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УКРАЇНСЬКОГО ПРАВА

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CONTENTS

CIVIL–LEGAL SCIENCES

ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

CRIMINAL–LEGAL SCIENCES

ЗМІСТ

ЦИВІЛЬНО-ПРАВОВІ НАУКИ

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

THEORY AND HISTORY OF STATE AND LAW

UDC [340.1:342.5] (477)"1985/1991"

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AUTHORITIES OF THE HIGHEST BODIES OF GOVERNMENT AND GOVERNANCE OF UKRAINE IN THE LAW-MAKING FIELD DURING PERESTROIKA (1985-1991)

Abstract. *In the history of the Ukrainian people, which has a centuries-old tradition of national nation-building, the period of perestroika (1985-1991) is distinguished by the fact that it was at this time that the processes that led to the destruction of the over-centralized state, which was the Soviet Union at that time, were favorable conditions for declaration of independence of Ukraine.*

The purpose of the article is to cover the process of gradual expansion of the powers of the highest bodies of state and the administration of the Ukrainian SSR in the field of law-making, that provided a high degree of its sovereignty and motivated the republic, ultimately, to proclaim independence.

As a result of the analysis of the norms of the USSR's Constitution 1977 and the Constitution of the Ukrainian SSR 1978, it was found that at the beginning of perestroika, the USSR's state authorities and management were given extremely wide powers to create a branched-out system of Union law that regulated almost all spheres of state, economic, socio-cultural construction in the country. The Soviet Union's republics, including the Ukrainian SSR, had little left for the rulemaking activity at the republican level. The norms of the union and republican constitutions, by means of which the supremacy of the union normative base and preventing any deviation of the Ukrainian SSR legislation from the requirements of the USSR legislation, were outlined. Special attention is given to Art. 71 of the Constitution of the Ukrainian SSR, which stated categorically that the laws of the USSR were considered binding at the territory of the Ukrainian SSR. It is proved that the constitutionally secured supremacy of the Soviet Union legislation has naturally led to the enactment of a large number of different legislative acts in the Ukrainian SSR, in particular, the Fundamentals of Legislation of the USSR Union and the Union Republics in

all major areas of law. Expansion of the Union legislation on the territory of Ukraine did not stop, practically, until the USSR's collapse.

It is substantiated that with the unfolding of democratic processes in terms of deepening of perestroika, it became obvious the need to abandon the Stalinist model of the union state and transformate it into a truly federal status with the subsequent extension of the rights of the Union republics, including the field of law-making. The content of the USSR's Law "On the separation of powers between the USSR and the subjects of the federation" on April 26, 1990 is analyzed. It is proved that the USSR government and the pursued a policy of retaining the broad powers of the authorities, including in the legislative sphere.

The study found out that in the context of perestroika, the then Kremlin leadership, forced to engage in tactics of dealing with ethnic relations, decided to demonstrate its ability to ensure the ability of the Union republics to exercise their constitutional right of secession from the USSR. The 'exit' of the Ukrainian SSR from the USSR would mean a complete rejection of the republic of the Union legislation. The article analyzes the Law of the USSR "On the procedure for resolving issues related to the secession of the Union Republic from the USSR" on April 2, 1990, and substantiates the conclusion that it was practically impossible to exercise Ukraine's right to withdraw from the USSR under this Law.

It is noted that after the adoption of the Declaration on State Sovereignty of Ukraine on July 16, 1990, the active distancing of Ukraine from the Union Center in all directions of state construction began. This was reflected in the amendments to the Constitution of the USSR and logically ended with the adoption by the Verkhovna Rada of the Ukrainian SSR on August 24, 1991 the historical document – "Act of Declaration of Independence of Ukraine", which in addition to the independence proclaimed the creation of an independent Ukrainian state – Ukraine.

The study analyzed the Law of Ukraine "On the succession of Ukraine" on September 12, 1991, and the resolution of the Verkhovna Rada of Ukraine "On the procedure of temporary action at the territory of Ukraine of certain acts of legislation of the USSR", which also paved the way, as to say, to dismantle the Union legislation, which for many years dominated the republic, held by the grip of a state called "USSR", which was dominated by the administrative-command system of government.

***Keywords**: rule of law of the USSR, legislation of the Ukrainian SSR, perestroika 1985–1991, proclamation of independence of Ukraine, legislation of Ukraine on the succession of Ukraine.*

In the centuries-old history of the state and law of Ukraine, the period of so-called perestroika (1985-1991) takes a special place. It was still this period when changes took place in the economic, political, ideological, state and legal spheres of the USSR, in the union republics that were part of this huge state, including the Ukrainian SSR as one of the union republics. And it all began with the fact that the extraordinary March (1985) plenum of the Central Committee of the CPSU elected to the post of General Secretary of the Central Committee of this party Mikhail Gorbachev, whose name is associated with a new multi-vector

political course in the USSR during 1985–1991 years. The essence of this course, initiated by the Kremlin party-soviet leadership, was to try to modernize the economics, social sphere, ideology, state apparatus and legal system, and the country's foreign policy. On April 23, 1985, the new General Secretary of the CPSU Central Committee, Mikhail Gorbachev, had a report at the plenum of the Central Committee of the Party entitled "On Convening the Next XXVII Congress of the CPSU and Tasks Related to Its Preparation" in which economic development of the country, the course of renewal of socialism was substantiated. Then this strategy was further developed in the decisions of the XXVII Congress of the CPSU, the XIX All-Union Conference of the CPSU, the plenums of the Central Committee of the CPSU. The course for the renewal of socialism took shape of the general line of the party for the revolutionary reorganization of all spheres of life in the multimillion country, which was the USSR at the beginning of the perestroika period.

The purpose of the study is to highlight the process of gradual expansion of the powers of the highest bodies of state power and administration of the USSR in the field of lawmaking, including ensuring a high degree of sovereignty and motivating the republic ultimately to declare its independence.

According to Article 70 of the USSR Constitution of 1977 in force at that time, the USSR was the only union state formed on the basis of the principle of socialist federalism, "as a result of free self-determination of nations and voluntary unification of equal Soviet Socialist Republics."[1] By the way, the CPSU was defined as the leading and guiding force of Soviet society, the core of its political system, state and civil organizations. Therefore, it is no coincidence that the perestroika was carried out still on the initiative and under the leadership of the CPSU.

The perestroika process in the USSR involved the Ukrainian SSR as one of the union republics, which received this status as part of the USSR, formed in 1922. At the beginning of the perestroika, the USSR was in fact a centralized state, which was characterized by excessive concentration of state power, functions and powers at the centre in the face of union's bodies of state power and administration. It greatly devalued the principle of the federal system of the USSR declared at the constitutional level. The Soviet Union as a sovereign state had its own single territory, which included the territories of the union republics; state border; the only union's citizenship, in which every citizen of the union republic was a citizen of the USSR; an integrated system of union's bodies of state power and administration; united armed forces, monetary and credit systems, budget, state symbols. The USSR also had an extensive system of legislation that directly reflected the nation-state system of the USSR.

[1] Сборник нормативных актов по советскому государственному праву. М.: Юрид. лит., 1984. С.109.

[1] The foundations of this system were determined by the Constitution of the USSR in 1977. Thus, in accordance with paragraph 4 of Article 73 of the Constitution of the USSR, the USSR, represented by its highest bodies of state power and administration, was empowered to ensure the unity of legislative regulation throughout the USSR, establishing the Fundamentals of USSR' and union republics' legislation in various fields of law. The Constitution of the USSR also contained articles that spoke about particular union legislation. Thus, Article 101 of the Constitution established that the procedure for holding elections to the Soviets of People's Deputies was established by the law of the USSR, the Union and the Autonomous Republics' law. Article 106 of the Constitution stated that the inviolability of deputies, as well as other guarantees of deputy activity, were established by the Law on the Status of Deputies and other legislative acts of the USSR, union and autonomous republics.

The Constitution of the USSR empowered the Government of the USSR – the Council of Ministers of the USSR, with rather broad rule-making powers. On the basis of and in pursuance of the laws of the USSR and other decisions of the Supreme Soviet of the USSR and its Presidium, the Government of the USSR had the right to issue resolutions and orders and to check their implementation. Normative acts of the Council of Ministers of the USSR were recognized as binding on the entire territory of the USSR (Article 133 of the Constitution). The Constitution also provided for rule-making powers carried out by the ministries and state committees of the USSR, which were empowered within their competence to issue acts on the basis of and in pursuance of USSR laws, other decisions of the USSR Supreme Council and its Presidium, resolutions and orders of the USSR Council of Ministers, as well as to organize and to check their implementation (Article 135 of the Constitution). Thus, the Constitution of the USSR of 1977 provided for an extensive system of union legislation, which regulated almost all spheres of state, economic, socio-cultural construction in the country. The Union republics had little left for rule-making at the republican level.

The Constitution of the USSR contained norms that ensured the supremacy of Union law, preventing the deviation of the Union republics' legislation, including the Ukrainian SSR, from the requirements of USSR law. Thus, Article 74 of the Constitution of the USSR established that the laws of the USSR had the same force on the territory of all union republics, and in case of discrepancy of the law of the union republic with the all-union law, the law of the USSR operated. This meant that the Constitution established the principle of the priority of union law.[2] Article 121 of the Constitution of the USSR empowered the Presidium of the Supreme

[1] Теория государства и права / Под ред. М.Н. Марченко. М.: Издательство Московского университета, 1987. С.349.

[2] Советское государственное право: Учебник. М.: Юрид. лит., 1983. С. 393.

Council of the USSR exercising control over the observance of the Constitution of the USSR and ensuring the compliance of the constitutions and laws of the union republics with the Constitution and laws of the USSR. The supremacy of Union law was also ensured by giving the Constitution of the USSR the Council of Ministers of the USSR the right to suspend the implementation of resolutions and orders of the Council of Ministers of the union republic (Article 134 of the Constitution) on matters within the competence of the USSR. In order for the laws of the USSR, resolutions and other acts of the Supreme Soviet of the USSR to be strictly observed in the union republics, Article 116 of the Constitution of the USSR provided for the publication of these legal acts in the languages of the union republics. These acts were also published in Ukrainian in such an official publication as the "Bulletin of the Supreme Council of the Union of Soviet Socialist Republics". Since 1989, the union acts have been published in Ukrainian in such an official publication of the Supreme Council of the USSR as "Bulletin of the Congress of People's Deputies of the USSR in the Supreme Soviet of the USSR." However, it should be emphasized that these "Bulletin", published in Ukrainian, were published in the same magazine together with "Bulletin" of the same content, but printed in Russian. According to Article 4 of the USSR Law "On the Languages of the Peoples of the USSR" of April 24, 1990, Russian was recognized in the USSR as the official language of the USSR and was used as a mean of interethnic communication[1].

At the beginning of the perestroika, the Constitution of the Ukrainian SSR of 1978 was in force in Ukraine. The preamble to this Constitution stated that the people of the Ukrainian Soviet Socialist Republic (hereinafter – Ukrainian SSR) had adopted and promulgated this Constitution, including in accordance with the 1977 Constitution (Basic Law) of the Union of Soviet Socialist Republics[2]. Therefore, it is no coincidence that this correspondence led to the fact that the Constitution of the Ukrainian SSR fully subordinated all spheres of life of the Ukrainian SSR to the union centre, including its legislative system. Thus, Article 4 of the Constitution of the USSR already established that state and civil organizations, officials were obliged to abide by the Constitution of the USSR, the Constitution of the Ukrainian SSR and Soviet laws. As we can see, the Constitution of the USSR comes first. According to Article 30 of the Constitution of the USSR, the responsibilities of state bodies, civil organizations, officials and citizens to ensure the security of the country and strengthening its defense capabilities were also determined by the legislation of the USSR. About the Constitution of the USSR, union legislation,

[1] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 19. Ст. 327.

[2] Історія конституційного законодавства України: Зб. док./ Упоряд. В. Д. Гончаренко. Х.: Право , 2007. С. 124.

the effect of which was extended to the territory of the Ukrainian SSR and was set in other articles of the Constitution of the Ukrainian SSR (Articles 37, 90, 95, 97, 120, 122, 127, 135, 138, 149). And Article 71 of the Constitution of the Ukrainian SSR generally stated that the laws of the USSR were considered binding on the territory of the Ukrainian SSR.

Thus, at the union and Ukrainian constitutional levels, the supremacy of the union legislation was proclaimed, on which Ukrainian republican legislation depended entirely, even in such narrow spheres of state, economic, sociocultural relations which belonged to the legislative powers of state power and administration of the Ukrainian SSR. The conclusion by G. S. Sapargaliev that since the USSR "was not actually a federal state, the Soviet legislation was not substantively federal", is quite well-founded.[1] Therefore, it is quite natural that at the beginning of the perestroika in the Ukrainian SSR there were a large number of different legal acts of the Union, before all the Constitution of the USSR and the Fundamentals of the Legislation of the USSR and the Union Republics in all major spheres of law.[2]

As democratic processes unfolded in the context of deepening perestroika, the need to abandon the Stalinist model of a union state and to establish a truly federal state in the country became increasingly apparent. Some measures to expand the powers of the union republics were outlined in the resolution of the Congress of People's Deputies of the USSR of June 9, 1989 "On the main directions of domestic and foreign policy of the USSR."[3] The document stressed, in particular, on the need for strict observance and significant expansion of the rights of the union republics, including in the legislative sphere. Guided by this instruction of the Congress of People's Deputies of the USSR, the Moscow Union's leadership began allegedly to pursue a policy of improving relations between the USSR and the Union Republics, but in fact a policy of preserving and even expanding the powers of the Union authorities and administration, including in the lawmaking sphere. On April 26, 1990, the USSR Law "On the Separation of Powers between the USSR and the Subjects of the Federation"[4] was adopted. The law contained a number of interesting articles of a constitutional nature. Thus, Article 6 of the Law referred not only to the jurisdiction, but to the exclusive jurisdiction of the USSR in the person of its highest bodies of state power and administration, a wide range of issues of state, economic construction, national defense, foreign policy. The law defined issues, the solu-

[1] «Круглый стол» журнала «Советское государство и право». Государственно-правовые отношения в обновленной федерации // Советское государство и право. 1991. №9. С. 19.

[2] Див: Основы законодательства Союза ССР и союзных республик. М.: Юрид. лит., 1987. 512 с.

[3] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1989. № 3. Ст. 52.

[4] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 19. Ст. 329.

tion of which was the joint responsibility of the union and republican bodies of state power. For example, according to paragraph 1 of Article 8 of the Law, the highest state authorities of the USSR were delegated the establishment of the legal status of Soviet citizens and their public associations, protection of the rights and freedoms of Soviet citizens regardless of their place of residence. It is obvious that in order to regulate relations in these areas, it was necessary to adopt legislative acts at the union level, on the basis of which the union republics could then adopt appropriate regulations. According to Clause 3 of Article 8 of the Law, the establishment of the foundations of civil, land, forest, water, mining, criminal, criminal-executive, financial, labor legislation, legislation on social security, public education, health care, environment protection, administrative offenses judiciary and justice was transferred to the highest state authorities of the USSR. The same Article 8 of the Law transferred to state power and management authorities the establishment of legal bases that would ensure the functioning of the all-Union market and its protection in the interests of all republics, as well as the establishment of general principles in other areas of state, economic, socio-cultural construction, which (these principles) were defined in the Union regulations. It should be noted that the commented Law, calling the issue of exclusive jurisdiction of the union state bodies and the joint jurisdiction of the union and republican bodies, did not say anything about the issues referred to the jurisdiction of the union republics. The supremacy of the legislative acts of the USSR was supported by Article 11 of the Law, which stated that the Constitution of the USSR, laws of the USSR, other acts of the highest state authorities and administration of the USSR were binding throughout the USSR. Since the territory of the USSR consisted of the territories of the republics, this meant that the binding nature of the Union legislation also applied to the territory of the Ukrainian SSR. The mentioned article also set that in case of contradictions between laws and other acts of the highest state authorities of the Union Republic and the USSR Constitution, USSR laws and other acts of the highest state authorities of the USSR; acts issued by the USSR authorities were in force.

At the same time, in fairness, it should be noted that the cited Law contained a provision which, at first glance, was designed to guarantee the union republic the right to protection from so-called legislative arbitrariness by the USSR Council of Ministers, union ministries, state committees and USSR departments in relation to the union republics. Thus, part one of Article 13 of the Law established that the highest state authorities of the Union Republic had the right to protest resolutions and orders of the Council of Ministers of the USSR if they violated the rights of the Union Republic. This norm gives grounds to assert the emergence of a mechanism for defending the rights of the union republic in the relationship between it and the union

body. In fact, this norm was somewhat declarative, as in the same part of the first part of Article 13 of the Law it was established that the disputed issue was to be resolved by the Supreme Council of the USSR. It is not difficult to guess in favor of which body the disputed issue would be resolved. The second part of Article 13 of the Law gave the highest bodies of state power and administration of the Union Republic now the right to terminate acts of ministries, state committees and departments of the USSR in their territory in case they violate the legislation of the USSR or the Union Republic by informing the Council of Ministers of USSR. The resolution of the dispute was entrusted to the Union authorities in this case. It was established that the dispute was decided by the Supreme Council of the USSR when the act of the relevant body of the USSR was terminated by the Supreme Council of a Union Republic, or decided by the Council of Ministers of the USSR when the act of the relevant body of the USSR was terminated by the Council of Ministers of a Union Republic. The envisaged mechanism for resolving disputes between the Union and republican bodies is another evidence of the Kremlin leadership's efforts to save the supremacy of Union legislation in the context of the active deployment of sovereignty processes in the union republics.

In these difficult conditions, the then Kremlin leadership, carrying out tactics of maneuvering, decided to demonstrate its commitment to ensuring such a fundamental constitutional right of the union republic as the right of free exit (secession) from the USSR, as stated in the USSR Constitution, constitutions of Union's republics, as well as in the Law of April 26, 1990 "On the delimitation of powers between the USSR and the subjects of the federation." Thus, Article 2 of this Law established that "every Union republic retains the right to leave the USSR freely. The decision to withdraw the Union republic from the USSR is made by the free will of the peoples of the Union republic by referendum (popular vote). The procedure for resolving issues related to the withdrawal of the union republic from the USSR shall be decided by the Law of the USSR."[1] The realization by a Union republic, such as the Ukrainian SSR, of its right to withdraw from the USSR would mean the beginning of the termination of Union legislation on its territory and the creation of the legislation of an independent state. But realizing the Ukrainian SSR's constitutional right to leave the USSR was far from easy. The fact is that on March 26, 1990 the Council of Nationalities of the Supreme Council of the USSR adopted a resolution "On the Draft Law on the Procedure for Resolving Issues Related to the Withdrawal of the Union Republic from the USSR" according to which the draft law should be adopted at first reading, and certain commissions and the committees of the Supreme Council of the USSR were instructed to finalize the draft law, taking into account the proposals and remarks made by the

[1] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 19. Ст. 329.

People's Deputies of the USSR, and to submit it to the Supreme Council of the USSR[1] on April 2, 1990. This order of the Council of Nationalities of the Supreme Council of the USSR was fulfilled and on April 3, 1990 the Supreme Council of the USSR adopted the Law of the USSR "On the Procedure for Resolving Issues Related to the Withdrawal of the Union Republic from the USSR."[2] At first glance, the adoption of this law seemed to be so-called an epoch-making event in the legal definition of relations between the USSR and its subjects – the Union republics. There was at least hope for the opportunity to restore, for example, the independence of the Ukrainian SSR and once again begin to build its own state. The fact is that the Ukrainian people had centuries-old traditions of its national state-building. These are Kievan Rus, Galicia-Volyn state, Hetman Cossack state (second half of the XVII–XVIII centuries), national statehood during the liberation struggle of 1917–1921. During the domination of the Soviet model of power in Ukraine, including during its stay in part of the USSR, the Constitutions of the USSR in 1924, 1936, 1977 contained rules that provided for the right of the Union republics to freely leave the USSR. The right of Ukraine to freely leave the USSR was also mentioned in the Constitutions of the USSR of 1929, 1937, and 1978. However, the mechanism for the withdrawal of the Union republic from the USSR was never developed. Analysis of the content of the USSR Law of April 3, 1990 "On the procedure for resolving issues related to the withdrawal of the Union republic from the USSR" gives us reasons to say that it very difficult to realize the right of the Union republic to withdraw from the USSR was, as the law provided really "extremely complicated withdrawal procedure".[3] Leaving the USSR for the Ukrainian SSR could become extremely painful. The fact is that in the second part of Article 14 of the Law it was determined that in the relations between the republic, which intended to leave the USSR, on the one hand, and the USSR, as well as other republics, on the other hand, during the transitional period lasting up to five years, a number of complex issues had to be resolved. It was also necessary to agree on the status of territories that did not belong to the republic leaving the USSR at the time of its accession to the USSR. It is well known that the Ukrainian SSR became part of the USSR in 1922. It is also known that in 1939 the western Ukrainian lands were connected to the Ukrainian SSR, and in 1954 the Crimean region was transferred from the Russian Soviet Federative Socialist Republic (hereinafter – RSFSR) to the Ukrainian SSR. It is not difficult to understand how much the territory of

[1] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 14. Ст. 229.

[2] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 15. Ст. 252.

[3] Колісник В. Біловезька Угода у контексті права та під тиском міфів // Віче. 1995. № 3. С.136.

Ukraine would have shrunk after its withdrawal from the USSR. And yet, despite the maneuvers of the Union center, including through the adoption of appropriate regulations aimed at maintaining its dominance over the Union republics, the latter responded by adopting in mid-1990 Declarations of State Sovereignty. Thus, on June 12, 1990, the Declaration of State Sovereignty of the RSFSR was adopted. On July 16, 1990, the Declaration on the State Sovereignty of Ukraine was adopted by the Supreme Council of the Ukrainian SSR.[1] The declaration proclaimed the supremacy, independence, completeness and indivisibility of power within its territory, inviolability and immutability of borders, the right of the people of Ukraine to own, use and dispose of national wealth, independent creation of banking, pricing, financial, customs, tax systems. The Declaration also declared the right of Ukraine to its own armed forces, internal troops, state security bodies subordinated to the Supreme Council of the republic. The declaration, consolidating a high level of sovereignty for Ukraine, really brought it closer to independence. At the same time, it should be noted that Declaration was adopted by the Supreme Council at a time when the Ukrainian SSR was a part of the USSR, which continued to be dominated by Union law. Therefore, trying to distance itself from the Union center, including through legislation, the Supreme Council of the Ukrainian SSR adopted on October 24, 1990, the Law of the Ukrainian SSR "On Amendments to the Constitution (Basic Law) of the Ukrainian SSR."[2] At the same time, the introduction of some changes and additions to the Constitution of the Ukrainian SSR in 1978 were determined by the adoption of the Declaration of State Sovereignty of Ukraine. The mentioned Law excluded from Chapter 7 of the Constitution, entitled "The Ukrainian SSR is a Union Republic within the USSR", parts two and three of Article 68, which established that the Ukrainian SSR provided for the USSR in the person of its highest state bodies of state power and administration rights, set by article 73 of the Constitution of the USSR and that outside the limits specified in Article 73 of the Constitution of the USSR, the Ukrainian SSR independently exercised state power on its territory. The new wording set out Article 71 of the Constitution of the Ukrainian SSR. If in the previous edition it had the following meaning: "Article 71. The laws of the USSR are binding on the territory of the Ukrainian SSR", then in accordance with the Law of October 24, 1990, it had the following meaning: "Article 71. There is a supremacy of laws of the republic on the territory of the Ukrainian SSR".[3] Thus, although the new version of Article 71 of the Constitution of the Ukrainian SSR did not state the complete disregard for the Union legislation, but the repub-

[1] Закони України. Том 1. К., 1996. С. 5–9.

[2] Відомості Верховної Ради Української Радянської Соціалістичної Республіки. 1990. №45.Ст. 606.

[3] Відомості Верховної Ради Української Радянської Соціалістичної Республіки. 1990. №45.Ст. 606.

lican legislation had supremacy in the territory of the republic. In addition, the Law of October 24, 1990 directly referred to those areas that were now governed exclusively by the legislation of the Ukrainian SSR. It concerned, in particular, the procedure for military service by citizens of the Ukrainian SSR; responsibilities of state bodies, public organizations, officials and citizens to ensure the security of Ukraine and strengthen its defense capabilities; organization and procedure of activity of the Constitutional Court of Ukraine; organization and procedure of the Prosecutor's Office of the Ukrainian SSR, etc. Until October 1990, the mentioned issues were regulated at the legislative level by the USSR.

The enshrinement of the supremacy of its laws on the territory of the Ukrainian SSR by the Law of the Ukrainian SSR of October 24, 1990 was one of the manifestations of a real "war" between union and republican legislation, which became especially tense after the Union republics adopted Declarations of State Sovereignty. A. S. Pigolkin called the war of laws "the war of norms: it is conducted at almost all levels of lawmaking" and stressed that the main area where the contradictions of legal norms were reflected – the publication of republican laws, which directly or indirectly, in general or in some parts contradict Union norms."[1] Trying to level the situation in favor of Union law, the Supreme Council of the USSR adopted on October 24, 1990, the Law "On Ensuring the Effect of Laws and Other Normative Acts of the Legislation of the USSR."[2] The Law, in particular, stated that the legislative activity of the highest state authorities of the Union republics on the basis of their declarations of state sovereignty strengthened the political and economic independence of the republics and filled their sovereignty with real meaning. At the same time, the Law noted that the cases of refusal of state bodies of the Union republics to implement all-Union laws and other acts of the highest bodies of state power and administration of the USSR issued within their competence became more frequent. It was also noted that attempts were made to consolidate the preconditions for the validity of these acts on the territory of the corresponding Union republics – ratification or approval of all-Union acts by the highest bodies of the republics. There were other circumstances that undermined the supremacy of Union law. Therefore, the Law contained rules aimed at ensuring the supremacy and effectiveness of Union legislation. In particular, Article 1 of the Law established that laws, decrees of the President of the USSR, and other acts issued within their powers were binding on all state and public organizations, officials and citizens in the USSR. The article also stated that

[1] «Круглый стол» журнала «Советское государство право». Государственно-правовые отношения в обновляющейся федерации // Советское государство и право. 1991. №9. С. 212.

[2] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. №44. Ст. 918.

if the law of the republic differed from the law of the USSR, then the law of the USSR continued to operate. It is obvious that the confrontation between the Union center and the Union republics in the legislative sphere created destabilization in the field of legal regulation, deepening the crisis in it. The situation in these relations went so far that on December 24, 1990 the Congress of People's Deputies of the USSR was forced to adopt a resolution "On Saving of the USSR as a Renewed Federation of Equal Sovereign Republics"[1] and a resolution "On the USSR Referendum on the Union of Soviet Socialist Republics"[2]. However, even after the adoption of these legal acts, the confrontation between the Union state bodies and the Union republics continued, as evidenced, in particular, by the information contained in the resolution of the Supreme Council of the USSR "On the speech on Central Television on February 19, 1991 by B. M. Yeltsin "of February 20, 1991. The resolution, in particular, stated that this speech B. M. Yeltsin contained provisions and appeals aimed at changing the legitimately elected highest authorities of the country, the immediate resignation of the President of the USSR, which were in conflict with the Constitution of the USSR and created a state of emergency in the country.[3] The confrontation between the Union center and the Union republics manifested itself during the USSR referendum on March 17, 1991 on the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics which was set in the USSR Supreme Council resolution on March 21, 1991. The document, in particular, stated that the authorities of some republics (Georgia, Lithuania, Moldova, Latvia, Armenia, Estonia) did not comply with the decision of the IV Congress of People's Deputies of the USSR and the Supreme Council of the USSR to hold a referendum. Therefore, the Supreme Council of the USSR considered it necessary to take measures to ensure strict observance of the laws of the USSR, "to prevent the confrontation of Union and republican legislation, to consolidate and unite society on the path of its democratic renewal."[4]

But even in such conditions, Union state bodies continued to increase their legal framework, which extended its effect to the Ukrainian SSR as one of the Union republics. It is easy to find an evidence if we turn, for example, to such a source as "Information of the Congress of People's Deputies and the Supreme

[1] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 59. Ст. 1158.

[2] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 59. Ст. 1161.

[3] Відомості З'їзду народних депутатів СРСМР і Верховної Ради СРСР. 1991. № 9. Ст. 204.

[4] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1991. № 13. Ст. 350.

Council of the USSR (issues 1–40) for the first half of 1991, which published texts of USSR laws, decrees of the President of the USSR, other legal acts of Union state bodies. But to what extent they were implemented in the republics, including the Ukrainian SSR, especially after the proclamation of Ukraine's independence on August 24, is a separate question. To stabilize relations between the Union Center and the Union Republics, including in the legislative sphere, was called for a new Union Treaty, work on the draft of which intensified in the end of 1990. Thus, on 3 of December that year, the Supreme Council of the USSR adopted a resolution "On the general concept of a new Union Treaty and the proposed procedure for its conclusion ", which was to support mainly the concept of this Treaty, as well as to submit the draft Union Treaty suggested by the President of the USSR for discussion at the Fourth Congress of People's Deputies.[1] Such a discussion took place. On December 25, 1990, the Congress of People's Deputies of the USSR adopted a resolution "On the General Concept of the New Union Treaty and the Procedure for Its Conclusion" which specifically emphasized that the main condition for reaching an agreement between the USSR and the federation's subjects was compliance with the USSR Constitution and Union's legislation.[2]

During the first half of 1991, active work was carried out to prepare a draft of a new Union Treaty was conducted. On June 28, 1991, the draft "Treaty on the Union of Sovereign States", which had been considered in detail and repeatedly, amended and clarified by the representatives of the republics, the Federation Council and the preparatory committee formed by the Fourth Congress of People's Deputies of the USSR, was published in central newspapers.[3] The draft Treaty also paid attention to the legislative issue. It contained Article 11 called "The Laws", which stated that the laws of the Union concerning its jurisdiction had supremacy and were binding on the territory of the republics. Article 5 of the Treaty referred to the jurisdiction of the USSR the most important issues of domestic and foreign policy for any state, which were planned to be regulated by Union laws. But that's not all. Article 6 "Sphere of joint jurisdiction of the Union and the republics" listed the issues of state, economic, socio-cultural construction, which were subject to resolution by the Union authorities together with the republics. An analysis of the content of Articles 5 and 6 of the Draft Treaty gives grounds to assert that the republics had little left to regulate public relations with the help of republican legislation.

On July 11 and 12, 1991, the report on the draft Treaty on the Union of Sovereign States was discussed at meetings of the Supreme Council of the USSR. On July 12, the Supreme Council of the USSR adopted a resolution "On the Draft

[1] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1990. № 50. Ст. 1077.

[2] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 19912. № 1. Ст. 2.

[3] Известия. 1991. 28 июня. № 152.

Treaty on the Union of Sovereign States," which, in particular, paid attention to the need to formulate a list of Fundamentals of Legislation of the USSR and Republics, as well as not to allow termination the Union Law by republics and visa versa, resolving possible disputes through conciliation procedures or decisions by the Constitutional Court of the USSR.[1] As we can see, the intention to preserve the Fundamentals of Legislation of the USSR and the republics guaranteed the Union bodies the opportunity to preserve their monopoly law in the field of legislation in the future Union of Sovereign States, one of which could be the Ukrainian state in the event of creation of such a Union. The Supreme Council of the USSR also adopted an Appeal to the Supreme Councils and deputies of such republics as Georgia, Lithuania, Moldova, Latvia, Armenia, and Estonia, who did not consider the draft Union Treaty at all.[2] And negotiations between the Union leadership and representatives of other republics on the Union Treaty were quite difficult. However, on August 15, 1991, the final text of the draft Union Treaty was shared. But even this document left, in fact, intact the supremacy of the center in decision-making on key issues of state, economic, socio-cultural construction in the new USSR (Union of Soviet Sovereign Republics) – as a sovereign federal state. The ceremony of the preliminary signing of the Union Treaty was scheduled for August 20, 1991. However, on August 19–21 an attempt of a coup d'etat aimed at preserving a centralized union state, was taking place in the USSR. But the three-day coup, which began in Moscow on August 19, 1991, was halted by democratic forces. An unsuccessful coup attempt in the USSR accelerated its collapse. Thus, on September 6, 1991, State Council of the USSR (which was formed in accordance with the USSR Law "On Bodies of State Power and Administration of the USSR in Transition" of September 5, 1991) adopted resolutions recognizing the independence of the Lithuanian, Latvian and Estonian republics.[3]

On August 24, 1991, an extraordinary session of the Supreme Council of the Ukrainian SSR adopted a truly historic document – the Act of Declaration of Independence of Ukraine, which, in addition to the country's independence, proclaimed the creation of an independent Ukrainian state – Ukraine.[4] On the same day, the Supreme Council of the Ukrainian SSR adopted a resolution "On the Declaration of Independence of Ukraine."[5] It is no coincidence that these brief historical documents provide a place to answer the question on the

[1] Відомості З'їзду народних депутатів С РСР і Верховної Ради СРСР. 1991. № 29. Ст. 853.

[2] Відомості З'їзду народних депутатів СРСР і Верховної Ради СРСР. 1991. № 29. Ст. 854.

[3] Ведомости Съезда народных депутатов СССР и Верховного Совета СССР. 1991. № 37. Статьи 1091, 1092, 1093.

[4] Відомості Верховної Ради України. 1991. № 38.Ст. 502.

[5] Відомості Верховної Ради України. 1991. № 38.Ст. 502.

legal framework of the now independent state. It was determined that from the moment of proclamation of independence of Ukraine on its territory only its Constitution, laws, resolutions of the Government and other acts of the legislation of the republic were in force. The Act of Declaration of Independence of Ukraine was confirmed at the All-Ukrainian referendum on December 1, 1991. On the same day, L. M. Kravchuk was elected as a President of Ukraine. On December 5, 1991, the Supreme Council of Ukraine adopted an appeal "To the Parliaments and Peoples of the World", in which it was emphasized that more than ninety percent of referendum participants voted for Ukraine's independence and thus fulfilled eternal dreams and aspirations of one of Europe's most numerous peoples to revive its repeatedly destroyed statehood. The document also stated that the Treaty of 1922 on the Establishment of the USSR was considered invalid by Ukraine.[1]

At the time of Ukraine's declaration of independence, the legislation of the Ukrainian SSR was in force on its territory, which largely duplicated the relevant legislation of the USSR. Therefore, on September 12, 1991, the Law of Ukraine "On Succession of Ukraine" was adopted. Article 3 of this Law stipulated that the laws of the Ukrainian SSR and other acts adopted by the Supreme Council of the Ukrainian SSR continued to operate on the territory of Ukraine, unless they contradicted the laws of Ukraine adopted after the proclamation of Ukraine's independence. The way to dismantle the Union legislation in Ukraine, which had dominated the republic for many years, was opened, although formally the USSR continued to exist, despite the fact that at the end of August 1991 not only Ukraine but also other republics declared their independence. The last, so to speak legal point, on the possibility of restoring the supremacy of Union law, was put by the Agreement on the Establishment of the Commonwealth of Independent States signed on December 8, 1991 by the Presidents of the RSFSR and Ukraine, the Chairman of the Supreme Council of Belarus, which included termination of the USSR's existence as a subject of international law and geopolitical reality, including with its legislatures.[2] Independent Ukraine had a way to create its own domestic law. The answer to the question about the fate of the Union legislation in Ukraine after the termination of the USSR was contained in the resolution of the Supreme Council of Ukraine of August 12, 1991 "On the procedure for temporary effect on Ukraine of certain acts of legislation of the USSR." The resolution stated that prior to the adoption of the relevant acts of legislation of Ukraine on the territory of the republic, acts of legislation of the USSR on issues that were not regulated by the legislation of Ukraine and pro-

[1] Відомості Верховної Ради України. 1992. №8. Сторінка 199.

[2] Людина. Право. Держава: Збірник правових актів / Упорядник В. С. Торош. Харків: НВКФ «Консум», 1996. С.47–49.

vided that they did not contradict the Constitution and laws of Ukraine, were in force.[1] This was the right decision, as the unconditional repeal of the entire legislative array of Union legislation that were being applied in Ukraine before the collapse of the USSR could lead to anarchy and disorder in the field of legal regulation in Ukraine after the declaration of its independence. The Law of Ukraine "On Succession of Ukraine" of September 12, 1991 and the Resolution of the Supreme Council of September 12, 1991 "On the Procedure for Temporary Effect on the Territory of Ukraine of Certain Acts of Legislation of the USSR" remained in force for a long time. And only at the end of August 2019 the President of Ukraine introduced a draft Law of Ukraine "On Amendments to the Law of Ukraine "On Succession of Ukraine" to repeal the acts of the USSR and the Ukrainian SSR on the territory of Ukraine", registered under № 1075. In the draft Article 3 of the Law of Ukraine "On the Succession of Ukraine" of September 12, 1991 is proposed to read as follows: "Article 3. Laws and other acts of state authorities and administration of the USSR and the Ukrainian SSR, except for the Declaration of State Sovereignty of Ukraine of July 16, 1990, Act of Declaration of Independence of Ukraine of August 24, 1991, acts relating to the administrative-territorial organization of Ukraine and the state border of Ukraine, acts approving the binding nature of international treaties concluded by the Ukrainian SSR, acts of organizational-administrative nature and individual acts do not apply to territory of Ukraine".[2] At the same time, the draft law proposed to recognize as invalid the resolution of the Supreme Council of Ukraine of September 12, 1991 "On the procedure for temporary effect on the territory of Ukraine of certain acts of legislation of the USSR." With the adoption of this Law of Ukraine the history of Union law will be put a full stop, which for many years dominated the system of legislation of Ukraine.

[1] Відомості Верховної Ради України. 1991. №46.Ст. 621.

[2] Про внесення змін до Закону України «Про правонаступництво України» щодо скасування дії актів СРСР та Української РСР на території України: проект Закону України від 29 серпня 2019 № 1075. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66305

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MULTI–DIMENSIONAL INEQUALITY AS THE LARGEST CHALLENGE OF REPRESENTATIVE DEMOCRACY WITHIN THE EU AND WORLDWIDE

On November 4, 2019, the Time Magazine reported that "more than 60% of the 12,500 people polled in Bulgaria, the Czech Republic, Germany, Hungary, Poland, Romania and Slovakia said the rule of law was under attack. And in six of the seven surveyed countries, most respondents said democracy was under threat in their country, a threat most felt in Slovakia (61%), followed by Hungary (58%). The poll also revealed widespread concerns about the legitimacy of domestic ballots, especially in Bulgaria, where more than three-quarters of respondents said their elections were 'not free and fair.' Large numbers of respondents also reported that their freedom to protest was under threat. Most Hungarians, Bulgarians, Romanians, Slovakians and Poles said they feared negative consequences if they criticized the government in public, and more than 60% in every country said the justice system was under siege."[1]

Another survey completed by Pew Research Center across 10 European countries demonstrated that a median 74% of their citizens say that the EU promotes peace and democratic values while, however, they consider Brussels as ineffective and intrusive and a median

[1] MADELINE ROACHE, Central and Eastern Europeans Believe Democracy is under Threat, Poll Finds, November 4, 2019, *The Time*, https://time.com/5717397/poll-eastern-europeans-democracy-threat/?fbclid=IwAR3RmXpIkGpPRZreSh9ATXFMqJWeHccCVPGVhWOZs7ACgsTt4qFqffhFdGA

62% say that it does not understand the needs of its citizens. At the same time, an overall attitude toward the EU is largely positive where majorities in most nations polled expressed a favorable opinion of the Brussels-based institution. Yet, while 7/10 of the polled population in Poland and Spain have a positive view of the Brussels, less than a half of the polled in the UK and Greece shares this view. Across the ten polled countries, 45% have a negative view of the EU Parliament while 50% have a positive opinion about it[1]. Obviously, such a high rate of approval would be a stellar result for virtually any political leader at a time when historically popular centrist parties can barely form a minority government in most of the Western democracies.

Enshrined in the EU Treaties is an aim to create an "ever closer union" among "the peoples of Europe" (the Treaty of Rome of 1957). This goal was re-affirmed in the Solemn Declaration on European Union of 1983 when the ten heads of states and governments (including the UK) committed to move toward an ever closer union among the peoples and the Member States of the EU (1983). The objective of an "ever closer union" is preserved in the Preamble to the Maastricht Treaty (1992). The Amsterdam Treaty contributed a democratic dimension to the "ever closer union" where decisions are to be taken as openly as possible to the citizen. The development of the EU law, providing a gradual movement toward an ever closer union, happened prior to the rejection of the EU constitution by France and the Netherlands in 2005 and, of course, Brexit. "Skepticism about the unity of the EU and the pursuit of further integration has existed in various degrees for some time, more visibly since the rejection of the EU Constitution in 2005 by France and the Netherlands."[2]

On November 11, 1947, Winston Churchill, when he was a rank and file member of the House of Commons, said: "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time…"[3]

Speaking in the UN headquarters in New York, Antonio Guterres, the UN Secretary General, stated that currently or recently demonstrations took place in Bolivia, Chile, Hong Kong, Ecuador, Egypt, Guinea, Haiti, Iraq, Lebanon, Algeria, Honduras, Nicaragua, Malawi,

[1] Richard Wike / Janel Fetterolf / Moira Fagan, Europeans Credit EU With Promoting Peace and Prosperity, but Say Brussels Is Out of Touch With Its Citizens, March 19, 2019, https://www.pewresearch.org/global/2019/03/19/europeans-credit-eu-with-promoting-peace-and-prosperity-but-say-brussels-is-out-of-touch-with-its-citizens/

[2] Rosa Maria Fernandez, Conflicting energy policy priorities in EU energy governance, June 6, 2018, *Journal of Environmental Studies and Science*, September 2018, Vol. 8, Issue 3, pp. 239–248, https://link.springer.com/article/10.1007/s13412-018-0499-0

[3] "Democracy is the Worst Form of Government…", June 26, 2009, https://richardlangworth.com/worst-form-of-government

Russia, Sudan, France, Zimbabwe, Spain and the United Kingdom and while "every situation is unique" there were common underlying factors which constituted "rising threats to the social contract" between citizens and the political class[1]. In September 2019, "Paris was placed under high security with about 7,500 police officers deployed, as hundreds of protesters – most not wearing the fluorescent vests that gave the movement its name – marched on Saturday. Paris police said at least 106 people were arrested. The yellow vest protests coincided with a demonstration by climate activists and a separate march by the far-left Workers Force union against a planned retirement reform. Masked demonstrators associated with the so-called 'black bloc' anarchist movement infiltrated the climate demonstration, sporadically clashing with police throughout the day. The black-clad protesters also set fire to bins and a motorbike and threw paint over the front of a bank during the otherwise peaceful march."[2]

Prof. Nicholas Stern, an author of an influential "Stern Report" on the economic ramification of the climate change, has summarized an overall challenge faced by the mankind as follows" "The two defining challenges of this century are overcoming poverty and managing climate change. We can and must rise to them together: if we fail on one, we will fail on the other"[3].

It is hard to disagree both with Antonio Guterres and Lord Stern. However, in their statements, do they go deep enough in explaining what is an underlying challenge faced by the world in tacking a universal problem of poverty and the climate change? Perhaps, we need to look beyond stating the obvious to find out a fundamental challenge faced by any democratic organization whether it applies to the United Nations, the EU or any democratic state.

The United Nations, the only universal inter-governmental organization in existence, consists of 193 members. Within the UN membership, two-thirds of the world population, around 90% of global GDP, 80% of global trade, around 60% of all agricultural land and approx. 80% of world trade in agricultural products are represented by the G20[4]. A similar observation can be made about the European Union, a widely diverse group of 28(27) countries where a small number of members is responsible for a large share of GDP and population. However, unlike the United Nations, the European Parliament has a much more solid foundation and is a truly democratic institu-

[1] Protests around the world: Politicians must address "growing deficit of trust", urges Gutteres, October 25, 2019, *UN News*, https://news.un.org/en/story/2019/10/1050031

[2] France: Tear gas fired at 'yellow vest' protesters, many arrested, September 21, 2019, *Al Jazeera*, https://www.aljazeera.com/news/2019/09/france-tear-gas-fired-yellow-vest-protesters-arrested-190921135141008.html

[3] Nicholas Stern, Economic development, climate and values: making policy, *Proc. R. Soc.* B 232: 20150820, https://royalsocietypublishing.org/doi/pdf/10.1098/rspb.2015.0820

[4] Role of the G20, The European Commission, https://ec.europa.eu/info/food-farming-fisheries/farming/international-cooperation/international-organisations/g20_en

tion where a number of members from each EU Member State is proportional to its population. Nothing is perfect but, at least, this is as a fair and logical system as far as representative democracy is concerned.

A fundamental moral and philosophical principle underlying a discourse regarding the representative democracy is the "equality of opportunity" vis-à-vis the "equality of outcome". When it comes to sovereign states, they come in all sizes and level of economic development from the USA which landed its representative on the Moon in 1969 to mostly poor states of Africa whose peoples, for most part, have limited access to safe water and still die from malaria decades after this disease has been eliminated in the West entirely. It is true that each and every state and each and every nation has the "right to development" within its border but it is equally true that no other state has an obligation to transfer its capital and technology to develop another state.

By territory, some countries are large while the other are relatively small but each one has a single seat of the UN General Assembly. The same idea, more or less, applies to the EU Parliament and each and every parliament in each and every democratic country. Each and every time when Antonio Guterres states that he wants to advance a particular point of view or initiative backed by any group of states, we may ask ourselves what percentage of the world population and economy does this group represent? The same question can be addressed to each and every politician within the EU when they promote a particular point of view.

For better or worse, the Westphalian sovereignty is a fundamental principle of the public international law enshrined in the United Nations Charter and there is no evidence that the idea of sovereignty within their border states is about to expire. If anything, after 1945, the number of states increased considerably. The same applies to the EU, whose Member States are not quite ready to surrender their sovereignty to Brussels.

The European States exhibit a wide variation in size and development; the EU faces the same problem as the UN or any political system based on the representative democracy, namely, a never ending discussion over the equality of opportunity vis-à-vis the equality of outcome. The representative democracy, as a fundamental political institute, was, in principle, supposed to tackle inequality within the EU and, hopefully, worldwide. But, when it comes to the UN or the EU or any political or legal body, it is somewhat unrealistic to expect a majority of members representing less than 5–10% of the constituency to dominate the rest part of any group.

Is there an obvious way to tackle a multi-dimensional inequality in the world and, while doing so, advance a more closer union within the EU? So far, we were unable to find a solution. However, perhaps some of the industrialized European countries may serve

as a "model of advanced post-industrial democracy" and try novel models such as, for instance, "a block-chain-voting-for-idea" or something else.

The representative democracy, as a political institute, is compromise. It is not a perfect system and each and every variation of it, whether deployed internationally or within a single state, has its strong and weak sides. However, as Winston Churchill had pointed out in 1947, so far, the mankind was unable to come up with a better idea. Can we improve it? For example, Switzerland experimented with block-chain-based e-voting which was shelved for a few years[1]. However, the use of block-chain and other advance algorithms can turn direct democracy (referendums) into a cheap alternative to the existing representative democracy mechanisms which are somewhat prone to manipulation and are quite costly to run.

In the grand scheme of things, it makes little difference to the future of the mankind whether the UK stays within the EU or not. Perhaps, the UK will enter into an all-encompassing free trade agreement with the USA, the largest and most important market in the world, and off-set any potential shortcomings of leaving the EU… As a democracy, the UK went for a referendum which rendered a vote to leave the EU. At the same time, some experts argued that the vote was, in reality, a minority vote and, therefore, the referendum has to be discarded. In fact, a "minority vis-à-vis majority" vote argument is not a new one. Are there many political leaders in the EU countries elected by an absolute majority of voters registered in the country? There are always those who ignore the elections because, probably, they find all candidates irrelevant.

Hence, the representative democracy is not a perfect system and the relevant law is not without flaws. Nevertheless, currently we have to live with it until a better system is invented.

The question is whether we are ready for a system which may put the established status quo in danger as the Brexit vote has demonstrated. What if a block-chain e-vote referendum is taken across the EU and it would clearly demonstrate that, first, a majority of constituents is not interested in moving toward a federal European state and, second, a majority is not ready to subsidize renewables or paying more than EU10 toward the climate-related initiatives while a majority of politicians appear to be strongly behind an ever closer European union and an aggressive carbon reduction strategy at a high cost?

Brexit is a demonstration of consequences of the first negative vote. While even a cursory attempt to investigate a scientific basis for the "global climate emergency" produces multiple opinions, several groups of respected scholars for and against the global climate emergency, approx. 120,000 scientific

[1] Kuenzi Renat, These are the arguments that sank e-voting in Switzerland, August 2, 2019, https://www.swissinfo.ch/eng/e-voting_these-are-the-arguments-that-sank-e-voting-in-switzerland/45136608

papers published on the subject worldwide since 1990 advancing all kinds of theories[1]. A multi-month "yellow vest" protest in France has been triggered by an aggressive carbon tax while the EU share in the GHG emissions worldwide is falling as its share in the world GDP continues to decline.

However, if nothing is done, then, we may abandon the movement toward an ever closer European Union and a shift away from fossil fuels. As long as the representative democracy is a key principle enshrined in the European Law, no fundamental change of any kind which influences everybody's life can proceed without a clearly expressed democratic support.

This short paper is a call for fresh ideas and tries to deal with the multi-dimensional inequality faced by the representative democracy within the EU and worldwide. According to the UN Secretary General, the world leaders showed a demonstrative lack of leadership in dealing with inequality and the global climate change, two of the most pressing problems faced by the mankind. Possibly, these and other problems faced by the EU and the world need a fresh perspective? Or, which is equally possible, we should try to preserve the existing status-quo, whether the UK stays in the EU or not, and patiently seek the seeds of a better system within the existing representative democracy framework?

What if a current version of the representative democracy is an optimal compromise and we are better off living with its limitations rather than trying to change it? What if the idea of an "ever closer" European Union has outlived its usefulness or reached its pinnacle? If Brexit was only a single event in a series of challenges faced by the EU, then, suppressing, ignoring or getting around the public opinion in a longer perspective may or may not cause disappearance of these challenges, while the EU may or may not develop into a more integrated and developed entity even at a slower pace.

