on the issuance of a new type of certificate to victims of the Chernobyl Disaster does not provide for the renewal of such documents for category 4B victims. Resolution of the Cabinet of Ministers of Ukraine No. 551 of 22 December 2018 [36] did not change this situation. This means that there is a real threat of losing the status of victims of the Chernobyl Disaster for 796,934 citizens of Ukraine with all social and medical consequences and the like.

So, taking into account certain social, political and economic factors, these rights – the right of citizens to an ecologically safe environment and to compensation for damages – are not easy to realize. But other environmental rights remain an ideal without content, as they are difficult, or more precisely impossible, to realize.

Practice shows that over the past decade Ukraine has been among the top five countries in terms of the number of applications to the European Court of Human Rights. Such statistics to a certain extent indicate their awareness of judicial and non-judicial international human rights mechanisms, but to a greater extent, it demonstrates the urgency of protecting the constitutional (including environmental) rights and freedoms of Ukrainian citizens.

Despite the fact that none of the major international and European documents fixes the human right to an ecologically safe environment, it should be noted that the lack of formalization of this right does not indicate its non-recognition by the international community and its impossibility of protection. Thus, although the Convention for the Protection of Human Rights and Fundamental Freedoms [25] does not contain this right in its text, the practice of the ECtHR indicates the activity of citizens' appeals for protection of their right to a safe environment. To confirm this, we will give several examples. In Lopez Ostra v. Spain [37], the applicant noted a violation of Article 8 of the Convention, because a liquid and solid waste processing plant was located near the house, which had long been causing unpleasant smells, noise, and other negative effects. As a result of the examination of the case, the ECtHR noted that severe environmental pollution may affect the well-being of people to the extent that it may have an extremely negative impact on their personal and family life, without causing significant danger to their health. The Court stated that the State failed to strike an appropriate balance between the interests of the economic well-being of the city and the proper observance of the applicant's rights with respect to the

inviolability of the home, personal and family life. The Court found such actions by the State to be a violation of Article 8 of the Convention [25].

Similar positions of the ECtHR are also contained in the cases against Ukraine. In Dubetska and Others v. Ukraine [38], the applicants considered that the state had failed to protect their housing, privacy and family life from the excess industrial pollution caused by two state-owned coal mines. The Court found this to be a violation of Article 8 of the Convention, noting that a frivolous claim under Article 8 could only take place if the environmental hazard reached such a serious level that it significantly interfered with the applicant's ability to use his or her accommodation, privacy or family life [25].

In another case, Grimkovskaya v. Ukraine [39], the applicant complained about the close proximity of a highway to her home, which threatened her home, private and family life. On examination of the complaint, the Court concluded that there had been a violation, since the significant influence of noise, vibration, air pollution in connection with the location of the highway impeded the possibility of exercising the right to use her home and threatened her private and family life [39]. In Dzemyuk v. Ukraine [40] the applicant complained that the establishment of a cemetery near his house had led to pollution of drinking water sources, which had prevented him from exercising his right to use his accommodation and adversely affected his physical and mental condition. As in the previous cases, the ECHR found a violation of Article 8 of the Convention, stating that the functioning of the cemetery at such a close distance from his home constituted an interference with the applicant's right to respect for his home and private and family life [25].

All of the above demonstrates the relevance for Ukraine of the European experience relating to the issues of strengthening, ensuring the implementation and protection of environmental human and civil rights, and above all, those elaborated by the institutions of the Council of Europe. What is this organization and why is its experience so important for Ukraine?

The Council of Europe as an intergovernmental regional organization was established on 5 May 1949 through the signature by government representatives of 10 Western European states (Belgium, Denmark, France, Great Britain, Ireland, Italy, Luxembourg, Netherlands, Norway, and Sweden) of the London Treaty establishing the Council of Europe and the Statute of the Council of Europe.

The purpose of the organization is to develop cooperation among its member States on the basis of common principles and ideals and to promote their economic and social progress. Its main areas of activity are related to its main idea – democracy for the individual.

The main document guiding the activities of the Council of Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950 [25]. The Convention, firstly, consolidated the basic human rights standards in Europe. Secondly, it obliges states to

be consistent in their implementation. Third, it consolidated the international system of human rights and freedoms protection. The purpose of the Convention is to place Man at the center of European politics. It is the first international treaty aimed at the implementation of the 1948 Universal Declaration of Human Rights, which guarantees the rights to life, freedom from torture and other inhuman or degrading treatment or punishment; freedom from slavery and forced labor; the right to personal liberty and security of person; the right to fair and public administration of justice; freedom from retroactive application of the law; the right to privacy; freedom of thought, conscience, and religion; freedom of speech; the right to peaceful assembly and association; the right to establish a family.

Ukraine has been a member of the Council of Europe since 9 November 1995 and ratified the Convention on 17 July 1997 [25].

The main instrument for the protection of human rights under the Convention is the complaint, the conditions of which are as follows: Ukraine's recognition of the jurisdiction of the European Court; full exercise by a citizen of all national means of protection of the violated right (freedom) – the period for filing a complaint – six months from the date of the final «national» decision.

When signing the main document – the Convention, Ukraine made a statement on the recognition in law of the right of individual applications to the European Commission on Human Rights and the jurisdiction of the European Court of Human Rights.

The authors of the European Convention devoted its provisions to the creation of a unique judicial mechanism, which, in fact, has made a kind of revolution in international law. For the first time in the field of human rights, States parties to the Convention had the opportunity to challenge judicially the failure of another State party to respect the treaty rights and freedoms of individuals, regardless of their nationality. For the first time, the right of individuals to complain directly to an international judicial body about violations of treaty rights was recognized, and for the first time, the decision of that international judicial body was strictly binding on the respondent State.

The European Court of Human Rights had become the only judicial body competent to interpret the provisions of the European Convention and to rule on the existence or otherwise of a violation of it in specific cases brought before it.

The main bodies of the Council of Europe are the Parliamentary Assembly of the Council of Europe, the Committee of Ministers, the European Commission of Human Rights and the European Court of Human Rights. The headquarters of the European Court of Human Rights is located in Strasbourg (France), where the Secretariat is also located and is organizationally part of the General Secretariat of the Council of Europe.

The European Court of Justice is competent to consider both interstate complaints filed by one State party and individual complaints, i.e. those submit-

ted by private persons (legal entities and individuals).

So, as it is not difficult to notice, the path of a Ukrainian citizen to the European Court is in fact open. In practice, the vast majority of complaints submitted to the European Court are individual complaints.

Complaints may not necessarily be filed by a citizen of the state against which he complains; the condition that the state against which the citizen complains is a party to the Convention is sufficient. Thus, Article 1 of the Convention states that States Parties shall ensure to everyone within their jurisdiction the rights and freedoms set forth in Section 1 of the said Convention.

A citizen of Ukraine may file a complaint with the European Court of Human Rights invoking the articles of the Convention. The European Court of Human Rights will accept a complaint from a citizen only on the violation of those rights and freedoms, which are contained in the Convention. And this, as described above, is a list of traditional civil and political rights. According to the Convention, the rights and freedoms that are of civil and political nature are subject to protection. This is what defines the characteristics of the subject matter of the complaint.

The complaint in the European tradition has one aspect that was previously unknown to Ukrainian citizens. A complaint filed for violation of human rights and freedoms can be both a recognition of a fact of violation and a signal of probable (possible) violation of human rights and freedoms. For example, it is possible to draw an analogy: in the Ukrainian legislation, there is a concept of «appeal» to a state body with a request to take measures to prevent and eliminate violations.

Implementation of the right to protection in the European Court of Justice implies compliance with a number of conditions that are enshrined in the Convention. Let us dwell on the basic conditions for the admissibility of a complaint and the conditions for accepting it for consideration.

First, the need to exhaust national remedies. This means that before filing a complaint with the Court, the applicant must address this complaint to all domestic judicial bodies, up to the highest instance, since the system of protection of rights and freedoms under the Convention is subsidiary (complementary) to national systems. When filing an appeal, the applicant must clearly follow Article 35 of the Convention [25]. In practice, this means that the protection should be clearly defined in domestic law, and its use should not depend on the will of an official. Moreover, the protection must be able to lead to the restoration of the violated right.

We would like to draw your attention to the fact that the deadline for filing an appeal with the European Court is 6 months. The six-month time limit begins with the public announcement of the final reasoned decision of the last domestic authority or written notification of the complainant; the complaint is inadmissible if it has been or is being examined by another international body, such as the Human Rights Committee, which

was established under the Optional Protocol to the UN Covenant on Civil or Political Rights; the complaint must come directly from a person who considers him or her to be the victim of a violation of the Convention. Anonymous complaints are inadmissible (part 2 of Article 35 of the Convention); a complaint is considered only as a violation of rights and freedoms in the Convention; a complaint is accepted only for actions (inaction) that relate to violations of the Convention and only in relation to a State party to the Convention; a complaint for a violation of rights and freedoms under the Convention is admissible from the moment of its ratification, and the State is not responsible for the violation of the Convention on the facts that took place before its ratification. Ukraine is responsible for its obligations only for the period since its ratification of the Convention in 1997; a complaint must be substantiated. The Court considers the very essence of a complaint (art. 35, para. 1). A complaint submitted will be considered on the basis of adversarial proceedings. Not only the complaint of the applicant but also the arguments of the state are considered.

However, it should be stressed once again that a citizen, before applying for protection in the ECtHR, must exhaust all available means of protecting his right in the national legal system.

However, speaking about the implementation and protection of the environmental rights of citizens, it would be unjustified not to see the real changes that are taking place in Ukraine, which, in our opinion, indicate positive changes in this area of relations. If a few years ago it was difficult to find a court decision on the case of ensuring and protecting the environmental rights of citizens, now there are grounds to state that the situation has changed for the better, and there are more of these decisions. This is evidenced, in particular, by court decisions.

As an example, we can consider the decision of the Kherson City Court dated September 21, 2017, in the case №766 / 10892/16-ts [42], which states that a citizen applied to the court with a claim to the service of construction and civil works on the obligation to perform certain actions. The defendant was the balance holder of an apartment building, which was provided, built and equipped with a system for collecting solid waste in the form of a garbage chute in the staircases. However, the defendant, on its own initiative, placed the waste collection bins on the roadside. These bins are not equipped with lids, not fenced, which results in constant spreading and dispersal of the waste along the roadway, light waste (paper, bags, etc.) is constantly flying into the yards of nearby private houses. In addition, the smell of open containers attracts stray dogs that scatter garbage in search of food and, being aggressive, pose a threat to the lives and health of citizens, especially children.

The court has fully satisfied this claim. Remarkable for this case is that the court in its decision referred to «detailed» bylaws. In particular, the CBN 1.1-1-0-93 «System of Standardization and Normalization in Construction. Ba-

sic provisions», State sanitary norms and rules of maintenance of territories of settlements from 17.03.2011 № 145 [42].

One more example. By the decision of the Court of Appeal of Kyiv region on May 19, 2017, in case 372/4399/15-ts it was established that there was a fire at the oil depot of LLC «Pobutrembudmaterialy» which lasted 10 days [43]. The consequence of the fire was causing damage to the natural environment with the risk to life and health of people. Plaintiffs, as inhabitants of the specified region, were inflicted moral harm in the form of a number of psychotraumatic factors connected with damage to health, destruction of property of claimants (namely, vegetables, which claimants grew, consumed and partially sold, for what they received the certain income). The plaintiffs asked to claim from defendants (from several enterprises) the caused moral damage at a rate of 263 088 UAH. The claim was satisfied. It is noteworthy that the court applied the provisions of the Convention on Civil Liability for Damage Caused by Activities Hazardous to the Environment of 21 June 1993 [44].

The right of citizens to an environment safe for life and health provides certain guarantees for its implementation. Such guarantees are set out in article 10 of the Law of Ukraine «On Environmental Protection». [26]. The major ones should include: carrying out state measures aimed at maintaining, restoring and improving the state of the natural environment; ensuring access of public organizations and citizens to environmental protection activities; control over compliance with environmental legislation by the state and public formations; compensation in accordance with the established procedure for damage caused to health and property of citizens as a result of violation of legislation on environmental protection. These guarantees are aimed at ensuring normal exercise by citizens of their environmental rights.

Part 2 of the above article enshrines an extremely important provision that any activity that hinders or somehow burdens the implementation of citizens' rights to a safe environment is subject to mandatory termination in accordance with current legislative norms.

As for the protection of citizens' environmental rights, a number of normative acts provide for such protection. For example, article 11 of the Law of Ukraine «On Environmental Protection» state guarantees citizens the exercise of their environmental rights under the law. For today the forms of such protection are administrative, judicial and public protection, self-protection, appeal to the Ombudsman, and appeal to the Constitutional Court of Ukraine.

The administrative form of protection is envisaged in article 40 of the Constitution of Ukraine [24] and article 1 of the Law of Ukraine «On Citizens' Appeals». [45], according to which citizens have the right to apply to public authorities, citizens' associations, institutions, enterprises, organizations of all forms of ownership. Such appeals may reflect comments, suggestions, and complaints, including on issues related to ensuring the implementation of the environmental rights of citizens. The persons, to whom

such appeals are directed, should carry out their consideration and give an answer with certain justification within one month from the date of receipt of the appeal. However, in reality, unfortunately, it is necessary to assert that the administrative form of protection of citizens' rights is ineffective. Public authorities approach such appeals of citizens formally, without going into the essence of the issue and having no desire to solve the existing problem.

The public order of protection includes protection provided by the legislation on holding referendums, public hearings, general meetings of citizens at their place of residence, meetings, demonstrations, etc. [46, c. 265]. It should be recognized that, like the administrative form of protection, public protection is not particularly effective. At present, it can only justify itself in the case of high-impact situations for society, involving a significant number of the population.

In legal science, self-protection is also singled out as a form of protection of citizens' rights. Its peculiarity is the ability to protect the right without turning to the competent authorities. Self-protection refers to constitutional rights. Thus, according to part 5 of Article 55 of the Constitution [24], everyone has the right to protect his or her rights and freedoms by any means not prohibited by law from violations and unlawful encroachments. It is characteristic that the number of means of self-defense is not restricted. They can be used both separately and as a package, but only with the obligatory observance of conditions of lawful realization. A person may independently choose the methods of self-defense taking into account the content of the violated rights and the characteristics of unlawful behavior. But the chosen method of self-defense may not contradict the requirements of the law.

Judicial protection remains, in our view, the most effective form of the legal protection of environmental rights. The possibility of judicial review is a constitutional right and does not require subsidiary regulation in other legal acts. Article 55 of the Constitution of Ukraine [24] provides for the possibility for everyone to appeal in court against decisions, actions or omissions of bodies of state power, bodies of local self-government, officials and officers. The direct judicial protection of the right to an environment that is safe for life and health is established by part 3 of article 11 of the Law of Ukraine «On Environmental Protection». [26], according to which the violated rights of citizens in the field of environmental protection should be restored and their protection should be carried out in court.

In addition to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Aarhus Convention of 25 June 1998 is of great importance [23]. Thus, article 9 of the said Convention guarantees the possibility to realize the right of non-governmental organizations to apply to the court in cases involving public participation. In particular, the decision of the Kharkiv Administrative Court of Appeal of 3 November 2014 in case No. 243/12077/13-a [47] took into account the above provisions. The court decision contains quite

a broad rationale, referring to the case-law of the European Court of Human Rights (ECtHR), which is considered a source of law in Ukraine. In particular, the decision in the ECtHR case Grimkovskaya v. Ukraine [38] of 21 July 2011, was recognized as such, which falls under the protection of the Convention for the Protection of Human Rights and Fundamental Freedoms, the violation of the right to public participation in decision-making on environmental issues as a procedural guarantee of the rights enshrined in Article 8 of the Convention.

Analyzing the ways in which the environmental rights of citizens are protected under environmental law, it should be noted that they have not been legislated in a generalized form. By analogy with the civil legislation, the main methods of protection, which are most often found, include compensation of losses and other ways to compensate for property damage; restoration of the violated right; termination of an action that impedes or violates the right; recognition as illegal of decisions or actions (inaction) of representatives of public authorities and other methods established in legislative acts.

It should be noted, for example, that there are also many challenges in compensating for losses related to the actual costs of restoring health. Thus, firstly, there is legislative uncertainty as to who is directly implementing the state obligation to create appropriate guarantees, and there is no clear definition of the actors to whom the obligation is imposed and what specific responsibilities will be incurred for not creating conditions for the realization of the right to a safe environment for life and health. In other words, it is important to establish the responsibility of a particular actor. Secondly, it is almost impossible to prove a causal link between the harm caused to the life or health of citizens and the violation by public authorities.

Another example of the use of remedies is the requirement of an individual to prohibit the activities of an enterprise that aggravates the environmental situation at the place of residence of a person. However, it is important to approach the appropriate respondent, who has the authority to do so. Thus, for example, the decision of the Donetsk District Administrative Court № 2a / 0570/6915/2012 [48] of July 23, 2012, states that the plaintiffs appealed to the court with a statement of claim to the Chief State Sanitary Doctor of Mariupol on the recognition of illegal inactivity regarding the renewal of the violated right to safe living conditions for life and health, the obligation to temporarily stop the activities of the enterprise in the sanitary protection zone of PJSC «Ilyich Iron and Steel Works», because this enterprise violates the sanitary regulations, and oblige them to take measures in accordance with the sanitary legislation regarding the resettlement of complainants from the sanitary protection zone of PJSC «Ilyich Iron and Steel Works». However, the court, referring to the norms of the legislation, pointed out that the list of powers of the chief state sanitary doctors of the cities, as well as the actions that they can take in case of de-

tection of violations of sanitary norms and rules, does not provide for the renewal of the constitutional right to safe living conditions by resettlement from the sanitary protection zone.

The protection of the right to a safe environment for life and health may also take place through the recognition as unlawful a decision, action or inaction of a public authority, an authority of the Autonomous Republic of Crimea or a local government body, their officials and officers. As an example, we can cite the decision of the Ivano-Frankivsk District Court No. 809/739/17 [49] of June 23, 2017. The plaintiff sued the Main Department of the State Geocadastre in Ivano-Frankivsk Oblast for invalidation of the order to lease the land plot. The lawsuit is motivated by the fact that on this land plot without changing its intended purpose a third party is building a pig farm in Hrushka village, which will be located at a distance of 1–1.3 km from the house of the plaintiff, which would constitute a threat of violation of the right to safe life and health of the environment guaranteed by Article 50 of the Constitution of Ukraine [24], because usually, pig farms with pig stock from 4 to 12 thousand heads produce about 7.47–186.47 tons of contaminants per year, including substances that emit specific odors. The claim was fully satisfied, and the order was rescinded.

Thus, as we can see, the domestic legislator gives citizens a wide range of powers to protect their right to a safe for life and health environment. This is manifested in a variety of forms and methods of protection, as well as protection of the said right, provided by the current legislation.

However, a number of forms of protection in the light of modern realities, in our opinion, are ineffective, unable to fully ensure the implementation of the right of citizens to a safe environment. At the moment, as noted, the most effective form of protection is judicial protection. However, it also contains a number of drawbacks, including the complexity and duration of the procedure, the difficulty in proving the harm caused and establishing the culpability of the subjects of power. Therefore, we believe that it is necessary to define by law the responsibility of public authorities in the exercise by citizens of all forms of protection of environmental rights, as well as to detail the range of subjects to which binding regulations of the constitutional norm to ensure the right of citizens to a safe environment.

In particular, one of the ways to protect citizens' rights is a legally provided opportunity to address the Ombudsman of the Verkhovna Rada of Ukraine for Human Rights. According to the Law of Ukraine «On the Authorized Human Rights Commissioner of the Verkhovna Rada of Ukraine» adopted on December 23, 1997, an annual report on the state of observance and protection of human and civil rights and freedoms in Ukraine, including environmental rights, should be submitted. However, despite the law's requirement, such reports do not appear frequently. This is an example of gross violation of legal requirements at the level of such a high institution as the Ombudsman of Ukraine. This state of

affairs should be urgently rectified. In particular, we suggest that the legislation should provide for liability of this body for failure to perform its duties.

Unfortunately, domestic legislation does not yet have a clear legal mechanism in which all the links of the system of consolidation, enforcement, and protection of citizens' rights, including environmental rights, would be organically connected.

According to the assessment of many domestic and foreign experts, the ambiguity, vagueness, blurring and sometimes lack of legal norms regulating the mechanism of ensuring the implementation and protection of the rights of citizens, including environmental rights of citizens, is evidence of an unsatisfactory legal situation in modern society. In this state of affairs (if not corrected), the legal status of a person and a citizen, enshrined in the Constitution of Ukraine, loses its real basis, and this threatens to turn real rights into an empty declaration, detached from the reality. Given the above, we believe that one of the most important and urgent tasks of the state is to improve procedures to ensure the implementation and protection of the environmental rights of citizens.

The human right is the core of the legal system of the state, the main thing that defines its social, political and legal meaning. The criterion of stability of the legal system of the society and the indicator of the level of its legal development in conditions of economic, political and social instability is the ability of the state to ensure the realization of human and civil rights. In our opinion, the main condition for the realization of individual rights in Ukraine is strong state power. The state requires a reasonable expansion of power in relation to society. For this purpose, there is a need to review stereotypes about the role of state power in society. However, this does not mean that the state should strengthen authoritarianism at the expense of democracy. It means that the state is obliged to create a legal mechanism that can fully ensure human rights. And the first step towards this should be to establish a proper order and introduce an effective system of governance.

After all, the work of both legal and other mechanisms to regulate environmental public relations depends on it, and it is these mechanisms that ultimately ensure the rights of citizens.

Conclusions. Environmental rights of citizens can be considered as a set of rights established in international and European acts, the Constitution of Ukraine, special environmental and related legislation, the rights of the individual, that is, a person and a citizen, which are exercised in the process of interaction with the environment and ensure the satisfaction of his basic needs in this area. The system of environmental rights of Ukrainian citizens has not yet been finalized and is still in the process of being developed.

The real, practical implementation and protection of citizens' environmental rights in Ukraine is still low. One of the reasons for this state of affairs is noncompliance with, and disregard for, legal requirements.

Furthermore, unfortunately, in all the years of independence, Ukraine has never established a coordinating body of executive power responsible for ensuring the rights of citizens, including environmental rights.

The main point that we would like to stress finally – there is a need to bring our country to a qualitatively new stage of activity in the field of strengthening, ensuring the implementation and protection of citizens' rights, including environmental rights.

There is no doubt that our state will face great difficulties and significant barriers on this way, but sooner or later (preferably, sooner) they will have to be overcome. We should note that the first steps in this direction have already been taken by the state. For example, on June 17, 1999, the Verkhovna Rada of Ukraine approved the «Principles of State Policy of Ukraine in the Field of Human Rights». This document is of a framework nature and can be developed into a large-scale document. In particular, such a document could become the National Program of Adaptation of Ukrainian Legislation to its International Obligations in the Field of Human and Civil Rights and Freedoms.

In order to optimize the processes of bringing domestic legislation into line with international and European standards in the field of human rights, there is also a need to make amendments to Article 9 of the Constitution of Ukraine regarding the operation of generally recognized principles and norms of international law in Ukraine and recognition of the precedence of our state's international legal obligations.

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O. Vinnyk, National Academy of Legal Sciences of Ukraine Kharkiv, Ukraine Department of Legal Support of a Market Economy The F. G. Burchak «Scientific Research Institute of Private Law and Business of Nationality Academy of Law Sciences of Ukraine» Kyiv, Ukraine

COMPOSITION OF E-COMMERCE RELATIONSHIPS IN THE CONTEXT OF CONSUMER RIGHTS PROTECTION

Abstract. *Activation of innovation processes in the world trade practice necessitates a reinterpretation of the management methodology at the level of subjects of the economic system of different levels and types. Purchasing goods online is becoming more commonplace. Therefore, the relevance of the work is beyond doubt. The paper is highlights the issues of legal regulation of e-commerce relations in Ukraine, which has become widespread due to numerous benefits for its participants. However, such commerce can be risky for consumers, should sellers abuse their capabilities. It is established that the relationships that arise between the buyer and seller of goods, works and services on the Internet do not differ from the traditional rules of sale and are regulated, in particular, by the provisions of the Civil Code of Ukraine and the Law of Ukraine "On Consumer Protection". But the loopholes in the Law of Ukraine "On E-Commerce" create grounds for abuse. This Law is not sufficiently understandable for the average consumer as it lacks sound and transparent provisions on the composition of e-commerce relationships (entities, objects, means of regulation), as well as requirements for the person using such resources as the online store and/or online trading platform; e-commerce communication schemes (a person who offers a product through an online store can be the seller of the product or use suppliers to send the product to the buyer); the content of the information to be provided to the consumer and the contracts with the consumer under various e-commerce schemes; authorized body and self-regulatory organizations, with definition of their role in the field of e-commerce. The aforementioned act does not properly regulate the relationship on liability, with consideration of the specificity of e-commerce. All of this testifies to the need to improve the legal regulation of these relations, taking into account*

the needs of civil society and the digital economy, which can be ensured by the adoption of a new, more substantive and consumer-friendly version of the Law "On E-Commerce".

Key words: *e-commerce, composition of e-commerce relations, subjects of e-commerce, online store, improvement of legal regulation.*

Introduction

One of the key features of modern state-organized social life is the development of civil society institutions and digital technologies that have given rise to such phenomena as the digital (electronic) economy and e-business. At the same time, traditional problems remain relevant in such a society, among which the issue of consumer rights protection is of paramount importance. Moreover, this issue is exacerbated both in the perspective of civil society (the latter focused on the harmonization of public interests and private interests of members of society, which do not conflict with the common good), and in view of the specificities of the digital economy (the use of information and communication technologies in business, including with e-commerce, not only has numerous benefits but is also associated with significant risks for participants in such relationships, the most vulnerable of which are consumers) [1–4]. In such circumstances, a significant role is played by statutory regulation, which should be adequate in relation to the state of said relations.

The adoption of the Law "On E-Commerce"[1] has largely contributed to improving such regulation, but there remain significant gaps in the current legislation governing the digital economy, including consumer rights protection mechanisms. This is largely due to the novelty and complexity of such relationships, their rapid development, the use of new communication schemes by businesses to minimize the costs of organizing and maintaining *electronic commerce* (hereinafter referred to as *e-commerce*). Consumer rights protection issues in the field of e-commerce as a component of e-commerce have been raised by a number of researchers, both by theorists (M. M. Kuzmin [5], A. M. Yazvins'ka [6], N. Yu. Golubeva [7], V. Zhelihovsky [8] and others) and by practitioners (Yu. Asadchev [9], V. Bunt [10], O. Fedyenko[2] and others). At the same time, the issues of complex e-commerce communication schemes that are not reflected in the legislation, which complicate and, in some cases, make it impossible to protect the consumer rights of such commerce, remain, despite their relevance, unexplored. However, these circumstances should not prevent the current e-commerce relationship status from being revealed in terms of its subjective composition and

[1] Law of Ukraine "On e-commerce". (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675–19

[2] Letter from the Chairman of the Board of Directors of the Internet Association of Ukraine O. Fedyenko No. 130/1–4 "On Amendments to the Law of Ukraine" On Protection of Consumer Rights «and certain legislative acts of Ukraine on measures for the de-activation of activities of sub- e-commerce objects". (2017, July). Retrieved from http://inau.ua/document/lyst-no1301-4-vid-24072017-shchodo-proektu-zakonu-ukrayiny-pro-vnesennya-zmin-do-zakonu

the ability to protect consumer rights in the event of applying complex links between the seller and the buyer using an online store and business partners/contractors on the part of the entity perceived by consumer as the seller, which is the purpose of this paper.

1. Materials and methods

To achieve this purpose, a number of scientific methods were applied: *analysis and synthesis* in determining the place and role of e-commerce and online trading platforms in the structure of e-commerce; *interpretation* (in determining the basic features of an online store), *dialectical* (on the development of these relationships, to which the legislator should timely respond), *systemic* (in identifying the use of various e-commerce schemes that affect the ability of consumers to protect their rights and legal interests); *generalization*, which made it possible to establish the basic properties of an online store as a special category of property and the related responsibilities of its owner/user, which eventually gave the opportunity to come up with proposals for improving the legal regulation of e-commerce in order to protect consumer rights.

Using the generalization method, it is established that the Internet, as a very important component of the information infrastructure, affects all components of information security. Therefore, the legal regulation of these relations should be implemented in all areas. There are two ways of defining the basics of public policy: 1) defining the basics of public policy and approving them with a statutory legal act; 2) the regulation of those real relationships that already exist. Among the various relationships that arise in the application of Internet technologies, it is necessary to distinguish those that by their nature perceive legal regulation, that is, can become legal relations. It should be noted that among experts there is a very negative attitude to the very idea of legal regulation of relationships that arise on the Internet. As there is John Barlow's "A Declaration of the Independence of Cyberspace", which proclaims the right to freedom of the Internet space and the principle that no country interferes in regulating Internet relations.

The method of analysis allowed to determine that the advantages of e-commerce, as a rule, are lower costs of doing business and, accordingly, lower price of the offered goods, convenience for potential consumers in finding the necessary goods, including those rare, hard to find in ordinary (physical) stores. However, in this area, there are significant security risks for the parties to these relationships in the event of unfairness of the partner/counterparty, in particular, for buyers (in terms of quality, completeness, receipt of the claimed product, the possibility of its exchange or return, compensation for related losses, confidential information leaks, etc.). As V. Zwass notes, absolute security in this area is hard to hope for [11].

2. Results and discussion

2.1 Analysis of the specifics of the development of e-commerce in the works of different researchers

To clarify the specifics of e-commerce, we should first of all refer to the

works of researchers of these relations, in particular, V. Zwass [11], who outlines the main stages of the development of relations with e-business and e-commerce as its component, advantages and risks of using the information and communication technologies in the process of concluding and performing the sale and purchase agreement with the consumer, participants of such relations. This researcher links the rapid development of these relationships with the spread of the Internet and the advent of the World Wide Web (1991) and the first browser to access it (1993), and more recently the availability of high-speed Internet and mobile devices (including tablets, laptops, smartphones). E-commerce is conducted in consumer-oriented e-commerce sites (or markets) and in the supply chain operating on the Internet [12–15]. Consumer-oriented trading venues include large shopping malls, consumer auction platforms (including eBay – a trading website managed by a US-based company of the same name [16]), multi-channel retailers (organizations engaged in retail sale of consumer goods) and numerous online stores. The so-called sharing economy allows for more efficient use of resources, while virtually instant access to services is provided by platforms at the request of potential consumers. As a result of establishing semi-permanent supply chains, hub-companies surround themselves with suppliers who perform most of the production tasks and supply goods and services to the central firm (and in Ukraine, as the experience shows, directly to the consumer in order to save on supplies to the central firm). The growth of e-commerce is facilitated by electronic directories and search engines for looking up information on the Internet, software agents or bots that act offline to search for a product in the system, digital authentication services that guarantee identity through the Internet. These intermediary services facilitate the sale of goods, the provision of various services (banking, ticket booking and stock market operations, services such as distance education and entertainment).

V. Zhelihovsky [8] points to two types of e-commerce (trade in information and trade in goods); distinguishes its components: networks (corporate; Internet; commercial); processes (market research; calculations; order performance; sales; support); subjects/participants (government; suppliers; sellers; users; manufacturers); conditions for the development of e-commerce (the conquest of consumer trust by companies using the Internet as a channel for distribution of products; ensuring the reliability of participants and their operations; creating the security of transmission and further storage of data in the Internet); composition of business operations necessary for e-commerce (contact, in particular, between potential customer and supplier; exchange of information; pre- and after-sales support – detailed information on products and services, product use instructions, customer's questions; sales; electronic payment by electronic money transfer, credit cards, electronic checks, electronic money); delivery management

and tracking for physical products, direct delivery of products that can be distributed electronically.

He pays attention to such an unconventional subject as a virtual enterprise – a group of independent companies that unites – although without forming organizational unity in the form of a jointly created legal entity – their efforts to obtain opportunities to provide products and services that are not accessible to individual companies (distribution between members of a business process group, jointly managed by a central company and its trading partners, receiving new opportunities of suppliers and customers as a benefit of this form of cooperation; customer response; rapid response to demand; cost savings; reduced costs through lower costs for advertising, delivery (for goods that can be obtained electronically), design and production, market analysis, strategic planning, opportunities, etc.). He highlights a number of benefits of e-commerce (equal access to the market for large corporations and small firms; access to new markets; involvement of customers in the development and implementation of new products and services, etc.) and legal problems of e-commerce, including information protection, consumer protection, liability, unification of national e-commerce legislation.

A. Shablyenko, analysing the relations that develop in the field of e-commerce [17], draws attention to their complexity both in terms of the processes and resources necessary for securing e-commerce, and in view of the subject composition. The latter, according to this researcher, includes two categories of persons: 1) "common subjects" – persons who can participate in civil relations in accordance with Art. 2 of the Civil Code of Ukraine[1] (legal entities and individuals, state of Ukraine, Autonomous Republic of Crimea, territorial communities, foreign states and other subjects of public law, all who are customers and suppliers of goods or services via the Internet); 2) special/institutional subjects "which are so-called "invisible" entities, but without them the process of e-commerce is impossible in the technological sense, they at different stages of the relationship can affect many conditions" (place and time and or performance of the agreement, message delivery confirmation, etc.). This category includes telecommunications operators and providers, payment system operators; registrars and administrators who assign network IDs, hosting providers; certification centres [17].

The peculiarities of the subjective composition of Internet relations are explored by R. E. Ennan [18], who attributes the following categories of persons to the scope of subjects:

1) telecommunication operators and providers, which ensure the functioning of the Internet as an information system and provide a number of necessary services: connection (providing access to the network); administration (ensuring the functioning of technical means of maintaining the Internet address space); hosting (placing customer information

[1] Civil Code of Ukraine. (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15

resources on web servers and providing access to these resources); network navigation services (creation of web portals that facilitate the search and access to network information resources);

2) manufacturers, owners and distributors of information and information resources that create content on the Internet (create electronic information resources, own the rights to them, ensure the functioning of these resources and meet the information needs of users);

3) entities providing specific services for concluding electronic (network) agreements (contracts) via the Internet, that is, all that is covered by the term "e-business (commerce)";

4) consumers (users) of telecommunication services (individuals and legal entities that need, order, receive telecommunication services for their own information needs). However, the said researcher attributes online shops, online casinos, online auctions, etc. to the third group of entities (according to his classification), although, in accordance with the Law "On E-Commerce" (Art. 3), an online store is a means of presenting or selling an item, job or service through an electronic transaction.

The specifics of functioning of the online store (including from the technical aspect) are rather comprehensively highlighted by A. Vasilyuk [19]:

1) defining it as a software package that allows you to sell products or services over the Internet and automate business process management, as a specialized website owned by a manufacturer, a trading company, etc., designed to promote consumer products in the market, increase sales, attract new buyers;

2) emphasizing its advantages over a traditional store (a wide range of goods, unattainable for a retail store; 24-hour availability without breaks and weekends; saving time on purchases; lower prices for goods and services; convenience of payment);

3) highlighting the functional parts of online stores (product catalogue, search engine, shopping cart, registration form, order form);

4) dividing online stores into: (a) the criterion of the business model used for the online store, which is characterized by the absence of a traditional trading network and the combination of offline and online business (online store is created on the basis of a real trading structure); (b) on the basis of stock availability – stores working under supplier contracts (they do not have significant own stock) and stores with their own warehouse facilities and corresponding stock availability, and also raising the major issues of online shopping that arise at the intersection of Internet technology and traditional business activities, both psychological and emotional (compared to traditional trading with its inherent ability to view and evaluate the consumer of the product, its delivery, etc.), and the lega lnature – legal regulation focuses mainly on traditional trade, and transparent and effective "rules of the game" in the field of its electronic version remain still desirable for consumers in the face of numerous violations of their rights, as evidenced by violations in this area [20–23].

2.2 Features of the analysis of e-commerce in the Ukrainian legislation

Recognizing the validity of most of the provisions of the aforementioned researchers, in view of this purpose, it is necessary to focus on the subjective composition of e-commerce, highlighting its direct participants (first of all, sellers and buyers-consumers, providers of information services on goods) and related by A. Shablyenko [17] to the category of "invisible" in the e-commerce process of entities (first of all, operators and telecommunication providers, providers of electronic trust services). Although these two categories of entities are important for establishing e-commerce relationships, let us focus on the first one – its direct participants, emphasized in the Law "On E-Commerce"[1], as well as on such e-commerce resources as an online store (and online trading platform (e-mall), which presents online stores of different entrepreneurs) [24].

In this regard, it is advisable to refer to the Law "On E-Commerce"[2], which defines e-commerce as an economic activity in the field of e-sale, sale of goods remotely to the buyer by making electronic transactions using information and telecommunication systems, and its subjects are, on the one hand, an entity of any legal form that sells goods, performs work, renders services using information and telecommunication systems, and on the other hand – a person who purchases, orders, uses the specified goods, works, services by means of electronic transaction (hereinafter referred to as the consumer).

The specified law more or less thoroughly defines the requirements for:

– 3 categories of subjects of e-commerce (Art. 6–9): (1) seller (performer, supplier) of goods, works, services, which is obliged to provide direct, simple, stable access to other participants in the field of e-commerce to such information (full name of the legal entity or surname, name, patronymic of the individual-entrepreneur; location of the legal entity or place of registration and place of actual residence of the individual-entrepreneur; e-mail address and/or online store address; identification code for the legal entity or the individual taxpayer card registration number for the individual-entrepreneur, or a series and passport number for the individual-entrepreneur who, due to their religious beliefs, refused to accept the individual taxpayer card registration number and officially notified the relevant authority of the state tax service, and bears a passport, license information (series, number, expiration date and date of issue), if the business is subject to licensing; regarding the inclusion of taxes in the calculation of the cost of goods, works, services and, in the case of delivery of goods, information on the cost of delivery; other information that is to be disclosed in accordance with the legislation; ensure full correspondence of the subject matter of the electronic agreement concluded by the parties with quantitative and qualitative characteristics; has the right to request from the other party

[1] Law of Ukraine "On e-commerce". (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675–19.