Abstracts / Résumés

A fundamental problem faced by the EU, the UN or any other democratic body is a multi-dimensional inequality of its constituents which may be the largest challenge to creating "an ever close union" among "the peoples of Europe". Is there an obvious way to tackle a multi-dimensional inequality in the world? Perhaps some of the industrialized European countries may serve as a "model of advanced post-industrial democracy" and try novel models such as, for example, "a block-chain-voting-for-idea". According to the UN Secretary General, the world leaders showed a demonstrative lack of leadership in dealing with inequality and the global climate change, two of the most pressing problems faced by the mankind, while a "threat to the social contract" grows worldwide. This is a call for fresh ideas and efforts to deal

[1] Robert McSweeney, Analysis: The Most "Cited" climate change papers, July 8, 2015, *Carbon Brief*, https://www.carbonbrief.org/analysis-the-most-cited-climate-change-papers

with multi-dimensional inequality in the EU and the world at large.

L'un des problèmes fondamentaux auxquels sont confrontés l'UE, l'ONU ou tout autre organe démocratique est l'inégalité multidimensionnelle de ses membres, qui représente peut-être le plus grand défi à la création d'une "union sans cesse plus étroite" entre "les peuples d'Europe". Existe-t-il une manière évidente de s'attaquer à une inégalité multidimensionnelle dans le monde? Peut-être que certains des pays européens industrialisés pourraient servir de "modèle de démocratie post-industrielle avancée" et essayer des modèles novateurs comme, par exemple, "une chaîne de blocs de vote pour une idée". Selon le Secrétaire général de l'ONU, les dirigeants mondiaux ont fait preuve d'un manque de leadership manifeste dans la lutte contre les inégalités et le changement climatique mondial, deux des problèmes les plus urgents auxquels l'humanité est confrontée, alors qu'une "menace pour le contrat social" se développe dans le monde entier. Il s'agit d'un appel à de nouvelles idées et à de nouveaux efforts pour faire face aux inégalités multidimensionnelles dans l'UE et dans le monde en général.

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FORMATION OF UKRAINIAN LAW AND ITS INFLUENCE ON STATE-BUILDING PROCESSES IN KIEVAN RUS

Abstract. *The long-term dominance of Russian historiography of the Old Russian state and its law is still evident in domestic historical and legal science in the interpretation of historical events and facts in the spirit of the ideology of the Russian Empire, the Marxist concept of class struggle. The works of Ukrainian scholars still remain outside Russian historiography. Therefore, the purpose of the article is a brief overview of the concepts and conclusions of domestic scholars on the formation of law and statehood in Kievan Rus.*

In the article the author refers to the chronicles of Russia, the Old Russian state, its law and its sources according to MF Vladimirsky-Budanov, MS Hrushevsky, MO Maksimeyko, RM Lashchenko, MD Chubaty. etc. According to them, the most common system of oral customary law in Kievan Rus was the Russian Law. Ukrainian historians of law associated the written forms of ancient Russian law with the first Russian-Byzantine treaties, the legislation of Volodymyr the Great. The author of the article examines the history of Pravda Ruska, its name, sources, Kyiv origin and publication of Pravda texts in Soviet times, draws conclusions about the shortcomings of the study of this outstanding legal monument.

The development of the law of the Kyiv state was influenced by the adoption of Orthodoxy and the baptism of the population. The article defines the content, the system of norms of the church "Statutes" of the great Kyivan princes Volodymyr and Yaroslav the Wise, which have not been sufficiently studied by modern researchers. Attention is drawn to the rare monuments of the Galicia-Volyn state.

Finally, the author of the article, based on the conclusions of Ukrainian scholars of the late nineteenth and early twentieth centuries, refutes the Russian stereotype of the

form of the Old Russian state as an early feudal monarchy, built on the principle of suzerainty-vassality. In his monograph, the author reveals the origins of democracy and representative power in Russia-Ukraine.

***Keywords**: sources of law, Pravda Ruska, Old Russian state, church "Charters".*

INTRODUCTION

Although the long-term dominance of Russian historiography of the Old Russian state and law enriched historical and legal science with extensive knowledge of their history, it adjusted the interpretation of historical events and facts in the spirit of the ideology of the Russian Empire, the Marxist concept of class struggle. On the periphery, or rather – beyond Russian historiography (modern – too) remained the works of Ukrainian scholars MD Ivanishev, VM Leshkov, FI Leontovich, MS Hrushevsky, MP Vasylenko, M. S. Slabchenko, RM Lashchenko, MD Chubaty and many others. Therefore, there is an urgent need, among others, to free historical and legal science from stereotypes and distortions, to return to domestic historiography, the achievements of Ukrainian scholars of the past to reproduce the true, objective history of the state and law of Ukraine.

MATERIALS AND METHODS

Back in the early 20's of the twentieth century R. M. Lashchenko in his "Lectures on the History of Ukrainian Law" wrote that the Russian government has traditionally been hostile to Ukraine and Ukrainians, did not recognize the Ukrainian people as a separate, neither their rights nor even the language[1]. This imperial ideology is continued by the current Putin regime in Russia.

The history of the formation of ancient n law and the ancient n (Kiev) state has been given attention since the days of its existence. The chronicle of "The Tale of Past Years" begins with the words: "Behold the Tale of Time Years, where did the Russian land go, who in Kiev began the first princes, and where did the Russian land begin to eat"[2]. The first date, when "the Russian land began to be called", the chronicler calls 852 (actually 842 – VE), establishes his chronology of the reign of the Kiev princes to the beginning of the twelfth century. Oleg's reign completed the process of formation of the Kiev state. Thanks to the chronicles, we learn about the emergence of the oral Law of Rus, close in composition and social nature to the tribes of Russia, united by state formation.

And in the further text of the chronicle the words "Rus", "Russian land", "Russian" extend or to the whole territory of Kievan Rus[3], as in the Rusko-

[1] Лащенко Р. Лекції по історії українського права / Р. М. Лащенко. К.: Вид-во «Україна», 1998. С. 6.

[2] Повесть временных лет. /АН СССР. Литературные памятники. Ч.1. Текст и перевод. Подготовка текста Д. С. Лихачева. Перевод Д. С. Лихачева и Б. А. Романова. Под ред. чл.-кор. АН СССР В. П. Адриановой-Перетц. По Лавреньевской летописи 1377 г. М.-Л.: Изд-во АН СССР, 1950. С. 9.

[3] Полное собрание русских летописей. Радзивиловская летопись / АН СССР. Ин-т истории СССР. Ленинградское отд-е. Т.38. Л.: Наука, 1989. С. 13.

Vizantyysk treaties of the 10th century, the Russian Law, the Russian Pravda, the Church "Lives", or the writer of the Kiev region, the Pereyaslavl region and the Chernigivshchyna, they lived "in the meadow, even now." "Have your own customs, and the law of your father, and traditions, your own disposition. Glade more customs of their fathers imeahu quiet, meek … "[1]. In the foreign dzherels, the term "Rus" is already too early to mark the efforts of the land of the common words[2]. "Law his father and tradition" and bully the basis of the sound law.

Dovgy historical process of the development of legal names among the Slavic tribes started at the VI century. and I found two stages. The first stage (VI-X century) – the consolidation of the common law in the norms of unwritten law, which formed among the ancient tribes and became the basis of the legal life of the Old Russian state, which was formed. Another stage (the end of the X–XI century) of the formation of law, including the transition to the written law of the Kiev state, the yogo codification, the dzherelami of what bully is the right, the princely legislation and the judiciary, the vizantyyske law.

For M. F. Vdadimirsky-Budanov[3], V. I. Sergeevich[4], R. M. Lashchenko[5], M. D. Chubatim[6] in the ninth and tenth centuries, in Kievan Rus, the system of norms of oral customary law was the most widespread and used. Its norms regulated relations between members of the vervi, tribe, with elders and first princes, property and family relations, cases of use of weapons, the rules of blood revenge, the system of punishment. With the formation of the state, the most general rules of customary law were sanctioned by the state and became universally recognized and binding. This oral system of norms, according to chronicle sources, was called the Russian Law and was perceived as the main

[1] Повесть временных лет. /АН СССР. Литературные памятники. Ч.1. Текст и перевод. Подготовка текста Д. С. Лихачева. Перевод Д. С. Лихачева и Б. А. Романова. Под ред. чл.-кор. АН СССР В. П. Адриановой-Перетц. По Лавреньевской летописи 1377 г. М.-Л.: Изд-во АН СССР, 1950. С. 10; Полное собрание русских летописей. Радзивиловская летопись / АН СССР. Ин-т истории СССР. Ленинградское отд-е. Т.38. Л.: Наука, 1989. С. 14.

[2] *Мирошниченко Ю. Р., Удовик С. Л.* Русь-Украина: становление государственности: В 2-х т. Т.1. Русь-Украина с древнейших времен до создания империи. К.: Ваклер, 2011. С. 55–67.

[3] Антологія української юридичної думки: в 6 т. / редкол.: Ю. С. Шемшученко (голова) та ін. Т.2. Історія держави і права України: Руська Правда / упоряд. І. Б. Усенко, Т. І. Бондарук, І. В. Музика, І. К. Омельченко; відп. ред. І. Б. Усенко. К.: Вид. дім «Юрид. кн.», 2002. С. 161–163.

[4] Антологія української юридичної думки: в 6 т. / редкол.: Ю. С. Шемшученко (голова) та ін. Т.2. Історія держави і права України: Руська Правда / упоряд. І. Б. Усенко, Т. І. Бондарук, І. В. Музика, І. К. Омельченко; відп. ред. І. Б. Усенко. К.: Вид. дім «Юрид. кн.», 2002. С. 164–169.

[5] *Лащенко Р. Лекції по історії українського права* / Р. М. Лащенко К.: Вид-во «Україна», 1998. С. 20–31.

[6] Чубатий М. Огляд історії українського права: історія джерел та державного права / М. Чубатий. Тит.-ред. і автор передмови В. Іваненко. Мюнхен; Київ: УДЖ «Ноосфера», 1994. С. 12–15.

source of law. On its basis, oral agreements were concluded between princes, princes and the council, determined the order of functioning and competence of state bodies, the establishment of taxes.

For M. S. Hrushevsky, ancient Russian law is a sphere of culture of ancient Russia-Ukraine, and its sources are important cultural monuments[1]. The Ukrainian historian associated the written forms of ancient Russian law with the first Russo-Byzantine treaties. It was the norms of the Rus' Law that were laid down by the first Kyivan princes as the basis for concluding treaties with Byzantium. The treaties of Prince Oleg in 911 and Prince Igor in 944, according to the historian, contain mainly the rules of criminal law, less – private and international, both Russian and Byzantine. References to the Rus' Law contain the texts of the treaties of 907, 911 and 944. According to RM Lashchenko, they reflected the legal provisions, the legal worldview of each of the parties who agreed[2]. According to both Hrushevsky and Lashchenko, Russia's treaties with the Greeks "give us a fairly clear idea of the state system formed by the Kyivan princes"[3]. In fact, the Russian ambassadors in 907 demanded tribute from Byzantium: according to the city of the seat of the great prince, under Olga there is»[4]. 944: "Our Grand Duke Igor, and his princes, and boyars, and all the people of Russia, messages from the Grand Duke of Russia Igor, and from all the princes of Russia and from all the people of the Russian land"[5]. In 971, the Grand Duke of Kiev Svyatoslav decides – "and began to think with his wife"[6].

RESULTS AND DISCUSSION

Treaties of Russia with Byzantium in the X century. – monuments of domestic and international law, attesting to the high level of development of customary and written law at the stage of formation of the Kyiv state. These monuments reflected Russia's broad interests in peaceful relations with the Byzantine Empire, the protection of its unsettled southern borders – the mouths of the Dnieper, the Danube, the neighborhood with the Greek colonies in the Crimea. At the same time, the Russo-Byzantine treaties are valuable sources for the study of socio-economic relations and the development of law in Kievan Rus, political, economic and cultural ties with Byzantium. Since the Russo-Byzantine treaties are international legal acts, they

[1] Грушевський М. *С.* Історія України-Руси. В 11 т., 12 кн.: Т.3. К.: Наук думка, 1993. С. 352–353.

[2] *Лащенко Р. Лекції по історії українського права* / Р. М. Лащенко. К.: Вид-во «Україна», 1998. С. 36.

[3] *Лащенко Р. Лекції по історії українського права* / Р. М. Лащенко. К.: Вид-во «Україна», 1998. С. 39.

[4] Полное собрание русских летописей. Радзивиловская летопись / АН СССР. Ин-т истории СССР. Ленинградское отд-е. Т.38. Л.: Наука, 1989. С. 20.

[5] Полное собрание русских летописей. Радзивиловская летопись / АН СССР. Ин-т истории СССР. Ленинградское отд-е. Т.38. Л.: Наука, 1989. С. 26.

[6] Полное собрание русских летописей. Радзивиловская летопись / АН СССР. Ин-т истории СССР. Ленинградское отд-е. Т.38. Л.: Наука, 1989. С. 36–37.

reflected certain rules of Byzantine law, often transformed by the compilers in the interests of the Russian side.[1]. Taken together, these treaties testified to the significant influence of Kievan Rus on the formation of international law of the tenth century. They were the first documents of the Middle Ages, which formulate the beginnings of private international law. Their norms are far ahead of their contemporary Western European feudal law.

The complication of economic, social, socio-political life in the Old Russian state caused the lawmaking of the great princes of Kiev. Initially, it included only the "Statutes" and "Lessons", which set the amount of taxes, duties, separation of legal, administrative and financial interests of the prince and the church, established punishment for crimes against princely men, free people, protected property rights. With the centralization and strengthening of the power of the Grand Duke of Kiev, the statutes began to acquire the features of laws.

The first attempt to unify the norms of Russian law was made by Prince Vladimir, who replaced the collection of beliefs for murder with the death penalty. However, he was soon forced to abandon his decision, as faith was one of the main sources of princely income.

The second attempt was made by Yaroslav Volodymyrovych, who compiled the Ancient Truth, or the Truth of Yaroslav. It was preceded by tragic and dramatic events in Kyiv and Nogorod in 1015, where Yaroslav ruled at the time. After the battle and victory near Lyubech over Sviatopolk's army, which seized the throne of Kyiv, Yaroslav Volodymyrovych, according to the Novgorod chronicle, returned to Kyiv, settled accounts with the Novgorodians, and, letting them go home, "gave them the truth and wrote the charter." At the same time, handing them the "Truth", he said: And this is the Truth of Russia"[2].

The oldest Pravda or Pravda Yaroslava is the first systematized collection of legal norms of the Kyiv state. Its main sources were ancient n customary law – n law, princely jurisprudence, n-Byzantine treaties. MO Maksimeiko convincingly argued that the Truth was formed under the influence of Roman law, and its author could be familiar with the Greek translations of Justinian's law[3]. According to the scientist, this is evidenced by the system of "Pravda Ruska", a statement of certain offenses and punishments. As for the origin and name of this legal monument, M. Hrushevsky and R. Lashchenko emphasized its Kyiv origin and considered it an outstanding

[1] Грушевський М. *С.* Історія України-Руси. В 11 т., 12 кн.: Т.3. К.: Наук думка, 1993. С. 352–353, 357–358

[2] Полное собрание русских летописей. Т.4, ч.1. Новгородская Первая летопись младшего и старшего изводов. М.; Л.: Изд-во Рос. Акад. Наук, 1950. С. 176–177.

[3] Антологія української юридичної думки: в 6 т. / редкол.: Ю. С. Шемшученко (голова) та ін. Т.2. Історія держави і права України: Руська Правда / упоряд. І. Б. Усенко, Т. І. Бондарук, І. В. Музика, І. К. Омельченко; відп. ред. І. Б. Усенко. К.: Вид. дім «Юрид. кн.», 2002. С. 313–318.

monument of Ukrainian law[1]. As is well known, Russian historiography has long since adopted the name "Rus" and has become known as "Pravda Ruska" – "Ruska Pravda", contrary to the name given to it by Yaroslav the Wise and the legislative technique in the title of the law. Not all of the modern domestic researchers notice this difference.

Yaroslav's truth is a legal answer to the burning problems of the time: the Grand Duke of Kyiv codified only part of the set of legal norms of Russia in the early eleventh century, introducing short stories in accordance with the requirements of the time, and probably formulated new rules that developed or changed obsolete. The legislator establishes new legal principles, unifies the system of punishments, supplements the Truth with new articles in the 1030s.[2] It reveals the process of formation of the institution of punishment in Kievan Rus, the development of legal regulation of civil and family relations[3].

The oldest (eleventh century) short edition of Pravda Ruska consists of Pravda Yaroslava, Pravda Yaroslavychi, Pokon vyrnya, and Urok u Mostnykiv. The articles contain norms of criminal, civil and procedural law, which regulated the procedure for compensating the victim in case of violation of his rights, including property rights to servants, horses, weapons, clothing and other property, the procedure for investigation and return to their owner. After the death of Yaroslav the Wise, his sons Izyaslav, Svyatoslav and Vsevolod, together with the boyars close to them, supplemented the "Truth of Yaroslav." The expanded Pravda consists of two parts: the first is the Yaroslavl Volodymyrych Court (Articles 1–52), which contains most of the norms of the Short Pravda and short stories on the norms of criminal, civil and procedural law. The second part of "Truth" begins with the "Charter" of Vladimir Monomakh (1113) and also contains legislative short stories (Articles 53–121), most fully reflected in its Trinity list (second half of the fourteenth century). In the Expanded Truth, homogeneous resolutions are generalized, it is practically deprived of the casuistic form of laws. Its composition was finally formed by the middle of the thirteenth century[4]. According to historians, the abbreviated edition of Pravda Ruska was created on the basis of the Extended Edition around the 15th-16th centuries.

Thus, Pravda remained a valid legal collection for a long time after the

[1] Грушевський М. *С.* Історія України-Руси. В 11 т., 12 кн.: Т.3. К.: Наук думка, 1993. С. 352–359; *Лащенко Р. Лекції по історії українського права /Р. М. Лащенко. К.: Вид-во «Україна», 1998*. С. 48.

[2] Юшков С. В. Русская Правда. Происхождение, источники, ее значение: монография / С. В. Юшков; под ред. О. И. Чистякова. М.: Зерцало, 2002. С. 287–303, 307–311, 322–330.

[3] *Бойко І. Й.* Кримінальні покарання в Україні (IX – XX ст.): навч. посіб. Львів, Львів. Нац. ун-т, 2013. С. 31–50; *Бойко І. Й.* Правове регулювання цивільних відносин в Україні (IX – XX ст.): навч. посіб. для студ. вищ. навч. закладів. – Львів. нац. ун-т ім. І. Франка. К.: Атіка 2013. С. 18–33.

[4] Правда Руська Ярослава Мудрого: початок вітчизняного законодавства: навч. посіб. / уклад.: Г. Г. Демиденко, В. М. Єрмолаєв : вступ. сл. В. Я. Тація. 2-ге вид., змін. та доп. Х.: Право, 2017. – С. 9–30, 31–87.

collapse of the Kyiv state, the norms of which were supplemented by new, dictated by the experience of public life, judicial practice and state-sanctioned norms of customary law. Modern domestic historical and legal science has established that Pravda Ruska was based primarily on purely domestic legal sources. State formation, social life and changes in it gave rise to the need to regulate the feudal relations, which were complicated in the system of legal norms, in the princely legislation. Thus, Pravda Ruska is a legal response to the needs of the state in the legal system, in resolving the most pressing problems of public relations.

The publication of Pravda on seven lists and five editions was carried out for the first time by Corresponding Member. This work continued, the result of the work of Soviet historians and archeographers was the academic publication "Truth of Russia" and comments to it, edited by BD Grekov (1940-1963), Monuments rights of the Kiev state. X–XII centuries. "in two issues (1952-1953), compiled by OO Zimin, edited by SV Yushkov, the first volume "Legislation of Ancient Russia" in 1984, edited by VL Yanin. However, these publications, despite the undeniable archeographic, historiographical and textual achievements, are now largely obsolete due to the Marxist methodology of interpreting the history of Kievan Rus, the legal nature of the state and law, class assessment of the content of Truth, crimes and punishments, objective and sub. of the active side of criminal acts, etc. Soviet historians of state and law denied any national affiliation of ancient Russian law and the Kiev state. We still do not have full-fledged domestic editions of Pravda Ruska's texts and editions of Pravda Ruska, translations from the Old Russian language into modern Ukrainian.

The development of the law of the Kiev state was influenced by the adoption of Christianity and the baptism of the population of Russia. This majestic socio-political event required the legal definition and separation of state and church jurisdiction, the normalization of the interaction of local and Christian legal customs, and the bringing of the system of punishment in accordance with the norms of "Truth." After all, before the appearance of the ecclesiastical statutes of Grand Dukes Volodymyr Sviatoslavych and Yaroslav the Wise, ecclesiastical courts were guided by the norms of Byzantine law – Eclogue, Prochiron, Nomocanon, and others. sources of canon law.

Thus appeared the "Charter of Prince Vladimir on ecclesiastical courts", which established the tithe of state revenues to the church, the independence and autonomy of the ecclesiastical court, its jurisdiction, defined the circle of "ecclesiastical people". The "Charter of Prince Yaroslav", drawn up in 1051–1054 together with the first Russian metropolitan Hilarion, confirmed the independence of the ecclesiastical court from the prince and the boyars, their judges, the jurisdiction of judicial rights and revenues only to the metropolitan and bishops. Here is a long list of misdemeanors and immoral

acts, for which there are fines in favor of the metropolitan and the victim (victim), and criminal offenses were also subject to consideration by the prince's court or the court of the volost. Thus, the legislators – the secular (grand duke) and the clergy (metropolitan) took care of the protection of public morals, the family, the dignity of women, marriage and family law for the welfare and spiritual unity of the state. However, the question of the time of creation of princely church statutes, especially their additions and clarifications, determination of their significance for historical and legal science has not been finally resolved. After all, they reflect specific historical realities, legal institutions, norms of regulation of relations between the state and the church, recognized by it, family and marriage law. Researchers of ancient Russian law turn to certain provisions of the "Charters", but the study of the charters themselves still remains with domestic historians of law on the periphery of researchers' attention.[1] After the decline of Kievan Rus, Pravda Ruska continued to operate in the Galicia-Volyn principality and the Grand Duchy of Lithuania, as well as in the Novgorod Republic, the Grand Duchy of Moscow until 1497, and in other former Old Russian lands. Unfortunately, one of the consequences of the Tatar-Mongol invasion, the conquest of Galicia by Poland, and the establishment of a protectorate of the Lithuanian prince in Volhynia in the second half of the 14th century, was the destruction of cities and temples where priceless ancient Russian legislative and act monuments were preserved. Among the single legal documents created in the days of the Galician-Volyn state, as a former part of Kievan Rus, its successor, we have only 3 legal monuments – a diploma of Ivan Rostislavovich Berladnik (1134), "Manuscript" of Prince Vladimir Vasilkovich (about 1287), "Charter of Prince Mstislav Danilovich" (about 1289).[2] Compilers of "Monuments of the law of feudally fragmented Russia. XII–XV centuries. "mistakenly considered the "Charter of Prince Mstislav Danilovich" "Charter of Prince Mstislav Romanovich", which is refuted by the beginning of the charter – "This is Prince Mstislav, son of kings, grandson of Romanov…"[3]. They differ in time, content and character – as an echo of distant events associated with the fragmentation of the Kiev state, the unification of the Galician and Volyn principalities and the formation of a great state, whose territory spread to all of Transnistria and even Kiev.

Simplifications in the modern historical and legal literature regarding the definition of the form of the Old Russian

[1] *Бойко І. Й.* Правове регулювання цивільних відносин в Україні (IX – XX ст.) : навч. посіб. для студ. вищ. навч. закладів. Львів. нац. ун-т ім. І. Франка. К.: Атіка 2013. С. 41–51.

[2] Законодательство Древней Руси // Российское законодательство X – XX веков. В 9 т. Т.1. / Отв. ред. В. Л. Янин. М.: Юрид. лит-ра, 1984. С. 210; Памятники права феодально-раздробленой Руси. XII – XV вв. Сост. А. А.Зимин / Памятники русского права / Под ред. С. В. Юшкова. Вып.2. – М.: Гос. изд-во юрид. лит-ры, 1953. С.29.

[3] Полное собрание русских летописей. Т.2. Ипатьевская летопись. М.: «Языки русской культуры», 1998. С. 928–929, 935–938.

state as an early feudal state, built on the principle of suzerainty-vassality, cannot be avoided. Thus, the state was headed by the Grand Duke of Kiev, who relied on the council of boyars. However, in the state life of Kievan Rus a significant role was played by the People's Chamber – the ancient people's legal institution of tribal democracy. Thus, MO Maksimeiko argued that in the n lands then dominated a mixed form of government: the supreme power was exercised by the prince, the boyar Duma and the Chamber[1]. Historians of law of the Ukrainian Free University in Prague – SS Dnistryansky, RM Lashchenko, MD Chubaty, SM Fedorov also defined the power of the chamber as supreme.[2]. Thus, Lashchenko believed that "the chamber was the supreme people's body of power, it reflected the supreme will of the people." Dnistryansky wrote: "The Ukrainian state has a long history of parliamentarism, which begins with the existence of the council of the princely era, when the functioning of the latter gave the rule of the Kiev princes the most democratic character." MS Hrushevsky expressed his opinion less categorically: "in moments of respect, the Chamber acted as a true sovereign. … In the conditions of (same) Kyiv centralization the chamber remained in the role of an emergency body and gained its supremacy only in Novgorod, where political self-government… brings the princely power to the background by a strong development of its political functions, in other lands it shows its life weakly. and rarely."[3] In general, the scientist concluded, the system of public administration operated on the basis of diarchy (dual power) – the prince with his administration and the chamber, as a body of public control over them. Only with the decline of state centralization does "political self-government begin to wake up again."

CONCLUSIONS

Extremely interesting topic of the origins and development of democracy, parliamentarism in Ukraine and prompted the author to study and publish the monograph "Higher representative bodies in Ukraine: history, theory and practice", which, in particular, analyzed the place and role in the political system of Kyiv boyar council and chamber, their composition, competence and procedure[4]. Thus, outstanding monuments of

[1] Максимейко Н. А. Лекции по истории Русского права. Харьков: Тип. и литогр. Н. В. Петрова, 1907. С. 21.

[2] Дністрянський С. Загальна наука права і політики. Прага, 1923. (Фрагменти) // Політологія. Кінець XIX – перша половина XX ст. /за ред.О. І. Семківа. Л.: Світ, 1996. С.148–151; *Лащенко Р. Лекції по історії українського права /Р. М. Лащенко К.: Вид-во «Україна», 1998*. С. 98–99; Чубатий М. Огляд історії українського права: історія джерел та державного права / М. Чубатий. Тит.-ред. і автор передмови В. Іваненко. Мюнхен; Київ: УДЖ «Ноосфера», 1994. С. 63–67; Федорів С. Вічова спадщина стародавньої Русі // Хроніка 2000. Вип. 27–28. К., 1998. С. 69–80.

[3] Грушевський М. *С.* Історія України-Руси. В 11 т., 12 кн.: Т.3. К.: Наук думка, 1993. С. 117, 210.

[4] *Єрмолаєв В. М.* Вищі представницькі органи влади в Україні: історія, теорія та практика: монографія. Харків: Право, 2017. 448 с.

ancient Russian law testify: the founders and lawmakers of the Kiev state transformed a huge layer of ancestral customs into customary law, used the experience of judicial practice of princes of Russia, regulation of new social relations, received some norms of Byzantine law in Pravda Ruska constitutional "legislation embodied a high level of legal thought, legal culture, legislative technique.

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CHALLENGES TO THE REALIZATION OF HUMAN RIGHTS UNDER THE PANDEMIC

The law is the measure of the right, and anything that contradicts the measure of the right is wrong (Jus est norma resti; et quicquid est cjntra normam recti est injuria)
(Ancient Roman expression)

SUMMARY

Introduction: *The article deals with the problematic issues of human and civil rights under pandemic on the example of the practice of combating the spread of respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 civil society in Ukraine in 2020. Account has been taken of the fact that the human, his life and health are the highest social value, and that human rights and freedoms determine the content and orientation*

of State activities. Since every State functioned for the human, in order to protect universally recognized rights and freedoms, it was a feature of a modern democratic State governed by the rule of law. At the same time, in legal science in recent years there has been a debate about the problems of human and civil rights against the background of widespread abuse of rights, individual selfishness, conflict of rights of one person and group of people, human and society. That is to say, in the order of the day came an all-civilizational discussion about the appointment of the State, the idea of humanocentrism and sociocentrism as the fundamental foundation and expediency of the State. The problem is posed by the global challenges faced by present-day civilization: climate protection and freshwater, poverty and corruption, terrorism and military conflicts, massive ethnic displacement and pandemics. In one way or another these problems are present on all continents today, both for the world community and for each State in particular, but there is no well-established mechanism for dealing with them. With regard to combating the spread of coronavirus, it is clear that the problem is a global one in the field of medical law, and that it must be addressed both at the level of the novelization of legislation and at the level of philosophy and sociology of law, 'cause that's the kind of system-wide results you can use in complex under the state-creative practice today.

Objective: *To conduct a comprehensive study and classification of the restrictions and prohibitions imposed to prevent the spread in Ukraine of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2 in Ukraine.*

Materials and methods: *Research material – legislative and other regulations aimed at overcoming the coronavirus pandemic, the practice of its implementation in Ukraine, scientific works and other publications of foreign and domestic scientists and specialists. While writing the article used the method of comparative law and systematic analysis, structural and functional methods, method of legal statistics, legal modeling.*

Results: *The general theoretical characteristic of the experience of combating the spread of the coronavirus pandemic is studied and given, the laws and other normative legal acts adopted in Ukraine aimed at combating and eliminating the consequences of the coronavirus pandemic are analyzed.*

Conclusions: *Theoretical generalizations have been made within the framework of medical law and sociology of law, new ways of solving the scientific problem have been introduced, and they are reflected in the definition of theoretical and legal framework for the fight against the pandemic in the context of globalization, through the adoption and implementation of the necessary legislation and regulations.*

Keywords: *respiratory disease COVID-19, coronavirus SARS-CoV-2, human rights, anthropocentrism, sociocentrism, State authority limits, quality of legislation, globalization, pandemic.*

INTRODUCTION

Modern development involves the overlapping of globalization processes, increased cooperation among States and the movement of people, and the need to develop effective methods of exercising power in the face of global challenges, the need to take into account the principles of human and sociocentrism in the activities of the State and the exercise

of the powers of the State in the context of pandemics in order to ensure the security of society on the basis of justice and equality of the people. The global problem of interstate cooperation in the context of global pandemics, the morality of power and national security needs to be addressed immediately around the world.

MATERIALS AND METHODS

Research material – Legislation pointed at the resisting and overoming the effects of the coronavirus pandemic, foreign and national legal, political and specialized literature on health, medical law, constitutional law, sociology and legal theory, Human and Civil Rights and Freedoms in the context of global risks. While writing the article used the method of comparative law and systematic analysis, structural and functional methods, method of legal statistics, legal modeling.

REVIEW AND DISCUSSION

Modern global challenges have necessitated a revision of the established policy of states in various spheres of public life. This need is particularly acute in the wake of the global COVID-19 pandemic. It is clear that this should be based on the important principles of the rule of law, for which it is important not only to give human rights priority in the policies of the State [1,2], but also to understand by everyone that the rights of each individual end where the rights of the other begin. Therefore, the practical work of State and local government bodies faces the problem of the choice between ideas of humanocentrism and sociocentrism [6]. With the outbreak in Ukraine and the world of acute respiratory disease COVID-19, caused by coronavirus SARS-Cov-2, the human rights problems are quite acute. This includes ensuring the right to health [3] and the possibility of restricting other human and civil rights, preventing the abuse of power under the guise of anti-quarantine measures. This is the concern of the European Union, the United Nations, international human rights organizations and ordinary citizens today [5].

In the European Union, they reacted by signing a joint declaration against the usurpation of power, human rights violations under the pretext of quarantine actions by 13 EU member countries: Belgium, Netherlands, Luxembourg, France, Germany, Greece, Italy, Portugal, Spain, Ireland, Denmark, Finland and Sweden. The contents of the document concerned the decision of the Hungarian Parliament of 30 March 2020 to grant absolute powers to Prime Minister Viktor Orban under a state of emergency, but for an unlimited period of time.

At the time of this decision, during the COVID-19 coronavirus outbreak, which affected more than 950,000 people worldwide at that time, including at least 585 people in Hungary, Orbán was given excessive powers under the new emergency legislation, and his right-wing party, Fides, was able to effectively bypass both Parliament and existing laws, and the Government was allowed to issue prison terms for those considered to be spreading disinformation, that

many political scientists considered the ideal occasion for the seizure of power, since emergency powers could only be revoked with the support of two thirds of the Parliament (the majority held by Prime Minister V. Orban).

From the Ukrainian experience of counteracting coronavirus, we can say in general that the authorities acted proactively despite the financial, institutional and human resources inadequacies of the health-care management system (suffice it to mention the reckless elimination of public health surveillance), the large-scale spread of coronavirus and the large number of victims has been avoided, which has meant that the situation in our State has not been as dramatic as in other countries.

The measures taken by the state can be divided into several groups:

1. Restrictions on entry into and exit from the territory of Ukraine.

2. Restricting the movement of people by public transport between urban and intercontinental routes and within human localities.

3. Restricting the work of business entities, especially those involved in mass gatherings.

4. Restrictions on the holding of public events of a sporting, visual or socio-political identity.

5. Restrictions related to self-isolation (restrictions on staying in streets, parks and other recreational areas).

6. Restriction of the educational institutions' activity.

7. Introduction of a special regime for health-care institutions.

8. Increased legal liability for violation of quarantine, sanitary and epidemiological rules and regulations.

These State response teams to the pandemic are more or less concerned not only with environmental and epidemiological safety issues, public health management, but also with health workers and institutions.

The life of all citizens of our State changed radically with the adoption on March 11, 2020 by the Decision of the Cabinet of Ministers of Ukraine 211 «On prevention of the spread in the territory of Ukraine of acute respiratory disease COVID-19, caused by coronavirus SARS-Cov-2» [7].

According to Article 29 of the Law of Ukraine «On Protection of the Population against Infectious Diseases» [8] in order to prevent the spread of acute respiratory disease COVID-19 in the territory of Ukraine, and taking into account the decision of the State Commission on Technogenic and Environmental Safety and Emergency Situations of 10 March 2020, the Cabinet of Ministers of Ukraine decided to establish a quarantine throughout Ukraine from 12 March 2020 to 24 April 2020. A number of restrictions and prohibitions have been established and are classified in this publication according to the following criteria.

1. *Restrictions on entry into and exit from the territory of Ukraine* (established on 13 March by the Decision of the National Security and Defence Council «Urgent measures to ensure national security under the outbreak of acute re-

spiratory disease COVID-19 caused by coronavirus SARS-Cov-2» of 13 March 2020) [10]:

1) Closure of State border crossings of Ukraine from 0 a.m. to 17 March 2020 for regular passenger traffic;

2) Cessation, from 0 a.m. on 16 March 2020, of the entry into the territory of Ukraine of foreigners and stateless persons, with the exception of persons entitled to permanent or temporary residence in the territory of Ukraine, and on individual decisions of the Ministry of Foreign Affairs of Ukraine accredited officials of diplomatic missions, consular offices, missions of international organizations, etc.

2. *Restricting the people movement by public transport between urban and intercontinental routes and within human localities*.

By the Decree Cabinet of Ministers of Ukraine No.211 [7] *with* not suitable subsequent passenger (March 11, 2020)**:**

1) regular and irregular transportation of passengers by road in suburban, long-distance, intra -regional and inter-regional communication, except for transportation: by cars; official and/or rented motor vehicles of enterprises, establishments and institutions, provided that drivers and passengers are provided with personal protective equipment during such transportation within the number of seats and only on routes agreed with the National Police, as well as compliance with relevant sanitary and anti-epidemic measures;

– limited number of people who can be transported in one vehicle with personal protective equipment and appropriate sanitary and anti-epidemic measures;

– entry of bus stations carrying commuter, intercity, intraregional and intercontinental passenger services and sale of tickets by station owners to road carriers carrying out such services;

2) from March 17, 2020 transportation of passengers by subways in Kyiv, Kharkiv and Dnipro in accordance with the decision of the State Commission on Technogenic and Environmental Safety and Emergencies of March 16, 2020;

3) from 12 a.m. to 1 p.m. 18 March 2020 passenger transport by rail in all types of inland transport (suburban, urban, regional and long-distance).

3. *Restricting the work of business entities, especially those involved in mass gatherings*. Such restrictions are in fact prohibitions in the field of economic activity (Such restrictions are, in fact, bans on economic activity (established on 11 March 2020 by the Decree of the Cabinet of Ministers of Ukraine No.211) [7]**:**

1) To the work of economic entities, which provides for the admission of visitors, including catering establishments (restaurants, cafes, etc.), shopping and entertainment centers, other entertainment establishments, fitness centers and cultural establishments; commercial and consumer services, except for:

trade in foodstuffs, fuels, hygienic products, medicines and medical products, veterinary preparations, feed products, pesticides and agrochemicals, seeds and planting material; communications equipment, while ensuring the provi-

sion of personal protective equipment to the personnel concerned, as well as appropriate sanitary and anti-epidemic measures;

Banking and insurance activities, as well as medical practices, veterinary practices, the operation of petrol stations, the maintenance and repair of vehicles, the maintenance of payment recorders, computer repair activities, household and consumer goods, postal facilities, while ensuring the provision of personal protective equipment to the personnel concerned, as well as appropriate sanitary and anti-epidemic measures; trade and catering activities with targeted orders' delivery, while ensuring the provision of personal protective equipment to the personnel concerned, as well as appropriate sanitary and anti-epidemic measures.

4. *Restrictions on the holding of public events of a sporting, visual or socio-political identity.* Such prohibitions were established on March 11, 2020 by the Decree of the Cabinet of Ministers of Ukraine No.211 [7] From 1 a.m. to 1 p.m. March 17, 2020 for all mass events (cultural, entertaining, sports, social, religious, advertising and other) in which more than 10 people take part, in addition to measures necessary for the functioning of State and local government bodies.

5. *Restrictions related to self-isolation (restrictions on being on the streets, in parks and other recreational areas).* Restrictions related to self-isolation (established on March 11, 2020 by the Decree of the Cabinet of Ministers of Ukraine No. 211) [7]:

1) persons who have had contact with a patient with acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2, or suffer from this disease and do not require hospitalization, are persons in need of self-isolation.

2) COVID-19, SARS-Cov-2 Coronavirus-induced Acute Respiratory Disease Treating Physician, independently determines the period of self-isolation of the patient and persons in need of self-isolation as a result of contact with the patient, based on sectoral health standards.

3) persons in need of self-isolation are obliged to refrain from contacting persons other than those with whom they live together and from visiting public places. Emergency visits to places of sale of food, hygiene, medicines, medical supplies and health-care facilities with personal protective equipment and with a distance of not less than 1.5 meters are permitted.

4) persons visiting countries/regions with local transmission of the virus in the community (in addition to drivers and service personnel of cargo vehicles, aircrews, sea crews, river crews, train and locomotive crews, if there is no reason to believe that they were in contact with a person suffering from acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2) are considered to have had contact with the patient with this disease and are subject to mandatory observation (isolation) within 14 days after the state border crossing in specialized institutions, which are determined by the Kyiv and regional state administrations.

5) persons who have been assigned quarantine (self-isolation) are obliged to strictly follow the recommendations of physician.

6. *Restriction of the educational institutions' activity.* These restrictions (established on March 11, 2020 by the Decree of the Cabinet of Ministers of Ukraine No. 211) [7] in the form of a ban on attendance by applicants.

7. *Introduction of a special regime for health-care institutions.* Restrictive anti-epidemic measures carried out by health-care institutions independently or in cooperation with the National Police, established by the Cabinet of Ministers Decree «Some issues on the application of restrictive anti-epidemic measures aimed at preventing the spread of acute respiratory disease COVID-19 caused by coronavirus SARS-Cov-2» of 25 March 2020 and the decision of the National Security and Defense Council «On urgent measures to ensure national security in the event of an outbreak of acute respiratory disease COVID-19 caused by coronavirus SARS-CoV-2I» of March 13, 2020) [9; 10]:

1) health care institutions have the right to implement:

compulsory medical examination of persons with acute respiratory disease COVID-19 caused by coronavirus SARS-Cov-2 (hereinafter COVID-19) or have symptoms COVID-19 if such persons refuse medical examination voluntarily;

compulsory hospitalization, quarantine (self-isolation) for COVID-19 patients or those with COVID-19 symptoms if such persons refuse to be admitted to hospital or quarantine (self-isolation) voluntarily;

compulsory hospitalization of the children of persons declared legally incompetent under the established procedure, living together with legal representatives who have been hospitalized for COVID-19 if they cannot be temporarily placed with the families of relatives known to them;

2) the referral of the persons referred to in paragraph 1 of this paragraph for compulsory medical examination and/or hospitalization and quarantine (self-isolation) shall be carried out by health-care institutions and individuals; entrepreneurs who provide primary health care in accordance with the established procedure;

3) at the written request of health-care institutions, the National Police is obliged to accompany vehicles in the cases provided for by law, as well as to escort them rescue and other special equipment during transportation for compulsory examination and hospitalization;

4) medical and preventive institutions should ensure readiness for the provision of medical care to COVID-19 patients and the creation of reserves of medical equipment, medicines and medical supplies, including personal protective equipment; as well as disinfectants.

8. Increased legal liability for violation of quarantine, sanitary and epidemiological rules and regulations, which is provided by the 530-IX Law of Ukraine «On Amendments to Certain

Legislative Acts of Ukraine aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)".» of March 17, 2020, should be considered separately [11]:

The Code of Administrative Offences of Ukraine was supplemented by Article 44–3 «Violation of Human Quarantine Rules», provided for in the Law of Ukraine «On Protection of the Population against Infectious Diseases», other legislative acts, as well as decisions of local governments on the control of infectious diseases.

Article 325 of the Criminal Code of Ukraine 'Violation of sanitary rules and norms on prevention of infectious diseases and mass poisoning", is stated in the new wording: violation of rules and norms established for prevention of epidemic and other infectious diseases, as well as mass non-communicable diseases (poisoning) and control if such acts have led to, or are known to have caused, the spread of these diseases, shall be punished by a fine of 1,000 to 3,000 minimum income not covered by the law, or by arrest for up to six months, or by restriction of liberty for up to three years, or imprisonment for the same term. For the same acts, if they have resulted in loss of life or other serious consequences, a penalty of 5 to 8 years' imprisonment may be imposed.

Regulations on pandemic control, both national and local, in the form of decisions of local self-government bodies and decisions of local State administrations, were prepared and adopted under extreme conditions of time scarcity, the risks of the spread of the pandemic, the need for the State to fulfil its responsibilities to society and the individual in a timely manner, therefore their analysis reveals significant strengths and weaknesses that need to be addressed now and in the future.

Let us highlight here some of the problems that have caused a sad smile in their treatment in the context of human rights. For example, the COVID-19 coronavirus regulations placed animal rights above human rights: one person could walk a dog in the park but not two persons, and not allowed to walk by two persons, later, the Chief State Medical Officer of Ukraine, Liashko, explained this as an attempt by the public authorities to exert psychological pressure on civil society to ensure self-discipline and avoid the spread of the coronavirus, which, of course, is an offence.

In Kiev, one and four medical institutions for the treatment of COVID-19 patients have been designated Alexander Hospital on Shelkovychna St. At the same time, by decision of the medical institutions, the treatment of ophthalmological patients was ordered by the medical institutions, despite the risk of the spread of COVID-19 coronavirus, and the Eye Microsurgery Centre, by decision of the Chief State Medical Officer, was able to treat only children.

However, it is particularly important to mention here the great national problems. First of all, as a result of the reaction to the spread of the coronavirus, a national mistake made earlier has been corrected and it is planned to restore the

system of anti-epidemic protection, in particular: appointment of chief public health doctors from the relevant administrative and territorial authorities.

The possibility of compulsory hospitalization under the mental health legislation, in which one of the authors participated, was not resolved – prof. Vasyl Kostytsky, previously it was possible only in the case of acute psychiatric disorders of a person by court order. COVID-19 is obviously required to be listed as a serious infectious disease that provides for involuntary hospitalization followed by a court decision, provided that such involuntary hospitalization is terminated by a health-care facility where the person with COVID-19 is based in accordance with the medical recommendations approved by the Ministry of Health.

Pursuant to the above-mentioned regulations, medical personnel, law enforcement personnel and emergency services involved in anti-epidemic activities, as well as persons in contact with COVID-19 patients, must be provided with personal protective equipment. However, the sources of supply and financing of these funds have not kept pace with this task, despite attempts by the State to simplify customs and procurement procedures for medical facilities.

Special attention should be paid to problems related to the rights of health workers. Provision is made in the regulatory documents for the introduction of additional material incentives for medical workers who are involved in anti-epidemic and curative measures to counter COVID-19 were under-resourced and the dedicated work of health workers was not adequately appreciated. The problems of the possibility of infection in the workplace have not been taken into account, and the questions of compensation for the harm caused to the health-care worker in the workplace in the context of the pandemic have not been resolved, a The Act of 7 May 2020 on additional guarantees for medical personnel provides for compensation and guarantees only in the event of the death of a person.

Ukrainian legislation has also neglected the problem of the protection of medical workers, which should include their compulsory insurance by the State or by an employer in private medical institutions, as well as the issue of treatment protocols.

The legislator has not decided that a person who shows signs of acute respiratory disease COVID-19, caused by SARS-Cov-2 coronavirus, is obliged to inform the community, family members, employer.

Results: In summary, it can be stated that the restrictions and prohibitions imposed on the territory of Ukraine in order to prevent the spread in the territory of Ukraine of the acute respiratory disease COVID-19 caused by the coronavirus SARS-Cov-2, have touched practically all spheres of public life. At the same time, aware of the negative consequences of these restrictions and prohibitions on the country's economy and the well-being of the population, we wish to emphasize the unprecedented

attention paid by the State in the history of independent Ukraine to the problems of the medical sector.

The right to a safe environment for life and health provided for in article 50 of the Constitution covers [3], in our view, the right to sanitary and epidemiological well-being, and is recognized as a duty of the modern State towards civil society. Itis based on the principle of the rule of law, which embodies both the recognition of the human being as the highest social value and the understanding of rights and freedoms, especially the fundamental human right to a healthy and healthy environment [4] such as to determine the content and direction of State action is an important.

CONCLUSIONS. As a result of the study carried out, we consider it advisable to re-establish the institutional system responsible for the sanitary and epidemiological well-being of the population, that is, to establish a renewed system of public health services Epidemiological surveillance of Ukraine in the central apparatus, oblast and city inspectorates. Legislation needs to be further improved and codified, in particular in connection with article 64 of the Ukrainian Constitution, which prohibits restrictions on human and civil rights and freedoms. In the event of martial law or a state of emergency, certain rights and freedoms may be restricted, so it is necessary to introduce legislation on states of emergency, such as the regulation of this issue in environmental legislation, which provides for the possibility of declaring a certain territory as an environmental emergency zone. Thus, the law should also provide for the possibility and procedure of involuntary hospitalization of patients with COVID-19 respiratory disease caused by SARS-Cov-2 coronavirus, the possibility of recognizing a certain territory of the State or of the whole country as an area of emergency sanitary and epidemiological situation and defining the procedure and conditions for restricting the movement of people and the work of business entities; mass events and other constraints based on the experience of the pandemic in 2020.

Besides, we consider it necessary to:

– restore the training of specialists in the specialty «sanitary supervision»;

– provide for increased wages (200–300 per cent) and compulsory insurance (State and employers in private health-care institutions) for health-care workers; Those involved in dealing with pandemics or in the treatment of acute infectious diseases;

– clarify the list of serious infectious diseases and include COVID-19 respiratory disease caused by SARS-Cov-2 coronavirus;

– procedure for compensation of damage caused to the health and property of doctors involved in work during the pandemic, including as a result of infection in the performance of duties in a medical institution.

Both the measures taken by the Parliament and the Government of Ukraine and the law and resolutions adopted by them not only were unpopular, but received a negative assessment by the

Constitutional Court of Ukraine, which in its decision as of August 28, 2020 drew attention to the Resolution of the Cabinet of Ministers of Ukraine № 392 of May 20, 2020 "On the establishment of quarantine to prevent the spread of acute respiratory disease COVID-19 caused by the coronavirus SARS-CoV-2 in Ukraine and the stages of mitigation of anti-epidemic measures" violating the Constitution. The government itself lifted unconstitutional restrictions on human and civil rights and freedoms in June and July. These problems are quite relevant and require additional understanding and separate analysis, which could be done in a separate article.

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THE SOCIAL DIMENSION OF MODERN LEGAL REALITIES

Summary: *The article is devoted to the criteria of effective protection and defense of social human rights, emphasizes the need to take into account the conditions when national legal systems "work in a non-standard mode", in particular, the global pandemic, RS aggression, economic destabilization. Attention is also paid to the consideration of social rights – social duties and social responsibility.*

Keywords: *social rights, criteria of social efficiency, social responsibilities, social responsibility, social policy.*

Formulation of the problem. *It is* clear that modern life is a reality, provoked by the pandemic, many negative processes could not but affect the legal plane.

Therefore, we would like to note that the experience gained shows that the functioning of the legal system in the "regular mode" and in extreme conditions have, of course, significant differences: including, and perhaps primarily in the protection of rights, freedoms and legitimate human interests..

It is axiomatic, and this has been confirmed in practice, that it is social human rights that are the defining "concern". A few remarks are not so much a textbook on the development of these rights, but on the segments that indicate the need for today to update their provision and protection.

In addition, the consideration of social rights, their "capabilities" and guarantees must address the threats and challenges that, unfortunately, are offered by the new realities of modern life.

Analysis of recent research. In this context, it can be emphasized that the issue of social human rights is in the center of attention of many modern researchers. Thus, O. Andriyko, Y. Bisaga, O. Petryshyn, V. Pohorilko, O. Skrypnyuk, Y. Shemshuchenko took care of this topic at different times. Various aspects of the given problem were also considered by M. Bulkat, O. Danych, R. Lutsky. O. Lvova, V. Sichevliuk and others. However, many important issues of the selected consideration were, unfortunately, left out of the scientific community, in particular: the issue of criteria of general social efficiency; compliance with social rights, social responsibilities and social responsibility; the importance of the category "sufficient standard of living" in the context of the development of social rights, etc.

Forming the purpose of the article. The purpose of this article is to emphasize the importance of effective protection and defense of social human rights in today's conditions.

Presenting main material. Several considerations of theoretical format. Thus, in our opinion, should be taken into account before the criteria of overall social efficiency. That is, efficiency criteria or performance indices, such as: the same boundaries, aspects, manifestations, manifestations of a particular activity, through the analysis of which you can determine the level and quality of the process, its compliance with the needs and interests of civil society and man.

Such criteria, on the one hand, are objectively related to the needs, interests and goals of social development (both national and regional), and on the other – give the opportunity to see (and measure) the satisfaction (implementation, realization) of pressing needs, interests and goals of each member of society.

In modern Ukraine, during the formation of the legal framework of state and public life, the problem of the effectiveness of legislation is acute. Its shortcomings are primarily related to the implementation mechanism, the lack of the necessary institutional forms. In addition, the legal forms of normative material are not sufficiently elaborated (imbalance of rights and responsibilities, failure to provide norms with appropriate sanctions, inconsistency of the legal system and legislation, etc.).

It should be borne in mind that the quality of legislation is determined by the social content, its compliance with public needs and interests.

Thus, when thinking about social rights, the scientific and civil communities should duly emphasize that in our time not only the state has failed to respond at least close to European models – to respond to threats, but also, in fact, the national legal system has demonstrated «arrhythmic»The nature of functioning in today's conditions.

The national legal system is a kind of indicator of sustainable (or close to it) economic, legal, political, social development of each state, and most importantly the achieved level of protection of

human rights, freedoms and legitimate interests. Thus, it is clear that the legal system, as the embodiment of the corresponding achieved level of development of law must be able to: a) perform certain tasks; b) reproduction of the necessary functions both in the normal course of life and in extreme conditions.

A few words about it in more detail. Today, the social orientation of the legal system as a means of forming and realizing the interests of the subjects by fixing certain goals, norms, rules of conduct is growing. Of particular importance is the provision of optimal combination of social and legal principles development of society.

This task is quite complex: and legal and social principles are designed to ensure the welfare of the individual, today it is primarily – social rights. As already mentioned, the social policy pursued by the state cannot be understood only as the protection of socially vulnerable segments of the population.

This is aimed at ensuring the effectiveness of social performance of economic transformations, ensuring the social component of the right implementation, investment, financial, tax, etc. policy of the state.

The legal system of the social, legal state is designed to ensure the stability of civil consent established by social policy by proclaiming, implementing and protecting social and legal conditions to stimulate the active part of the population to work productively as a basis for personal well-being; maintaining the optimal ratio between the incomes of the able-bodied part of society and incapable citizens; providing subsidies, relevant benefits, reducing and limiting the scale of impoverishment; curbing unemployment, and as a prospect, ensuring a sufficient standard of living.

And this is about the "regular" course of events. However, today it is also such general social tasks as guaranteeing national security, eliminating the consequences of pandemics, environmental disasters, implementation of social programs that will reflect the position of "everything necessary is taken into account", support for rehabilitation measures [1, p. 34–40].

In these conditions, it is extremely important what "slice" of social rights should be provided to the legal system today, guaranteed by the state and defended by the judiciary: those that will be built for decades on a residual basis or, indeed, those that will help live in modern Ukrainian realities not only "bread alone", but also to have sufficient conditions for self-realization of the person, protection of his honor and dignity.

Thus, in today's European countries, the right to an adequate standard of living is one of the most important social rights of the individual. Despite the fact that each person must personally take care of their well-being, it must, however, be created conditions for them to be able to ensure a minimum standard of living. Especially when it comes to the elderly, the disabled.

It is the duty of the state, according to which the state recognizes the right of everyone to an adequate standard of living for himself and his family [2].

It should be noted that the concept of "sufficient standard of living" is not defined in the scientific community. Therefore, it is evaluative; that is, each person determines for himself a level that corresponds to his idea of a sufficient standard of living. However, the position formulated by the lawyers of Ancient Rome, according to which "the law can and should be determined" (Digests of Justinian), is relevant to any legal system. The principle of certainty, accuracy, unambiguity of the rule of law is considered a guarantee of a strong rule of law, because provided that each member of society understands his rights and responsibilities, he gets some freedom of action and decisions within the legal space.

Thus, there is some uncertainty in the provisions of international instruments that refer to a "sufficient standard of living." It is up to the state to define and set minimum standards below which the living standards of citizens cannot fall. Of course, ensuring a sufficient standard of living is a difficult problem even for wealthy countries.

The realization of the right to an adequate standard of living, of course, affects the internal resources and capabilities of the state. The right to an adequate standard of living includes, as already mentioned, such opportunities as the right to adequate food, the right to sufficient clothing, housing, and the improvement of living conditions. The right to adequate food is: freedom from the Holodomor; the right to quality food; the opportunity to have the means to obtain quality food, etc.

The International Covenant on Economic, Social and Cultural Rights identifies the most general programs against the Holodomor.

Using the right to work, a person must receive the means necessary for him to exist. To provide it with the appropriate conditions for this is the task of the domestic legislation of each state, as well as the establishment of the necessary standards of food quality.

In this context, attention should be drawn to the fact that health care in Europe is an archival issue, as it is worldwide, especially in today's world. Normatively it is fixed in Art. 35 of the 2000 Charter of Fundamental Rights of the European Union. It is the realization of the right to health care that most reflects the inadequacy of the legal system of Ukraine, and not only in terms of the principles of the social, legal state.

Unfortunately, there are still significant differences in the level of health care in different social strata and even in different regions of the EU. In particular, the health care systems of Central and Eastern Europe are significantly inferior to the systems of the "old" EU members.

However, national legal systems governing health care are heavily burdened everywhere. First of all, it's about the

share of health care spending in budgets. Already today, this is the largest item of expenditure, but the amount of funds allocated for these purposes continues to increase annually. Over the last 30 years, the share of health care expenditures in GDP has increased in all EU countries. For example, in Italy – from 5.7 to 7.4 percent, in Spain – from 5.6 to 7.3 percent.

Another factor complicating national health systems is demographic trends. Europe is getting older, by 2020 there were 40 percent more people over 75 than in the 1990s. It is these factors that have been "underdeveloped" by the pan-European community, including the spread and dissemination of COVID-19.

Conclusions. Finally, the purpose of social policy is to ensure the material well-being of citizens, to achieve stability and security of life in society, the integrity and dynamism of its development.

It is known that the society remains calm and stable, when the number of dissatisfied or disagree with the implementation of public policy is not more than twenty percent of the population. Therefore, it is extremely important to ensure social rights, as noted by leading lawyers – practitioners and representatives of the scientific community, the following areas have been developed:

1. Scientific forecasting of law, legislation, economy, population growth, creation of new industries and jobs; development of appropriate plans of forecasts and material and financial support in the economy of the social sphere, the fight against unfair competition, monopoly in the economy, etc.

2. Redistribution of material goods between regions and segments of the population, their direction on maintenance of the average standard of living reached by the given country on all territory of the country, prevention of poverty, change of quality of indicators of life towards deterioration.

3. Creation of state, first of all legal, guarantees for prevention of natural disasters, epidemics, epizootics, man-caused catastrophes, for immediate elimination of their consequences, help to the affected population.

4. Creating accessible to the general population systems of education, health care, pensions, solving other social issues, taking into account the safety of citizens, certain societies, groups, etc.

In addition, the implementation of "sound" social policy is impossible today without the following statements: it is important to emphasize that to ensure the practice of social human rights it is necessary to doctrinally develop and implement the category (social responsibilities) including social responsibility: state, business, each member of civil society. Without proper, corresponding rights to raise the question of proper social rights, it is not possible in a theoretical sense or in a practical sense.

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LEGAL DOCTRINE AS A RESULT OF COURTS' ENFORCEMENT ACTIVITY

Conceptual approaches to defining the essence and content of legal doctrine as a source of law, its role in the process of law-making, law enforcement activities, including the interpretation of law, were clarified. However, legal doctrine may be of a different nature. Accordingly, the purpose of this research is the clarification of the essence and content of legal doctrine, which is formed as a result of generalization of law enforcement and interpretative practice of courts.

As a result, it is determined that the judicial doctrine is formed by the court through developing established, typical approaches to resolving specific cases on the merits. The introduction of such notions as "exemplary case" and "typical case" into the legislation of Ukraine is an important step towards strengthening the importance of judicial doctrine, its recognition as a source of law in the formal legal sense in Ukraine. At the same time, in our opinion, the legal structure of determining the legal force of the Supreme Court's conclusions needs to be improved, given the obligation to take them into account along with other sources of law, the hierarchy of which is enshrined in the Constitution of Ukraine

Keywords*: doctrine, court-made doctrine, precedent, concept, Supreme Court, court order, exemplary case, standard case.*

Introduction. The gradual disappearance of the borderlines between the legal systems comes as one of the consequences of globalization changes that are taking place in the world. Thus, Ukrainian legal system has been radically transformed during the last twenty five years. It concerns also the legal doctrine that has been traditionally considered as a developed by lawyer-scientists combination of ideas, perspectives and concepts that influence the lawmaking and law enforcement.

Lawyers that research the real condition of legal regulation by means of revealing the existent gaps and disadvan-

tages are the instigators of improvement and reforming of the current legislation. If the rule-making body takes the decision about the development of regulatory legal acts projects, lawyers provide scientific support of that process (justification of the development relevance of such acts, participation in the working groups concerning their development, carrying out the legal-scientific examination and the comparative legal research of the national and foreign experience, discussion of the projects of elaborated acts etc.). Doctrinal justification of the regulatory act project determines to a large extent the position of the rule-making body regarding the definition of its content, promptness and the feasibility of admission. That is, lawyers and most of all lawyer-scientists are the subjects which identify the urgent needs of legal regulation. By developing common coordinated views on solving different judicial problems, they form the legal doctrine the terms of which are widely used in legal practice by virtue of their persuasiveness, justification and scientific authenticity.

In other words, it is about conventional scientific knowledge. Herewith, R. V. Puzikov correctly indicates that judgements and views of various scientists are only individual perspectives that do not create a legal doctrine. But their combination and systematic transformation, based on the unity of views of lawyer-scientists, predetermines the emergence of separate science directions. Their integration into one concept which is based on common principles and priorities is a proof of the emergence of the doctrinal form of understanding various phenomena[1]. Thus the integrity and logical alignment of scientific terms that represent the content of the legal doctrine are ensured[2].

The refore generally acknowledged conceptual basis of development of the state and the law play a huge role in the process of the fulfillment of lawmaking and law enforcement activities and legal regulations interpretation. As a rule, the usage of the legal doctrine as a precondition or a factor of lawmaking or law enforcement is emphasized.

However, the legal doctrine can be of another nature that directly determines its essence, content and purpose. The objective of this research is, respectively, the clarification of the essence and content of the legal doctrine that is formed as a result of the generalization of law enforcement and statutory interpretation judicial practice.

Problem statement and presentation of the main material. The generally accepted approach is that the legal doctrine is created on the basis of data about the objective laws of existence, interaction and development of legal phenomena, which is the main reason for its high authority, a precondition for recognition, legitimation of doctrinal

[1] Цитується за Семеніхін І. В. С 30 Правова доктрина: загальнотеоретичний аналіз / І. В. Семеніхін ; наук. ред. О. В. Петришин. – Х. : Юрайт, 2012. С. 30.

[2] Семенихин І. В. Правова доктрина: загальнотеоретичний аналіз / І. В. Семеніхін ; наук. ред. О. В. Петришин. – Х. : Юрайт, 2012. – 88 с. – (Серія «Наукові доповіді»; вип. 2). С. 30.

regulations in the legal consciousness of the legal community, and as a result – of the society in general. It concerns, in particular, legal knowledge organized in a generalized theoretical form: categories and notions, principles, theories, concepts, axioms, presumptions, prejudices, legal constructions that reflect the laws and logic of legal matter and that are forms of expression of the substantive part of legal doctrine[1].

It is noted that even if the doctrinal regulations are not generally required, they are widely used in legal and, particularly, in law enforcement practice due to their persuasiveness, validity and scientific truth.

In law enforcement activity doctrine/science is primarily related to law awareness, the achievement of adequate interpretation of the law regulations or other regulatory legal acts. It is a rather complex professional-intellectual cognitive creative process. In jurisprudence such a process, as mentioned earlier, is referred to as "doctrinal (scientific) interpretation", the focus of which is to scientifically clarify the true meaning and purpose of legal norms, which is given by intensive search and comprehensive scientific analysis of the law regulations. In this regard, the correct opinion of V. Syrykh attracts attention, that the main feature of the doctrinal interpretation is not that it is carried out by persons endowed with academic degrees and titles, but that it contains the most in-depth and accurate analysis of current legislation, correctly discloses and explains the essence and content of the law "[2].

In this regard, it should also be noted that the doctrinal interpretation is carried out with the involvement of scientific means, methods and modern achievements of science [3].

The practice of using scientific achievements directly by judges, interpreting the regulations of legal acts by leading specialists of scientific institutions and institutions of higher education on demand or by court decision is currently quite common.

Resolving the case on the merits, the judge interprets the rules of law based on legal doctrine. The point is that the meaning (content) may not coincide with the text from which the interpretation begins. Value is the result of interpretive activity, respectively – the norm itself as a rule of behavior is the result of interpretation. The central idea is that the interpreter, foremost the judge, is called upon to cooperate with the legislator in order to send an appropriate normative message to the participants of the public relations, especially considering the fact

[1] Ibid. P. 28, 72.

[2] Сырых В. М. Теория государства и права: учебник / В. М. Сырых. М.: Юстицинформ, 2006. С. 288.

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that such a message is incomplete without legal intervention[1].

I. V. Spasibo-Fateeva also rightly notes that the formation of the doctrine has its origins in science, which should work on problematic aspects of the application of legislation (including through generalization of practice) and provide appropriate recommendations. Judges, given the authority of scientific proposals and schools, should use them[2]. S. N. Lyulkovich also pays attention to the relationship and interaction of legal doctrine and judicial (administrative) practice , and D. I. Stepanov in this regard notes that "the very existence of the doctrine is due to problems caused by practice or identified by it; it must generate rational legal constructions"[3].

Thus, there is a concept according to which the legal doctrine acts as a result of interpretation of legal norms by the authorized subjects – courts. Due to such activity the generally accepted approaches to the decision of concrete cases in essence are made. The judge in the process of law enforcement establishes the actual circumstances of the case, carries out their legal qualification and solves the case on the merits; documents the court decision. In the process of examining of standard cases, the judge is guided by previous experience and usually makes a similar decision. Thus the formation of a typical conceptual approach to solving similar cases by a judge, the so-called judicial doctrine is carried out. In the future, such approaches can be used in similar cases.

Accordingly, the essence of judicial doctrine is formation of established, typical approaches to resolving specific cases on the merits as a result of the judges' activities. These approaches are usually formed in relation to the evaluation of evidence, the distribution of the burden of proof, the definition of the subject and means of proof[4].

For a long time, the doctrine of the Romano-Germanic legal system was mentioned indirectly only in the context of the analysis of the essence and content of the plenum decisions of the Supreme Court. The status of judicial doctrine also was not defined at the legislative level, except for the plenum decisions of the Supreme Court. The main focus was on the denial of judicial precedent as a source of law and the definition of generalizations of judicial practice as a factor in lawmaking and law enforcement. Taking into account the case law of the Supreme Court was not mandatory, as the

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[4] Форсюк Віта Судові доктрини як засіб протидії зловживанню правом у податкових правовідносинах http://advisortax.org/wp-content/uploads/2018/02/Vita-Forsyuk.pdf

courts could deviate from the position of the Supreme Court with due justification.

At present, the convergence of legal systems, which only intensifies over time, has led to a change in conceptual approaches to defining the essence, content and purpose of generalizations of case law and the formation of established approaches to solving typical cases. The concept of "judicial doctrine" appeared and became used in scientific circulation. At the legislative level, these changes are also reflected.

In particular, according to part 2 of Art. 125 of the Constitution of Ukraine, the Supreme Court is the highest judicial body in the system of courts of general jurisdiction. According to Art. 36 "On the Judiciary and the Status of Judges" of the Law of Ukraine it is stipulated that the Supreme Court must ensure the stability and unity of judicial practice. On this basis, it should be emphasized that, according to ECOHR judgements, disagreements are, by their nature, an integral part of any judicial system based on a network of courts of first instance and courts of appeal. At the same time the role of the highest court is to resolve such disputes[1].

The unity of law enforcement practice in the field of justice is achieved through the activities of the judiciary that are aimed at creating standard models of qualification or interpretation of law, their objectification in court decisions. Unification (formation of a common judicial practice) is achieved through identifying the need for unification of judicial practice and determining its basic parameters; creation of a standard model of legal qualification and development of a legal position; fixation of the legal position in the judicial act; bringing the result to the notice of the subjects of law enforcement.

Accordingly, judicial practice is formed: 1) on the basis of established practices (representations) of law enforcement; 2) in accordance with the new legal institutions (amendments to the law); 3) on the basis of the case law of the European Court of Human Rights on the interpretation of the regulations of the Convention for the Protection of Human Rights and Fundamental Freedoms; 4) taking into account the acts of interpretation of the Constitutional Court of Ukraine.

Conclusions on the application of the legal rules that are set out in the orders of the Supreme Court are taken into account by other courts in the application of such legal rules. Thus, according to M. V. Onishchuk, the institution of incomplete judicial precedent is being introduced[2].

In this regard, special attention in the Law of Ukraine which is called "On the Judiciary and the Status of Judges" is paid to the creation of mechanisms that will ensure the unity of the practice of law enforcement by the Supreme Court.

[1] Застосування практики Європейського суду з прав людини в адміністративному судочинстві. Науково-методичний посібник для суддів https://www.osce.org/uk/ukraine/232691?download=true

[2] Оніщук М. В. Єдність судової практики як конституційний імператив та гарантія верховенства права // http://nsj.gov.ua/files

The development of the indicated regulations of the Law took place in 2017 in the CAP of Ukraine. In particular, one of the novelties was the introduction of such a procedural institution as "exemplary case" and "typical case".

According to the Law, typical administrative cases are administrative cases in which the defendant is the same subject of power (its separate structural units), the dispute in which arose on similar grounds in relations governed by the same legal rules, and in which the plaintiffs stated similar requirements. An exemplary administrative case is a typical administrative case accepted for proceedings by the Supreme Court as a court of first instance for the regulation of a model decision (Article 4, paragraph 22). It means that if there are signs of typicality of the case, the Supreme Court accepts it for proceedings, and such a case becomes exemplary.

Prescriptions of the Art. 290 CAP of Ukraine regulate the features of the proceedings in the exemplary case. In particular, if one or more administrative courts are dealing with typical administrative cases, the number of which determines the relevance of a model decision, the court viewing one or more such cases may apply to the Supreme Court for consideration of one of them by the Supreme Court as the court of first instance. In the request to the Supreme Court for consideration of the exemplary case are indicated the reasons why the submitting court considers that the case should be viewed by the Supreme Court as exemplary, including references to standard cases[1]. In general, as T. Podorozhna emphasizes, the main advantage of the exemplary case procedure is if there is a range of monotonous cases concerning the application of any rule, the highest court immediately expresses its legal position, which will be taken into account in all similar cases. Thus, exemplary cases are aimed at relieving the courts and will serve to establish judicial precedent in Ukraine. The very fact of recognition by the Supreme Court of the right to create judicial precedent is a step towards the development of Ukraine as a social, legal state, primarily because there is a change in the perception of law and judicial practice in society[2].

In the decision of the court, approved on the results of the exemplary case, the Supreme Court additionally notes: signs of typical cases; the circumstances of the exemplary case, which determine the typical application of substantive law and the procedure for applying such rules; circumstances that may affect the application of substantive law other than in the exemplary case. In 2018-first half of 2019, 17 decisions on opening proceedings in an exemplary case were made and 11 decisions (resolutions) in such cases were adopted[3].

[1] Зразкові та типові справи в адмінсудочинстві // https://protocol.ua/ua/zrazkovi_ta_tipovi_spravi_v_adminsudochinstvi/

[2] Подорожна Т. С. Зразкові та типові справи як новий механізм адміністративного судочинства. URL: https://sud.ua/ru/news/blog/124220-zrazkovi-ta-tipovi-spravi-yak-noviy-mekhanizm-administrativnogo-sudochinstva

[3] Оніщук М. В. Єдність судової практики як конституційний імператив та гарантія верховенства права // http://nsj.gov.ua/files

Thus, recent changes in current legislation regarding the administration of justice have strengthened the position of judicial doctrine as a result of the law enforcement practice of the courts, which are set out in the rulings of the Supreme Court. Only the Supreme Court can deviate from these positions. In such circumstances, the rulings of the Supreme Court become a source of law that is binding. Accordingly, lower courts in law enforcement are guided not only by law, but also by the Supreme Court's conclusions set out in its rulings.

It is necessary to pay attention to the legal force of such conclusions. At present, the hierarchy of sources of law and the hierarchy of normative legal acts are built and established in the Constitution of Ukraine. It is therefore important to determine the place of the Supreme Court's conclusions in this system. This is important given the need for a clear answer to the question: what should a judge be guided by when deciding a case on the merits, if the law and the opinion of the Supreme Court do not equally regulate certain relations?

D. Hetmantsev and N. Blazhivska hold the same opinion, according to which the court should not implicitly obey the conclusions of the Supreme Court, but take them into consideration along with other sources of law (such as legal principles, international acts, other conclusions of the Supreme Court and Of the Constitutional Court of Ukraine, the ECOHR and, of course, the law) when making decisions. The priority of sources should be established by the judge taking into account their hierarchy, as well as the specific circumstances of the case. In addition, the conclusions of the Supreme Court do not change, do not cancel, but complement the existing legal field[1].

The content of such changes in the legislation of Ukraine and their significance are currently being discussed in both legal science and legal practice. According to D. Hetmantsev and N. Blazhivska, there is a direct contradiction regarding the consideration of the Supreme Court conclusions by the courts. They concern the rule of law, implemented in several standards of justice adopted on the international level, namely the Bangalore Principles of Judicial Conduct: "The judge must assert and implement the principle of judiciary independence in its individual and institutional aspects." Here we cannot accept the argument that these norms are aimed at ensuring the uniformity of judicial practice due to the obvious imbalance between the principle of stability ensured by the uniformity of practice and the principle of judicial independence underlying the rule of law (Article 6 of the European Convention On Human Rights). In fact, this can be seen as an interference with the independence of the judiciary: in a literal reading of the rule, the court must not apply the law itself now, but implicitly

[1] Гетьманцев Д., Блажівська Н. Судові доктрини, що потребують перегляду з адміністративно-процесуального погляду. *Право України*. 2018. №2. С. 92.

obey the Supreme Court's conclusions in other cases, even if those conclusions are erroneous. To allow this would mean to level the role of the judiciary in society as such, would turn the court into a blind official who mechanically applies the law in accordance with the valuable instructions and circulars issued by the Supreme Court[1].

Doctrine is not a template. This is a logical construction that justifies the legal conclusion of the court. That is why we should not look for typical stencils in the Supreme Court's conclusons that overlap with similar disputes. The casual interpretation of the law set forth in the regulations of the Supreme Court cannot and should not be taken by us as conclusion within the meaning of Article 242 of the CAP. Therefore, any opinion of the Supreme Court before its application by lower courts must be tested for an appropriate level of generalization of the conclusions, which must make sense and content in the context of all law enforcement practice of the Supreme Court[2].

Thus, within the mentioned transformations in the Romano-Germanic legal systems appear legal precedent and accordingly judicial doctrine in various types and forms as sources of law. In fact, today we can talk about a fundamental change in legal doctrine, which is a precondition for rule-making and its integral part – judicial doctrine, which is a direct source of law. Thus, determination of the meaning and role of judicial doctrine as a source of law in our legal system should be done based on specific rules of procedural law. It is obvious that in the new CAP the judicial doctrine means "conclusions on the application of the rules of law set forth in the decisions of the Supreme Court".

Conclusion. Law enforcement and interpretation of the judiciary should be based on the achievements of legal science as a legal doctrine on the one hand. On the other hand they act as a judicial doctrine, create conceptual approaches to bridging gaps in law and improving law enforcement; influence lawmaking and legal system development.

In essence, the introduction into the legislation of Ukraine of such concepts as "exemplary case" and "typical case" is an important step towards strengthening the importance of judicial doctrine, its recognition as a source of law in Ukraine. Thus there is a gradual change in the perception of law, judicial practice, judicial lawmaking in society. At the same time, in our opinion, the legal structure of determining the legal force of the Supreme Court's conclusions needs to be improved, given the obligation to take them into account along with other sources of law, the hierarchy of which is enshrined in the Constitution of Ukraine. Only under this condition can we expect an increase in the effectiveness of judicial enforcement and the perception of judicial doctrine as a full-fledged source of law in the formal legal sense.

[1] Ibid. P. 87.
[2] Ibid. P. 89–90.

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ORIGINS, NATURE OF POWER AND LEGAL FRAMEWORK OF THE UKRAINIAN STATE HETMAN P. SKOROPADSKY

Summary. *The Ukrainian State of Hetman P. Skoropadsky became a kind of milestone of the Ukrainian state. Its emergence did not derive from previous development and did not create conditions for the further process of the state. And then her assessment in the scientific literature is quite contradictory.*

To determine the origins of the hetman P. Skoropadsky Ukrainian State, the geopolitical situation of that time should be taken into account. In particular, it was influenced by the course and results of the First World War, the complex and ambiguous social and economic policy of the Central Rada, which led to the crisis in Ukraine that occurred in early 1918.

Having come to power, hetman P. Skoropadsky had a clear program of action. He began his state activities with a decisive rejection of the social policy of the Central Rada and promised to return life to normal. All this was contained in a concentrated form in the “Letter to the entire Ukrainian people” announced on April 29, 1918, and the “Laws on the Temporary State Structure of Ukraine.” However, the hetman did not have enough measures to implement it. The presence in Ukraine of a significant military contingent of Germany and Austria-Hungary restrained the development of Bolshevism within the state and protected it from penetration from the outside, which allowed the hetman government to concentrate on solving pressing problems of the state. However, the excessive appetites of Germany and Austria-Hungary, the desire to solve their economic and food problems at the expense of Ukraine limited the scope of the Hetman government to this framework, preventing it from dealing with such important issues of state development as the creation of its army, the establishment of a local government apparatus etc.

Regarding the form of the Ukrainian State, hetman P. Skoropadsky concluded that this was a return to the historical traditions of the Cossack hetmanate, but in content did not

have the nature of a spontaneous breakthrough of social energy. This was a typical path of the German command, and the hetman served as a screen for unacceptable, given the terms of the Brest Treaty of the German occupation of Ukraine. The form of the Ukrainian State was complex and contradictory. It was an authoritarian, albeit quite liberal form of government, limited both by the law and by the time – before the convening of the constituent Ukrainian Sejm. Republican institutions were interspersed here with signs of a monarchical form of government.

The main conclusions are that despite the significant dependence on the Germans, the Ukrainian State of Hetman P. Skoropadsky had its own goals and social base. Its formation was an attempt by conservative political forces to extinguish the flame of the revolution, bring down a wave of radical socialist sentiments, by the force of state power and moderate reforms to introduce social life into the framework of legal norms, and defend the right of private property.

Keywords: *state; the form of the State; power; law-making; public education.*

The Agricultural Congress, held on April 29, 1918, proclaimed the Ukrainian State, so Ukraine now officially became known and elected P. Skoropadsky to the post of hetman of Ukraine.

The assessment of the fact of the proclamation of the Ukrainian State by Hetman P. Skoropadsky and its legitimacy today provoke heated discussions in historical and legal literature and are characterized by researchers in diametrically opposite positions. Soviet historiography strictly adhered to the Leninist concept, according to which hetman P. Skoropadsky was a protege of the bourgeois-landowner circles of Ukraine and a political puppet of the German-Austrian military command. Authors who adhere to the positions of national socialist figures of the Central Rada and the Director accuse hetman P. Skoropadsky of trying to restore pre-revolutionary socio-economic relations, of anti-Ukraine and trying to establish their military regime in Ukraine. The memoirs of Russian generals, white river guides contain assessments of P. Skoropadsky as a separatist and traitor to Russia.

The assessment of the legitimacy of the hetmanate as a form of Ukrainian statehood, the face of P. Skoropadsky, his achievements and miscalculations in the affairs of the state in Ukraine cannot be given only in black and white, it should take into account the difficult circumstances in which Ukraine found itself at the beginning of 1918.[1]

As an undeniable fact, it should be recognized that the proclamation of the Ukrainian State became, albeit with certain reservations, a continuation of the state process in Ukraine during the revolutionary competitions of 1917–1921.

[1] D. Doroshenko, History of Ukraine 1917–1923: in 2 tons T. 2: Ukrainian Hetman State of 1918 (Galushko K stubborn, Tempora 2002) 351; About Kopylenko and M. Kopylenko, State and law of Ukraine. 1917–1920: textbook (Lybid 1997) 208; H. Polonskaya-Vasilenko, History of Ukraine in two volumes. T. 2: From the middle of the 17th century to 1923 (Lybid 1995) 606; O. Subtelny, Ukraine: history (Shevchuk Yu per from English, Lybid 1991) 512.

The crisis that arose in Ukraine in the spring of 1918 due to the failure of the Central Rada government to fulfil its obligations under the Brest Treaty predetermined two possible ways of development: the official occupation of Ukraine by Germany and Austria-Hungary and its outright robbery, or the creation under the protectorate of the Germans and Austro-Hungarians of a puppet Ukrainian government that would satisfy their needs. This is what exactly happened.

External signs of the Ukrainian State have been borrowed since the time of Kozakia – the Hetmanat. As for the internal content of this form of statehood, it was complex and contradictory. It was an authoritarian, albeit quite liberal form of government, limited both by the law and by the time – before the convening of the constituent Ukrainian Sejm. Republican institutions were interspersed here with signs of a monarchical form of government.

Despite a significant dependence on the Germans, the hetman regime had its own goals and social base. It was an attempt by conservative political forces to put out the flames of the revolution, bring down a wave of radical socialist sentiments, introduce social life into the framework of legal norms by the force of state power and moderate reforms, and defend the right of private property. In achieving these goals, the hetman government relied on industrialists, landowners, employees, the rich peasantry, and the like.

Although the Hetman State was not the direct successor of the Ukrainian People's Republic, it has to some extent adopted its experience and democratic achievements. Even representatives of the German and Austro-Hungarian military commands could not dismiss these achievements when designing the Ukrainian State.

Having come to power, hetman P. Skoropadsky had a clear program of action. He began his state activities with a decisive rejection of the social policy of the Central Rada and promised to return life to normal. All this was contained in a concentrated form in the "Letter to the entire Ukrainian people"[1] announced on April 29, 1918, and the "Laws on the Temporary State Structure of Ukraine."[2] However, the hetman did not have enough measures to implement it. The presence in Ukraine of a significant military contingent of Germany and Austria-Hungary restrained the development of Bolshevism within the state and protected it from penetration from the outside, which allowed the hetman government to concentrate on solving pressing problems of the state. However, the excessive appetites of Germany and Austria-Hungary, the desire to solve their economic and food problems at the expense of Ukraine limited the sphere of activity of the Hetman government precisely by this framework, preventing

[1] "Letter to the entire Ukrainian people "(May 16, 1918) State Gazette 1 <http://irbis-nbuv.gov.ua/dlib/item/0001096> (date of appeal: 08.11.2019).

[2] «Laws on the temporary state structure of Ukraine» (May 16, 1918) State Gazette 1 <http://irbis-nbuv.gov.ua/dlib/item/0001096> (date of application: 08.11.2019).

it from dealing with such important issues of state development as the creation of its army, the establishment of a local government apparatus and the like.

The development of the Ukrainian State of Hetman P. Skoropadsky was greatly affected by the geopolitical situation of that time. Having inherited from the Central Council a strong link through the Brest Treaty with the states of the Central Bloc, primarily Germany and Austria-Hungary, the hetman state fell into opposition to the Entente states. The victory of these states in World War I forced hetman P. Skoropadsky to seek their support, but these efforts were in vain. Recognizing only a "united and indivisible" Russia, the Entente states, especially England and France, did not recognize Ukrainian state independence and negatively treated the inconsistency of Ukrainian leaders in choosing a foreign policy vector.

This is evidenced by the development of events in the Ukrainian state. The idea of the hetmanate as a purely Ukrainian national model of the organization of state power did not die during the 18th, 19th and early 20th centuries. The February Revolution of 1917 aroused the desire in Ukraine to have its state and created the fate of this real prerequisites. The Central Rada has done a lot for the development of the Ukrainian state. But its failed social policy, its inability to create strong state foundations in the form of an army, a judicial system and an effective local government apparatus, and its strong attachment to the states of the Central Bloc, which were defeated in World War I, led to the fall of the UPR and the Central Rada.

Against this background, a new movement spread – a large mass of peasants and the urban population sought to establish a new government – non-socialist. In Kyiv, a broad activity was launched by the political conservative party "Ukrainian People's Gromada," founded by General P. Skoropadsky, which included many servicemen of the 1st Ukrainian Corps and Cossacks from the Free Cossacks. The best form of such power was considered historical hetmanism.

Around General P. Skoropadsky and the Ukrainian People's Community, all anti-socialist elements of Ukraine gradually rallied. It was a fairly strong bloc without party disputes and national discord. P. Skoropadsky supported a significant layer of Ukrainian peasant owners, for whom the mortal threat was the socialization of the land proclaimed by the Central Rada.[1]

The activities of the Ukrainian People's Community and personally P. Skoropadsky give individual researchers reasons to accuse the future hetman of treason in Ukraine and even of Bonapartism. According to them, at the end of 1917, P. Skoropadsky focused on the possible arrival of Austrians and Germans in Ukraine as invaders and planned his cooperation with them to achieve his own goal, he considered it necessary to disguise himself and join the national

[1] N Mogilyansky, «The Tragedy of Ukraine» in the Revolution in Ukraine on the memoirs of whites (1930) 127–8.

Ukrainian movement to become the commander of the Ukrainian army, that is, to be able to become a dictator.[1]

Such accusations were also inherent in contemporaries of those events, leading figures of the Central Rada and, unfortunately, had practical, extremely negative consequences for the development of Ukrainian statehood.

It is difficult to agree with P. Skoropadsky's accusations of Bonapartism because such an assessment more notes his personality and completely ignores the specific realities that developed in Ukraine in the spring of 1918. Firstly, the obvious impossibility of cooperation with the government of the Central Rada, primarily in fulfilling the terms of the Brest Treaty, forced the Germans and Austro-Hungarians to look for opportunities to eliminate this government. And secondly, the measures of the Central Rada to socialize the land caused opposition to it from the land-owning strata of the population, and primarily large ones, of which P. Skoropadsky himself was a representative. The combination of these circumstances determined the interest of the Germans and Austro-Hungarians in the coup in Ukraine and P. Skoropadsky as the person who could lead him. As a result, in April 1918, representatives of the German command and P. Skoropadsky reached an agreement. And here we should agree with the opinion that in April 1918 there were only two options for the course of events: direct military administration of Germany, which already legally made Ukraine occupied territory, or the establishment of a strong power capable of ensuring order in the country.[2]

In mid-April 1918, at one of the meetings of the German and Austrian command in Ukraine, it was decided, given the impossibility of cooperation with the Central Rada, to support another government that would appear as a result of the coup. The hetmanate was recognized for the best form of the state.[3] The new power was supposed to be created without popular representation. Although the Ukrainian government soon created was a supporter of the restoration of popular representation. In the appeal of the government of the Ukrainian state to the population of May 10, 1918. it was noted that "the main task of the Government, which has a temporary, transitional character, to strengthen the state system in Ukraine in complete calmness and a real wave of the convocation of national representation."[4]

Candidates for the hetman were called different persons, including E. Chikalenko – a wealthy landowner, a famous public figure, M. Mikhnovsky – an ideologist of Ukrainian nationalism and P. Skoropadsky – a former commander of the 1st Ukrainian Corps and honorary chieftain of the Free Cossacks.

[1] D Solovey, «In assessing the act of coup on April 29, 1918» (1994) 3 Political science readings 236.

[2] D Tabachnik, «The Ukrainian State and the White Guard: from Confrontation to Late Compromise» (1996) 7 Politics and Time 60.

[3] Polonskaya-Vasilenko (n 1) 489.

[4] Skoropadsky P. Memoirs. Late 1917 – December 1918 (Pelensky Ya goal ed, 1995) 148.

Preference was given to P. Skoropadsky for such reasons. Firstly, he was a descendant of the hetman I. Skoropadsky, and this justified his claims to the hetman's mace, formally made his power legitimate. Secondly, P. Skoropadsky was one of the richest landowners in Ukraine and could count on the support of landowners dissatisfied with the actions of the Central Rada to socialize the land. Thirdly, as a Russian general, he had considerable military experience and enjoyed authority in the army. Fourthly, P. Skoropadsky was the first among the generals of the tsarist army to Ukrainize his corps, which contributed to the growth of its popularity among the Ukrainian public. These arguments certainly influenced the choice of the hetman's candidacy, but they were formal in nature. The main reason was that the German and Austro-Hungarian command and many influential Ukrainians did not want to nominate a civilian person as the head of state during the war.

Standing at the origins of the hetmanate, the German and Austro-Hungarian military command in Ukraine tried to determine in advance the directions of the future state. So, the chief of staff of the German troops, General Grener, at the end of April 1918 agreed with the Ukrainian People's Community on the conditions under which the Germans agreed to a coup. The final document contained the following provisions: Recognition of the Brest Agreement; Dissolution of the Central Rada; Postponement of the convening of the Constituent Assembly; Agreed with the German command of the number of Ukrainian military formations; Restoring the correct judicial apparatus and limiting the competence of military field courts only by considering actions directed directly against German and Austro-Hungarian troops; Streamlining of the administrative apparatus and dissolution of all committees of "revolutionary origin"; Confirmation of Ukraine's obligations to meet the food needs of German and Austro-Hungarian troops; Restoration of free trade and other commercial activities; The restoration of private property, the preservation to a certain norm of large farms to ensure the export ability of farmers, the separation of large estates, the transfer of land to peasants for ransom on credit.[1]

General Grener emphasized that the Germans would not directly take part in the coup and would support the hetman only after he was elected. These conditions largely made the hetman regime dependent on Germany and Austria-Hungary. The subordination of the future head of the Ukrainian State to the Germans is supported by the text of the telegram of Emperor Wilhelm to the commander of the German troops in Ukraine, Field Marshal Eichgorn: "Tell General Skoropadsky that I agree to the election of a hetman if the hetman gives an obligation to strictly follow our advice."[2]

The hetman's dependence on the German and Austro-Hungarian military command was also recognized by his

[1] Skoropadsky P. Memoirs. Late 1917. December 1918 (n 8) 148.

[2] A Denikin, «Hetmanism and the Directory in Ukraine» in the Revolution in Ukraine on the memoirs of whites (1930) 138.

opponents – the socialists. Vinnichenko wrote: "Hetman was a fake, insignificant figure, dummy and decoration, behind which was the German general and his will, desire, interests and orders."[1]

And in the fact that "the German generals put the Russian general P. Skoropadsky for the hetman," V. Vinnichenko saw the transition of "power from the hands of the national-Ukrainian petty-bourgeois democracy to the hands of the non-Ukrainian big bourgeoisie."[2]

For a long time, there has been an opinion in historical literature that the proclamation of the Ukrainian hetman state was in form a return to historical traditions in the further development of Ukrainian statehood[3], but the hetman coup did not have the nature of a spontaneous breakthrough of social energy, provoked by the helplessness of the Central Rada. This was a typical putsch of the German command, and the hetman served as a screen for the unacceptable, given the terms of the Brest Treaty, the German occupation of Ukraine.[4]

Such contradictory assessments of the circumstances of the coming of hetman P. Skoropadsky to power inevitably raise difficult questions about the legitimacy of his regime and the nature and degree of succession in the development of Ukrainian statehood.

The position of the hetman as the heir to the Central Rada in the creation of the Ukrainian state was complex and ambiguous because he freely or freely became an opponent of the Central Rada. Although it was dispersed not by the hetman government, but by the high German command, the lack of protest from hetman P. Skoropadsky about this meant silent solidarity with the Germans.[5] Of the point of view of succession in the development of Ukrainian statehood, this was, of course, a discrediting fact for the hetman, which largely entailed opposition to his regime by the Ukrainian socialist parties, whose representatives formed the backbone of the Central Rada.

However, the events of April 29, 1918 cannot be qualified as a coup in full understanding of this word, since they were not the result of the social Ukrainian movement, and their success was determined by third-party factors (German military force). The fact that the hetmanate did not grow organically from the Ukrainian soil was largely its non-viability.[6]

Of course, such a point of view has the right to exist, but the analysis of the situation, objectively established in Ukraine, and the ways of its further

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[1] V Vinnichenko, Revival of the Nation: (History of the Ukrainian Revolution [Maetz 1917 – December 1919]): Part 2 (Bell 1920) 26.

[2] Same 326.

[3] Great history of Ukraine: from ancient times. T. 2 (Kripyakevich I author. Introduction. Holubets M Sladil, Reprint reproduction of 1935, Globe 1993) 342; History of Ukraine: a new vision. T. 1. (Smoliy V ed, View Ukraine 1995) 57.

[4] Great history of Ukraine: from ancient times. T. 2 (n 13) 342.

[5] V Lipinsky, «Letters to fellow farmers» in Lipinsky V, Two concepts of Ukrainian political thought: Vyacheslav Lipinsky – Dmitry Dontsov (Vaskovich G auth., Bulava 1990) 48.

[6] M Bezruchko and B Kuchabsky and E Konovalets, The History of Sich Archers: Military Historical Essay (Ukraine 1992) 89.

development as a state leads to other thoughts. Firstly, it was not P. Skoropadsky and his entourage who were to blame for the appearance of Germans and Austro-Hungarians in Ukraine: even before the hetman came to power, the possible occupation of Ukraine became a fait accompli with which one could not but reckon. Secondly, the Germans and Austro-Hungarians agreed to the formation of a Ukrainian government from moderate elements. They tried on their own to ensure order, preventing the development of Bolshevism, and to protect Ukraine from its penetration from the outside. Thirdly, in the event of a refusal of cooperation, Germany and Austria-Hungary were ready to declare Ukraine legally occupied and remove everything possible from it. All this was well understood by P. Skoropadsky, who noted in his memoirs: the German-Austrian armies flooded the whole country, in the north there were Bolsheviks. I had extremely difficult feelings towards the Germans. On the one hand, we needed them. And from the second – I could not indifferently see their management in Kyiv.[1]

Ultimately, harsh historical realities made it possible for General P. Skoropadsky to come in handy for his election as the hetman of Ukraine under the protectorate of the Germans, and for part of the Ukrainian public to support the hetman government, since the alternative to the coming to power of representatives of the proprietary circles, as it became clear after the tragic events of January-February 1918, could only be more. As for the Ukrainian socialist intelligentsia, it was unable to establish the cause of the development of statehood and with its socialist slogans and promises, which it could not fulfil, only opened the doors of Bolshevik expansion. And this was well understood by P. Skoropadsky. According to him, our democratic and socialist intelligentsia was adopted by fierce envy towards all those who had it did not understand the tasks of the state and did not understand in the organization of power, introducing destabilization and anarchy into the masses with its inept management.[2]

The election of P. Skoropadsky to the hetman of Ukraine took place in a certain organizational and legal form, although formal in content. On April 29, 1918, the Khleborobsky Congress gathered in Kyiv, to which 6,432 authorized representatives from eight ethnically Ukrainian provinces arrived. This provided the forum with signs of a representative body, and then made the power of the hetman, at least externally, legitimate. In speeches, congressional delegates strongly expressed dissatisfaction with the policies of the Central Rada, socialist experiments and demanded the restoration of private land ownership and the introduction of strong power in the form of a historical hetmanate. Those present unanimously elected General P. Skoropadsky as the hetman of Ukraine.

[1] Skoropadsky P. Memoirs. Late 1917 – December 1918 (n 8) 146.

[2] Skoropadsky P. Memoirs. Late 1917 – December 1918 (n 8) 75.

The eligibility of the Khleborobsky Congress as a representative body of the Ukrainian people and the legitimacy of the hetman authorities received from it by P. Skoropadsky do not withstand serious criticism and they should be considered only as a formal act. And it is hardly possible to agree with the statement of N. Polonsky-Vasilenko that compared with the election of hetmans, starting with Vygovsky and ending with Razumovsky, this was the most crowded of all the elections,[1] since the Khleborobsky Congress reprised a certain layer of Ukrainian society, namely, its land-owning layer. Moreover, under the conditions of the German-Austrian occupation, the final definition of the form of Ukrainian statehood and the occupation of certain state posts was entirely in the hands of the German command.

A characteristic feature of the coming to power of hetman P. Skoropadsky is the almost complete absence of resistance to this action. On the night of April 29–30, 1918, supporters of the hetman coup captured all state institutions with virtually no struggle. The Central Rada no longer had either physical or moral support among the population of Ukrainian cities, and with its agrarian policy caused complete disappointment of the village. In such conditions, supporters of the Ukrainian People's Republic well understood that the chances of its preservation were very weak.

Besides, on the side of the hetman's coup, there were fairly wide circles of passive inhabitants who did not clearly understand the essence of the events that were happening but wanted calm, security and order at all costs.[2]

This attitude to the hetman coup on the part of the population of Ukraine is a kind of confirmation of the regularity of changing the form of Ukrainian statehood and the legitimacy of the power of hetman P. Skoropadsky.

Along with geopolitical problems, internal state processes had a significant influence on the form of the Ukrainian state: the organization of central power, the establishment of the local administration, the judicial system, military construction, etc.

P. Skoropadsky envisaged that the new Ukrainian government would be between two enemy camps: the Ukrainian socialist parties of the overthrown Central Rada and the German and Austro-Hungarian troops, which sought to remove as much food as possible from Ukraine.

It should be noted that the socialist parties were one of those forces in Ukrainian society that reacted negatively to the hetman P. Skoropadsky, who was proclaimed the Ukrainian State, did not accept it and resorted to active actions aimed at saving, as they seemed, the remnants of the democratic system, which had not yet been destroyed by the Germans and Austro-Hungarians. The main efforts of the opposition were aimed at giving a new power a "national-Ukrainian character."[3]

[1] Polonskaya-Vasilenko (n 1) 490.

[2] Denikin (n 10) 141.

[3] V. Vinnichenko, Revival of the Nation: (History of the Ukrainian Revolution [Maetz

The leaders of socialist parties categorically refused to participate in the work of the government under the leadership of P. Skoropadsky but allowed their participation in the government under certain conditions. Well aware that the coup occurred thanks to German military force, the Ukrainian socialists on May 2, 1918. sent a delegation to General Grenera to convey to him the conditions for the participation of socialists in the government, which, in their opinion, should have changed fundamentally. The main condition was recognized that the Constitution adopted by the Central Rada on April 29, 1918 should form the basis of the state structure of the Ukrainian State. The opposition aslo demanded: 1. The exclusion from the cabinet of members who have little understanding of Ukrainian affairs, or are hostile to Ukrainian statehood. 2. Transfer of most ministerial portfolios to Ukrainians. 3. Appointment of Ukrainian candidates for the posts of the prime minister, minister of foreign affairs, minister of land affairs and minister of education.[1]

At first glance, it seems that the socialist parties were ready for far-reaching compromises with the Hetman government. However, they put forward the main prerequisite for cooperation the introduction of a design of the state apparatus that would fundamentally change the essence of the hetman state. This, of course, did not suit the Germans, and on May 4, General Grener categorically refused. It should be noted that in the early days of the existence of the Ukrainian State, the hetman had a clear intention to give the authorities a national-Ukrainian character, recognizing even V. Vinnichenko,[2] who was extremely negative about the hetman coup and the personality of P. Skoropadsky. But representatives of socialist parties categorically refused to participate in the work of the hetman government, which led to an acute confrontation between the socialist parties and the hetman government.

This moment, according to the outstanding historian of Ukraine and a direct participant in those events, D. Doroshenko, is very dramatic in the history of Ukrainian statehood, since Ukrainian socialists did not want to negotiate with the hetman, their compatriot, preferring to deal with the invaders – the main carriers of the disaster.[3]

In general, the refusal of socialist parties to participate in the construction of a hetman's state is deeply tragic: the socialists did not find enough patriotism, national consciousness and, finally, common sense to become above party interests and unite in the name of Ukrainian statehood.[4] The reasons for this phenomenon were that Ukrainian society, deformed socially and politically during its hundreds of years in the imperial system, was not capable of pluralistic forms of political life. These contradictions had an extremely negative impact on the state-forming process and were not in favour

1917 – December 1919]): Part 3 (Bell 1920) 29.

[1] V Ivanis, Simon Petlyura is the President of Ukraine. 1879–1926 (1952) 73.

[2] Vinnichenko (n 21) 29.

[3] Doroshenko (n 1) 54–9.

[4] Polonskaya-Vasilenko (n 1) 492.

of the masses of the population. To look for the culprits of this disaster today is useless since both sides tried to honestly defend the interests of the people: P. Skoropadsky stood for order, legality and calm in the state, and his opponents believed that democray should be the basis of it. At the same time, the hetman did not realize the weight of national awakening, and the socialist parties did not understand the importance of strong state power as a guarantee of a fair system, which they tried to introduce.[1]

The proclamation of the Ukrainian State and the policy of the hetman government also provoked opposition from other parties and a certain part of Ukrainian society. And there were rather serious reasons for this since the Hetman government led an unsuccessful national and social policy. Both the state and military apparatus got many people who, due to their imperial beliefs, looked at Ukraine as a bridgehead for the formation of anti-Bolshevik forces. At the same time, it was implied to create military formations from Ukrainians who, at the cost of their blood, would overthrow Soviet power in Moscow and restore a "large and indivisible" Russia. This caused riots among the Ukrainian military units of the Kyiv pledge.[2]

The hetmanate's opposition grew. The main point of her accusations was that the cabinet was non-Ukrainian because it did not include members of the Ukrainian socialist parties that created the Ukrainian state during the Central Rada. In this regard, the unification of opposition groups into the Ukrainian National State Union (UNDS) in mid-May 1918, which included Ukrainian independent socialists, federalist socialists, social democrats, socialist revolutionaries, the Labor Party, the Council of Railway Workers, and the Postal and Telegraph Union, was of significant importance.[3] The union began the struggle against the hetman and his government as "bourgeois and non-Ukrainian."

It should be noted that the Hetman government was concerned about the problem of the existence of the opposition and it resorted to various, even military, means of combating it. For example, on May 7, 1918, the assistant to the head of the special department under the hetman, together with a representative of the German command, went to Radomysl near Kyiv, where a congress of representatives of the Peasant Union was to be held, at which "a decision could be made touching local humanity against the clear-minded hetman and the Ukrainian Government". The means to "liquidate" the congress were peculiar: two light panzer men, two guns, machine guns and 90-foot soldiers were sent to Radomysl.[4]

[1] T Gunchak, Ukraine: the first half of the 20th century. Essays on political history (Lybid 1993) 148.