[2] Ibidem

only such information, without which the conclusion and performance of obligations under the electronic agreement is impossible; (2) the buyer (customer, consumer) of goods, works, services in the field of e-commerce, the rights and obligations of which are determined by the Law of Ukraine "On Consumer Rights Protection"[1], as well as Art. 7 of the Law "On E-commerce"[2] concerning: notification of the information necessary for the conclusion of the electronic agreement; (3) an e-commerce intermediary provider for disclosure of information depending on its role in the conclusion of the e-contract, including if it is the initiator of the transfer of information (Art. 9);

– order of electronic transactions (Art. 10–16), including distribution of commercial electronic communications in the field of e-commerce, which must meet the requirements of Art. 10, in particular, regarding their content; the order of conclusion of the e-contract, including its essential terms and conditions; the requirements for acceptance and the offer and the form of confirmation of the electronic transaction (in the form of electronic document, receipt, merchandise or cash receipt, ticket, coupon or other document at the time of the transaction or at the time of the seller's obligation to transfer the goods to the buyer); the confirmation of the electronic transaction must contain the following information: terms and conditions and procedure for the exchange (return) of the goods or refusal to perform work or render a service; the name of the seller (contractor, supplier), its location and the procedure for claiming the goods, works, services; warranties and information about other services related to the maintenance or repair of the product or the performance of the work or the rendering of the service; the procedure for termination of the agreement, if its validity period is not determined.

However, the rights of the buyer (customer, consumer) in the field of e-commerce are often violated in relation to:

– disclosure of the above information about the seller (because the consumer-only online store is only a means – a website for the promotion and sale of goods online, not an entity with a certain legal status), warranty, terms and conditions of return of goods;

– sending a confirmation of the conclusion of the electronic agreement and its terms and conditions in accordance with the requirements of the Law "On E-commerce", which reduces the ability of the consumer to protect their rights in the event of their violation;

– determining the seller's identity at the stage of ordering a product when it comes to selling through online stores without their own inventories (the buyer learns about the identity of the seller at the stage of receipt of the product without having the opportunity to verify their business reputation in this area in advance);

– opportunities for the consumer to determine (a) the specifics of the legal

[1] Law of Ukraine "On consumer rights protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023–12.

[2] Law of Ukraine "On e-commerce". (2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675–19.

regime of the online store and online trading platform, including the obligatory identification of the identity of its owner (the person in whose name such site is registered or who actually uses such resource) with the relevant information about them (regarding legal form, address, identification code, etc.) that will determine at least to a certain extent (b) the integrity of the intent of the person who created or commissioned the site as an online store (the problem of fake sites is addressed by the cyber police through provision of guidance on how to identify them [25] in the absence of appropriate legal mechanisms (in particular, the ability of the consumer to identify the person in whose name the site is registered as an online store; the requirements for such a person in order to prevent abuse on their part);

– designation of a body, authorized and competent in the field of e-commerce regarding the possibility to detect violations in this field, to prosecute violators, to protect the rights of consumers.

At present, the reliance on the provisions of the Laws "On E-Commerce"[1] and "On Consumer Rights Protection"[2] is often in vain, since the former contains only reference provisions to the "law and treaty" (Articles 17–19) and the latter – in spite of the provisions on non-compliance with the requirements of the first of the mentioned laws on disclosure of information about the participants in the relationship and the offered goods (works, services)[3], it does not properly consider the specificity of e-commerce (including the buyer/consumer's ability to confirm the fact of conclusion and content of electronic agreement, establishing the seller's identity because of the violation of obligations by the online store owner and using their suppliers to send the goods to the buyer, of which the latter only learns upon receipt of the goods) and the abilities of the body authorized in the matters of consumer rights protection to prosecute violators in this new field [20].

Liability issues in the field of e-commerce are raised by the aforementioned and other researchers [26], who propose ways to solve them, including amending the aforementioned laws[4]. The government also addressed these issues by adopting the Concept of National Policy in the Field of Consumer Rights Protection for the Period up to 2020 [10], which emphasizes the problems of consumer vulnerability due to their weak protection by the state due to the declarative nature of the proclaimed rights and the lack of mechanisms for their realization and restoration. The purpose of this Concept is to create and implement an

[1] Law of Ukraine "On e-commerce".(2015, March). Retrieved from https://zakon.rada.gov.ua/laws/show/675–19

[2] Law of Ukraine "On consumer rights protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023–12

[3] Law of Ukraine "On consumer rights protection". (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1023–12.

[4] Draft Law on Amendments to the Law of Ukraine "On Consumer Rights Protection" and certain legislative acts of Ukraine on measures for the de-activation of the activities of e-commerce entities. (2017, July). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62329

effective system of consumer protection in Ukraine on an EU basis, with consideration of the best practices of EU countries, and among its tasks is to ensure the protection of consumer rights in the field of e-commerce, performed by economic entities through information and telecommunication networks, including the Internet. Problem solving is possible by applying a comprehensive approach to solving consumer rights protection issues, which involves the development and interaction of all components of the consumer rights protection system in Ukraine[1], in particular, and legal support.

As A. N. Novitsky points out [27], "the influence of Internet-related public relations management by public authorities in the world is steadily increasing" due to the transfer of various functions of ordinary public relations, including e-commerce, to the Internet. In this regard, there is an increasing "need for legal regulation of these relations, especially by specialized bodies of the state" [27]. However, the specificity of the Internet space (transnational in nature, huge number of users, specificity of technologies used) makes the classic form of legal regulation of public relations that have arisen in the field of Internet use, quite ineffective, which necessitates to address the international practices [28–30].

For this reason, we should refer to the EU practices[2], including: E-Commerce Directives on consumer awareness, protection of their interests by contacting the competent authority, adopting codes of conduct in the field, etc.

In these circumstances, the role of self-regulatory organizations, both at the transnational level and within Ukraine, is increasing, including conferring certain functions on them to regulate relations in the field. Focusing some of them (in particular, the Internet Association of Ukraine [31]) not only on protection of the interests of its members, but also on the establishment of civilized rules in the relevant field with balanced consideration of the public and private interests of the participants in the relations [31], testifies to the expediency of determining at the level the law of their role in regulating the said relations.

Such an improvement in e-commerce relations is possible by adopting a more substantive version of the Law "On E-

[1] Concept of state policy in the field of consumer rights protection up to 2020: Approved by the order of the Cabinet of Ministers of Ukraine. (2017, March). Retrieved from http://www.kmu.gov.ua/control/uk/cardnpd?docid=249869713

[2] Directive 2011/83 / EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13 / EEC and European Parliament and Council Directive 1999/44 / EC and repealing Council Directive 85/577 / EEC and Directive 97/7 / EC of the European Parliament and of the Council. Retrieved from http://eur-lex.europa.eu ; Directive 2000/31 / EC of the European Parliament and of the Council of 2000/8 / EC of the European Parliament and of the Council of 22 June 2000 on certain information society services services, in particular electronic commerce, in the internal market ("Directive on electronic commerce"). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031.

Commerce"[1] than the current one, that would not only fundamentally, with consideration of EU practices [32–35], regulate these relations, but also make them transparent by providing an opportunity for average consumers to understand the specifics of such trade (the legal status of its participants, the legal regime of the resources used, e-commerce technology, including the information component, liability for infringements in this area and mechanisms for its enforcement, including authorized body, etc.) in order to have protection from abuse in this field without resorting to expensive services of lawyers. Legislation oriented on civilised regulation of e-commerce relations and strengthening of the role of self-regulatory organizations in this field will facilitate the development of civil society institutions and the digitization of economic relations in line with the government's decisions[2].

Conclusions

To summarize the research, we should emphasize the following issues of e-commerce: the composition of relations arising in this field is complicated: apart from the traditional components (subject composition: economic entities with the status of sole proprietorship – individual or business organization with the status of legal entity), we encounter virtual groups of such entities using the same online store, the same online trading platform to promote their goods to consumers; objects (property in physical form – goods ordered by the consumer, warehouses or delivery points of ordered goods, such as telecommunication networks and structures, by means of which information is transferred/exchanged between the said entities regarding the advertising and offer of goods, their order, as well as virtual objects – e-commerce, online trading platform, electronic resources used in the process of establishing e-commerce relationships); legal regulation of e-commerce relationships is not transparent to the average consumer, who usually seems to be dealing with the online store as a seller, though such a store is only a site administered by interested parties who may act as a seller or mediator.

In addition, it is difficult to call the Law "On E-Commerce" profound, the one that considers the provisions of the relevant EU directives, despite Ukraine's official course on adapting their provisions in national legislation. Such a situation contradicts our country's course on civil society development and overcoming digital inequality, since the specified

[1] Law of Ukraine dated 09/3/2015 "On e-commerce". Retrieved from https://zakon.rada.gov.ua/laws/show/675–19.

[2] National Strategy for Promoting the Development of Civil Society in Ukraine for 2016–2020: Zat. By Decree of the President of Ukraine dated February 26, 2016, No. 68/2016. Official Bulletin of Ukraine, 2016, No. 18, art. 716. The same thing. Retrieved from https://www.kmu.gov.ua/ua/gromadskosti/gromadyanske-suspilstvo-i-vlada/spriyannya-rozvitku-gromadyanskogo-suspilstva/nacionalna-strategiya-spriyannya-rozvitku-gromadyanskogo-suspilstva-v-ukrayini-na-2016–2020-roki; On approval of the Concept of development of the digital economy and society of Ukraine for 2018–2020 and approval of the plan of measures for its implementation: Order of the Cabinet of Ministers of Ukraine dated January 17, 2018, No. 67-r. Retrieved from http://zakon2.rada. gov.ua/laws/show/67–2018-%D1%80/page2.

law does not properly consider consumer rights regarding protection of their interests in dealing with a seller, the information on whom is often absent from an online store or online platform, and obtaining it depends on digital skills that have not yet become commonplace for the average consumer. The way out of this difficult situation is seen in the adoption of a new, much more substantiated than the current one, and understandable for average citizens wording of the Law "On E-commerce", which defines (a) the content of the concepts used in this field, (b) the legal status e-commerce participants, depending on their role in establishing e-commerce relationships, including obligations of informational nature before the consumers, (c) the relationship schemes applicable in this field and the persons responsible before the consumer in the event of use of the supplier of goods in the chain e-commerce as a direct participant of these relations, (d) a body authorized in this field with the definition of its rights and responsibilities, (e) the role of self-regulatory organizations in the field of e-commerce, the criteria for delegation of individual powers of the state to them, the place of business rules ethics established by such organizations in the system of rules governing e-commerce relationships, (e) the legal regime of the e-commerce and online trading platform, (e) sanctions applicable to e-commerce violations, and procedure for their enforcement.

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P. Kulinich, Doctor of Legal Sciences, Professor, Corresponding Member of National Academy of legal Sciences of Ukraine, Koretskiy Institute of State and Law of National academy of sciences of Ukraine

PURPOSES OF LAND LAW OF UKRAINE

Abstract. *Purposes of land law as a separate branch of legal system of Ukraine are researched. Purpose is an obligatory part of any social mechanism. So legal regulation of land relations must be oriented on achievement of some legal purposes. It was stated in legal literature that purpose of law (legal purpose) is regarded as form of future in temporary times. It is a kind of proper status of social relations in current legislation. That is why purpose in law plays a role of legal instrument which serves to lawmakers as a mode of organization of all system of legal regulation of social relations.*

It was also stated in the legal literature that the most significant peculiarities of any purpose in law is its normativeness, because most of legal purposes are not only desired result but is obligatory way of activity. That is why legal purpose serves as a regulator of social relations in any society. Besides, legal purpose is regarded as some model of social order which is guaranteed by state. So legal purpose is an official orient for legal practice.

It is proved in the article that modern land law of Ukraine has two legal purposes. The first purpose of land law of Ukraine is protection of land, but second its purpose consists in promotion of realization of rights and legal interests of participants of land legal relations. However, the purposes of land law of Ukraine are not equal by its legal force. The purpose of protection of land should be regarded as the main purpose of land law of Ukraine. It means that the second purpose of land law of Ukraine might be achieved only in case of achievement of the first its purpose. Bu other words, modern land law of Ukraine has to be based on principle provision "no land – no right to land". The author of the article proves that if society are not able to protect land it also is unable to secure any rights to the land. Finally, to streamline activity of all participants of land legal relations at achievement of the main purpose of land law of Ukraine it is necessary to adopt legal normative (requirements) of quality status of all types of land in Ukraine.

Key words: *purpose in law, land law of Ukraine, purposes of land law of Ukraine, protection of land as the purpose of land law of Ukraine.*

In Ukraine, land reform, started 28 years ago, whose main task is to ensure the transition of legal regulation of land relations from the principles of command-administrative economy to the principles of market economy, is being finished. Such a transition was accompanied by "tectonic" changes in the content of legal norms and the system of land law, the breakdown of the old Soviet ones, and the formation of new land-legal institutions and norms. At the same time, quite often changes to the land legislation were made spontaneously – as a reaction to the aggravation of a certain problem during a period of land reform. Unfortunately, this did not contribute to the formation of an internally agreed system of land legislation of Ukraine, aimed at ensuring the achievement of clear socially significant legal purposes in the development of land relations in our country.

At the same time, the legal regulation of land relations should be oriented towards the achievement of certain purposes defined by land law as one of the systemic formations of the domestic legal system. After all, as noted in the literature, purpose is a necessary attribute of any mechanism and the reason for its creation[1]. Therefore, the definition of the purposes of land law is a methodological problem of the science of land law.

Accordingly, in legal doctrine, purposes in law are considered as concrete transformations of opportunity into reality. According to D.A. Kerimov, the purpose of law is a peculiar form of the future in the present, a prototype of that state of social relations to which the legislator seeks[2]. Accordingly, the purpose of the legislation is to act as such a factor in the organization and development of social relations, by which the objective ability is transformed into an ideal reality, which, if such a purpose is achieved, becomes a reality. Thus, the purpose in law expresses the desire of the legislator to the occurrence of a particular state of social relations governed by law.

In literature, another important feature of the purpose in law is noted – its normativity. As A.A. Sevastyanov notes, normativity is an essential sign of a legal purpose, since the absolute majority of purposes in law are an indication not only of the desired result, but of the obligatory direction of behavior. Therefore, in his view, the purpose in law is not simply aspiration, but imperative set aspiration, which makes it an effective regulator of social relations[3].

In addition, the purpose in law is also considered as a state-guaranteed model of a particular social condition or process that they are trying to achieve through a system of legal measures. Therefore, the purpose in law is the official, set at the normative level, legal practice framework, because ideally for the subjects of

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law-making and law-enforcement activities, the purposes of the law coincide[1].

Thus, a clear definition of the purpose of legal regulation of social relations as a normative principle makes it possible not only to formulate a certain system of theoretical provisions about the desired legal "image" of the future in the legal regulation of social relations, but also to build an appropriate system of legal principles, rules and other legal measures for the consistent achievement of the relevant purpose as a concrete result – the state of relevant social relations. Therefore, the purposes of the activities of legal relations subjects are getting the legal content because they are in accordance with the spirit of law and are achieved through legal measures.

Legal purposes studying as a measure of legal cognition of the processes of life of modern society, in our opinion, has great scientific potential. After all, purposes in law play different functions. In particular, it is mentioned in literature that in the legal system, the legal purpose performs communicative, meaning-forming (motivational), evaluative, prognostic, stimulating and regulatory functions[2]. In addition, S. O. Poghribnyi proposes to identify a hierarchy of purposes of legal regulation, for which the achievement of one purpose is the basis for the achievement of another[3]. Finally, the theory of law studies (classifies) the purposes as closest, perspective and final; general and specific; functional and substantive; true and false[4] and so on.

In the legal literature of today, the most widespread are interpretations of the legal purpose as one of the foundations of building a system of law in general, as criteria while assessing the effectiveness of legal norms[5], a means of detecting legal gaps and resolving legal conflicts[6]. In addition, G. L. Znamenskyi expressed the opinion that not only the subject and method, but also the purpose are the system-making factors of the field of law[7].

Usually in the legal doctrine two methods of legal regulation of social relations are singled out – dispositive and

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[1] Мызникова Е. А. Цели в праве: теоретико-правовой анализ. Автореф. дисс. … канд. юрид. наук. Специальность 2.00.01 – теория и история права и государства; история учений о праве и государстве. Краснодар, 2011. 27 с. С. 10.

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imperative, as well as their combination (mixed method). That is why the method of legal regulation of social relations is a key feature of independence only in those fields of law where one of these methods is dominant (for example, the imperative method in criminal and administrative law, the dispositive method in civil law). The vast majority of other fields of law use a mixed method of legal regulation of social relations, which combines elements of imperative and dispositive methods. Moreover, in such spheres of law, the ratio of dispositive and imperative methods is dynamic and not quantifiable, which significantly reduces the identification potential of the method as an indicator of the independence of the field of law.

With regard to the matter of the field of law, it is, in our opinion, the main identifier of the field of law in the vast majority, but not of all of them. Due to the peculiarities of the legislative process in Ukraine, a number of spheres of law have been formed in the legal system of the country, the subjects of legal regulation in which partially coincide. Such fields of law are, in our opinion, civil and land law, land and environmental law, land and forest law, etc., in the matters of which land relations occupy at least a certain place.

In addition, it is noted in literature that the matter and method are external features that characterize the degree of difference of the branches of law. However, each branch of law is also characterized by intrinsic (internal) features[1]. It is quite clear that for those branches of law, the matters of which are partially identical, an additional identifier of their sectoral autonomy is required, which would reflect the in-depth properties of the sphere of law. In this regard, it has been suggested in the literature that one of the features of an independent branch of law, in addition to its matter and method, should be its functions, which are regarded as additional features of a particular branch of law[2]. In our view, the purpose (s) may be the identifier of those fields of law in which the matter and method are not sufficient identifiers of their independence, as they are objective in nature. As V. V. Laptev and V. P. Shakhmatov mentioned, the purposes of legal regulation, as a subjective category, are defined by objectively existing social relations, are formed on a scientific basis as tasks for the management of social development and are reproduced in the law as purposes that reflect existing social relations[3].

Based on the above, we believe that since land relations are regulated not only by land law, and the method of land law combines elements of dispositive and imperative methods, the ratio of which changes while regulating land relations which are covered by different institutions of land law, it seems appropriate to single out and to use one more identifying feature of the land law industry – its purpose (s).

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[2] Радько Т. Н. Теория государства и права [Текст] : учебник/ Т. Н. Радько. 2-е изд. М., 2009. 752 с. С. 403.

[3] Лаптев В. В., Шахматов В. П. Цели правового регулирования и система права// Правоведение. 1976. № 4. С. 26–35. С. 29.

In the environmental and land law literature, attempts have been made to identify the purposes of the relevant fields of law. Thus, according to M. M. Brynchuk, the purpose of environmental law is to preserve (maintain) and to renew the favorable state of the environment (nature). He believes that the purpose of legal regulation related to the saving of a favorable state of the environment should not be focused solely on ensuring the constitutional right of everyone to a favorable environment, but should focus on the broader tasks of nature saving, including in particular the task of biological diversity saving[1]. Thus, M. M. Brynchuk believes that the purpose of environmental law should be not only and not so much in ensuring the realization of environmental rights of citizens, but also focus on environment saving. In fact, the scientist proves that the main purpose of environmental law is realized in the achievement of not a certain legal status of the subject, but of a certain legal state of the object of environmental relations.

I. O. Krasnova mentions the same point of view. It argues that the purpose of land law is to design a model of human behavior that will support the effective use of land to satisfy economic and non-economic needs, taking into account the conservation of land as an integral part of the Earth's single ecosystem and the condition for the further development of society[2].

At the same time, as it was stated above, the purpose in law is a form of the future in the present, a prototype of that state of social relations to which the legislator seeks. It expresses the desire of society for the onset of a particular state of law-governed social relations. And the purpose in law is not simply aspiration, but imperative set aspiration, which makes it an effective regulator of social relations. In other words, the purpose in law must reflect not the process, not the direction of such activity or the content of public relations subjects conduct, but the result of such activity or conduct. Therefore, the definitions of the legal regulation of environmental and land relations proposed in the literature need clarification.

In our view, modern land law in Ukraine is based on the achievement of two main purposes, each of which has its own legal basis. The first of these purposes is aimed at the realization of land rights and legitimate land interests of the subjects of land relations. The essence of the second purpose is that it has as its main orientation the state of the object of land relations – land. It is still that understanding of the purposes of land law that follows from the analysis of the tasks of legal regulation of land relations, defined in Art. 4 of the Land Code of Ukraine. It states that the task

[1] Бринчук М. М. Эколого-правовой механизм: понятие и сущность//Экологическое право. 2013. № 3. с. 12–19. С. 14.

[2] Краснова И. О. Земельное право. Элементарный курс / И. О. Краснова. М., 2001. 240 с. С. 16.

of land legislation is to regulate land relations in order to secure the right to land of citizens, legal entities, territorial communities and the state, rational use and protection of land. Unfortunately, both the stated norm of the land law and the practice of legal regulation of land relations serve the purpose of ensuring the rights and legitimate interests of participants in land relations on the first place, while the main purpose of land law – to ensure the protection and rational use of land – is the second one. After all, land law can ensure the purpose of realizing the rights and legitimate interests of participants in land relations on land only if the environmental, economic and other properties of land as the object of such relations are preserved. Land law is characterized by the saying "no object – no right to it".

Unfortunately, due to a lack of understanding of the purposes of legal regulation of civil and land relations, there are controversial statements in the literature regarding the functional purpose of the rules of civil and land law as a regulator of land relations. Thus, A. M. Miroshnichenko, exploring the differences between Art. 152 of the Land Code of Ukraine and Art. 16 of the Civil Code of Ukraine on the methods of protection of rights to land, states that the legislator in Art. 152 of the Land Code of Ukraine "…mechanically duplicated traditional ways of protecting civil rights (Article 6 of the Civil Code of the USSR, Article 16 of the Civil Code of Ukraine), which, in fact, would be an unjustified increasing of the legal mass, and distorted them. For example, such a way of protecting rights as renewing a situation that existed before a violation, is known to civil law for more than two thousand years (from Latin *in integrum*), in Art. 152 of the Land Code of Ukraine was reproduced as a "renewing of the status of a land plot that existed before the violation of rights", which is, of course, much narrower"[1]. In our view, such a conclusion is logical, taking into account that the purposes of the legal regulation of land relations, which are declared in the civil and land legislation of Ukraine, are identical. However, if we take into account the existence of significant differences in purposes of public relations regulation in the fields of civil and land law, it is difficult to admit A. M. Miroshnichenko's as methodologically correct.

So, since we believe that the main purpose of legal regulation of public relations by the rules of civil law is protection the rights and legitimate interests of participants in civil relations, and the main of the purpose of legal regulation of public relations by the rules of land law is protection and ensuring the rational use of land, then the existence of the Article 16 in the Civil Code Ukraine, and in the Land Code of Ukraine – Article 152 does not in all cases cause duplication of legal regulation of relations on the protection of right to land. After all, based on the main purpose of civil law of Ukraine, the renewing of the situation

[1] Мірошниченко А. М. Колізії між приписами земельного та цивільного законодавства: перспективи усунення та рекомендації до вирішення//Право України. 2009. № 3. с. 126–131. С. 128.

that existed before the violation as a way of protecting civil rights, in accordance with Art. 16 of the Civil Code of Ukraine, means renewing of financial state of the person whose right is violated. Such restoration is provided by a certain amount of material goods or means of the offender, which must go to the person whose right is violated, in order to fully compensate for the material losses of the latter. Instead, the renewing of the condition of the land, which existed before the violation, as a way of protecting the right to land, enshrined in Art. 152 of the Land Code of Ukraine, provides that in violation of the right to land of a certain person, which is manifested in the reduction of certain qualitative characteristics of the land plot, the offender must personally or through involvement of other persons take action on the land plot to renew the lost due to violation of its characteristics. Undoubtedly, the renewing of the condition of the land plot may not lead to the complete restoration of the financial state of the person whose right to the land has been violated. For example, if the offender has restored the previous state of the land for several years, during that time the owner or user of the land did not receive income from it, for example, rent. In that case, one can protect one's violated right to land not only by applying the requirements of Art. 152 of the Land Code of Ukraine (renewing of the state of land), but also by applying the requirements of Art. 16 of the Civil Code of Ukraine (restoration of person's status), which will be fair enough. Instead, in such cases only Art. 16 of the Civil Code of Ukraine may cause the owner or user of the land whose right is violated will receive material compensation from the offender in full, including lost profits, but the land plot which quality characteristics are impaired or lost as a result of violation of the right to land will remain unrecovered. Although both sides will be considered as fully resolving the property dispute that has arisen between them, another one more side of land relations – society – will suffer. After all, according to Art. 14 of the Constitution of Ukraine, land is under special protection of the state, which gives land legal public-private character in the interests of society, since the main purpose of land law of Ukraine is first and foremost to ensure the protection and rational use of land as a key social need of the present, and only in the second turn – to protect the rights and legitimate interests of participants of land relations. We believe that the existence in the structure of the legal system of Ukraine of land law as a separate field of law creates better conditions for the achievement of the main purpose of civil law, since only maintaining the qualitative characteristics of land can ensure the proper implementation and civil rights to land plots.

Since the main object of land legal relations is land, the formation of the purpose of land law as a field of the legal system of Ukraine should, in our opinion, focus on modeling a certain state of lands, which should be provided by the rules of this sphere of law. In general, land law is aimed at providing three main results that characterize the state of the object of land relations: conservation of

land, that is, such usage, in which the properties of the earth's surface are not degraded; restoration of the properties of the lands that were lost during its use; improving land, that is, providing land with new or more beneficial properties for nature and humans. However, these results cannot be considered as a completed purpose as a "form of the future in the present" because of their lack of specificity and lack of quantitative measurement. In fact, the lack of specificity of the purpose makes it impossible to give it a normative character and makes it dysfunctional in the legal mechanism of regulating land relations.

The main purpose of land law – protection of land – can be achieved through the formation of targeted, localized legal support for the development of various land relations. In turn, such targeting (localization) can be ensured by dividing the country's lands into such types, which require special "sets" of legal means of influencing the participants of the relevant land relations. It should be noted that in the development of the current Land Code of Ukraine the legislator included in it a number of rules aimed at specifying and ensuring the normativity of land protection as the main purpose of land law of Ukraine.

First, the Code not only retained but also increased the number of land categories as part of the land fund of the country for which a special legal regime is established. The basis for the formation of their legal regimes is the specificity of the object – features of land of different types. That is why the basic basis of the land law of Ukraine is the division of land into separate types, which require special, adequate to their nature legal regulation. These types of land are their categories.

Secondly, the Land Code of Ukraine provides for the possibility to establish the peculiarities of the legal regulation of land relations within the administrative-territorial units (regions, districts), which makes it possible to take more fully into account in the rules of the law of the peculiarities of land of different natural and climatic zones – Polesie, Steppe, Forest-steppe, etc.

Third, the Land Code of Ukraine introduced a system of standards of land status for the needs of more effective legal regulation of land relations (Articles 165 and 167). Yes, Part 2 of Art. 165 of the Code set the standards: a) optimal ratio of land; b) the quality of the soil; c) maximum permissible soil contamination; d) indicators of land and soil degradation. And Article 167 of the Land Code of Ukraine provides for the application of maximum permissible concentrations standards of dangerous substances in soils. The standards contain requirements for the quality of land, the permissible anthropogenic load on soils and certain territories, the permissible agricultural development of land, etc. Therefore, the application of these standards makes it possible to ensure the control of the state of land and, accordingly, to make a purposeful legal regulation of land relations. Unfortunately, the Cabinet of Ministers of Ukraine has not yet approved any of these standards, which significantly reduces the ability to ensure the achievement of the basic pur-

poses of land law of Ukraine. As a result, during the period of land reform, the quality of land in Ukraine has significantly deteriorated[1].

Thus, the main purpose of the land law of Ukraine is to protect the land fund of the country as ensuring the preservation, renewing and improvement of lands in accordance with their natural-climatic and categorical characteristics, the criteria of which should be the legal standards of qualitative and quantitative state of land. The second purpose of land law of Ukraine is to ensure the rights and legal interests of land owners and users and other subjects of land relations in the sphere of land usage of the country. Moreover, the achievement of the second purpose must be made dependent on the achievement of the first purpose. It means that the land law of Ukraine ensures the realization of the rights and legitimate interests of the participants of land relations, provided that their activity on land usage ensures the preservation, renewing and improvement of land in accordance with established legal standards.

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A. Stativka, Doctor of Legal Sciences, Professor Department of Land and Agrarian Law Yaroslav Mudryi National Law University, Kharkiv, Ukraine

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

Abstract. *The article is devoted to fundamental principles of EU agricultural policy in terms of ecological measures in agriculture, the usage of which is stimulated by economic mechanism of agriecological programs (direct payments for farmers within the frameworks of Regulation 1307/2013 of the European Parliament and of the Council). The evolution of reformation of Common Agriculture Policy has been studied in the context of greening. The greening of the agricultural production can be reached through crop diversification, the maintenance of permanent pasture and the respect of ecological focus areas, which have a positive impact on relief of soil, natural resources conservation and ecosystem restoration. The special attention in the article is focused on necessity to provide complex approach to solution of problem of permanent environment degradation because of agriculture. Achievement of sustainable development goals in the context of taking into account economic, environmental and social factors is possible through correlation of updated agricultural practices, intensification of agricultural production by innovative technologies in the agricultural sector of the economy and the need to protect the environment, preserve valuable natural resources and ecosystems.*

Key words: *greening of agriculture, ecological measures, Common Agriculture Policy, nature conservation, preservation of biodiversity.*

Introduction

In the context of globalization processes in the European space, the question arose of reforming the EU Common Agricultural Policy (hereinafter referred to as the CAP) and changing the orientations on predatory uncontrolled use of natural resources, especially agricultural land, in order to increase agricultural production for environmentally balanced use. To preserve the unique properties of land, water and forest resources, which

are the most important components of life ecosystems.

At the European level, the conceptual foundations of a new vision of the economy through the lens of stability, competitiveness, socio-financial growth are laid down in the Europe 2020 Strategy, which establishes additional incentives for farmers to apply green farming practices that go beyond the basic requirements of the system of norms required receiving EU assistance and complementing existing agri-environmental programs [1].

Seven key areas of cooperation are in place for the implementation of the priorities set out in the Strategy, including the Resource Efficient Europe Initiative, which seeks to support change towards a resource efficient, low carbon and green economy, as well as linking economic growth and use of natural resources. and energy [1].

The key provisions for the strategic development of EU economic and environmental relations are laid down in the EU's eighth Horizon 2020 Framework for Research and Technology, which provides food security, sustainable agricultural and bioeconomy development, safe, clean and efficient energy, climate change, efficient the use of resources and raw materials are recognized as major priorities among social challenges [2].

The mechanism of implementation of the principle of greening of agricultural production in European policy is provided by the Resolution of the European Parliament of 23.06.11 "Common agricultural policy 2020: food, natural resources and territorial challenges" [3].

The European Community has recognized that the inclusion of renewed and ambitious goals in the CAP, including those related to consumer protection, environmental protection, animal welfare and regional cooperation, are the highest standards to be protected internationally. Long-term productivity and food security depend on the proper care of natural resources, especially soil, water use and biodiversity. The agricultural sector of the economy is crucial for combating climate change, especially by reducing greenhouse gas emissions, carbon sequestration and biomass production. Thus, the integration of environmental issues into the CAP is aimed at reducing the risks of environmental degradation and improving agro-ecosystems.

Agriculture makes a significant contribution to the support of unique rural areas. Agricultural land management was a positive force for the development of a rich diversity of landscapes and animal habitats, including wetlands, afforestation, and extensive open countryside. In addition, agricultural development contributes to the fight against climate change, job creation through the stimulation of economic growth with environmentally efficient use of natural resources and the use of renewable energy sources [3]. On the other hand, the pristine nature and landscape value of landscapes have made rural areas more attractive for business, housing, tourism and recreational businesses.

Many animal habitats in Europe are supported by extensive agriculture, and the survival of a wide array of wildlife

is dependent on farming practices. However, improper farming and land use can have an adverse effect on natural resources: soil, water and air pollution, fragmentation of wildlife habitats, and loss of biodiversity.

All of the above dictated the need for accelerated "green" development through the introduction of innovation, the implementation of new technologies, the development of new products, changes in the production process and support the nature of demand, especially in the context of the emergence of the bioeconomy [3].

The CAP identified three priority areas of the updated agricultural policy: 1) conservation of biodiversity, development of farming and forest systems, as well as traditional agro-cultural landscapes; 2) use of water resources; 3) the area of climate change regulation. These rules meet the requirements of the environment, and the CAP measures will promote the development of agro-cultural practices, preserving the environment and protecting the countryside [4].

The support of agro-technical methods aimed at protecting the environment, preserving the countryside and improving the livelihood of animals are essential elements in achieving the goals of agricultural and environmental policies. Such support should provide for: (a) ways of utilizing agricultural land in accordance with the objectives of the environment, landscapes, natural resources, soil and genetic diversity; b) ecological extensification of agricultural production and management of low-productive pastures; c) the use of environmental planning in agricultural activities; d) improving the conditions of animal keeping [5].

1. Materials and methods

In order to achieve the goals and objectives of the work, a complex was applied to identify the features of legal regulation and implementation of environmental measures, as well as to find out their effectiveness for environmental protection during agricultural activities in the EU, which involves the use of conglomerate of both general scientific and special methods of scientific cognition: dialectical, historical, formal-legal, hermeneutic, comparative-legal, structural-functional and method of abstraction. These methods were used in their interconnectedness and interdependence, which allowed a comprehensive, objective and comprehensive solution to the task of work and formulate scientifically sound conclusions.

The dialectical method of cognition allowed: on the one hand, to identify the interdependence of the existence of (common link) environmental and agrarian policies in the context of environmental security requirements, biodiversity conservation and enhancement of the agricultural sector of the economy through the production of competitive agricultural products in the EU; on the other hand, this method contributed to the detection of the genesis of the application of environmental protection measures in agricultural production in EU legislation. In addition, the dialectical method has contributed to the comprehensive justification of the laws governing the formulation of EU legislation

in the field of research, as well as its constant updating and dynamics.

Using the historical method, the genesis of the substantive essence of such a phenomenon as greening in agricultural production has been elucidated. In particular, at the initial stage of birth, greening was dispositive, that is, applied to agricultural entities only if environmental requirements were met in particularly vulnerable areas. Subsequently, such measures were envisaged by agri-environmental programs and were of an imperative nature.

The use of the formal-legal method allowed to obtain reliable information on the state of legal regulation of crop diversification, maintenance of permanent pastures and establishment of ecological priority areas, as well as to determine the internal construction of EU legislation in the field of greening agricultural production.

The interpretation and interpretation of EU regulations on the legal regulation of the application of environmental protection measures in agriculture were carried out using the hermeneutic method.

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

Crucially important in achieving the goals of this scientific article was the structural-functional method that helped to identify the characteristics of environmental protection measures used in agricultural activities as structural elements of a single interdependent system of measures to implement the principles of greening. In addition, this method has helped to identify the place of these measures in the EU agricultural policy system, as well as their uniqueness and features among the system of all environmental measures.

The method of abstraction made it possible, among all the variety of means to ensure the implementation of the principle of greening agricultural activities on the European continent, to identify specific features of such environmental measures as diversification of crops, support of permanent pastures and establishment of ecological priority areas.

Using the method of analysis, it was possible to conclude on the axiological role of each type of environmental action in agriculture and its impact on overcoming the ecological crisis, preserving natural ecosystems, improving the status of water, land, forest resources, combating climate change and sustaining biodiver-

sity. It is established that the implementation of the investigated means is able not only to contribute to the achievement of environmental goals, but also to ensure the economic prosperity of the country.

2. Discussion and results

2.1. Greening of agricultural production

The CAP reform process should include a comprehensive approach to addressing the development of the agricultural production sector and, at the same time, the environmentally-balanced use of natural resources during agricultural activities.

Greening is considered as a modern line of activity of agricultural producers based on the use of ecological and economic management methods in order to ensure comprehensive restoration of natural resources by forming a sustainable ecological and economic system, increasing the production of competitive and environmentally safe products, creating an agrarian system through the use of environmental methods [6, c. 9].

The first series of agri-environmental measures in the CAP was integrated in the 1980s. and was aimed at making payments to farmers involved in the process of protecting green areas [7]. The concept of "agro-ecology" was first applied in the UK, but later this agro-ecological tool was extended to other member states and towards the end of the 1980s. has acquired a contractual form of cooperation between public authorities and farmers who have applied green land management practices for agricultural land.

In the 90's of the twentieth century, agri-environment programs have been extended to compensate for lower control prices and mandatory acreage reduction. Measures aimed at reducing production residues that began to emerge from the introduction of dairy quotas in 1984 were introduced to the CAP in 1992 in order to pay compensation for arable (field) crops. In this context, the second wave of agri-environmental programs was aimed at providing compensation for the lower guaranteed price and implementation of mandatory acreage reduction [8, p. 3–4].

Today, all EU Member States have their own agro-environmental programs, prioritizing rural development plans and achieving environmental goals. In general, the richer EU countries (Finland, Ireland, the United Kingdom, Austria, Sweden and Denmark) prioritize far more agri-environmental programs than the poorer countries (Bulgaria, Romania and Malta), which focus on socio-economic and social cohesion. Thus, the advantage given to agri-environmental programs in a country or region is not only a reflection of the ecological status of agricultural landscapes, but also their formation is influenced by the socio-economic situation [8, p. 8].

According to the European Parliament Resolution of 23.06.11 "Common Agricultural Policy 2020: Food, Natural Resources and Territorial Challenges", the list of measures that can be applied in the agricultural sector also includes: 1) support for low carbon emissions and measures to reduce greenhouse gas emissions; 2) supporting low energy consumption and promoting energy effi-

ciency; 3) creation of anti-erosion strips (buffer zone around industrial zones), hedges, etc .; 4) the existence of permanent pastures, etc. (paragraph 34) [3].

In modern foreign literature, greening in agriculture is considered through three innovative models: 1) new scientific bases and generalized technologies with environmentally friendly potential (biotechnology, information and communication technologies, bioproduction and biofortification; 2) the implementation of agricultural management integrated pest management methods without the use of poisonous chemicals, organic farming, integrated nature management system, urban agro ltura and suburban agriculture); 3) national integrated greening regime (biofuel production, agritourism, use of renewable energy sources in agricultural production, etc.) [9, p. 18].

The process of reforming the EU's Common Agricultural Policy should cover all available instruments, taking into account the best of them, as provided for by the regulatory documents of the European institutions.

Today, European public institutions oblige agribusiness representatives to apply environmental measures within the direct payments system, which are considered to be a mechanism for integrating greening into agricultural activities, including: 1) crop diversification; 2) maintaining permanent pastures; 3) establishment of ecological priority areas.

2.2. Certain types of environmental measures in agricultural production under EU law

2.2.1. Diversification of crops

The purpose of this environmental event is, first and foremost, to protect and protect the soil and improve its quality, since sowing monocultures in one area for a long time can lead to soil disturbance, poor quality, and drying and recompacting. The implementation of this measure by farmers is also aimed at providing environmental public benefits and mitigating the effects of climate change.

According to paragraph 1 of Art. 44 of Regulation (EC) No 1307/2013 of 17.12.2013 "On the establishment of rules for direct payments to farmers under the common agricultural policy programs" farmers holding arable land with an area of 10 to 30 ha must grow at least two cereals, and Farms with more than 30 ha – 3 cereals. Main grain crops should not cover more than 75% of the land [10].

Although this rule is imperative in the activities of agricultural producers, several flexible provisions are permitted in the area of application of the crop diversification rules.

Yes, the norm of item 1 of Art. 44 of that Regulation does not apply, for example, to holding companies where more than 75% of the eligible arable land is permanent pasture and used for the production of grasses, other plant fodder or crop underwater for much of the year or agricultural cycle, provided that arable land covered by these uses do not exceed 30 hectares [10].

In 2016, 75% of arable land in the EU was subject to such an environmental measure as crop diversification, with up to 63% applying the rule of planting three crops and 12% of arable land being

diversified by two crops. The percentage of arable land that is diversified in every European country also differs: for example, in the Czech Republic and Hungary 90% of the land is subject to this environmental measure, while in Greece or Malta – less than 50% [11, p. 37].

Member States should ensure that a list of nitrogen-fixing crops is established in accordance with established principles, the cultivation of which will contribute to the achievement of biodiversity goals. The number of landings of such crops is allowed within 4–19 units. The most popular are horse beans, peas, alfalfa, lupines and clovers, which must be presented during the growing season. EU Member States should also lay down rules where nitrogen-fixing crops can be grown in order to avoid the increased risk of leaching in the fall. These rules should take into account the requirements of Directive 91/676 / EC on the protection of waters against pollution caused by nitrates from agricultural sources (Nitrates Directive) [12] and the Water Framework Directive 2000/60 / EC establishing a framework for Community action in the field of water policy [13 , c. 26].

In some countries, alternative crop diversification practices are being applied to the practice of greening agricultural production. For example, France has a certification system for maize producers. Farmers who are members of this system are allowed to place winter ground cover with the help of vegetation cover from sown crops on all their arable land, which is a very similar measure of crop diversification. The essence of this measure is that maize producers have to grind and mulch their residues, which can have a positive environmental impact, as they remain environmentally friendly, since such residues provide coverage, guarantee the presence of nitrogen fixers and organic matter in the soil and allow control of pests and pests. 13, p. 48].

2.2.2. Maintenance of permanent pastures

Permanent pastures should be understood as land used for the cultivation of grasses or plant fodder naturally (self-propelled) or by cultivation and not included in crop rotation for 5 years or more. The definition of permanent pasture is first provided in EU Regulation 2017/2393 of the European Parliament and of the Council of 13.12.2017 [14], which amended Regulation 1305/2013.

The legal regime of permanent pasture is laid down in EU Regulation 1307/2013 of 17.12.2013 "On establishing rules for direct payments to farmers according to the programs under the common agricultural policy". Thus, according to Part 2 of Art. 45 of this Regulation, Member States must provide at least 5% of permanent pasture in relation to the total area of agricultural land [10].

In the same case, if the proportion of permanent grassland at regional or national level is less than 5%, the Member State concerned shall be obliged to return the land previously transferred to it for other uses and to grant that land the status of permanent grassland. This rule does not apply where the reduced percentage of permanent grassland is the result of arable planting in accordance

with environmental requirements and does not include short rotation plantations, spruce trees or fast-growing trees for energy production [10].

Establishing a proper conservation regime for such pastures is of conceptual importance for ensuring the integrity of the ecosystem functions of natural resources and preserving biodiversity. For example, permanent pastures perform important functions for the protection of water resources.

For example, a study of the effectiveness of permanent pastures and their impact on water resources, conducted on the example of Poland, in which such pastures cover 21% of agricultural land and 13% of the total area of the state, indicates their ability to prevent soil erosion. This is due to the fact that the pollutants remaining on the surface of the pasture or alkali decompose rapidly due to the intensive biological activity of the soil microorganisms associated with the pasture ecosystems and the saprophytic activity of the mesofauna, thus making the pastures the role of biofauna. 59].

As the problems of biodiversity conservation in the current context of globalization processes, on the one hand, and the requirements for greening the agrarian sector of the economy, need correlation, some EU Member States are embarking on a comprehensive approach to addressing these problems based on relevant European legislation and common protection instruments, including through the system of specially protected natural areas, the legal regime of which is determined by Council Directive 92/409 / EEC of 2 April 1979 on birds and Council Directive 92/4 3 EEC of 21 May 1991 on the protection of the natural habitats of wild fauna and flora (Habitats Directive).

Thus, according to Part 1 of Art. 45 of Regulation (EC) No 1307/2013 of 17.12.2013, Member States should designate permanent pastures which are specially protected areas within the meaning of Directive 92/43 / EEC, including peat and wetlands located in and in need thereof enhanced protection to achieve the objectives of the Directives [10].

This means that EU Member States are obliged to establish permanent pastures, which are specially protected zones in the territories defined by the Directives, including peat and wetlands located in those territories, which need strict protection to achieve the objectives of these Directives [12, p. 38].

Such specially protected areas are defined within the Natura 2000 network and are prohibited from plowing the soil. As of 2015, 48% of permanent pastures included in the Natura 2000 network have been designated as Protected Areas (6.99 million hectares), and in 2016–51% (7.71 million hectares) [11, p. 59–60].

At the same time, a study of the effectiveness of the use of such an environmental measure by the EU's CAP as establishing permanent pastures in Germany by the Federal Environment Agency has made it possible to observe that Germany has limited use of the possibility of creating permanent pastures in specially protected areas under conversion restrictions. Only pastures that are habitats (according to the Habitats Directive) are designated as protected

areas. The area of pastures established under this Directive amounts to about 666 thousand hectares, which is about 14% of the total area of pasture in Germany [16, p. 28].

Regulation (EC) No 1307/2013 of 17 December 2013 establishes sufficiently flexible rules for the maintenance of permanent grassland, allowing Member States to introduce the equivalent of greening practices: 1) regulating the use of grassland or grassland. In doing so, farmers are required to maintain permanent pasture and take any of the following measures: mowing mode, maintaining landscape features of permanent pasture and shrub control, applying a sowing regime to restore depending on the type of pasture without reducing its natural value, hay and feed, fertilizer and pesticide use restrictions; 2) the use of an extensive grazing system: sheep or mountain pasture and the use of local or traditional breeds for grazing on pastures [10].

2.2.3. Establishment of ecological priority areas

The implementation of this environmental measure is aimed, first of all, at protecting and improving the state of biodiversity on land used by farms, as well as obtaining other environmental and climatic benefits [11, p. 66].

Farmers with more than 15 hectares of cultivable land should provide at least 5% of their land as ecological priority areas in order to protect biodiversity [10].

Within the framework of this measure, agricultural producers may grant the status of ecological priority territories to one or more types of parcels of land (fallow land; terraces; landscape elements adjacent to arable land; buffer strips; agrolis sites; strips along crops; nitrogen-fixing cultures, etc.) [10]. At the same time, at the level of each EU Member State, farms take into account the economic factor (that is, choose the least costly but most effective type and political and administrative factors) when deciding on the choice of a particular type of environmental priority area.

Ecological and economic studies of the potential potential impact of this environmental measure have shown a positive impact on biodiversity. At the same time, the greatest value for the environment are the elements of the landscape and the land under steam. The former have an effective effect on invertebrates, birds and terrestrial plants, while fallow land contributes to the conservation of reptiles and amphibians. The reduction of the effects of climate change is ensured by the increased use of legumes and the displacement of nitrogen fertilizers [17, p. thirteen]

However, the environmental benefits of greening agricultural production, including through explored environmental measures, are significantly limited, as a large proportion of land and farms are exempted from environmental measures. In addition, an analysis of the implementation of greening at the national level indicates that the domestic policy of each EU country is oriented towards avoiding negative economic impacts on farmers rather than achieving positive environmental impacts [17, p. 34].

Achieving the modernized goals of the common agricultural policy requires

coordinated cooperation at both the regional and local levels and involving all actors that can affect the outcome. Of course, such cooperation should be based on a wide range of legal mechanisms.

Against this background, the environmental measures under study should not conflict with other key legal instruments in the field of greening agricultural production. In particular, it is about adherence to the system of norms necessary for receiving assistance from the EU, as well as agro-climatic measures, afforestation and agroforestry, organic farming, protection of areas with natural limitations [11, p. 10].

Conclusions

Agriculture, as a central link in the agrarian sector of the economy, is key to meeting the current challenges of food and energy security on the European continent. The current demographic trends indicate an increase in population that requires rapid economic development, including through the intensification of agriculture, an increase in production in order to guarantee sufficient food production, which is not always achieved through the use of environmentally sound and rational measures. At the same time, in the Agenda 21st. the global task is to ensure sustainable development, in particular through the conservation and sustainable use of natural resources. It is clear that the two global challenges outlined are contributing to the disintegration of the economic, social and environmental components of sustainable development. All this gives rise to the pressing question of today: what should be the priority – the achievement of the highest economic indicators, the level of GDP, including at the expense of agrarian production, which uses new technologies that can irreversibly affect the environment, destroy ecosystems and create threat to biodiversity; or the conservation of land, water, forest resources, the provision of adequate and safe atmospheric air quality, the maintenance and improvement of the living conditions of wild flora and fauna species. It seems that in the 21st century. in the conditions of globalization processes, development of scientific and technological progress, creation of biotechnologies into production should not force officials, politicians, agricultural producers, peasants and other categories of persons involved in the process of making and executing decisions in the sphere of SAP implementation, to choose between the economic and environmental component. ensuring sustainable development, that is, commercial and non-commercial benefits, otherwise, ignoring the objective laws of nature, humanity is awaiting the inevitable consequences of a planetary scale.

A comparative legal study of the mechanism of application of environmental measures in agricultural production has shown that the effectiveness and success of the implementation of these measures directly depends on the level of development of the state, its political and legal guidelines and economic ambitions and economic stability of the country. The most widespread use of agri-environmental programs, their positive impact on the achievement of the Sustainable Development Goals, is

observed in the most economically advanced high-living countries (Finland, Ireland, the United Kingdom, Austria, Sweden and Denmark), while countries such as Bulgaria, Romania and Malta are targeting implementation agrarian policy is more about enhancing the economic attractiveness of the state rather than introducing greening into agricultural production.

Diversification of crops, as one of the measures to introduce the principle of greening into agricultural production, is possible and flexible. The first feature of this measure is the subordination of the mechanism of its implementation to certain conditions and rules: the number of diversified crops will depend on the size of arable land, planting of some crops is allowed only in a certain (vegetative period). The flexibility of the analyzed measure is conditioned by the possibility of using alternative means, the results of which are identical to diversification (for example, certification for corn producers).

The ambivalence of such an ecological measure as the maintenance of permanent pasture is manifested in the cultivation of crops by self-seeding or cultivation on land, or the extension to these lands of the regime of specially protected natural areas in accordance with the Habitats Directive.

The imperative for the implementation of the mechanism for establishing the ecological priority areas is the obligation of farmers who own or use land of more than 15 hectares to allocate at least 5% of their territory to areas where agricultural activities will be substantially restricted.

Therefore, it is of fundamental importance to ensure sustainable development and the right of everyone to a safe and environmentally sound environment to integrate environmental conditions into strategic plans and concepts of territorial development, both at industrial, regional and international levels, as pollution air, the destruction of important ecosystems, the destruction of biodiversity and other environmental threats are not only localized within a particular country, but are often interregional or global in nature.

Thus, the practical significance of the investigated results lies in outlining the prospects for reforming the agrarian policy of Ukraine in the context of the Europeanisation of political and legal reality and compliance with our country's international legal obligations to introduce the principles of a "green economy" (greening production), improving not only the environmental situation both nationally and globally. At the same time, the mechanism of application of environmental measures in agricultural production is complex and requires careful self-study of the implementation features of each environmental measure. In this regard, these issues require further research and scientific-theoretical substantiation.

To summarize, the words of the prominent American philosopher and founder of Ralph Waldo Emerson's theory of transcendentalism: "Nature cannot be trapped by the untidy and half-dressed, it is always beautiful. Nature does not tolerate inaccuracies or errors. "

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V. Ustymenko, Correspondent Member of the National Academy of Sciences of Ukraine, Doctor of Law, Professor, Honored Lawyer of Ukraine, Director of the Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine, Kyiv, Ukraine

O. Zeldina, Doctor of Law, Professor, Head of Sector of the Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine, Kyiv, Ukraine

EU INVESTMENT POLICY AS THE BASIS FOR SUSTAINABLE DEVELOPMENT: IMPLEMENTATION PROSPECTS IN UKRAINE

Abstract. *Ukraine has no state investment policy capable of securing the achievement of sustainable development goals. The purpose of this article is to analyze the experience of the European Union (EU) regarding the use of the investment policy for sustainable development and, on this basis, to offer the provisions to be further taken into account when forming the investment policy of Ukraine to achieve the sustainable development goal. The authors focus on the investment policy of the EU countries, as the Czech Republic, Poland, Hungary, Germany, Austria, Britain, France, Italy, and Greece. The analysis of the investment policy of these countries revealed both positive and negative aspects. Based on the experience of the EU countries, it was suggested what positive approaches of the investment policy of the European countries should be considered in the laws of Ukraine. Based on the principles of investment policy development for sustainable development proposed in the UNCTAD report, national sustainable development paradigm of Ukraine and EU countries' experience, the authors defined what the investment policy of Ukraine should be like in terms of sustainable development.*

Key words: *investment policy, sustainable development, EU experience, laws, perspectives.*

1. Introduction

To ensure the investment attractiveness, the state should focus on the implementation of the appropriate investment policy. The balanced, consistent investment policy is able to stimulate the investment income and, consequently, create a basis for achievement of the sustainable development goals. Besides, the sustainable development concept is flexible and developing, provides guidance to assess the quality of investment processes (Cotula, 2016). So, an important element for investment attractiveness of Ukraine is an effective state investment policy, which should ensure sustainable development. Still, it must be remembered that sustainable development promotion in many countries ultimately helps encouraging the investments increasing the stability. In this sense, there is no economic activity more important to achieve the sustainable development than investment (Cosbey et al, 2004).

In this situation, the development and implementation prospect of an appropriate investment policy is an important priority for Ukraine.

Before an investor decides to invest in a country, it analyzes the local economic, political and social situation, environment and regulations determining the investment policy of the state. Still, the sustainable development is not based on individuals economic, social, environmental or institutional dimensions, but on their system, and is considered as an integrated whole (Ciegis and Martinkus, 2009).

In 2012, UNCTAD produced a report dedicated to the investment policy framework for sustainable development. In 2015, a revised edition was released (UNCTAD, 2015), which shows the main principles of investment policy development for sustainable development. These principles include investment in sustainable development (in order to develop a comprehensive investment policy, it is required to promote the investments for inclusive growth and sustainable development); consistency of policies (investment policy should be based on the overall development strategy of the country. All the policies affecting the investment must be consistent and synergetic both at the national and international levels); governance and institutions (investment policy should be developed with involvement of all stakeholders and implemented in the institutional framework based on the rule of law meeting the highest standards of governance and providing the predictable, efficient and transparent procedures for investors); the dynamic policy-making (investment policy should be regularly checked for effectiveness and relevance and be adapted to the changing developments); balanced rights and obligations (the investment policy should be balanced when determining the rights and obligations of investors and meet everyone's development interests); the right to regulate (every country has a sovereign right to determine the entry and operational conditions for foreign investment in accordance with international obligations in the interest of the public good and to minimize the potential adverse consequences); openness to investment (in accordance with the

development strategy of each country, the investment policy should establish open, stable and predictable conditions for investment entry); investment protection (the investment policy should provide for an adequate protection for investors. The investor treatment should be non-discriminatory); investment and assistance (the policy encouraging and simplifying the investment should be consistent with the sustainable development goals and minimize the risk of harmful competition for investment); corporate governance and responsibility (the investment policy should promote the adoption of and adherence to the international best practices in corporate social responsibility and good corporate governance); international cooperation (the international community should work together to address the common challenges in the field of investment and development, especially in the least developed countries. It is also required to take a collective effort to avoid the investment protectionism).

The National Sustainable Development Paradigm of Ukraine notes that the second important conclusion about the sustainable development trends is to find its projective model. It is about building a relevant policy, and shifting the conceptual sustainable development goals into the projective plane. It is noted that this applies primarily to streamlining the investment policy, which should be flexible and mobile in relation to the changing priorities of each space-time model of sustainable development (Paton, 2012)

The investment policy of Ukraine doesn't meet the said principles of investment policy for sustainable development, but the state should strive to implement them when determining the investment strategy. To achieve the goals, it is required to move society towards sustainability, and this movement should be encouraged by investments requiring the strategic planning (Robèrtet al, 2002).

The contents of state regulation of the investment activity is defined by the goals set to the state, as well as the means and tools available to the state when determining the investment strategy, which is provided by the investment policy. Therefore, the content of the public investment policy should provide for an effective, targeted and reasoned position of public authorities to stimulate the investment for sustainable development at different government levels (national, regional, sectoral).

An important task of the government is to improve the investment policy of the state, priorities and mechanisms of its implementation with a focus on the sustainable development goals and the need to exploit the potential of Ukraine's economy. Therefore, the real solution of the challenge of developing a sustainable investment strategy requires appropriate decisions of public authorities defining the investment policy. Therefore, the government agencies of the country play a crucial role in shaping a coherent, systematic investment policy.

Given that today Ukraine faces an ambitious objective to implement the provisions of the association agreement between Ukraine and the EU and ensure the European vector of Ukraine's development, the investment policy of

the state should build the foundations to implement the sustainable development goals throughout Ukraine.

The experience of the public investment strategies of a number of EU countries to attract stable investment shows a positive trend, so this experience should be studied and implemented in Ukraine to support Ukraine's aspirations for sustainable development.

2. Investment policy in the EU countries

The investment laws of the Visegrad Group are relevant for Ukraine. The Visegrad Group countries offer to investors the benefits of economic and political security, and access to a large and wealthy market at relatively low operating business costs, as well as various allowances and preferences (Dorożyński and Kuna-Marszałek, 2016).

Due to its strategic location, competitive infrastructure, educated workforce, developed real estate market and support of Czech investors, the *Czech Republic* is one of the most attractive countries for investment in multinational firms (Basile et al, 2008). The laws of the Czech Republic are based on the same legal support of both domestic and foreign investors, which are equal before the Czech tax laws. The Government of the Czech Republic offers support to the new and existing investors in covering 60% of the costs associated with investment projects. The support is provided under the national scheme of investment incentives. Special activities, such as the creation of centers of research and development, are also supported by EU structural funds. The forms of investment incentives in the Czech Republic include the tax relief for up to ten years; financial support for creation of new jobs (EUR 2,000 per job created); financial support for training and retraining of new employees (up to 45% of the total education costs); cash grants for strategic investments in industry and technology sector (Czechinvest, 2013).

One of the strategic objectives of the Czech Republic Government is attraction of foreign investments in the Czech economy. The instrument of this policy is the creation and operation of strategic industrial zone regimes. In the field of foreign investment attraction into the Czech Republic, the issue of industrial zone promotion has a priority. The policy of the Czech Republic is aimed at achieving specific economic results in the form of foreign investment, technology and job creation. The investment and jobs created have a synergistic effect for supply of materials, components and related services provided to investors (Review of the state of the economy and the main areas of foreign economic activity of the Czech Republic in 2016, 2017).

The Czech Republic provides support in the form of direct grants, interest rate subsidies and non-repayable financial assistance from the state budget, as well as free or concessional transfer of state assets to support the industrial zone development. This program is aimed primarily at increased competitiveness of the investment environment, especially in economically disadvantaged or structurally affected regions, and is designed to create new jobs (Review of the state of the economy and the main

areas of foreign economic activity of the Czech Republic in 2016, 2017). According to the Law on Investment Incentives (Promotion), the investors, scientific research and design organizations, as well as innovative enterprises are provided benefits in the form of significantly lowered rental rates for office and industrial buildings in comparison with the market ones, as well as provision of business services at a relatively low cost (Review of the state of the economy and the main areas of foreign economic activity of the Czech Republic in 2016, 2017).

With regard to the investment policy in general, the openness to foreign investment and free competitive market allowed the Czech Republic to obtain a positive growth prospect. Therefore, the key macroeconomic reform and microeconomic progress established a relatively stable and secure environment for investment. The Czech Republic provides a safe investment environment and features a stable, fast growing economy.

Poland's economy is very attractive for foreign investors, since the policy of the Polish government towards foreign investment is friendly and open. The Polish government offers to foreign investors a variety of incentives, depending on the type of investment, including the attractive incentives for foreign investors who invest in areas with high unemployment. The rate of government assistance (in the form of tax and customs privileges) for such investors is 50%. For SMEs, it is 65%. Special subsidies are granted to entrepreneurs who invest in the scientific research. These projects can expect up to 100% government subsidies (Invest in Poland, 2016). The government grants are provided to foreign investors based on the Program for the supporting investments of major importance to the Polish economy for the years 2011–2020, adopted by the Council of Ministers of the Republic of Poland on July 5, 2011 and consolidated on October 27, 2014 (Ministry of Economy, 2014).

It is also worth noting that the local governments are granted autonomy to regulate the investment business. Such steps allow attracting the investors and ensuring the development of the country's strategic directions (Popova and Tarasenko, 2017).

Two processes have increased the investment attractiveness of Poland:

• The strategy of economic reforms, which is based on three pillars: macroeconomic stabilization, macroeconomic liberalization, and institutional reforms. The coverage of this reform and its rapid implementation are vital to its success (Fischer, 1993; Investing in Poland: Untapped Potential, 2017).

• Poland's accession to the European Union, which reduced the cost of moving the employees, capital, goods and services, and helped reducing the political and regulatory risks (such as limiting the use of discriminatory practices in the single EU market) (Investing in Poland: Untapped Potential, 2017).

Hungarian economy is open to foreign investment, and the activities of foreign investors are allowed in almost all of its fields. The intensive inflow of direct foreign investment into this country economy since the beginning of the post-socialist era was largely secured by

intensive sales of state assets to foreign investors (Vyshyvana, 2007).

Hungary implemented a set of state investment support programs. The most prominent of them is the Economic Development Fund, one of the main objectives of which is to stimulate the investment in small and medium Hungarian enterprises by provision of soft loans. The foreign investment support in Hungary is governed by the practice of "individual" approach to investors in terms of the benefits available to them. In recent years, the practice of concluding the strategic partnership agreements with the major investors has been introduced. Along with this, the support of depressive regions by stimulating investment on a territorial basis should be noted. For this purpose, the Hungarian company may receive subsidies of up to 50% of the planned investment. The size of the support depends on the territory development level. State support of investments in the field of scientific development and innovation development has been expanded substantially (Review of the state of the economy and main directions of foreign economic activity of Hungary in 2016, 2016).

Analysis of the laws reveals the following features of investment activity regulation in Hungary: simplification of procedures for registration of legal entities, introduction of the state investment support program, concessional loans for small and medium-sized Hungarian companies, the practice of "individual" approach to investors in terms of the privileges granted to them, support of the depressed regions through the investment stimulation according to the territorial principle, and the use of the practices of creating the industrial parks for capital raising.

Therefore, the experience of the Czech Republic, Poland, and Hungary is valuable for Ukraine when developing the investment policy. Each country established its own regulatory regime of the investment activity affecting the level of the country's investment attractiveness. Some countries use more stringent methods of regulating the investors' activities, while the others, on the contrary, have created liberal laws promoting the capital inflows. In some countries, the admission of foreign investment to the economy is governed by a single regulation, while in the others, various aspects of investment are governed by a set of regulations. Common to these countries is that the foreign investors are guaranteed a national tax regime. All benefits are available to any investor, regardless of its nationality, subject to its compliance with certain requirements. The activities of foreign investors are permitted in almost all sectors of the economy; they are allowed to buy real estate, including the land. An important role in shaping the investment attractiveness is played by the local governments and specialized organizations entrusted with the authority to control the investment process. An important factor in the investment attractiveness of these countries is the stability of their laws, since the potential investors assess the investment conditions and available safeguards to protect the investors' rights.

Germany has a law on the regulation of investment activities ("Investmentgesetz") fully adapted to the EU norms, as well as the other regulations governing the investment grants and subsidies. According to the adapted laws in Germany, the investors can benefit from the numerous government incentives for all investors, regardless of whether they are German nationals or not. The funds are provided by the government of Germany, certain federal lands and the European Union. The forms of such support can range from cash to labor, as well as research and development encouragement. The funds provided in the form of irreversible subsidies are an essential part of these measures. Various forms of incentives can be combined. The level of available subsidies depends mainly on the company size and the number of its employees. The grants and subsidies in Germany are usually given on certain conditions, for example, activities in the supported industrial sector, the minimum number of employees over a certain period, all of the proceeds must remain in an industrial enterprise (Review of the state of the economy and the main directions of foreign economic activity of the Federal Republic of Germany in 2015, 2016). The investment subsidy (Investitionszulage) is calculated as a percentage of the cost of acquisition or manufacturing of the new production property, buildings, machinery and equipment (except for the aircrafts and passenger cars). These investments must be made in the territory of six eastern lands, as a part of new investment projects in processing industry, production services, and hospitality industry (Review of the state of the economy and the main directions of foreign economic activity of the Federal Republic of Germany in 2015, 2016). To overcome the difference in land development, Germany implemented a system of investment incentives. In this regard, the state offered mainly the following incentives which, on the one hand, are based on the tax revenue reduction and, on the other, do not require significant budgetary costs. These instruments primarily include the depreciation mechanism features. So, along with the standard depreciation charges, the foreign investors have the right to write off the investment in the purchase or production of fixed assets during the first year. Besides, the bank loans with reduced interest rate are available for investment in fixed assets. 35% of the total investments in the country were covered by various kinds of investment surcharges. The state also offset up to 23% of the costs for construction, expansion of production capacities and rationalization or restructuring of the companies. The incentives are available to both foreign and domestic investors. Foreign investors are offered a number of programs to stimulate the inflow of capital into certain industries, including the high tech. Besides, each federal land has developed its own development programs subject to provision of appropriate investment incentives, especially for the territories lagging behind in their economic development (Vyshyvana, 2007).

Thus, the foreign investment plays an important role the German economy. For foreign investors, Germany estab-

lished a national treatment and the laws don't provide for restrictions on the foreign capital import and export. A non-resident can freely invest in the economy of Germany, buy property for personal use or company construction. There is a large number of companies with foreign share in the country; they actively use the scientific and technological achievements of the parent companies located abroad.

In *Austria*, an effective system aimed at supporting the investment activities of foreign investors is created. The most attractive offers for foreign investors in Austria are the tax benefits on income received as a result of participation in the activities of another company. Where an Austrian company receives dividends from a foreign company, according to the national laws, they are not subject to income tax, provided that the following conditions are met: the legal form of a foreign company must correspond to the Austrian counterparts; the Austrian company investment share must be at least 25% of the total; the investments must be made within 12 months; the share of investment in the other similar companies should not exceed 25% of the total operations of a foreign company (except for the companies owning a bank). The Austrian laws grant the income tax exemptions to the companies transferring dividends to their country of origin. The release of foreign investment from tax also applies to indirect profits. Austria was one of the most successful countries in regulating and stimulating the foreign investment through the development and implementation of an effective mechanism to attract foreign capital in the national economy based on a modern system of economic and legal regulations on investment (Dupay, 2014).

The main feature of the *British* policy in the field of foreign investment has been and remains the desire to encourage the inflow of investment. UK policy is to encourage the investments from non-residents, attract the foreign direct investment in the country, accompanied by the importation of advanced foreign technology and job growth. In the UK, the exchange control mechanism contributes to the inflow of foreign investment, but there are strict rules under which foreign the firms established to import and sell the products manufactured outside the "sterling zone" in the British market shall be financed exclusively with their funds, not obtained in the UK. However, there are exceptions to this procedure when the created company is a major concern for the UK economy. In this case, a foreign investor can receive UK loans for its business development. The UK developed and applies a system of financial incentives for investors, which are the same for national and foreign companies. First of all, financial support and various incentives are available to the firms focused on the development areas, i.e. a part of Scotland and Wales, Liverpool and Merseyside districts, North-East and South-West England. "An important role in shaping the investment policy of UK regions is played by the regional development agencies and corporations (Scottish and Welsh Development Agency, London Development Corporation areas and

river docks Meyser). Such organizations can better focus on the study of the problems and advantages of the region and ensure its continued prosperity" (Shevchenko, 2010).

Thus, the UK laws promote the inflow of investment, and applies a system of financial incentives available to both national and foreign companies.

The experience of *Italy* is particularly interesting, because both Ukraine and Italy feature the regional heterogeneity. In Italy, the regional heterogeneity has historical roots, and despite the long-standing efforts of the state, the disparity in the level of socio-economic development of the territories remains significant as compared to the European standards. The depressed regions of Italy are the agricultural South, the territory of which is a home to 40% of the population with the production representing more than 25% of the total GDP (Travaglini, 2012).

The economic system of Italy has been formed in terms of the capital deficit for the local industrial development, budget deficit, inefficiency of public enterprises and securities market. However, Italy managed to stop the decline and economic slowdown. Over the past decade, Italy has shown a strong economic growth.

The main instruments of the state investment policy of Italy is a lack of the tax discrimination between foreign and domestic investors; investment subsidies; tax subsidies; support of entrepreneurs in problem areas; online availability of information for potential investors etc.

The laws of Italy, in particular the Decree for the South (Act 91 of 2017) provides for a "special economic zone (ZES – Zone Economica Speciale), which is guided by port authorities in less developed South areas and islands of Italy (Abruzzo, Basilicata, Calabria, Campania, Molise Puglia, Sardinia and Sicily regions). The investors can access the tax benefits up to EUR 50 mln, employ the incentives, reduce the bureaucracy and receive reimbursement of IRAP regional business tax, covered by the national allocation of EUR 25 mln for 2018, EUR 31.5 mln for 2019, and EUR 150.2 million for 2020 (Bureau of Economic and Business Affairs, 2018).

In January 2018, the Italian government granted a "super depreciation" and "hyper depreciation" to investment in specific economy sectors. In 2017, the Government launched the "Industry 4.0" initiative aimed at improved competitiveness of the Italian industrial sector through a combination of policies, research and infrastructure funding (Bureau of Economic and Business Affairs, 2018).

Thus, the investment policy in Italy is remarkable for stimulation of investment activity in depressed regions for their development. It is extremely relevant for Ukraine.

The legal regulation of investment activity in *France* is governed by the Code of Financial and Monetary System, and a number of regulations since 1996, which completed the reform of laws for foreign investment liberalization in France. The French laws provides for three modes of investment regulation ensuring an effective impact on stimula-

tion of the country's economic system, namely investment requiring a prior authorization; investment requiring an administrative declaration; investment requiring statistical declaration (Abesalashvili, 2015).

The French government established a preferential tax treatment for companies operating in several regions of the country, i.e. special industrial areas (near Dunkirk, La Ciotat, and La Seine). The tax incentives are granted to the companies implementing the staff training program in the workplace, and companies implementing a scientific and technical research program. "The government of France also implements a special program to attract foreign investors in the development of research centers in the country. The priority when allocating the government grants is given to the companies investing in: 1) design and development, management system and mathematical support tools; 2) areas outside the "big Paris"; 3) companies with at least 30 jobs during the first three years of operation" (Zatonatska, 2014).

Therefore, the main distinguishing features of the French model of investment process regulation include the following: absence of a special law regulating the investment activities; low control of foreign companies operating in the country; "market access system"; "government notification" system; a clear distinction between direct and other foreign investments, as well as the system of tax preferences for certain businesses.

It should be noted that not only the positive, but also the negative experience must be explored. This will allow detecting the errors in the investment policy of these states, and avoiding them in Ukraine. A striking example of the low investment attractiveness is *Greece*. A low attractiveness of Greece as the investment host country is the result of a complex tax system, bureaucracy and corruption incidents in the public sector. Moreover, the Greek regions are still lagging behind in development of the factors capable of attracting investment because of a lack of strong connection between investment, production, employment, human capital and specialized production factors. The Greek economy is mainly focused on activities with low added value, where quality, planning, innovation and know-how of products (goods and services) are relatively low (Kokkinou and Psycharis, 2004).

Summarizing the experience of the European countries, it should be noted that a small number of countries has huge investments. Many countries have to make efforts to ensure the required level of investment inflows, since they experience a decline in foreign direct investment. The reasons may be different, depending on the country. In particular, the main reasons include an increased competition for FDI with Asian countries, the loss of advantages by some countries of the Central and Eastern Europe, corruption and bureaucratic components of the investment process etc. However, the investment policies in several European countries have many positive developments, which Ukraine must take into account to form an effective investment model in terms of sustainable development.

3. Investment policy of Ukraine

The fundamental regulations defining the investment policy of Ukraine are the Commercial Code of Ukraine (CC of Ukraine), Laws of Ukraine on Investment and on Foreign Investment. For example, according to the Civil Code of Ukraine (Verkhovna Rada of Ukraine, 2003), the investment policy of the state is one of the main directions of state economic policy aimed at creating the required conditions for the business entities to attract and concentrate the funds for expanded reproduction of fixed assets, mainly in the areas, the development of which is a priority according to the structural and sectoral policies, as well as ensuring an efficient and responsible use and monitoring of resources.

The CC of Ukraine regulates some aspects of foreign investors' activities, but the main directions of investment policy towards the domestic investors remained out of sight of this codified act. The Laws of Ukraine on Investment (Verkhovna Rada of Ukraine, 1991) and on Foreign Investment (Verkhovna Rada of Ukraine, 1996) were adopted in the 1990s. That period was significantly different from the present times in socio-economic and political terms, so these pieces of laws are not able to ensure an adequate public investment policy. Fragmentary changes made to these regulations during the years of Ukraine's independence cannot solve the accumulated problems.

Analyzing the investment policy of Ukraine, it is feasible to highlight the major determinants affecting the investment attractiveness of Ukraine. First, these are the military actions occurring in the eastern regions of Ukraine. This is confirmed by statistics (Ministry of Economic Development and Trade of Ukraine, 2018). For example, in 2013 (the beginning of this process), the FDI accounted for USD 5.5 billion, while in 2014, they reduced significantly to USD 2.5 billion. However, to date, this factor is not determinative, since the employers have adapted to this situation, and it immediately affected the investment inflow in 2016, and foreign direct investment amounted to USD 4.4 billion. At the same time, be aware that this level of investment inflow cannot address the current issues in the economy of Ukraine.

Another, not less important, determinant is the instability of the laws of Ukraine. The frequent changes in tax laws have a particularly negative impact on the investment image of Ukraine. To resolve this issue, the law guaranteeing the stability of the tax laws is needed, but in practice, these provisions are violated continuously.

Another determinant is the corruption, which has become an integral feature of Ukrainian reality and touched all spheres of society. The state adopted a series of long-term policy documents providing for the direction to combat corruption. The laws to combat corruption are frequently adopted. However, the more laws to combat corruption the government adopts, the more sophisticated the corrupt techniques become. The main task of the legislator is to avoid passing the laws containing the provisions, which can be used for corrupt purposes.

The next determinant affecting the investment policy of Ukraine is the ex-

cessive regulation of certain business procedures. To solve this problem, the legislator continuously adopts the regulations aimed at simplifying various business procedures. However, this problem remains unresolved.