[2] O Udovichenko, Ukraine in the war for statehood: History of the organization and hostilities of the Ukrainian Armed Forces 1917–1921 (Globe 1995) 42.

[3] Ukrainian socio-political thought in the 20th century: doc. and materials. T. 1 (Gunchak T and Solchanik R stubborn, Modernity 1983) 390–4.

[4] Central State Archive of Higher Authorities of Ukraine. F. 1064, Op. 2, C. 21, A.3.

But due credit should be given to P. Skoropadsky because he did not completely refuse the possibility of cooperation with socialist parties. In the summer of 1918, on his behalf, D. Doroshenko, who was among the ministers closest to the opposition, began negotiations with the leadership of the National Union on the entry of his representatives into the government. And on October 5, the hetman received his leaders – V. Vinnichenko, A. Nikovsky and F. Shvets. The latter's proposals boiled down to "so that the hetman would self-isolate his government and help them restore the regime of the Central Rada, which was already turning to history."[1]

Tensions between the Hetman government and the socialist parties made the situation in Ukraine very difficult. This was well understood by the Germans, who began to put pressure on Skoropadsky to Ukrainize his government. Hetman took a step in this direction. October 24, 1918, the Council of Ministers included five ministers proposed by the UNDS. According to Vinnichenko, the new government "included almost half of the Ukrainians."[2] But this measure did not remove the contradictions, because they were much deeper – in the future fate of Ukrainian statehood: independent, which the UNDS defended, or in federation with Russia, as Protophis advocated (an organization of representatives of industry, trade, finance and agriculture). As T. Gunachak rightly noted – history did not know another government with such different views.

The front of the internal struggle against the hetmanate was also formed by various Russian organizations – the Kyiv National Center, the Union for the Renaissance of Russia, etc., known for their hostile attitude to the idea of an independent Ukrainian state. This can be confirmed by the memoirs of General Denikin: the Kyiv National Center set its closest task: the fight against Ukrainian independence – because it believed that "Ukrainians" were not a nation, but a political party merged by Austria-Germany. The hetman and the Ukrainian government of the Kyiv National Center were very hostile.[3]

The fact that officials who were hostile to the new regime worked in almost every ministry did not strengthen the hetman's power. There was no lasting contact between the government and the local administration, part of which was also hostile to the new government: some as supporters of the Central Rada, others as supporters of the Bolsheviks. Here, the hetman government, like the previous government of the Central Rada, faced a problem of personnel for the state apparatus, mainly local. Attracting people who until recently were in opposition caused discord and discredited the authorities. Old administrators, who were again involved in the cause of public administration, used old, often unacceptable methods of management

[1] I Nagasvsky, History of the Ukrainian state of the twentieth century (Lybid 1995) 151.

[2] Vinnichenko (n 21) 83–4.

[3] Denikin (n 10) 158.

for the population, which also did not add authority to the power.

The situation deteriorated due to anti-government propaganda, on the one hand, and government errors, on the other. Firstly, he was compromised by his dependence on the Germans, the obvious purpose of which was reduced to the economic exploitation of Ukraine. Secondly, the Hetman government was closely associated with the property classes, which tried to cancel the changes introduced by the revolution. Thirdly, many Ukrainians believed that P. Skoropadsky was too favourable to the Russians.[1]

At the same time, hetman P. Skoropadsky carefully and carefully tried to approach the change of local authorities. All other officials working in state institutions remained in their posts and were forced to continue to fulfil their duties. This provision of the Letter was specified in a special appeal of the Council of Ministers: "Government officials of state and public institutions were called upon to continue to fulfil their official duties." Hetman and his government were well aware that the professional experience of these workers had to play an important role in establishing a clear work of the state apparatus on the ground, without which the effective development of the Ukrainian state was impossible. Although at the same time the Council of Ministers warned that "strikes and covert sabotage of officials will be considered as hostile to the Ukrainian State, the perpetrators will be removed from the duties of the service and also will suffer a strict execution."[2]

[1] Subtelniy (n 1) 312.

[2] Central State Archive of Higher Authorities of Ukraine. F. 1064, Op. 2, p. 21, A. 7.

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THE IMPACT OF COVID-19 PANDEMIC ON IMPROVING THE LEGAL REGULATION OF PROTECTION OF HUMAN RIGHT TO HEALTH

ABSTRACT

Introduction. *Public security is a key goal of public policy, so the demographic aspect needs more attention, especially when there are external threats to the demographic security of the state. The growing number of patients with COVID-19 has led to destructive processes in all spheres of society, which requires the development of effective policies to counter the impact of the pandemic on the socio-economic situation and development strategy of the state.*

Theaim: *theoretical and methodological substantiation of the impact of COVID-19 on the implementation of state policy on the protection of human right to health in terms of improving the legal framework in the field of demographic security.*

Materialsandmethods*.The main research materials are the norms of the International Covenant on Economic, Social and Cultural Rights, the Conventions for the Protection of Human Rights and Fundamental Freedoms and the legal framework of the countries that have adopted temporary quarantine measures. This research is based on empirical and analytical data from WHO, Bloomberg's financial information provider. During the research, the following methods have been used: statistical, system-structural analysis, content-analysis, comparison, grouping and forecasting.*

Conclusions.*Under the conditions of pandemic, attention should be paid to strengthening both administrative and criminal liability for violating quarantine, which will serve as a prerequisite for improving the legal mechanism of combating threats to the country's demographic security. The protection of the right to health requires the state to create conditions to prevent the risk of occupational diseases among health care workers and others involved in the response to COVID-19.*

Key words*: global health, demographic sphere, state policy, health care.*

INTRODUCTION

The determining factor of stable socio-economic development of the state is demographic security, and demographic processes are the prerequisite and the result of qualitative and quantitative changes in the demographic situation in the country. Therefore, the preservation of human resources, as a carrier of the intellectual potential of the nation, requires special attention and, today, acquires not only domestic but also geopolitical significance. It should be noted that the state of demographic security of the country is influenced by external factors, which due to the destructive impact on the demographic system can affect the political, economic, social and spiritual spheres of society, the level of socio-economic development of the state. Demographic security is currently the focus of the issue of depopulation of inhabitants, especially under the conditions of active phase of the COVID-19 pandemic, which requires demographic security as an adaptive system, improvement of state demographic policy in order to respond in a timely manner and counter threats to demographic security.

An important direction in struggle against the COVID-19 pandemic is a proper and timely legal response. The sphere of health care today, as never before, requires improvement of the existing and creation of the new strong legal framework, the legal principles of which would meet the international obligations of the state to respond to threats to public health.

Scientists such as I. Azemsha, Ye. Podorozhnii, V. Lordkipanidze, A. Malnar, D. Malnar made an invaluable contribution to the study of the influence of the category "responsibility" on the state of demographic processes and, accordingly, the state of demographic security of the state. However, the scientific work of the scientists focuses on the study of certain aspects of the studied phenomena, while the issue of improving the normative-legal providing of demographic security of the country under the conditions of pandemic becomes actual, namely improving the legal regulation of liability for violating the rules and norms of human quarantine. Thus, the relevance of the research topic determined the aim and the objectives of the study.

THE AIM

Theoretical and methodological justification of the impact of COVID-19 on the implementation of state policy to ensure the demographic security of the state and the protection of human right to health under the conditions of improving the legal framework in this sphere.

To achieve this aim the following tasks should be solved:

1) to determine the main sources of threats to demographic security under the conditions of COVID-19 pandemic, to determine the main aspects of improving state policy during the pandemic;

2) to study foreign experience as for the legal regulation of liability for violation of quarantine conditions and the specifics of determining the amountof fines;

3) to suggest the main ways to increase the response to the negative consequences of the pandemic and to formulate key recommendations as for counteracting the threats to demographic sphere from the consequences of the pandemic.

MATERIALS AND METHODS

The main research materials are the norms of the International Covenant on Economic, Social and Cultural Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms and the legal framework of the countries that have adopted temporary quarantine measures. This research is based on empirical and analytical data from the WHO, Bloomberg's financial information provider, in particular on the number of patients in WHO regions, as well as the amount of fines for violating quarantine norms. In the course of the research we used a number of research methods, in particular: the method of processing statistical data to analyze the number of patients in the world; the method of system-structural analysis to study the peculiarities of the application of measures to counteract and prevent possible threats to the demographic sphere; content analysis, method of comparison for the study of state policy of foreign countries related to ensuring the demographic security of the state under the conditions of quarantine and the specifics of setting the amount of fine for violation of quarantine; grouping and forecasting to substantiate the conceptual framework of legal regulation of the issue of liability for violations of quarantine conditions and improving the mechanism of protection of human right to health.

REWIE AND DISCUSSION

Taking into account the importance of the demographic situation in the country, it should be noted that the negative processes of declining birth rates and increasing aging of population can threaten the passage of demographic processes and demographic security in general [1, p. 115].

Studies of the security aspect indicate the priority of demographic development of the state as a determining factor of security, which can serve as an indicator of the security sector and possible changes [2, p. 59]. The prerequisite for these steps should be clarifying the contextual filling of the category "responsibility". Considering legal responsibility as an independent phenomenon, it is advisable to emphasize that it comes from social responsibility, acting as a separate, unique manifestation [3, p. 7].

The opinion of I. B. Azemsha is essential, who emphasizes the social – communicative nature of responsibility, which arises when human behavior is regulated by social norms and carries social significance. In this case, the implementation of social norms is a social value phenomenon, and the actions that violate the rules that are socially significant are considered unacceptable and those that lead to the rupture of social communication causing negative reaction of society in the form of social responsibility [4, p. 54]. Thus, responsibility has a

preventive effect, it is a mechanism for stopping illegal behavior and a measure to protect society. Establishing strategic priorities for the development of the demographic sphere will undoubtedly have a significant impact on the development of both society and the state. Therefore, special importance should be given to the process of formation and implementation of effective balanced state demographic policy, especially under the conditions of pandemic, which will improve demographic processes in the country and prevent negative consequences of internal and external threats to demographic security of the country in the context of global transformations. Among the main aspects to pay attention to when analyzing the state of demographic security of the country, the following are worth noting:

1) the number of population of the country (population density, proportion of inhabitants of a particular region in the general structure of the population, depopulation, etc.);

2) the structure of population (disparities in gender and age composition of the population, imbalance of rejuvenation and population aging processes);

3) the reproduction of population (life expectancy, the ratio of reproduction and mortality of population);

4) the natural movement of population (natural increase (decline) of the population, birth rate and mortality, number of marriages and divorces);

5) the migration processes (intensification of urbanization processes, disproportions of the territorial location of the population, migratory population growth, growth of amounts of illegal migration).

The active spread of the COVID-19 coronavirus pandemic has caused great concern, forcing the countries to adapt to the new realities of today. As of August 17, 2020, 21,549,706 confirmed cases of COVID-19 were registered, including 767,158 deaths [5]. According to the World Health Organization, the leading region in the number of confirmed cases of COVID-19 is the United States (11,561,554 cases), followed by Europe (3,754,649 cases), followed by Southeast Asia (3103,018 cases), Eastern Mediterranean (1737027 cases), Africa (945165 cases), western Pacific (414606 cases) [5].

The virus is known to be aerosol-transmitted, so social distancing can prevent infection through respiratory drops when sneezing and coughing. Scientific studies suggest that the corona type of SARS-CoV virus can persist on the surface for up to 96 hours [6], while other types of virus – up to 9 days, and the incubation period can last up to 24 days [7], although the basis for conclusions is the state of patients after two weeks of the disease. It should be noted that SARS-CoV-2 infection significantly worsens the course of concomitant chronic diseases, especially diabetes and cardiovascular disease. Therefore, the key recommendation in the struggle against the pandemic is the prohibition of mass gatherings, social distance and

timely consultation with a doctor when the first symptoms.

The scale and severity of the COVID-19 pandemic is clearly growing to the level of the threat to society as a whole. In a number of countries, the outbreak has demonstrated shortcomings in health and social protection systems, making it difficult to protect at-risk groups and reduce disease transmission. In responding to this crisis, governments must give priority to human rights, including the right to health.

Responding to the challenges of COVID-19, countries are trying to create conditions that would contain the spread of the pandemic. However, each country responds to the same challenges with different measures and deadlines, which ultimately leads to differences in the epidemiological situation. Nevertheless, it is also necessary to take into account that countries have different reporting standards, different approaches to testing. It takes time to properly assess the effectiveness of the implemented measures, so the most informative is the negative experience of places with early outbreaks – China, South Korea, Singapore and others.

China's approach included strict quarantine; strict restrictions on international and domestic travel; use of QR-health codes for permits to movement around the city; frequent household and street disinfection; testing, admission and treatment of all patients; isolation of suspicious cases, rapid construction of specialized hospitals for the treatment of patients with coronavirus.

In South Korea, free and mass testing was conducted for people with symptoms, contacts and travelers. Education was not conducted in schools, it was recommended to work remotely, and large gatherings of people were prohibited.

Taiwanese authorities have been actively identifying patients with severe respiratory symptoms (based on information from the National Health Insurance database), and citizens have been encouraged to report suspicious symptoms or hotline numbers. The authorities monitored infected people and mapped cases. Contact persons were inspected on a large scale, from simple communication with the patient to the inspection of internal surveillance cameras. The location and observance of the rules of self-isolation of people in whom coronavirus was detected through personal phones were monitored.

Although these early and decisive measures did not eradicate the virus, they helped to delay its spread over time, relieving the capacity of the health care system, thus guaranteeing everyone the right to health guaranteed by the International Covenant on Economic, Social and Cultural Rights, which stipulates that states must create conditions that provide all with medical care and medical assistance in the event of illness [8].

The tendency to increase the number of patients has led to the increase in state budget expenditures to overcome the coronavirus epidemic and eliminate the consequences. Thus, as of April 9, 2020, budget measures totaling more than 8

trillion US dollars have been implemented worldwide [9].

Overcoming the negative consequences of the pandemic requires the implementation of appropriate measures and their realization through the state policy. Thus, a number of countries and health care providers are making concerted, joint efforts to combat the coronavirus. The European Commission has launched the global online donor conference, "Coronavirus Global Response", to combat COVID-19 in response to the World Health Organization's call for cooperation to raise funds to jointly develop and widely implement effective diagnostic, treatment and vaccination tools against the coronavirus, whose participants managed to raise 7.4 billion euros [10].

To reduce losses and overcome the spread of infectious disease, it is extremely important to work ahead, introducing additional unprecedented protection measures, including forced quarantine, curfews, restrictions and / or blocking opportunities to travel, engage in economic activities, lead active social life and more. The Convention for the Protection of Human Rights and Fundamental Freedoms recognizes that in the context of public danger that threatens the life of the nation, including serious threats to public health, such restrictions on rights may be justified [11]. The International Covenant on Economic, Social and Cultural Rights guarantees everyone the right to the highest attainable standard of health and obliges states to take all necessary measures for the prevention, treatment and control of epidemic diseases [12]. The Syracuse Principles determine that in the event of a conflict between human rights and public health needs, states may restrict rights. However, in any case, such actions must be necessary to achieve legitimate goals, based on scientific evidence, to have limited period to be revised [13].

The study of foreign experience in solving this problem revealed that the pandemic contributed to the increase in fines for violating quarantine conditions.

For example, in Poland, the amount of the fine imposed by the sanitary-epidemiological service for violating quarantine reaches PLN 30,000. In Latvia, the fine for violating the quarantine is 350 euros, but if such violations are found serious or prove the intentional infection of others, the violator faces 3 years in prison [15].

In Saudi Arabia, violation of quarantine is punishable by a fine of $ 53,300 or two years in prison [14].

In some countries, criminal liability was immediately introduced for those who did not comply with coronavirus control instructions. For example, in Romania, for ignoring the quarantine requirements, a person can get up to 3 years in prison, for infecting others – up to 5 years, for failure to take measures to combat the epidemic that led to death – up to 15 years in prison [15]. The largest share of offenses is the presence of people in public places without a mask, which is a very serious disregard for

one of the basic rules of anti-epidemic safety. The study of the situation regarding quarantine restrictions in the Federal Republic of Germany shows the possibility of slowing down the spread of the virus by 40% due to the establishment of requirements for wearing a mask. The basis of this hypothesis was the experience of the German city of Jena, in which the mask regime was among the first to be introduced. After 20 days, the number of new cases in the city decreased by 25%, and later approached almost zero. The results of the study varied depending on the region, but there was a noticeable tendency to reduce the number of reported cases of infection by 2.3–13% within 10 days after wearing the mask became mandatory [16]. Therefore, the use of medical masks, provided they are used properly, is an effective method of preventing the spread of coronavirus.

Equally important task for the states in the context of ensuring the right to health is to minimize the risk of occupational diseases among health care workers and others involved in responding to COVID-19. In the first place, this should be done by providing these people with appropriate protective equipment. In addition to the risk of COVID-19 infection at work, they are forced to overwork, as a result of which they may experience psychological stress and fatigue [17]. Therefore, special training and psychological assistance should be provided for such persons.

The World Health Organization has established strategic and technical advisory group of the World Health Organization on infectious hazards, the main activity of which today includes regular monitoring and risk assessment of the COVID-19 pandemic, as well as the development of practical recommendations to the World Health Organization on measures to counteract and prevent emergencies in the sphere of health care. The active spread of the pandemic and the growing number of patients requires the use of self-defense measures. Thus, the World Health Organization's strategic and technical advisory group has developed a number of recommendations to reduce the rate of infection transmission:

1) States should ensure preparedness and strengthen response measures, taking into account possible scenarios for the spread of the virus.

2) In order to strengthen preventive measures, it is necessary to consider the possibility of combining protection measures, in particular: preparation of the health care system for a possible increase in the number of diseases, control and prevention of infections in medical institutions, informing population, active promotion of personal hygiene under the conditions of pandemic.

3) In countries where COVID-19 has not yet been identified or has been detected in a small number of cases, epidemiological surveillance activities should be intensified in order to detect cases of illness in a timely manner and apply preventive measures for further spread among the population. Also necessary

measure to combat the spread of infection is social distancing, which should be observed both indoors and in crowded places.

Countries in the WHO region should receive the necessary financial and technical assistance, including from the World Bank, in particular from the Pandemic Emergency Fund, etc. [18].

4) Scientific researches on gaps in the COVID-19 pandemic study should be strengthened and foreign experience in combating and counteracting the spread of the virus should be implemented.

Taking into account the rapid spread of the disease and the increase in budget expenditures to combat COVID-19 among members of the world community, we propose to implement best practices in legal enforcement of the COVID-19 pandemic, increasing the responsibility for violating quarantine rules:

administrative liability – by increasing the amount of fines;

criminal liability – by abolishing the possibility of execution of a penalty in the form of a fine, leaving in the sanction of the article only sanctions in the form of arrest, restriction or imprisonment.

CONCLUSIONS

Revenues to the state budget from the payment of fines for violating quarantine norms should be used to finance monetary compensation to those involved in the struggle against the pandemic, in order to form effective state demographic policy to respond to today's challenges.

We emphasize that the proposed aspects of responsibility can serve as practical recommendations for the formation of the regulatory framework of foreign countries.

1) Under the conditions of pandemic, attention should be paid to strengthening both administrative and criminal liability for violating quarantine, which will serve as a prerequisite for improving the legal mechanism for countering threats to the country's demographic security by responding to challenges and dangers, creating conditions for socio-economic development and quality progress of society.

2) The protection of the right to health requires the creation of conditions by the state to prevent the risk of occupational diseases among health care workers and other persons involved in the response to COVID-19.

3) All countries must commit themselves to responding quickly to challenges and take all necessary health measures, strive to provide adequate and sufficient funding to contain the virus and protect people. Only global, coordinated, international cooperation can minimize the negative effects of the pandemic.

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STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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PRIVACY, INFORMATION PRIVACY AND PRIVATE PERSONAL DATA SECURITY

Summary. *The article considers the recent problems of formation and development of theoretical and legal foundations for protecting privacy of the person's life, information privacy and personal data security under the modern conditions of globalization, spread of information and communication technologies, information confrontation and European integration of Ukraine. A scientific discussion is initiated on the use and understanding of the terms "information privacy", "private personal data" and "security of private personal data". Proposals are formulated for the development of legislation in the context of the use of the term "privacy" as a factor that determines the principles of information security in a democratic society. It is proposed to clarify and legally establish the list of confidential information about the person to which the legal guarantees of protection should apply. Emphasis is also placed on the need to find a balance between the protection of human rights in the field of information privacy and personal data security and the need of society, the state and the international community for security, which in the context of global digital transformation is an urgent international problem.*

Keywords: *privacy, information privacy, private personal data, confidential information, personal data security, personal data protection.*

Formulation of the problem. The need to create conditions for person's security in the context of the use of his/her personal data by other people and authorities was studied for quite a long time. This is due to gradual and long-term development of constitutional human rights as well as focus on the formation of legal basis for privacy and immunity.

Important fact is that personal rights and freedoms are inseparable from security of the person and the society. Under such conditions we face the problem of a balance between privacy protection,

including personal data security and national information security. It means that in case of rule of law and information society development, restrictions related to arbitrary treatment of human rights, in information sphere in particular, should be legally defined.

The article is aimed at summarizing the problematic issues and finding out the logical interrelations between privacy, information privacy and personal data security.

Core material

1. ***Privacy and information privacy***

Human life, desires, dreams and activities were always associated with the phrase *"personal privacy/immunity"*, the equivalent of which in USA law and public publications of EU member-states is the concept ***"privacy".*** This term was borrowed from following Latin words: personality, intimacy, secrecy, loneliness, property, interpersonal relations [1].

There is no only legal definition of "privacy". It has different understandings and interpretations, i.e.: *personal life, right for privacy, privacy, right for solitude* [2].

Ukrainian Legal Encyclopedia defines the term "privacy" as *private business, secret, solitude – legal category of Anglo-Saxon legal system related to human intimate life protection.* [3].

Russian Big Legal Dictionary interprets the term "privacy" as *secrecy, loneliness and private life – special legal category in English-American legal system, which means secrecy and immunity, person's intimate sphere. The term has no analogues in Russian language. In some cases it can be interpreted as private life, in other – as right for privacy or right for immunity, etc.* [4].

The Report of British Committee on Confidentiality and Related Issues (1990) states that *no one* Study on "privacy" interpretations in different eras, cultures and political systems *found the only acceptable legal definition of the concept* [5].

It is considered that *privacy* and related to it *confidential information* has more than 3 000 years history. In early times the privacy was always a secondary concept because the need to survive dramatically shadowed the desire for solitude. There was no classical Latin word equivalent to "privacy" as well. Instead, they used "privactio", which meant "to take away" [6].

One of the most commonly used interpretations of "privacy" is *the right to be oneself.* Every person has the right for its own space, free from arbitrary encroachment [7].

The right to be oneself was first discussed in December 1890, when American lawyers Louis Brandeis and Samuel Warren published their article "Right for Privacy" in Harvard Law Review. In particular, they wrote: *"Life intensity and complexity related to civilization development resulted in need for solitude. Under the influence of culture people became more sensitive to publicity making loneliness and confidentiality more important to individual. Modern enterprises and inventions, while inter-*

fering into a person's personal life, cause sincere pain and suffering, much greater than physical injuries" [8].

Later, in 1928 Louis Brandeis, who became the judge of Supreme Courte of the United States, told that *the right for privacy should not depend on the way in which information about the person was obtained. What mattered was not how the recording of information (eavesdropping, in particular) was carried out technologically or technically, but the fact that a person had a right for the secrecy of communication.*

It should be noted that above opinions were formulated when the words like "infomatization", "TV communication", "Internet", etc. did not exist. They were speaking only about *private immunity* in ordinary, non-virtual life. Despite the views of Louis Brandeis, founder of the right for privacy were not widely disseminated, he was well ahead of his times.

In 1934, *the right to be oneself* was legalized by the Decision of US Congress. The process of industrialization and intrusion of new technologies in private life as well as unauthorized sale of information about a person *(files with addresses, personal data, phone numbers, etc.)* in commercial interests seem to become the impetus for this.

From legal point of view, perhaps the most adequate definition of the term "privacy" is *the right for immunity/ privacy.* It is protected by article 12 of the Universal Declaration of Human Rights (1948), articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and articles 6–8, 11 of the Charter of EU Fundamental Rights (2000).

At the same time, decisions of European Court on Human Rights constantly clarify the meaning of some concepts in the sphere. In particular, ***the components of private life,*** considered since 1992 under the Case Law of European Court on Human Rights were [9]:

– *personal identification.* It concerned, firstly, change of surname, registration of names, change of sex and making appropriate corrections in civil status acts;

– *determining of legal connections.* It was pointed out that person's access to information on his/her past and family ties, possibility not only to establish but also to deny paternity was an important component of private life;

– *physical and moral immunity.* Mandatory medical examinations, coercion to medical and psychiatric treatment, physical violence and lack of legal capacity to prosecute as well as prohibition of voluntary death and medical abortion could be considered as interference into private life;

– *personal space.* Cases related to "ecological" human rights and publications of photos as personal information were considered;

– *information collection and use.* Modern society cannot exist without surveillance systems, fingerprinting, DNA databases and official population census. All information collected in such a way relates to private life;

– *access to personal data.* There was a decision: although some information may be stored, it did not necessary mean that a person about whom it was collected would have automatic access to it;

– *sexual relations.* Individual's sexual life was considered as part and important aspect of his/her personal life. The applicants also defended their right for homosexual relations, sadomasochistic practices and public demonstration of sexual behavior in European Court;

– *social activity.* It concerned the effective interaction with other people;

– *professional interrelations.* According to the Court, there are no fundamental reasons to consider that the concept of "private life" excludes professional and business activities. It is in their work most people have the greatest chance to build relationships with the outside world.

European Court for Human Rights was also determining the inviolability of personal correspondence under article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). We must note that the Court has clarified the circumstances under which the State is allowed to violate the inviolability and has developed the standards for interception of phone messages (conversations) protected under Convention as "correspondence". Interception is not considered as violation if it is carried out in a following way [10]:

1. *In line with the Law.* Any on-looking should be carried out in line with National Law and meet the following requirements:

– *accessibility* – the citizen should be able to make sure that eavesdropping complies with Law standards;

– *predictability* – the citizen should be able (if necessary, with the help of attorney) to predict the consequences of any possible action;

– *quality* – Law should have adequate and effective countermeasures against any possible abuses.

In particular, Law should specify the following:

– list of crimes, which can be the reason for listening;

– listening is to be limited to cases when factual grounds to suspect a person in committing a serious crime have already been identified by other means;

– authorized only grounding on a reasoned written statement by a senior official;

– listening can be allowed only after receiving a sanction from a body or official that does not belong to executive power (judge);

– set limits on the duration of listening indicating the period for it;

– determine the rules for compiling reports on the content of listening;

– restrict the exchange of wiretapping materials between governmental bodies;

– determine the circumstances under which wiretapping materials should be wiped out;

– decide what to do with wiretapping materials if the accused (victim) is acquitted. Any person in the country where secret wiretapping provisions are applied can claim to be a victim without any obligation to provide evidence or

grounding on unsubstantial allegation that surveillance was actually carried out.

2. *As a necessity in a democratic society.* Listening should be:

– only to the extent necessary for the security of democratic institutions;

– under exceptional conditions and in the interests of national security and/or to prevent disorders or crime;

According to foreign experts, legal protection of the right for privacy means establishing and complying with the limits of permissible interference into any private life and is based on the following principles [11]:

– *boundaries between public and private spheres of interests,* the latter of which other people, organizations and/or governments cannot interfere into (it also concerns biometrical data as an equivalent of the human body);

– *forms of activities, behavior and manner of actions that a person has the right to protect (hide) from the attention of others;*

– *protection against invasion of privacy and freedom to choose its forms;*

– ***possibility for a person to control information about himself/herself* – to decide when, how and to what extent information about him/her becomes known or communicated to others.**

Currently privacy is considered as fundamental human right and is on a par with the right for life, freedom of belief; property and personal achievements resulted from information or intellectual work.

Experts of *E1ectronic Privacy Information Center* and *Privacy International* NGOs, in their joint study, proposed to conditionally distinguish following ***types of privacy*** [7]:

– *physical privacy* – protection conditions from coercive procedures, medical, in particular, etc. Some measures are justified by society and state interests. For example, police has the right to take fingerprints from the detainee or DNA analysis and include them into national database, etc.;

– *territorial and property privacy* – usually means the inviolability of physical things and housing. Not only houses and apartments have a certain level of privacy, but workplaces, hotel rooms, train compartments, etc. as well. Property privacy is regulated by the right for property ownership and right for intellectual property. Law does not regulate the property for information product, despite information was always traded and it is in a commercial circulation.

– *information privacy* – first of all, it presupposes the protection of human rights and fundamental freedoms in information sphere, person's ideas and efforts to improve his/her living;

– *communication privacy* – everything related to technical means and technical-technological actions, including secrecy of phone calls, mail and electronic messages. Communication privacy is directly related to information privacy, including Internet, which, as never before, provides opportunities for unauthorized control and influence on a person's private life.

Information privacy was always of a special importance for human relations.

It is based on ensuring protection of information about a person, primarily, in the context of improper and unauthorized receipt and use of private personal data.

There are following ***main components of the right for information privacy:***

– *right for solitude;*

– *right for intimacy;*

– *right for anonymity;*

– *right to control information about oneself* [9] and

– *right "to be forgotten"* [12].

The above implies the existence of legally defined guarantees related to ensuring of the privacy conditions, in particular, for any actions related to personal data, which should:

– *be obtained in a legal way;*

– *be gathered with the knowledge and consent of a person and in an amount necessary for a particular purpose;*

– *be accurate and protected from unauthorized access;*

– *be used only for the purpose for which they were obtained;*

– *be provided to third persons only with the consent of a person about whom they were collected;*

– *be available to the person whom they relate to, in particular, in the context of the right to receive information about its use with the correction of incorrect information and the right for access to any computer data;*

– *be deleted after the purpose for which they were collected has been achieved and the data is no longer needed.*

Above guarantees are not absolute and pretty depend on the context in which rules of privacy and the requirements of what can and should be open to the public or the state are determined [11]. Thus, it is believed that the boundaries of information privacy are mobile and based on the desire or unwillingness of individual to communicate this or that information about him/her. It should be also noted that legal definition of privacy and control over information use is one of main tendencies in political and legal discussions on personal data protection [13].

Under current conditions of wide use of TV communication technologies and social networks, it is becoming more and more difficult to ensure information privacy. It is already a common knowledge that any information or data about a person can be obtained through Internet and used not only for his/her benefit but also for illegal purposes (for consciousness manipulation, blackmail, intimidation, aggressive advertisement, information violence, etc.). Above actions directly relate to the problem of ensuring personal data security in Ukraine, which is an integral part of national state security.

Along with the above it should be noted that Ukrainian legislation does not have and does not use the concept "privacy" except for its mention in article 182 of the Criminal Code of Ukraine and Normative Act of the Cabinet of Ministers of Ukraine "On Ratification of Agreement between the Cabinet of Ministers of Ukraine and Government

of Israel on Temporary Employment of Ukrainian Workers in Certain Sectors of Labor Market of Israel" (31 August 2016, # 0108). In particular, article 8 "Personal Data Protection" of Agreement states: *"The Parties undertake all necessary measures in line with national legislation in the sphere of* ***personal data protection*** *to ensure* ***personal data security*** *of Ukrainian citizens selected for temporary employment under this Agreement, including data's accidental loss, damage, illegal processing and access"* [14].

2. ***Personal data security***

According to the results of analysis, there are no common approaches to the definition of "*private personal data*" and "*personal data security*". Law of Ukraine "On Basic Principles of Information Society Development if Ukraine for 2007–2015" (9 January 2007, # 537-V) fixes only the concept "information security". According to paragraph 13, Section III of the Law, *information security is a state of protection of vital interests of person, society and state, which prevents damage from incompleteness, lateness and reliability of information used; negative information impact; negative consequences of information technologies use; unauthorized dissemination, use and violation of the integrity, confidentiality and availability of information.* Law does not refer to the "security process".

According to the Doctrine of Information Security of Ukraine [15], ***key features of information security*** are as following:

1) confidentiality – information handling in which only those entities that have a right for information have access to it;

2) integrity – prevention of unauthorized or illegal modification of information;

3) accessibility – prevention of temporary or permanent concealment of information from the users who have the right for access.

Given the above, ***private personal data security can be considered as protection of information (data) about the person and the process of protection ensuring.***

The problem of privacy protection and personal data security is becoming pretty actual and complicated under conditions of global digital transformation, information and communication systems and networks development and spread of "virtuality" in public relations.

Global information networks and many services unauthorizedly and invisibly collect terabytes of data about their users and users themselves, for different reasons, constantly share their lives in social networks. For example, when Internet users try to access any site or database, they often come across mandatory questions. Afterwards their e-responses and e-traces are automatically processed and distributed from one server to another, filtered sorted, analyzed, stored in unknown databases, clouds and used for purposes unknown to data' subject. As a rule, these actions never explained and many users do not care about it.

Misuse of private personal data can result in a dramatic harm for a person. First of all, it concerns *sensitive personal data,* such as information about the state

of health, which requires a particularly delicate treatment, i.e. special legal protection measures. As a result, the practice of using Internet to offer various personal databases is becoming common.

Currently, information and computer technologies seem to be a powerful tool, which criminals from different countries use for their illegal activities, including on transnational level. Protection of information security and fight against cybercrimes are becoming one of contemporary international politics priorities, which tries to find a balance between privacy and security. It is perfectly illustrated by European Convention on Cybercrimes.

Council of Europe launched its work on Convention in spring 1997 [16]. It was a closed process, in which European countries representatives and lawyers from US Department of Justice took part. Only three years later, when the number of versions reached 22, information on the text of the document was opened for the public. Angry assessments were made about its developers. It was believed that Convention should set European standards in the sphere of combating attacks on computer systems, online fraud, spread of computer viruses, child pornography, promotion of violence and etc. This is quite understandable since Internet does not have physical boundaries and actively used by criminals. Therefore, according to Convention developers, it was time to provide "unlimited basis" for operation of law enforcement agencies from different countries. They had assured that till there was no Convention, any violation was possible and if it was adopted, the process of combating crime would be more effective and organized. At the same time, while expanding the powers of law enforcement agencies and special services, too little attention was paid to guarantees of rights of Internet users.

On 18 October 2000 several dozen NGOs issued Open Letter against Convention. In particular, they criticized the idea of requiring Internet providers to report on their customers activities. Open Letter authors believed that article 18 of Convention draft was incompatible with article 8 of European Convention on Human Rights Protection and decisions of European Court of Human Rights. Some independent experts, journalists and officials were also of the same opinion. For example, Data Protection Commissioners expressed concern about Convention draft during their meeting in Stockholm in April 2000. However, the document was approved by Council of Europe on 8 November 2001.

35 European member-states of Council of Europe and 55 other countries (Australia, Dominican Republic, Japan, Panama and USA) are the Parties to the Convention [17]. Convention is necessary to stop actions against confidentiality, integrity and accessibility of computer systems, networks and computer data as well as systems, networks and data misuse through establishing criminal liability for such actions, providing power to effectively combat relevant crimes and offences by facilitating their detection, investigation and prosecution at national and international levels as well

as conclusion of agreements on rapid and reliable international cooperation.

In accordance with Convention provisions, Parties mutually support each other for the purpose of investigating or prosecuting crimes related to computer systems and data or for the purpose of gathering evidence in electronic form.

Party may request the other Party to issue a warrant or otherwise urgently store computer data, stored in a computer system located on the territory of the other Party and in respect of which requesting Party intends to request for mutual assistance related to search or similar access, arrest or similar actions or data disclosure.

In 2011 UN established Inter-State Group of Experts on Cybercrime, which conducted Comprehensive Study on Cybercrimes in 2013 [18]. The document analyzes the issues of legislative regulation, law enforcement activities and international cooperation in the area. In particular, it was noted that 80% of cybercrimes are committed in an organized manner.

Work of Inter-State Expert Group is going on. Thus, he report on the results of its meeting on 27–29 March 2019 in Vienna covered the issues of legislation improvement, including international one, problems of law enforcement and electronic evidence. It was also noted that given transnational nature of cybercrimes and the fact that most global cybercrimes were committed by organized groups, member-states should greater use UN Convention against Transnational Organized Crimes to facilitate the exchange of information and evidence in criminal proceedings related to cybercrime [15].

In Ukraine, Cybercrime Convention of 2001 entered into force on 1 July 2016 [19]. State bodies of Ukraine authorized to consider requests of competent bodies of foreign states and to send requests to them in line with Convention are: Ministry of Justice of Ukraine (execution of court decisions) and Prosecutor General Office of Ukraine (procedural actions during the investigation of criminal cases). Procedures and conditions for consideration of the requests of foreign states' competent authorities as well as sending requests to them are defined by Chapter 42 of Criminal Procedure Code of Ukraine. According to Law of Ukraine "On Amendments to Law of Ukraine "On Ratification of Convention on Cybercrime"" of 21 September 2010 # 2532-VI, Ministry of Internal Affairs of Ukraine is responsible for establishment and operation of 24-hour contact network for emergency assistance in crimes' investigation related to computer systems and data, prosecution of persons accused in committing of the above crimes as well as collection of evidence in electronic form.

In the context of information security provision and fight against cybercrimes, one should note that one of encroachment objects is private personal data, i.e. confidential information about a person.

From the point of view of law, there are different types of professional secrets based on confidentiality of information.

Article 21 of Law of Ukraine "On Information" (2016) ensures the protection of professional data in a confidential manner, in particular, in following spheres: commercial, tax, bank, law, notary, journalistic, secret confession, etc. At the same time, above Law (2016) does not provide definition of essential features of the concept "confidential information". It was removed from Law of 1992 (with the same name). Regarding the sphere of information and communication privacy, Ukrainian legal encyclopedia also proposes to consider personal data as confidential information [20].

Current Laws of Ukraine provide only lists of information about a person, which is officially defined as confidential, without legal definition and legal use of a term ***"confidential information",*** in particular:

– article 32 of Constitution of Ukraine forbids *collection, storage, use and dissemination of confidential information about a person without his/her consent, except as provided by Law and only in interests of national security, economic prosperity and human rights;*

– article 182 of Criminal Code of Ukraine states that *illegal collection, storage, use, destruction, dissemination of confidential personal information or illegal alteration of it, except as provided by other articles of the Code;*

– paragraph в 70.15 *Of Tax Code of Ukraine* states *information on registration and identification number of a taxpayer, account number of a physical person and etc. belong to confidential information* as well. Paragraph 17.1.9 of the Code also states that *a taxpayer has the right for not disclosing of information about him/her without his/her consent as well as information that constitutes confidential information, state, commercial or bank secret and became known to controlling bodies (officials) during the performance of their duties, except in cases when it provided by law;*

– article 11 of Law of Ukraine "On Information" states that *confidential information about physical person (personal data) includes, in particular, data on his/her nationality, education, marital status, religion beliefs, health status as well as address, date and place of birth;*

– according to article 7 of Law of Ukraine "On Access to Court Decisions", the above information category includes *information contained in court decisions, which makes it possible to identify physical person, in particular: names (first name, patronymic, surname) of physical persons; information on place of residence or stay of physical persons, including address, phone numbers or other means of communication, e-mail address, identification numbers (codes); vehicles registration numbers; реєстраційні номери транспортних засобів».*

Other laws contain only fragmentary data or references to confidential personal information.

Thus, we can say that Ukrainian legislation does not systematically use the concept "confidentiality". Existing approach to protection of information

and personal data in Ukraine follows a way where there are no general legal criteria for *confidential information* concept, *which has a special property that necessitates specific conditions for its privacy, use and appropriate protection means*.

At the same time, it should be noted that in line with paragraph 4.1.1.2 of current State Standards of Ukraine 3396.2–97 "Technical Protection of Information. Terms and Definitions" [21], *confidential information is information with limited access, which is available to, used or disposed of by physical or legal persons or state and the procedure of access to which is established by these persons or state.* Paragraph 2 of the Preface to above Standards states that its requirements ensure the implementation of provisions of Law of Ukraine "On Information", but as it was noted, this norm-definition was removed from the Law.

We cannot but say that this term defines the triad of powers related to human property rights, including: *the right to own, use and dispose one own information,* which is in details discussed in monographic study "Formation and Development of Legal Framework and Personal Data Protection in Ukraine" [12]. The definition provides clear classification of criteria that determine the very subject of information confidentiality and privacy for any type of personal data. This is important from the point of view of information society active development, digital transformations and development of information and communication technologies, for regulation of which traditional legal approaches and mechanisms related to privacy protection and personal data security indicate on their low efficiency. Above requires further working over the problem of privacy, information privacy and personal data security.

Conclusions

1. Under conditions of development of global information space, information and communication systems and networks, the challenge of finding common approaches and legislative definitions or clarifications in international and national legal acts of necessary conceptual apparatus is becoming actualized. First of all, it concerns following terms: privacy, information privacy, private personal data, confidential information, personal data security, etc. List of confidential information about the person to which legal protection guarantees should be applied, also need to be clarified and legally approved.

2. Further search for balance between human rights protection in information sphere and security needs of society, state and international community is an actual international problem in the context of global digital transformation, including for EU member-states, associate members or countries, which cooperate with EU. Balance between privacy and information security is a pretty complicated issue, which under conditions of information society, cannot be resolved basing on views formed in the times of agrarian or industrial society.

3. Markers for assessment of judgments about admissibility of interference into personal (private) life of a person may become the following: *a) human privacy right for his/her personal data; b) person's control over the use of information about himself/herself; c) cases related to protection of national and international security, fight against crime, protection of rights and fundamental freedoms of citizens and other persons identified by legislation; d) basic principles of "EU Data Protection Package" (2016).*

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THE CONSTITUTIONAL COURT OF UKRAINE: TO THE QUESTION OF THE PLACE IN THE SYSTEM OF SEPARATION OF POWERS

The article analyzes the legal nature of the Constitutional Court of Ukraine, outlines the features of this body that distinguish it from the courts of the judiciary, and identifies the place of the Constitutional Court in the system of separation of powers in Ukraine.

Characterizing the relationship between the legal status of the Constitutional Court of Ukraine and the courts of the judiciary, the authors identified the following distinctive features: special system of legislation governing the Constitutional Court, differences in the formation of the judiciary and the Constitutional Court, differences in procedural forms of powers, different subject competence , differences in the legal nature of acts of the Constitutional Court of Ukraine and courts of the judicial system.

Based on the analysis of the peculiarities of the legal nature of the Constitutional Court of Ukraine, it is determined that this body, organizationally and functionally is not

included in any of the branches of government, is the guarantor of the effective functioning of the system of separation of powers. It is in the sphere of ensuring the state organization as a whole, being a body of the state, which, exercising constitutional control, ensures the implementation of state power.

Emphasis is placed on the fact that in order to effectively implement the function of constitutional control and to be the guarantor of the balance of power, the Constitutional Court of Ukraine must be outside political influence, its political function can and should be exercised only in the form of constitutional control. In this case the position of the Constitutional Court as a body that exercises state control over the state of constitutional legality has legal significance and legal consequences that are binding on the participants in constitutional and legal relations. The independence of the Constitutional Court of Ukraine from the sphere of politics is one of the key preconditions for ensuring the supremacy of the Constitution of Ukraine and the real separation of powers.

Keywords: *Constitutional Court of Ukraine, courts of judicial system, state control, constitutional control, separation of powers, supremacy of the Constitution.*

In the modern period of Ukrainian statehood development, taking into account the Euro-Atlantic aspirations of Ukraine, the effective functioning of all public institutions, the focus of their activities on ensuring democratic principles of society, human and civil rights and freedoms, the establishment of the supremacy of the Constitution are extremely important. An important role in carrying out these tasks belongs to the Constitutional Court of Ukraine. It is worth noting that the Constitutional Court has largely adopted the basic principles of organization and functioning of similar bodies operating in the world's leading democracies, however, with some cautions about the difficulties of the democratic legal state establishment, attempts by certain political powers and oligarchic clans to influence on its activity, low level of legal consciousness and legal culture of citizens, the presence of little experience and the problem of determining the legal status of the Constitutional Court of Ukraine, its place in the system of separation of powers of our state.

Problematic issues of the organization and activity of the Constitutional Court of Ukraine were studied by such domestic scientists as O. Batanov, I. Berestova, A. Georgitsa, V. Gergeliynyk, Y. Groshevyi, V. Dzhun, I. Dombrovskyi, R. Kalyuzhiyi, M. Kelman, V. Kovalchuk, M. Kozyubra, O. Konstantyi, O. Kopylenko, M. Kostytskyi, P. Martynenko, O. Martselyak, O. Myronenko, L. Moskvych, O. Petryshyn, V. Pohorilko, Yu. Remeskova, M. Savenko, M. Savchenko, A. Selivanov, V. Skomorokha, P. Stetsyuk, M. Teslenko, Yu. Todyka, Yu. Fritsky, V. Shapoval, Yu. Shemshuchenko, L. Yuzkov and others. However, the subject of research of domestic legal scholars were mainly some issues of the organization of the Constitutional Court of Ukraine, the procedure for exercising certain types of powers, the role of this body in the

mechanism of legal protection of the Constitution. While the issue of the legal nature of this body, its place in the system of separation of powers in the legal doctrine was paid insufficient attention. In addition, amendments to the Basic Law of the state regarding the status of the Constitutional Court of Ukraine, as well as the adoption of a new law regulating its activities did not clearly define the place of this body in the system of separation of powers, but rather intensified scientific discussion.

That is still the reason why the purpose of the article is to study the legal nature of the Constitutional Court of Ukraine, to analyze the features of this body that distinguish it from the courts of the judiciary system, as well as to determine the place of the Constitutional Court in the system of separation of powers in Ukraine.

In domestic legal science, it is widely believed that the Constitutional Court of Ukraine is part of the judiciary. In particular, the supporters of referring the Constitutional Court of Ukraine to the judiciary include: I. Berestova [1, p. 156], M. Kozyubra [2, p. 20–25], O. Constantyi [3, p. 37], M. Kostytskyi, N. Kushakova-Kostytska [4, p. 105], L. Moskvich [5, p. 73], Yu. Remeskova [6, p. 121], V. Skomoroha [7, p. 10–11, 8, p. 14], V. Shapoval [9, p. 120] and others. Thus, V. Skomorokha believes that the Constitutional Court of Ukraine is one of the levels of a single judiciary that administers justice through constitutional justice [7, p. 10–11]. The scholar notes that the status of the Constitutional Court of Ukraine within the judicial branch is special, because as a specialized court, it stands within its competence over courts of general jurisdiction, which are not able to decide the constitutionality of legal acts, official interpretation of the Constitution of Ukraine [8, p. 14].

L. Moskvych refers the Constitutional Court of Ukraine to the judiciary, basing on the content of Art. 6 of the Constitution of Ukraine, which stipulates that state power in Ukraine is exercised on the basis of its division into legislative, executive and judicial and taking into account the scope of competence of the Constitutional Court, the content of its powers. According to the scholar's point of view, such an approach will not contradict the Constitution of Ukraine, as there is no norm that would deny the assignment of the Constitutional Court to the system of judicial authorities. According to the scholar, the content of the activity by the Constitutional Court is a legal dispute (constitutionality of acts of political institutions), and the jurisdiction of the courts covers any legal dispute (Part 3 of Article 129 of the Constitution of Ukraine). In addition, the delegation of court functions, as well as the assignment of these functions to other bodies or officials are not allowed (Part 2 of Article 129 of the Constitution of Ukraine). Taking into account the abovementioned, according to L. Moskvich, it follows, that, firstly, the Constitutional Court is a court in its own sense as the institution of the judiciary, and secondly, its jurisdiction

(constitutional) must be different from the jurisdiction (constitutional) of other bodies. Given all this, the legal status of the Constitutional Court should be determined as a body of judicial constitutional jurisdiction [5, p. 73]. This position is supported by Yu. Remeskova [6, p. 121].

M. Kostytskyi, N. Kushakova-Kostytska claim that with a certain autonomy, the Constitutional Court of Ukraine is part of a single system of judicial power, is a body of justice and administers constitutional proceedings (as one of the types of proceedings). These scholars consider the introduction of the institute of constitutional complaint to be an important argument in favor of this position [4, p. 105]. This position is supported by I. Berestova, who believes that the possibility of the Constitutional Court of Ukraine to be a full-fledged court is controversially enshrined in law, because although the Constitutional Court of Ukraine is not directly defined as a judicial body in section VIII "Justice", but its status is set in section XII of the Basic Law Ukraine, however, the Constitutional Court of Ukraine performs procedural jurisdictional activity to protect the rights and fundamental freedoms of human and citizen, which is characterized by the features of justice, inter alia by considering constitutional complaints (Articles 55, 1511 of the Constitution of Ukraine) [1, p. 156].

According to O. Konstantyi, even after amendments to the Constitution of Ukraine by Law № 1401-VIII of June 2, 2016, the Constitutional Court of Ukraine, despite not being mentioned in Section VIII "Justice", did not lose the status of a judicial body, but on the contrary – strengthened in the guarantees of its independent activity as an autonomous body of justice from the courts of general jurisdiction, specializing in resolving the most socially significant constitutional disputes arising from the application of the Basic Law of Ukraine by higher subjects of state power [3, p. 37].

Strongly disagreeing with the above positions, we consider it necessary to note that, in our opinion, after the exclusion by the Law № 1401-VIII of June 2, 2016 [10] mentioning the Constitutional Court of Ukraine from Chapter XIII of the Constitution of Ukraine "Justice" it can be said with confidence on the inadmissibility of referring it to the judiciary.

The non-affiliation of the Constitutional Court of Ukraine to the judiciary is evidenced by a number of special features that distinguish this body from the courts of the judiciary. In support of our position, we consider it necessary to analyze, in particular, the relationship between the legal status of the Constitutional Court of Ukraine and the status of the courts of the judicial system.

First of all, it should be noted that the regulatory framework governing the activities of the Constitutional Court and the courts of the judiciary differs. Significant features of the constitutional and legal status of the constitutional control body in comparison with the courts of the judiciary are indicated by the Con-

stitution of Ukraine, which enshrines the legal status and powers of the Constitutional Court of Ukraine in a special section XII "Constitutional Court of Ukraine", separately from section VIII "Justice". In addition, the current legislation governing the activity of the Constitutional Court and the courts of the justice system is different.

The activity of courts of the judicial system is regulated by the Law of Ukraine "On Judiciary and Status of Judges" [11], which defines the legal basis for the organization of the judiciary in Ukraine, the system of courts of general jurisdiction, the status of judges, the system and procedure of judicial self-government, the system and order of court's activity provision and other important issues of the judiciary and the status of judges.