The analysis shows that the state investment policy of Ukraine doesn't provide for the formation of effective mechanisms to attract the investments in the national economy. The legislator has no strategy to make Ukraine attractive for investment, but continuously adopts non-systematized laws intended to solve the short-term problems. The state investment policy of Ukraine fails to reflect promptly the changes in the political situation of the country. The laws presented as aimed at simplifying the procedures for investors are formal and don't have a significant impact on investment attraction. The current investment policy of Ukraine is not favorable to attract the investment in the industry. The investment funds are distributed extremely unevenly between cities, mainly focusing on the major regional cities and towns rich in natural resources. The remaining cities are not able to use the investment potential.

A comparative analysis of the investment policy of the EU and Ukraine shows that a number of positive provisions inherent in the investment policy of the EU are not reflected in the investment policy of Ukraine or there is no implementation mechanism for the same. The example of such provisions are given in Table 1.

Table 1.

EU investment policy provisions, which should be borrowed

EU countries	EU investment policy provisions, which should be borrowed	Reflection in the investment policy of Ukraine
Czech Republic	Stable and reliable environment for investors	Stability and reliability are absent
Poland	Local governments regulate the investment on their own	The investment activity is regulated at the state level
Hungary	State investment support program	A similar program exists, but its implementation mechanism is lacking
Germany	Investment incentive system	The investment incentive system is unstable, changing continuously
UK	Single financial incentive system for national and foreign companies	The incentives for national and foreign investors may differ
Italy	Investment stimulation system for depressed regions	The laws provide for incentives for investors in depressed regions, but they are declarative and don't promote the development of depressed regions
France	The policy of reducing the risk of investing money in investment funds	There is no effective mechanism to reduce the risks for investors in investment funds

Source: *complied by authors*

4. Conclusion

1. The current investment policy of Ukraine does not allow attracting investments to implement the sustainable development goals. A systematic nationwide approach to this issue is required, so it is needed to develop a modern investment strategy to increase the investment attractiveness of the state for foreign and domestic investors.

2. The experience in most EU countries shows that an adequate investment policy with the balanced public and investors' interests can provide the investment inflow and a sustainable development of these countries.

3. Considering the basic principles of investment policy development for sustainable development proposed in the UNCTAD report, a National Sustainable Development Paradigm of Ukraine and EU experience regarding the formation and implementation of the investment policy, it can be argued that Ukraine's investment policy in terms of sustainable development must be a dynamic state strategy, involve the state bodies' efforts aimed at attracting investment for sustainable development and establish the rule of law based on predictable, stable and transparent procedures for investors, balanced rights and obligations, effective protection of investors' rights, incentives and facilitation of investments, and take into account the best international practices.

4. Sustainable development requires implementation of the European experience of investment policy development in Ukraine. It is therefore required to consider the positive legal provisions of various EU countries promoting the investment inflows and, consequently, sustainable development in the laws of Ukraine. Specifically, to develop an effective investment model of the state in terms of sustainability, it is advisable to adopt a policy of reducing the risk of investing money in investment funds from France; the system of incentives for investment from Germany; a common system of financial incentives for national and foreign companies from the UK; a program of state investment support from Hungary; a the system of incentives for investment activity in depressed regions from Italy; a mechanism to ensure a stable and reliable environment for investment from the Czech Republic; and provision of autonomy to local governments as regards the investment regulation from Poland.

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P. Liubchenko, Doctor of Law, Professor of the department of State Building, Yaroslav Mudryi National Law University, Ukraine, Kharkiv

M. Shulga, Doctor of Law, Professor, Head of the department of Land and Agrarian Law, Yaroslav Mudryi National Law University, Ukraine, Kharkiv

ON THE QUESTION OF THE IMPLEMENTATION BY THE LOCAL COUNCILS OF OWNERSHIP POWERS IN THE FIELD OF LAND RELATIONS

Abstract. *Land plots owned by territorial communities of villages, settlements, cities, city districts can be combined as objects of their rights with the emergence of their joint ownership and transfer of these objects to the management of district and regional councils, representing the common interest of territorial communities of villages, settlements, cities. At the same time, territorial communities do not lose their ownership rights, but the ownership of district and region does not arise. Only the legal regime of communal property and the authority authorized to manage it changes. District or regional councils become owners instead of the corresponding village, settlements, cities or city districts, depending on which territorial communities unify their property, including land plots.*

Thus, district and regional councils, on the one hand, are defined as managers of unified land plots, which are the objects of the right of joint ownership of territorial communities, and on the other – recognizes their right of joint ownership on land plots of territorial communities.

One of the possible solutions to problems related to the management of unified land plots of communal property is the use of the norms of the civil law institute of trust ownership. This institution is borrowed from Anglo-American law and according to the Civil Code of Ukraine is defined as a special type of property right. Under such a model of legal regulation, the ownership of two subjects comes into ownership on the unified land: nominal owners – territorial communities of villages, settlements and cities (founders of trust

property) and trusted owners – district or regional council. It is the district or regional council that will manage the unified land in the interests and in favour of the territorial communities of villages, settlements and cities as founders of trust ownership.

Key words: *local councils, competence, management, land relations, local self-government, decentralization, trust ownership*

The relevance of the topic of the research is due to the fact that in the conditions of modern reform of land relations in Ukraine and in view of the processes of decentralization of the system of public authority, the problems of realization by the local councils of ownership powers in the sphere of use, protection and reproduction of lands become more important.

Formulation of the problem. It is known that until 1990, in the Ukrainian SSR, as well as in the former Union of SSR in general, there were local councils that belonged to state authorities and were subordinate to lower-level councils in the hierarchy. The activities of local councils were aimed primarily at securing national interests rather than local interests. This approach was implemented in the Land Code of the Ukrainian SSR (1990). According to its Article 5 the disposal of land was carried out by local councils, who provided land into lease and seized it. In the future, the powers of local councils in this area changed depending on the position of the legislator. Thus, for a certain period of time the ownership powers in the field of land relations were exercised by local councils depending on the location of the land plots, for example, only within the settlements.

The analysis of publications shows that the problems of realization by the local councils of ownership rights in the sphere of use, protection and reproduction of lands have not been comprehensively and systematically studied. Only certain aspects of this issue were considered in the works of such domestic and foreign authors as D. V. Busuiok, O. A. Zabelyshenskyi, A. P. Hetman, V. V. Nosik, A. M. Miroshnychenko and others.

The purpose of the article is to investigate the conflicts of legal regulation of ownership competencies of district and regional councils in the field of land resources management, use, protection and reproduction of land, to develop recommendations for improving the legal basis of local councils in the field of land relations.

The main material. As a result of the demarcation of lands of state and communal property, as well as the formation of communal property lands as an object of this right, the status of local councils as subjects of land relations has also undergone significant changes.

The Constitution of Ukraine (Article 142) and the current Land Code of Ukraine (Article 80) recognize territorial communities as the subject of communal ownership of land that directly exercise ownership of land (by holding local referendums, Article 7 of the Law of Ukraine «On local self-government in Ukraine»), or indirectly, that is, through bodies of local self-government.

As we can see, the above legal regulations determine not only the subjective and objective composition of communal land ownership rights, but also the ways of territorial communities exercising their ownership rights. This is due to the fact that in the vast majority of cases territorial communities, such as villages, settlements and cities cannot directly exercise their powers as communal land owners. Therefore, on their behalf, the administrative powers for these lands are exercised by the respective self-government bodies. The systematic analysis of the current legislation shows that the following local councils act as such bodies: 1) village, settlement, city – regarding the lands of territorial communities of villages, settlements and cities; 2) district, region and Verkhovna Rada of the Autonomous Republic of Crimea – concerning the lands of joint ownership of territorial communities. At the same time, according to the legislation, issues related to the regulation of land relations, including the exercise of ownership powers by these bodies, are solved by councils exclusively in plenary meetings.

It is known that the disposal of land provides for the possibility of determining its legal fate by taking appropriate actions, for example, by making decisions by the authorized bodies on the transfer of land to property or the lease or use of civil transactions, namely the purchase, sale, lease of land, etc. The administrative actions of the owners of communal lands are also reduced mainly to the transfer of the land plots to the property, the provision, use, establishment and change of purpose of the land, etc.

The powers of local self-government bodies to transfer land into ownership or use are defined in the Article 122 of the Land Code of Ukraine. From the content of the mentioned norm it follows that village, settlement and city councils transfer land plots to the ownership or use from the lands of communal property of the respective territorial communities for all needs. According to this norm, the Verkhovna Rada of the Crimea, region, district councils transfer land plots for ownership or use from the respective lands of joint ownership of territorial communities also for all needs. Unfortunately, Article 122 of the Land Code of Ukraine does not clearly define the powers of local self-government bodies of the united territorial communities, the emergence of which is caused by the reform processes in the local self-government system. The absence of specific regulations in the Land Code of Ukraine, which directly relate to the powers of the united territorial communities and their local self-government bodies in the field of land relations, creates a number of problems related to the regulation of land relations within the territories of the united territorial communities. It is obvious that there is a need to amend the Land Code of Ukraine, which would determine the powers of local self-government bodies of the united territorial communities.

In modern conditions, there is some interest in the question of the exercise of ownership rights to joint ownership of land plots of territorial communities.

It should be noted that land relations are regulated not only by land but also

by civil legislation. This is especially relevant for public relations concerning the possession, use and disposal of land, which according to the Article 2 of the Land Code of Ukraine form the basis of land relations, i.e. the subject of land law as a separate branch of the legal system of Ukraine.

According to the Article 355 of the Civil Code of Ukraine, property owned by two or more persons (co-owners) belongs to them under joint ownership (joint property). The Land Code of Ukraine (Article 86) stipulates that the land plot may be jointly owned with the determination of the share of each of the participants in the joint ownership (joint partial ownership) or without the determination of the shares of the participants in the joint ownership (joint compatible ownership). Outlining the range of possible subjects of joint ownership, this rule refers to citizens, legal entities, as well as the state, territorial communities. Possible subjects of joint ownership of land plots of territorial communities are separately recognized by district and regional councils.

It is customary to define joint ownership of a land plot as the right of two or more persons for one object, that is, for one land plot. Therefore, in this case it is a question of the multiplicity of subjects of this right and the unity of its object. It should be emphasized that the right of joint ownership on the land plot is precisely the division of the right to the integral object, not the division of the object itself. In this case we are talking about a share in the right, not the right of the share of the object.

Article 83 of the Land Code of Ukraine provides for the possibility of territorial communities of villages, settlements, cities to unite on a contractual basis their land plots of communal property. Such land consolidation is the basis for the emergence of the right of joint partial ownership of territorial communities on the unified land. According to the Article 87 of the Land Code of Ukraine the right of joint partial ownership of the land arises at the voluntary association of the owners of the land owned by them. Only adjacent land plots that share the same purpose and common border can be combined. Obviously, the land of communal property, to which the Article 83 of the Land Code of Ukraine applies: all land within settlements, except land of private and state ownership; Land plots on which buildings, structures, other objects of communal property are located, irrespective of their location, can be difficult to combine, and often not possible, since it is necessary to take into account the requirements for the same purpose of land and location (adjacent areas that share a common border).

The possibility of emergence of a joint partial ownership of a plot of land is linked to the law, including the joint pooling of funds for construction, for example, a joint property located on such a plot of land. In this case the basis of the common ownership rights is according to the Article 120 of the Land Code of Ukraine.

The first version of the Article 83 of the Land Code of Ukraine stipulated that the management of the unified land plots had to be carried out by district and re-

gional councils. The current version of the part 6 of Article 83 of the Land Code of Ukraine stipulates that the management of land plots of united territorial communities is carried out in accordance with the law. This means that the legislator has foreseen the possibility of different options for managing land plots. An example of such regulation is the Law of Ukraine "On cooperation of territorial communities", which sets out the forms and procedure for cooperation of territorial communities. This approach is more in line with Part 2 of Article 142 of the Constitution of Ukraine, which enshrines the right of territorial communities of villages, settlements and cities to unite on a contractual basis objects of communal property, as well as budget funds for joint projects or for joint financing (maintenance) of communal enterprises, organizations and institutions, to create for the relevant authorities and services.

Another circumstance should be noted. Part 3 of Article 86 of the Land Code of Ukraine establishes that subjects of joint ownership of land plots of territorial communities may be district and regional councils. This position of the legislator seems contradictory, since Article 80 of the Land Code of Ukraine, which defines the subjective composition of land ownership and does not name district and regional councils as subjects of land ownership. Thus, district and regional councils, on the one hand, are defined as the subject of management of the unified land plots, which are objects of the joint ownership of territorial communities, and on the other hand, recognizes them as the subjects of the joint ownership of the land plots of territorial communities. Therefore, named councils at the same are time determined both as the landowners and the entities that manage the land plots.

It is appropriate to point out that the Law of Ukraine «On local self-government in Ukraine» defines district and regional councils as bodies of local self-government, representing the common interests of territorial communities of villages, settlements and cities (Article 1) and exercising on their behalf the management of the objects of their joint property that meets the common needs of territorial communities (Part 4 of Article 60). It is the district and regional councils that can manage the trusts of jointly owned partial territorial communities in accordance with the current legislation and taking into account the peculiarities of the legal regime of such land plots. The granting of these councils with ownership rights over land of territorial communities can hardly be considered correct. In this regard, the provisions of Article 122 of the Land Code of Ukraine, which define the powers of the Verkhovna Rada of the Autonomous Republic of Crimea and local self-government bodies for the transfer of land for ownership or use, need adjustment. These councils should have managerial functions, and territorial communities, as co-owners, should not lose their powers to own, use and dispose of the unified land.

At the same time, there is still a question to be clarified: what does land management mean? As it is known, the land law doctrine uses different terms: «land management»; «state management of

land fund»; «state regulation of land relations» and others. Usually these terms are used as synonyms.

Studies of legal relations of public management in the field of land use and protection were carried out in the legal literature of the Soviet era. The definition of this category was debatable.

Management in this area was sometimes regarded as an activity carried out on the basis of property rights and determined the content of the right of exclusive state ownership of land. It was emphasized that such traditional functions as land management and land accounting was previously exercised by the state, which had the status of a sovereign and supreme political body. The Soviet state began to fulfill these functions in relation to nationalized lands as sole owner [1, p. 40].

Subsequently, in the land literature, the right of management was considered as an element of exclusive state ownership of land [2, p. 344].

It is sometimes emphasized that land management cannot be regarded as an additional power of the landowner. In this case, it is about land management and protection, the legal basis of which is not the right of ownership, but the right of territorial rule [3, p. 174].

Management has been considered by some authors in two aspects: as a form of realization of the content of land ownership and its integral component [4, p. 11–13]. O.A. Zabelyshenskyi considered management as a set of powers that covered ownership, use, and disposal. In his view, the lack of the need to construct a fourth power, which constitutes a management right, was obvious [5, p. 9–12]. Finally, management ceased to be classified as constituents of the content of land ownership and began to define it as a form of content of exercising of ownership. Elements of the content of ownership (possession, use and disposal) made up its content. And management was a form of its exercising [6, p. 53–55].

Modern land law doctrine also lacks a systematic view of management as a legal category. A study of literary sources shows that approaches to defining managerial relationships differ. According to A. P. Hetman, the state management in the field of land use, protection and reproduction should be considered as based on the legal organizational activity of the authorized bodies for ensuring the effective and rational use of land and protection within the limits defined by the legislation of Ukraine [7, p. 259].

V.V. Nosik believes that the concept of «land management» is generally not sufficiently substantiated, first of all, in terms of general management theory. In his view, it is possible to manage not the land, not the land resources, but the social relations that arise between the subjects. He proposes to consider the realization of the rights and obligations of the state in the field of land relations by means of the category «state regulation of land relations», the essence of which the author sees is that it is the state itself that should introduce such mandatory rules of conduct that would ensure the stability of the land system, guarantee of rights to land, land protection, law and order in land relations [8, p. 217–220]. A.M. Miroshnychenko, defines management in the

field of land relations as activity with the use of power coercion aimed at ensuring the rational use, protection and restoration of land [9, p. 320–321].

In Soviet times, representatives of the land law science, exploring public management in the field of land use and protection, offered different approaches to the definition of this category. Based on the analysis of the legal literature of the Soviet era, D. V. Busuyok proposes to distinguish at least seven such approaches [10, p. 36–37].

The question of the legal nature of managerial relations in the field of land use and protection was investigated at the doctrinal level by D. V. Busuyok. She came to a well-founded conclusion that the legal relations in the field of land use and protection in a narrow sense it is advisable to understand as the relations arising from the rulemaking and administrative activity of the executive authorities with the purpose of power-organizing influence on the subjects of the land legal relations in order to predict and planning in the field of land use and protection, land monitoring, maintenance of the state land cadastre, standardization and normalization in the field of land use and protection, control in this area [10, p. 31–44].

The term «management» is also used in civil legislation. Civil law scholars understand the term «management» quite broadly and associate it with industrial or purely organizational relations. This term is considered by them as the competence of the owner. Since the civil law of Ukraine refers to the management of property, for example, the ward (Article 72 of the Civil Code), the inheritance (Article 1285 of the Civil Code), by contract (Article 1029 of the Civil Code), this makes the term «management» civil law one. Various suggestions are made regarding the management of the owner of his property. It is proposed to be considered as: a) part of the owner's right of disposal; b) the method of realization by the owner of three other powers; c) a separate jurisdiction that does not coincide with his other competences [11, p. 427].

It is known that the state exercises ownership through state bodies acting on behalf of the state and in its interests. The legislation does not exclude the possibility of exercising state ownership by involving private individuals (natural or legal) and contracting them to manage individual objects on a contractual basis. Thus, the special Law of Ukraine «On the management of state property» [12] not only outlines the range of state bodies authorized to manage state property, but also defines the powers of these bodies. The competence of bodies, which are granted the right to manage state property, includes the creation and termination of state legal entities, control over their activities, granting permission for the alienation of fixed assets of production, etc. Along with the powers that actually belong to the sphere of public law regulation, representatives of civil law also call the civil aspects of such management, in particular, the transfer of ownership of state property in the process of privatization, the leasing of property objects of state property, and more.

Territorial communities, exercising ownership rights, in accordance with the law (Constitution of Ukraine – Articles 142; 143), Law of Ukraine «On local self-government in Ukraine» – Article 1, have extensive rights to manage communal property, including land. They have the right to take any action that does not contradict the law with respect to these objects – to transfer the objects of ownership for temporary or permanent use, to rent, to transfer them in the course of privatization, to be redistributed on a competitive basis between their own legal entities.

Territorial communities of villages, settlements, cities and districts in cities may unite land plots as objects of their rights with the emergence of common property in them and the transfer of these objects to the management of district and regional councils representing the common interests of territorial communities of villages, settlements and cities. In this case, as emphasized in the civil legal literature, territorial communities do not lose their property rights and the ownership of districts and regions does not arise [11, p. 429]. Only the legal regime of communal property and the body empowered to manage it change. This body, instead of the respective village, town, city or district councils in the city, becomes a district or regional council, depending on which territorial communities combine their property, including land. If land plots of territorial communities of villages and settlements are combined, their management is exercised by the district council, and in the case of merging, for example, land plots of territorial communities of cities of regional importance, they are transferred to the management of regional councils.

One of the possible solutions to the problems related to the management of land plots of communal property is to use the rules of the civil law institute of trust property. This institute is borrowed from Anglo-American law and according to Part 2 of Article 316 of the Civil Code of Ukraine is defined as a special kind of property right. In this model of legal regulation of the unified land, the ownership of two entities arises: nominal owners – territorial communities of villages, settlements and cities (founders of the trust property) and the trustee – in the person of a district or regional council. It is the district or regional council that will manage the land in interest and for the benefit of the territorial communities of the villages, towns and cities as the founders of the trust.

However, representatives of civil law science claim that in the absence of a definition of a given right in the domestic law, the construction of a trust property is alien to the law of Ukraine. In their view, the introduction of the right of trust property into the legislation of Ukraine destroys the general principles of legal regulation of property rights as a single, monolithic, absolute right and introduces the concept of split property [11, p. 416].

Conclusion. In our opinion, the management of unified land plots of territorial communities of villages, settlements and cities should be exercised on the title of trust property by district or regional councils with the execution of the rele-

vant property management agreement, which does not entail the transfer of ownership to the property manager (land plots, which are merged), submitted to trust. At the same time, it is worth noting that the proposed version of the regulation of relations concerning the exercise of powers to own, use and dispose of a jointly owned land plot is possible only after amendments to the current legislation of Ukraine. Taking into account the provisions of Part 2 of Article 1033 of the Civil Code of Ukraine, it is necessary at the legislative level to allow district and regional councils to be governors and to manage the objects of joint property of territorial communities of villages, settlements and cities. There also should be provided the possibility of concluding between the respective village, settlement, city councils, on the one hand, and district, regional councils, on the other, a property management agreement, in which to determine the district, regional councils as the trusted owner of the property they own, use and dispose of in accordance with the law and the contract of property management.

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V. Andreitsev, Candidate of Juridical Science, Doctoral Student of the Vasyl Stus Donetsk National University Vinnitsa, Ukraine

SUBJECTS OF COMMERCIAL ACTIVITY CONNECTED WITH DANGEROUS OBJECTS, THEIR COMPOSITION AND TYPES: ASPECTS OF UNIFICATION

Part one of Article 55 of the Commercial Code of Ukraine contains a general definition of subjects of commerce, which recognizes the participants of commercial relations performing commercial activity, exercise commercial competence, that is, a set of rights and obligations, have separate property and are responsible for their obligations within of this property, except the cases provided for by legislation.

On the basis of this definition, it became possible for V.M. Pashkov to doctrinally distinguish the following features of subjects of commerce: organizational unity that allows to independently participate in the commercial turnover, as participants of commercial relations as subjects of commercial relations and other relations in the sphere of commerce; direct commercial activity implementation aimed at fulfilling the general public needs and purposefulness; authorization by commercial competence in the process of commercial activity exercising (commercial personality); legal legitimacy of the subject of commercial activity (licensing of this activity, state registration); personal responsibility for one's own commercial activity[1].

Prof. Znamensky G.L. rightly noted that without being registered according to the legal procedure the person will not be a legal subject of commerce and should be regarded as a shadow structure with all legal consequences[2].

Prof. Vinnyk O.M. specifies certain provisions for the presence of separated property assigned to the respective

[1] Пашков В.М. Загальна характеристика суб'єктів господарських правовідносин. Господарське право. Підручник. За заг. ред. Д.В. Задихайло, В.М. Пашкова, – Х., Право. 2012. – С. 93–118.

[2] Знаменський Г.Л. Коментар до Гл. 6 ГК України. Науково-практичний коментар Господарського кодексу України. За ред. В.К. Мамутова. – К., Юрінком Інтер. 2004. – С. 91–92.

subjects of commerce on different legal titles: property right; full commercial administration right; operational management right; the right of use that is a feature of rental companies; the right of operational commercial usage[1].

In general, it should be noted that the general questions on the concept, types of subjects of commerce and commercial law are quite fully and objectively disclosed in the scientific works of scientists in the field of commercial law, in particular prof. Belyanevich O.A. [2], prof. Vinnyk O.M.[3], prof. Grudnytska S.N.[4], prof. Znamensky G.L.[5], prof. Pashkov V.M.[6], prof. Saniakhmetova N.A.[7], prof. Shcherbina V.S.[8] etc.

The peculiarities of subjects of commerce in particular areas of commercial activity and economics were analyzed by academ. Bobkova A.G.[9], candidate of legal sciences (hereinafter – CLS) Koval I.F.[10], doctor of legal sciences (hereinafter-DLC) Kologoida O.V.[11], prof. Podserkovniy O.P.[12], DLC Smityukh A.V.[13], CLS Trush I.V.[14], prof. Khrimli O.G.[15] etc.

However, in the studies mentioned above, the specific features of commercial subjects associated with high-risk objects were not comprehensively researched.

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Prof. Zeldina O. R. studied special regimes of commerce, paid her attention to the disclosure of the peculiarities of individual regimes in respect of certain regime compliance by the subjects of commerce[1].

The analysis of the special commercial legislation allows to distinguish the peculiarities of the subject composition of commercial activities related to the objects of high risk. In particular, the Law of Ukraine "On High Risk Objects" of January 18, 2001[2] defines subject of commerce as a legal entity or an individual which has or use at least one high risk object, that is an object on which one or more dangerous substances or categories of substances are used, manufactured, processed, stored or transported in an amount equal or exceeding the set threshold masses, as well as other objects, such as those according to the law are under a threat of an emergency man-made and natural disasters.

Therefore, to the subjects of commercial activity, according to the specified law, if it is connected with the objects of high risk can be attributed:

• any legal entity;

• an individual, provided that he/she owns or uses (rents, leases, etc.) at least one high-risk object with quantities of dangerous substances present in different forms of management:

• which are equal or exceed the set masses of these substances;

• according to the law, such high-risk objects include those, that according to the law, pose a real threat of an anthropogenic or natural emergency, that means, cause the termination of commercial activity and the danger for the surrounding population and should be evicted from this territory of negative influence on the environment.

According to the Law of Ukraine "On Environmental Impact Evaluation" of May 23, 2017[3], the environmental impact means any consequences of planned activities for the environment, ***including consequences for the safety of human life*** (stressed by me – V. A.) and their health, flora, fauna, biodiversity, soil, air, water, climate, landscape, natural territories and objects, historical sites and other material objects or the totality of these factors, as well as the consequences for cultural heritage sites or special economic conditions which are caused by such factors changing.

Basing on the requirement of technogenic and ecological safety, which is based on the corresponding risk of commercial activity, subjects of commerce according to the legislation of Ukraine are divided into three main groups:

• high-risk subjects;

• medium risk subjects;

• low risk subjects.

In that case, the classification of subject of commerce to the specified levels of risk in the relevant sphere of state supervision (control) is carried out on the

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[2] Відомості Верховної Ради України. 2001. № 15. – Ст. 73.

[3] Відомості Верховної Ради України. 2017. № 29. – Ст. 315.

basis of the sum of points, accrued by all defined criteria on the established scale:

• 41–100 points – high risk;

• 2–40 points – up to medium risk;

• 0–20 points – to a small degree of risk.

Depending on the mentioned indicators, the order of carrying out planned measures of state supervision (control) is determined: for the first class of commercial subjects such measures should be carried out not more than once for every two years. According to the second class of subjects, planned activities should be carried out at least once for every three years. For the third class of subject of commerce it should be not more than once for every five years[1].

However, the division of commercial subjects according to the level of risk according to the EU law is somewhat different, which in our view requires some correlation of Ukrainian legislation in the context of European integration of commercial legislation.

For example, according to the EU Directive 2012/18 of the European Parliament and the Council of 4 July 2012 "On the control of major-accident hazards involving dangerous substances"[2] subjects of commerce (entities) are classified into two types: a higher level of danger; a lower level of danger.

Therefore, in order to ensure a clear enforcement of the types of commercial subjects by the indicator of the level of danger, it is advisable to harmonize the relevant governmental regulations with the legislation of the European Union.

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[1] Про затвердження критеріїв, за якими оцінюється ступінь ризику від провадження господарської діяльності та визначається періодичність проведення планових заходів державного нагляду (контролю) за додержанням законодавства у сферах охорони праці, промислової безпеки, гігієни праці, поводження з вибуховими матеріалами промислового призначення, зайнятості населення, зайнятості та працевлаштування осіб з інвалідністю, заходів державного гірничого нагляду державною службою з питань праці. Затв. постановою Кабінету Міністрів України від 6 лютого 2019 року №223. // Урядовий кур'єр. 2019. 27 березня №49.

[2] Офіційний вісник Європейського Союзу. 24.7.2012. 1.197. 1–37.

CRIMINAL–LEGAL SCIENCES

V. Shepitko, Doctor of Law, Professor, Head of Criminalistics Department of Yaroslav the Wise National Law University, Academician of the National Academy of Legal Sciences ofUkraine, President of INGO «Criminalists Congress»

THE DEVELOPMENT OF SCIENTIFIC PERCEPTIONS OF CRIMINALISTIC TACTICS AND MODERN TRENDS

Summary. *The article is devoted to the history of the origin of tactical beginnings in the study of a criminal for criminalistic purposes and the further formation of a system of scientific knowledge in crime counteraction. The development of criminal tactics and its transformation into investigative tactics, and then forensic, are traced. The role of forensic tactics in the system of criminalistics knowledge is revealed.*

Attention is paid to changing the subject of criminalistic tactics in modern conditions, the reasons for such changes are identified. The content and structure of criminalistic tactics are due to the need to provide different specialists (investigator, prosecutor, investigating judge, parties to criminal proceedings, court, etc.) with tactical measures. The interrelation of legislative changes, procedural instructions and tactical recommendations has been established. An activity approach to criminalistic tactics is proposed and the necessity of isolating its branches (advocatory, judicial, investigative, inquiry) is substantiated.

The structural elements of criminalistic tactics (tactical technique, tactical combination, tactical operation, etc.) are considered. The role of psychological influence in a tactical tool is determined. Attention is focused on the limits of admissibility and legitimacy of influence for the purposes of criminal proceedings.

Key words. *Criminalistic tactics, investigative tactics, advocatory tactics, judicial tactics, trends in criminalistic tactics, tactical measure, tactical technique, psychological influence, tactical combination, tactical operation.*

Introduction

The history of criminalistic knowledge can be traced back to the emergence and formation of the first types of state and law, when certain rules of conduct, folklaws and laws were established and

violated. A. Hellwig writes that crimes, in other words, illegal acts that are committee under the threat of punishment by the state or other public organizations, have always existed and will continue to exist, even in the ideal "state of the future." As time went on, the range of acts recognized as crimes changed, since the recognition of the extent to which an act violates the interests of society depends entirely on the existing needs and on certain ethical, religious, political and economic views[1] in each particular era.

Specific recommendations of criminalistic nature have been known for a long time and are found in legislative monuments. Back in ancient times, there were attempts to do tests, based on the regular patterns of psychophysiological reactions of the human body (ordeals or testing by "water", testing by "hot iron", "rice", "tam tam", etc.).

The first means of forensic tactics were based on physical and mental abuse of a person. A confession was obtained with the help of torture and torments, the so-called "enhanced interrogation" was applied. Such interrogation was carried out using «scientific and technical" (criminalistic) means – thumbscrews, pigeonholes, a choke pear, a "Spanish boot", rope winches for stretching the body, a pillory, a special wheel, etc. Mental violence was also widely used – "intimidation with words", persistent inquiries, posing questions, demonstrating torture instruments and explaining their purpose, obtaining testimony in the presence of a corpse, etc.

The emergence of forensic tactics is inextricably linked with the history of the development of scientific ideas about criminalistics as a science. The formation of forensic science was based on borrowing data from various sciences (natural, technical, humanitarian, etc.) and was directed to the optimal solution of the tasks of combating crime. In particular, the attempts to use data from various sciences for combatting crime led to the emergence of integrated scientific knowledge described by the term "criminalistics", the use of promising achievements of science and technology in the fight against crime.

From criminal tactics – to criminalistics

As criminalistics was developing as an independent branch of knowledge, tactics were considered as part of the police (criminal) techniques. E. Locard emphasizes that "we will call police technique as the totality of methods borrowed from biology, physics, chemistry and in very small quantities from mathematics (cryptography theorems), which give the opportunity to obtain material evidence and prove a crime. It is striking that this definition encompasses both forensic medicine, forensic chemistry and the psychology of testimony"[2]. P. Liublinsky distinguishes six research areas in criminalistics. One of which was defined as a "study of the methods of committing various crimes and ways of de-

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[2] Локар Э. Руководство по криминалистике / пер. С. В. Познышева и Н. В. Терзиева. Москва: Юрид. изд-во НКЮ СССР, 1941. С. 9.

tecting them (criminal tactics)[1].

The first ideas about criminal tactics were related to the study of the specifics of the professional criminals' activities, the study of secret methods of their communication, methods of committing crimes, information about the behavior of the criminal before and after the commission of a crime, methods of solving crimes, search for criminals and their detention; there were also recommendations in regard to investigatory actions (inspection of the crime scene and discovery of traces, search, interrogation of the accused and witnesses, comparison of handwritings, etc.) [2]. I. Yakimov points out that criminal tactics study criminals and methods of committing crimes in order to work out the best methods for their detection. For such purposes, scientific material, collected and developed with the help of criminal techniques [3], is used.

The formation of criminal (criminalistic) tactics is conditioned by the implementation of psychological knowledge in the sphere of combating crime. The data of psychological science traditionally is included as a source of criminalistic tactics in its genesis. Its special role is determined by the fact that tactical methods are directly or indirectly aimed at a specific object – the human psyche; their development and formation are based on the psychological characteristics of the processes of perception, memory, thinking, certain properties and states: their content and implementation mechanism are conditioned by the need to exert psychological influence in order to establish psychological contact, update the forgotten, expose lies in testimony, etc[4]. In the late 19th and early 20th centuries, the study of the psychology of testimony and the testimony of the accused became an independent trend in the development of criminalistics.

The development of criminalistic tactics is characterized by the irregularity and hyperbolization of its individual parts. At various periods of time there was a fascination with the tactics of criminal activity, the study of the personality and the type of criminal, and then vice versa, a bias towards investigative tactics and the development of methods of investigative activity[5]. There are various terminological approaches to the designation of tactics in the history of criminalistics: criminal tactics, investigative tactics, criminalistic tactics. In this case, there were both terminological and fundamental changes.

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The subject of criminalistic tactics and its transformation

In modern criminalistics, there are various approaches to the definition of the concept of criminalistic tactics. A. Exarлhopulo notes that researchers fairly recently started using the term "forensic tactics" in criminalistics to denote the relevant sphere of science and training course. Previously, this area of criminalistics was called investigative tactics, since the tactical recommendations proposed in it were developed mainly for use in the framework of the preliminary investigation. However, both investigative practice, operational work (forensic intelligence activities) and the work of the judicial authorities required scientific support for taking the optimal course of action[1].

Under these conditions, new definitions of criminalistic tactics were suggested. In particular, there is an opinion that criminalistic tactics are a system of scientific propositions and recommendations developed on the basis of organizing and planning preliminary and judicial investigations, defining the line of conduct for persons, who provide proofs and methods of specific investigative and judicial actions aimed at collecting and investigating evidence to establish the causes and conditions conducive to the commission and concealment of crimes[2]. Other researchers define criminalistic tactics as an area of criminalistics, which includes a system of theoretical principles and practical recommendations for taking the optimal course of actions for persons, who conduct preliminary investigations, as well as judicial review of criminal cases, based on the norms and principles of the criminal procedure[3]. Other authors point out that criminalistic tactics, as a subdiscipline of criminalistics, explores the patterns of organization and implementation of *judicial, investigative and expert activities* in order to develop general scientifically based recommendations to improve its efficiency (*italics added – V. Sh.*) in accordance with the law[4].

The approaches to understanding the nature of criminalistc tactics by individual criminalists are highly controversial and do not correspond to the objective state of affairs. So, S. Lavrukhin, who supports a new model of criminalistics, restricts criminalistic tactics only to algorithms of investigative actions[5]. In our opinion, criminalistic tactics cover not only the problems of optimization of investigative (search) actions. It is much wider in scope; its recommendations are not limited to the tactics of investigation of crimes. Tactics also cannot be lim-

[1] Эксархопуло А. А. Криминалистика: учебник. Санкт-Петербург., 2009. С. 445.

[2] Аверьянова Т. В., Белкин Р. С., Корухов Ю. Г., Россинская Е. Р. Криминалистика: учебник для вузов / под ред. Р. С. Белкина. Москва: Норма, 2003. С. 453.

[3] Якушин С. Ю. Криминалистическая тактика: вопросы теории и практики: учеб. пособие. Казань: Казан. гос. ун-т, 2010. С. 35.

[4] Курс криминалистики: В 3 т. Т. 1. Общетеоретические вопросы. Криминалистическая техника. Криминалистическая тактика / под ред. О. Н. Коршуновой и А. А. Степанова. Санкт-Петербург.: «Юридический центр Пресс», 2004. С. 468.

[5] Лаврухин С. В. Система криминалистики // Государство и право. 1999. № 8. С. 31–36.

ited to the framework of algorithms and programs. Tactics is not always a ready-made scheme, it is dynamic, situationally dependent, individual in each specific case. Tactics should not be reduced to templates only. There is a variety of techniques, approaches, methods matching their types, forms and content[1].

In modern conditions, criminalistic tactics are not limited to the tactics of individual investigative actions. In the system of tactical means, typical tactical (criminalistic) operations hold a special place – the most effective complexes of investigative (search) and covert investigative (search) actions, operational investigative, organizational and other measures in relation to intermediate investigative tasks and investigative situations. The development and implementation of tactical operations should help optimize the detection and investigation of crimes, and also implies the establishment of interconnection and interdependence between individual investigative (investigative) actions, organizational and other activities.

Changes in the legal field, the model of criminal proceedings, the "revision" of traditional institutions of criminal law and procedure affect the content of criminalistic tactics. This problem is of particular relevance due to harmonization of the criminal procedure mechanism and bringing it in line with international and European standards, introducing the adversarial principle of the parties, ensuring the proper balance of public and private interests. Criminalistics (and its subdiscipline, criminalistic tactics) performs, in a sense, the security function of a criminal or other judicial procedure. The development and implementation of criminalistic tools depends on their particular consumer (investigator, investigating judge, prosecutor, barrister, judge, etc.), the form of the criminal process, the procedure for conducting investigative (search) and judicial actions.