The activity of the Constitutional Court of Ukraine is regulated by the new Law "On the Constitutional Court of Ukraine" of July 13, 2017 [12], which was adopted on the basis of amendments to the Basic Law of Ukraine regarding the functions and powers of the Constitutional Court of Ukraine. In general, the new Law has become a complex normative legal act, which at the legislative level regulates not only substantive-legal, but also a number of structural and procedural aspects of the activities of a single body of constitutional control.

In addition, depending on the specialization of cases, the courts of the judiciary are guided in their activities by relevant procedural codes, and the procedure for exercising constitutional control in the Constitutional Court is regulated by the Law "On the Constitutional Court of Ukraine" and the Rules of the Constitutional Court of Ukraine.

There are also differences in the methods of formation and composition of the Constitutional Court and the courts of the judicial system. According to Art. 19 of the Law of Ukraine "On the Judiciary and the Status of Judges" courts of the judiciary are formed, including through reorganization, and liquidated by the adoption of the law by the Verkhovna Rada of Ukraine on the proposal of the President of Ukraine after consultations with the Highest Council of Justice [11]. Appointment to the position of a judge is made by the President of Ukraine on the proposal of the Highest Council of Justice in the order prescribed by law (Article 128 of the Constitution of Ukraine) [13].

As for the Constitutional Court of Ukraine, three subjects of state-legal relations have equal rights to appoint judges – the Parliament, the President of Ukraine and the Congress of Judges of Ukraine. According to Art. 148 of the Constitution of Ukraine and Art. 9 of the Law of Ukraine "On the Constitutional Court of Ukraine" the Court consists of 18 judges: six of them are appointed by the President of Ukraine, six – by the Verkhovna Rada of Ukraine and six – by the Congress of Judges of Ukraine. A judge of the Constitutional Court of Ukraine is appointed for a term of nine years without the right to be reappointed

(Article 16 of the Law). The legislation provides for competitive principles for the selection of judges of the Constitutional Court.

The next thing which is worth to be paid attention to is the principles of the Constitutional Court. V. Shapoval, in particular, based on the similarity of the basic principles of the Constitutional Court and the courts of the judicial system, calls the Constitutional Court of Ukraine as an active bearer of judicial power [9, p. 120]. Indeed, Art. 149 of the Constitution of Ukraine extends the general principle of independence of judges, guarantees of this independence to judges of the Constitutional Court of Ukraine too. Part 4 of Art. 148 of the Basic Law of Ukraine determines the requirements for incompatibility of the position held by a judge of the Constitutional Court, which are similar to the requirements of incompatibility established for courts of general jurisdiction. And Art. 149^1 of the Constitution provides the grounds for dismissal of judges of the Constitutional Court, which are almost similar to the grounds for dismissal of judges of courts of general jurisdiction, which are enshrined in Art. 126 of the Basic Law. The Law "On the Constitutional Court of Ukraine" enshrines the principle of independence, transparency, full and comprehensive consideration of cases, collegiality, which also govern the courts. It should be noted that the principle of legality, which governs all courts, is mandatory for the Constitutional Court of Ukraine too in the form of the principle of constitutional legality, which is the core, the highest reflection of legality in state and public life [14, p. 46].

However, the adversarial principle, which is a fundamental principle of the administration of justice in the courts of the judicial system as a basis for the activities of the Constitutional Court of Ukraine, is provided by neither the Constitution nor the legislation. This indicates that the powers of the Constitutional Court are not the power to administer justice, it is something else. These are control powers aimed at ensuring compliance with the principle of separation of powers, balance in the exercise of powers between national and regional (local) levels, as well as preserving the legislature from acts that counter to the will and interests of the people as the sole source of power in a democratic state.

In addition, in accordance with Part 2 of Art. 147 of the Constitution [13] and Art. 2 of the Law "On the Constitutional Court of Ukraine" [12] the activity of the Constitutional Court is also based on the principles of the rule of law and the validity of its decisions and conclusions. That is, along with the principles inherent to the activity of all judicial authorities in Ukraine, the current legislation defines as mandatory for the Constitutional Court of Ukraine and those in accordance with which the head of the state, the legislature and the executive branch of power perform [15, p. 14].

The analysis of the ratio of their functions is important for distinguishing between the Constitutional Court of

Ukraine and the courts of the judicial system. If the functions of the courts of the judicial system are understood as directions, types and forms of activities to resolve legal conflicts, disputes in civil, commercial, administrative and criminal proceedings carried out exclusively by courts on the grounds, within the limits and in the order prescribed by the Constitution and laws of Ukraine, functions of the Constitutional Court of Ukraine, their types and features remain debatable, despite the significant achievements of domestic and foreign legal science in the study of this problem [16].

In accordance with Part 1 of Art. 147 the Constitutional Court of Ukraine decides on the conformity of the laws of Ukraine with the Constitution of Ukraine and of the other acts in other cases provided for by the Constitution, performs official interpretation of the Constitution of Ukraine, as well as other powers in accordance with this Constitution. It means that it has a special function – the function of constitutional control. That is, the Constitutional Court is given the right in the form established by the Constitution and the law to exercise control over the bodies of all branches of government – legislative, executive and judicial, to help eliminate confrontational tendencies between them. It means that by its functional nature it belongs to the highest level of state power. In our opinion, the function of constitutional control permeates all directions of Court's activity, determines the special legal status of the Constitutional Court of Ukraine in the system of public authorities, its inherent feature of a single body that exercises constitutional control in Ukraine [15, p. 15].

The Constitutional Court and the courts of the judicial system also differ in the procedural forms of exercising their powers. The exercise of constitutional control by the Constitutional Court of Ukraine presupposes the existence of a special procedure for its implementation. There is a certain similarity between the procedure for exercising constitutional control performed by the Constitutional Court of Ukraine and court proceedings. However, the procedure of constitutional control has many features. In particular, it applies to the range of applicants to the Constitutional Court of Ukraine, the subject of constitutional review, the range of participants and the procedure for constitutional control exercising. The legislation provides for both the general procedure for proceedings in the Constitutional Court of Ukraine (Chapter 10 of the Law) and the peculiarities of constitutional proceedings for the consideration of certain categories of cases (Chapters 11, 12 of the Law).

The legal nature of acts by the Constitutional Court of Ukraine and by courts of the judicial system also differs. The study of the peculiarities of acts of the Constitutional Court of Ukraine gives all grounds to claim that they have a normative-legal nature, provide for the regulation of important public relations, designed for all participants or for a certain part of them, as well as for repeated

use in legal regulation of relevant public relations [17, p. 148].

Article 151^2 of the Constitution stipulates that decisions and conclusions adopted by the Constitutional Court of Ukraine are binding, final and could not be appealed. What we could not say about the decisions of courts of general jurisdiction, as well as about the highest body in this system. In accordance with Part 5 of Art. 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" conclusions on the usage of law, set out in the Supreme Court regulations, are binding on all subjects of power who apply in their activity a legal act containing the relevant norm of law. In addition, the conclusions on the usage of law set out in the regulations by the Supreme Court are taken into account by other courts in while application of such rules. That is, courts of general jurisdiction only need to take into account the conclusions by the Supreme Court, set out in its regulations, which does not indicate a general obligation [18, p. 99, 100]. On the other hand, in their activity, courts of general jurisdiction must be guided, in addition to the Constitution and laws of Ukraine, also by acts of the Constitutional Court, taking into account their general obligatory nature.

Thus, summarizing the analysis of the ratio between the legal status of the Constitutional Court of Ukraine and the courts of the judicial system, we could identify features that distinguish the Constitutional Court. Such features are: a special system of legislation governing the Constitutional Court, differences in the formation of the judiciary system and the Constitutional Court, differences in procedural forms of powers exercising, different subject-matter competence, differences in the legal nature of acts of the Constitutional Court of Ukraine and courts of judiciary system.

It allows us to conclude that organizationally and functionally that body is not part of the judiciary, as well as not a part of other branches of power. It is a bearer of state power, which performs a special, unique function – the function of constitutional control and has a special purpose in the state – ensuring human and citizen rights and freedoms, maintaining balance between branches of powers, ensuring the supremacy of the Constitution, acts as a safeguard against violations of constitutional legal order. It is still in this context, as rightly noted by S. Vitvitskyi, the Constitutional Court of Ukraine is a separate – the highest – subject of control over the activities of public administration in the hierarchy of the system of controlling subjects [19, p. 227–228]. And it is still its status of a body of constitutional control which should be enshrined at the constitutional and legislative levels.

Basing on the analysis of the peculiarities of the legal nature of the Constitutional Court of Ukraine, it could be stated that this body, organizationally and functionally id not part of any branch of power, is the guarantor of the effective functioning of the system of separation of powers. It could be considered as the

most important element of the system of checks and balances: limiting the abuse of power, it is an important guarantee of compliance with the constitutionally provided system of checks and balances [20, p. 133; 21, p. 88]. The Constitutional Court is aimed at preventing the usurpation of state power. Exercising constitutional control as a form of state control, it must ensure the restriction of state power itself in favor of law. It is the function of constitutional control that is the most important factor in deterring subjects of power from taking over powers that are not inherent in their status, and, as a consequence, achieving an acceptable balance between branches of power, a reasonable balance of the entire system of power.

However, in order to effectively implement the function of constitutional control and to be the guarantor of the balance of power, the Constitutional Court of Ukraine must be outside political influence. Of course, one of the purposes of the Constitution as the Basic Law is to define the boundaries of political relations. However, the Constitutional Court, applying certain constitutional norms, must decide not political but legal issues, restraining politics within the established constitutional and legal framework, thereby exercising indirect influence on political relations, acting not as a participant of the political process, but as a defender of the Constitution and law in general [22, p. 96]. The political impartiality of the constitutional control body is of fundamental importance, as the politically dependent Constitutional Court of Ukraine automatically becomes incapable of exercising its powers. It should be taken into account that the public legitimacy of the domestic body of constitutional control is quite problematic today – the level of public confidence in it is extremely low. Thus, according to a study by the Razumkov Center as of February 2020, 60.5% of the population of Ukraine did not trust the Constitutional Court and only 2.2% completely trusted [23]. Moreover, the tendency of distrust in the body of constitutional control in Ukraine, unfortunately, is stable. Thus, as of October-November 2020, according to research by the same Razumkov Center, the level of complete distrust to the Constitutional Court of Ukraine is already 65% of citizens [24]. To compare with, for example, approximately 70% of US, German, Canadian, and more than 80% of Israeli citizens are satisfied that their constitutional control bodies perform their duties.

In such a situation of low public legitimacy, the future of the Constitutional Court of Ukraine as a state institution largely depends on how legally justified its decisions would be. After all, the attempts to implement the political interests of individual rulers and oligarchic clans by making legally unconvincing, unfounded decisions by the constitutional control body will not give such decisions any legal weight and will raise questions about the possibility of their implementation by the relevant public authorities.

Based on the results of the study, it should be noted that the Constitutional Court of Ukraine is organizationally and functionally outside both the judiciary and other branches of powers and is in the sphere of state organization provision in general, being a state body that, by exercising constitutional control, ensures the realization of state power. It is the highest constitutional body in the mechanism of public power of Ukraine, which has the right to control all other public authorities. The purpose of the constitutional control exercised by the Constitutional Court is to stop attempts by any branch of power to exceed their constitutional powers or to exercise them in an unconstitutional manner.

The issue of delimitation of politics and law in its activity is important for the effective exercise of powers by the Constitutional Court of Ukraine. The Constitutional Court of Ukraine is an important element of the political system, but the political function of this body could and should be exercised only in the form of constitutional control. It is still in this case the position of the Constitutional Court as a body exercising state control over the state of constitutional legality has legal significance and legal consequences that are binding on the participants of constitutional law relations. The independence of the Constitutional Court of Ukraine from the politics sphere is one of the key preconditions for ensuring the supremacy of the Constitution of Ukraine and the real separation of powers. In connection with the above, further study is needed on issues of improving the formation of the Constitutional Court of Ukraine, functional and procedural aspects of its activity in order to determine the place of this body in the mechanism of state power as an independent, politically unbiased body, which acts as a guarantor of clear separation of powers in the state.

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THE CONCEPT OF THE ADMINISTRATIVE LAW DOCTRINE

Abstract. *In conditions of modern state-building and law-making caused by significant changes in positive law, arises the necessity of developing a new understanding of the doctrine of administrative law. This understanding should be based on the methodological pluralism, present the doctrine as a complex, multidimensional system phenomenon that denotes a set of legal scientific judgments about administrative legal framework. The above outlines the purpose of this study. The main method of scientific work is the method of legal analysis, the use of which allowed, in the context of a holistic presentation of knowledge about the doctrine of administrative law, to determine its concept, structure, system by analysing the consequences of: a) the philosophy of law, b) the theory of law, c) the history of law; d) the administrative law. The focus is on the methodological significance of philosophical, theoretical positions, connections with the general legal doctrine in the mutual perception of research achievements; delimitation of administrative law with other branches; ensuring the consideration of administrative legislation in the statutory material of other branches of law (and vice versa); identification of the identity or differences in the genesis of legal phenomena, etc. It is proved that the phenomenon "doctrine of administrative law" constitutes a system described by: 1. Unity in relation to the environment (integrity) and diversity of relations with it; 2. Its structure, the presence of relatively independent components in its system; 3. The presence of determinant features of "doctrine" as an entity, which constitute the result of the interaction of its components; 4. The presence of contradictions within the system that are the driving force*

of self-development of the system; 5. Historicity, the presence of over-time development, the "historical basis" and the experience of the past. The definition of the doctrine of administrative law is offered. The practical significance of the research results is that the theoretical provisions and conclusions can form the basis for further research on the doctrine of administrative law and its issues.

Keywords: *administrative legislation, legal doctrine, development strategy, doctrine structure, legal system of the state.*

INTRODUCTION

The doctrine of law («communis opinio doctorum» – the legal science of lawyers, the general opinion of doctors, teachers, professors, scientists) – is the concept of a systematic set of legal scientific interpretations and judgments about positive law. The doctrine of administrative law, as a derivative and structural component of the phenomenon«doctrine of law», generates a logical-theoretical model of the positive segment of this legal branch. This model (design, scheme, means, method) serves as a test of proper understanding of:

a) the interpretation of provisions, b) the need for legal regulation of social relations, c) the assessment of their efficiency, d) the compliance with the principles of state and civil society, e) the laws of evolution of the legal framework and the system of law. At the present stage of development of Ukrainian statehood, the necessity of investigating the issues of the doctrine of administrative law is dictated not only by general theoretical considerations, but also by significant changes in the positive law itself. First, it is the consolidation of natural human rights and freedoms in the provisions of positive law; secondly, the fundamental requirement for a positive segment of the right to meet these standards.

Under such conditions, the modern theory of administrative law of Ukraine should focus on the development of a new doctrine of administrative law, the definition of the conceptual directions of development of administrative law, the administrative law research, the main aspects of such a doctrine. In doing so, an important role belongs to the science of administrative law as a system of knowledge about administrative phenomena, the theory of administrative law, the administrative law doctrine [1]. That is why the purpose of the study is to develop a new understanding of the doctrine of administrative law as a complex, multidimensional systemic phenomenon to denote a set of legal scientific judgments about the administrative legal framework, its logical-theoretical paradigm. To achieve the said purpose, the study is based on research of modern multivariate source base and methodological pluralism of scientific research (including with increased use of integrated methods, including: narrative, historical-genetic, taxonomy, periodisation, comparative-synchronous, comparative-diachronic, system- structural, etc.). The findings of the study will contribute to the develop-

ment of an innovative scientific basis for modern reformational state-building and law-making.

In 2019, the pages of the All-Ukrainian legal journal "Legal Science of Ukraine" saw two discussions on doctrinal issues of administrative law. The first covered the new national doctrine of administrative justice [2], the second – the new national doctrine of administrative law [3] with expression of positions by representatives of various Ukrainian branch scientific schools. Three issues of the yearly periodical of branch scientific professional works "Issues of Administrative Law", published in 2017–2019, also focused on the results of innovative scientific research of scholars of administrative law, covering the substantiation of the need for updated understanding of the doctrine of administrative law and priorities for its definition, structure, understanding component series, development of "basic" terminology.

During 2017–2020, several landmark international, all-Ukrainian scientific, research-to-practice events were organised and held, primarily under the auspices of the National Academy of Legal Sciences of Ukraine and its structural units, including with the involvement of foreign legal scholars, representatives of international and domestic professional legal associations and with the awareness of the participants of such events of the urgent need to develop basic innovative approaches to a new understanding of the doctrine of administrative law, to prioritise basic fundamental and applied professional branch-related research. In recent years, in dissertations, primarily for the degree of Doctor of Laws, the topical issues of the doctrine of administrative law have been thoroughly studied. For example, in terms of the distribution of powers of public administration [4], administrative and legal support of the rights of citizens of Ukraine in terms of European integration [5], the use of sources of administrative law in the judiciary of Ukraine [6], etc. An array of scientific articles on various issues of administrative law doctrine, which were published in 2019 in Ukrainian and foreign scientific journals, also attract attention of the authors [7–12].

1. MATERIALS AND METHODS

Correct definition of methodology for accompanying legal research, including and branch realities, serves as a condition for objective results of scientific research in the form of new knowledge. Accordingly, the desire to understand the properties of the phenomenon «doctrine of administrative law» inevitably forces to objectify the methodological paradigm, correlated with the purpose and objectives of the study. This paradigm is primarily based the following: a) cognitive technologies; b) the worldview of the researcher; c) research objectives; d) features of the object and subject of scientific research. The methodology used in this paper is harmonised with the principle that the application of a method cannot be reduced to a single formula, and specific research technologies (especially procedures for analysis,

comparison, taxonomy, periodisation, etc.) vary depending on the nature of the subject and its purpose. In our case, the subject of knowledge (the doctrine of administrative law) constitutes a complex and multidimensional systemic phenomenon, the harmony of which is bound by the pluralism of legal understanding of the substantive essence of administrative law. This determines the methodological pluralism as a stable structure, into which methods are integrated in a separate segment, including: narrative, historical-genetic, taxonomy, periodisation, comparative-synchronous, comparative-diachronic, etc. Notably, the study used a unique resource of the dialectical method as a basic one, which allowed to explore the qualitative changes in the phenomenon of the administrative law doctrine, its components, systemic, comprehensive understanding, etc.

The method of semantic analysis is used to specify the content of the subject matter terminology ("administrative law", "legal doctrine", "doctrine of administrative law", "structure of the doctrine of administrative law", "system of doctrine of administrative law", "features of doctrine of administrative law", "components of the doctrine of administrative law", etc.), and the logical-legal method is used for the development of basic elements of such a subject matter terminology. The comparative legal method allowed to characterise the integrative features of the doctrine of administrative law, its components and defects in the use of their resources upon the statutory consolidation in the conditions of modern state-building and law-making. The system-structural method allowed to consider the latest doctrine of administrative law as a systemic multifaceted phenomenon, to identify components of the doctrine of administrative law, features that form its uniqueness, especially in modern conditions of radical revision of its essence, content, and purpose, to consider it as: a) an established set of views, ideas, and positions generated by legal science and mediated by legal practice; b) the collective opinion of reputable legal scholars on the main issues of legal regulation and other administrative and legal phenomena; c) statutory material, which reflects the principles and values of the state, local government, and civil society; d) a certain type of legal understanding, according to which a holistic administrative and legal system functions and develops. The methods of forecasting and modelling facilitated the development of an original understanding of the "doctrine of administrative law" and recommendations for its use to form an innovative scientific basis for modern rule-making and law enforcement activities.

Knowledge of different aspects of the subject matter is achieved through the use of methodological diversity, mutual correlation of methodological sets, directly adapted to the study of anthropological, phenomenological, sociological, ontological, epistemological, cultural, historical, system-structural, axiological, and other aspects and fea-

tures. Thus, it can be argued that it is precisely the methodology used in the study that ensured the following: a) objective knowledge of the systematic nature of the doctrine of administrative law; b) patterns of evolution of its subject, structure, and system; c) the development of new knowledge about the impact of doctrine on administrative law theory, branch-related rule-making and branch law enforcement.

2. RESULTS AND DISCUSSION

The concept and term «legal doctrine» is used conventionally both in statutory and research sources. Therewith, the Ukrainian legal science has no generally accepted understanding of legal doctrine. Much of the discussion on this matter focuses on issues of its legal nature, the correlation with the forms and sources of law, legal science, legal theory. Thus, V. V. Kopeichykov considers legal doctrine as a set of scientific knowledge about a particular legal phenomenon which, under appropriate conditions, can be developed into legal theory with a greater or lesser degree of generalisation [13]. Instead, V. V. Dudchenko does not deny the identification of doctrine with legal theory. In this regard, she writes that the term "legal doctrine" is used as a) a philosophical and legal theory, b) opinions of legal scholars on law-making and law enforcement, c) scientific articles of authoritative legal scholars,

d) comments on codes and laws [14]. Notably, the above fragment mentions differing judgments, some of which are recorded in scientific articles and some of which are the thoughts of legal scholars, objectified in some other way. The textbook "General Theory of State and Law" edited by M. V. Tsvik and O. V. Petryshyn notes that legal doctrine traditionally belongs to the secondary sources of both Romano-Germanic and Anglo- Saxon law, manifesting itself in the scientific articles of prominent legal scholars and constituting conceptual ideas, theories, and views on the reality of state and law [15].

The textbook "General Theory of Law", edited by M. I. Koziubra, presents the legal doctrine as one of the oldest sources of law, which includes the work of well-known legal scholars who can be used to resolve legal cases. The legal force of these provisions is conditioned, firstly, by the fact that they reflect the legal reality, the idea of law, the content of law, which constitutes the expression of certain social realities and interests, and secondly, by respect and trust in legal scholars on the part of the society, especially among practicing lawyers [16]. The opinion is expressed that the legal doctrine constitutes an act- document that contains conceptually designed legal ideas, principles developed by scientists to improve legislation, understood by society and recognised by the state as mandatory [17]. The third volume of the Great Ukrainian Legal Encyclopaedia presents legal doctrine as a holistic and logically consistent set of ideas and scientific views on law, acknowledged by the legal community, which constitutes the basis of professional legal conscious-

ness and the conceptual framework of rule-making, law enforcement, law interpreting activities [18]. The legal doctrine is similarly described in special researches concerning its nature, concept, structure, and meaning [19]. For example, E. Yu. Polianskyi writes that in general, legal doctrine should be understood as a set of ideas and principles, as well as legal institutions that are inextricably linked with legal science, legislation, and practice; it should determine the basic principles on which the legal system of the state is based. The doctrine originates in the past, directly regulates the law of the present, defines the law of the future, and constantly functions as a dynamic category that ensures the further development and improvement of law. The legal doctrine of the state, or general doctrine, includes all knowledge that meets the general requirements of the current theory of law, reflected in the law and used in practice [20].

Appropriate analysis of the concept of legal doctrine is contained in the study by Semenykhin, who supports its recognition as one of the most influential sources of law, and also considers it as an important link between legal provisions and legal practitioners. Semenykhin believes that the results of rule-making activity reach the practitioners through a "sieve" of interpretive activity of scholars, who specify and convey the content of legal prescriptions to the reader in plain language. If necessary, they also supplement, improve, and clean them from various defects – discrepancies, ambiguity, or vagueness of wording in legal acts, etc. [21].

Despite the pluralism of opinions on some attributes of the concept of legal doctrine, there are reasons to state the existence of a consolidated position of the representatives of the theory of law on the most important provisions of its content. Notably, the achievements of Ukrainian scholars on this matter in many cases coincide with the views of authoritative European lawyers, who emphasise that the doctrine creates a framework of terminology and concepts for law-making and law enforcement, methodologically provides interpretation of statutory material, formats legal understanding of the legislator [22], and correlates it with historical sources [23]. Provisions outlined within the philosophy and theory of law have methodological significance for branch-related legal disciplines. They test the content of knowledge accumulated by them, their system integrity, the logic of their conclusions, theoretical models and hypotheses, determine the methodological reflection, determine the relevance of potential research. The above, with corresponding caveats as to the features of the structure and system, subject, sources, methods, and principles, is perceived as fair point in administrative law. To state this, it is sufficient to compare the above definitions of legal doctrine, which are based on the theory of law, with branch administrative and legal definitions. In fairness, there is another opinion. Thus, P. P. Sierkov is convinced that the theo-

retical multiplicity and controversy on many issues of administrative legal science has led to the fact that the doctrine of administrative legal regulation does not allow real and systematic development of relevant areas of modern law [24]. In the fundamental five-volume edition "Legal Doctrine of Ukraine", the doctrine of administrative law is defined as a set of theoretical ideas and views on goals, objectives, principles, components, main directions, and ways of development of administrative law as a branch of law of its sub-branches and institutions [1]. Various aspects of the doctrine of administrative law are intensively studied by Ukrainian lawyers in dissertations, monographs, scientific articles, and are published at conferences, forums, round tables, seminars, etc. As a systemic product, the phenomenon of administrative law doctrine is described by the unity in relation to the environment (integrity) and diversity of relations with the environment; the structure of administrative law doctrine, the presence of relatively independent components in its system; the presence of integrative properties, i.e. the determinant features of doctrine as an entity, which constitute the result of the interaction of its components; the presence of contradictions that are the driving force of self-development of the system within this very system (between the components that formed it); historicity of the phenomenon of "administrative law doctrine", the presence of development over time, "historical basis" and the experience of the past [25].

1. *Unity in relation to the environment (integrity) and diversity of connections with the environment* – this is a dual feature of the doctrine of administrative law, which constitutes an important feature with regard to its recognition as a systemic entity. It makes the doctrine a subsystem of another, more complex system. The doctrine of administrative law is a subsystem of at least two systems: administrative law theory and the doctrine of law. It is connected with administrative law theory by the fact that it represents a legal- logical (mental) paradigm (model, logical-theoretical construction, scheme, means, and method) of this branch of law. As part of administrative law theory, it standardises: a) a proper doctrinal understanding and interpretation of administrative law, b) the parameters of its interference with reality. Connections with the general legal doctrine lies in the plane of mutual perception of research achievements, delimitation of administrative law with other branch-related formations, maintenance of the account of administrative statutory material in statutory material of other branches of law (and vice versa, ensuring that the statutory material of other branches of law is considered in the administrative statutory material), determination of identities or differences in the genesis of legal phenomena, etc.

2. *The structure of administrative law doctrine, the presence of relatively independent components in its system* is also an important attribute. Determination of the components of administrative law

doctrine can be performed according to various criteria, which are conditioned by the objectives of the study and the specific features of the scientific views of the researcher. Thus, for example, S. V. Baturina outlines the following components among the substantive features of the doctrine: a) legal knowledge, b) legal values, c) legal experience, d) legal traditions, e) legal dogma, e) legal empiricism [26]. Such a proposal does not raise fundamental objections. Therewith, to understand doctrine as a system, it is appropriate to determine the components that would in themselves represent substantially meaningful, organisationally multifaceted, dialectically interdependent system formations capable of interacting to generate integrative properties of the system "administrative law doctrine". Analysing the statutory material from such standpoints, it is easy to see whether the legislator pays attention to the adoption of acts of doctrinal, conceptual, strategic aspect, and application of similar conceptual constructions in their titles and texts. These are, for example, "Communication Strategy in the Sphere of Prevention and Counteraction to Corruption"[1], "Concept of Development of Mountain Territories of the Ukrainian Carpathians"[2], "Maritime Doctrine of Ukraine until 2035"[3], "Military Medical Doctrine of Ukraine"[4], "National Doctrine of Physical Culture Development and Sports"[5] , etc. The texts of documents also contain the term "concept note"[6].

In the literature, the terms "doctrine", "concept", "strategy" are often identified, and the legislator is not very careful upon distinguishing between them, therefore there is a need to find grounds for a clearer definition of their correlation. In official sources, the term "doctrine" can be defined, firstly, as a document (Recommendations of parliamentary hearings No. 827-VIII on the topic: "On the military medical doctrine of Ukraine" dated 25.11.2015[7]); secondly, as a set of views, scientifically sound principles, common organisational requirements for the establishment of relevant activities (Military Medical Doctrine of Ukraine); thirdly, as a system of conceptual ideas

[1] Communication strategy No. 576-r in the field of preventing and combating corruption. (2017, August). Retrieved from https://zakon.rada.gov.ua/laws/show/576–2017-p#Text.

[2] The concept of development of mountain territories of the Ukrainian Carpathians No. 232-r. (2019, April). Retrieved from https://zakon.rada.gov.ua/laws/show/232–2019-p#Text.

[3] Maritime doctrine of Ukraine No. 232-r for the period up to 2035. (2009, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1307–2009-п#Text

[4] Military medical doctrine of Ukraine No. 910. (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/910–2018-п#Text.

[5] Decree No. 1148/2004 on the national doctrine of development of physical culture and sports. (2004, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1148/2004#Text

[6] Procedure for selection of state investment projects No. 571. (2015, July). Retrieved from https://zakon.rada.gov.ua/laws/show/571–2015-п#Text.

[7] Recommendations of the Parliamentary Hearings No. 827-VIII on the topic: "On the Military Medical Doctrine of Ukraine". (2015, November). Retrieved from https://zakon.rada.gov.ua/laws/show/827–19#Text.

and views on the role, organisational structure, and tasks for the functioning of the subject (National Doctrine of Physical Culture and Sports). The functions of the doctrine at the official level are called, firstly, the definition of strategy and main directions of further development (Maritime Doctrine of Ukraine); secondly, to be the basis for the development of regulations; thirdly, to be the basis for the development of guiding documents (Military Medical Doctrine of Ukraine); fourthly, to play the role of the bearer of concepts, conceptual ideas (National Doctrine of Development of Physical Culture and Sports). Notably, the official documents entitled "concept" and "strategy" are adopted at both the state and regional levels. For example, the Development Strategy of the Kyiv Oblast for 2021–2027 – approved by the Order of the head of the Kyiv Oblast State Administration No. 695 of November 29, 2019[1]; the Concept of territorial development of Kyiv Oblast – approved by the Order of the head of the Kyiv Oblast State Administration No. 591 of July 19, 2007[2]; Communication strategy in the field of prevention and counteraction to corruption – approved by the Order of the Cabinet of Ministers of Ukraine No. 576-r of August 23, 2017[3]; the Concept of training specialists in the form of dual education model – approved by the Order of the Cabinet of Ministers of Ukraine No. 660-r of September 19, 2018[4]. There are no documents called "doctrine" at the regional level. This can also be considered in favour of the dominant position of the phenomenon "doctrine" in the triad "doctrine – concept – strategy".

Analysis of scientific sources that address the distinction between the phenomena of doctrine, concept, and strategy gives grounds to believe that the views of scientists are not fundamentally different from the vision of the legislator [27]. Thus, V. B. Averianov, in his reflections on the new doctrine of administrative law, sees the concept of administrative torts, the concept of administrative sanctions, etc. in its system [28]. R. S. Melnyk explores the concept of "human-centredness" as one of the components of the doctrine of modern administrative law [29]. The clearest position in this regard is occupied by P. D. Barenboim, who insists that "doctrine" is a higher systematic development of an important problematic issue of law as against the term "concept" and therefore it may include

[1] Development strategy of Kyiv Oblast No. 695 for 2021–2027. (2019, November). Retrieved from http://koda.gov.ua/oblderzhadministratsija/publichna-informatsiya/strategiya-rozvitku-kiivskoi- oblast/.

[2] The concept of territorial development of Kyiv Oblast № 591. (2007, July). Retrieved from http://koda.gov.ua/normdoc/pro-skhvalennya-proektu-koncepcii-teri/.

[3] Communication strategy No. 576-r in the field of preventing and combating corruption. (2017, August). Retrieved from https://zakon.rada.gov.ua/laws/show/576–2017-p#Text.

[4] Order No. 660-r "On approval the concept of training specialists in the dual form of education". (2018, September). Retrieved from https://zakon.rada.gov.ua/laws/show/660–2018-p#Text.

several concepts [30]. Thus, the phenomenon of administrative law doctrine in relation to strategies, concepts, laws, and other acts of administration, research, investigations, proposals, conclusions, etc., serves as a theoretical dominant, a guiding principle, a complex attitude.

They are integrated into the doctrine, and the implementation of each of them ensures the implementation of the doctrine at large.

3. *The presence of integrative properties, i.e. determinant features of "doctrine" as an entity, which constitute the result of the interaction of its components*. Thus, the interaction of these components generates for the system (of administrative law doctrine) such properties that act as its features and do not constitute features of each of the components. A simple, schematic example of such solvation can be the interaction of traffic rules, building rules of the city of Kyiv, the rules of improvement of the city of Kyiv. Its results are the concepts of development of parking and pedestrian space, introduction of intelligent transport system, automated traffic management system, which are the features of the Kyiv City Development Strategy. In the given case, the integrative properties of the system "administrative law doctrine" should recognise: clearly and consistently unified framework of concepts and categories; continuous process of ordering of summative fragments in system components; generation of scientifically sound guidelines for the areas of law-making, rule-making, law enforcement; the ability to integrate individual scientific opinions into the public consciousness; to form knowledge about the unity and differences of the interacting components of the system; to determine the need to improve the quality of administrative law material; to ensure the evolution of the subject and theory of administrative law; to outline criteria of the uniform scientific approach to understanding of administrative law institutes and their elements; to stimulate the development of internal relations between administrative law by the relevant legislation and academic disciplines; to determine the laws of development of administrative law and to the principles of administrative law on their basis.

4. *The presence of contradictions within the system (between the components that formed it) that are the driving force of self-development of the system.* There are no phenomena in public life that are outside the process of development. The system of administrative law doctrine is no exception to this rule. The driving force behind its evolution are internal contradictions, conflicts, discrepancies, and contradictions. Their detection and launch of coordination mechanisms give rise to the dynamics of self- development of both structural components and the system at large. These processes are objectified in the problems of administrative legal framework and efforts to solve them. These are, for example, problems of harmfulness and public danger of administrative misconduct, administrative responsibil-

ity of a legal entity, the ratio of administrative process and administrative procedure, reform of the Code of Ukraine on Administrative Offenses, the legal nature of official relations, etc. Research on problematic issues of administrative law generates new knowledge and enriches the content of administrative law doctrine [31].

5. *The historicity of administrative law doctrine, the presence of development over time, the historical basis, and the experience of the past.* Correct, objective, impartial understanding of social transformations, changes in legal policy and regulatory support of legal practice, as well as the treatment of branch-related problems, is impossible without recourse to the historical and philosophical treasuries of administrative law. For modern Ukrainian administrative legal science, recourse to historical heritage has become an important source of updating and replenishing modern knowledge about the regulation of relations by means of administrative law [32; 33]. Borrowing the achievements of previous times, the science of administrative law is constantly moving forward [34].

CONCLUSIONS

The analysis of the studied literature allowed to make important generalisations about the understanding of the administrative law doctrine. Firstly, it testifies to the globality and universality of this category; secondly, the identity of the genesis of concepts and definitions used to interpret its content, characteristics, features, essence, attributes, qualities, etc.; thirdly, it allows to consider the doctrine of a systemic product of legal scientific interpretations developed and concentrated in the space of administrative law, which have gained a well-established understanding in the field of understanding legal phenomena. Administrative law doctrine is integrated by: a) an established system of views, ideas, and provisions generated by legal science and mediated by legal practice; b) the collective opinion of authoritative legal scholars on the main problems of legal regulation and other administrative phenomena; c) statutory material which reflects the principles and values of the state, local self-government, and civil society; d) a certain type of legal understanding, according to which a holistic administrative system functions and develops. Thus, the administrative law doctrine, as a systemic entity, provides the overall substantive unity of the administrative legal framework with help of its integrative properties, ensures its internal differentiation and organic dependence on the essence of law, the interrelation with forms of expression, informativeness, predictability, stability of elements.

According to the logic of historical development, one of the important conclusions of the study of the interaction of the components of the system of administrative law doctrine is the recognition of the feature of legal succession in local doctrines of administrative law, existing at different stages of its evolution. This integration feature, firstly, expresses the

inseparability of the process of cognition of administrative ideas, principles, theories, concepts, methods, and forms generated at different evolutionary stages, and secondly, ensures the preservation and organic implantation in modern understanding of all that was gained by predecessors. Each step of the science of administrative law is prepared by the previous stage and each of its subsequent stages is naturally connected with the previous one.

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THE SUBJECT OF ADMINISTRATIVE LAW AS AN «EVERGREEN»* PLOT OF ADMINISTRATIVE LAW SCIENCE

Abstract. *The article focuses on the problems of the subject of administrative law as a phenomenon, which is characterized by its topicality at all stages of the development and the formation of this area of public law.*

The aim of the article is to draw attention to the fact that lively discussions that are now underway on the subject of administrative law, and its components, may and should be able to finalize. Legal scholars should agree on what to consider the subject of administrative law and determine the social relations that constitute it. This, as opposed to the practices of precise disciplines, seems possible and appropriate.

Within the framework of administrative law, it has been established that an attempt at an unbiased and objective view of its subject matter is essential. This phenomenon is characterized by theoretical-methodological and systemic significance. This is not an exaggeration, as the subject, answering the questions what this branch of law is studying, actually aims at the enumeration, awareness, and understanding of the components – social relations, which are regulated by the norms of this branch of law. It is emphasized that the subject answers the question "what is being studied" in administrative law rather than "what has been studied" (retrospective view) or «what will be studied» (prospective view).

Unfortunately, it is not uncommon for the administrative law science to function «ahead of the curve», but rather post facto, trying to analyze what has already received the force of the legal decision of the subjects of power. This approach is not optimum. And, as it is noted in the article, it concerns not only the realization of state powers (in the broad sense) in one or other spheres of public life but also the development of administrative law as a science and academic discipline. To reform this sphere without preliminary involving specialists and wide public discussion means to question the results of such reform.

Special attention is paid to the identification of the distinctive features of the subject of administrative law, which include: the homogeneous nature of the respective social relations (otherwise, these social relations are regulated by several branches of law); the qualitative difference in social relations, which are part of the subject of administrative law; the need to take into account the Concept of Reform of Administrative Law of Ukraine, which significantly refreshed the scientific understanding of the subject of administrative law; the departure from the exceptional «managerial» nature of public relations, constituting the subject of administrative law.

Expansion or contraction of the subject matter of administrative law is presented. It seems that the expansion of the subject of administrative law should not become an objective in itself, an uncontrollable process in which the social relations that comprise it will be difficult to classify over time on the basis of certain common features and characteristics. At the same time, the dispersion of the subject of administrative law by the separation of legal entities from it and the claim to their independent status should not be subjective but should be justified to the maximum extent possible by the required legal science and law enforcement practice.

***Keywords**: the subject of administrative law, administrative law, the subject of public administration, legal relations, the Concept of Administrative Law Reform.*

Problem setting and its correlation with important scientific and practical tasks.

Recently, debates on the subject of administrative law have intensified among administrative scholars. The reasons for this trend are quite numerous, we will try to highlight the key ones:

– the modernization of the Basic Law of the State, which manifested itself in a number of amendments to the Constitution of Ukraine during 2014–2016 and, as a result, a certain renewal of constitutional law. Perceiving the understanding that administrative law is the "younger sister" of the constitutional law, when changes are made within the "family" they apply to all, in our case, the administrative law as well;

– the constant emergence of new social relations, which, if given a power public management component, require regulation at the expense of the norms of administrative law;

– the need for proper consideration of the Euro-integration aspirations of our state, which, among other things, should be manifested by the modernization of domestic administrative legislation, administrative and legal space as a whole;

– the new approach of the Ministry of Education and Science of Ukraine to the wording of the Single Admission Test for Master's Degree in the specialty 081 «Law»[1], which contains a number of innovative provisions that require updated approaches to the teaching of administrative law;

– the approval at the end of 2018 by the central executive authority imple-

[1] Про затвердження Програми вступного випробування: Наказ Міністерства освіти і науки України від 7 лютого 2018 р. № 115 // «Електронний ресурс»: Режим доступу: https://mon.gov.ua/ua/npa

menting the state policy in the field of education and science of an approximate list and description of the subject areas of research in the specialty 081 «Law»[1], which, we note, contains a number of areas of administrative law science, which play a positive guiding role in the implementation of scientific research in the field of administrative law.

A review of recent studies and publications that have addressed the problem.

The problems of the subject of the administrative law in their scientific practice were studied by such scholars as V. B. Averianov, O. M. Bandurka, D. M. Bakhrakh, Yu. P. Bytiak, K. S. Bielskyi, I. V. Boiko, V. V. Halunko, I. P. Holosnichenko, O. F. Yevtykhiiev, A. I. Yelistratov, V. L. Kobalevskyi, Yu. M. Kozlov, T. O. Kolomoiets, V. K. Kolpakov, Ye. B. Kubko, Ye. V. Kurinnyi, P. S. Liutikov, R. S. Melnyk, H. I. Petrov, N. B. Pysarenko, L. L. Popov, S. V. Pietkov, A. O. Selivanov, Yu. M. Starilov, S. S. Studenikin, and others. However, given the very nature of the subject matter of law, the subject of administrative law continues to be a relevant trend in scientific and practical research.

The aim of the study is to draw attention to the fact that the intense discussions that are currently ongoing on the subject of administrative law, its components, may and should find their logical realization. Legal scholars should agree on the subject of administrative law and decide on the social relations that constitute it.

Presentation of the research material and its main results. «A strong state requires powerful administrative law» – this is exactly how academician of the Ukrainian Academy of Natural Sciences N. S. Kuznietsova formulated her vision in the podium discussion «The subject of administrative law and its relationship to the subjects of legal regulation of other branches of domestic law», which was held on December 18, 2018, at the Kyiv National Taras Shevchenko University. It is rather difficult to argue with a reputable domestic legal expert. Indeed, it does. And I am convinced that the strength of the state is manifested, besides purely military or economic factors, also by the ability to properly ensure human rights and guarantee their protection. And in this regard, administrative law stands out among other branches of law for its maximum involvement in the implementation of state obligations to the individual.

Within the framework of administrative law, it is now important to seek an impartial, objective view of its subject matter. This phenomenon is characterized by theoretical-methodological and systemic significance. This is not an exaggeration, as the subject, answering the questions "What is studied by this branch of law?" actually aims at the enumeration, understanding, and comprehension of its components – social relations, which are regulated by the norms of this

[1] Про затвердження примірного переліку та опису предметних напрямів досліджень в межах спеціальності 081 «Право»: Наказ Міністерства освіти України від 28 грудня 2018 р. № 1477 // Електронний ресурс: Режим доступу: https://mon.gov.ua/ua/npa

branch of law. I emphasize that the subject answers the question "what is studied" in administrative law, not «what has been studied» (retrospective view) or «what will be studied» (prospective view). We understand that the history of administrative law provides answers to many questions, both past, and present, but the subject of this branch of law naturally modernizes in parallel with the renewal (change) of the form of the state, its administrative-territorial structure or political regime. On the other hand, the prospects for the development of administrative law are important as a point of research efforts, but they should not be perceived as an automatic component of the subject of administrative law. In other words, according to the author, the subject of administrative law is relevant "here and now", it reflects the state of perception of administrative law in its current state. In this part, we should agree with Ye. V. Kurinnyi that «the characteristics of the subject of administrative law are closely related to the main tasks that it faces at a particular stage of its development»[1].

To a large extent, the subject of administrative law is a derivative, stating a phenomenon in relation to the administrative law itself. In its turn, it is one of the fundamental branches of law in Ukraine, which is comparable to such branches as constitutional, criminal, civil law, and which defines the basic principles of administrative activities of the state, state bodies, and officials. Administrative law deals with an amount of legislation that significantly exceeds the scope of the legislation of any other branch of law. Based on the fundamental nature of administrative law, it is necessary to be aware of the role it plays in the entire legal system of Ukraine. The norms of administrative law regulate public relations in such spheres as the functioning of executive power, local self-government, public administration (regulation) in the sphere of economy, education, health care, foreign and internal affairs, defense, etc.

It is noteworthy that for a long time the main emphasis in the definition of administrative law was placed on the fact that it was a set of legal norms regulating public relations that arise in the process of the implementation of executive power, the exercise of public administration. Consideration was drawn to the unequal position of the State and of an individual, in which the former had many means to force the latter to act as it considered appropriate from the point of view of public interest. In general, the dominant view in Soviet times regarding the purpose of administrative law was that of A. I. Yelistratov, who argued that «administrative law aims to regulate relations between people in the sphere of state administration»[2].

[1] Є. Курінний, «Об'єкт та предмет українського адміністративного права: змістовна та аксіологічна сутність категорій» (2016) 1 Публічне право 43

[2] А. Елистратов «Основные начала административного права» в Юрій Шемшученко (голова редкол.) Антологія української юридичної думки. В 6 т. (Видавничий Дім «Юридична книга 2003) т 5, 72.

At the same time, gradually, largely with Ukraine's acquisition of the status of an independent, democratic state governed by the rule of law, after the adoption of the Basic Law of the State in 1996 and the elaboration of the Concept of Administrative Law Reform in 1998, this branch of law is increasingly evolving. The norms of administrative law contribute to the realization of the rights, freedoms and legitimate interests of citizens in the sphere of public administration and guarantee protection from possible violations and limitations by the state apparatus. A breakthrough in the definition and understanding of the social purpose of administrative law was the approach proposed by Professor V. B. Averianov in a number of publications in the late 1990s – early 2000s, where he defined this area of law primarily from the point of view of the person's priority in relations with the state, which resulted in the positioning of «human-centric» orientation of state activities. Accordingly, the subject of administrative law has also undergone changes: «Today, the need to revise the assessment of the nature of the subject of administrative law is objectively justified by the regularities of social development and, in particular, by the fact that in modern conditions the very ideology of the executive branch should gradually change – from the administration of the state by man and society to the service of the state to the interests of man and society»[1].

Gradually, such an ideology of perception of administrative law is gaining popularity and is more widely used in scientific, educational circulation and in practice. From this perspective, the position of A. O. Selivanov, formulated at the end of 2013, seems quite logical, according to which the essence of the development of democracy is determined by the ability of society to influence the authorities and demand that they serve their interests[2]. All this could not but affect the perception of public legal regulation, formulation of the concept of administrative law subject, the definition of its components.

In our opinion, the realities correspond to the definition according to which administrative law is a set of legal norms regulating public relations arising in the process of public management of economic, socio-cultural and administrative-political spheres of life, as well as in the process of ensuring the implementation and protection of rights, freedoms and legitimate interests of individuals and legal entities by the executive authorities and local self-government bodies.

I find it appropriate to pay attention to the following. At the end of the last century, a significant step forward in the development of administrative law was the emergence of the Concept of Administrative Law Reform. The starting element of such activity was the emergence of the Order of the Cabinet of Ministers of Ukraine dated May 12, 1997, № 257-r «On the creation of a working group to

[1] Вадим Авер'янов. Вибрані наукові праці. Юрій Шемшученко (ред.). (Ін-т держави і права ім. В. М. Корецького НАН України 2011) 268

[2] Анатолій Селіванов «Справедливість влади» Голос України (Київ, № 243, 2016) 6

prepare the Concept of Reform of Administrative Law and the draft of the Administrative Code of Ukraine»[1]. The working group was made up of qualified specialists, most of whom were recognized authority experts in the field of administrative law. This seems to be a classic approach that does not require excessive attention and discussion: first the idea, then the establishment of a team of authors, then the work and in the end – the result of this effort. And the collective developed the text of this concept. However, for the time being, it is worth mentioning this separately, because, unfortunately, today we are witnessing that such an organizational and legal approach to the search for ways to improve the law in general and administrative law, in particular, is becoming less and less frequently used. Often the science of administrative law functions not "ahead of the curve", but post facto, trying to analyze what has already obtained the force of the legal decision of the subjects of power. This approach does not appear to be optimal. And, I should note, it concerns not only the exercise of state power (in the broad sense) in certain spheres of public life, it concerns the development of administrative law as a science and academic discipline. To reform this sphere without preliminary involvement of specialists and wide public discussion is to question the results of such reform.

In this regard, S. V. Pietkov's point of view is fair, who claims «that the realization of steps to bring the Ukrainian legislation to world standards should take place in a comprehensive and coordinated manner and not create additional conflicts in the legal system of the country. The openness of this process should be ensured by a wide discussion with the public, the scientific community, and popularization of the authorities' legislative actions among the population»[2].

Constant scientific monitoring ensures the «prevention» of a one-sided view of the subject of administrative law, its constancy and invariability, makes it possible to take into account changes in public life, the emergence of new social relations, which objectively require settlement through administrative and legal instruments. One of the options for such monitoring is to periodically discuss these issues on the pages of the print media, during specialized scientific forums and the like.

The subject of administrative law is the totality of public relations, which are regulated by the norms of administrative law. In other words, it is what administrative law studies. It should be noted that the attitude towards the subject of administrative law largely

[1] Про створення робочої групи для підготовки Концепції реформи адміністративного права та проекту Адміністративного кодексу України: Розпорядження Кабінету Міністрів України від 12 травня 1997 року № 257-р // «Електронний ресурс»: Режим доступу: https://zakon.rada.gov.ua/laws/show/257–97-%D1%80

[2] С Пєтков, Предмет адміністративного права – константа в процесі трансформації суспільно-політичних відносин (2006) 1 Публічне право 37

depends on the attitude towards administrative law itself. Proceeding from this, it is advisable to cite some interpretations of the subject of administrative law made by well-known administrative scholars, which will allow one to draw conclusions regarding the evolution and modern understanding of this important component of the general part of administrative law.

According to Ye. V. Kurinnyi: «the subject of administrative law of Ukraine is a system of homogeneous social relations of regulatory and protective, material and procedural nature, in which the rights, freedoms, and obligations of participants of power and management activities or administrative and legal protection are realized»[1].

The author's team of the academic course on administrative law under the editorship of V. B. Averianov, defending the idea of a new doctrinal assessment of the subject of administrative law, within the framework of the academic course on administrative law considers the latter to be the public relations, which are formed under:

a) state management of economic, socio-cultural and administrative-political spheres, as well as in the process of exercising delegated powers;

(b) the activities of executive and local self-government bodies to ensure the realization and protection of the rights of citizens and legal entities and the performance of their duties;

(c) the provision by the executive authorities and local self-government bodies of various administrative (management) services;

d) the application of administrative coercive measures, including administrative liability;

(e) the exercise of jurisdiction by administrative courts;

f) intra-organizational activities of the staff of all state bodies, administrations of state enterprises, institutions and organizations;

(f) the performance of civil service or service in local self-government bodies[2].

It should be noted that such a vision of the last one and a half to two decades is dominant in the perception of the subject of administrative law. It is supported by many leading specialists in the field of administrative law. This is not a coincidence, because this approach takes into account the traditional "power and management" component of the subject of administrative law, and at the same time indicates the proper consideration of the «human-centric» component.