A significant change in the functional purpose of the investigator as a procedural figure, the legislative limitation of it only to "accusatory function" is an important argument regarding the feasibility of introducing the provisions of "adversarial" criminalistics. This provision is already quite clearly defined in the Criminal Procedure Code of Ukraine (§ 2 of Chapter 3 of the Criminal Procedure Code of Ukraine). In particular, Art. 40 of the Criminal Procedure Code of Ukraine determines the powers of the investigator as the prosecution. The role of an autonomous and procedurally independent investigator who must make responsible decisions and perform an important function of collecting and documenting evidence (the function of investigation) is currently substantially limited by procedural mechanisms (judicial control, procedural guidance by the prosecutor, etc.). In this regard, the investigator actually becomes a "supporting" procedural figure.

In the modern period there are heated scientific discussions about "criminalistic advocacy", "criminalistic support of the activities of the prosecutor", "criminalistic component of the court". We are

[1] Шепитько В. Ю. Проблемы структурирования криминалистической тактики // Избранные труды. Харьков: Видавнича агенція «Апостіль», 2010. С. 152–155.

convinced that at present it is advisable to raise the question of the formation of "adversary" criminalistics. Criminalistic data should be used not only by the prosecution, but also by professional defense.

The question arises – should criminalistic tactics develop methods, techniques and means for defense activities or does it function only for the prosecution? The answer to this question lies in the purposes of the proceedings and the fundamental nature of the adversary procedure. If a defense lawyer seeks to establish the truth, restore justice and eliminate social conflict, the answer should be positive. Moreover, there is no other scientific knowledge that would provide lawyers with scientific methods, techniques and means, except for criminalistics. The most important areas of criminalistic support of lawyers (barrister) activities should include: 1) criminalistic technical area; 2) criminalistic tactical and organizational and methodical area; 3) forensic and criminalistic area (special knowledge support).

Admissibility and legitimacy of means of criminalistics tactics

The problem of admissibility of the means of influence in criminal proceedings is highly relevant. criminalistic tactics can be considered as a system of permissible means of psychological influence on parties to the criminal procedure (witnesses, victims, suspects, defendants, etc.). Influence has positive qualities and does imply any elements of coercion[1] (unlike to the violence). The use of tactical means (tactical techniques, tactical recommendations, tactical combinations, tactical operations) implies knowledge of the psychological mechanism of their implementation.

Psychological impact forms the basis of forensic tactics. Impact (in psychology) – is a purposeful transfer of movement and information from one participant to another[2]. The term "psychological impact" indicates its target direction – the human psyche. Any communication, any interaction is primarily a psychological impact on the interlocutor[3]. In the context of an interaction, each person performs both the role of the object and the subject of communication. As a subject, he/she cognizes other participants in communication, shows interest in them, and perhaps indifference or hostility. As a subject, who solves a certain task in relation to them, he/she influences them. At the same time, he/she is the object of cognition for all others involved in the interaction. He/she turns out to be an object for their feelings, which they try to influence, affect in some way[4].

What level of impact is admissible in criminal proceedings? The International Covenant on Civil and Political Rights (adopted by resolution 2200 A (XXI) by the UN General Assembly

[1] Коновалова В. Е., Сербулов А. М. Тактика допроса при расследовании преступлений. Киев: РИО МВД УССР, 1978. С. 104.

[2] Психология. Словарь / под общ. ред. А. В. Петровского, М. Г. Ярошевского. – 2-е изд., испр., и доп. Москва: Политиздат, 1990. С. 58.

[3] Доспулов Г. Г. Психология допроса на предварительном следствии. Москва: Юрид. лит., 1976. С. 51.

[4] Бодалев А. А. Психология о личности. Москва: МГУ, 1988. С. 75.

of December 16, 1966) states that no one should be subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 7)[1]. According to Article 5 of the Code of Conduct for Law Enforcement Officials – "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment"[2]. Thus, international documents provide a total prohibition of some forms of impact. In addition, Ukraine of January 26, 1987, ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the UN General Assembly on December 10, 1984 resolution 39/46) [3].

In the history of the law enforcement agencies there were periods when physical influence was permissible in their activities. In particular, the Letter of the Central Committee of the All-Union Communist Party of the Bolsheviks of January 10, 1939 (to the secretaries of the regional committees, territorial committees, the Central Committee of the National Communist Party, the people's commissar of internal affairs, the chiefs of the People's Commissariat for Internal Affairs (NKVD)) said that the use of physical force in the NKVD practice, was acceptable since 1937 with the permission of the Central Committee of the All-Union Communist Party, as an exception, and, moreover, in relation to only such obvious enemies of the people, using humane interrogation methods… In addition, it was stated in the letter that the Central Committee of the Communist Party of the Soviet Union considered that the method of physical influence was to be applied and henceforth, as an exception, in relation to overt and implacable enemies of the people, as an absolutely correct and rational method.

It is significant that only in 1953 an order was issued by the USSR Ministry of Internal Affairs № 0068 of April 4, 1953 to ban torture in the Ministry of Internal Affairs, signed by L. Beria. This order states that it is necessary "1. Strictly prohibit the use of any measures of coercion and physical force against arrested persons in the bodies of the Ministry of Internal Affairs; in the course of the investigation, strictly observe the norms of the criminal procedure code. 2. To eliminate in Lefortovo and internal prisons, organized by the leadership of the former Soviet Ministry

[1] Международный пакт о гражданских и политических правах [Электронный ресурс]. Режим доступа: http: //zakon.rada.gov.ua/laws/show/995_043

[2] Кодекс поведения должностных лиц по поддержанию правопорядка [Электронный ресурс]. Режим доступа: http:/un.org/ru/document/de…/code_of_conduct.shtml

[3] Конвенція проти катувань та інших жорстоких, нелюдських або таких, що принижують гідність, видів поводження і покарання [Электронный ресурс]. Режим доступа: https:/zakon.rada.gov.ua/laws/term

of State Security premises for the use of physical measures against the arrested, and to destroy all the torture instruments»[1].

The criminal and criminal procedural legislation of Ukraine regulates the provisions prohibiting individual means of influence in certain cases. So, p. 1 art. 18 of the Criminal Procedure Code of Ukraine establishes that no one can be forced to admit his/her guilt in committing a criminal offense or forced to give explanations, testimonies that can be used as the basis for suspicion, or a charge of a criminal offense. Article 373 of the Criminal Code of Ukraine provides for criminal liability for coercion to testify (by illegal actions on the part of the person conducting the inquiry or pre-trial investigation), and Art. 127 of the Criminal Code of Ukraine – for torture (intentional infliction of severe physical pain or physical or moral suffering by beating, torture, or other violent actions in order to induce the victim or another person to perform actions contrary to their will).

Amnesty International, an international human rights organization, criticized the state of human rights in Ukraine in 2017–2018, in particular, pointed out the lack of progress in the investigation regarding the so-called "secret prisons" of the Security Service of Ukraine; tortures, inflicted by law enforcement officials. Every year, the ECHR takes dozens of decisions, reiterating the absence of an effective torture investigation system in our country. According to the official data of the health care institutions, in 2017, almost 2,500 people sought medical assistance due to injuries caused by the police. However, before the trial in 2017, only 9 criminal cases were filed under the article "torture" (Article 127 of the Criminal Code of Ukraine) [2].

Tactical means should not be based on violence, threats and other illegal methods. Tactical techniques should be characterised by high moral parameters, which do not allow humiliation of the person or creation of an environment that psychologically distorts the perspective of criminal proceedings[3]. In the special literature, attention was drawn to the problems of the use of illegal influence in the activities of law enforcement bodies in Ukraine[4].

It is important to distinguish between psychological impact and mental abuse. Mental abuse (violence) should not be permissible in the work of law enforcement agencies. Mental abuse should be understood as any act (or omission), which in form, direction and intensity leads to a decrease in human mental activity or, as a result of losing will, de-

[1] Арест Л. П. Берии совпал с Международным Днем борьбы с пытками [Электронный ресурс]. Режим доступа: an-babushkin.livejournal.com/820322.html

[2] Як катують в Україні // Українська правда. 28 вересня 2018 [Електронний ресурс]. Режим доступу: Pravda.com.ua

[3] Коновалова В. Е. Криминалистичекская тактика: состояние и перспективы // Актуальные проблемы уголовного процесса и криминалистики на современном этапе: межвуз. сб. науч. тр. Одесса: Одесский ун-т, 1993. С. 151.

[4] Беца А. Аргумент «третьей степени» // Зеркало недели. 2002. №45 (429). С. 6.

prives him/her of the opportunity to choose a position[1].

In forensic literature, the question of the use of deception in investigative activities is debatable. So, R. S. Belkin notes that deception (subject to certain restrictions) is one of the means to overcome counteraction to investigation. His assumption is a more or less adequate response to the prevalence and sophistication of counteraction, used by perpetrators of the offense as well as their accomplices, including corrupt law enforcement officials[2]. There is another point of view that techniques, fundamentally based on a veiled deception, false information or ignorance of persons, involving magnetic storms, extrasensory sensations, hypnosis, etc. should be excluded from the practical activities of the investigator (judges, prosecutors)[3].

Tactical instruments should be based on various methods of permissible psychological impact. Methods of impact may differ in their intensity. The attitude to techniques and methods based on the use of suggestion – a one-way impact on human consciousness, the transfer of information without its critical understanding – should be hard-headed. Suggestion is carried out with the help of a message, characterized by the unconscious perception of its content[4]. The danger of suggestion lies in the possibility of bona fide errors in the testimony. For these reason suggestive questions (containing elements of suggestion) or use of other tactical methods of interrogation (other investigative (search) actions), based on the mechanisms of suggestion, are banned.

Measures of criminalistic tactics should meet certain criteria (legal, moral, epistemological, psychological, etc.). The tactical means should comply with legal prescriptions, their cognitive value, scientific character, moral acceptability or ethical behavior. It should be pointed out that a tactical tool as a carrier of psychological influence differs from violence (mental or physical) in its positive direction, freedom in the choice of position and form of behavior.

Conclusions

The development of criminalistic tactics is considered in the period of the emergence of criminalistic knowledge and its formation, the transformation of scientific discipline from criminal – to criminalistic tactics. The main trends in the formation of the intellectual core of forensics (its most important section) have been identified. The attention is focused on the fact that regular patterns of psychological science were

[1] Звонков Б. Н. Проблемы этики и психологии расследования // Актуальные проблемы государства и права (Уголовное право, уголовный процесс, криминалистика). Краснодар, 1976. Кн. 1. С. 134.

[2] Белкин Р. С. Криминалистика: проблемы сегодняшнего дня. Злободневные вопросы российской криминалистики. М.: Норма-Инфра Москва, 2001. С. 114; Белкин Р. С. Криминалистика в процессуальной упаковке // Щит и меч. 10.XII. Москва, 1998. С. 5.

[3] Более детально см.: Шепитько В. Ю. Теория криминалистической тактики: монография. Харьков: Гриф, 2002. С. 73, 74.

[4] Велика українська юридична енциклопедія: у 20 т. Т. 20: Криміналістика, судова експертиза, юридична психологія / редкол. В. Ю. Шепітько (голова) та ін. Харків: Право, 2018. С. 495, 496.

used in the formation of criminalistic tactics.

Attempts have been made to study the subject of criminalistic tactics in the new, modern conditions. The factors, which influence changes in the content of criminalistic tactics, have been identified. An idea and arguments were suggested regarding the feasibility of introducing the provisions of "adversarial" criminalistics. The provisions of tactics and its means (tactical methods, tactical recommendations, tactical combinations, tactical operations) should be used by various subjects (investigator, investigating judge, prosecutor, barrister, judge).

Criminalistic tactics are considered as a system of permissible means of psychological influence on participants in the criminal procedure. Attention is drawn to international and European standards on the inadmissibility of illegal exposure in criminal proceedings (torture, physical violence, threats, other forms of mental violence, etc.), legislative prohibitions regarding certain forms of impact. The danger of using means of influence based on the mechanisms of suggestion and deception has been emphasized. A provision on the necessity of bringing forensic tactics into compliance with certain parameters and criteria has been formulated.

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V. Zhuravel, Doctor of Juridical Science, Professor Full Member (Academician) of NALS of Ukraine Chief Scientific Secretary National Academy of Legal Sciences of Ukraine Kharkiv, Ukraine

Y. Kurumisawa, Professor School of Law Waseda University Tokyo, Japan

CRIMINOLOGY IN THE SYSTEM OF SCIENTIFIC KNOWLEDGE

Abstract. *Changes in the social, political and economic development of society contribute to the development of sciences. Criminology is not an exception. The genesis and the current state of scientific views on the nature of inter-scientific links of criminology, the essence of its nature, its place in the system of sciences have been considered. The attention has been focused on the fact that these problems are interrelated and remain ones of the most debatable in the general theory of criminology. It has been established that domestic criminology is developing gradually, has logical change of the system, transits from one state to more perfect state. It has been stated that throughout the history of the development of criminology, different views were expressed regarding its nature. At the same time, not only scientific concepts, but also personal views of individual scientists changed repeatedly. Attention is drawn to the fact that, so far, criminologists have not reached an agreed position on these issues. Criminology implies using of the creative approach, situation conditionality, presence of alternatives when choosing certain ways, means, methods or techniques. It has been established that efficiency of investigation of robberies and brigandage depends on correct determination of an investigative situation; proposing and refining of all possible versions; organisation of interaction of an investigator with operational units. Therefore, she is associated with different sciences. Currently, two basic concepts coexist regarding the nature of criminology, according to one of them criminology is recognised as a special science of law, and according to the other – a science of synthetic (integral) nature. It has been concluded that criminology, based on the subject of the study, its nature and objectives, integrates the knowledge of legal, technical and natural sciences. At the same time, criminology is a unified fusion of knowledge, not an aggregate of sciences, since it is not possible to single out purely legal, natural or*

technical sections, that is, knowledge complexes as any fixed structures, which once again testifies the synthetic (integral) nature of its origin.

Key words: *nature of criminology, differentiation and integration of knowledge, inter-scientific links, legal sciences, synthetic sciences.*

Introduction

The research of specifics of criminology knowledge, finding out its place in the system of sciences and determination of the nature of inter-scientific relations traditionally are the most relevant science-related problems, the solution of which is conditioned be the nature of criminology, the subject of its study, the range of objectives facing this field of knowledge. It should be noted that criminologists have not yet reached agreement on many key issues of the issue under consideration, which once again proves that criminology is a complex and controversial object in its empirical existence that is not subject to a simple generalisation [1].

Therefore, the state of science of criminology, the degree of formation of its general theory, the productivity of the implementation of tasks and functions necessities to intensify research on the nature of this science, the specifics of its inter-scientific relations, the formation of a generalised scientific position on these problems.

Such legal scholars as R. S. Belkin, A. M. Vasiliev, A. I. Winberg, A. F. Volobuev, I. O. Vozhrin, M. V. Danshin, A. V. Dulov, E. P. Ishchenko, Z. I. Kirsanov, N. I. Klymenko, V. Ya. Koldin, O. N. Kolesnichenko, V. O. Konovalova, G. A. Matyusovsky, V. O. Obraztsov, A. R. Rosinskaya, M. V. Saltevsky, P. I. Tarasov-Rodionov, O. G. Filippov, B. M. Shaver, V. Yu. Shepit'ko, O. O. Eysman, O. O. Eksarkhopulo, M. P. Yablokov, I. M. Yakimov and others addressed the essence of the nature of criminology, the specifics of its inter-scientific connections in different years in their studies. At the same time, scientific views on this problematic constantly change, and criminology in different historical periods has been considered natural science, i.e. science of dual (dualistic) nature or jurisprudence. Recently there have been new views on the nature of criminology, for which it belongs to the hybrid sciences, and it is recognised as a science of integral or synthetic nature. By its nature criminology has multidisciplinary inter-scientific connections with a variety of branches of knowledge. At the same time, these links are not limited to purely legal orientation, but related to technical and natural sciences. In this regard, R. S. Belkin noted that the nature of criminology is not a complex of any constituent parts, not mechanical combination of data of various sciences, but deep synthesis, the alloy of knowledge within the subject and content of criminology [2].

2. Materials and methods

Outlined problematic is among researches aimed at solving complicated and topical scientific problems related to figuring out the nature of criminology, its inter-scientific connections, specifics of criminology knowledge, ways and

means of scientific enquiry.

In order to achieve formulated purpose, the author used a set of general scientific and special methods of scientific cognition. Thus, using dialectical and historical methods of scientific learning allowed studying of evolution of scientific views on the nature of criminology, specifics of criminology knowledge, their place in the system of sciences and character of inter-science connections. Method of comparison created an opportunity to show the difference between the criteria and arguments presented by scientists in favour of attributing criminology to technical, natural sciences, law and hybrid sciences, that is, the sciences of synthetic (integral) nature. Such kind of research allowed to speak of an alloy of knowledge within the subject and the content of criminology, rather than about their adaptation, adaptation of criminology to own needs and tasks.

Using formal and logical method and systematic and structural method led to the conclusion that scientific connections of criminology with other branches of knowledge are of unilateral and bilateral character, which made it possible to distinguish and organise these branches of knowledge depending on the nature of the impact and the specifics of interpenetration, integration. Method of analysis provided generalisation of existing theoretical knowledge regarding the nature of criminology basing on the specifics of objects of its knowledge, which have a synthetic essence and study of which is impossible without the involvement of knowledge from various scientific fields.

3. Results and discussion

3.1 Scientific conceptions regarding the nature of criminology

Accumulation of scientific knowledge has led to the fact that criminology has outgrown its potential and gone beyond the bounds of "police science" or "science of crime investigation." As V. Yu. Shepit`ko emphasises, "means, methods and techniques of criminology are successfully used in other spheres (operational search, judicial, prosecutorial, expert, advocacy), or allow establishing facts laying beyond criminal law phenomena (use of criminology in civil, arbitration (economic) or administrative processes) "[3]. In this regard, V. G. Goncharenko and V. S. Kuzmichov considered criminology as an interdisciplinary legal applied science [4; 5].

Such scientists as O. Yu. Golovin, A. F. Volobuev, V. O. Konovalov, G. A. Matusovsky, A. S. Podsbyyakin, O G. Filippov, V. Yu. Shepit`ko, M. P. Yablokov and some others support the view that criminology is legal science of applied character or special legal discipline. In particular, M. P. Yablokov considers criminology as special legal science of applied nature [6], and O. G. Filippov stresses that the use of certain provisions of other sciences by criminology, including natural and technical ones, can in no way call into question its legal nature [7].

The supporters of the considered scientific concept in support of their position point to such arguments: a) criminology is legal science because its subject and objects of cognition are in the field of legal phenomena; b) criminology

of legal science because its service function, tasks it solves are related to the legal sphere of activity of state bodies, to legal proceedings (investigation, trial); c) all recommendations developed by criminology for practice, are of strictly expressed legal nature, based on the law corresponding to its spirit and letter; they are designed in order to provide scientific assistance to investigators and to contribute to judicial authorities in finding the truth in a case; d) the legal nature of criminology manifests itself in the normative and legal function inherent in it as a branch of jurisprudence, under the influence of which many scientific recommendations of criminology are introduced in the content of legal norms; e) criminology is associated with many sciences – both social and technical – but these links are mostly individual and local, while the basis for criminology is law, jurisprudence, investigative and judicial practice [8]; e) historically, criminology was born within the limits of the legal and criminal-procedural science [9]; g) recommendations of criminology are addressed to entities whose activities are solely legal, has legal regulation and nature; h) the future of criminology is only a legal application [1].

In view of the above, the special literature correctly drew attention to the fact that the essence of the legal nature of criminology is mainly due to the legal scope of its knowledge and the necessity to respect the law in the activities for the disclosure and investigation of criminal manifestations. At the same time, it is necessary to clearly delineate the scope of criminology knowledge and the source (nature) of its origin. In this regard, it is advisable to consider the nature of the science of criminology basing on the specifics of the objects of its knowledge. These objects have a synthetic essence, and their study is impossible without the involvement of knowledge from various scientific fields [10].

Analysing this state of affairs, R. S. Belkin mentioned that arguments of scientists in favour of the legal nature of criminology are controversial and do not give grounds for an unambiguous conclusion. In support of his opinion, he gives the following arguments:

1. Not the whole subject and not all objects of cognition of criminology are in the field of legal phenomena. For example, not all patterns of the mechanism of crime, criminal activity and especially occurrence of information about a crime and its members are in the field of legal phenomena. Some of them are patterns of any activity in general, patterns of the process of reflection, which are general in nature and do not depend on the scope of their actions, manifestations.

2. Criminology cannot be regarded as a legal science only in view of the fact that its official function and tasks, which it solves, belong to the legal field of activity of state bodies and to legal processes.

3. Not all recommendations developed by criminology for practice are of legal character, based on law, correspond to its spirit and letter.

4. Is it possible to consider the connection of criminology with other, non-legal sciences, "individual and local",

and law, legal science, law enforcement practice – its main "fertile ground"?

That is why, in the opinion of R. S. Belkin, it is necessary to speak of an alloy of knowledge within the subject and the content of criminology, rather than about adaptation of data of other sciences by criminology, that is integral nature of criminology [9].

This view of R. S. Belkin was supported by T. V. Averyanova, O. Kh. Volynsky, Yu. G. Korukhov, V. P. Lavrov, O. R. Rosinskaya, who emphasised that it is impossible to distinguish in criminology purely legal and natural science or technical sections, knowledge complexes as some fixed structures. It is the alloy of knowledge but not totality of sciences; it is the science of the synthetic nature but not complex (since complexing implies combining of certain knowledge, not merging). Possibilities of criminology in solving legal problems directly depend on its ability to accumulate achievements of other sciences and provide their use for the disclosure and investigation of crimes [11; 12; 13].

Change of scientific paradigm regarding the nature of criminology has been perceived ambiguously by criminologists. Thus, in the opinion of O. Yu. Golovin, non-legal nature of criminology largely changes the perception of its system, and therefore such views of scientists cause serious objections [14]. O. O. Eksarkhopulo is convinced that the synthetic nature of criminology knowledge should not be considered as a ground for changing the place of criminology in the system of sciences. It must still be classified as the legal science [15].

Consequently, at the present time, two basic scientific concepts concerning the essence of the nature of criminology coexist: 1) the well-established, traditional, in which criminology is a special legal science; 2) innovative, which regards criminology as a science of synthetic (integral) character that "fully corresponds to the current trends in the transition from disciplinary research methods to problem-oriented, the use of ideas and methods of some sciences by others, the formation of new branches of knowledge, the creation of a universal scientific picture "[16].

3.2 Specifics of inter-scientific connections of criminology with other branches of knowledge

The multidimensional character of criminology, the diversity of its inter-scientific relations, the specifics of their implementation allows concluding that the scientific connections of criminology with other branches of knowledge are of two varieties: (1) unilateral is when criminological research uses data of other branches of knowledge without retroactive effect on the development of the latter criminology, that is, it refers only to the relationship of application; (2) bilateral is when data of other sciences find their transformation not only in criminological research, but also achievement of criminology has a reverse effect on these sciences, that is, it refers to the interpenetration, integration of scientific knowledge.

The first variety include the inter-scientific connections of criminology with philosophy, logic, ethics, psychology, sociology, science of management,

prognostication, computer science, as well as such natural and technical sciences as physics, chemistry, biology, physiology, anthropology and others. As the special literature noted, philosophical categories contribute to understanding of the place and role of the scientific fact in the process of knowing the truth, they reflect the new, unknown to science connections and relations between the phenomena that science studies. Without addressing philosophical categories, it is impossible to build such criminological theories as forensic identification, diagnostics, causality and others [9]. In particular, the theory of forensic identification is based on two fundamental notions – equation and similarity, the mechanism of trace formation – on a feature and property, the formation of the expert's conclusion – on the probability and reliability. In this case, criminology can serve for philosophy only as a practical application, illustration of its theoretical developments.

Criminology uses also methods of formal logic in its researches [17] – analysis and synthesis, deduction and induction, analogy, generalisation, modelling, abstraction and others, in order to form recommendations concerning investigative, court, expert and operative and search activity on building and testing versions, reconstruction of a situation and circumstances of an event. In addition, technical means, tactical techniques and methodological recommendation developed within criminology should meet criteria of ethic, i.e. to be moral [18;19].

The special field of relations of criminology is psychology – general and forensic. Data of this branch of knowledge is actively used in development of tactical and forensic techniques and recommendations. Some of them are the basis of formed criminological doctrines (theories), for example, doctrine on versions [20], the method of committing a crime and the corresponding to it skills [21]. V. Yu. Shepit`ko systemised tactical techniques on the basis of application of certain psychological criteria [22]. Psychological positions are also basis to form a tactic of conduct of certain investigative (search) actions, solving mental tasks faced by an investigator, a judge, an expert, a staff member of the operational units, and the establishment of psychological contact between participants in criminal proceedings.

Criminology uses sociological methods mostly to collect and process empirical data. Among the methods for collecting primary information, widespread methods are: the generalisation of materials of criminal cases (criminal proceedings), interviewing practitioners (written (questionnaires) and oral (interviewing), content analysis (text research). To establish statistical connections between objects that is researched correlation analysis is used. It is about the establishment of correlations between the elements of forensic characteristics of certain types of criminal offences and the construction on this basis of typical versions, serving as appropriate benchmark for investigators in the implementation of a specific criminal proceeding [23].

Criminology is closely tied to science of management, the provisions of which are implemented in the formulation of

recommendations for the organisation of investigations of criminal acts in general and the scientific organisation of the work of the investigator [24]. In particular, in modern conditions, it is impossible to organise an investigation qualitatively and effectively, especially an investigation of multi-episode criminal procedures, without the use of managerial principles and approaches to solving these problems. In addition, the scientific organisation of work of an investigator is a key to the success of pre-trial investigation, saving time and procedural resources, especially during the period of adaptation of investigators to the substantially changed domestic criminal procedural doctrine.

Prognostics and informatics are relatively new fields of inter-scientific relations of criminology. Prognostics is the methodological foundation for the formation of criminological theory of forecasting, is considered as the basic, maternal science for the implementation of branch forecasting in this area of knowledge. Principles and methods of prognostics is determinative to forecast the development of science of criminology and its research objects in the future [25]. Criminology does not stand aside from the process of informatisation and application of the latest information technologies in its research, which are either specially designed or adapted to the needs and tasks of criminology. For example, in order to ensure the exchange of information between the registration arrays of various types of accounting through the use of computer technology, development of effective information retrieval, information and reference, information modelling and information and consulting systems [26–29].

Close relationships with natural and technical sciences are inherent in criminology. And this is no accident, because one of the functions of criminology is transformation, creative processing and adaptation of the achievements of these branches of knowledge in order to create new scientific product. Thus, basing on fundamental researches of physics, chemistry, microbiology, and mechanics, the such approaches of criminology as optical, ultraviolet, infrared, luminescent, electron, X-ray, atomic microscopy operate, such as emission, spectral, laser, chromatographic, titrimetric analysis, etc. are used. According to the figurative statement of R. S. Belkin, this is a real manifestation of the "expansion" of natural and technical sciences in judicial proceedings [31]. And the main means of ensuring the implementation of this expansion, the direct channel of penetration of information from these areas of knowledge to criminal proceedings is criminology.

Integrative connections of criminology are manifested primarily with the sciences of the criminal legal cycle – criminal law, criminal process, criminology, the theory of operative and investigative activities, as well as such special branches of knowledge as forensic medicine, forensic psychiatry, forensic statistics, expert analysis. The sciences of the criminal legal cycle share the dame research object that is criminal acts. However, each one of them researches this object from own perspective, that is,

has own subject of study, and it is known that the subject and object of research are different concepts and cannot be equated. The philosophical literature notes that several subjects may correspond to the same object, since the nature of the research subject depends not only on what object it reflects, but also on why this object was formed, for solving which problem. The subject can be said to be a special aspect of a real object [32].

The above provisions determine the nature of inter-scientific relations between the studied branches of knowledge. So, for criminology, the concept of crime, the features of its composition, developed in criminal law, is axiomatic. Principles of criminal law classification of crimes serve as a methodological basis for the construction of a forensic classification of them. In identifying the grounds for delimiting the criminal legal and forensic classification of crimes, it should be taken into account that the integration of the sciences of the criminal cycle affects the corresponding unity of their conceptual apparatus, theoretical concepts, problems and ways of their solution. In this regard, criminology organically absorbed a certain amount of knowledge of criminal law nature, which, of course, was useful for its theoretical and applied developments. At the same time, solving specific problems, which are faced by criminology, requires the development of a purely criminological classification of crimes. In addition, criminology on the basis of the study of forensic practice draws the attention of lawyers to new ways and means of criminal activity, which are appropriate to determine as qualifying signs, and in some cases, criminologists even point to completely new manifestations of criminal activity that have not yet found their legislative settlement. (for example, raiding). That is why criminology is called the doctrine of the realities of criminal law [33].

The mutual task of criminalistics and criminology is the development of means of counteracting a criminal offence. The difference is in the scale of this activity. If criminology determines the state, dynamics, forms and causes of crime and measures for its prevention, then criminology develops technical means of prevention, as well as recommendations to the investigator in relation to the prevention of specific types of criminal manifestations. At the same time, it is worth mentioning that intensity of connections between criminology and criminalistics in this aspect recently has begun decreasing in connection with the exclusion of the functional duties of the investigator, prosecutor, judge for the implementation of preventive measures from the current criminal procedural law. If the CPC of 1960 required the pre-trial investigation and trial to establish the causes and conditions that contributed to the commission of the crime (Article 23 of the 1960 CPC) and to make a corresponding submission on their elimination based on these data (Article 231 of the 1960 CPC), then, according to the current CPC, such obligations to the participants in criminal proceedings are not foreseen at all. For some reason, the legislator referred them to the category of secondary and forgot to predict not only in the subject of proof

(Article 91 of the CPC), but also in a separate article, which in our opinion is erroneous and needs its normalisation.

However, the current procedural legislation, on the contrary, contributes to implementation of inter-scientific connections of criminology with the theory of operative and search activity implying the procedure of covert investigative actions (Chapter 21 of the CPC). This expands the sphere of application of tactical and criminological techniques and recommendations and disseminates them to secret investigative (search) actions. The development of such methods and recommendations should take place taking into account the provisions of the theory of operational and investigative activities.

Traditionally, the tightest inter-scientific connection of criminology is manifested with criminal procedural law, because criminology is considered to be the praxeology of the criminal process. "The criminal process, emphasises Y. P. Ishchenko, offers normative models, sets certain limits, but does not reveal how this should be done. The process defines the most general form, certain abstractions. While criminology fills them with the necessary content" [34]. In this case, the technical means, tactical techniques and methodical recommendations developed by criminology must comply with the rules of the current Code of Criminal Procedure. In turn, scientific criminological concepts and practical recommendations contribute not only to optimising the procedure of pre-trial investigation and judicial proceedings, but also to improve criminal procedural law. On the contrary, gaps in the legislation, the unconstitutionality of certain provisions, the presence of contradictions negatively affect the development of the necessary criminological means, techniques and recommendations.

Unfortunately, it is necessary to state that the current Criminal Procedure Code of Ukraine is not devoid of certain disadvantages, controversial provisions that do not facilitate the implementation of inter-scientific relations of the criminal process with criminology.

Conclusions

For today, there are legal and integral paradigms concerning the nature of criminology. As it is seen, the coexistence of these paradigms is to a certain extent forced; and it is explained, on the one hand, by a purely pragmatic motivation to attribute criminology to the legal sciences, but on the other hand, by that now there are well-known division of sciences into the natural, technical and humanitarian, but there is no such a kind of science as synthetic science (integral) character. But this state of affairs, in our opinion, is temporary and in the future, in the conditions of successful formation of the class of integral sciences, it will find its solution in favour of the latter. In the work it is established that psychology is a special field of criminology connections. Because it allows developing tactical and criminological techniques and recommendations. Data of these sciences contributes to development of criminological technical means, tactical techniques and methods of investigation of a certain types of a crime related to the as-

signment of cause of death, time of death, the severity of bodily injuries, the presence of mental illnesses, which prevent a person from correctly understanding the significance of his/her actions, managing them and predicting their consequences (medical element of insanity), significant deviations in the healthy psyche, intellectual age of a person, the presence of a state of a physiological affection or its simulation, and solving of many other issues of great importance to establish the truth. At the same time, criminology not only uses data of these sciences, but also helps to determine focuses of relevant forensic, forensic psychiatric and forensic psychological research. It has been established that criminology has close relations with the science of management and methods of formal logic. Since the scientific organisation of a work of an investigator is a guarantee of the success of the pre-trial investigation.

Criminology is also connected with such legal sciences as civil and civil procedural law, administrative and administrative procedural law, criminal executive law, etc. Criminology has already gone beyond the cycle of criminal science. Recommendations of criminology are essential not only for the investigation of crimes. This also concerns the possibility of using special knowledge in a civil or administrative process, conducting various court actions, full fixation of court proceedings by technical means, etc.

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M. Panov, Doctor of Law, Professor, Head of the Department of Criminal Law No. 2, Yaroslav Mudriy National Law University, Member of the National Academy of Legal Sciences of Ukraine, Ukraine, Kharkiv

ON CORRELATION AND INTERRELATION OF CONCEPTUAL APPARATUSES OF THE CRIMINAL CYCLE SCIENCES

Abstract*. The paper deals with the issues of correlation and interrelation of conceptual apparatuses of criminal cycle sciences: criminal, criminal procedural, criminal enforcement law, criminology, forensic science, etc., based on methods of differentiation and integration of sciences. The method of differentiation enables us to divide the corresponding branches of knowledge into certain groups and to consider them as independent sciences; the method of integration illuminates the processes of convergence and interaction of sciences, their interpenetration on the level of separate elements of conceptual apparatuses: legal categories, concepts of legal terminology. We distinguish a class of «interdisciplinary» categories of notions and terms, which are the subject of criminal law science and are used by all sciences of the criminal cycle. The rationale is given for the necessity of their interpretation in all cases on the basis of the content and volume enshrined in them mainly by criminal law science. Other categories, concepts, and terms that are the subject of the applied sciences of the criminal cycle should be considered in all cases of their use, based on the interpretations provided by the relevant science that develops them.*

Key words: *conceptual apparatus of sciences of the criminal cycle, legal categories, legal concepts, legal terminology, differentiation of sciences, integration of sciences, interdisciplinary categories, concepts, terms.*

Subject topicality. The problem of conceptual apparatuses of sciences of a criminal cycle, especially their correlation and interrelation, is underdeveloped. Meanwhile, the literature argues that the same legal categories, concepts, and terms that make up the content of the conceptual apparatus of most (or all) sciences of the criminal cycle should be interpreted in a different way and each of these sciences can develop «own» categories, concepts and terminology.

This approach – albeit too controversial – is significant both for legal science and for solving practical issues in lawmaking and law enforcement. These circumstances led to the selection of the theme of correlation and interrelation of the conceptual apparatus of the criminal cycle sciences.

The aim of the article is to investigate the correlation and interrelation of conceptual apparatuses of criminal cycle sciences on the level of legal categories, notions and legal terminology, to develop and justify the rules of interpretation of the same («interdisciplinary») categories, concepts and terms used by different criminal cycle sciences and branches of legislation.

The criminal cycle (block) sciences in the literature include criminal law, criminal procedure law, criminal enforcement law, criminology, forensic science, and others. (1, p. 77–79). These legal sciences are united mainly by the only generalized subject-pragmatic problem concerned – the problem of combating crime, founded on the intersectoral fundamental scientific basis – «general theory of combating crime», which substantiates a specific and very important complex approach to the activities of state and society in this extremely important area (2, pp. 170–223). However, each of these sciences has significant differences from the others, which can be traced at different levels – at the level of research subjects, content, tasks, volume and limits of the sciences, their conceptual apparatus, etc. The basis of this approach is the *method of differentiation of sciences* (from the lat. differentia – division, dissection of the whole into qualitatively different parts), which is fundamental in science when dividing scientific knowledge into certain groups (types) and dividing certain types of sciences (3, p.241). The application of this method gives grounds to state that scientific knowledge in the field of the criminal cycle (criminal law, criminal procedure law, criminology, forensic science, etc.) is a group of independent, relatively isolated areas of knowledge, which, from the standpoint of their disciplinary organization, should be recognized as independent sciences.

Notional apparatuses of these sciences play a special role in the differentiation of criminal cycle sciences. The term «conceptual apparatus of science» represents a collective concept, the structure of which includes its constituent elements: legal categories, concepts, and legal terminology, which constitute closely related and interacting legal logical-linguistic entities, determined by the subject of the corresponding science (4, P. 205–222).

The development of a system of categories, concepts and legal terminology, the clarification of their interrelation and interaction and, at the same time, their relative isolation, the establishment of integrative links with the conceptual apparatus of related branches of knowledge are the most important tasks and functions of each of the legal sciences. The more perfect their conceptual apparatuses, the more developed are the categories, concepts, and corresponding terminology, the more thoroughly clarified their interrelation and correlation with

the system of elements of conceptual apparatuses of other sciences, the more perfect is the scientific «toolkit» of the corresponding science and its disciplinary organization, the more fully and accurately reflects the essence of the phenomena of objective reality, which allows to master these phenomena more successfully and positively influence them (5, P. 3–8).

Accordingly, each of the sciences of the criminal cycle in its content has a system of categories, notions, and terms, which are objectively determined by the historically established subject of science and belonging directly to this science. Thus, in criminal law, these can include, for example, the categories of «crime», «elements of crime», «criminal liability», «guilt», «subject of crime», «punishment», some concepts of specific crimes provided for by the norms of the Special Part of the Criminal Code, etc.; in criminology – «crime», «causes of crime», «conditions contributing to the commission of a crime», «prevention of crime», «personality of a criminal», etc. In criminal proceedings: «state prosecution,» «accused,» «pre-trial investigation,» «victim,» «sentence,» «criminal proceedings,» «evidence,» etc.; in criminal forensics: «forensic tactics,» «forensic technology,» «forensic identification,» «traceology,» «investigation tactics,» «methods of investigation of certain types of crimes,» etc. These categories, concepts, and terms in the system of other logical-linguistic elements of the said sciences, in their unity and interaction, form the conceptual apparatus of each of the sciences, which allows, in particular, to separate, differentiate and identify the corresponding branches of knowledge as independent sciences.

In addition to the differentiation of the sciences of the criminal cycle, their *integration* is also evident (from the lat. Integration – consolidation of separate parts into a whole), caused primarily by the fact that these sciences study separate aspects of one and the same common (generalized) object for them – crime and measures applied by the state and society in the struggle against it. The most complete and prominent integration processes are manifested in the fact that all these sciences quite often operate with the same categories, notions, and terms, such as «crime», «constituent elements of a crime», «socially dangerous act», «guilt», «motive», «goal», «mode of committing a crime», «punishment», and notions of specific elements of crimes: «murder», «theft», «robbery», «plunder», «rape», etc. Moreover, all sciences of the criminal cycle include these categories, notions, and terms in the content of their conceptual apparatus and are used as logical and legal tools for solving the tasks each of them faces. Therefore, categories, notions, and terms of this kind acquire the significance of «*interdisciplinary*» or «*intersectoral*». They certainly qualitatively supplement the system of categories, notions, and terms of each of the sciences of the criminal cycle, make their conceptual apparatuses more complete, capacious, logically finalized. Taking into account the fact that the mentioned «interdisciplinary» notions are used by all the mentioned sciences, they can be referred to as the

category of «regional» notions (6, P. 27).

Nevertheless, it should be noted that the majority of «interdisciplinary» categories, concepts and terms: «crime», «socially dangerous act», «corpus delicti», «guilt», «motive», etc. objectively reflect various aspects of such social and legal phenomena of social and legal reality as crime, punishment or criminal liability, which are the subject of research directly by the criminal law science (7, P. 539–543). Therefore, these elements of the conceptual apparatus are, first of all, the subject of criminal law science, which should be primarily engaged in their analysis and study of phenomena and processes of real life reflected by these concepts. And this does not mean that other sciences of the criminal cycle can not develop the said categories, concepts, and terms. The latter, as noted, in some cases, are also part of the conceptual apparatus of criminology, criminal procedure, forensics and other sciences of the criminal cycle and, consequently, can be the subject of their study, because, with the unity of the subject of study, different sciences can establish different tasks and solve them with different, specific methods, techniques and obtain different results.

But the extent and limits of the study and use of «interdisciplinary» categories, concepts and terminology by the said sciences, as well as the meaning of the conclusions of each of them for other related branches of knowledge, are quite uneven. This is explained by the fact that the mentioned sciences, being in close interrelation, at the same time are in different ways related to each other. The different relationships between these sciences are the result, in particular, of the fact that some of them are fundamental sciences while others are applied sciences. Jurisprudence is known to have a subdivision of sciences and branches of law on fundamental and applied sciences (8, P. 20–21; 9, P. 28–33). *Fundamental* sciences reveal the essence and patterns of development of the phenomena of the objective world and answer the question: «what is cognized?» And «how will it be discovered?» (8, P. 20–21; 9, P. 28–33). The *applied* sciences solve the problems of using the obtained scientific knowledge about the objective reality to solve specific practical problems and answer the question: «for what purpose it is learned?» (10, P. 45–53). Fundamental legal sciences are always primary, they serve as a framework for a group of other sciences (family of sciences), as they contain such a reference (constituent) logical and legal «material», which underlies the applied sciences. For this reason, the sciences that study the problem of fighting crime should obviously also be divided into fundamental and applied sciences.

It follows from the above that the basis of all the sciences of the criminal cycle is the science of criminal law, the task, and subject of which is the cognition of crime, punishment, criminal liability, criminal law as phenomena of social and legal reality, clarification of their essential features, legal forms of manifestation, development of measures concerning the correct application of the relevant legislation and its improvement, etc. Other sciences of this cycle, being in-

extricably linked with criminal law, have the purpose to ensure the implementation of the basic provisions and regulations that are developed by this fundamental science. Thus, the link between criminal law and criminology is inseparable, which is of genetic nature, since criminology as an independent branch of legal science has emerged from the criminal law, it is based on the developed science of criminal law problems of crime, the composition of specific crimes, punishment, measures to combat crime in general. Hence, criminal law is certainly a basic (fundamental and starting) science for criminology (11, P. 70, 12, P. 58–67). At the same time, criminology, in its turn, enriches criminal law with a wide range of knowledge about crime, its causes, the effectiveness of various social and preventive measures in combating it, etc. (13, P. 14–61). So there is a mutual real influence of each of the sciences on the other (interaction of sciences).

Substantive criminal law, which is the subject of study of the science of criminal law, is the regulatory framework for the emergence of criminal procedural relations. The latter, having their own meaning, serve as a legal form of establishing the existence of elements of a crime in the actions of a person found guilty of committing a socially dangerous act, as a mandatory condition of criminal liability and the imposition of an appropriate punishment, which is determined by the norms of criminal law. It follows that criminal procedural relations represent a form in which criminal legal relations are exercised (14, P. 106–107). On this basis, the question of the relationship between the norms of criminal law and criminal procedure, which has long been considered in legal science as a relationship of form and content in their dialectical unity, should also be solved: the same spirit should revive the judicial process and laws, because the process is only a form of law life, therefore, a manifestation of its inner being (15, P. 158). Therefore, substantive criminal law is the content of the corresponding criminal procedural form. The law of criminal procedure ensures the implementation of the norms of criminal law and therefore has an auxiliary, «proprietary» character in relation to the norms of substantive law (16, P. 84). It follows that the science of criminal procedure, the subject of which is the norms of criminal procedure law, while preserving the basic features of fundamentality, has an «auxiliary», «proprietary» nature in relation to the science of criminal law, and therefore in this ratio of sciences performs the functions of applied science.

Forensics is also closely interconnected with criminal law and process sciences. This relationship is also of a genetic nature, as forensic science originates primarily in the theory of criminal law and criminal process, where the formation of its foundations took place. The impact of substantive and procedural law is therefore extremely strong in forensics. The norms of criminal law, as noted by A. A. Piontkovskyi, – are of decisive importance for understanding the content of objective truth in criminal proceedings and the range of circumstances that should be established in

each specific case (17, P. 11). The concept of the elements of crime, which is central to the science of criminal law, is essential in the construction of methods of crime investigation. The attributes of specific elements ultimately determine the subject matter of an investigation in each case (18, P. 31). The relationship between criminology and the science of criminal proceedings is no less close. The data of procedural science, in particular, the general provisions of the theory of evidence, as indicated by G. M. Minkovskyi and A. R. Ratynov, are, of course, the starting points and determinants for the science that develops detailed recommendations for the collection and investigation of evidence (19, P. 147). Therefore, a number of provisions of forensics are based on the theory of the criminal process, for example, forensic tactics, recommendations on the investigation planning, execution of investigative actions, etc. The solution of questions of forensic techniques and tactics is impossible without the application and indispensable observance of the norms of criminal procedure, just as the application of most norms of criminal procedure requires a wide and optimal use of forensic knowledge. The most important task of forensics is to ensure the correct and precise application of criminal law and process norms. In this regard, it seems reasonable to assert that forensics is an applied science in relation to criminal law and criminal procedure and, consequently, in relation to criminal science and criminal procedure science (20, P. 87–89; 21, P. 20–23).

Therefore, the science of criminal law, combining the features of fundamental and applied knowledge, is a fundamental science in relation to criminology, criminal procedure, forensic science, and other related sciences, as well as a theoretical and normative basis for all sciences of the criminal cycle. Consequently, these sciences are not only in the relationship of *coordination*, but also in the relationship of subjugation, that is, *subordination*, and the determining value in their subordinate relationship is the science of criminal law. So, there are grounds to assert that in cases when other criminal law sciences of the criminal cycle use the provisions of the criminal law science, the latter, while developing matters arising from the subject of their study, and at the same time relate to the criminal law, and must proceed from the basic provisions of theoretical developments of the criminal law science. With regard to the question under consideration, this means that these sciences, using categories, concepts, and terminology developed by the criminal law science and belonging to the class of «interdisciplinary», use them generally as data. Thus, the categories (cardinal concepts) «crime», «elements of a crime», «guilt», «complicity in a crime», «subject of a crime», «unfinished crime», etc., the wording of certain elements of crime in criminology, as indicated by M. I. Kovalyov, draws from the criminal legislation and criminal law theory and cannot interpret them arbitrarily (22, P. 58). The criminal-legal theory and the criminal law based on it, O. M. Dzhuzha considers, give legal characteristics

to crimes and criminals (to subjects of a crime – M. P.) that is obligatory for criminology (23, P. 361). In the opinion of V. I. Kaminska, when a criminal-legal notion is used in procedural law, it cannot be assigned a different meaning in comparison with criminal law (16, P. 98–99). Just as R. S. Bielkin wrote, forensic science does not develop issues of criminal law but takes ready-made solutions of this science (24, P. 38).

The stated above gives grounds to assert that interdisciplinary categories, concepts, and terminology developed by criminal law science and used by other related sciences are of a rather high level of abstraction. They have basic essential features that define the essence of phenomena that are reflected in these concepts and therefore are not created, but are used («accumulated», «assimilated») by criminology, criminal process, forensics as data (existing). Therefore, these sciences, such as those that are in a relationship of subordination with the criminal law science, when using categories, concepts and terms belonging to the class of interdisciplinary and are the subject of criminal law science, should be based on the content and scope that the criminal law science puts into them.

However, the proposed approach is not widely shared among scholars. Some of them believe that each of the sciences of the criminal cycle, operating with notions that belong to the class of «interdisciplinary» and are the subject of criminal law science, can interpret them differently and put different meanings into them. For example, Yu. D. Bluvshtein, N. A. Dobrynin, S. G. Kurganov argue that criminologists can put *their own meaning* into criminal law concepts (25, P. 45, 26, P. 61–62). D. A. Shestakov believes that crime science, not being limited to the criminal law definition of crime, feels the need to develop its own criminological concept, more in line with its essence. He suggested that *in criminology, crime* should be understood as acts which constitute a significant evil for a person and society, irrespective of the recognition of such act as a crime in legislation (27, P. 80). Close views of this position (that contravenes the law on criminal liability – M. P.) were also expressed by other criminologists (28, P. 113–119). In criminology, G. G. Zuikov and I. Sh. Zhordaniia believe that criminal law, forensic science, criminology while studying the methods of crime, abstracting from its sides, which are indifferent to them, study *different concepts in terms of content* (italics are mine – M. P.) by means of which the same object is investigated (29, P. 54, 30, P. 91). Similar deviations take place in law-making when, while elaborating and adopting a regulatory legal act in a certain area, notions or terms of other sectoral affiliation are borrowed and used which are, however, not yet sufficiently developed by science and practice or those which this science «does not necessarily know» yet or which are only being discussed. In this respect, the shortcomings of the decision of the Verkhovna Rada of Ukraine when adopting the Criminal Procedural Code of Ukraine ((Law No. 4651-VI of 13.04.2012) further referred to as the CPC (entered into force on 20.11.2012)), which provides

for the features of pre-trial investigation (inquest) of *criminal offenses* (para. 7 part 1 of Article 3, Article 215, Article 298–302 of the CPC), draw attention. However, *it is clear that at that time the criminal law category «criminal offense» was not yet known to the criminal law of Ukraine* (it was only discussed in the scientific community) and therefore definitely could not be used in the CPC to resolve both criminal procedural and criminal law issues for legislative regulation of the inquest of a rather important area of the state's activity in the fight against crime. Only on 22 November 2018 the Law of Ukraine No. 2617-VIII «On Amendments to Certain Legislative Acts of Ukraine Concerning the Simplification of Pre-trial Investigation of Certain Categories of Criminal Offences» (which will come into force on 1 January 2020) determined this criminal category by introducing amendments and additions to the Criminal Code (part 1, part 2 of Article 12) and the CPC and thus the previously made error was corrected. Such negative practices in lawmaking are certainly extremely undesirable.

Analyzing the above-mentioned positions of scientists and lawmaking practice, it should be noted that the content of any concept, as it is known, forms a set of basic essential features of phenomena (objects) that make up the volume of the concept. Therefore, if following the above-mentioned judgments and practices, it is necessary to admit that each of the mentioned sciences can recognize different, even not essential, features of the same phenomena (objects) as significant. But such a solution is erroneous, because the essential signs forming the content of «interdisciplinary» notions reflecting the essence of the phenomena of real life, regardless of which of the sciences of the criminal cycle seeks to cognize it. Moreover, such an approach does not take into account the fundamental and determinant meaning of the criminal law science (which is based on the regulatory framework of criminal legislation) in relation to other sciences of the criminal cycle.

The stated above does not exclude the possibility of developing interdisciplinary categories, concepts, and terminology related to the conceptual apparatus of criminal law science in criminology, criminal procedure, and forensics. But the features that form the content of these categories, concepts, and terms in these related sciences should be derived from the main essential features of the conceptual apparatus of criminal law science. Therefore, these categories, notions, and terms in these sciences (criminology, forensic science, etc.) should be derived from the elements of the conceptual apparatus of criminal law. The peculiarity of these elements is that they characterize the phenomena of objective reality, taking into account the tasks faced by the said sciences and arising from the subject of their study.

The criminal law science, having a personal relatively coherent and complete system of categories, concepts and terminology, at the same time employs in a number of cases relevant elements of the conceptual apparatus of other applied sciences related to the criminal cycle and thus includes them in its con-

ceptual apparatus. Thus, the Special Part of Criminal Law uses the concepts of «arrest», «detention», «custody», «sentence», «decision», «court sentence», «witness», «interpreter» and other concepts related to the criminal process: «firearms», «edged weapons», etc., which are developed by forensic science. In many cases, forensics also relies on concepts that are developed by the science of the criminal process, as well as on theoretical provisions developed in criminology. Similarly, criminal procedure and criminology operate with the concepts and terms that are developed by forensic science. So, in all these cases there is an interpenetration of sciences (strongly emphasized integration), which is observed at the level of individual elements of their conceptual apparatus. And the use of each of these sciences concepts and terms related to adjacent branches of knowledge should not seem to be arbitrary. It is known that scientific concepts are subjective in nature of their formation, but objective in their origins, genesis, as a whole, are inextricably linked with the objective world and reflect it in generalized and essential features. Developing «own» concepts, each of the sciences of the criminal cycle clarifies the essence of the corresponding objective phenomena and anchors them in the concepts. Thus, the content of categories, notions, and terms of these sciences is ultimately determined by the objective world phenomena included in the subject of their study. Therefore, if a criminal cycle science includes in its conceptual apparatus the concepts and terms of related sciences that do not belong to the class of «interdisciplinary» notions, i.e., developed specifically not by the criminal law science, but by other sciences, then it should use them as data and proceed from the point of view that the relevant sciences invest in these concepts. A different solution would contradict the logic of scientific analysis, making it impossible to study the problems faced by each of the sciences of the criminal cycle, especially in areas where these sciences are closely linked to each other.

Conclusions. The provisions and suggestions on the correlation and interrelation of the conceptual apparatus of the criminal cycle sciences are of great importance both for the organization and conduct of scientific research in these sciences and for the solution of practical issues in the field of combating crime, in particular, in lawmaking and law enforcement activities. The defining dominating factor in this activity and the main goal in this regard should be to achieve coherence and consistency of the conceptual apparatus of criminal cycle sciences – their categories, concepts, and legal terminology, especially in situations where a branch of knowledge (science) uses certain elements of the conceptual apparatus of another. In such cases, the interpretation of the relevant categories of concepts and terms belonging to the class of «interdisciplinary» should be carried out on the above scientific principles. Proceeding from this, we believe it is unacceptable to have different definitions and interpretations of the same categories, concepts and legal

terms used in adjacent (related) but still different sciences of the criminal cycle, belonging to the class of «interdisciplinary». Their definition, in this case, is determined by their interpretation in criminal law. This is especially important in the sciences, the subjects of which include (as their legal framework) the relevant branches of legislation: criminal, criminal procedure, criminal enforcement. These legislative systems should be clearly coordinated while their conceptual apparatuses are logically coordinated, contradictions and different interpretations of the same categories, concepts and terms in these different (but related) areas of legislation are unacceptable.

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V. Hryshchuk, Department of Scientific Work Organization Lviv State University of Internal Affairs Lviv, Ukraine

EFFECTIVENESS OF CRIMINAL LAW SUPPORT OF DIGNITY PROTECTION AND SECURITY IN UKRAINE: QUESTIONS OF SOCIAL CONDITIONALITY

Abstract. *The article attempts to study the effectiveness of criminal law support of dignity protection and security in Ukraine. The solution of such a problem was made possible by paying attention to the questions of the social conditionality of the criminalization of acts that infringe upon human dignity. It is important that the author established the factors of social conditionality of the criminalization of such acts. Particular attention was paid to the need for criminalization of insult and slander as a crime against the dignity of the individual in Ukraine. Such a solution to the problem was made possible by the study of national, foreign and international legislation. The author has established the existence of social conditionality to establish criminal liability for such encroachment on human dignity such as slander and insult, which will significantly increase the effectiveness of legal protection and protection of human dignity, and will also contribute to the further assertion of rights and freedoms towards Ukraine's European integration.*

Key words: *crimes against dignity, social conditionality, effectiveness of criminal law ensuring the protection of dignity, defamation, insult, slander.*

Introduction

In legal literature, when analyzing criminal law problems, the term "guard" and "protection" is commonly used, although the etymological content of them seems to be different. "Guard" means to protect from the danger someone, anything, from the threat of attack (encroachment – VK), an attempt, to guarantee the inviolability of someone, something. "Protect" – to defend, to protect someone, anything from attack, assault, blow, hostile, dangerous, etc. actions [1]. The difference between them is that the concept of "protect" reflects the statics of social relations, provided by the rules of material criminal law. These norms contain the command, volitional regulations of the state, expressed in models of the corresponding behavior

of the subject in a concrete situation: a prohibition, duty, permission (granting of right), promotion, exercising the same protective function of criminal law [2]. The concept of "protect" reflects the dynamics of social relations, when a person performs the corresponding criminally wrongful act. For example, preparing for a crime, attempting an offense or completing a criminal offense [3]. This is the implementation of a legislative model of command, a voluntary prescription on the behavior of the subject in a specifically defined situation. In the above cases, the rules of substantive criminal law, figuratively speaking, "come alive", and are applied by the competent authorities of the state. In this version, in addition to the rules of substantive criminal law, criminal procedure norms are applied, and further – the rules of criminal executive [4]. One more thing, in the case of a person's conviction, the rules of administrative law are applied. In general, in this option, the regulatory function of criminal law is exercised concerning relations that arise between a person who commits or has committed an offense and a state represented by its competent authorities. Therefore, the effectiveness of criminal law protection and protection of human dignity must be carried out qualitatively at both levels, each of which has its own specifics.

Specialist in the field of criminal law O. Protynyak [5], N. Savinova [6], O. Hramtsov [7] and others addressed the problem of guard legal enforcement and protection of human dignity. At the same time, these studies are not sufficient to establish the effectiveness of criminal law enforcement of guard and protection of dignity in Ukraine, as well as to address the issues of social conditionality.

The purpose of the article is to establish the effectiveness of criminal law enforcement of guard and protection of dignity in Ukraine through studying issues of social conditionality.

1. Materials and methods

The system of positive (effective) law of the state should contain comprehensive legal guaranteed of human dignity based on international law. Providing of the protection and the guard of human dignity is systemic, if all elements of the legal system are involved in harmony. In this regard, the situation in Ukraine not all guarding and protecting rights to maximize effective enforcement of human dignity are fully exploited. Without proper scientific substantiation, the civil law means are considered the main in the guard and protection of human dignity. At the same time, the question about social conditionality of criminal law guard and protection of human dignity arises.

The metrological significance of event causation of social phenomena has the categories of objective and subjective factors. In the broadest sense, the objective factor includes historical preconditions, interethnic and interstate relations, natural conditions, existing social relations and connections between people. In human activity, such components of the objective factor as politics, law, interethnic and external interstate relations, the state of objects of nature may be involved. All of them are interconnected and interdependent.

The socio-political and spiritual activity of people forms the component of subjective factor. Generally, definitive factors of it are moral, emotional-psychological and ideological factors [8]. All components of consciousness are involved in the structure of the subjective factor. Purposeful and systematic activity of people makes them a driving force. In the mechanism of action of the subjective factor, not only humans' conscious activity is involved, but also spontaneous manifestations of human abilities and passions. In such organic and harmonious combination, objective and subjective factors manifest themselves as dialectically contradictory and inextricably interacting sides of the phenomena of social development. Fully these general approaches are inherent in the activities of finding out the social conditionality of criminalization such acts against human dignity as slander and insult.

2. Results and discussion

2.1 Factors of social conditionality of criminalization of acts that violate human dignity

The scientific study of the complex of long-standing problems of the social conditionality of criminal law guard and protection of human dignity, as well as any other socially significant values, gives, first of all, the answer to the question if there are social circumstances (factors) that confirm the necessity of prohibition of slander and insults under the threat of punishment, and if so, what should be the theoretical and applied model of the norm (norms) of the law on criminal liability.

In the doctrine of criminal law, there is no generally accepted understanding of the circumstances leading to the criminalization of human actions. They are called differently, in particular: grounds, principles, criteria, conditions, reasons; grounds and principles; prerequisites and grounds, factors, etc. There are reasons to think that they should be called factors (circumstances) that predetermine the criminalization of certain socially dangerous acts, that is, criminal liability for these acts performance [9].

Regarding the social conditionality of criminalization of acts that violate human dignity, in particular slander and insult, the following are the most significant factors: 1) the social danger of acts that encroach human dignity; 2) the relative prevalence of these encroachments; 3) the expediency of counteracting this encroachment by means of criminal law; 4) the coherence of their criminalization with the norms of international law; 5) the conformity of their criminalization with the Constitution of Ukraine; 6) legislative practice to counteract this encroachment in European states; 7) traditions of the Ukrainian legislative practice to counteract this encroachment..

The public danger of encroachments on human dignity, their prevalence manifested itself especially during the period of the hybrid war against Ukraine. In the mass media, for example, so-called fake, false information, which contains defamatory, offensive attacks against the President of Ukraine, the Prime Minister of Ukraine, ministers, other public officials is systematically and purposefully distributed in order to undermine their

authority in the eyes of the public, to weaken the belief in the effectiveness of the social reforms being implemented and in the European future of Ukraine. Slander and insult have become commonplace means of sorting out the relations between politicians of different levels, the realization of a competitive confrontation between business entities in the economic sphere, the construction of accounts between individual citizens in the service relationships and at the domestic level. Apparently, the limits of normative freedom in the information sphere are unjustifiably wide, it lacks righteousness [10]. All this undermines the normal, civilized moral and psychological state of social relations, promotes the implementation of hostile technologies to weaken the Ukrainian state and society. Given the above circumstances, as an attack on human dignity slander and insult are an increased public danger.

The expediency of counteractions to slander and the insult by criminal means is obvious, since the application of only civilian remedies is clearly insufficient, both for the general and for the special prevention of their commitment.

The criminalization of slander and insult is consistent with the norms of international law, the Constitution of Ukraine, the legislative practice of counteracting these attacks in European states, the traditions of Ukrainian historical legal practice.

2.2 Human dignity under protection of national, interethnic and international regulatory legal acts

In international law, human dignity has been an object of protection for a long time. In international law, human dignity has been the subject of protection for a long time. Thus, in the Universal Declaration of Human Rights (1948) there has been a repeated appeal to the dignity of human. In particular, its preamble proclaimed that recognition of human dignity is the foundation of freedom, justice and universal peace throughout the world; and article 1 states that all people are born free and equal in dignity and rights. According to article 5 of the declaration, no one should be subjected to torture or cruel, inhuman or degrading treatment or punishment. The principled provisions on human dignity have also been consolidated in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the OSCE legal acts; and they were specified, clarified in the decisions of the European Court of Human Rights.

In the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), it has been stated, in particular, that all rights derive from the dignity inherent to a human.

A new confirmation of international legal protection of human dignity was the Charter of the European Union (2000). In Article 1, it is unequivocally proclaimed that human dignity is untouchable; it must be respected and protected. Consequently, there are grounds to claim that, in international law, human dignity is a source of human rights, a black letter law, and this must be taken into account when developing legislative mechanisms to ensure the protection of its untouchability in Ukraine.

The Constitution of Ukraine organically embodies all the achievements of international legal science and practice in protecting human dignity. The key is article 3, which proclaims that human dignity belongs to the highest social values. According to the Constitution, all people are free and equal in their dignity and rights (article 21), every person has the right to respect for his dignity (article 28), the use of property cannot prejudice the rights, freedoms and dignity of a person; the duty of everyone is not to encroach the rights and freedoms, honor and dignity of others (article 68). Consequently, the above provisions of the Constitution, including criminal law, as the main law of the state, serve as a legal basis for the comprehensive guard and protection of human dignity [11; 12].

An important precondition for Ukraine's integration into the European Union is to harmonize Ukrainian legislation and to bring it to European standards. A lot has been made, however, the European legislation on the guard and protection of human dignity by means of criminal law has not been noticed in a proper way. For instance, Germany Criminal Code provides for liability, in particular, for the offense of Federal President (paragraph 90), the offense (paragraph 185), the defamation (paragraph 186), discredit (paragraph 187), defamation or discredit against politicians (paragraph 188), the offense of honor of the dead (paragraph 189); the Dutch – for the offense (paragraph 266b, 267), the defamation (paragraph 266c, 267a, 268–275); the Swiss – for the offense (paragraph 177), the defamation (paragraph 173,174), the offense of honor of the dead (paragraph 175); Sweden – for the offense (paragraph 3),the defamation (paragraph 1.2), the offense of honor of the dead (paragraph 4); Spain – for the offense (paragraphs 209–210), the defamation (paragraphs 206–207); Austria – for the offense (paragraph 115), the defamation (paragraph 111), the public insult of a constitutional representative body, federal armed forces, a federal body (paragraph 116); Poland – for the offense (article 216), the insult to religious feelings (article 196), the public insult of a person or group of persons in connection with their national, ethnic, racial or religious affiliation (paragraph 196), the insult of the Polish people or the Republic of Poland (article 133), the public insult of the President (paragraph 2 of article 135); France – for the ridicule in order to violate the dignity of human (paragraph 226-4-1), the offense of a person who is in the public service (paragraph 433–5). Attention is drawn to the fact that the Criminal Code is not the only source of French criminal law. In addition, other French laws provide criminal liability. Thus, the Freedom of the Press Act provides for criminal liability for insult and defamation (chapter 4 of the Law). In particular, in accordance with paragraph 26 of this Law, the offense of the President of France is punishable by imprisonment for a term of three months to one year and a fine of 300 to 300 thousand francs [13].

The above selective analysis of the legislative criminal law practice of European states proves the expediency of us-

ing norms of criminal law for the guard and protection of human dignity.

Criminal law means of guard and protection of human dignity is inherit in historical legislative practice of Ukraine [14]. In the Soviet period, three criminal codes were in force; they provided liability for such encroachments upon human dignity as slander and insult. Thus, in chapter 5 of USSR Criminal Code of 1922 "Crimes against human life, health, will and dignity" there are following types of crime: insult by action, word or in written (article 172); insult in widespread or publicly displayed printed works or images (article 168), defamation as an essential element of a crime and libel in printed or spread in other way (article 169) – aggravating circumstances. USSR Criminal Code also provided liability for such actions. In the section 3 of its Special part "Crimes against human life, health, will and dignity" there are also two types of crime: 1) defamation as an essential element of a crime, its aggravating circumstance is in printed or spread in other way, in anonymous letter, as well as committed by the person previously convicted for such actions, especially its aggravating circumstance – defamation combined with accusation in state crime or other severe crimes (article 125); 2) offense (article 126).

Conclusions

Latest codification of criminal legislation, in conditions of independence of Ukraine, was marked with the sign of democratization, humanization, and intensification of human rights. It completed the process of bringing criminal law norms to the ripen interests and necessities of social development, made them qualitive effective guardian tool and regulation of social relations with the ability to develop. Criminal Code of 2001 turned out to be of a new, higher order. After becoming an objective reality it has acquired a status of priority object of scientific research, in the process of which its most important positive characteristics, discussion approaches were determined. In particular, attention was paid to a certain lack, incompleteness of system-forming connections between the Criminal Code and the Constitution, that is, it refers to criminal law and protection of human dignity. Thus, despite the fact that the honor and dignity of human are named in Article 3 of the Constitution of Ukraine as the human goods, which are the highest social values in Ukraine, and in the title of the third section of the Special Part of the Criminal Code there are the words "honor" and "dignity", there are no such crimes in this section. In addition, unlike the previous criminal codes, the word "honor" appeared in its name, but the use of it appears to be incorrect in relation to the above-mentioned modern understanding of human dignity in the doctrine of the philosophy of law and the theory of law. Consequently, the title of this section is wider in its content; there is no criminal responsibility for encroachments on these goods.

It should be noted that human dignity, in cases when it is recognized as a victim, is an additional object of the corresponding crimes. For example, crimes against life and health, the will

of a person, crimes against sexual freedom and sexual integrity of a person, crimes against property, etc. It is also necessary to draw attention to the fact that a person with high prosocial attitudes can perceive any crime as an attack on her dignity.

The above analysis of the factors gives grounds for the conclusion that there is a social conditionality for establishing criminal liability for such attacks on human dignity as slander and insult, which will significantly increase the efficiency of ensuring legal guard and protection of human dignity, will contribute to further consolidation of its rights and freedoms on the way of European integration of Ukraine .

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O. Kaplina, Doctor of law, professor, Head of the Department of Criminal Procedure of Yaroslav Mudryi National Law University, Correspondence member of the National Academy of Legal Sciences of Ukraine

O. Kotova, judge's assistant Kharkiv Appeal administrative court, PhD student of the Department of Criminal Procedure of the Yaroslav Mudryi National Law University

CRITERIA OF LEGITIMATE RESTRICTION OF OWNERSHIP DURING PROPERTY ARREST IN CRIMINAL PROCEEDINGS IN THE LIGHT OF PRACTICE OF THE ECHR

Abstract. *The article deals with the topical questions for modern law-enforcement practice, which are connected with determining the lawfulness of the state's interference into the right to peaceful possession of property in criminal proceedings while applying such a measure to ensure criminal proceedings as seizure of property. It is noted the important role of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 of Protocol No. 1 to the Convention, which sets out the criteria of assessing the lawfulness of interference in the property rights. The authors analyze in detail these criteria – legitimacy, legitimate purpose, necessity in a democratic society. This analysis is made on the extensive use of the case law of the European Court of Human Rights. It is highlighted, that the development of the criteria of the legitimate restriction of the persons' rights in criminal proceedings is urgent, because during arresting the property the legislator demands from the legislative judges to take into account among others the reasonableness and proportionality of restraint of property rights in the criminal proceedings and to apply the least burdensome way of arrest, which will not result in the restraint of lawful entrepreneurship of a person or other consequences which have the significant effect on the interests of others. On the basis of generalization of the practice of giving the rulings by the investigative judges on satisfaction or dismissal a satisfaction of the motion of the investigator, prosecutor about seizure of property, it is concluded that national courts gradually accept*

the novelties and requirements of the law and practice of the ECHR, but most often during deciding the motion of the investigator in the declaration of the ruling the standard argumentation of the general nature is used, the general content of the articles of the CPC is quoted without attempts to analyze the legality of the restriction, the purpose of such restriction, the proportionality of the interference of the state in the rights of a person, which corresponds the purpose. Meantime, it is important to have a proper systematic, logical, consistent argumentation, which, as a rule, is lacking in the rulings.

The article develops and proposes a model of logical argumentation, following which the investigative judges will be able to formulate correctly the declaration of the ruling on satisfaction or dismissal a satisfaction of the motion to seizure of property. The authors emphasize that the legitimacy of the purpose of seizure of property is established basing on the requirements of the law. A measure which is objectively necessary in the presence of certain grounds and conditions is reasonable. Suitable is a mean by which the desired aim can be achieved. The measure is necessary, if there is no other, equally suitable but less burdensome for a person, and just it is necessary for solving an urgent social problem. Proportional may be the measure, using which the encumbrance that will be imposed on a person, taking into account all the circumstances and risks, will be proportionate to the aim, which may be achieved during applying this restriction. At the final stage, an assessment is made whether the desired result, taking into account all the analyzed conditions, is commensurate with the restriction of a person's right to a peaceful possession of property.

In the view of the authors, the proposed model of argumentation is universal, capable during deciding the question of arresting of property to restrict the discretion of the law enforcer, to protect a person from arbitrariness of public authorities, as well as to become a methodological basis for making a criminal procedural decision.

Key words: *inviolability of property rights; legality; measures of ensuring criminal proceedings; seizure of property, criteria for the admissibility of human rights restrictions.*

In Article 41 of the Constitution of Ukraine it is stated that: "Everyone shall have the right to own, use, or dispose of his property and the results of his intellectual or creative activities… No one shall be unlawfully deprived of the right for property. The right for private property shall be inviolable… Confiscation of property may be applied only pursuant to a court decision, in the cases, to the extent, and in compliance with the procedure established by law". Thus, the Constitution, in establishing the inviolability of property rights, provides that it is not absolute, but its restriction is possible only in cases provided for by law and solely by court decision.

Such a provision of the Constitution correlates with the requirement of a number of international legal documents, which enshrine the principle of inviolability of property rights. Among them there is the Universal Declaration of Human Rights (Art. 17, Part 2 Art. 29);[1] Inter-

[1] Загальна декларація прав людини від 10 December 1948 p. URL: https://zakon.rada.gov.ua/laws/show/995_015 (дата звернення 17.07.2019).

national Covenant on Civil and Political Rights (Articles 2, 17);[1] International Covenant on Economic, Social and Cultural Rights (Articles 3, 4),[2] Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention).[3]

In more detail, the right to respect for property is enshrined in the First Protocol to the Convention.[4] This protocol was signed on 20 March 1952 and included the right to protection of property in the list of rights guaranteed by the Convention. Appeal to Art. 1 "The right to property" of Protocol No. 1 to the Convention gives grounds to state that it contains at least three rules that are of importance to national criminal justice, to which scholars and practitioners have always drawn attention: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the *public interest* and subject to the conditions *provided for by law and by the general principles of international law*. However, the preceding provisions shall in no way limit the right of a State to enforce such laws as *it deems necessary* to control the use of property in the *general interest* or to secure taxes or other charges or penalties." (Emphasis ours – O. K.)[5]

The European Court of Human Rights (hereinafter – the ECHR, Strasbourg Court, Court) has interpreted the provisions of this article, stating that "The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.[6]

In the case of *James and Others v. The United Kingdom*, the ECHR ex-

[1] Міжнародний пакт про громадянські і політичні права від 16 December 1966 р. URL: https://zakon.rada.gov.ua/laws/show/995_043 (дата звернення 17.07.2019).

[2] Міжнародний пакт про економічні, соціальні і культурні права від 16 December 1966 р. URL: https://zakon.rada.gov.ua/laws/show/995_042 (дата звернення 17.07.2019).

[3] Конвенція про захист прав людини і основоположних свобод від 4 November 1950 р. URL: https://zakon.rada.gov.ua/laws/show/995_004 (дата звернення 17.07.2019 р.).

[4] Перший Протокол до Конвенції про захист прав людини і основоположних свобод від 20 Marh 1952 р. URL: https://zakon.rada.gov.ua/laws/show/994_535/ed19520320 (дата звернення 17.07.2019 р.).

[5] Протокол до Конвенції про захист прав людини і основоположних свобод зі змінами, внесеними Протоколом 11, ратифікований Законом 475/97-ВР від 17.07.97. URL: https://zakon.rada.gov.ua/laws/show/994_535 (дата звернення 17.07.2019).

[6] ECHR decision in the case «Спорронг і Лоннрот проти Швеції» (Sporrong and Lonnroth v. Sweden), 23 September 1982, Application no. 7151/75 and 7152/75, § 61; «Депаль проти Франції» (Depalle v. France), 29 March 2010, Application no. 34044/02, § 77; «Зеленчук і Цицюра проти України» (Zelenchuk and Tsytsyura v. Ukraine), 22 May 2018, Application no 846/16 and 1075/16, § 56; «Андрій Руденко проти України» (Andriy Rudenko v. Ukraine), 21 Desemder 2010, Application no. 35041/05, §§ 35–37.

plained the relationship between the three sentences above and stated that "The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."[1] The same is stated by the ECHR in the case of *Papastavrou and Others v. Greece,* underlining that the second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.[2] Extrapolating the provisions of international documents to criminal justice, we can state that property rights are not absolute, which makes it possible to be regulated and limited by the state. However, in exercising such powers, the state must adhere to the established principles of permissible lawful interference. Such legal intervention should be guided by international standards and provisions of national law. In addition to the Constitution of Ukraine, the inviolability of property rights is reflected in sectoral legislation. In particular, Article 16 of the Criminal Procedure Code (CPC) provides that the deprivation or restriction of the right to ownership shall be made only upon a motivated court's decision adopted as prescribed in the Code. Temporary arrest of property is allowed without a court decision on grounds and according to the procedure prescribed in the Code.