The author's team behind the textbook «Administrative Law» (Yu. P. Bityak, V. M Harashchuk, V. V Zui points out that the subject of administrative law is formed by the relations associated with:

(1) the activities of the executive branch; (2) the internal organizational activities of other State bodies, enterprises, institutions, and organizations; (3) the administrative activities of local

[1] Євген Курінний, Предмет і об'єкт адміністративного права України (Ліра лтд 2004) 34

[2] Адміністративне право України. Академічний курс. Вадим Авер'янов (голова ред. кол.). (Юридична думка 2004) т 1, 71

self-government bodies; (4) the exercise by non-State actors of their delegated powers; (5) the consideration by the courts of cases of administrative offenses[1].

Professor R. S. Melnyk's views on the subject of administrative law have recently attracted considerable attention from the academic community. Paying tribute to the purposefulness, argumentation of the researcher in defending his scientific positions, I emphasize that his vision, in general, corresponds to the ideology of European integration aspirations of Ukraine. The author clearly, and is worth to be supported in this, claims that:

«The concept of human-centrism, the focus on the practice of the European Court of Human Rights, Ukraine's European integration aspirations and the principle of the rule of law are only a part of the legal phenomena and categories that define the purpose of administrative law, determine the internal structure and form the subject of its regulation»[2].

At the same time, additional argumentation of the author's thoughts on the subject of administrative law is needed, which are reflected in the following:

– critique of the concept of perception of the subject and method of legal regulation as criteria for differentiating branches of law, its perception as «artificial and non-viable»;

– the attempt to level out (neglect) the developments of domestic researchers of the Soviet era, which do not even contain ideological layers: "… why the theoretical conclusions about the subject of modern Ukrainian administrative law contain ideas formulated during the totalitarian statehood, within which administrative law fulfilled conceptually different social tasks?

– placement of the " relations arising from the direct realization of power by the Ukrainian people" among the components of the subject of administrative law as well;

– the perception of regulation of factual actions of subjects of public administration, which, in R. S. Melnyk's opinion, do not cause legal consequences and are not accompanied by legal relations, as components of the subject of administrative law[3].

Indeed, the analysis of scientific thoughts on the problems of the subject of administrative law shows the multiplicity and ambiguity of this phenomenon[4].

A couple of important positions. It is impossible to disagree with the point of view of T. O. Kolomoiets who observes that «in the conditions of cardinal revision of positions of a modern domestic administrative-legal science the specific weight of scientists-legalists is concentrated on a subject of the

[1] Адміністративне право: підручник. Юрій Битяк (кер. авт. кол.) (Право, 2010) 28

[2] Р Мельник, «Предмет адміністративного права» (2018) 3 Право України 159–182

[3] Ibid.

[4] Адміністративне право України. Загальна частина. Академічний курс (за заг. ред. Олександра Бандурки) (Золота миля, 2011) 57

administrative law that one should recognize as justified, as the subject was and remains the basic (despite a variety of approaches of scientists-legalists to assignment of signs of any branch of the law, (their names, quantity) an attribute of the branch»[1].

As to the current account of the developments of the Soviet epoch's administrative scholars, O. I. Mikolenko's position deserves support, which is restricted to the proposal to use continuity in the science of administrative law. «Each step of the science of administrative law is drawn up by the previous stage and each of its next stages is naturally associated with the previous one. Borrowing the achievements of the previous epoch, the science of administrative law is constantly evolving»[2]. Also, N. B. Pysarenko's point of view is reasonable, which notes that «modern administrative law can be perceived as a branch, which must necessarily contain rules about: a) powers c) methods and procedure of protection of rights of individuals from violations caused by the illegal activity of the mentioned subjects»[3].

The reform of modern administrative law requires an appropriate attitude towards such an important object of its study as the subject of administrative law. First of all, it is necessary to highlight the distinctive features of the subject of administrative law, which include:

– homogeneous nature of the respective social relations

(Otherwise, these social relations are regulated by several branches of law);

– the qualitative distinction of social relations that are part of the subject of administrative law;

– the need to take into account the Concept of Administrative Law Reform in Ukraine, which significantly updated the scientific understanding of the subject of administrative law;

– departure from the exceptional «administrative» nature of social relations, which constitute the subject of administrative law.

From our point of view, the subject of administrative law is the social relations arising in the process of:

1) external organizational management activities of public administration authorities;

2) intra-organizational management activities of all public administration bodies and administrations of state enterprises, institutions and organizations;

3) public service activities of public administration authorities;

4) exercise of delegated powers by local government bodies and public organizations;

5) application of administrative liability measures;

[1] Т Коломоєць, «Адміністративно-процесуальне право – самостійна галузь національного права (в аспекті пошуку нової моделі предмету адміністративного права України)» (2016) 1 Публічне право 26

[2] О Миколенко, «Наступництво в науці адміністративного права» в Надія Писаренко (відп. ред.) Питання адміністративного права. Кн. 1 (Право, 2017) 54

[3] Н Писаренко «Процесуальні правові відносини у структурі предмета адміністративного права» Надія Писарекно (відп. за вип.) Питання адміністративного права. Кн. 2 (Оберіг, 2018) 55

6) exercise of jurisdiction of administrative courts[1].

Briefly describing the components of the subject of administrative law, it is necessary to specify the following. First of all, it should be noted that public administration bodies are essentially the bodies of public management that have been referred to as state administrations for a long period of time in the history of our state, as well as in the history of administrative law. A certain modernization of public administration (as compared to state administration) concerns both quantitative parameters (this also includes local self-government bodies) and substantive characteristics. It is a matter of preferential focus of public administration bodies on the implementation of the constitutional precept on the content and orientation of state activities, which are determined by human rights and freedoms and their guarantees. In other words, state administration no longer dominates the mind of the subject of administrative law. That is why we agree with I. P. Holosnichenko that «when raising the question about the subject of administrative law, it should be noted that today we can no longer unequivocally speak about it only as a matter of administrative relations, which are governed by its norms»[2].

External management activity of public administration bodies is the implementation of the competences of executive authorities and local self-government bodies in the field of public management of economic, socio-cultural and administrative-political spheres of life. Naturally, we are talking about relations between different public administration bodies and between them and natural or legal persons. The majority of relations arising in this segment of the subject of administrative law are characterized by the inequality of subjects, i.e. they occur according to the principle «power – subjection».

Intra-organizational management activities of the apparatus of all public administration bodies and administrations of state enterprises, institutions and organizations are public relations that arise within these bodies (for example, the Office of the President of Ukraine, the Supreme Court, the General Prosecutor's Office, state enterprise administration, etc.), in the course of distribution of powers between the head, his deputies, structural subdivisions, changes in the staff schedule, maintenance of official activity, etc.). The said activity ensures the stable state, optimal functioning of state bodies and enterprises, institutions and organizations owned by it. It should be noted that in the first case (external management activity) we are talking mainly about executive power bodies (plus local self-government bodies), whereas in the second case – about all branches of power.

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[1] Семен Стеценко Адміністративне право України (Атіка, 2011) 19

[2] І Голосніченко, «Оптимізація предмета адміністративного права» В Джужа О, Дзюба В, Стеценко С (ред) Адміністративне право і процес: шляхи вдосконалення законодавства і практики: наук.-практ. конф. (Київ. нац. ун-т внутр. справ 2006) 11

It is necessary to speak about public service activities of public administration bodies when it comes to providing various administrative (management) services. Precisely in this way, today's administrative and legal science defines the activity of public administration bodies to meet certain needs of a person, which is carried out at his or her request (registration, licensing, authorization, issuance of a certificate, etc.).

The exercise of delegated powers by local self-government bodies and public organizations is a component of the subject of administrative law, which involves the interaction of institutions of the state and the non-state sector, in which the latter (usually local self-government bodies) are entrusted by the state with certain powers in the field of public administration. The basis for the delegation is the norms of the law or a decision of the delegating subject[1].

The application of administrative responsibility measures is considered to be a necessary component of the activity of any state. It is a democratically-minded society that is not deprived of certain persons who violate specific rules of conduct concerning public order, property, rights, and freedoms of citizens, the established order of governance. For the purpose of an adequate response from the state (broadly speaking, from society), competent state bodies shall develop a procedure for bringing those responsible for committing an administrative offense to justice. In this part, it is important to note the existing proposals regarding the removal of administrative delinquency from the subject of administrative law. We consider such proposals premature. In this part, we agree with the opinion of T. A. Kolomoiets, who rightly notes that «realities are unlikely to unambiguously exclude administrative delinquency from the subject of administrative law. The analysis of available various sources does not give any grounds to speak about the formation of administrative-tort law as an independent branch of law with all inherent features of the branch»[2].

The exercise of the jurisdiction of administrative courts can be viewed as a real means on the part of individuals and legal entities to legally protect their rights, freedoms and legitimate interests that have been violated by public authorities. The Code of Administrative Procedure of Ukraine, which came into force on September 1, 2005, regulated social relations arising in the process of consideration of the above cases. The document (and the direction of administrative justice in general) is based on the implementation in practice of the rule of law, according to which human rights are a priority for the State, while the implementation and protection of human rights determine the content and

[1] С. Стеценко, «Сучасний погляд на предмет адміністративного права» (2016) 1 Публічне право 24

[2] Т. Коломоец, «Предмет административного права: к вопросу поиска нового формата в современной украинской административно-правовой науке» в Административное право: развитие теоретических основ и модернизация законодательства (Воронежский госуд.ун-т, 2013) 118

direction of the actions of public administration bodies.

It should be also noted here that not only traditional for administrative justice cases «person vs. state» constitute an array of administrative proceedings. In confirmation of the previously stated position on the process of modernization of the subject of administrative law, it should be noted that the understanding of administrative justice as one of the important components of the subject of this branch of law is being streamlined. As V. R. Shchavinskyi rightly points out, «administrative courts also consider cases where the state acts as a plaintiff, thus claiming that administrative proceedings protect not only the interests of the person but also to a certain extent the interests of the state»[1].

It is worthwhile to indicate our position regarding the expansion or restriction of the subject matter of administrative law. It seems that the expansion of the subject matter of administrative law should not become an objective in itself, an uncontrollable process in which the social relations that constitute it will be difficult to classify over time on the basis of certain common features and characteristics. At the same time, the dispersion of the subject of administrative law by separating legal entities and their claim to independent status should not be subjective in nature but should be grounded as much as possible in the required legal science and law enforcement practice.

Conclusions. Overall, in our opinion, in contrast to representatives of the precise sciences, where the degree of objectivity of certain facts does not require additional explanations, the humanitarians (and lawyers, among others) should negotiate. On the definition, the components, the characteristics of certain phenomena. Discuss, criticize, and argue – but to reach an agreement, come to a shared conclusion. Including the subject of administrative law.

Thus, the problem of defining the subject of administrative law is not accidentally defined in the title as «evergreen». It indeed requires processing, exchange of opinions among scientists, identification of trends and forecasting of development directions. It appears to be essential to the science of administrative law, it is vital to the law enforcement practice, it is significant for the educational process. We need to speak in categories aimed at finding ways to unify the approaches of different researchers, which, in the end, should lead to beneficial results.

[1] В Щавінський, «Держава як позивач у адміністративному процесі: сутність та відповідність природі адміністративної юстиції» (2015) 4 Публічне право 104

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ITALIAN EXPERIENCE OF THE ADMINISTRATIVE JUSTICE FUNCTIONING

Abstract. *The development of administrative legal proceedings in Ukraine determines the search for optimal ways to improve the system. Each country has its own strategy for the functioning of administrative justice, which depends on cultural, historical, national, integration processes, as well as the gradual formation of the legal system of a particular state. The main purpose of the study is to analyse the Italian experience of the administrative justice functioning. To achieve this goal, various theoretical methods are used. The method of legal forecasting allowed to identify areas for improvement of administrative justice in Ukraine. The author presents the concept and features of administrative justice operation in Italy in matters of protection of violated rights, freedoms and interests of individual and citizen by decisions, actions and omissions of the authorities; analyses the system and structure of administrative justice in Italy, its specialisation; features of some categories of public law disputes and delimitation of jurisdiction of administrative courts and general courts in resolving certain categories of administrative cases, features of their reading in administrative courts of Italy of first and appellate instance; powers of the Italian State Council in resolving public law disputes, and powers of quasi-judicial tribunals of Italy, which perform the functions of justice. It is revealed that the administrative courts of Italy are empowered with the rights to assess the activities of public administration. Based on the experience of other countries, including Italy, we can conclude that a well-built system of administrative justice can help protect the rights of Ukrainian citizens and the rule of law. But it is important not only to focus on foreign countries, but also to take into account the peculiarities of the legal system of Ukraine.*

Keywords: *administrative courts, public law disputes, public interest, administrative regulation, public authority, public administration body.*

INTRODUCTION

The basic rights and freedoms of citizens were established in the constitutions of many Western European countries before the middle of 19th century. This was the most important achievement of legal thought at the time. One of the most important elements of the modern rule of law is the institution of judicial control over the subjects of power, as the nature of their public authority management functions in society has created the preconditions for such control by the judiciary. In modern EU countries, the institution of administrative justice has gone through quite complex and ambiguous stages of its establishment. As a result, each EU country has created its own institutions for the protection of citizens' rights, taking into account historical traditions and the needs of social development. Control over the activities of public administration is considered to be one of the most important elements of ensuring the rule of law, efficiency of public administration and justice in modern society. Of particular importance is the judicial protection of the rights, freedoms and interests of citizens from unlawful decisions, actions or omissions of the public authorities. In most EU countries, the task of protecting citizens from unlawful actions of the state and control over acts, actions or omissions of the public authorities (public administration) is entrusted to the administrative justice authorities. By interacting with citizens, bodies of authority may violate the rights, freedoms and interests of individuals by their decisions, actions or omissions. Under these circumstances, the administrative court is the mechanism of legal protection of the rights, freedoms and legitimate interests of citizens violated by the bodies of authority in all cases of power and authority abuse by the public bodies and their officials.

The study of the experience of the administrative justice of Italy is especially relevant for Ukraine, as it perform not only the function of judicial protection of the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of public authorities, but directly have authority in the separation of powers, in particular, the administrative court of Italy participate in the development of draft regulations of the Government of Italy, the Parliament of Italy and the President of Italy, assist them in the exercise of their powers, perform coordinating functions, etc. The mechanisms of practical implementation of the principle of separation of powers with the direct participation of administrative court in Italy differ significantly from other EU countries, which have a classic model of administrative justice. The administrative court of Italy have passed a difficult historical path since their establishment, which preceded the creation of a united Italian state in the 19th century, and until their implementation in the system of government bodies established by the Republican Constitution of Italy in 1947.

The aim of the paper is to investigate the peculiarities of the functioning of administrative courts in Italy and resolve public law disputes in certain categories, which may be of considerable practical interest for domestic practice in the development and amendment of current legislation of Ukraine.

1. LITERATURE REVIEW

So, according to V. B. Averyanov, administrative justice is a system of judicial bodies (courts) that monitor compliance with the law in public administration by resolving in a separate procedural order of public disputes emerging in connection with appeals of individuals or legal entities to administrative authorities, local governments or their officials [1]. J. V. Lazur notes that administrative justice is a procedure for considering and resolving of public disputes arising in the field of administrative management between citizens or legal entities, on the one hand, and public authorities – on the other, carried out by judicial bodies specially created to resolve such disputes [2]. According to O. P. Ryabchenko, administrative proceedings are regulated by the rules of administrative law, the process of hearing by a special administrative court of a lawsuit in order to restore the violated rights and freedoms of participants in administrative relations, as well as to control the legality of acts and decisions of public authorities and local governments, as well as their officials [3].

O. Kuzmenko and T. Gurzhiy present their classification of views on the concept of "administrative justice". They point out that there are currently three main areas according to which it can be understood as [4]:

1) a special procedure for resolving administrative and legal disputes by courts and other authorised state bodies. Such position in the definition of "administrative justice" is shared, for example, by Yu. Shemshuchenko and V. Stefanyuk.

2) an independent branch of law, the purpose of which is to resolve disputes by courts between citizens and public authorities (administration) or between the governing bodies themselves (i.e. administrative proceedings). Such explanation of administrative justice is offered, for example, by G. Breban;

3) not only a special type of proceedings, but also a system of specialised courts or specialised litigation functions that carry out administrative proceedings.

V. R. Shchavinsky notes that administrative justice should be understood as a special procedure for resolving public law disputes through a system of administrative courts established to protect the rights, freedoms and interests of individuals, the rights and interests of legal entities in the field of public relations [5]. O. Sergeychuk characterises administrative justice as a mandatory element of the system of external control over the legality of acts of public authorities and their officials in part of their acts or actions (omissions) that violate the statutory rights of individuals or legal

entities provided by the system judicial authorities in the prescribed administrative procedure [6].

2. MATERIALS AND METHODS

To achieve this goal, general scientific approaches were used, the concepts and features of the administrative justice in Italy in the protection of violated rights, freedoms and interests of individuals and citizens by decisions, actions and omissions of the public authorities. The system and structure of the administrative court of Italy, its specialisation and features of hearing of some categories of public law disputes, etc. are analysed with the help of methods and ways of cognition of the object of research. To study this issue, it is necessary to use system analysis, the methodological basis of which is based on the dialectical method. The use of this method ensures a systematic approach to differentiation of the jurisdiction of administrative courts and general jurisdiction courts in resolving certain categories of administrative cases. The development of an effective theory for solving this is the task facing the doctrine of administrative law. In turn, the solution of this problem depends on the right goals and the right tools, which determine the complexity of the correctness of its description. Therefore, the analysis of the special aspects of the functioning of administrative justice in the administrative courts of Italy of the first and appellate instance, the powers of the State Council of Italy in resolving public disputes allows us to understand the relation between their components and their impact on the external environment. The comparative method was used to establish the contents of the powers of the quasi-judicial tribunals of Italy, which perform the functions of justice in the field of administrative justice. This made it possible to study the experience of the administrative court of Italy, which is especially relevant for modern realities of Ukraine. In addition, the comparative method was used not only to study the function of judicial protection of the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of the authorities, but also to substantiate that the Italian administrative court is involved in development of regulatory acts, and have direct authority in the system of separation of powers.

The use of the logical-dogmatic method together with the method of hermeneutics made it possible to determine the essence of administrative justice and some approaches to its functioning. Thanks to this approach, the scientific basis for the study of the legal basis of the organisation of administrative justice in Italy was determined. The outlined scientific visions are based on the principles of scientific unity of theory and practice, scientific objectivity, which includes the scientific results of the study, and does not make such results dependent on other subjective or objective approaches. Dominant, in the methodological sense, among all the

above methods is the method of comparative law, which allowed to conduct research and compare the functioning of the administrative justice of Italy.

The method of legal forecasting provided an opportunity to identify possible areas for improving the functioning of administrative justice in Ukraine. With the help of the modelling method, proposals aimed at improving the functioning of Ukrainian legislation in the functioning of justice were forecasted and developed. The comparative method allowed to conduct a comparative and analytical analysis of the norms of the Administrative Law of Italy and to conclude that it is necessary to introduce this institution in Ukraine. The method of analysis and synthesis helped to ensure the formation of basic concepts and categories of functioning of administrative justice. Consideration of the main approaches and various components should be based on system-structural, technological, functional and operational approaches, which are also the basis for creating the preconditions for the establishment of administrative justice operation. After all, the exercise of power and the implementation of the constitutional function of protecting the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of the state in the face of its public bodies is the main task of administrative justice.

Logical methods, in particular inductions, deductions, generalisations, etc. were the basis of the whole study. The use of the generalisation method allowed us to draw a general conclusion that the exercise of power and the constitutional function of protecting the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of the public authorities represented by its power entities is the main task of administrative justice, entrusted to the State Council of Italy, regional administrative tribunals and "quasi- judicial" authorities.

3. RESULTS AND DISCUSSION

3.1. Judicial system of Italy

The administrative courts in Italy as a tool to protect the rights, freedoms and interests of citizens from wrongful decisions, actions or omissions of public authorities and their officials appeared during the formation and development of administrative justice in Western Europe in early and second half of the 19th century. And in Italy, since the establishment of the State Council of the Kingdom of Sardinia in 1831, which later became the State Council of Italy. The administrative courts in Italy have gone through several stages of development, which allow us to speak about the significant role of Italy in the development of theoretical and practical approaches to the development of the institution of administrative justice. Currently, the institute of administrative justice in Italy is a well-developed system of legal and organisational norms and mechanisms designed to resolve public law disputes. Although the current Italian legislation does not contain a definition of administrative justice, this institution includes, in ad-

dition to administrative courts, a set of other governing institutions authorised by law to hear administrative cases to resolve various categories of public law disputes. Administrative courts play an important role in the system of governing institutions in Italy, as they are simultaneously at the junction of all three branches of government. First, they perform the functions of justice in administrative cases for appeals against acts of public administration under Italian law. Secondly, the State Council of Italy is an advisory body to the Government of Italy, which is the appellate court in appealing against decisions of the administrative court and within its advisory functions provides its opinion on the statutory list of bills and other regulations requiring its assessment as expert body in the field of law. Third, the Italian State Council participates in the exercise of legislative power, as it assists the Government in law-drafting activities.

Italian administrative justice has all the basic general features of administrative justice, but in structural terms it is carried out by established administrative and courts of general jurisdiction, individual statutory subjects of power, which will be discussed below. Such system has also been established in other European countries: France, Spain, Portugal. In addition, there are mixed forms where the functions of administrative justice are performed by both courts of general jurisdiction and special administrative courts (UK, Switzerland, Belgium). The Italian judicial system includes the Italian Constitutional Court, general and special courts, which include administrative courts. According to Article 102 of the Italian Constitution, justice is administered by courts of general jurisdiction, the activities of which are governed by the Judiciary Act; no new emergency or special courts may be established. Therefore, the administration of justice is entrusted exclusively to courts of general jurisdiction and special courts. The status of courts of general jurisdiction is established directly by the Constitution of Italy[1] and the Law "On the Judiciary" of January 30, 1941 No. 12[2]. Courts of general jurisdiction hear criminal and civil cases. The system of courts of general jurisdiction includes magistracy, tribunals, courts of appeal and cassation, juvenile courts, and supervisory courts. The system of general courts is headed by the Italian Court of Cassation (Corte di Cassazione), which is the highest court in civil and criminal cases and hears disputes over jurisdiction between general courts and administrative courts. A feature of the Italian judicial system is that public law disputes concerning appeals against acts, actions or omissions of public administration can be heard, depending on a certain category, by both administrative courts and general courts. The essence of the division of justice into general

[1] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

[2] Italian Law No. 12 "On the Judiciary". (1941, January). Retrieved from https://rm.coe.int/168070098d.

and administrative in public law disputes involving public administration is the specifics of the Italian legal system, and, above all, the existence of such concepts as legitimate interest (interesse legittimo) and subjective right (diritto soggettivo).

The distinction between the jurisdiction of general courts and administrative courts in appealing against acts, actions or omissions of the public administration is based on the division of public law disputes affecting subjective rights and legitimate interests. Italian administrative courts, including administrative courts, hear cases involving public disputes affecting the legitimate interests of individuals, and general courts deal with their subjective rights. Moreover, in certain cases defined by Italian law, the jurisdiction of administrative courts extends to disputes involving public administration, affecting the subjective rights of citizens (the so-called "exclusive jurisdiction"). At the same time, general jurisdiction court and administrative courts are endowed with different competence in hearing cases of appeal against acts of public administration. Courts of general jurisdiction may terminate acts of public administration bodies due to their inconsistency with the law. Administrative courts have the right to cancel and change them, extending the effect of previously adopted regulations to the legal relationship heard during the trial.

If it is impossible to determine the jurisdiction of a particular case of general courts or administrative courts, such jurisdiction is determined by the Court of Cassation of Italy. The existence of subjective rights and legitimate interests in Italy has historical roots, as the Law on Administrative Disputes of March 20, 1865 No. 2248[1] introduced the division of powers between the judiciary and the executive branches, when courts of general jurisdiction were empowered to hear disputes, related to the protection of civil and political rights, and public authorities were empowered to hear all other categories of administrative cases. The Constitution of Italy[2] mentions subjective rights and legitimate interests in three articles at once (Articles 24, 103 and 113), but does not define them or indicate the difference between them. Thus, in Italy, the legal doctrine has identified the differences between subjective law and legitimate interest, and law enforcement practice has attributed the specific circumstances of the case to a particular concept [7]. Subjective right belonging to an individual is absolute and subject to protection regardless of any factors. Subjective right is directly provided and protected by law, in respect of which all other subjects must adhere to the established behaviour [8]. The rights that are subject to absolute protection under Italian law include the right to life, the right to property, etc. The legitimate interest in Italy is not subject to absolute protection, it is the pursuit of some good and

[1] Italian Law No 2248 "On Administrative Disputes". (1865, March). Retrieved from http://www.aca- europe.eu/en/eurtour/i/countries/italy/italy_en.pdf.

[2] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

its implementation depends on another interest, the bearer of which is the public administration. The legitimate interest implies the obligation of the public body to act in accordance with the rules established by law and a person's right to demand compliance with it [9–11].

In the Italian legal literature, the following examples of legitimate interests are often cited. A citizen who participates in a public competition for a position in a public body has a legitimate interest. Interest in this case is the pursuit of good, which is a vacant position in this public body. The benefit in the form of a position is available to the public administration, and its transfer to the citizen depends on his professional qualities, level of training and other criteria on the basis of which the public administration makes a choice in favour of a particular candidate. The citizen, therefore, has not a subjective right, but a legitimate interest, which is at the disposal of the public administration [12]. Another example is Article 42 of the Constitution of Italy[1] which gives the public administration the right to forcibly confiscate privately owned objects in the public interest on condition of the payment of compensation (in particular, for the purpose of constructing certain objects for public use). The legislation in this case establishes the priority of public interests over the right of private property. In these circumstances, the legitimate interest of the owner, in respect of which the public administration has decided to forcibly seize the privately owned property, is for the expropriation procedure to take place in accordance with the law and for the public administration to fairly assess the property and pay compensation. In all other cases, the citizen's right to private property (for example, in relations with other citizens) is absolute, i.e. subjective right. Italian lawyers schematically reflect the subject of the differences between legitimate interests and subjective rights in terms of the level and form of legal protection. According to the level of protection, the subjective right is always protected, immediately and completely regardless of the behaviour of other subjects, and the protection of the legitimate interest is not carried out immediately and not in full, but in connection with the implementation of public interest by subjects of power that perform functions of public authority management [8]. The form of protection also differs. Subjective right is subject to protection by the enforcement or judicial authorities of compensatory or rehabilitative measures. The legitimate interest provides for the possibility of broader protection, which allows for the possibility of revoking a wrongful act, as well as obtaining compensation regarding the illegal actions of public administration bodies and their officials [8].

The possibility of obtaining compensation regarding the adoption of illegal acts by a public authority was provided for by Italian law relatively recently – after the adoption of the law

[1] *Ibidem*, 1947.

"Regulations on Administrative Justice" of July 21, 2000 No. 205[1]. This law added to the jurisdiction of the administrative judiciary the power to hear all public disputes concerning damages caused by decisions, actions or omissions of the public administration, while previously all matters of damages were heard exclusively by general jurisdiction courts. An important characteristic of the Italian judicial system is that it distinguishes between proceedings in general courts and administrative courts according to the criteria of "jurisdiction over monitoring of legality" and "material jurisdiction". The difference is that the court, endowed with "jurisdiction over monitoring of legality", has the right to hear the case only from the standpoint of application of a rule of law within the circumstances of the case. "Material jurisdiction" provides an opportunity not only to assess the actions of the parties in the case in terms of compliance with the law, but also to assess the feasibility of such actions. The administrative courts of Italy, which are endowed with "substantive jurisdiction", in considering public law disputes between individuals and public administration have the right to decide on the case based on the expediency of the public administration in adopting the contested act in certain circumstances, while the courts of general jurisdictions do not have the right to go beyond the jurisdiction to verify legality when making a decision. And only the Italian Court of Cassation, which hears the case as a last resort, is endowed with "substantive jurisdiction" and has the right to be guided in its decision by the principle of the expediency of the parties' actions.

3.2. The system of administrative courts in Italy

The system of administrative justice includes both judicial and "quasi-judicial" authorities. The judicial bodies of administrative justice of Italy include: 1) regional administrative tribunals; 2) The State Council of Italy (heads the system of administrative justice); 3) Council of Administrative Justice of Sicily. The "quasi-judicial" bodies of administrative justice in Italy are the Accounting Chamber, which has certain powers to hear public disputes in its field; provincial and regional tax commissions, which consider cases of taxpayers to appeal the decisions of tax authorities; patent litigation commissions; public water tribunals; regional commissioners for the liquidation of public facilities. For example, provincial tax commissions hear cases as a first instance, which can be reviewed by regional tax commissions. Decisions of tax commissions can be appealed in cassation to the Court of Cassation of Italy.

The system of judicial bodies of administrative justice includes the Court of Cassation of Italy. Although the Court of Cassation heads the system of general jurisdiction courts, it has the right

[1] Italian Law No 205 "Regulations on Administrative Justice". (2000, July). Retrieved from https://eu- ua.org/sites/default/files/inline/files/review-of-the-case-law-of-the-eu-court-of-justice-fields-covered-by- the-association-agreement-2018.1.1.eng.pdf

to set aside decisions of administrative courts on the grounds that the administrative court has no jurisdiction regarding the decision in the case. The system of administrative courts also includes the Presidium of Administrative Justice, a coordinating body of judicial self-government that takes care of the status of judges of administrative courts. In this paper special attention will be paid to the analysis of the peculiarities of the functioning of administrative courts. Italy has a two-tier system of administrative courts. The regional administrative tribunals are the courts of first instance, and the Italian State Council is the body that hears appeals against decisions of the regional administrative tribunals, which will be discussed below. In total, in Italy, twenty regional administrative tribunals, the jurisdiction of each of them extends to the respective region, provinces and communes within the structure of the region. The tribunals are located in the administrative centres of the regions. In nine regions, departments have been established outside the administrative centres of the region, which allow to consider cases in other largest cities of the region as well. In addition, in the administrative centre of each region several departments can operate at once, for example, in the administrative centre of Lazio – the city of Rome – there are three departments. Despite the existence of several departments within one regional administrative tribunal, the structure of tribunals remains the same. All divisions of regional administrative tribunals have equal powers, and cases are referred to them on the basis of an internal distribution, which is carried out by the chairman of each tribunal. Each tribunal must have at least five judges in addition to the chairman. Of all the regional administrative tribunals, only the Trentino-Alto Adige Tribunal has a special status. An autonomous division was established in Bolzano within the framework of this tribunal. The peculiarity of this department is that it hears all cases of appeals against acts of public administration related to the violation of the principle of equality of ethnolinguistic groups in the region – Italian and German. In addition, there is a special procedure for selecting judges for this autonomous department – it must be staffed by judges who speak both Italian and German, are attached to the autonomous department of the city of Bolzano for the entire term of office and cannot be later transferred to other tribunals.

The status of the State Council of Italy is that this body is not only the highest court in the field of administrative justice, an advisory body to the Government of Italy, but also a body that assists the President in out-of-court appeals against public administration. The exercise of judicial and extrajudicial functions by the Italian State Council is reflected directly in the structure of this authority. It has three judicial and three advisory departments. Each advisory department have two heads of the department and at least nine judges, who shall be called counsellors of state in the exercise of their powers in the

State Council, and each judicial department shall have two heads and at least twelve counsellors of state. Councillors of the State Council and judges of regional administrative tribunals belong to a single system of judges of administrative justice, in which counsellors of state are the most authoritative judges with appropriate qualifications and long experience in administrative justice. The status of administrative judges, their appointment, rights and responsibilities are established by the law "On the structure of administrative jurisdiction and staff of the Chancellery and subsidiary bodies of the State Council and regional administrative tribunals" of April 27, 1982 No.186[1], which establishes an exhaustive list of administrative judges have the right to participate in the administration of justice in appealing against acts of public administrations: 1) the Chairman of the State Council; 2) heads of departments of the State Council, heads of regional administrative tribunals; 3) counsellors of state; 4) advisers of regional administrative tribunals, first referents, referents.

The Judicial Bodies of Administrative Justice also include the Council of Administrative Justice of the Region of Sicily. The existence of this body is mainly due to historical reasons. The Statute of the Region of Sicily, approved by Legislative Decree of May 15, 1946 No. 455, was adopted a year before the Constitution of Italy[2], Article 23 of which provides that the central judicial authorities of the state must have their own special departments in the regions to address regional issues. The statute established the Council of Administrative Justice of the Region of Sicily. After the entry into force of the Italian Constitution in 1947, national and regional legislators decided not to abolish the Council, but to preserve it and subsequently adapt it to the provisions of the Constitution of Italy.

Today, the Council of Administrative Justice of the Region of Sicily performs advisory and judicial functions similar to the State Council. As an advisory body to the Government of the Region of Sicily, the Council provides its opinion on the draft regulations of the Government of the region. As a judicial body, the Council is a court of appeal regarding review of the decision of the Regional Administrative Tribunal of the Region of Sicily. Also, the Council of Administrative Justice has the right to send the case to the State Council only in cases where there is a possibility of disagreement between the judicial authorities of Sicily and the previously formed legal position of the State Council, which may deviate from the previously adopted legal position. Italian doctrine and jurisprudence treat the Council in two ways. On the one hand, it is perceived as a division of the State Council, located outside the

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

[2] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

location of its other branches – the city of Rome – but, on the other hand, it is an independent judiciary for the reason that judges of the State Council are appointed. Council of Administrative Justice of Sicily, removed from the State Council of Italy [13]. A special place in the system of administrative justice is occupied by the Presidium of Administrative Justice, whose status is established by the Law "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the State Council and regional administrative tribunals"[1] and is the coordinating body of the entire administrative justice system in Italy. The Presidium of Administrative Justice coordinates the activities of the State Council of Italy and the regional administrative tribunals. The status of the Presidium of Administrative Justice is similar to the status of the High Council of Magistracy, enshrined in Articles 104 and 105 of the Constitution of Italy. In particular, the High Council of Magistracy considers issues related to the appointment of judges to positions in general jurisdiction courts, their transfer and promotion, as well as the disciplinary liability of judges of general jurisdiction courts. The Presidium of Administrative Justice exercises similar powers to the High Council of Magistracy, but in relation to judges of administrative courts of Italy.

Among the wide range of functions of the Presidium of Administrative Justice are the development and adoption of proposals to improve the work of the State Council of Italy and regional administrative tribunals, inspection of offices and subsidiary bodies of administrative courts, consideration of dismissal of administrative court judges. The Presidium of Administrative Justice consists of the Chairman and six members of the Italian State Council, eight judges of regional administrative tribunals and four Italian citizens appointed by both chambers of the Italian Parliament: two members appointed by the Chamber of Deputies and two by the Senate. These citizens must belong to the university faculty and hold the positions of professors in the field of law or must be lawyers with twenty years of experience.

3.3. Jurisdiction of the administrative courts of Italy

Depending on the specifics of its own legal system, each state gives the courts a certain competence to hear cases in terms of appealing against wrongful decisions, actions or omissions of the public authorities. The jurisdiction of courts in most European countries is limited to the hearing of cases of compliance of public authorities' actions with national law. As a rule, the powers of administrative courts are limited to the possibility of recognising an act of public administration as inconsistent with applicable law. Thus, in France, the State Council acts as the first and last instance court on complaints about the repeal of decrees and regulations adopted by the Prime Minister, the President of the Republic and minis-

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals", op. cit.

ters. Article 184 of the Constitution of the Republic of Poland[1] stipulates that administrative courts are created to make decisions on compliance with the laws of public administration, decisions of local governments and regulations of local authorities. In Italy, the jurisdiction of administrative courts provides for the invalidation of acts of public administration, as in most European countries. At the same time, the peculiarity of the administrative courts of Italy is that they are endowed with broader powers, in particular, have the right to assess the appropriateness of public administration's actions, extend regulations to legal proceedings and rule all property issues when assessing acts of public administration for their compliance with applicable law. In addition, in some cases, administrative courts are endowed with powers that go beyond the protection of citizens' rights against wrongful acts of the power entities and are aimed at the effective functioning of the judiciary as a whole.

3.3.1. Types of jurisdiction of administrative courts

In general, the jurisdiction of the administrative courts of Italy is defined as the hearing of public law disputes related to the legality of acts of public administrations that violate the legitimate interests of citizens, the right to repeal this act and compensation for decisions, actions or omissions of public administration [12]. Such competence is called "jurisdiction to verify legality". Its characteristic features are the general nature of hearing of all public- law disputes concerning the protection of legitimate interests, the power to repeal acts and resolve all issues related to compensation and restoration of property rights. In addition, there is "exclusive jurisdiction" under which administrative courts have the right to hear cases of violation of subjective rights by acts of public administration. "Exclusive jurisdiction" and "substantive jurisdiction" are an exception to the statutory order of division of cases between administrative and courts of general jurisdiction. In general, when challenging acts of public administration, there is a "jurisdiction over monitoring of legality", and other types of jurisdictions occur only in cases expressly provided by law. In addition, "exclusive jurisdiction" and "substantive jurisdiction" are characterised by the fact that they are used only in the protection of certain legitimate interests or subjective rights.

"Material jurisdiction" is the endowment of the administrative court with broader powers, within which the judge has the right not only to revoke the act, but also to "replace" it, as well as to take the necessary precautionary measures. By "replacing" an act, Italian law implies the power of a court to extend the limits of another existing legal act of public administration to legal relations that are the subject of legal proceedings. The legislator does not specify what other specific measures a judge may take, which allows him to conclude that the powers of a judge of a regional administrative tribunal and the Italian State Council are very wide when considering a case with-

[1] Constitution of the Republic of Poland. (1997, April). Retrieved from https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

in "material jurisdiction", as evidenced by many years of practice. However, it should be borne in mind that "material jurisdiction" applies to a very limited number of administrative cases in Italy.

Three types of jurisdiction extend their effect to different legal relationships. Let us take a closer look at each of the three types of jurisdictions. The main categories of cases heard in the administrative courts of Italy fall under the "jurisdiction over monitoring of legality", under which the courts verify the legality of an act of public administration. For administrative courts, there is no single piece of legislation that defines the list of cases that courts hear under "jurisdiction to verify legality". The list of issues heard by administrative courts in the order of "jurisdiction over monitoring of legality" is contained in a large number of regulations, many rules are referenced, and often on regulations that are outdated and do not reflect the current state of legal relations. Thus, Article 2 of the Law "On the Establishment of Regional Administrative Tribunals"[1], deals with the competence of these judicial authorities, which contains a reference to the Royal Decree "Adoption of a single text of laws on provincial administrative junta in the exercise of judicial functions" of June 26, 1924 No. 1058. The provincial administrative junta has ceased to exist since 1968. Regional administrative tribunals were created instead of junta, but the legislator in the text of the new law only made reference to a de facto invalid act, assigning junta powers to tribunals. In addition, since 1924, the nature of legal relations has changed radically, and in the 21st century it is not so easy to apply the law of 1924, adopted at a time when Italy was a monarchy and was already burdened by the fascist dictatorship.

In this regard, courts often refer not to outdated provisions of law, but to the general rules according to which the administrative court has the right to accept for hearing a statement of claim to appeal against an act of public administration if it violates the legitimate interest. The administrative court is not entitled to accept the statement of claim for hearing only if the case is under the jurisdiction of general courts or "quasi-judicial" authorities. The text of the laws on the State Council lists the main bodies of public administration, whose acts can be heard in the administrative courts of Italy to verify their legality in connection with the filing of an administrative lawsuit. Regional administrative tribunals in Italy consider as the first instance claims for appeals against acts of power entities: 1) community councils; 2) provincial boards; 3) mayors of communes; 3) presidents of regions; 4) interregional public authorities (public authorities include regional authorities, provinces, communes, any state organisations that

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

provide medical benefits, pension and other public services to the population); 5) territorial public authorities of the region; 6) central public authorities. The above list does not include the legislative bodies of the Republic and regions. Administrative courts do not have the right to hear cases as a court of appeal against the provisions of the laws of the Republic and regions. This follows directly from the provisions of the Constitution of Italy[1]. So, in accordance with Art. 134 of the Constitution of Italy, the Constitutional Court has jurisdiction over all disputes over the constitutionality of the laws of the Republic and regions, which may be declared unconstitutional by a decision of the Constitutional Court. This category of public law disputes is not subject to other types of judicial control.

With regard to the laws of the regions, the Italian Constitution provides for a special procedure for their appealing. According to Article 127 of the Constitution, if the Government of the Republic considers that a law passed by a regional council is outside the competence of the region, it may raise the issue of constitutionality before the Constitutional Court of Italy within sixty days of its publication. The provisions of Article 127 of the Italian Constitution have been developed in the legal positions of the Italian Constitutional Court. Thus, in one of the decisions of the Constitutional Court it was noted that the State Council has no right to consider the constitutionality of regional law in accordance with the legislation of the Republic and thus violate the regional right to protect its laws exclusively in the Constitutional Court. Outside the jurisdiction of administrative courts are acts of the President of the Republic, which in their legal force are equated to laws (legislative decrees) and which can be appealed only in the constitutional proceedings. Other acts of the President of the Republic that require countersignature of the competent minister or the Prime Minister are heard by administrative courts in the same manner as acts of the Government or individual ministers, as they are responsible for countersigned acts of the President of Italy. In addition to the list of public administration bodies whose acts can be challenged in administrative courts, Italian law distinguishes three other categories of cases covered by "jurisdiction over monitoring of legality": 1) admission of citizens to the civil service, its passage, dismissal from the civil service; 2) in cases related to the election process – elections to communal, provincial and regional councils; 3) in cases of refusals to issue passports.

This selective approach of the legislator, according to one of the Italian scholars A. Trava, is caused by the importance of these cases and the specifics of the functioning of administrative courts, where the judiciary understands much better the nature of these relationships, the nature of disputes than judges of general courts [14]. In addition, these areas of legal relations are regulated in detail by law, there are a number of spe-

[1] Constitution of Italy. (1947, December). Retrieved from https://legalns.com/download/books/cons/italy.pdf.

cial laws on these issues. The Law "On the Establishment of Regional Administrative Tribunals"[1] in relation to these categories of cases contains a reference to the fact that regional administrative tribunals when considering these disputes should be guided, first of all, by special legislation governing these issues. When exercising "jurisdiction over monitoring of legality", regional administrative tribunals may hear cases concerning acts of public administration that contradict the current legislation, as well as those acts adopted by a subject of power that does not have the competence to adopt them. In the first case, the tribunal revokes the contested act in whole or in part. In the second case, the administrative regional tribunal is empowered to revoke the contested act altogether and to indicate to the plaintiff another public body empowered to consider such matters. This is the main difference between administrative and courts of general jurisdiction. The latter – in case of violation of subjective rights – only have the right to invalidate the regulation and suspend its effect. The procedure for determining "exclusive jurisdiction" is fundamentally different from "jurisdiction over monitoring of legality". "Exclusive jurisdiction" of administrative courts is considered to be all categories of administrative cases that do not fall within the competence of courts of general jurisdiction over monitoring of legality of public administration's acts. Administrative courts are empowered to monitor the legality of public administration's acts that violate the subjective rights of citizens, in accordance with the law. Among the regulations that have given administrative courts the competence to monitor the legality of acts that violate subjective rights, we can mention the Legislative Decree "On new provisions on the organisation of labour and labour relations in public administrations, jurisdiction in labour disputes, administrative jurisdiction, issued pursuant to Article 4 of the Law of 15 March 1997 No. 59 of 31 March 1998 No. 80, Legislative Decree "On New Provisions on the Organisation of Labour and Labour Relations in Public Administrations, Jurisdiction in Labour Disputes, Administrative Jurisdiction" of March 30, 2001 No. 165, as well as the Law "Regulations in the field of administrative justice" of July 21, 2000 No. 205[2].

Among the objectives of "exclusive jurisdiction" of administrative courts, the most important are:

1) hearing of cases on appealing against acts of public administration

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

[2] Legislative Decree "On New Provisions on the Organization of Labor and Labor Relations in Public Administrations, Jurisdiction in Labor Disputes, Administrative Jurisdiction, Issued pursuant to Article 4 of the Law of March 15, 1997 No. 59". (1998, March). Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

regarding vacancy filling and passing of civil service;

2) monitoring of the legality of acts of public administration on the provision of public services, the list of which includes state lending and insurance, state property, provision of medicine, transport services, telecommunications, electricity, gas services.

3) hearing of all cases related to acts of public administration in the field of construction and urban planning.

The "exclusive jurisdiction" of administrative courts is primarily determined by Article 27 of the Unified Text of Laws on the State Council, which contains a list of cases that should generally be heard in courts of general jurisdiction, but due to their specifics were removed from their jurisdiction and transferred to administrative courts. This category of administrative cases includes, in particular, cases of appeals against acts: 1) the establishment of the boundaries of communes or provinces; 2) in respect of road consortia, the activities of which affect the territory of several provinces; 3) on the refusal of the public administration to protect the rights of legal entities; 4) on the functioning of companies engaged in hydraulic works, the activities of which are provided by the state with the assistance of provincial authorities and interested organisations; 5) on the classification of provincial and municipal roads.

In contrast to "exclusive jurisdiction", "material jurisdiction", which allows the court to proceed from the expediency of a decision made by a public administration, tends to lose its significance over the years. In fact, the list of issues decided by administrative courts "on the merits" is reduced to a few articles of the Unified Text of Laws on the State Council and the Law "On the Establishment of Regional Administrative Tribunals". Cases that have retained significance and are heard by administrative courts in the order of "material jurisdiction" include appeals against regulations:

1) on allowing or prohibiting the creation of public charitable and educational institutions;

2) on merger, division, transformation, creation of consortia or other business associations with the participation of public administration, public institutions, as well as institutions equated to them;

3) on hospitalisation of disabled people;

4) regarding support of the mentally ill;

5) the prefect to take measures to regulate or prohibit the activities of harmful industries.

"Material jurisdiction" also extends to the hearing of regulations issued by the mayors of communes on public safety, construction, local police and hygiene. According to the law "On the establishment of regional administrative tribunals", the administrative court may: cancel the act due to its inconsistency with the law; replace it in whole or in part with another act; oblige the public administration to reimburse the damage or pay the debt incurred before the plaintiff

in connection with the adoption of a legal act, which was invalidated by a court of law. The possibility of "changing" the contested legal act is the possibility of the administrative court to extend the application of a similar existing act of public administration to the disputed legal relationship. The administrative court also has the right to invalidate the part of the contested regulation and to indicate the special conditions of validity of the uncanceled part of the same act. "Material jurisdiction" is considered in Italian doctrine as a restriction on the power of public administration [15].

3.2.2. Hearing of cases in the administrative courts of Italy of the first and appellate instances

The legal rules governing the procedure of administrative trial in the administrative courts of Italy are fragmented, as they are contained in a number of legislative acts. Hearing of cases in administrative courts is regulated primarily by the Italian Code of Civil Procedure. All special norms that establish the peculiarities of the procedure for hearing of administrative cases in administrative courts are contained in the Unified text of the laws on the State Council and the law "On the establishment of regional administrative tribunals". Many provisions of the Unified Text of Laws on the State Council extend their effect not only to the procedure of hearing of cases in the State Council, but also to the administrative procedures that exist within the process in the regional administrative tribunals. These regulations contain a large number of procedural rules. More than half of the norms of the law "On the Establishment of Regional Administrative Tribunals" are procedural norms. The regulation of procedural issues is thus not fully systematic, but at the same time very detailed, which certainly contributes to the lawful, fair and impartial judicial protection of human and civil rights.

When hearing cases of appeal against an act of public administration, the administrative court determines the existence of conditions under which it has the right to accept the statement of claim for proceedings. First, it is permissible only to appeal against acts of public administration that establish or terminate certain legal relations. In the absence of an indication of a specific act in the statement of claim, the court refuses to accept the statement of claim because the subject of the appeal is missing. The act of public administration can be expressed in its omission or so-called "silence". Thus, according to Article 21 of the Law "On the Establishment of Regional Administrative Tribunals"[1] a statement of claim aimed at challenging the "silence" of the public administration at the request of the applicant must be heard in court within 30 days (so-called "claims against omission of the public administration"). Such claims are heard by the court in a

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

simplified manner within a reduced period of thirty days. Second, the act of public administration must be an expression of the will of the public administration. Finally, both final and non – final decisions of the public administration can be appealed in administrative courts. A decision that has been appealed by a person out of court to a higher instance and in the order of which a higher instance has not yet made a decision is considered incomplete. The parties to the case by the administrative court are, as a rule, the public administration and a natural or legal person as a bearer of a legitimate interest. A body of public administration has the right to appeal in court an act of another body of public administration, if this act, in the opinion of its officials, limits its powers or otherwise violates the law. The defendant is always a body of public administration.

The legislation provides for the possibility of involving in the trial of third parties directly interested in the results of the administrative case. These include those who make and do not make independent claims on the subject matter of the dispute, if the court finds that the judgment may affect the rights and obligations of those who are not parties to the case. As an example of an interested person, we can cite the winner of a public competition, when the final decision of the public administration on the results of the competition is appealed by the person who lost it. In addition, any person interested in the process may take part in it if the court also finds that the review procedure affects the interests of the person. In the first instance, the administrative case of appealing the act of public administration is considered in the regional administrative tribunal. The Law "On the Establishment of Regional Administrative Tribunals" regulates in detail the jurisdiction of cases and their distribution between regional administrative tribunals.

There are three criteria for delimitation of jurisdiction: 1) according to the location of the public administration that issued the contested act; 2) within the scope of the act of public administration; 3) at the place of civil service by a civil servant in regarding whom the contested act was issued. According to the criterion of location of the body of public administration that issued the act, the administrative case is considered in the regional tribunal of the region in whose territory such body of public administration exercises its powers. If the act extends its effect to more than one area, the competent tribunal is the tribunal in whose territory the body of public administration that issued the act is located. In the event that the act extends to the entire territory of Italy, the competent court is the regional administrative tribunal of the region of Lazio, located in the city of Rome. According to the scope of the act, there are two possibilities for determining jurisdiction. The court of a particular region may be considered competent when the act extends its effect only to the territory of that region; if the act extends to two or more regions, the regional administrative court of Lazio will be competent.