Since during the arrest of property a person *de jure* is not deprived of ownership, but only temporarily, until its cancellation in accordance with the CPC, is restricted the right to alienation, disposal and/or use, the ECHR recognizes the arrest of the property by means of control over the use of the property,[3] and requires that the actions of the authorities not contradict the third rule of Art. 1 of Protocol No. 1 to the Convention referred to above.

For the purpose of controlling the property, Protocol No. 1 gives states broad powers, "which they deem necessary". It is important that the rights of the state to interfere with the right to peaceful ownership of property should be governed by law.

Since, as noted above, all three provisions of Art. 1 of Protocol No. 1, which positioned as interconnected rules, the powers that the state has to interpret should be systematically linked to the

[1] ECHR decision in the case «Джеймс та інші проти Сполученого Королівства» (James and Others v. the United Kingdom), 21 Februaru, 1986, Application no. 8793/79, § 37.

[2] ECHR decision in the case «Папаставру та інші проти Греції» (Papastavrou and Others v. Greece), 10 April 2003, Application no. 46372/99 § 33.

[3] ECHR decisions in the cases «Раймондо проти Італії» (Raimondo v. Italy), 22 February 1994, Application no. 12954/87, § 27; «Эндрюс проти Сполученого Королівства» (Andrews v. the United Kingdom), 26 September 2002, Application no. 49584/99; «Адамчик проти Польщі» (Adamczyk v. Poland), 7 November 2006, Application no. 28551/04; «Боржонов проти Росії» (Borzhonov v. Russia), 22 January 2009, Application no. 18274/04, § 57.

second rule; therefore, state-owned property controls must be carried out in the public interest.

Since, in the course of restriction of property rights, the state interferes with individual law in one way or another, the conditions of such interference must meet the requirements specified in Art. 8 of the Convention, according to which: "Everyone has the right to respect for his private and family life. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Thus, Article 8 of the Convention sets out the conditions under which a state may interfere with the exercise of a protected right and which are often referred to as the criteria for intervention. According to the Convention, restrictions are permissible if they are "prescribed by law", "necessary in a democratic society" and pursue one of the legitimate goals envisaged. As we can see, these criteria are consistent with the provisions, which are also contained in Art. 1 of Protocol No. 1 of the Convention. And it should be noted that despite the construction of Part 2 of Art. 8 of the Convention, the court assesses the adherence of the specified conditions separately by the state in the following order: "legality", "legitimate purpose", "necessity".[1] This is constantly stated in the ECHR decisions. In particular, in the case of *Shvydka v. Ukraine*, the Court noted that "in order for an intervention to be justified …, it must be "established by law", pursue one or more legitimate goals … and be "necessary in a democratic society" – that is, proportionate the goal pursued".[2]

Having been introduced into the ECHR practice, criteria for assessing the lawfulness of state interference with the rights guaranteed by the Convention were named the "three-part test". [3] Meanwhile, as it is well known, the ECHR has "borrowed" from the German roots in the right-to-practice practice and the principle of proportionality, which is now existing in many legal systems,[4] which, although not directly enshrined

[1] Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights (3rd edn, Oxford university press 2014).

[2] ECHR decision in the cases «Швидка проти України» (Shvydka v. Ukraine), 30 October 2014, Application on. 17888/12, § 33. See also: Case of «Гладишева проти Росії» (Gladysheva v. Russia), 6 December 2011, Application on. 7097/10, § 77; «Брумереску протии Румунії» (Brumarescu v. Romania), 23 January 2001, Application no. 28342/95, § 78; «Спорронг і Лоннрот протии Швеції» (Sporrong and Lonnroth v. Sweden), 23 September 1982, Application no. 7151/75 and 7152/75, § 69–74.

[3] Фулей Т. І., Застосування Конвенції про захист прав людини і основоположних свобод та практики Європейського Суду з прав людини при здійсненні правосуддя (BAITE 2017) 38.

[4] Бажанов А. А., Обоснование принципа соразмерности в практике Федерального Конституционного Суда Германии (1950–1960 гг.) (2018) 5 Вестник Университета имени О. Е. Кутафина (МГЮА) 159–168.

in the Convention, is one of the most important principles that is part of the rule of law, has become the principle of the Convention interpretation[1] and most commonly applied by the Court. Moreover, elements of this principle have been known in ancient times,[2] its content has gradually evolved over several centuries, but only nowadays it has received a "new breath" through constitutional justice and international judicial institutions.

The first and most important requirement of Article 1 of Protocol No. 1 of the Convention is that any interference by the state in the unimpeded use of property must comply with *the law.*

If one tries to understand the concept of "law", "provided for by law", "in accordance with the law" used in the Convention, then one should refer to the ECHR practice in which the Strasbourg Court developed a legal position and formed an autonomous concept of "law". One of the first and most common cases of the ECHR in which it has been formulated in these terms is the case of T*he Sunday Times v. the United Kingdom*.[3] The complaint concerned a possible violation of Art. 10 of the Convention due to the ban by UK national courts to publish articles in the *Sunday Times* dedicated to discussing a "high-profile" lawsuit that had not been completed yet. Such a ban was due to contempt of court, which was expressed in the fact that the comments in the press could be seen as influences and assumptions that were incompatible with the principle of independence and impartiality of the court and the trial. One of the aspects that needed to be considered by the Court was the interpretation of the term "provided for by law" in the light of the interference with the rights protected by the Convention.

The ECHR, in particular, noted that: "The word "law" in the formula "provided for by law" covers not only statutes but also unwritten law… Considering that a restriction, by virtue of com-

[1] Гюлумян В. Г., Принципы толкования Европейской конвенции прав человека (критика и защита) (2015) 3 (45) Журнал конституционного правосудия 17; Дудаш Т. І. Практика Європейського суду з прав людини: герменевтичний аналіз (2009) 21 Практика Європейського суду з прав людини: загальнотеоретичні дослідження, Серія І. Дослідження та реферати 26–40; Рабінович П. М., Федик С. Є., Особливості тлумачення юридичних норм щодо прав людини (за матеріалами практики Європейського суду з прав людини) (2004) 5 Праці Львівської лабораторії прав людини і громадянина Науково-дослідного інституту державного будівництва та місцевого самоврядування академії правових наук України 27.

[2] Бажанов А. А., Соразмерность как принцип права (дис канд юрид наук, Російський університет дружби народів 2019); Євтушок Ю. О. Принцип пропорційності як необхідна складова верховенства права (дис канд юрид наук, Університет економіки та права «КРОК» 2015); Погребняк С. П., Принцип пропорційності у судовій діяльності (2012) 2 Філософія права і загальна теорія права 49–50; Цакиракис С., Пропорциональность: посягательство на права человека? (2011) 2 (81) Сравнительное конституционное обозрение 47–51; Фоскулле А., Принцип соразмерности (2015) 1 (104) Сравнительное конституционное обозрение 159.

[3] ECHR de decision sn the case ««Санді Таймс» проти Сполученого Королівства» (The Sunday Times v. the United Kingdom), 26 April 1979, Application no. 6538/74.

mon law, does not refer to "provided for by law" solely on the ground that it is not enshrined in law, and then it deprives a state participating in the common law Convention, protection… and cuts down the very roots of this state's legal system. This would clearly contradict the intentions of the drafters of the Convention…"

In the Court's view, the following two requirements are followed from the expression "provided for by law". First, the right must be adequately accessible: citizens must be able, in appropriate circumstances, to navigate what legal rules are applied to the case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be predicted with absolute certainty: experience has shown that this is unattainable… Accordingly, "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."[1]

Thus, the ECHR has formulated several requirements that must be satisfied by national law in order to comply with the rule of law as enshrined in the preamble to the Convention and makes sense of the whole Convention. First, it is a fairly broad understanding of the concept of "national law", which includes not only current law but also the interpretation given to it by national courts, established practice, including judicial one. Secondly, it is a requirement concerning the "quality of the law": accordingly to its accessibility and predictability.

The ECHR continues to recall the requirements of the concept of law formulated in the judgment of *The Sunday Times v. United Kingdom*, complementing it with new content. In particular, in the case of *Silver and Others v. The United Kingdom*, it was stated that "accessibility, indeed, provides an opportunity to read the texts of acts containing rules";[2] "the principle of legality also provides that the applicable provisions of national law are accessible, clear and predictable in their application."[3] Since interference with the right of property borders with the possibility of arbitrary restriction, the state must not only ensure the quality of the law, but also provide remedies against the arbitrary interference of the authorities in the exercise of the rights guaranteed by the Convention. Thus, "legislation must determine with sufficient certainty the extent of freedom

[1] ECHR de decision in the case ««Санді Таймс» проти Сполученого Королівства» (The Sunday Times v. the United Kingdom), 26 April 1979, Application no. 6538/74.

[2] ECHR de decision in the case «Сільвер та інші проти Сполученого Королівства» (Silver and Others v. the United Kingdom), 25 Marh 1983, Application no. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, §§ 87–88

[3] ECHR de decision in the cases «Зеленчук і Цицюра проти України» (Zelenchuk and Tsytsyura v. Ukraine), 22 May 2018, Application no. 846/16 and 1075/16, § 98, and «Будченко проти в України» (Budchenko v. Ukraine), 24 April 2014, Application no. 38677/06, § 40.

of action and the way in which they are exercised"[1] and "there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities."[2]

An example is the case of *Denisova and Moiseyeva v. Russia*, in which the ECHR found a violation of Art. 1 of Protocol No. 1 of the Convention. The reason for this was the seizure of the property (and subsequently its confiscation) of his wife on the basis of a judgment passed against her husband. At that time, the Supreme Court of the Russian Federation had already provided an explanation for such cases, stating that the confiscation of jointly-owned property is possible only within the share of a spouse found guilty of a crime. Due to the fact that the seizure of his wife's property was not "in accordance with the law", the Court found a violation of Art. 1 of Protocol No. 1 of the Convention.[3] There is another example. Latvian citizen V. M. Baklanov decided to move from Latvia to Russia, agreed with the realtor to buy an apartment, withdrew the amount of $ 250 thousand from his bank account and transferred this sum to his acquaintance B. for sending to Moscow. On arrival at the airport, B. without specifying the amount in the customs declaration at the passage of customs control was detained. He was charged with smuggling, and subsequently he was sentenced to two years of probation. The court ordered the funds stored in the customs terminal to be converted into government revenue as a smuggling item. The ECHR, having considered the case, noted that the first and most important requirement of Art. 1 of Protocol No. 1 is that any interference by public authorities in the peaceful possession of property should be lawful; deprivation of property is possible only "under the conditions provided by law". In assessing compliance with the law in this case, the European Court has stated, among other things that, according to the law, the *instruments of crime belonging to the accused, money and other objects of crime* are subject to seizure. (Emphasis ours – O. K.) Meanwhile, no one was alleged, nor was there any evidence that the applicant's money had been "illegally acquired". Taking into account failure to bring legal provisions before national courts as grounds for withdrawing a substantial sum of money and the apparent contradictions of the case law regarding national legislation, the Court noted that the national legislation at issue had not been formulated with such precision that the applicant could have foreseen the consequences of his actions to the extent reasonable to the circumstances of the case. Therefore, the interference with the applicant's property could not be regarded as legitimate

[1] ECHR de decision in the case «Маестрі проти Італії» (Maestri v. Italy), 17 February 2004, Application no. 39748/98, § 30.

[2] ECHR de decision in the case «Крюслен проти Франції» (Kruslin v. France), 24 April 1990, Application no. 11801/85, § 30.

[3] ECHR de decision in the case «Денисова і Мойсеєва проти Росії» (Denisova and Moiseyeva v. Russia), 1 April 2010, Application no. 16903/03, §§ 55–65.

in the sense of Art. 1 of Protocol No. 1 of the Convention, and consequently there has been a violation thereof.[1]

Thus, this makes it possible to conclude that since the mechanism of the protection of rights provided by the Convention is subsidiary in comparison with the protection at the national level, and the ECHR does not replace the national courts. That is why the regulatory potential of the law is of key importance. The state at national level should create safeguards to protect the rights of the person against arbitrary interference during, inter alia, the seizure of property in criminal proceedings, which necessitates the adoption of the relevant legislation, and the quality of the law, which imposes additional obligations on the state, aimed at preventing the defects of the criminal procedural legislation, creating a clear and predictable procedure, and the mechanism of the court appeal of the lawfulness of the intervention, is of particular importance.

In order that the interference with the property right was legitimate in the sense of Art. 1 of Protocol No. 1 of the Convention, as stated above and follows from the second rule of Art. 1, it should be carried out in the public interest. The ECHR will consider the existence of a *legitimate purpose* for interfering with the property after the legality of the intervention has been established. As the ECHR recalled in the case of *Tregubenko v. Ukraine*, the court reiterates that deprivation of property can only be justified if it is shown, *inter alia*, in the "public interest" and the "conditions provided for by law". Moreover, any interference with property rights must necessarily comply with the principle of proportionality. As the Court has repeatedly stated, a "fair balance" should be maintained between the requirements of the general interest of society and the requirements of the protection of fundamental human rights, and that "the necessary balance will not be respected if the person concerned carries an "individual and excessive burden", moreover, "the correct application of the law is undoubtedly of public interest."[2]

In the case of *Sukhanov and Ilchenko v. Ukraine*, it was also stated that "the first and foremost rule of Article 1 of Protocol No. 1 is that any interference by public authorities with the right to peaceful possession of property should be lawful and should pursue a legitimate purpose in the interests of society".[3]

Moreover, an analysis of the ECHR's practices makes it possible to conclude that in determining the lawfulness of the purpose of the intervention, the Court gives states the discretion,[4] since it is the

[1] ECHR de decision in the case «Бакланов проти Росії» (Baklanov v. Russia), 9 July 2005, Application no. 68443/01, § 39–46.

[2] ECHR de decision in the case «Трегубенко проти України» (Tregubenko v. Ukraine), 2 November 2004, Application no. 61333/00, § 53–54.

[3] ECHR de decision in the case «Суханов та Ільченко проти України» (Sukhanov and Ilchenko v. Ukraine), 26 June 2014, Application no. 68385/10 та 71378/10, § 53.

[4] ECHR de decision in the case «Олссон проти Швеції (1)» (Olsson v. Sweden (1)), 24 Marh 1988, Application no. 10465/83, § 67.

authorities themselves that are more aware of the needs of their society, and are therefore more favorably placed than the judge of the ECHR in assessing the public interest of their country. Supervision of the ECHR in this part is limited to cases of abuse of power and blatant mischief.

With regard to such a component as the possibility of restricting rights to the extent necessary in a *democratic society*, the ECHR explained that, taking into account the case-law of the ECHR, "the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate purpose pursued."[1] The ECHR noted that "whilst the adjective "necessary"… is not synonymous with the adjective "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".[2]

The ECHR also developed the components to be assessed in determining whether interference was necessary in a democratic society: the importance of protected rights; the nature of a democratic society; the possibility of a European and international consensus; the importance and objective nature of the protected interest; the availability of a judicial evaluation of the intervening interest.

Within this criterion of admissibility of interference with a person's right, the proportionality is assessed between the need for interference with human rights in a democratic society and the possibility of securing a legitimate purpose during the intervention. As the ECHR stated in the above-mentioned Decision in the case of *Sukhanov and Ilchenko v. Ukraine*: "Any interference should also be proportionate to the objective pursued. In other words, a "fair balance"" should be struck between the general interests of society and the duty to protect the fundamental rights of the individual. The necessary balance will not be achieved if the individual or persons are burdened with personal and excessive burden."[3]

Therefore, interference with individual rights is disproportionate if it does not lead to the achievement of legitimate purposes. The resolution of the issue of proportionality is often about balancing the various factors, which is often difficult for both the ECHR itself and law enforcers trying to justify their interference with the rights of individuals. The ECHR often speaks of a "fair balance" between the interests of society and the interests of the individual, but finding that balance is very difficult. In other words, human rights restrictions applied by the state should be proportionate to the content and scope of the law itself and may not be so severe

[1] ECHR de decision in the case «Олссон проти Швеції (1)» (Olsson v. Sweden (1)), 24 Marh 1988, Application no. 10465/83, § 58.

[2] ECHR de decision in the case «Хендісайд проти Сполученого Королівства» (Handyside v. the United Kingdom), 7 December 1976, Application no. 5493/72, § 48.

[3] ECHR de decision in the case «Суханов та Ільченко проти України» (Sukhanov and Ilchenko v. Ukraine), 26 June 2014, Application no. 68385/10 and 71378/10, § 53.

or violate the very essence of the law.

For example, in the case of *Bokova v. Russia*, a complaint was filed by a citizen Bokova that after convicting her husband and his accomplices for committing particularly large-scale fraud, the perpetrators were obliged to pay more than USD 9 million to the victim. Due to the need to secure a civil suit, the house of Bokova was arrested. Not receiving legal protection at the national level, the applicant appealed to the ECHR, which in her decision stated, inter alia, that she had obtained the house prior to the criminal activity of her husband, and therefore had a legitimate reason to demand the abandonment of at least a part of it, namely the part which was not subjected to repair at the expense of a man's criminal proceeds. In addition, the decision to confiscate the house was not accompanied by sufficient procedural safeguards to avoid arbitrariness, as no domestic court examined the amount of the proceeds of the crime, and did not give the applicant the opportunity to present arguments regarding the protection of his share of the property. This approach has led the ECHR to unanimously acknowledge the violation of Art. 1 of Protocol No. 1 of the Convention.[1] Therefore, it can be seen that the interference with the applicant's property rights was disproportionate to the purpose pursued by the state authorities. The applicant was subjected to undue burdens, had an undue influence on her property rights, and was not provided with any procedural safeguards to protect her property.

As it was stated above, the right to peaceful possession of property is a fundamental right, but it is not absolute and may be limited under certain conditions, but a violation of Art. 1 of Protocol No. 1 of the Convention will take place when it is established a significant imbalance, a disproportionate effect "between the means employed and the aim sought to be realized".[2]

For a more thorough understanding of the essence of the principle of proportionality, we should turn to modern doctrinal approaches to its understanding.[3]

If, as noted above, the ECHR uses the following stages of lawfulness restriction assessment: "legality", "legitimate purpose", "necessity in a

[1] ECHR de decision in the case «Бокова проти Росії» (Bokova v. Russia), 16 April 2019, Application no. 27879/13, § 54, 59.

[2] ECHR de decision in the cases «Джеймс та інші проти Сполученого Королівства» (James and Others v. the United Kingdom,), 21 February 1986, Application no. 8793/79, § 50, and ««East/West Alliance Limited» проти України» (East/West Alliance Limited v. Ukraine), 23 January 2014, Application no. 19336/04, § 168.

[3] Barak A., Proportionality. Constitutional Rights and their Limitations (Cambridge University Press 2012) 638. Бажанов А. А., Проблемы реализации принципа соразмерности в судебной практике (2018) 6 (т. 13) Труды Института государства и права РН 124–157; Коэн-Элия М., Порат И., Американский метод взвешивания интересов и немецкий тест на пропорциональность: исторические корни (2011) 3 Сравнительное конституционное обозрение 59–81; Погребняк С. П., Принцип пропорційності у судовій діяльності (2012) 2 Філософія права і загальна теорія права 49–55.

democratic society", then scholars propose their own vision of algorithmizing lawfulness assessment activities. In particular, A. Barak distinguishes four elements (stages) of the proportionality test: 1) identification of the legitimate purpose of law restriction; 2) determining the existence of a rational link between the legitimate purpose and the means chosen to achieve it (the relevance of the means employed); 3) assessment of the necessity of the measures applied; 4) comparing the benefits of achieving a legitimate purpose and the limitations to which human rights have been subjected (proportionality in a narrow sense or "weighing").[1]

There are approaches according to which the number of steps proposed by A. Barak is reduced to two, but there are criteria for determining the proportionality of the intervention.[2]

Thus, as we can see, basic details of the proportionality principle of the legitimacy determination of human rights restriction, which are developed in the doctrine, applied in national legal systems and used in the ECHR, are the same.

Consideration of the issues raised above becomes even more relevant in view of the fact that Art. 173 of the CPC provides that in deciding whether to seize property, the court should take into account, inter alia, the reasonableness and proportionality of the restriction of ownership to the task of criminal proceedings. In addition, if the investigator's request for the seizure of the property is satisfied, the court should apply the least onerous manner of arrest that will not result in the suspension or undue restriction of the person's legitimate business activity or other consequences that significantly affect the interests of others (Para. 5 Part 2, Part 4, Art. 173 of the CPC). So, as we can see, the domestic legislator tried to unify the international legal standards contained in Art. 1 of Protocol No. 1 of the Convention and national practice to ensure that the rights of the seized person are respected. Such a move by the legislator is a positive one, since the ECHR, as mentioned above, states that it is for the state to establish the goals of interference with the exercise of individual rights of the individual and to determine a fair balance between the needs of such intervention and the general interests of society. Criminal proceedings belong to those types of state activity where the possibility of using coercion permeates all its stages and proceedings, facilitates the exercise of evidentiary activity, is a means of ensuring the participants in criminal proceedings of their duties, etc. Therefore,

[1] Barak A. Proportionality. Constitutional Rights and their Limitations (Cambridge University Press 2012) 638; Бажанов А. А., Проблемы реализации принципа соразмерности в судебной практике (2018) 6 (т. 13) Труды Института государства и права РН 129.

[2] Коэн-Элия М., Порат И., Американский метод взвешивания интересов и немецкий тест на пропорциональность: исторические корни (2011) 3 Сравнительное конституционное обозрение 61; Погребняк С. П., Принцип пропорційності у судовій діяльності (2012) 2 Філософія права і загальна теорія права 51.

it is inevitable to raise awareness of the criteria for the legitimacy of the rights restriction of persons in criminal proceedings, including whilst the arrest of property, as well as their widespread implementation in law enforcement practice.

Referring to the practice of national courts shows that judges are gradually adopting the new legal requirements and requirements. Cases with reference to Art. 1 of Protocol No. 1 of the Convention in the rulings on the satisfaction or satisfaction refusal of the investigator's request for the arrest of property. As a positive trend, it should be noted that in some rulings investigative judges try to make an argument and evaluate the proportionality of the means of limiting the rights of the person being pursued, but such argumentation is very lapidary; the components of the proportionality test are not analyzed in detail, judges do not explain exactly how public interest is compared, the purpose the law enforcer wants to achieve and the rights of the individual.

In particular, having considered the request of the investigator for the arrest of "movable and immovable property" in the case, which was initiated on the grounds of the crime under Part 3 of Art. 212 of the Criminal Code "Tax evasion, fees (mandatory payments)", the investigating judge concluded that it was necessary to refuse to grant the request of the investigator and in the ruling stated that "the investigators were not provided with adequate and admissible evidence by the court that in this criminal proceeding any person was informed of suspicion, the possibility of using property as evidence in criminal proceedings, since the petition is based only on the assumption of tax evasion of this individual, the court has also not proved the reasonableness and proportionality of the restriction of ownership by the criminal proceedings. Since… seizure of… the account will completely stop the activity… of the individual and because of the inability to purchase poultry feed will lead to its maturity, that is, it will have irreversible consequences…"[1]

Another order of the investigating judge stated: "the petition does not specify the basis and purpose of seizure of the vehicle in accordance with Art. 170 of the CPC of Ukraine and the necessity of such arrest is not duly substantiated. And the need for an examination is not a basis for taking such a measure to secure criminal proceedings as seizure of property. In addition, according to Part 4 of Art. 173 of the CPC of Ukraine, the investigating judge, the court is obliged to apply in such a way the seizure of property, which will not lead to the suspension or undue restriction of the legitimate business activity of the person, or other consequences that significantly affect the interests of other persons. Thus, the imposition of arrest implies the deprivation of the right to alienate, dispose and/or use the property, so in the case of arrest of a car owned and used in the business activity of JSC Iceberg in

[1] Ухвала слідчого судді Ужгородського міськрайонного суду від 23 February 2017 р., справа 308/1740/17. URL:. http://reyestr.court.gov.ua/Review/64906747 (дата звернення: 20.06.2019).

the form of LLC, it may lead to a restriction of legitimate business activity of the company… the court was not provided with adequate and admissible evidence that there were risks that the individual entrepreneur PERSON_3 may conceal, lose, transfer, alienate it, since during this period he had sufficient time and opportunities to dispose of the funds from the stated accounts of the petition." In view of the foregoing, the judge denied the application.[1]

Meanwhile, it should be noted that in the motivating part of the decisions of investigative judges, the standard argumentation of the general nature is most often applied, the relevant parts of Art. 170–174 of the CPC, there are formal criteria without attempting to introduce a discretionary scheme, which undoubtedly are grounds for satisfaction or refusal to grant a request, but the proper systematic, logical, consistent reasoning, which is usually lacking, is important. Certainly, it is not easy to construct such a sequence, but based on the ECHR's practice and the above approaches of scholars, we will try to offer a model of argumentation algorithm that can be used by the investigating judge when considering a motion for seizure of property, as well as by an investigator in making a request for seizure of property. In our view, the value of developing such an algorithm is obvious. The use of coercion pervades all criminal proceedings by virtue of its specificity, so the question arises about determining the admissibility criteria for restricting the rights of persons involved in criminal proceedings and using them in petitioning for the seizure of property, as well as the decision of investigating judges to grant or refuse their satisfaction.

The conducted research gives us grounds to propose the following algorithm whereby the investigating judge, or the investigator who drafts it, should resolve the following questions:

1) what is the purpose of interfering with a person's right;

2) whether the purpose of interfering with a person's right is legitimate, that is, whether it is provided by law;

3) whether the purpose can be achieved through the seizure of property, whether it is reasonable, appropriate and necessary for the achievement of that purpose, and whether the evidence is necessary;

4) whether there is any other means less burdensome than the seizure of property by which this purpose can be achieved;

5) whether the means used are proportionate to the purpose which the state wishes to achieve;

6) whether the degree of restriction of the person's right they wish to achieve is proportionate.

The proposed questions give reason to conclude on a three-stage solution to these issues. In the first stage, the first two questions concerning the definition of purpose are solved. In the second stage, the third and fourth questions

[1] Ухвала слідчого судді Берегівського районного суду Закарпатської області від 26 June 2017 р., справа 297/1390/17. URL: http://reyestr.court.gov.ua/Review/67410143 (дата звернення: 20.06.2019).

concerning the choice of a means of restriction are addressed. Finally, the third stage addresses the issue of proportionality between the right of the individual and the purpose to be achieved.

The legitimacy of the purpose is established based on the requirements of the legislation. A measure which is objectively necessary in the presence of certain grounds and conditions is *reasonable*. *Suitable* is a means by which the desired purpose can be achieved. The means is *necessary*, if there is no other, equally suitable, but less burdensome person, and it is necessary to solve an urgent social problem. When, of all the means by which a legitimate purpose can be achieved, it is the most appropriate one, it is capable of ensuring its achievement as effectively as possible. *Proportional* may be the means to which the burden is imposed on the individual, given all the circumstances and risks will be commensurate with the purpose to be attained in the application of this restriction and also of benefit to society. That is, it is necessary to "weigh" the degree of influence that a person should exert on the one hand, and the public interest protected by the state on the other one. In other words, the benefits to society of applying this measure are obvious and more important than the burdens a person carries. It is also necessary to determine the degree of intensity of influence on the person, since when seized property may be different. Not only the achievement of the purpose but also the gravity of the crime committed, the risks involved and the person to whom the measure is applied are to be taken into account. Finally, one can then conclude whether the desired result, taking into account all the conditions analyzed, is commensurate with the restriction of a person's right to peaceful possession of property.

In our opinion, our model of argumentation is universal, capable in the decision to arrest property to restrict the discretion of the law enforcer, to protect a person from arbitrariness of public authorities, and also to become a methodological basis in making a criminal procedural decision.

The algorithm developed seems to be capable of resolving the value conflict arising from the use of property arrest as a measure of criminal proceedings related to the possibility of interfering with bodies conducting criminal proceedings in a law guaranteed by the Constitution of Ukraine (Article 41), the Convention and its Protocol No. 1, as well as the CPC (Article 16) by determining such a correlation between the legitimate purpose of the intervention and the extent of the intervention, which will strike a balance between the values protected by law, between which there is a conflict as a result of such intervention.

The proposed approaches, on the one hand, will ensure the inviolability of property rights and, on the other, the possibility of restricting them in necessary cases, while ensuring the priority of human rights and the proportionality of such restrictions.

Conclusions. Property arrest is a measure of ensuring criminal proceedings, during which the interference with the fundamental right of a person to

peaceful possession of property is interfered with, which is protected by the Constitution of Ukraine and international legal acts. Against this background, it is inevitable to raise awareness of the criteria for the legitimacy of the person's rights restriction in criminal proceedings, as well as their widespread incorporation into law enforcement practice. Such criteria have been developed, based on the provisions of the Convention, Art. 1 of Protocol No. 1 to the ECHR, in the ECHR's case-law, and were called the "three-part test", the elements of which are to analyze the legitimacy of an interference with a person's right, legitimate purpose, and address the need for such interference in a democratic society, its proportionality to the purpose that the state wants to achieve.

The analysis of such criteria becomes even more relevant due to the fact that Art. 173 of the CPC provides that, in deciding whether to arrest property, the court should take into account, inter alia, the reasonableness and proportionality of the restriction of property to the task of criminal proceedings, and to apply the least aggravated method of arrest which will not result in the suspension or undue restriction of the person's legitimate business activity or other consequences which have a significant effect on the interests of others. Thus, the domestic legislator tried to unify the international legal standards contained in Art. 1 of Protocol No. 1 of the CPC and national practice in order to ensure the rights of the person the property of which is seized are respected.

National judges are gradually accepting the ECHR legislation and practices, but most often the standard reasoning is generally used when deciding on a seizure request for property arrest; the contents of the relevant articles of the CPC are provided without attempting to reason and to give detailed and substantiated grounds for satisfying or denying the petition. Meanwhile, it is important to have a proper systematic, logical, consistent argument, which is generally lacking in the rulings.

The model of gradual logical argumentation, developed and proposed by the authors of the article, is universal, capable of restricting the discretion of the law enforcer in the decision to arrest property, to protect the person from arbitrariness of public authorities, and also to become a methodological basis for making a criminal procedural decision.

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M. Shumylo, Department of Justice Taras Shevchenko National University of Kyiv Kyiv, Ukraine

R. Jurka, Mykolas Romeris University Vilnius, Lithuania

V. Kaplina, Institute for the Training of Personnel for Justice Yaroslav Mudryi National Law University Kharkiv, Ukraine

INFORMATIONAL THEORY OF EVIDENCE AND THE PROBLEMS OF USING THE ELECTRONIC MEANS OF PROVING IN CRIMINAL PROCEDURE

Abstract. *Article deals with the topical for modern science of criminal procedural law and law enforcement practice question of use in criminal procedure digital evidence. Authors highlight that development of digital technologies, electronic forms of communication, Internet, transnational and transboundary nature of crimes, which are committed in the sphere of computer information, specific nature of creation of digital tracks, gives the opportunity to state the considerable broadening of the possibilities to use in proving digital evidences, and also cause the necessity of addressing to the solving the problems of proving, which appear in the conditions of digitalization, including the heritage of informational theory of proving, which gives the possibility to adapt the probative activity in criminal procedure to any future innovative discoveries, scientific and technical progress and define the place of the digital evidence among other procedural sources of evidence. During the research, it is found the factors, which influence negatively on the law enforcement practice, lead to recognition the evidence obtained in criminal proceeding as inadmissible. It is emphasized, that the cognitive potential in the aspect of development of the science of criminal procedure has the informational theory of criminal procedural proves. Relying on the fact that digital technologies are based on the methods of coding and transporting information using double code of encryption, which gives the possibility not only transport the information, but also recognize it after that, authors make the con-*

clusion about suitability to use wider concept of «digital information» and «digital evidence» instead of concepts «electronic information» or «computer information». In order to formulate relevant conclusions, the authors refer to the legislation of foreign countries. The results of the study are formulated in the conclusions, where authors suggest definition of the concept of digital evidence and state the need to distinguish the digital evidence as an independent processual source of evidence.

Key words: *evidence in criminal procedure; digital information; electronic information; electronic document; informational technologies.*

Introduction

The development of digital technologies, electronic communications, the Internet has caused significant impact on social life and legal rules. Computers, mobile phones, artificial intelligence, the use of electronic money and cryptology have become commonplace for many of us. In the conditions of digital reality, the law as a whole and the criminal procedural law in particular gradually change. However, despite the updating of the criminal procedural law, it still does not meet the needs of the present. During proven activity in criminal proceedings, the latest technologies of fixing traces of a crime, and the identification of persons who committed it are increasingly being used, but not always received information is used as evidence in court or may be grounded in a court decision. Factors that negatively affect law enforcement practices, in our opinion, are of a systemic nature and are, first of all, due to the lack of proper legislative tools; and secondly, to the theory of proof that meets the needs of time, contains the concept of evidence and proving, according to which the procedural status of "digital information" becomes clear. In addition, legal terminology, which is contained in the law or which is used in the legal doctrine, has dialectical unity with the process of law enforcement. Meanwhile, it should be noted that there is no unity in the approaches to understanding such concepts as "computer evidence", "digital evidence", "digital information", "electronic document", "computer information", "electronic media" "a document made using computer technology", etc. All above mentioned obviously requires addressing the problem of evidence in a digitalisation environment, which will allow the adaptation of proving activity in criminal proceedings to any future innovation achievements and determination of the place of digital (electronic) evidences among procedural sources of evidence.

Problems of legal regulation of use of digital (electronic) information as evidence in various aspects were investigated in the works of O. S. Aleksandrov, V. D. Arseniev, M. S. Alekseyev, V. S. Balakshin, A. R. Belkin, J. P. Borulenkov, V. B. Vekhova, B. Ya. Gavrilova, V. P. Gmyrka, L. V. Golovko, V. Ya. Dorokhov, N. A. Zygury, Z. Z. Zinatullin, S. V. Zuev, A. Yu. Kalamayko, I. O. Krytska, O. S. Kuchin, V. O. Lazareva, P. A. Lupinskaya, O. P. Metelev,

I. D. Naidis, P. S. Pastukhov, C. B. Rosinsky, M. S. Strogovich, D. M. Tsekhan, S. A. Sheifer, A. V. Shilah and others. The growing scientific interest in the abovementioned problems should be noted as a positive point. At the same time, the scholars mainly concern only certain aspects, the doctrine of criminal procedural law is not studied comprehensively, in particular, at the dissertation level, in which the problems of the legal nature of electronic means of proving, their classification, epistemological and methodological basis of use in proving would be solved; proposals regarding effective legal regulation of the use of digital information would be formulated; the legal regulation of the use of digital technologies in the course of proving in the criminal process of foreign states would be analysed, etc.

Consequently, the purpose of the article is to develop scientifically grounded approaches to solving problems arising when using electronic means of proving in a criminal proceeding; their consideration through the prism of the information theory of evidence; definition of the ratio between the concepts of ""digital" and "electronic" evidence", "digital" and "electronic" information; development of features of digital evidence; definition of its concept; establishment of the place of digital evidence in the system of procedural sources of evidence; study of foreign experience of legal regulation of use digital evidence in proving.

1. Materials and methods

In order to achieve the purpose of the article and to formulate substantiated conclusions, in the process of work a complex of general scientific and special methods of scientific research, which are traditional for legal science was used: dialectical, formal and logical, hermeneutical, generalisation and comparative and legal. The dialectical method, absorbing the entire system of categorical apparatus of dialectics and operating during the cognition with the principles of reflection, activity, comprehensiveness, ascension from the individual to the general, and on thecontrary from the general to the one, the interconnection of quantitative and qualitative characteristics, determinism, the unity of induction and deduction, analysis and synthesis, made it possible to study the problems arising from the use of digital evidence in criminal proceedings from the point of view of the integrity of this legal phenomenon and the interconnectedness of its element. Ascension thinking from specific to abstract, with the subsequent transition from abstract to specific, allowed establishing essential, typical and generalised features, characteristic for understanding the legal nature of digital evidence, to emphasise their individual and specific features. The formal and logic method became the basis to disclose and improve the notion of digital evidence, to compare it with other concepts used in legislation and doctrine. With the help of the hermeneutic method, the legal content of certain norms of the criminal procedural and civil procedural legislation was established, the fact that legal terminology does not correspond to the modern achievements of the technical sciences was revealed. Using

the comparative legal method, the authors learned the legislative tendencies of foreign states. The method of generalisation made it possible to consistently integrate single facts into a single whole and formulate substantiated conclusions aimed at improving the normative regulation of the issues under investigation, and overcoming the problems that are encountered in enforcement practice. These methods were used in the interconnection, which contributed to the completeness of the research and the validity of the formulated scientific conclusions and proposals.

2. Results and discussion

2.1 Information theory of evidence as promising vector of scientific researches in terms of digitisation of the proving process

In the theory of procedural law of the end of 19th – early 20th the notion of "evidence" was defined as everything that filled the world with matter, all that may be perceived by us from the spiritual world [1]; or as totality of grounds to believe that there are circumstances, which must be established in the present case [2]. Such an understanding of the notion of "evidence" was due to the time, corresponded to the development of the science of procedural criminal law, and therefore significantly differed from that existing in the domestic doctrine of the criminal process and legislation.

In the Soviet period, there was view of evidence as facts learned by a court during the administration of justice. Such a vector of understanding of evidence was developed by such scholars as A. Ya. Vyshinsky, M. O. Cheltsov, S. V. Poznyshev [3–5]. However, such an understanding of evidence was not devoid of deficiencies. Emphasising that the above definition of evidences leaves the question of the origin of the fact unclear, it as if appears before a subject of proving to be in the finished form, M. S. Strogovich proposed the "double" concept of the notion of evidence, the essence of which was that the notion of evidence unites: 1) a fact on the basis of which necessary circumstances of crime are established and 2) the source provided by law from which a subject of proving obtains the facts [6]. M. S. Strogovich understood sources of facts as types of evidence common to modern science of the criminal process: testimony, expert opinions, material evidence, protocols, reviews, other written documents, etc.

In the 60s of the last century, in conditions of rapid development of technological progress, the issue on informational nature of evidence became topical. V. Ya. Dorokhov was the first who mentioned this aspect of evidence; he can be considered the founder of the information theory of evidence. According to this theory, evidence is reviewed not as a fact, but as information about the fact that it is an information signal [7]. The information theory of V. Ya. Dorokhov is based on the theory of reflection, the main thesis of which is the postulate that the outside world objectively exists and can in principle be known. The author concluded that evidence is result of interaction of two

material objects, each of which leaves own mark on others. Therefore, the mechanism of evidence formation is in system of "double reflection". First of all, objects of the surrounding world interact with each other, leaving trace-reflection on one another or in the consciousness of witnesses of interaction – this is the "primary reflection". Later, the traces left are revealed by a subject of evidence and are already reflected in his/her mind during the review of the place of the event, interrogating eyewitnesses, which is a "secondary reflection". Information, in the opinion of V. Ya. Dorokhov, being in its essence a reflection of past events, is of signal nature and cannot exist separately from matter: its existence is always conditioned by presence of information source and its receiver. The same evidence is the unity of information (information) and their source (material carrier) [8].

Consequently, within informational theory, evidence is information (data or message) that is transmitted through signal and is an encoded equivalent of an event, recorded by a carrier of information and expressed in the form of conditional physical symbols, which creates a certain ordered set [9]. Such understanding of evidence can be perceived by modern science, which has faced the necessity of the transformation of approaches to understanding evidences in criminal proceeding, that in its turn is conditioned by significant changes in economy and society as a result of digitalisation and the forthcoming fourth industrial revolution [10].

2.2 The essence and features of electronic evidence, its place in the system of procedural sources of evidences

The Law of Ukraine of October 3, 2017, "On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Justice of Ukraine and other legislative acts" introduced such a means of proof as an electronic evidence in the procedural codes [11]. The legislator uses unified approach to understanding of "electronic evidence" as information in electronic (digital) form that contains data about circumstances important for a case, in particular, electronic documents (including text documents, graphic images, plans, photographs, video and audio, etc.), websites (pages), text, multimedia and voice messages, metadata, databases, and other data in electronic form. The law provides that such data may be stored, in particular, on portable devices (memory cards, mobile phones, etc.), servers, back-up systems, and other places of data storage in electronic form (including the Internet).

At the same time, the legislator has neglected the need for such changes in the criminal procedural law, which has already been discussed among legal scholars and practitioners. On January 17, 2019, Verkhovna Rada of Ukraine adopted draft law № 9484 "On Amendments to the Criminal Procedure Code of Ukraine and the Criminal Code of Ukraine (regarding the improvement of the order of application of certain measures for the enforcement of criminal proceedings)." Despite the fact that the developers announce in the explanatory

memorandum that the draft law provides for amendments to the CPC of Ukraine in terms of clarifying the special terminology in the field of information technologies, the text does not define the notion of electronic (digital) evidence or at least electronic (digital) information [12].

In our opinion, the absence of appropriate changes to the criminal procedural legislation can only be explained by the conservatism of the domestic legislator. Thus, law-enforcement practice is forced to adapt the current CPC to the needs of the present, and "electronic evidence" in criminal proceeding are considered material evidences or documents that not always corresponds to the nature of the latter (art. 98, 99 of the CPC) [13]. Such "adaptation" does not always find support in the courts, and the evidence obtained is deemed inadmissible. Thus, it is obvious that there is a need to improve the legal definition of the notion of evidence in criminal proceedings, taking into account the specifics of digital information, as well as the normative consolidation of the special regime for its use and verification. It also confirms the thesis that it is necessary to allocate electronic (digital) evidences as a separate procedural source of evidence and the inability to identify them with material evidences and documents.

It is known that terminology has the important place in doctrine and lawmaking. Each legal term has a legal sense and with the help of a legal notion reflects an essence of a legal phenomenon or process. Therefore, it is no coincidence that terminology used in legislation and science is the subject of close attention and discussion. This is about equation or, on the contrary, separation of the concepts of "digital" and "electronic" evidence. Thus, M. O. Efremova defines "electronic information" as information (messages, data), presented in electronic and digital form, regardless of the means of their storage, processing and transmission [14]. A similar position is taken by V. M. Shchepetylnikov, who believes that the totality of social relations connected with the circulation of information cannot be exhausted by the use of the term "computer", since the computer is only one of the varieties of electronic computing technology. In this regard, the author prefers the use of the term "electronic information" [15].

The opposite position is taken by the American scientist Joseph Rotenberg, who argues that the notion of "digital information" is more appropriate because information theoretically can exist in non-electronic form, for example, with the use of optical and quantum technologies, and "electronic information" is not necessarily digital [16]. S. P. Kushnirenko also emphasises the expediency of using the term "digital information". According to his understanding, digital information is any information presented in the form of a sequence of digits available for input, processing, storage, transmission through technical devices [17].

Ukrainian legislator equates the notions of "digital" and "electronic" information and, consequently, there are

"digital" and "electronic" evidence, in particular, in the norms of the Civil Code of Ukraine. Basing on the legislator's approach domestic scientists also equate these notions, using the terms "electronic" and "digital" evidence as synonyms [18].

In our opinion, such the position is more convincing according to which it is appropriate to use the broader notion of "digital information" and "digital evidence", since digital technologies are based on methods of encoding and transmitting information using a dual encryption code (0 and 1), which allows not only the transmission of information, but also it recognition after receipt. Electronic information (and computer information) is only a kind of digital information and correlates with the latter, respectively, as kind and class.

Taking into account requirements of time, modern scientists try to develop the definition of the notion of electronic evidence. In particular, A. I. Zozulin understands digital information as information that is encoded in a dual system of computation and is transmitted using any physical signals [19].

Also it is proposed to understand as digital evidence any information (messages, data) that is in electronic form on the basis of which a court, prosecutor, investigator basing on a certain established procedural order, determines the presence or absence of circumstances to be proven during the criminal proceedings, as well as other circumstances relevant to a criminal case [20].

On the basis of the formulated definition, the authors propose a number of features of electronic evidence, among which are the following: 1) they are represented in encoded form in one of the objective forms of information existence – electronic; 2) they are always mediated through technical material carrier beyond which their existence is impossible; 3) simultaneously several participants of the criminal proceedings may have access to them and acquaint with them; 4)evidence is quickly transformed into non-electronic forms and vice versa; for example, they can be printed on paper and scanned from a paper carrier; 5) there is a possibility to copy them on any type of electronic media and to send on any distance; 6) evidence is collected, investigated and used for the purpose of criminal proceedings only with the help of special scientific and technical means – means of storage, processing and transmission of computer information, information and telecommunication networks and terminal equipment [20].

In general, it is worth agreeing with the proposed features of digital evidence and emphisisng that, in our view, key one is the absence of material form because they cannot be felt due to the lack of material expression. Meanwhile, digital evidence can exist in intangible form on technical media. These features distinguish electronic evidence from written and material evidence. In addition, it should be added that digital information is more vulnerable to third-party intervention, it can be easily destroyed or changed. The process of creating and storing information is also specific; it makes it easy to change a carrier without losing content and, on the contrary, pro-

vides the ability to make changes to the content without leaving traces on a carrier. In addition, the transmission and copying of digital information is possible without removing a carrier using which this information was created.

2.3 Features of using digital information in foreign countries

To create updated domestic model of proving, which corresponds to modern level of achievements of science and technology, from the perspective of search the ways to solve similar problems, it is important to analyse foreign practices in order to learn from advanced countries. In addition, the transnational and transboundary nature of crimes in the field of computer information, the use of computers as tools for committing a crime, the specific nature of the creation of digital traces outside the jurisdiction of one particular state entails the development of intergovernmental cooperation and, possibly, the formation of a unified international application law information technology in criminal proceedings.

The use of digital evidence in the United States, which is considered a pioneer in computerisation, is governed by the Federal Criminal Procedure Code [21], the Federal Rules of Evidence [22], Manual on Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations [23], the Federal Law "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" (so called "the USA Patriot Act") [24], the Foreign Intelligence Surveillance Act [25], as well as judicial precedents. In the United States there are also a number of rules, instructions, and techniques aimed at regulating the use of electronic evidence.

Unlike in the Ukrainian legislation, in the United States there is no legal definition of evidence. The norms of the federal rules of evidence also do not contain any mention of digital or electronic evidence, which is explained by the fact that this act was adopted in 1975, but the evaluative concepts and their functional interpretation allow the distribution of the provisions of the Rules to the current needs, as evidenced by the textbooks, practical comments and scientific articles. Also, the absence of exhaustive list of evidence in the procedural legislation of the USA gives such an opportunity [22].

In the doctrine, evidences are defined as information that is able to establish or refute a fact [26]. Article 401 of the Federal Rules of Evidence establishes a rather evaluative notion that evidence is appropriate if it can, in any form, make any fact which has an effect on the qualifications of an offence to be more likely or less probable than in the absence of this evidence [27]. In this, evidences are divided into three categories: 1) real or physical evidence that consists of tangible objects that can be seen and touched; 2) testimony of witnesses, which may be provided in court proceedings on the basis of personal observation or experience; 3) indirect evidence, based on additional information, observation of reality, which can

confirm the conclusion, but does not prove it (so they are considered as indirect).

Definition of digital (electronic) evidences is also developed in the theory of American criminal proceeding. Digital (electronic) evidence is any evidentiary information stored and transmitted in digital form, which a party to a lawsuit may use in a court session [28]. The legislation does not provide list of procedural actions that are used to collect digital evidences.

Usage of digital evidence in the process of proving in the USA is regulated in details in Manual on Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (Chapter V). In the Manual, electronic documents as evidences are divided into non-hearsay and hearsay [23].

By the origin and content there are two main groups of computer evidences: 1) evidences as a result of activity of a person stored on an electronic carrier and containing information filled in by a user; 2) evidences created by a computer in accordance with in accordance with the program laid down (*computer-stored evidence, human generated computer evidence*);

Non-hearsay evidence includes those that generated by a computer without a human participation; such evidences are divided onto two categories: *computer-generated records* (records created by a computer) and *computer-stored records* (records that are stored in a computer) [29].

The result of human activity (personal letters, memos, accounting documents, etc.) are reviewed as *hearsay.*

In this, the Manual establishes a list of requirements for an electronic document as procedural evidence. Before accepting an electronic document as evidence, a process participant must prove its authenticity, which allows to establish the admissibility and conclude that the authenticity is correct. This approach is due to the fact that evidences created by a human is more vulnerable to interference and changes than the evidence that is created directly by a computer. Consequently, the main thing in the American proof theory is the possibility of verifying the evidence that conditions its admissibility.

In France, according to Part 1 of Art. 427 of the CPC of France, the presence of crimes can be established using any type of evidences that allow a judge to make a decision based on his/her own conviction. Consequently, the CPC of France does not contain an exhaustive list of types of evidence. In addition, the CPC of France consolidates the freedom to collect evidences, any act of an investigating judge which he/she considers necessary to do, except in cases explicitly prohibited by law, may be admissible [30].

In the CPC of Germany, although direct digital information is not isolated as an independent source of evidence, based on the CPC, it can be concluded that such information can be collected during any procedural action: seizures, mailboxes, telephone conversations, searches, examination of documents, telecommunications control, computer search, possible criminals, etc. [31].

Conclusions

The development of digital technologies, electronic forms of communication, the Internet, the transnational and transboundary nature of crimes committed in the field of computer information, the use of computers as tools for committing a crime, the specific nature of the formation of digital traces, including beyond the jurisdiction of a particular state, make it possible to ascertain the significant expansion of the possibilities to use digital evidences in proving, as well as condition the necessity to address the problems of proving that arise in the conditions of digitalisation, including relying on the acquisition of the information theory of evidence, which will allow to adapt evidence in criminal proceedings to any future innovation achievements, scientific and technological progress and determine the place of digital evidence among procedural sources of evidence.

Factors that adversely affect law enforcement practice lead to the recognition of evidence obtained in criminal proceedings as inadmissible, they are of systemic nature and related to the lack of proper legislative tools. The theory of evidence, which meets the needs of the time, contains the concept of evidence and proving, according to which the procedural status of "digital evidence" becomes clear, as well as the lack of unified terminology and awareness of its legal content.

The scientific potential in the aspect of the development of criminal procedural science is the information theory of criminal procedural evidences, which, based on the information theory, explains the essence of judicial evidence as information signals coming from the objective reality in a mind of a subject of evidence and contributes to the formation of the corresponding cognitive images.

The essence of electronic evidence must be investigated through their peculiarities, inherent features that reflect the specifics and legal nature of electronic evidence, and using which they can be distinguished as an independent form of evidence.

Relying on the fact that digital technologies are based on the methods of encoding and transmitting information using dual encryption code, which allow not only transmitting of information but also recognizing it, there is the logical conclusion it is more expedient to use more wide term "digital information" and "digital evidence". Electronic information (and computer information) is only a kind of digital information and correlates with the latter, respectively, as kind and class.

It is necessary to understand as digital evidence any information (messages, data) that is in electronic form on the basis of which a court, prosecutor, investigator basing on a certain established procedural order, determines the presence or absence of circumstances and facts relevant to a criminal proceeding, an investigation of which can be conducted using special program and technical means.

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O. Tolochko, Candidate of Juridical Sciences, Professor State Counsel of Justice of the 3rd Class Honored Lawyer of Ukraine Vice-Rector of National Prosecution Academy of Ukraine Kiev, Ukraine

STADARDS OF PROOF IN CRIMINAL PROCEDURE (COMPARATIVE ANALYSIS)

Abstract. *In criminal process the main task of achieving result is forming of a verdict of guilty or acquittal on the basis of court decision. In this, every decision is grounded on independent evaluation of given evidences. Exactly these form the actuality of research – search for methodological and forming methods of evaluation of evidences. The author points out that evidences have different origin and application. That is why there is necessity that use of evidence in the framework of a judicial process has unified methodology. The author of the article provides such methodology on the basis of development of proof procedure. It has been determined that application of standards allows to use within criminal process differentiated sources thereby defining the boundaries of interaction between the subjects of the criminal process. The author of the article has found principles that form open standards of proof, that is, application of which is possible for all interested parties and which can be verified by controlling and supervisory bodies. The author in article provides not only the basis for development of methodological criteria, but also defines its practical application in all possible interpretations. Practical significance of research is defined by goals to increase transparency of criminal process and the possibilities of engaging relevant experts in the evaluation of evidence and general process of proof.*

Key words: *process of proof, standards, criminal proceeding, objectivity, hearing.*

Introduction

After renovation of criminal procedure legislation, law enforcement practice remained without strong scientific support in the field of evidence in criminal procedure [1]. The reason is certain attempts to stay in the paradigm of previous formally dogmatic doctrines including procedure proof [2]. The normativist way of thinking of a certain number of proceduralists is conditioned by the absolutist outlook of domestic jurisprudence, whose philosophical basis is dialectical materialism. New cognitive ap-

proaches to philosophical problems of evidence are perceived negatively that does not allow domestic scientists to refuse a number of concepts of inquisitorial-investigative ideology of pre-trial proceedings, which is inherent in the idea that study of evidence in court is a continuation of pre-trial investigation [3]. Accordingly, there is no significant procedural difference between trial and pre-trial evidence. That is why validity of protocols of investigation is presumed and is almost not questioned in trial [4].

However, according to the renewed national criminal procedure law a contradiction between a written secret investigative legal form of establishing evidence and a new legal ideology, which is based on priority of rights and freedoms of human embodied in the system of procedural means (presumptions), objectively grows. The investigator turned into a party of charge. Since a defence is limited in possibilities for gathering evidence and the main way to gather is investigation, which is carried out by a party of charge, in trial there are doubts about objectivity and impartiality of an investigator (presumption of the accusatory matter) [5]. According to judicial procedure a defence cannot and must not recognise as reliable information, which is collected by opponents of an accused. In addition, while maintaining the existing model of proof, the result of which is fixed in the written documents, in evaluating the evidence, the emphasis on the formal element (evaluation of details of procedural documents) will be strengthened. Completion of parties in court will turn in discussion about admissibility of evidence and lower priority will be given to their affiliation, validity and sufficiency.

Materials and methods

The basis of the study is the method of comparative law. It applies for purposes of comparison of certain provisions of criminal procedural legislation. In particular, the basis to apply standards of proof is being disclosed. The structure of a legislative act for the purpose of integrating the methodological framework into the proof process is being determined.

Historical method defines the sources of appearance and application of evidence in general structure of criminal process. This method is used to correlate the application of proof standards to the evidence itself, which, in their turn, have been obtained applying certain standards of obtaining.

Method of modelling a legal decision is used not only as recommendation method, which allow expanding application of related complex standards of proof in the process of forming a court decision, but also let implement accompanying proof processes to correlate them with leading methods and techniques of proof procedure.

Method of analysis revealed that in countries if continental law the traditional approach is approach, according to which finding truth the purpose of court. Thus, the saying of K. I. Malyshev that truth is equally necessary for the trial as justice has truly become catching. Though, in practice finding

truth is not that simple, it is exactly truth has being keep stated as a purpose of trial. In fairness, it is worth noting that recently truth is perceived as pious wish without reference to specific means of its search and without answers to question what king of truth is established in the process.

Standards of proof, on the contrary, sometimes are considered far from truth. In many ways, this perception is associated with the name of one of them – "balance of probabilities". Probability is far from truth. Moreover, even criminal procedure standard "out of reasonable doubts" in the classical saying of Lord Denning is defined through a degree of probability. I. V. Reshetnikova also points out that standards of proof do not follow the goal to find truth. However, actually everything is different. Firstly, even Soviet doctrine allowed establishing knowledge based not on truth, but on probability. Thus, S. V. Kurylev notes that in the field of court proceeding jurisdiction of probability is wider. As an example he cites cases of fact establishment basing on presumptions or in the situation when there is no sufficient evidences of presence or absence of fact, which court is obliged to establish. A. T. Bonner also writes about probability. Secondly, standard of balance of probabilities is not boiled down only to the fact that position of one side is more probable than position of other. The probability of proving even should be possible and based on common sense.

Results and discussion

Reconsideration of views on the role of judicial bodies in system of managing public processes is conditioned by division of state power into legislative, executive and judicial [6]. Reorganisation of state power necessitated a scientific understanding of the concept of judicial power, functions and forms of its implementation and naturally has led to recognition of judicial power as a main power providing rights and freedoms of human and citizen. Judicial protection of interests slowly, but consistently comes to the fore in the system of state guarantees of human rights and freedoms. In connection with this, reconsideration of the court role in criminal process in unavoidable: court becomes independent subject of special powers able to objectively and fairly hear and resolve a criminal case that is actuality of this research. The author demonstrates that new forming legal reality requires abandonment of dogmatic notions about main criminal procedure institutions hindering their effective implementation [7]. Research of many problems of criminal court proceeding appearing under new social and legal terms from the perspective of modern scientific views on judicial power and value of human personality, is one of the actual tasks of modern science. The most important among such problems are issues of organisation of proof process. It is noted that participants of proof process implement rights and duties provided by criminal procedure law; criminal procedure guarantees completely cover them. In proof process use of procedure forcing is also unavoidable. In connection with mentioned, evidence law also include norms by structure located in other sections of the Code of

Criminal Procedure, but regulating the process of proving.

New paradigm of knowledge, which is inherent to competitive procedure systems, is fixed in the new CPC and requires changes in technology of proof and establishing truth in criminal procedure [2]. Results of court criminal procedure demonstrate that judges determining affiliation, validity and sufficiency of proof information use provisions of modern doctrines of proof. That is why it can be stated that domestic procedure science has fallen behind in the development of such concepts as cross-questioning technique, art of formulation and articulation of questions, admissibility of leading questions, lingual-psychological power of court evidence, proof of guilty beyond reasonable, interpretation of al doubts concerning proof of guilt of an individual in his/her favour, etc. [6].

Speaking of proof standards two are usually mentioned: valid in civil process balance of probabilities or, as it is called in the USA "preponderance of the evidence", and standard beyond reasonable doubt, which is valid in criminal court procedure. However, actually there are three standards of proof [8]. Yet only American lawyers accept it. In practice there may be other standards of proof (for example, comfortable satisfaction). However, all of them are no more than results of combination of three mentioned above.

The third standard of proof is standard of clear and convincing evidence. In literature there is position that it has not worked out in jurisprudence of England. Instead of this, English courts speak about a higher degree of probability. Initially, American judges used different words to indicate requirements to provide higher degree of proving: "clear, sufficient and convincing evidence", "clear, overwhelming and convincing evidence", "explicit and obvious evidence", etc. The saying "clear and convincing evidence" also has worked out.

In the current instruction to the jury in civil cases of the California, it is noted that clear and convincing evidence are required in cases where the most important individual rights and interests such as termination of parental rights, involuntary gospitalisation, deportation, are at stake. It also notes that the mere weight of the imposition of a private law sanction does not entail the application of a more stringent standard of proof. Such approached may be noticed also in practice of the Supreme Court of the USA.

Mentioned in instruction categories is not an accidental set of discussions. Necessity to prove basing on clear and convincing evidence in cases of such type is established by the Supreme Court of the USA. The necessity of a higher proof standard in American courts is explained by constitutional requirement of adequate legal protection. As it may be understood, such standard is aimed at alignment of procedural inequality and protection of personal interests when they confront public interest.

In this, it should be remembered that standard of clear and convincing

evidence (as well as other standards) may be directly mentioned in law or follow from it. For example, exactly this standard of proof, in the opinion of the Supreme Court of the USA, is proper in cases of invalidating patents. Most judges of the SC of the USA emphasised that application of the standard of clear and convincing proofs followed out of law.

Nevertheless, application of stricter proof standard may be based on other reasons too. For example, standard of clear and convincing evidence is applied in imposing punitive damages. The fact is that such damages are considered as "punishment", i.e. aimed at achieving the goals that are inherent in criminal law. Although in such matters only monetary amounts are at stake, their value is quite substantial.

We also note that, despite the fact that the phrase "beyond reasonable doubt" has become familiar, it is not always used in modern literature and practice.

In foreign literature it is admitted that the phrase "beyond reasonable doubt" is fraught with confusion, especially, if try to explain it through the difference between terms "sure" and "certainty".

In particular, the jury of the case R. v. Majid (2009) faced this difficulty. That is why now such standard is described as proof, which makes the jury sure. In such way, it is considered that prosecution manages to prove own rightness, if the jury after considering all evidence are sure that an accused is guilty.

The decision in case Rhesa Shipping Co. SA v. Edmonds (1985) was boiled down to this. That is why in case when "probabilities" (positions of a claimant and respondent) are equal, respondent wins. In such case it is stated that a claimant did not fulfil his/her burden of proof [9].

Is there criterion of sufficiency in Russian court proceeding? It is obvious that the answer should be positive, because courts by virtue of direct indication of law evaluate also sufficiency of evidence. Evidences are evaluated by inner conviction, so the state of inner conviction itself can be a measure of sufficiency. A criterion seems to be quite subjective. However, considering the ideas of achieving truth, exactly truth can be called a criterion of sufficiency. Consequently, parties have to provide such sets of evidence proving its position, which allow to make all circumstances obvious, consistent, and knowledge of them can be considered true, in the framework of a competitive process with participation of private persons negative side of this criterion is quite obvious: parties have too heavy burden of proof.

Against the background of the Russian criterion of sufficiency, proofs standards appear to be very attractive and even objective criteria. But is it so?

To start, we focus on that the standard "beyond reasonable doubts" or the standard "certainty of guilt" is also very subjective, because certainty (as conviction) – is internal state that is difficult to manage. The standard of clear and convincing evidences is no less subjective.

It seems that the balance of probabilities is intuitively simpler and more understandable, because implies a simple advantage in favour of one of the parties. In addition, such standard is perceived

as subjective: it is about a probability, which is measurable. Often this standard is described through numerical expression "if a claimant fulfilled a burden of proof and could convince a judge in his/her rightness, then he won with a probability of at least 51 against 49". However, numerical expression of this phrase is notional and has a descriptive purpose.

When making decision a judge (or jury) does not conduct mathematical calculation of probability [10]. Strict criteria of standards have not developed, as V.K. Puchinskiy underlined. Apparently, the situation has not changed and for now. In west literature reviewers note that it is impossible to formulate the exact meaning of civil and criminal proof standard.

In addition, in practice of English courts, the balance of probabilities is understood not so unequivocally and simply. A number of guiding principles in application of this standard is laid down in two decisions of the House of Lords: Re H (minors) (Sexual Abuse: Standard of Proof) and SoS for the Home Department v. Rehman. In particular, one of them is about flexibility of application of the balance of probability.

The flexibility of the standard is based on the fact that some events are more likely than others.

Thus, it is considered that a person committed negligence rather than misled, caused damage by chance rather than deliberately caused harm. To describe probability the words of Lord Hoffman, said in the decision on the second case, became common: "To satisfy one that the creature seen walking in Regents Park in London was more likely than not to have been a lioness than to be satisfied to the same standard that it was a German Shepherd dog".

Unlike American courts in English literature it is pointed out that there are no intermediate standards. Instead of this the practice suggests various fillings of the standard of the balance of probability. The more serious statements or its consequences, the more powerful evidences should be provided to court in order to prove this statement on the basis of the balance of probability. The flexibility is not in the probability, but in the power or quality of provided proof. Probability or improbability of an event themselves become a question, which should be taken into account when weighing the probability and deciding whether this event really has been.

The origins of the problem of flexibility of the proof standard are probably laid in the case of Bater v. Bater (1951).

The case was about the divorce, but lord Denning expressed general judgments concerning proof and other civil cases. In particular, he noted that in the standard of the balance of probability the probability could have different degrees, which depended on a subject of dispute [11]. For example, when hearing the case about fraud, lord Denning considered to be natural to require higher degree of certainty than in the case about negligence. Nevertheless, such strict standard should be weaker

than a legal criminal. However, further judges refused the existence of the intermediate (third) standard, having decided that it is more correct to speak about power and persuasiveness of proof.

Perhaps, this approach carries some uncertainties and intellectually such constructions are difficult to perceive. In addition it seems obvious that power and weight of proof directly affect a degree of certainty. Maybe continental approach to the evaluation of proof bothers to descry details? It is doubtful. Thus, the authors of the famous textbook "Murphy on Evidence" describing the standard of proof say that this is measurement of quality and persuasiveness of proof. Admitting that the probability remains the same, only requirements to proof change, English lawyers probably allow a certain degree of slyness. Under this approach difference between proof standard may be illusory.

In this, flexible is not only the standard of the balance of probability, but also the solution of question about what proof standard to apply. That is why in formally civil cases whether even the balance of probability cannot be applied or higher proof standard may be established. In practice, the latter, for clarity, is usually called the criminal standard.

For a long time divorce processes have been resolved on the basis of criminal standard. However, modern practice has chosen the way of applying the standard of the balance of probability. The analogical standard is applied in the situation when a person has been charged with criminal offence. For example, act of fraud, in particular fraudulent representation when conducting a bargain (Hornal v. Neuberger Products Ltd.). Afterwards other judges referred to this decision justifying the flexibility of the civil proof standard. Also, there is number of specific situations-exceptions to the general rule about the proof standard in the civil process.

Among modern domestic scientific conceptions, which represents theory of criminal procedure proof, approach suggested by the scientists V. P. Gmyrko is worth of special attention. The scientific character of his approach is in overcoming the "gap" between "activity positioning of evidence and inactivity practice of his theoretical mastering (comprehension)". The practical value is consistent comprehension and application of procedural rules (standards) of proof in criminal procedure.

Domestic theory of proof should consider reasonable balance of development of the criminal process in two classical models: a) Due Process Model, which proclaims the main priority the protection of individual rights and freedoms, the provision of which is ensured by providing the maximum guarantees of their implementation to persons who have fallen into the criminal-procedural sphere; b) Crime Control Model, the basis of which is the protection of society and its member (potential or real victims) from offences; this basis allows a significant restriction of individual rights and freedoms for achieving maximal effectiveness (G. Parker).

In connection with this national criminal procedure, system should always pay attention to the improvement of the

system of evidence law in order to be consistent and able to respond to changes in social conditions and needs. The measure of such improvement is international standards (rules) and proof doctrines in criminal procedure. Among international proof standards there are proof rules, which are content elements of the presumption of innocence ("the right against self-incrimination", "right of an accused to remain silent", "proof beyond a reasonable doubt", interpretation of reasonable doubt in dubio pro reo").

The component of proof methodology is the provision concerning "proof of guilty beyond a reasonable doubt". If this standard is not complied with, the fact cannot be regarded as established and be the basis of the indictment [12]. In the Ukrainian legal system this proof standard is new unlike English and American systems wherein it has existed for a long time. The burden of proof of all the circumstances of the case and the conviction of the jury in the defendant's guilt beyond a reasonable doubt lies entirely on the prosecution side. Such proof according to the legal position of European Court states the absence of irrefutable, weighty, clear, consistent with each other presumptions and signs of guilt (the decision in cases "Kobez v. Ukraine", "Avsar v. Turkey"). The modern vision of "a reasonable doubt" may be boiled down to two components: 1)proof beyond a reasonable doubt does not mean proof beyond all possible doubts; 2) proof beyond a reasonable doubt is defined as such a convincing proof because of which a person can act without hesitation. Its essential features are, firstly, certainty, steadfastness, absence of any hesitations; secondly, it is not equal to the definition "absolute certainty" [13].

The provision concerning proof of guilty beyond a reasonable doubt is a general ground not only for a judge, but also for parties of criminal procedure, that is why it changes not only approaches to the evidence evaluation, but also affect a model of competition in criminal procedure. The purpose of defence can be defined as both in the sense of "to prove the reverse" and in the sense of "refuting the allegations as doubtful" (the decision in the case "Allan v. the United Kingdom"); public recognition of a person's innocence until a person will be convicted by a competent court; obligation of officials to refrain from revealing statements and assessments; impossibility for a state to use non-criminal procedures to obtain recognition of guilt in committing a crime and/or imposition of sanctions equal to a criminal penalty; the inadmissibility of the accusatory matter in the work of judges [12].

In practice of European court, human rights have been used to formulate "reasonable suspicion" as proof standard, as the standard for evaluation the validity of a prosecution when choosing a preventive measure, under which there is facts that indicate commitment of criminal offence by a person and also risks, which give reasonable grounds to believe that a suspect will impede criminal proceedings or commit criminal

offences. Besides, inadmissible methods of gathering evidence, which violate rights and freedoms of a person: 1) questioning the suspect as a witness ("Lutsenko v. Ukraine"); 2) right of a person not to testify against relatives and spouses ("Asch v. Austria" "Unterpertinger v. Austria"); 3) absolute inadmissibility of evidence obtained through torture or ill-treatment at their threat ("Gafgen v. Germany", "Harutynyan v. Armenia", "Gogmen v. Turkey"); 4) inadmissibility of evidence obtained under pressure from the accused or evidence obtained with a material violation of the right of a person to privacy, housing, correspondence, telephone conversations ("Magee v. the United Kingdom", "Jalloh v. Germany").

Updated doctrinal approaches to the rules of admissibility of evidence. The doctrine of asymmetry of the rules of admissibility of evidence establishes: 1) prosecutorial or other evidence, which worsen a position of a suspect, accused, obtained in violation of the criminal procedural law, in any way should be inadmissible; 2) illegally obtained exculpatory evidence, which commute sentence should be taken into consideration by the court at the petition of the party concerned. In Ukraine this theory has not gained its legislative consolidation and practical application.

The CPC of Ukraine recognises inadmissible evidences obtained due to information received as a result of a significant violation of human rights and freedoms (P.1 of Art. 87) [14]. That is why the doctrine of "fruit of the poisonous tree" has been mainstreamed; it claims that evidence obtained due to the violation of the constitutional rights of persons loses its legal force (originated in US case law in the early 20th century). In American criminal procedure evidence can be brought before a court during trial if it has evidentiary weight to prove a certain fact (act. 402 of the USA Federal Rules of Evidence). Inappropriate evidence is inadmissible. They also may be inadmissible in the cases: 1) if their admission leads to an unjust prejudice or misleading jury; 2) unjustified delay, excessive use of court time or unnecessary representation of a large amount of evidence collected together; 3) if these are hearsay; 4) when they are obtained in violation of procedure or obtained in violation of benefits or witness' immunity; 5) their recognition in court as unexpected for one party if they are filed by the other party after the completion of the pre-trial hearing. The Supreme Court of the USA does not rule out the examination of evidence if they were obtained illegally, but would still have been prosecuted, with greater effort ("Nix vs. Williams") or evidence obtained through unintentional police mistakes ("The United States v. Leon").

The doctrine of "fruit of the poisonous tree" is not characteristic for continental type of criminal process [15; 16]. In particular, the CPC of the Federal Republic of Germany does not imply normative determination of admissibility (inadmissibility) of evidence, but the issue of their proper evaluation is settled, therefore, the evidence obtained as a result of illegally obtained information is evaluated as admissible. The exceptions are the prohibition to use testimonies

obtained through physical influence, drugs, torture, hypnosis, etc.; violation of which automatically entails their inadmissibility (art. 136sa of the CPC) [14].

French system of proof is based on free proof evaluation by inner conviction of an investigative judge, prosecutor, judge, court. Any evidence is admissible regardless of whether it is indicated in law or not, but in the process of proof or conducting investigative actions, it is forbidden to violate the procedural law and to preserve decency, that is, to use means that are in accordance with the fundamental principles of the rule of law (art. 427 of the CPC).

The doctrine of "fruit of the poisonous tree" is being used in practice of European Court with its corresponding development. In solving the problem of evidence derived from an illegal, the Court estimates, how much an illegality of the initial investigative action poisons following evidence. If sentence was completely based on materials investigated in a court session, and none of the protocols of pre-trial investigation was taken into account, the right to a fair trial was not violated ("Allan vs. The United Kingdom", "Gafgen v. Germany"). However, the Court find inadmissible evidence obtained as a result of illegally obtained information with significant violations of the right of a person to legal assistance based on the traditional approach of "fairness of the process as a whole" (Todorova v. Ukraine).

Domestic court practice demonstrates that quite often the component of grounding of acquittal sentences, which constitute the content of the doctrine of "fruit of the poisonous tree ". In particular, court finds inadmissible evidence an expert's conclusion that the subjects submitted to the investigation received as a result of an illegal search, since the decision of the investigating judge did not contain circumstances with reference to evidence and other materials, with which prosecutor substantiated the petition for the search, and in the resolution part of the decree did not indicate the objects to be searched (the case № 136/940/14-k. dated December 27, 2014). In the other case the court upheld the verdict of acquittal because it considered the expert's opinion to be inadmissible since the evidence filed for an expert study was removed during an illegal review of the place of the event without the participation of the witnesses, although incorrect information regarding their participation had been recorded (the case № 490/12158/13-k dated May 5, 2014).

Conclusions

Mentioned examples of court decisions demonstrate that order of p. 1 of art. 87 of the CPC of Ukraine regarding the inadmissibility of factual data through information obtained as a result of a significant violation of human rights and freedoms, is used, as a rule, without exceptions. However, as it was showed above, this doctrine is not absolute even in the country of its origin and the practice of the European Court. That is why, in every specific example of court's evaluation of the admissibility of any evidence the significance of

the alleged violations of the criminal procedural law and the importance of each evidence for establishing the circumstances of the criminal proceedings should be taken in account.

Rights of defence and prosecution in out ore-trial proceeding are not equal. Prosecution, which carries all difficulties due to the duty of proof, should also have such powers that allow effectively fulfill the duty. Defence as represented by an accused and defence counsel has fewer powers, but it is also relieved from the duty of proof. In such way, inequality of parties' rights in pre-trial proceeding compensates with unequal division of duties. It could be said that an accused is protected not by his/her rights, but by duties assigned on subjects of criminal prosecution.

Real competition of parties in full extend is possible only in judicial proceeding where there is an arbitrator independent of the parties who, by direct instruction, is not a body of criminal prosecution. Independent court makes decision exclusively by inner conviction, by law and conscience. Because the basis for inner conviction is totality of evidence of case, independence of court from preliminary conclusions of bodies of criminal prosecution and, consequently, from their preliminary evaluation of evidence, is provided by examination of all evidence in court prosecution in the presence and with the participation of both parties. Independence of court is provided also by equality of parties' rights in court prosecution, which is aimed at neutralisation of benefits of prosecution conditioned by its rights at the stage of preliminary investigation.

At the same time, only independent judicial power is able to ensure true competitiveness of parties, i.e. to treat equally unbiased the arguments presented by the parties in support of their positions, to create really equal conditions for them including mechanism of compensation of their factual and processual inequality in pre-trial prosecution. Independence of court, as we may see, is a guarantee of competitiveness of all criminal proceeding.

In such way, competitiveness is a form of administration of justice in country where independent judicial power functions. One follows from the other and is provided by them. Recognising the independence of judiciary in practice, we are obliged to recognise and really ensure its competitive principles.

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та Національного юридичного університету
імені Ярослава Мудрого
вул. Чернишевська, 80а, Харків, 61002, Україна
Тел./факс (057) 716-45-53
Сайт: www.pravo-izdat.com.ua
E-mail для авторів: verstka@pravo-izdat.com.ua
E-mail для замовлень: sales@pravo-izdat.com.ua

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