The third criterion for distinguishing administrative cases applies only to public law disputes involving civil servants who defend their legitimate interests in court. A statement of claim may be filed by civil servants in the court of the region in whose territory the public administration body is located. In cases with inter-region or central bodies of public administration, the administrative case will be subject to the regional administrative tribunal of the Lazio region. At the same time, the defendant or any other participant in the proceedings has the right to demand recognition of the jurisdiction of the court. In this case, the person submits a request for consideration of the issue of jurisdiction to the State Council, and must reasonably indicate in which court, in his opinion, the case should be considered. The petition shall be filed no later than twenty days from the beginning of the proceedings or may be filed at a later date, when the territorial jurisdiction of the case will be revealed as a result of the submitted documents, of which the party filing was unaware. The petition cannot be submitted at the stage of decision-making by the court in an administrative case. If all parties agree to the request to transfer the administrative case to another regional administrative tribunal, the chairman of the tribunal shall refer the case to another court and notify the parties, who shall apply to that court within twenty days of receiving notice of the transfer to another court. In other cases, the court makes a decision to deny the petition or to transfer the case to the State Council for further determination of jurisdiction. The decision of the Italian State Council regarding the jurisdiction of an administrative case is binding on the regional administrative tribunals. If the State Council satisfies the request to postpone the case in another court, the plaintiff may send a statement of claim to the territorially competent regional administrative tribunal within thirty days from the date of the request satisfaction.

The Law "On the Establishment of Regional Administrative Tribunals"[1] pays special attention to the issue of distribution of cases between departments of one regional administrative tribunal, which has already accepted the claim. The chairman of the tribunal distributes cases between departments located both in the administrative centre of the region and in other cities of the region. The party to the case, considering that the statement of claim should be considered by the regional administrative tribunal located in the administrative centre of the region, should submit to the court in this case its objections.

The head of the regional administrative tribunal investigates the objections, hears the parties to the case and issues an order that is not subject to appeal. In

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

any case, the fact that the decision was made by a regional administrative tribunal located in the administrative centre of the region or located in another city may not be grounds for reconsideration of the administrative case. One of the key powers of the administrative court in handling the case is the ability to take measures to secure the claim. The administrative court, as well as the court of general jurisdiction, has the right to apply such measures to secure the claim as, for example, prohibiting the defendant or other persons to take certain actions in relation to the subject matter of the dispute. In addition, the administrative court is empowered to suspend the contested act of the public administration body until the moment of its decision in the administrative case and the closure of the proceedings. The plaintiff has the right to demand that measures be taken to secure the claim in connection with great damage and/or irreparable negative consequences caused by the adoption of an action or omission of a public administration body at the time of court proceedings, such as a court decision prohibiting payment. Measures to secure the claim are regulated in detail by the Law "On the Establishment of Regional Administrative Tribunals"[1]. Italian law also regulates the application of temporary precautionary measures by a court. These are the cases when, in case of extreme necessity, at the request of the plaintiff, the administrative court decides on the immediate entry into force of measures to ensure a temporary claim. After hearing the motions of one of the parties to the case to take measures to secure the claim, the regional administrative tribunal may order hearing of the administrative case on the merits. If the public administration body does not implement the preventive measures established by the court or partially implements them, the interested party may submit a request to the regional administrative tribunal to take action by the tribunal to implement preventive measures. The regional administrative tribunal has the right to intervene in the implementation of preventive measures to ensure the claim, indicating the procedure for their implementation. Italian law also regulates in sufficient detail and clearly the submission of evidence by the parties in an administrative case. They shall be filed within twenty days following the filing of the statement of claim, by the body that issued the contested act, and by other interested persons. The main evidence is documentary. The Italian doctrine assumes that individuals cannot be required to present evidence which they are unable to do. Documents, explanations of public authorities, etc. are recognised by law as admissible evidence in Italy. The procedure of hearing of the case in the administrative court provides for the possibility of cancellation by the public administration of the contested act during the trial before the beginning of

[1] Italian Law No 186 "On the structure of administrative jurisdiction and staff of the office and subsidiary bodies of the Council of State and regional administrative tribunals" of 27 April 1982. Retrieved from https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ITA.htm.

consideration of the administrative case. If during this period the public administration body cancels the contested act or brings it in line with the requirements of current legislation, the regional administrative tribunal closes the proceedings and distributes the costs between the parties in the administrative process. It is necessary to stipulate separately the terms of hearing of the case of claim by the administrative court. One of the main problems of the Italian judicial system is the unreasonable length of proceedings in court, which goes beyond reasonable time limits for hearing [16]. Italian law does not set a deadline for hearing of the case of claim and decision-making on it. Only the deadline for the beginning of the discussion of the statement of claim in court is set – two years from the moment of filing the statement of claim in court. The court itself may, at its discretion, postpone the commencement of proceedings within the specified period [17]. It is considered that the plaintiff withdraws his claim in the event that no proceedings take place within two years. Thus, only the agreement of the date of hearing can take two years, and the process itself can be stretched even longer. Shortened terms of hearing of the statement of claim are established only for a certain category of administrative cases. In this case, all procedural deadlines are reduced by half, including the appointment of the start date of the administrative case [18–20]. This category includes administrative cases related to decisions on the formation and operation of local governments, surety procedures for the design of buildings, distribution and execution of works of public importance, as well as decisions on the forcible seizure of land for public use.

The State Council is the appellate instance when considering administrative cases on appeals against acts of public administration. In exceptional cases, the State Council hears cases as the first and only instance. This occurs when appealing against acts of public administration related to the enforcement of decisions of general courts, when the execution of a court decision is entrusted to the central or public administration bodies of an interregional nature. The State Council also hears cases of special importance as the first instance, which are sent from the regional administrative tribunals to the State Council on the initiative of the Italian Government and with the consent of the parties to the proceedings. The procedure for hearing of administrative cases by the State Council as a first instance is similar to the procedure for hearing of administrative cases by regional administrative tribunals.

The main function of the State Council of Italy is to investigate appeals against decisions of regional administrative tribunals. An appeal against a court decision shall be filed within sixty days from the date of this decision by the regional administrative tribunal, and in disputes in cases related to the election process – within twenty days. Filing an appeal does not suspend the decision of the regional administrative tribunal, as the latter comes into force

from the moment of adoption. Only upon hearing of the appeal may the decision of the regional administrative tribunal be reconsidered. However, in the presence of a petition and in case of possible serious consequences in connection with the execution of the decision of the regional administrative tribunal, the Italian State Council has the right to suspend the decision of the court of first instance until the end of the appeal. The process of reviewing an appeal by the State Council against a court decision is as simplified as possible. On the appointed date for the discussion of the appeal, the responsible counsellor of state shall publicly announce the prepared report on the administrative case. Decisions of the State Council are made by approving them by an absolute majority of votes of state advisers of the department that investigates the administrative case. Advisers who have previously expressed their position regarding the advisory department on an issue that forms the subject of an appeal in an administrative case may not participate in decision-making and voting. Thus, counsellors of state who took part in the procedure of discussion by the State Council of the government bill, which was later adopted and became the subject of appeal in the State Council of Italy, are excluded from participation in the process.

The State Council of Italy may, by its decision on the outcome of the appeal, satisfy the appeal or refuse to satisfy it. Upon satisfaction of the appeal, the State Council may act of the public administration or return the administrative case for a new examination to the regional administrative tribunal. The case may be remanded only if the Italian State Council overturns the decision due to a violation of procedural law committed by the court of first instance, or if the regional administrative tribunal erroneously found no powers to investigate an administrative case.

CONCLUSIONS

The jurisdiction of administrative justice bodies is complex. The delimitation of competence between different bodies of administrative justice directly by the norms of the Constitution of Italy has avoided jurisdictional disputes between these authorities. In addition, the determination of the jurisdiction of public-law disputes by the bodies of administrative justice is determined by a number of legal acts of Italy. The main criterion for determining the jurisdiction of administrative courts is to appeal the act of public administration in violation of the legitimate interest. However, the current legislation of Italy establishes numerous exceptions to this rule, in many areas of legal relations there is a specificity of determining the jurisdiction of administrative cases.

The system of judicial bodies of administrative justice, the procedure of hearing of administrative cases of different categories, the legal status of "quasi-judicial" bodies of administrative justice, which are endowed by law with certain functions of justice, but which are not judicial authorities, were also defined. Exercise of power and fulfilment of the constitutional function of protec-

tion of rights, freedoms and interests of citizens from illegal decisions, actions or omissions of the state represented by its power entities is the main task of administrative justice, which is entrusted to the Italian State Council, regional administrative tribunals and "quasi-judicial" authorities. The division of jurisdiction between "quasi-judicial" bodies of administrative justice, administrative and courts of general jurisdiction was also determined, which allowed to clearly delineate the competence of different courts in order to most effectively protect the rights, freedoms and interests of individual and citizen.

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CIVIL–LEGAL SCIENCES

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FEATURES OF UPDATING THE CIVIL LEGISLATION OF UKRAINE IN THE FIELD OF THE RIGHT TO INFORMATION IN THE CONDITIONS OF DEVELOPMENT OF THE GLOBAL VIRTUAL ENVIRONMENT

Abstract. *Nowadays, the right to information stands out with its specific features of implementation and protection compared to the original approaches laid down in the Civil Code of Ukraine and related to the usual legal relations in the material, "physical" world. The study investigates the features of updating the civil legislation of Ukraine in the field of the right to information in the development of the global virtual environment, as well as the analysis of the concept of "virtuality" to identify the specifics of information relations. It is concluded that legal regulation in the field of information relations in general and the right to information, in particular, should be based primarily on traditional legal constructions and using the terminology inherent in civil law, and to establish adequate legislation for the challenges of the information society, it is necessary to clearly agree on the positions of scientists and legislators on the concept, content, features of information, specifics of information processes and systems, which is also discussed in the studies of other fields of science, i.e., philosophy, physics, cybernetics, etc. Attention is drawn to the fact that information in civil law is considered as a separate intangible object (Article 200 of the Civil Code of Ukraine), and in the Book Two of the Civil Code of Ukraine this object acquires the characteristics of personal intangible property with all its features. The author concludes that the understanding of the processes taking place in a developed virtual environment requires the coordination of positions on the provision and implementation, protection and defence of this right with European and global trends. Such factors led, among other things, to the need to update (recodify) the Civil Code of Ukraine. The author found that starting with the first one, almost every article of the*

Civil Code of Ukraine contains elements of information content, is information-filled, or related to information or information relations, information rights of participants in civil relations, which requires, in turn, clarification, legal consolidation and additions to the provisions of the updated code. The proposals expressed in this study are aimed at further research on the right to information and help to find an answer to the main question – what should be the updated legislation in the field of regulation of relations related to the right to information in the context of the development of virtual systems and networks, and taking into account modern European and world trends in the legal support of the processes that occur in the global virtual environment.

Keywords: *non-property law, international acts, virtuality, information relations, recodification.*

INTRODUCTION

At present, to lead a discussion that touches on the problems of updating the Civil Code of Ukraine[1] (hereinafter referred to as "the CC of Ukraine"), given the role of information as a phenomenon and as an object of civil rights in this process, information relations, virtuality, robotics, artificial intelligence, and even more so, a set of information rights led by the personal intangible right of the individual to information in the development of modern theories of virtuality and posthumanism, it is necessary to return to the origins of society and science of these concepts, as well as a number of others that accompany and supplement them, as well as to the studies of the head of the working group of developers of the current CC of Ukraine A. S. Dovhert, where the need and main directions of updating the civil legislation in Ukraine are substantiated [1; 2]. Explanation of the phenomenon of virtuality is also important from the standpoint of further search for the correct legal approaches to solving the issues of guilt and legal responsibility, protection of rights when it comes to causing harm by a person – a living being, and a machine, robot, or artificial intelligence generated by a person. The competition of ideas about the essence of "human" on the one hand and "cybernetic", "informational", "virtual", on the other hand, is currently at the forefront of science as never before, since it is in this century that many previously fantastic ideas associated with the above concepts find their implementation. In addition, legal science and practice cannot stay away from these truly global and comprehensive processes, as principles, tools, history and philosophy of law, centuries-old practice of exercise and protection of human rights, including the right to information, can and should serve as the basis for humane resolution of many controversial issues in the modern rapidly changing information world. As for information, as an object of civil law regulation, mention of it can be found in various institutions and provisions of civil law, but one should not forget that information is primarily an independent object of civil rights, and those

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

rules that govern information relations are still in the stage of development, the right to information is stipulated only in a few articles of the CC of Ukraine and its structural parts (Articles 200, 277–278; 302 of the CC of Ukraine)[1], but even under these conditions an independent institution of civil rights has developed in Ukrainian legislation – the right to information, which has prospects for further development. The above approaches were substantiated in a monograph on the regulation of information relations in 2006 [3]. Nowadays, information is also considered a component of a substantial number of personal intangible assets, which are protected by Book Two of the CC of Ukraine[2]. Thus, within the system of personal intangible goods that ensure the natural existence of an individual and his or her social existence, protected are the goods that have an information component, and the rights to them can be described as defensive. This group of rights includes: the right to information about one's health and the right to secrecy about one's health (Articles 285, 286 of the CC of Ukraine); the right to reliable information about the state of the environment, the quality of food and household items, as well as the right to collect and disseminate it (Part 1 of Article 293 of the CC of Ukraine); the right to a name and to change and use it (Articles 294–296 of the CC of Ukraine); the right to honour, dignity and business reputation (Articles 297, 298 of the CC of Ukraine); the right to express one's individuality (Article 300 of the CC of Ukraine); the right to privacy (Article 301 of the CC of Ukraine); the right to personal papers and the right to secrecy of correspondence (Articles 303–306 of the CC of Ukraine); the right of a person to conduct photo, film, television, and video shootings (Articles 307–308 of the Civil Code); the right to freedom of literary, artistic, scientific and technical creativity (Article 309 of the CC of Ukraine), etc., which are not currently enshrined, but may actually have individuals and legal entities. This refers to the turnover of rights, the probability of their economic, monetary valuation and contractual regulation, and personal intangible assets (name, honour, dignity, business reputation, health information) under no circumstances can have economic meaning and be freely transferrable. After the adoption of the current CC of Ukraine[3] in 2003, research and development of the mechanism of legal regulation and protection of personal non-property rights, including the right to information, became especially important for the entire spectrum of civil relations. Among the main achievements of the first private law codification of independent Ukraine is the settlement of relations in the field of personal non-property right to information of an individual within the Book Two of the CC of Ukraine, which positively influenced

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

[2] *Ibidem*, 2003.

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

the introduction of liberal ideas of all human rights, implementation of adequate legal mechanisms and protection of personal non-property relations. The developers of the draft of the current CC of Ukraine, and later the entire civil society, made a positive regulation of personal non-property relations, including information, which was either not carried out or took place outside the civil legislation, although its content should be consolidated precisely in civil legislation. Currently, the situation has radically changed, as after the adoption of the current CC of Ukraine, dozens of theses on personal non-property rights and various aspects of the right to information and information rights were defended, including several doctorate theses [4–8]. The desire to establish a true democratic society with comprehensive provision of fundamental, including informational human rights and freedoms, found expression in 1990, in the Declaration of State Sovereignty of Ukraine[1], and the Book Two of the CC of Ukraine[2] in general became the embodiment of morality, justice, self-worth of each particular individual, each of its articles took into account the progressive provisions of international human rights instruments: the Universal Declaration of Human Rights of 1948[3], the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[4] and others, civil codes of numerous highly developed countries. codifications of civil law, which significantly strengthened and updated the wording in which its rules are built. The provisions of the Constitution of Ukraine have led to changes in the understanding of human information rights from those received by the state to the concept of human rights, which are related to the very fact of its existence, i.e., relate to its fundamental properties, which fully complies with private law theory of natural law. In the years since the adoption of the CC of Ukraine, the idea that civil law both regulates information relations and protects the right to information and the information itself as an intangible asset has found unconditional support in the national doctrine; therefore, the provisions of the CC of Ukraine can and should not only protect personal non-property rights to information, but also engage in their further positive regulation.

Meanwhile, although the CC of Ukraine[5] currently contains a considerable set of provisions governing personal non-property relations in the field of the right to information and other information rights, it does not provide for a systematic presentation of legal material on personal non-property rights to in-

[1] Declaration of State Sovereignty of Ukraine No 55-XII. (1990, July). Retrieved from https://zakon.rada.gov.ua/laws/show/55–12#Text

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

[3] Universal Declaration of Human Rights. (1948, December). Retrieved fromhttps://zakon.rada.gov.ua/laws/card/995_015

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

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

formation and other information rights; therefore, there is little to say about the consistent provision of positive regulation of the content of personal non-property information rights. Moreover, in the new century, during the current CC of Ukraine, it did not have rules that would fully regulate information relations, taking into account the features of the virtual environment, new technologies, the needs of the global information society, the place of personal nonproperty rights to information in these circumstances, proposals for the implementation and protection of personal non-property rights to information of individuals and legal entities. The search for answers to these problematic questions constitutes the essence of this study, and proposals for their solution can be used as a basis for further research and be used to update civil legislation.

1. MATERIALS AND METHODS

To develop an idea of the phenomena stated in the title and briefly outlined in the introduction to this study, an idea of the theoretical trends related to the problems of virtuality, information, the right to information, information rights in an era increasingly called posthumanism, it is necessary to analyse not only the articles of modern legal scholars and their legislative initiatives, but also works on philosophy, psychology, sociology, biology, cybernetics, physics, journalism, literature and other sources, including books and movies in the genre of science fiction. These are the works of prominent scientists Peter Anokhin, Viktor Glushkov, Vladimir Vernadsky, Norbert Winner, Claude Shannon and many others, as well as works by classics of the 20th century, including the "golden age of science fiction" – Isaac Azimov, Alfred van Vogt, Clifford Simak, John W. Campbell, Hugo Gernsbeck, Paul Anderson, Alfred Bester, James Blish, Frederick Brown, Ray Bradbury, Arthur Clark, Arkady and Boris Strugatsky, films by directors such as James Cameron, Lana and Lilly Wachowski, Robert Zemeckis, Christopher Nolan, Steven Spielberg, Ridley Scott, Andrew Tarkovsky, George Lucas, Vladimir Bortko, John Carpenter, Ron Howard, Luke Besson and many others, the work of modern science fiction writers of the 21st century: Peter Watts, Ken McLeod, Chey Meville, Peter Hamilton, Karl Schroeder, Charles Stross, John Scalzi, Alastair Reynolds, Stephen Baxter, Adam Roberts, Anne Lecky, Lauren Buckets and others. [9–11]. Moreover, many words that we use nowadays to speak the modern language of yet another technological revolution and some of which are introduced into special legislation, were invented by science fiction: android, blaster, cyberspace, clone, spaceship, cryonics, multiverse, science fiction, posthuman, force field, superhero, telepathy, teleportation, etc. [12].

The methodological framework for studying the problems of the right to information in a virtual environment is the doctrine of civil law on these issues, international acts on information, objects of information rights, information rela-

tions, rights to information, provisions of the Constitution of Ukraine, provisions of Ukrainian and foreign civil legislation. Special attention is paid to the practice of the ECtHR, namely disputes over the right to information: the freedom to receive and impart information, for example, Ahmet Yildirim v. Turkey, 18.12.2012; on freedom of the media (for example, Lingens v. Austria, 08.07.1986; Times Newspapers Limited v. the United Kingdom, 10.03.2009); on freedom of scientific activity and access to the Internet (Sorguc v. Turkey, 23.06.2009; Ahmet Yildirim v. Turkey, 18.12.2012); access to public information (Leander v. Sweden, 26.03.1987; Gaskin v. The United Kingdom, 07.07.1989) and many others.

2. RESULTS AND DISCUSSION

2.1 Features of the term of "virtual"

An insight into the meaning of the term "virtual" suggests that it has many meanings. Virtual is both "conditional" and "possible", "imaginary", "potential", "real". The word itself appeared in the early Byzantine philosophy of the 2nd century, has Latin roots and means an object or state that does not really exist, but may arise under certain circumstances (which emerge due to software), in philosophy the term "virtuality" is known since the 13th century and is attributed to Thomas Aquinas, who argued that a person is a combination of body and soul; in the information society, the term "virtuality" acquired a new meaning, which is associated with the so-called virtual reality and is understood in philosophy, psychology, aesthetics and culture in general as a certain state in which the subject loses the difference between real and constructed (virtual) world, which is a feature of consciousness and perception of the subject [13].

This concept is mentioned when terms such as "post-humanism", "post-humanity" are brought up. Therefore, it is important to take this into account in legal science which, in a broad sense, should be based on morality, ethics, human psychology in society. The world generated by the human imagination can be described as conditional or possible, which creates a certain image, which can be implemented in a particular form under certain conditions. Since it is necessary to convey this image to society, its individual representatives, it is embodied in human society in signs that carry the meanings conditioned in it and are broadcast in this form. Linguists and philosophers believe that it is important not only to understand the meaning of signs, but also their relationship for learning in human society to become the property of the culture of each individual. Thus, the images seen in films are perceived as real and sometimes it takes some effort to understand that they are virtual. The image is in fact a form of reflection of the surrounding reality, which is generated by human mental activity.

It is extremely important to remember that the very phenomenon of virtuality did not emerge with the advent of certain technical devices or with the invention of computers, but, most likely,

with the advent of the sign system of humankind. Today, scientists around the world are asking questions regarding the virtualisation of the material world or the materialisation of the virtual one. Related to this are some additional questions – what in general is virtuality, which is called a phenomenon of modernity; is virtuality related to human nature, in particular, to its mental component; what the nature of virtuality is, etc. Virtuality as a subject of study is so interesting that it causes, among other things, a considerable emotional response in people's minds, becomes the basis of literary works, films, inspires artists and is reflected in philosophy, sociology, cybernetics, psychology, etc. Cybernetics, mathematics, physics, and philosophers made a special contribution to the study of the phenomenon of virtuality in the 20th and 21st centuries. Thus, with the advent of the new century, one central problem has emerged that requires a modern explanation – what is virtuality and what are the features of the virtual world, if there is so much controversy about it.

Experts, among other things, also pay attention to the historical conditionality and gradual change (improvement) of the human psyche as the main cause of virtuality, while technical devices, including computers, only contributed to the process of human understanding of nature, essence, which became especially noticeable in the era of the information society. One can agree that "…the fear it causes is each time more related to the nature of human themselves, the peculiarities of their psyche, which works to fulfil themselves as a person…", and that "…virtuality is a fundamental attribute of mental consciousness (a specific form of reflection of the surrounding reality)" [14]. At the same time, when it comes to scientific progress, not only enthusiastic voices of approval are always heard, but also the stern warnings of sceptics who point out the possible negative consequences of the use of the said progress. Discussions, for example, revolve around everything that is described by such a part of speech as "post". Thus, articles and television programmes, books and films are now filled more ever with the concepts of "post-industrial society", "post-modernism", "post-apocalypse", and even "post-science". Meanwhile, at the heart of all these concepts – new, previously unknown opportunities that can carry both positive and negative aspects.

It is believed that the word "posthuman" first appeared in the story of the classic of horror literature, "Beyond Time" by Howard Phillips Lovecraft, which was published back in 1936, and Lovecraft interprets this concept somewhat differently than it is perceived today: the author uses it not to describe the transformation of humans, but to describe the beings who will come after us. Around the same time, the word "posthumanism" appeared – a trend in philosophy which states that the evolution of human has not yet ended and after human should appear a superhuman [15]. This worldview recognises the inalien-

able human rights to improve human capabilities (physiological, intellectual, etc.) and achieve physical immortality [16]. Thus, as a principle, this could be formulated in law as follows: "Everyone has the right to improve their human capabilities, physiological, mental and intellectual, in order to achieve physical immortality", if it did not sound too fantastic to a modern person. As for immortality in networks, it is an even more controversial subject today, related to the problems of neurolink and "electronic immortality". The difference between transhumanism and posthumanism remains debatable to this day.

2.2 Analysis of the right to information

The right to information has become one of the greatest achievements in the process of human development and today belongs to the personal intangible rights of an individual, to which the Book Two of the CC of Ukraine "Personal Non-Property Rights of an Individual"1 is dedicated. Since Book Two comprises three chapters ("General Provisions on Personal Non-Property Rights of an Individual", "Personal Non-Property Rights Ensuring the Natural Existence of an Individual", "Personal Non-Property Rights Ensuring the Social Existence of an Individual"), it is important to define the place of the right to information in the structure of this Book. Therewith, a significant array of rules governing the personal non-property right to information is contained not only in other parts of the CC of Ukraine, but also in other acts of civil legislation[1].

The advantages of the current CC of Ukraine in terms of regulation of relations in the field of information rights are as follows: the information is mentioned in general provisions on personal non-property rights of an individual, which means that the concept is consolidated, as well as its types, content, guarantees and ways to protect personal non-property rights to information; composition of articles on the right to information on the same principles according to a holistic approach to understanding the subject and method of regulating public relations; consolidation of provisions on this right in the appropriate order, etc. Thus, the Book Two contains provisions that regulate personal non-property relations regarding the right to information based on such principles as dispositivity, legal equality, inadmissibility of interference in the private life of an individual; judicial protection of any violated civil right; as well as justice, good faith, reasonableness, etc. These principles equally apply to all other personal nonproperty rights.

With the rapid development of the information society in the 21st century, the time has finally come for Book Two

[1] Law of Ukraine No 48 «On Information». (1992, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2657–12#Text; Law of Ukraine No 34 «On Personal Data Protection». (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2297–17#Text; Law of Ukraine No 32 «On Access to Public Information». (2020, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2939–17#Text

to become a system-forming factor for all other pieces of legislation governing information relations, and especially for those relating to the personal inalienable right to information, whether they have a complex or private nature. In the Book Two, the personal non-property rights of an individual are divided into those that ensure natural existence (Chapter 21 of the CC of Ukraine)[1] and those that ensure its social existence (Chapter 22 of the CC of Ukraine). Meanwhile the right to information can be attributed both to Chapter 21 – "Personal Non-Property Rights that Ensure the Natural Existence of an Individual" and to Chapter 22 – "Personal Non-Property Rights that Ensure the Social Existence of an Individual", because a person has the right to information from birth, and in the process of social existence expands its capabilities. In addition, this right may belong to legal entities, which also needs to be standardised in the process of updating the CC of Ukraine in terms of changing the title of Book Two to "Non-property rights" or "Personal non-property rights".

As for personal non-property relations that develop regarding the information, in the process of applying the relevant provisions of the CC of Ukraine, certain changes have occurred[2]. Thus, the presumption of "integrity" was excluded from the current CC of Ukraine, according to which negative information disseminated about a person was considered unreliable until proven otherwise (while the judicial practice on the protection of honour, dignity, and business reputation was based on the fact that that the obligation to prove that the disseminated information is reliable rests with the defendant[3], and the Law of Ukraine "On Amendments to the Law of Ukraine "On Prevention of Corruption" regarding Corruption Detectors"[4] adopted in 2019 is still under discussion; the regulation of relations for the dissemination of information obtained from official sources was clarified; dissemination of informa-

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

[2] Law of Ukraine No 47 «On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offences». (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/720–20#Text; Law of Ukraine No 48 «On Information». (1992, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2657–12#Text; Law of Ukraine No 15 «On Amendments to the Civil Code of Ukraine on the Right to Information». (2005, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3261–15#Text; Law of Ukraine No 32 "On Access to Public Information". (2020, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2939–17#Text

[3] Resolution of the Supreme Court in the Composition of the Panel of Judges of the First Judicial Chamber of the Civil Court of Cassation in Case No 522/14156/14-ts. (2018, February). Retrieved from <http://reyestr.court.gov.ua/Review/72269115

[4] Law of Ukraine No 140-IX "On Amendments to Certain Legislative Acts of Ukraine to Ensure the Effectiveness of the Institutional Mechanism for Preventing Corruption". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/140–20#Text

tion obtained from official sources; the list of personal non-property rights in the field of medical care3 has undergone certain changes that now require clarification in the context of the right to information, namely in matters of sterilisation of a minor individual, reproductive rights, and several other issues.

Information related to intellectual activity can have various forms of its external reflection, suitable for perception directly by a person or with the help of various technical devices in a virtual environment. As a result of intellectual activity of the person the information can be personified both in an independent object, and in the form of results of intellectual creative activity, to be protected by system of the intellectual property right. Today there is some uncertainty between the system of intellectual property rights and the information capabilities of the individual regarding the free collection, storage, dissemination and use of information, while the monopoly right of the subject of intellectual property must undergo numerous restrictions (in time, space, etc.)

In general, a gradual weakening of the regulatory system of intellectual property protection should become the trend of development of legal regulation of intellectual activity in the information society, in order to ensure a balanced combination of interests of creators and their successors. This is important primarily in matters of remuneration by the creator and the interests of members of society in exercising their right to access, receive, disseminate, and use information. Here are some examples. Thus, essential information is embedded in the commercial (brand) name. All requirements for this object of intellectual property rights are "informational" in nature. It should give an objective, reliable, complete, up-to-date idea of what is additional to the information, which is the name of the person – the designation of the person, which may be part of the name of the person or be a fictitious name or abbreviation. This explains foreign approaches, for example, in the United Kingdom, when it comes to the mandatory disclosure of information about a person by indicating the person's name and address. This refers to the responsibility of each person who uses such a name to indicate, taking into account the legal status, the name of the corporation, or the name of each partner or the name (individual) of the person and other information.

The essence of such results of intellectual activity as know-how, business information, and commercial secrets refers to information per se. On 8 July 2016, Directive (EU) 2016/943 of the European Parliament and of the Council[1] concerning the protection of undisclosed know-how and business information (trade secrets) against their unauthorised acquisition, use and disclosure was adopted. The adaptation of Ukrainian

[1] Directive of the European Parliament and of the Council of the European Union 2016/943 on the Protection of Confidential Know-How and Business Information (Trade Secrets) from Illegal Acquisition, Use and Disclosure. (2016, June). Retrieved from http://base.garant.ru/71615160/#ixzz6Y1vvv6EQ

legislation is currently aimed at revising it to launch new approaches to the protection of trade secrets and know-how. A trade secret can actually comprise two types of information – non-creative information (this is the so-called business information about the number of employees, customers, etc.) and creative information. Since Directive 2016/943 contains a definition of a trade secret, which corresponds to its definition in the TRIPS Agreement[1], it can be considered and consolidated in Chapter 15 of the CC of Ukraine[2], which deals with intangible assets by a separate rule, or supplement Article 200 of the CC of Ukraine, define this object in Article 505 of the Civil Code, as proposed by the authors, and to supplement its content with the provision that a trade secret includes information in the form of know-how and business (commercial) information. It is also logical to make provision for changes in the title and content of Chapter 46 of the CC of Ukraine, which would be called "Intellectual property rights to know-how", thereby supporting the proposals of intellectual property experts who believe that such changes will add business information to the objects of intellectual property rights and contribute to the harmonisation of approaches to the protection of know-how in Ukraine. The right to information can also be the subject of various types of agreements, which has been repeatedly emphasised in the literature [17]. Since information has an intangible nature and is embodied in various forms of its external expression, it should be noted that within the framework of civil turnover, there can be a turnover of rights to information as such, and not just turnover of the information itself, for example, the provision of information by the acquirer to the copyright holder. In addition, such rights can be obtained by the acquirer for a certain period – then it would refer more to the provision of information rights, indefinitely or on terms specified in the contract.

An important contribution is made to the understanding of law in the field of personal non-property information relations in the process of making decisions by the Constitutional Court of Ukraine and other judicial bodies. This primarily refers to the protection of the right to information and other personal non-property information rights, in particular, to the constitutional interpretation of the concept of "information about a person's private and family life"[3]; to the decision of the Constitutional Court of Ukraine on the recognition of certain provisions of Sub-paragraph 1 of Paragraph 40 of

[1] World Trade Organization (WTO) Agreement No 981_018 «On Trade-Related Aspects of Intellectual Property Rights». (1994, April). Retrieved from https://zakon.rada.gov.ua/laws/show/981_018#Text

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

[3] Decision of the Constitutional Court of Ukraine in the Case on the Constitutional Petition of Zhashkiv District Council of Cherkasy Region Regarding the Official Interpretation of the Provisions of Parts One, Two of Article 32, parts Two and Three of Article 34 of the Constitution of Ukraine No 2-rp/2012. (2012, January). Retrieved from https://zakon.rada.gov.ua/laws/show/v002p710–1.

Section VI "Final and Transitional Provisions" of the Budget Code of Ukraine on the right of the Ministry of Finance of Ukraine to receive information containing personal data[1]; to the protection of honour, dignity, and business reputation[2].

A number of aspects of personal non-property information rights are covered by the content of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, respectively the case law of the ECHR applies in particular to: protection of personal data (Rotaru v. Romania, 04.05.2000); access to personal information (Odievre v. France, 13.02.2003); secrecy of health information (Z v. Finland, 25.02.1997); the right to information on environmental risks or accidents (Tătar v. Roumanie, 27.01.2009); freedom to receive and impart information (Ahmet Yildirim v. Turkey, 18.12.2012); freedom of the media (Lingens v. Austria, 08.07.1986; Times Newspapers Limited v. the United Kingdom, 10.03.2009); access to public information (Leander v. Sweden, March 26, 1987; Gaskin v. The United Kingdom, July 7, 1989); electronic messages (emails) (Bărbulescu v. Romania, 05.09.2017); use of the Internet (Copland v. The United Kingdom, 03.04.2007), and many others. Among the acts of the *acquis communautaire* concerning the right to information, mention should be made of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC)[3].

In the process of updating the CC of Ukraine[4] it is necessary to pay attention to some general provisions that have an impact on the development of personal information non-property rights. This primarily concerns the principles of their regulation, the features of their implementation and guarantees; places in the system of all personal nonproperty rights; clarification and addition of the list of special ways to protect these rights; mechanism for ensuring the proportionality of their application, especially if the application of mechanisms for ensuring and protecting other personal non-property rights may lead, for example, to a restriction of the right to freedom of speech, the right to information, etc. The harmonious process of updating the CC of Ukraine cannot take place without the simultaneous introduction of changes

[1] Decision of the Constitutional Court of Ukraine in the Case on the Constitutional Petition of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine on the Constitutionality of Certain Provisions of the First Paragraph of Paragraph 40 of Section VI «Final and Transitional Provisions» of the Budget Code of Ukraine No 7-r/2018. (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/v007p710-18#Text

[2] Resolution of the Plenum of the Supreme Court of Ukraine No 1 «On Judicial Practice in Cases of Protection of the Dignity and Honor of Individuals, as well as the Business Reputation of Individuals and Legal Entities.» (2009, February). Retrieved from https://zakon.rada.gov.ua/laws/show/v_001700-09#Text

[3] Directive 2003/4/EC of the European Parliament and of the Council. (2003, January). Retrieved from https://eur-lex.europa.eu/eli/dir/2003/4/oj

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

and additions to other codified acts that govern personal information intangible relations, for example, the Family Code, the Code of Ukraine on Electronic Communications, etc. An adequate response to challenges of the modern information society should be to ensure the statutory regulation of contractual relations arising from personal information non-property objects, which, upon receiving an objective form, acquire signs of turnover. This refers to the solution of issues of ensuring the rights of the physical person to use such objects for the commercial purpose. Signs that personalise an individual, and the possibility of their commercial use is covered by the content of consolidated personal non-property information rights – powers of positive and negative direction and protection. Therefore, this does not refer to the use of the good itself, which is the information, but rather its projection on a material medium. Information itself as a personal non-property right remains a non-property good and it does not change in the process of commercial use.

Virtuality as a phenomenon and environment, where the right to information and other information rights are currently actualised and developed, is impossible to cognise without immersion in philosophical, historical, and artistic sources. The modern virtual world, among other things, includes information systems and networks. Hans Moravets also called the very human personality an information system or structure, believing that this definition becomes a reality if human consciousness is embedded in a computer and a certain scenario is simulated to prove that it is possible in principle. He argued that machines could become the receptacle of human consciousness and that machines could become human beings for any practical need, that is, a human could in fact be identified with a cyborg, and vice versa. [15] Meanwhile, humans described mechanical creatures long before the words "android" and "cyborg" appeared. History mentions, for example, the Catholic priest Albert the Great, who in the 13th century created a mechanical head that could answer questions, and Ephraim Chambers, a famous encyclopedist, in 1728 combined the Greek prefix "*andr-*" – "a human" with the suffix "*-oid*" – "to have a form, to be similar" to describe Albert's machine [18].

Finding the difference between the processes of "thinking like a human" and "thinking like a machine" was one of the tasks of Hans Moravets, who was mentioned above. Notably, at the same time with this research there was a development of the basic principles of an information society in combination with distribution of liberal perception of the world. Nowadays, it is a sacred human right to cultivate the right to life in a civil democratic society. The revision of the boundaries between a machine and a human has, as expected, led to the replacement of the question "who can think" with the question "what can think"; to take a decisive step towards determining the difference between a physical, real human body on one side of a computer screen and a body that is "represented"

in an electronic environment on the other side. These discussions should take place in the legal environment in order to more fully consolidate all possible information rights for the real subject of civil rights.

The state of affairs described in this study, according to researchers, necessarily "makes the subject a cyborg, because both of the described entities merge due to the technologies that unite them", which means that those who believe that in the moment a person first began to look at the monitor screen, he or she actually became a post-human – a hypothetical prototype of the future human, who abandoned the usual human posture as a result of the implementation of advanced technologies, computer science, biotechnology, medicine, etc. [15]. At the global level, this problem has been studied by scientists such as A. Peng-JuSu [19], M. Barker et al. [20], B. Custers et al. [21], S. D. Cardoso et al. [22]. Notably, the author of this study has performed a long-term research on the analysis of all these sources, which were interpreted and, as a result, allowed to look at the problem of virtuality from the standpoint of a civilist, whose goal is to update civil legislation in the context of fast development of a new society of information, networks, and systems. The purpose of the law in the development of general provisions on personal non-property rights in Chapter 20 of the CC of Ukraine[1], among which the right to information plays one of the key roles, should from the outset be understood as the need to establish general rules applicable to all personal non-property information rights, as well as a new stage in ensuring the comprehensive development of the individual, protection of his or her life, freedom, honour, dignity, and personal inviolability in the context of increasing coverage of all spheres of life by a new specially created virtuality. Meanwhile, discussions are still underway regarding the content of certain rules that are already stipulated and that can be included in Chapter 20 of the CC of Ukraine in the process of updating, in particular regarding the principles of personal non-property rights. Admittedly, some of these principles should remain in place, but they must be supplemented by those that describe the existing and subsequent stages of development of the information society, take into account the creation and use of robots and elements of artificial intelligence, new species, experiments with living organisms in everyday life, including humans from the moment of conception, the specific features of electronic money circulation and e-commerce, copyright protection in networks, the issue of settlement of relations on such a complex object of information and intellectual creative activity as digital content. These discussions are becoming increasingly thorough in the process of updating the CC of Ukraine, and in the conclusions to this study the author once again suggests ways to resolve the outlined issues.

Thus, this study differs from previous publications on the right to information

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

as a personal non-property right of an individual, by the breadth of coverage of the problem, primarily due to the clarification of what is virtuality, a virtual world to which the processes, which previously could occur only in real life and be embodied in real relations, including those governed by law, are partially (and sometimes completely) transferred. The author analysed the problematic issues of the concept, types, specifics of the right to information as a personal intangible right, its implementation and protection in a context that covers all spheres of life, the global information virtual world. This approach allows for an almost interactive continuation of information rights research in the future.

The updating of civil legislation in the current period is described and conditioned, among other things, by the rapid development of a global virtual environment where the right to information should occupy one of the leading places, and the solution of all personal non-property information rights should be the priority task for civilistics. The very title of the Book Two of the CC of Ukraine[1] should cover the entire sphere of non-property relations and be called "Non-property rights", as it should govern the provisions on all non-property relations of both individuals and legal entities, as well as provisions relating to virtual the environment where these relations currently arise. The content of the articles of Chapter 20 of the CC of Ukraine should be clarified and supplemented by provisions that take into account the achievements of the information society, information technologies, the emergence of new personal non-property assets to which non-property rights can be extended; the subjective composition of these relations, the specific features of the exercise, implementation, and protection of rights in their existence, including in a virtual environment, and Chapter 20 of the CC of Ukraine should be entitled "General Provisions on Non-Property Rights".

It is necessary to significantly supplement the list of intangible assets and rights to them, to determine their place in Chapters 21 and 22 of the CC of Ukraine, and the rule on the right to information (and all related non-proprietary information rights) should be transferred to Chapter 21 of the CC of Ukraine[2] (provided that the current classification of personal non-property rights is retained). It is also possible to provide for the amendment of the Book Two of the CC of Ukraine with additional chapters, which would cover non-property rights that cannot be attributed to the current classification. These are non-property rights of legal entities; non-property rights related to the development of information relations, etc. It is proposed to discuss the possibility of supplementing the said Book Two with a rule on the turnover of rights to the objects of non-property rights, in particular on the turnover of certain information rights, while the list

[1] *Ibidem*, 2003.

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

of obligations in Book Three should be supplemented with obligations with non-property content subject to the development of the corresponding provisions.

The provisions of the CC of Ukraine on objects of civil rights should also be expanded with regard to the emergence of objects unknown at the time of adoption of the current CC of Ukraine. These are different types of information, information products, resources, systems, etc. and objects of rights created and located in the Internet, cryptocurrency, personal data (personal information), autonomous works, artificial intelligence, content (digital content), etc. These objects should be clearly listed among the intangible assets of Chapter 15 of the Book One of the CC of Ukraine, clarified in Articles 199–201 of the CC of Ukraine and additional articles to avoid errors in their misinterpretation, errors in determining their legal nature and regulatory mechanisms, methods of protection. It is necessary to expand Chapter 15 of the CC of Ukraine with additional articles that would amend the general provisions on such objects and emphasise the general significance for all other books of the Code. First of all, this applies to information as an intangible asset – an object of civil rights, which would allow to introduce important and timely additions to many articles of all the books of the CC of Ukraine.

The provisions of the updated CC of Ukraine on transactions should ensure the full functioning of relations in the field of e-commerce, smart contracts, web banking, and other attributes of the digital economy in a virtual environment, which will not only preserve all assets and achievements of the current CC of Ukraine of Ukraine but will also allow to adapt it to modern realities.

CONCLUSIONS

Summing up, it should also be noted that the right to information and other intangible information rights of individuals are not only developing at a significant pace, but in the last few years are very closely confronted with the problems posed by information technology, robots, and artificial intelligence. Virtuality has never been so similar to reality, and post-humanity has never seemed so close. These processes must be taken into account in the current development of civil legislation at the level of principles and individual articles, but it is necessary to "make haste slowly", bearing in mind that the legal consolidation of processes occurring in society in the development of information society should be based on well-being of people as the highest virtue", which Aristotle advocated for, and the "morality in law", on the need to comply with which insisted I. O. Pokrovsky. This study is of interest to scholars, in particular, representatives of the civilistic school of law, teachers and students of higher educational institutions of law, lawmakers, representatives of the working group on recoding (updating) civil legislation and all those interested in civil law, information relations, personal non-property rights of individuals in general and in a virtual environment in particular.

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ABOLITION OF THE COMMERCIAL CODE OF UKRAINE: POTENTIAL CONSEQUENCES AND NECESSARY PREREQUISITES

Abstract. *The paper analyses the provisions of the Commercial Code of Ukraine, comparing them with certain provisions of the Civil Code of Ukraine and separate laws and other regulations. Considering the need to align Ukrainian legislation with the legislation*

of the European Union countries in legislation regarding the establishment and operation of partnerships, corporate governance, protection of shareholders, creditors and other interested parties, regarding the further development of corporate governance policy in accordance with international standards, including the gradual approximation to the rules and recommendations of the European Union in this area, it is concluded that it is advisable to abolish the Commercial Code of Ukraine by adopting the relevant law, which stipulates all necessary measures to ensure proper legal regulation of relations for the period of preparation of the relevant systemic changes to the Civil Code of Ukraine. It is proved that most of the provisions of the Civil Code of Ukraine are reference or blanket, and therefore have minimal regulatory impact and mostly duplicate the provisions enshrined in other regulations. Based on the analysis of the provisions of the Commercial Code of Ukraine, it is concluded that its provisions, given their minimal regulatory impact on business relations and considering the detailed regulation of these relations in the Civil Code of Ukraine, can be repealed without any reservations. In such settings and in order to simplify the legal regulation of business activity, as well as in view of the obligations of our country (in particular, to bring the Ukrainian legislation in conformity with the legislation of the EU countries in legislation regarding the establishment and activity of partnerships, corporate governance, protection of rights of shareholders, creditors, and other stakeholders, regarding further development of corporate governance policy in line with international standards, as well as the progressive approximation to EU rules and recommendations in this area), the expediency of abolishing the Commercial Code of Ukraine is beyond doubt.

Key words: *Civil Code of Ukraine, legal principles, private law relations, codification, recodification, entrepreneurial relations.*

INTRODUCTION

The adoption of the Civil Code of Ukraine and the Commercial Code of Ukraine in 2003[1], which came into force on January 1, 2004, marked a new era of development of the national legal system under the conditions of artificially created dualism of private law. An analysis of the fifteen years of experience of applying the provisions of the Civil Code of Ukraine and the Commercial Code of Ukraine, as well as the scientific discussions that have been ongoing since the very beginning of the draft of the Civil Code of Ukraine, the judicial practice of dispute resolution, give grounds to conclude that there are systematic contradictions between the provisions of these codified acts, in particular concerning the basic principles of regulation of business activity, legal entities, substantive and binding legal relations, etc., which significantly impede the economic development of our country, in particular the development of legislation in line with the provisions of the Association Agreement between Ukraine and the European Union.

In view of its fundamental principles, the Commercial Code of Ukraine

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15; Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

substantially limits the development and functioning of market relations in Ukraine, since the very nature and methods of regulating business law have historically been aimed at ensuring the functioning of the planned economy of the Soviet state. From a formal legal standpoint, the existence of general provisions in the Commercial Code of Ukraine makes it impossible to qualify this code, in accordance with Part 2 of Art. 4 of the Civil Code of Ukraine, as an act of civil legislation that regulates entrepreneurial (in the terminology of the Commercial Code of Ukraine – the so-called «business») relations.

It should be Individually noted that most of the provisions of the Commercial Code of Ukraine (as will be proved below) are blanket or referential at best, which reason to argue about the insignificant effect of the Commercial Code of Ukraine (as against the rules contained in special laws) on regulation of public relations, in particular entrepreneurial ones.

The depth and extent of the contradictions between the Civil Code of Ukraine and the Commercial Code of Ukraine suggests that these conflicts can only be eliminated by abolishing the Commercial Code of Ukraine. Under the abolition of the Commercial Code, the authors of the paper understand the recognition of it as invalid. The corresponding draft law No. 2635 was registered in the Verkhovna Rada of Ukraine on December 19, 2019.

Considering the above, the purpose of this paper is to identify potential consequences and to establish the necessary prerequisites for the abolition of the Commercial Code of Ukraine in pursuance of the Resolution of the Cabinet of Ministers of Ukraine No. 650 dated 17.07.2019 "On Creation of a Task Force on the Recodification (Updating) of the Civil Legislation of Ukraine".

1. MATERIALS AND METHODS

The research methodology is conditioned by its purpose and lies in the analysis of the corresponding provisions of the Commercial Code of Ukraine (its structural parts – sections, chapters, paragraphs, separate articles, etc.) for the occurrence of negative consequences or legal vacuum in the regulation of entrepreneurial relations in case of abolition of the Commercial Code of Ukraine. For the purpose of writing this paper, the legal and regulatory framework included the Civil Code of Ukraine, the Commercial Code of Ukraine, the Land Code of Ukraine, the Water Code of Ukraine, the Forest Code of Ukraine, and the Subsoil Code of Ukraine, as well as other regulations, including the Law of Ukraine "On Joint Stock Companies"[1], the Law of Ukraine "On Securities and Stock Market"[2], the Law of Ukraine "On Environmental Protection"[3] etc. The paper uses general scientific and special legal methods of scientific knowledge.

[1] Law of Ukraine "On Joint Stock Companies". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514–17

[2] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480–15

[3] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264–12

The main method is comparative law, which allowed to identify and analyse the duplication of legal provisions by the Commercial Code of Ukraine, which are contained in other regulations, including the Civil Code of Ukraine.

The historical law method allowed to investigate the stages of the establishment, adoption, and development of regulations. Philosophical and functional methods allowed to outline the prerequisites for developing an effective mechanism for the legal regulation of relations and to identify the interrelation between the preconditions for their emergence. The dialectical method of cognition accompanied the entire process of scientific research and allowed to consider the tendencies of development and improvement of the Ukrainian civil legislation in the context of European integration. Formal law method is applied in the analysis of legal rules governing legal relations and practices of their application.

Among other methods of researching the aforementioned issues, a simulation method was used, which provided an opportunity to consider the scientific and legislative problem of improving the civil legislation and, accordingly, the abolition of the Commercial Code, as an organized and purposeful goal that serves to improve the Ukrainian legislation. The presented scientific ideas of the authors in the context of the modern development of civil relations include targeted, methodological, substantive, institutional, and resultative components.

2. RESULTS AND DISCUSSION

1.1 General characteristics of the Commercial Code of Ukraine and its main drawbacks

The debate over the ways in which the legal rules governing relations in economic turnover should be organized have been ongoing for more than a decade and its fiery has not diminished over time. It received a new impetus during the last large-scale codification in Ukraine. Back in 2002, the authors of the textbook «Commercial Law» stated with unprecedented optimism that the main branch-related codification act in economic relations should be the commercial code, which would consolidate the unity of the subject, the general principles and directions of business and legal regulation and thus should become a backbone act [1].

Representatives of commercial law science had high hopes for the Commercial Code, because they viewed it as a pivotal act that would determine the basic «rules of the game» for all participants of economic turnover [2]. At the same time, even before the entry into force of simultaneously adopted and inharmonius Civil Code and Commercial Code, civilists had warned of probable issues that awaited not only lawyers but also the entire entrepreneurial environment [3].

Even then, the Commercial Code of Ukraine caused an avalanche of criticism from opponents: «The pillars of the code and many other «components» were made during the first five-year plans (economic competence, forms of property, branch management of the national

economy) and in the 1960s (the right of economic management, the right of operational management, forms of ownership, enterprise funds, the owner of the enterprise, industrial goods, consumer goods). The «youth» is represented by the monstrosities that saw the light in the early 1990s as a result of desperate attempts to oppose the old Soviet instruments of managing the administrative economy by the new economic realities of semi- and quarter-market Ukrainian reforms (state, communal, private, leased enterprises).

The developers of the Commercial Code gripped the legacy of the socialist past with a bulldog determination, either intentionally or otherwise trying to squeeze the Ukrainian economy into a Procrustean bed of bankrupt concepts [4]. We shall note that the developers of the Commercial Code of Ukraine and its supporters have largely manipulated the unawareness of most Ukrainian entrepreneurs at the time and the assurance that in civilized Europe, along with the conventional Civil Code, there is another one, which governs the stream of commerce – the Commercial Code, for example, in Germany, France.

I. V. Spasybo-Fatieieva fairly points out that the comparison of the adoption of the Civil Code and the Commercial Code in Ukraine with the codification experience of other countries, which our codified acts attempt to emulate, is not always appropriate. This applies to the statement that in many countries there are commercial or trade codes andtherefore the adoption of the Commercial Code of Ukraine is a natural step in the European legal framework. Apart from being untrue, this statement contains a misrepresentation of the Commercial Code of Ukraine as something similar to commercial or trade legislation of other countries [5]. Analysing the experience of legislative development of Eastern European countries, Ye. O. Sukhanov points out some important general tendencies which, among other things, extend to Western European states. Firstly, this refers to a substantial reduction of legal systems that maintain a separate regulation of civil and commercial law. Secondly, in reducing the scope of agreement-based regulation that is enforced by trade law (in those countries where it is preserved as a national feature of their rule of law), its "corporate part" comes to the fore. Thirdly, the commercial codes that are in force in European states (both the classic codes of the 19th century and the modern codifications of Bulgaria, Lithuania, or the draft Slovak Trade Code) remain private law acts, which systematize a certain (rather small) part of private law institutions and represent commercial law as "special private law", which is generally subordinated to the action of civil law as "general private law" [6].

Despite the fact that over the years since the Commercial Code of Ukraine came into force it has been massively ousted by acts of special legislation, its proponents do not give up the hope of delaying its complete disintegration, mak-

ing every effort to demonstrate its ability to "survive" in the legislative orbit". At the same time, the experiment, which began in Ukraine in 2003–2004, not only did not reveal any advantages of the implemented codification of economic legislation, but quite the contrary – confirmed that the only correct and logically consistent way is the incorporation of commercial legislation according to its main areas: stock, investment, competition, banking, insurance, corporate, bankruptcy, etc. [7].

One of the developers of the Civil Code of Ukraine, A. S. Dovhert points out that civil law codification has become a significant achievement of national legal thought in Ukraine and, undoubtedly, the most significant step towards democratic transformation in the country. The Code confidently steers relations towards the market and civil society, even though it was doomed to act in the environment of the non-market and opposing Commercial Code of Ukraine [8–10]. Therefore, it is no coincidence that the updating of the Civil Code of Ukraine and its recodification cannot be a complete, logical, effective tool without abolishing this "vestige" of the administrative-totalitarian system – the Commercial Code of Ukraine. To assess the consequences and identify potential risks of cancellation of the Commercial Code of Ukraine, the provisions of the Commercial Code of Ukraine were consistently analysed and compared with the corresponding provisions of the Civil Code of Ukraine, other codes and laws of Ukraine. Considering the limited volume of the scientific article, only the main conclusions and results of the study are given.

Thus, the analysis of Section I of the Commercial Code of Ukraine[1] *"Basic Principles of Business Activity"*, which includes 4 chapters and 54 articles, gives reason to believe that its provisions by their nature create a certain attribute of the Commercial Code as a codified regulation, which should include certain general provisions. However, the analysis of articles included, for example, in Chapter 1 of the Commercial Code of Ukraine, suggests that they do not substantially comply with the principles of free entrepreneurial activity, market principles of economic development of Ukraine, in particular those enshrined in Art. 42 of the Constitution of Ukraine[2]. The same applies to the provisions of Chapter 2, *"Main Directions and Forms of State and Local Government Participation in the Economic Sector",* which are purely declarative in nature and are intended to outline the potential fields of influence of the state and local governments on entrepreneurial relations. At the same time, in view of the fact that according to Part 2 of Art. 19 of the Constitution of Ukraine, the said influence of state and local self-government bodies is exercised solely on the basis, within the

[1] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

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

powers and in the manner prescribed by the Constitution and laws of Ukraine, the respective regulatory powers, as a rule, are stipulated by special legislation – Laws of Ukraine "On the Cabinet of Ministers of Ukraine", "On the Antimonopoly Committee of Ukraine", "On the State Property Fund of Ukraine", etc. Accordingly, the provisions of Chapter 2 of the Commercial Code of Ukraine are purely declaratory or referential and have no considerable regulatory effect on entrepreneurial relations.

A detailed analysis of Chapter 3 of the Commercial Code of Ukraine[1] *"Restriction of Monopoly and Protection of Business Entities and Consumers from Unfair Competition"* also confirms the conclusion that this chapter is unable to ensure even a minimal level of regulatory influence on respective relations in competition law. This function is performed in full by specific laws. These are, above all, the Laws of Ukraine "On the Antimonopoly Committee of Ukraine"[2], "On Protection of Economic Competition"[3], "On Protection against Unfair Competition"[4], etc.

A similar conclusion is reached in the analysis of Chapters 4 and 5 of the Commercial Code of Ukraine[5], which lack the truly meaningful principles of regulation of entrepreneurship in Ukraine. Instead, the provisions of these chapters are either declaratory or refer to an indefinite scope of legislative acts that should regulate the so-called "commercial business" and "non-commercial business" activities. Art. 49 of the Commercial Code of Ukraine deserves special mention, it introduces the term "foreign entrepreneurs" into Ukrainian legislation, and at the same time fails to define it.

Against this background, and given the minimum substantive and regulatory load of articles included in Section I "*General Provisions*" of the Commercial Code of Ukraine, it is reasonable to conclude that there are no adverse effects in the abolition of the articles included in this section (Articles 1–54 of the Commercial Code of Ukraine). Furthermore, the abolition of Section I of the Commercial Code of Ukraine can take place without significant risks to the legal regulation of economic relations, given their minimal regulatory impact on entrepreneurial relations and considering the detailed regulation of these relations in the Civil Code of Ukraine.

Section II *"Business entities"* also incites serious remarks. It is known that in the Civil Code of Ukraine[6] the

[1] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

[2] Law of Ukraine "On the Antimonopoly Committee of Ukraine". (1993, November). Retrieved from https://zakon.rada.gov.ua/laws/show/3659–12

[3] Law of Ukraine "On Protection of Economic Competition". (2001, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2210–14

[4] Law of Ukraine "On Protection against Unfair Competition". (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/236/96-%D0%B2%D1%80

[5] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

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

concept of legal entities originally proceeded from the approaches existing in the European private law concerning the types and legal forms of legal entities. As Professor A. S. Dovhert points out on this matter, "maintaining an existing system of" enterprises" in Ukraine (identifying an enterprise with a legal entity is a fatal error) will only prolong economic stagnation".

The concept of legal entities enshrined in the Civil Code of Ukraine is as follows. Legal entities are the subjects of relations, these legal structures provide for the separation of property, which may occur with or without the unification of persons (Art. 81 of the Civil Code of Ukraine). Approaches to differentiation of legal forms in Civil Code of Ukraine are quite simple and clear:

– if the property is separated with the association of persons, this refers to companies (entrepreneurial and non-entrepreneurial);

– if property is separated without an association of persons, these are institutions and their founders do not take part in the management of these institutions (Art. 83 of the Civil Code of Ukraine).

In turn, entrepreneurial companies can be set up as business partnerships (joint stock partnerships; limited or additional liability partnerships; unlimited partnerships; limited partnerships) or as production cooperatives (Art. 84 of the Civil Code of Ukraine). In its draft prepared by the developers, the Civil Code of Ukraine did not envisage the possibility of other legal forms [11]. However, given the simultaneous adoption of the Civil Code of Ukraine and the Commercial Code of Ukraine in 2003, Art. 83 of the Civil Code of Ukraine defined the list of legal forms of legal entities as open. In the doctrine of civil law prevails the position that separated property can be held by a legal entity only on an ownership basis. Such subject as a non-owner legal entity should not exist in the economic environment. The retention of such organizations in Ukraine contradicts the nature and designation of legal entities in society [12]. And this is quite logical since legal entities in property turnover are responsible for their obligations with their own property.

Management of any legal entity is carried out in accordance with the rules established by Articles 97–103 of the Civil Code of Ukraine. Such transparency in relation to the management of a legal entity, according to the developers of the draft of the Civil Code of Ukraine is one of the main guarantees of protecting the rights of all subjects of economic turnover.

The Civil Code of Ukraine also regulates the issue of state involvement in civil relations. As these relations in the conditions of a market economy with the participation of the state are relations of private law, the state therefore must act in these relations not with the combination of its political and economic functions or as some special subject of law, as it was in times of a planned administrative system of management, but in legal forms that are adequate to these relations. The state (as well as territorial communities, the Autonomous Republic of Crimea)

takes part in these relations as a legal entity governed by public law (Articles 81–82 of the Civil Code of Ukraine). Unlike other public law entities, important aspects of the legal status of the state, the Autonomous Republic of Crimea, territorial communities are directly defined in articles 167–176 of the Civil Code of Ukraine [12]. Considering the commitments made by Ukraine pursuant to the Association Agreement with the European Union (hereinafter referred to as the EU) in the areas of legislation on the establishment and operation of partnerships, corporate governance, with a view to creating a fully functioning market economy and stimulating trade, Ukraine and the EU have agreed to cooperate in particular to protect the rights of shareholders, creditors, and other interested parties in line with EU requirements in this area; on the further development of corporate governance policy in line with international standards, as well as the progressive approximation of EU rules and recommendations in this area.

At the same time, the regulation of legal entities (so-called "business entities") in the Commercial Code of Ukraine corresponds neither to the concept of legal entities reflected in the Civil Code of Ukraine nor to the common EU practices and standards in this field. In such circumstances, it is advisable to harmonize the legislation of Ukraine in this respect with the European approaches to the regulation of the institution of a legal entity, with consideration of the general provisions of the Civil Code of Ukraine and certain special laws adopted by the Verkhovna Rada of Ukraine after their entry into force, in particular the Laws of Ukraine "On Joint Stock Partnerships"[1], "On Limited Liability and Additional Liability Partnerships"[2], etc.

The issue of the fate of legal entities that currently operate in legal forms that are not stipulated by the Civil Code of Ukraine is fully justified in this situation – this refers, above all, to enterprises as subjects of law (state and municipal enterprises, so-called "collective ownership enterprises", private enterprises, enterprises with foreign investments, etc.) and their unions (associations, corporations, consortia, groups, etc.). Back in the day, the Ukrainian legal system has already faced a similar issue. With the adoption of the Law of Ukraine "On Joint Stock Partnerships" in 2008, the types of joint stock partnerships were changed – at the time, the law separated public joint stock partnerships and private joint stock partnerships. Pursuant to the transitional provisions of this law, a period of 2 years was established for companies created before its adoption to bring their articles of association into conformity with the provisions of the law. It should be reminded that there were more than 30 thousand joint stock partnerships at the time.

[1] Law of Ukraine "On Joint Stock Partnerships". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514–17

[2] Law of Ukraine "On Limited and Additional Liability Partnerships". (2018, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2275–19

According to the State Statistics Service of Ukraine, as of October 1, 2019, there are 1,354,069 registered legal entities in Ukraine, of which 3,745 are state-owned enterprises, 32 are public enterprises for operational management of public property, and 14,018 are municipal enterprises. The figures for the unions of enterprises are similar: 553 associations, 79 corporations, 185 consortia, 317 concerns, 741 unions of consumer cooperatives. There are, according to the State Statistics Service, "other" unnamed unions of legal entities, of which there are 619 more units [13]. It is considered that a mechanism for establishing a certain transitional period for the harmonization of legal forms of legal entities in accordance with the Civil Code of Ukraine should also be proposed in case of abolition of the Commercial Code of Ukraine.

In terms of the structure of Section II "Business Entities" of the Commercial Code of Ukraine[1], it consists of 7 chapters and at the time of adoption there were 88 articles, a wide array of which was eliminated over time. Obviously, the provisions contained in these articles are declaratory provisions devoid of any regulatory influence. This, in particular, can be exemplified by Art. 59 of the Commercial Code of Ukraine "Termination of a Business Entity", which consists of one sentence: "Termination of a business entity is carried out in accordance with the law". It is clear that the abolition of this rule, as well as of other provisions of this section, will have no negative consequences for the legal regulation of activity and termination of legal entities.

We cannot ignore Chapter 7 of the Commercial Code of Ukraine (Articles 62–72 of the Commercial Code of Ukraine), which covers the enterprise as a subject of law and has caused many conflicts in domestic legal regulation. As mentioned earlier, the existence of an enterprise as a subject of law contradicts not only the provisions of the Civil Code, but also the obligations assumed by our state under the Association Agreement between Ukraine and the EU. The parallel existence of the category "enterprise" in the Ukrainian legal framework both as a subject of law and as an object of law (see, in particular, Art. 191 of the Civil Code of Ukraine) has created ambiguity and confusion in the legal regulation of entrepreneurial relations. Obviously, the enterprise as a subject of law entered into the Commercial Code of Ukraine precisely to justify the possibility of existence of state, municipal, and other types of enterprises. These are, in particular, state and municipal unitary enterprises, state commercial enterprises, public enterprises for operational management of public property (Chapter 8 Commercial Code of Ukraine, Articles 73–78), the so-called "collective ownerhsip enterprises" (Articles 93–112 of the Commercial Code of Ukraine). The Commercial Code of Ukraine includes in this concept production cooperatives, consumer cooperatives, enterprises of public and religious organizations, other enterprises

[1] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15.

envisaged by law. The Commercial Code of Ukraine also mentions private enterprises and other types of enterprises (Articles 113–117 of the Commercial Code of Ukraine).

In addition, Chapter 12 (Articles 118–127 of the Commercial Code of Ukraine) establishes the right of enterprises to unite with other enterprises to coordinate their industrial, scientific, and other activities in order to solve common economic and social problems. However, instead of determining that the union of enterprises as legal entities is excercised by means of creating of a certain business partnership, Articles 119–120 of the Commercial Code of Ukraine state that, depending on the procedure of establishment, the business unions may be formed as economic unions or as a state or municipal economic unions. With that, business unions are formed as associations, corporations, consortia, concerns, and other unions of enterprises envisaged by law. Art. 127 of the Commercial Code of Ukraine goes further and states that the law may determine other forms of joining the interests of enterprises (alliances, unions, associations of entrepreneurs, etc.), not stipulated in Art. 120 of the Commercial Code of Ukraine. We shall draw attention to the fact that it is no longer a matter of uniting enterprises, but of "joining the interests of enterprises".

Particularly noteworthy is the regulation of the creation and operation of business partnerships in the Commercial Code of Ukraine – this issue is addressed in 12 articles of the Code (Chapter 8 of the Commercial Code of Ukraine, Articles 79–90 of the Commercial Code of Ukraine). As already noted, the Commercial Code is characterized by a blanket method of regulation, when the text of the Commercial Code of Ukraine includes declaratory provisions devoid of regulatory influence, which do not even refer to a specific regulation, but simply indicate that the issue is regulated (or should be regulated) by law. The provisions of Chapter 8 of the Commercial Code of Ukraine are no exception. Thus, Part 1 of Art. 79 states that the procedure of creation and the order of activity of certain types of business partnerships is regulated by law. The rest of the provisions duplicate the corresponding provisions of the Civil Code of Ukraine and special laws – "On Joint Stock Partnerships", "On Limited and Additional Liability Partnerships". The lion's share of this chapter is occupied by Art. 90 of the Commercial Code of Ukraine "Accounting and Reporting of a Business Partnership". It should be reminded that the Law of Ukraine "On Accounting and Financial Reporting in Ukraine"[1] covers the issues of accounting and reporting of legal entities. In such circumstances, an attempt to regulate these relations with a single Art. of the Commercial Code of Ukraine is undoubtedly not the best solution from the standpoint of lawmaking technique.

Thus, the analysis of the provisions of Section II of the Commercial Code of

[1] Law of Ukraine "On Accounting and Financial Reporting in Ukraine". (1999, July). Retrieved from https://zakon.rada.gov.ua/laws/show/996–14

Ukraine, which deals with the regulation of the legal position of economic entities, gives reason to conclude that there is a wide arrat of systematic contradictions between the provisions of the Commercial Code of Ukraine and the Civil Code of Ukraine, and the EU-Ukraine Association Agreement. In such circumstances, it is considered appropriate to eliminate these contradictions by abolishing the corresponding provisions of the Commercial Code and at the same time defining a transition period to bring the legal forms of existing legal entities in conformity with the provisions of the Civil Code of Ukraine.

2.2. Features of regulation of property fundamentals of management in accordance with the Economic Code of Ukraine

Section III of the Commercial Code of Ukraine[1], which begins with Chapter 14, "Property of Business Entities", covers the regulation of the property fundamentals of business. It is based on an understanding of property rights that is enshrined in Book 3, "*Property Rights and Other Real Rights*" of the Civil Code of Ukraine. However, the provisions of Art. 136 ("Right of Economic Management") and Art. 137 ("Right of Operational Management") of the Commercial Code of Ukraine in fact reflect the regulation of property relations, which was inherent in a controlled economy, when the property was transferred to the legal entity (as a rule, state-owned or municipal enterprise) not into ownership, but on titles, which constituted some kind of a substitute, an ersatz. A legal entity to which property was provided under the right of economic management or the right of operational management could not freely manage it or operate it under its obligations.

As stated in one of the comments to the Commercial Code of Ukraine, "the right of economic management is one of the legal forms of exercising ownership. The right of economic management is remarkably similar to ownerhsip, but it cannot be equated with ownership… the right of economic management is a right that is dependent on ownership and is its derivative. The right of economic management is limited not only by law, but also by the prescriptions of the certificate of title, approved by the owner… The right of economic management… is understood as the real right of the business entity that owns, uses, and disposes of the property assigned to it by the owner (their authorized body), with limitation of the competence to dispose of certain types of property with the consent of the owner in cases stipulated by the Commercial Code of Ukraine and other laws" [13]. A similar approach is defined in the above commentary to the right of operational management, which is "a derivative, secondary right. It is even more restricted than the right of economic management, for example, by the purposes of the activity of thesubject of this right, by the tasks of the owner,

[1] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

by the purpose of the property owned by it uner the right of operational management, the authority to dispose of the said property [13].

Considering the contemporary realities, it should be noted that the Ukrainian economy, in accordance with our commitments to the international community, must objectively comply with established global approaches not only regarding the legal forms of legal entities, but also regarding property relations. Thus, the provisions of the Civil Code of Ukraine not only regulate the property rights in detail (consolidating concepts, warranties, grounds for acquisition, transfer, termination, etc.), but also establish common approaches to the use of the property of another – this primarily refers to rent and trust management. It should be emphasized that the institution of property management, which has become one of the innovations of the Civil Code of Ukraine[1], is completely understandable for the developed economies and can fully perform the functions of the instrument of transfer of property by the owner (including the state) to legal entities of public law so as to exercise their respective functions. In other words, the institution of property management is capable of completely replacing the outdated Soviet vestiges, such as "right of economic management" and "right of operational management" [14–16].

If we analyse entrepreneurial companies, first of all, joint-stock partnerships and limited liability partnerships whose shares and corporate rights belong to the state – such companies should own the property right on the title understandable to all participants in the trade turnover. For these reasons, Art. 141 of the Commercial Code of Ukraine[2] "Features of the Legal Regime of State Property in the Field of Business" can be abolished. The rest of the articles in Chapter 14 of the Commercial Code of Ukraine are either blanket or declarative, or they duplicate legal rules contained in special legislation and can therefore be abolished without any adverse effect on the legal regulation of property (real) relations in entrepreneurial activity.

A similar conclusion is reached upon the analysis of Chapter 15 *"Use of Natural Resources in Management"* of the Commercial Code of Ukraine, the provisions of which completely duplicate the provisions of the Constitution of Ukraine[3], in particular of Art. 13, Part 3 of Art. 14, paragraph 5 of Part 1 of Art. 92, Art. 4 of the Law of Ukraine "On Environmental Protection"[4], Articles 1, 3, 78 of the Land Code of Ukraine,[5] as well as articles of the Water Code of

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

[2] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

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

[4] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264–12

[5] Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14

Ukraine[1], the Forest Code of Ukraine[2] and the Subsoil Code of Ukraine[3]. An example of this are the provisions of Art. 149 of the Commercial Code of Ukraine, which repeat Part 1 of Art. 38 and Art. 23 of the Law of Ukraine "On Environmental Protection"[4], and Part 2 of the same Art. has no regulatory impact at all, including only the informative component. The same is observed in the analysis of the provisions of the following articles: Art. 150 of the Commercial Code of Ukraine (acquisition of land title together with water bodies, forests, perennial plantations thereon is regulated by Articles 56, 59, 79 of the Land Code of Ukraine; Art. 7 of the Law of Ukraine "On Farming"[5]; the procedure for exercising this title is determined by Art. 51 of the Water Code of Ukraine, Art. 12 of the Forest Code of Ukraine, Articles 18, 23 of the Subsoil Code of Ukraine, Art. 4 of the Land Code of Ukraine[6]; the procedure for granting land ownership is determined by Part 3 of Art. 14 of the Constitution of Ukraine[7]); Art. 151 of the Commercial Code of Ukraine (duplicates the provisions of Art. 2, Part 3 of Art. 38 of the Law of Ukraine "On Environmental Protection"[8]. The implementation of economic activity is regulated in the Land, Water, Forest Codes of Ukraine, Subsoil Code of Ukraine and other regulations regarding the use of natural resources); Art. 152 Commercial Code of Ukraine (duplicates Articles 90, 95 of the Land Code of Ukraine; Art. 18 of the Law of Ukraine "On Farming"; Art. 7 of the Law of Ukraine "On Personal Farming"[9]; Art. 153 Commercial Code of Ukraine refers to Articles 91, 96 of the Land Code of Ukraine, Art. 44 of the Water Code of Ukraine, Articles 14, 19, 20, 21 of the Forest Code of Ukraine, Art. 24 of the Subsoil Code of Ukraine, Art. 34 of the Law of Ukraine "On Fauna").

As a result, it should be noted that the provisions of Articles 148–153 of Chapter 15 *"Use of Natural Resources in Management"* of the Commercial Code of Ukraine[10] by their very nature, contain

[1] Water Code of Ukraine. (1995, June). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80

[2] Forest Code of Ukraine. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80

[3] Subsoil Code of Ukraine. (1994, July). Retrieved from https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80

[4] Law of Ukraine "On Environmental Protection", op. cit.

[5] Law of Ukraine "On Farming". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/973–15

[6] Water Code of Ukraine. (1995, June). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80; Forest Code of Ukraine. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80; Subsoil Code of Ukraine. (1994, July). Retrieved from https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80; Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14

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

[8] Law of Ukraine "On Environmental Protection", op. cit.

[9] Law of Ukraine "On Farming". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/973–15

[10] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

provisions referring to special regulations and are not of a regulatory nature. Accordingly, they can without exception be excluded as such that duplicate the provisions of special legislation [17]. Particular attention in this study should be given to the issues of the use of intellectual property rights in economic activity (Chapter 16 of the Commercial Code of Ukraine). An analysis of Chapter 16, *"Use of Intellectual Property Rights in Economic Activity"*, points to the conclusion on duplication of the provisions of the Civil Code of Ukraine[1], including the provisions of special regulations in this sector.

Provisions of Art. 154 of the Commercial Code of Ukraine are exemplary, which are of a blanket nature and for the most part are non-regulatory. They merely state that the provisions of the Civil Code of Ukraine shall be applied to govern such relations. The provisions of Art. 155 of the Commercial Code of Ukraine duplicate the provisions of Art. 420 of the Civil Code of Ukraine, which defines the list of intellectual property rights. Art. 156 of the Commercial Code of Ukraine also contains no substantive regulation, as it duplicates the provisions of Part 1 of Art. 462 of the Civil Code of Ukraine, Articles 7, 8 of the Law of Ukraine "On Protection of Rights to Industrial Designs"[2]. Articles 8, 9 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models"[3]. Art. 157 of the Commercial Code of Ukraine duplicates the provisions of Part 1 of Art. 494 of the Civil Code of Ukraine, including Part 3 of Art. 5 of the Law of Ukraine "On Protection of Rights to Marks for Goods and Services"[4]. Art. 158 of the Commercial Code of Ukraine does not determine the specifics of legal regulation and is a reference to other regulations, and also partially duplicates Part 3 of Art. 16 of the Law of Ukraine "On Protection of Rights and Marks for Goods and Services", which gives grounds to claim that there is no actual influence of the Commercial Code of Ukraine rules on the regulation of such relations as against the rules contained in special regulations.

Thus, almost all of the provisions of Chapter 16, *"Use of Intellectual Property Rights in Economic Activity"* (except Articles 160, 161 of the Commercial Code of Ukraine), duplicate the provisions of the Civil Code of Ukraine, incldуing the provisions of special regulations and thus can be excluded as having no regulatory effect.

The analysis of Chapter 17 *"Securities in Economic Activities"* also shows that there is no independent regulatory influence, since the types of securities,

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

[2] Law of Ukraine "On Protection of Industrial Design Rights". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3688–12

[3] Law of Ukraine "On Protection of Rights to Inventions and Utility Models". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3687–12

[4] Law of Ukraine "On Protection of Rights to Marks for Goods and Services". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3689–12

their issue, sale, acquisition are governed by Art. 195 of the Civil Code of Ukraine, as well as the Law of Ukraine "On Joint Stock Partnerships"[1], the Law of Ukraine "On Securities and the Stock Market"[2], the Law of Ukraine "On the Circulation of Bills in Ukraine"[3] and the Law of Ukraine "On the Depository System of Ukraine"[4]. As an example, we shall take Art. 164 of the Commercial Code of Ukraine, the provisions of which duplicate the provisions of the Law of Ukraine "On Securities and the Stock Market"[5] (Part 2, Art. 8 – regarding the prohibition of covering losses at the cost of the bonds of the enterprise; provisions of Art. 12 – regarding the concepts and general provisions concerning investment certificate); including the provisions of the Law of Ukraine "On Joint-Stock Partnerships"[6] (Part 5 of Art. 15; Part 2 of Art. 19 – regarding the special procedure for the use of shares to cover losses; Art. 13 – regarding the right of depositors to receive of the deposit and interest on it (savings (deposit) certificates after the specified term [17]. Features of the issue, circulation, and repurchase of securities, joint investment institutions are regulated in the Law of Ukraine "On Joint Investment Institutions"[7]. Part 6 of Art. 164 of the Commercial Code of Ukraine contains no regulatory mechanisms. Financial activities of the states that created the real estate operations fund and attracted funds of individuals and legal entities are regulated by the Law of Ukraine "On Financial and Credit Mechanisms and Property Management in the Construction of Housing and Real Estate Transactions"[8]. Part 7 of Art. 164 of the Commercial Code of Ukraine duplicates the provisions of Part 1 of Art. 14 of the Law of Ukraine "On Securities and the Stock Market"[9]. The issue and circulation of securities is regulated by the Law of Ukraine "On Circulation of Bills in Ukraine"[10] and the Law of Ukraine "On Securities and the Stock Market"[11]. Part 8 of Art. 164 of the Commercial Code of Ukraine is purely informative, has no regulatory effect, since the production

[1] Law of Ukraine "On Joint Stock Partnerships". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514–17

[2] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480–15

[3] Law of Ukraine "On the Circulation of Bills in Ukraine". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2374–14

[4] Law of Ukraine "On the Depository System of Ukraine". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/5178–1

[5] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480–15

[6] Law of Ukraine "On Joint Stock Partnerships". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514–17

[7] Law of Ukraine "On Joint Investment Institutions". (2012, July). Retrieved from https://zakon.rada.gov.ua/laws/show/5080–17

[8] Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/978–15

[9] *Op. cit.,* 2006.

[10] Law of Ukraine "On the Circulation of Bills in Ukraine". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2374–14

[11] Law of Ukraine "On Securities and Stock Market", op. cit.

of securities (or their forms) is regulated by the Law of Ukraine "On the National Bank of Ukraine"[1]. The same applies to other articles in this chapter.

The foregoing suggests that Chapter 17 "Securities in Economic Activities", namely Articles 163–166 of the Commercial Code of Ukraine[2] can be removed without negative consequences, given their referential nature and lack of regulatory impact.

Chapter 18 *"Corporate Rights and Corporate Relations"*. Unlike the controversial regulation of corporations and corporate rights in the Commercial Code of Ukraine, the Civil Code of Ukraine does not contain the definition and regulation of corporate law and corporate relations. In its turn, the Commercial Code of Ukraine also does not address this issues, as it rather ambiguously defines the approach to defining corporate rights, since the provision of Art. 167 refers to "the rights of a person whose share is determined in the authorized capital (property) of a business organization". It is known that the authorized capital is the value of the contributions of the shareholders (founders, participants) made for the purpose of forming its assets for the beginning or further activity, and also serves to guarantee the interests of creditors and debtors. In turn, property as a special object is considered to be a separate thing, a combination of things, including property rights and obligations (Part 1 of Art. 190 of the Civil Code of Ukraine). The above suggests that the approach of the Commercial Code of Ukraine to the identification of authorized capital and property of a business organization in the context of modern development of economic relations is unacceptable and creates obstacles in the cooperation of Ukrainian companies with foreign ones. Considering the best practices of the doctrine of private law, business organization should be understood as a generic concept, arising from the basic understanding of the legal entitiy as an organization.

The concept of "corporate relations", which are mentioned in paragraph 3 of Art. 167 Commercial Code of Ukraine, also does not add to the clarity, according to which "corporate relations are relations that arise, change, terminate in relation to corporate rights". Hence the misunderstanding: are the relations between business organizations and participants or the supervisory board and general meetings, etc. corporate?

The issues of the scope of the relations covered by Part 3 of Art. 167 of the Commercial Code of Ukraine remains unclear. Considering the fact that corporate legal relations, like any other legal relations, have their own structure, which consists of subjects, objects, content, as well as the grounds for the emergence of such relationships, it is also erroneous to claim that they are specifically regulated [18–20]. According to the general

[1] Law of Ukraine "On the National Bank of Ukraine". (1999, May). Retrieved from https://zakon.rada.gov.ua/laws/show/679–14

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

legal understanding, corporate relations are a type of economic relations, and therefore their regulation should be in accordance with the provisions of the Civil Code of Ukraine[1], the Law of Ukraine "On Business Partnerships"[2], the Law of Ukraine "On Joint Stock Partnerships"[3], the Law of Ukraine "On Limited and Additional Liability Partnerships"[4], etc. A much broader list of competences that make up the content of corporate rights is contained in the Principles of Corporate Governance, approved by the National Securities and Stock Market Commission No. 955 of July 22, 2014.

More successful, in our opinion, is the definition of corporate relations contained in the Draft Law No. 2635 dated 19.12.2019. Thus, the draft proposes to supplement Art. 96–1 of the Civil Code of Ukraine[5] as follows:

"Art. 96–1. Corporate rights.

1. Corporate rights are a set of competences that belong to a person as a participant (founder, shareholder, partner) of a legal entity in accordance with the law and/or constituent documents of a legal entity.

2. Corporate rights are acquired by a person from the moment of acquiring the right to a share (stock, share, or other object of civil rights, which certifies the participation of the person in the legal entity) in the authorized (compound) capital of the legal entity.

3. Participants (founders, shareholders, partners) of legal entities can have the rights stipulated in the constituent documents and the law.

4. The law can impose restrictions on the exercise of certain corporate rights by certain persons, as well as conditions and/or restrictions on the exercise of certain corporate rights by certain persons".

Regarding Art. 172 of the Commercial Code of Ukraine, we shall note that its provisions refer us to the Law of Ukraine "On State Property Objects Management". The provisions of this article do not have a regulatory impact, as relations related to corporate rights management are governed by an entire system of legal acts of different legal force. Relations with the exclusive subject of certain activities, in particular banking, insurance, stock exchange, joint investment, etc. are regulated by special legislation, namely the Law of Ukraine "On Privatization of State and Municipal Property".

Therefore, given the existence of an entire system of regulations governing corporate rights in general, including corporate states in particular, Chapter 18 "Corporate Rights and Corporate Rela-

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15; Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15

[2] Law of Ukraine "On Business Societies". (1991, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1576–12

[3] Law of Ukraine "On Joint Stock Partnerships". (2008, September). Retrieved from https://zakon.rada.gov.ua/laws/show/514–17

[4] Law of Ukraine "On Limited and Additional Liability Partnerships". (2018, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2275–19

[5] Civil Code of Ukraine, op. cit

tions" can be excluded without any negative consequences for the legal regulation of corporate relations. In turn, the concept of corporate rights and the specifics of their regulation should be enshrined in the Civil Code of Ukraine factoring in these reservations.

The above suggests that articles included in Section III of the Commercial Code of Ukraine *"Property Management Basis"* can be excluded from the text of the Commercial Code of Ukraine, and the concept and general provisions of corporate rights must be enshrined in the Civil Code of Ukraine.

2.3. Comparative analysis of controversial and debatable provisions of the Commercial Code of Ukraine and the Civil Code of Ukraine

Thus, the rules contained in Chapter 19 of the Commercial Code of Ukraine on the regulation of business obligations, by their very nature and content, should exclusively reflect the specific features inherent in the latter. Instead, "the regulation of business obligations in the Commercial Code of Ukraine in many cases almost coincides with the provisions stipulated in Book Five of the Civil Code of Ukraine. An example of this is the very first article of this chapter (Art. 173 of the Commercial Code of Ukraine – definition of business obligation) which by its content repeats Art. 509 of the Civil Code of Ukraine. It would seem that the focus of this paper should be on property and organizational and business obligations, but from the definitions of both property and economic (Part 1 of Art. 175 of the Commercial Code of Ukraine) and organizational and business obligations (Part 1 of Art. 176 of the Commercial Code of Ukraine) follows their private law nature, as directly stated in the analysed chapter of the Commercial Code of Ukraine (Part 1 of Art. 175, Part 4 of Art. 176 of the Commercial Code, etc.). In this regard, Section 1 of the Book Five of the Civil Code of Ukraine would be appropriate to supplement with an article that would enshrine the concept and nature of the legal obligations.

As for the grounds for the emergence of business obligations – Art. 174 of the Commercial Code of Ukraine repeats Art. 11 of the Civil Code of Ukraine almost word for word, at the same time introducing terminological confusion by using the term "agreement" in the context of a transaction. Art. 177 of the Commercial Code of Ukraine "Social and Municipal Obligations of Business Entities" is dissonant with Art. 4 of the Commercial Code of Ukraine and duplicates the provisions of Art. 17 of the Law of Ukraine "On Fundamentals of Social Protection of Persons with Disabilities in Ukraine"[1], Resolution of the Verkhovna Rada of Ukraine "On the Concept of Sustainable Development of Settlements"[2], Art. 40 of the Law

[1] Law of Ukraine "On the basics of social protection of persons with disabilities in Ukraine". (1991, March). Retrieved from https://zakon.rada.gov.ua/laws/show/875–12

[2] Resolution of the Verkhovna Rada of Ukraine "On the Concept of Sustainable Development of Settlements". (1999, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1359–14

of Ukraine "On Regulation of Urban Development"[1] etc. The same applies to the wording of Art. 178 of the Commercial Code of Ukraine "Public Obligations of Business Entities", which duplicates the provisions of Art. 633 of the Civil Code of Ukraine, bringing disharmony into the understanding of the construction of a public contract. Chapter 20, "Economic Agreements" (Articles 179–188), as it appears from its content, is essentially an brief version (a kind of a "sampler") of Chapters 52–53 of the Civil Code of Ukraine. However, based on the titles of Art. 183 «Features of Conclusion of Economic Agreements under Public Procurement» and Art. 186 "Conclusion of Organizational and Economic Agreements" should reflect the dynamics of contractual obligations and their respective features. However, in their current wording, they are "copying" the provisions of Section VII of the Law of Ukraine "On Public Procurement" in the first case, and the general provisions of Chapters 52–53 of the Civil Code of Ukraine in the second case. Furthermore, the provisions of articles of Chapter 20 of the Commercial Code of Ukraine contain significant contradictions regarding the use of the construction of standard contracts (Art. 184) under the Commercial Code of Ukraine and the concept of standard conditions (Art. 630) under the Civil Code of Ukraine. The approaches used in the Commercial Code of Ukraine substantially limit the principle of freedom of contract in business, which significantly impedes investment in the country's economy.

Chapter 21 *"Prices and Pricing in the Commercial Field"* (Articles 189–192) has neither substantive nor regulatory weight, since the basic principles of price policy, the detailed regulation of relations in this field, and the exercise of state control (oversight) and surveillance in pricing is governed by the Law of Ukraine «On Prices and Pricing». Given the existence of which retention of a separate chapter in the Commercial Code of Ukraine is inappropriate. Chapter 22 *"Performance of Business Obligations. Termination of Obligations"* (Articles 193–208) as well as Chapter 20 of the Commercial Code of Ukraine also constitute a brief version of Chapters 48–51 of the Civil Code of Ukraine. Thus, Art. 193 of the Commercial Code of Ukraine contains provisions which, within a single article, specify: 1) the general conditions for the performance of the obligation (Art. 526 of the Civil Code of Ukraine); 2) elements of performance (Articles 527, 529, 531 of the Civil Code of Ukraine); 3) the legal consequences of non-performance or improper performance (Articles 610, 615, 616, 622 of the Civil Code of Ukraine); 4) confirmation of performance (Art. 545 of the Civil Code of Ukraine), which indicates the inappropriateness of its retention. By analogy, Art. 194 of the Commercial Code of Ukraine «Performance of a Business Obligation by a Third Party», which duplicates the provisions of Art. 528 Civil

[1] Law of Ukraine "On Regulation of Urban Planning Activity". (2011, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3038–17

Code of Ukraine and creates the effect of excessive "regulation" of relations concerning the possibility of involving third parties as executors of a contractual obligation. Concerning the revision of Art. 195 of the Commercial Code of Ukraine "Transfer (Delegation) of Rights in Business Obligations" we deem it appropriate to transfer Part 1 of this Art. to Book Five of the Civil Code of Ukraine by supplementing Part 1 of Art. 527 of the Civil Code of Ukraine with paragraph 2 of the following content:

"1. The debtor shall be obliged to perform its obligation, and the creditor shall be obliged to accept the performance in person, unless otherwise stipulated by the agreement or law, does not follow from the essence of the obligations or customs of business turnover. The creditor, unless otherwise stipulated by law, can transfer to another person, with their consent, the right to accept performance from the debtor".

The wording of Art. 198 of the Commercial Code of Ukraine "Performance of Monetary Obligations" contradicts the provisions of Art. 533 of the Civil Code of Ukraine "Currency of Monetary Obligation Performance", considering that these articles reflect different approaches to assessing the possibility of a mismatch between the currency of an obligation and the currency of payment under an agreement. In modern circumstances, it appears to be impractical to imperatively restrict the ability of business entities to express monetary obligations in foreign currency (Art. 198 of the Commercial Code of Ukraine). With that, the currency of payment within the territory of Ukraine should be exclusively hryvnia.

The provisions of Chapter 22 of the Commercial Code of Ukraine (Articles 199–201) should be deleted as devoid of regulatory load, but merely repeating in brief the general and special provisions of Chapter 49 of the Civil Code of Ukraine "Ensuring Performance of Obligations". As for articles dealing with the termination of business obligations and their legal consequences (Articles 202 to 208 of the Commercial Code of Ukraine), it is appropriate to emphasize that the content of Art. 202 of the Commercial Code of Ukraine indicates duplication of the provisions of Art. 598 Civil Code of Ukraine, which consolidates a non-exhaustive list of grounds for termination of obligations under Articles 599, 601, 606, 604, 607 of the Civil Code of Ukraine, etc. The same applies to Art. 203 of the Commercial Code of Ukraine, which in its content is a combination of such articles of the Civil Code of Ukraine as: 1) Part 1 of Art. 203 of the Commercial Code of Ukraine – Part 1 of Art. 599 of the Civil Code of Ukraine; 2) Part 2 of Art. 203 of the Commercial Code of Ukraine – Part 1 of Art. 539 of the Civil Code of Ukraine; 3) Part 3 of Art. 203 of the Commercial Code of Ukraine – Parts 1–2 of Art. 601 of the Civil Code of Ukraine; 4) Part 5 of Art. 203 of the Commercial Code of Ukraine – Part 1 of Art. 602 of the Civil Code of Ukraine. A similar situation occurs with other articles in this chapter, which duplicate the provisions of the Civil Code of Ukraine, which raises reasonable doubts about

their practical value and the need to retain them. The existence of Chapter 23, *"Bankruptcy Procedure for a Business Entity"* (Articles 209–215) within Section IV of the Commercial Code of Ukraine has previously caused some surprise and astonishment, and even more so with the adoption of the Bankruptcy Procedure Code of Ukraine, since there neither was nor is the need for fragmentary, superficial regulation of relations by provisions which do not regulate, and in many cases even contradict the newly adopted codified act.

Therefore, the provisions of Section IV *"Business Obligations"* should, by their very nature and content, reflect the specific features inherent exclusively in business obligation. Instead, the proposed regulation in the respective articles of the Commercial Code of Ukraine in many cases actually repeats the provisions of Book Five of the Civil Code of Ukraine. Accordingly, there are no arguments regarding the advisability of keeping this section in the Commercial Code of Ukraine.

The provisions of Section V, *"Responsibility for Offenses in Business Activity"* duplicate, by their general content, the provisions of Chapter 51 of the Civil Code of Ukraine. As an example, it is advisable to cite the provisions of Chapter 24, "General Principles of Responsibility of Participants in Economic Relations" of the Commercial Code of Ukraine, which duplicate the provisions of Chapter 51 of the Civil Code of Ukraine, and in some cases only enshrine the general rules, such as: "Participants of business relations are economically and legally liable for offenses in business activity by means of applying economic sanctions to business offenders on the grounds and in accordance with the procedure established by this Code, other laws and agreement" (Part 1 of Art. 216 of the Commercial Code of Ukraine) or: "grounds for commercial law liability of the participant in economic relations are an offense committed in business activity" (p. 1, Art. 218 Commercial Code of Ukraine). Partially duplicating the provisions of Art. 617 Civil Code of Ukraine, Art. 219 of the Commercial Code of Ukraine consolidates the grounds for exemption from said liability. This duplication appears to be inappropriate. However, Part 4 of Art. 219 of the Commercial Code of Ukraine deserves to be transferred to Art. 617 of the Civil Code of Ukraine by consolidating the ability of the parties to envisage certain circumstances which, by virtue of their extraordinary nature, may give rise to their exemption from liability in case of a breach of the obligation due to given circumstances, as well as the procedure for attesting to the occurrence of such circumstances.

Articles 220 and 221 of the Commercial Code of Ukraine completely duplicate the provisions of Articles 612 and 613 of the Civil Code of Ukraine. The same applies to the expediency of regulating procedural issues in the pre-trial dispute settlement procedure (Art. 222 of the Commercial Code of Ukraine). Art. 222 of the Commercial Code of Ukraine contains many aspects of the procedural

nature that must be enshrined in the procedural codes. In this regard, it is worth emphasizing that it is appropriate to exclude Chapter 25 "Compensation for losses in the in Business Activity" of the Commercial Code of Ukraine, since it does not carry any legal load. In particular, Articles 224–225 of the Commercial Code of Ukraine duplicate the provisions of Articles 22, 623 of the Civil Code of Ukraine, and Articles 227–228 of the Commercial Code of Ukraine, respectively, duplicate Articles 541–544 of the Civil Code of Ukraine.

Chapter 26 *"Penalties and operational-economic sanctions"* should be excluded, given the internal inconsistency of its rules (for example, the recognition of fines and penalties as separate sanctions apart from the forfeit or consolidation of a set-off penalty in Art. 232 of the Commercial Code of Ukraine contrary to the provisions of Art. 624 of the Civil Code of Ukraine, etc.) and duplication of provisions of the Civil Code of Ukraine (for example, Art. 233 of the Commercial Code of Ukraine duplicates the provisions of Articles 551 and 616 of the Civil Code of Ukraine; Art. 234 of the Commercial Code of Ukraine duplicates provisions of Art. 622 of the Civil Code of Ukraine; Art. 235 of the Commercial Code of Ukraine duplicates provisions of Art. 615 Civil Code of Ukraine, etc.). Furthermore, there is doubt regarding the wording of Art. 231 of the Commercial Code of Ukraine (especially Part 2), in which the expediency of imposing sanctions is unclear if the party to legal relations is the state. This article effectively negates the principle of legal equality of the parties in private law relations, and Chapter 26 "Penalties and operational-economic sanctions" itself does not contain any new approaches to the mechanism of bringing the offender to justice, thereby duplicating the provisions of the Civil Code of Ukraine.

Special attention should be paid to the provisions of Chapter 27 «Administrative and Economic Sanctions» of the Commercial Code of Ukraine on issues that were separately resolved in the provisions of the codified acts of public law (Tax Code, Customs Code, Laws of Ukraine «On Foreign Economic Activity», «On Features of State Regulation of Activities of Business Entities Related to the Sale and Export of Timber», etc.). Furthermore, to date, by means of removal of Art. 37 of the Law of Ukraine «On Foreign Economic Activity», the legislator has refused to apply such special sanctions to business entities engaged in foreign trade activities as temporary suspension of foreign economic activity; individual licensing regime and penalty). Instead, in Chapter 27 of the Commercial Code of Ukraine, these types of administrative and economic sanctions remained. The foregoing indicates that special legislation in this field has been updated without amending the Commercial Code of Ukraine as an ineffective regulator of these relations.

The presence of Chapter 28 *«Responsibility of the Business Entities for the Violation of Antitrust and Competition Laws»* in the structure of the Commercial Code of Ukraine also raises a

few concernes on this matter. Thus, the logic of the legislator is unclear, who, having foreseen the specific features of holding business entities liable for violation of antitrust law, placed this chapter in the Commercial Code of Ukraine. The expediency of its existence is undermined by the existence of perfect special legislation in this field, which is evidenced by the adoption of the Law of Ukraine «On Protection of Economic Competition» (section VIII, IX) and the Law of Ukraine «On Protection against Unfair Competition» (Chapter 5, 6). Considering the existence of special legislation in this area, the value of Chapter 28 of the Commercial Code of Ukraine is minimal, because the provisions stipulated therein do not reflect the mechanism of holding business entities liable for violations of antitrust and competition law.

2.4. Analysis of the subject matter of provisions of Section VI "Features of legal regulation in certain economy sectors" of the Commercial Code of Ukraine

The largest by volume is Chapter VI, *"Features of Legal Regulation in Certain Business Sectors"*, consisting of 8 chapters and 118 articles. This section begins with Chapter 29 *"Industries and Types of Business Activity"*, the content of which indicates that it does not carry any regulatory burden and practical value. Chapter 30 *"Features of Legal Regulation of Economic and Commercial Activities"* is divided into 6 paragraphs: supply, contracting, energy supply, stock trading, property rent and leasing, including other types of economic and commercial activity.

§ 1 "Supply" essentially duplicates the general provisions of the Civil Code of Ukraine on the sale and purchase.

§ 2 «Contracting Agricultural Production» partially duplicates the provisions of Art. 713 of the Civil Code of Ukraine. At the same time, it would be advisable, within the framework of the same article, to consolidate separate features of the performance of the terms of this agreement (Parts 2–3 of Art. 273 of the Commercial Code of Ukraine). Instead, Art. 274 of the Commercial Code of Ukraine on liability is general and does not contain any features that would distinguish it from liability under agreements of this contractual type. Thus, the Commercial Code of Ukraine does not contain rules that would not be covered by the Civil Code of Ukraine in the regulation of agricultural contracting. Furthermore, it is doubtful whether regulation of agricultural production contracting is based on a model agreement.

§ 3 «Energy Supply» partially replicates Art. 714 of the Civil Code of Ukraine. Furthermore, the subject of the agreements stipulated by Art. 714 of the Civil Code of Ukraine and Art. 275 of the Commercial Code of Ukraine is not identical. This issues arises due to the confusion of the terminological nature of the mentioned agreements in the Commercial Code of Ukraine and the Civil Code of Ukraine, considering that the former implies under the wording «to comply with the contractual regime of its use» the use of energy (electricity, steam,

hot and overheated water), and the latter, respectively, under "adhering to the contractual regime of its use" means the use of an affiliated network, which creates a certain terminological confusion, which, with the wrong qualification and understanding of the essence of such an agreement can cause problems in its proper application.

§ 4. Stock trading concerns, as follows from the content of Part 1 of Art. of the 278 Commercial Code of Ukraine, the legal status of commodity exchange. Hence, firstly, the question arises as to the expediency of placing this paragraph within the individual contractual groups at all, and secondly, the legal status of the commodity exchange is regulated in detail at the level of special legislation (the Law of Ukraine «On Commodity Exchange»), and therefore the advisability of retaining this paragraph is rather dubious.

§ 5. «Property and Leasing» duplicates the general provisions for the rental (lease) of Chapter 58 of the Civil Code of Ukraine. Furthermore, the lease of property under Art. 283 of the Commercial Code of Ukraine is described exclusively as real, although the agreement must be described both as real and as consensual. Furthermore, the analysis of Chapters 58–59 of the Civil Code of Ukraine reveals a more detailed regulation of lease relations, both at the level of general provisions and in such objects of civil legal relations as land, housing, buildings or other capital structures, vehicles, etc. Moreover, special law "On Leasing of State and Municipal Property" and § 6 of Chapter 58 of the Civil Code of Ukraine, Law of Ukraine "On Financial Leasing", etc. cover such relations as rental of state, municipal property, and leasing. Given the significant differences between the provisions of the Civil Code of Ukraine, special legislation in these fields and § 5 of Chapter 30 of the Commercial Code of Ukraine, there is no doubt in the expediency of completely excluding this paragraph.

§ 6. Other types of business and commercial activities cover barter relations (Art. 293) and storage in the warehouse (Art. 294). The expediency of retaining this paragraph appears to be doubtful, because barter relations are settled at the level of § 6 of chapter 55 of the Civil Code of Ukraine, Art. 716 of which provides for the possibility of applying to such relations general provisions on the sale and purchase, supply agreement, contracting agreement or other agreements, the elements of which are contained in the barter agreement, if this does not contradict the essence of the obligation. Instead, storage relations are regulated by the provisions of Chapter 66 of the Civil Code of Ukraine, under which a separate paragraph "Storage at the warehouse" is highlighted, including the special Law of Ukraine "On Certified Warehouses and Simple and Double Warehouse Certificates".

Chapter 31 *«Commercial Mediation (Agency Relations) in Management»* raises several questions, the main of which is the following: why does the Commercial Code of Ukraine identify commercial mediation in management exclusively with agency relations? At

the same time, the issues of legal regulation of relations under such intermediary agreements as power of attorney, commission, consignment, and property management are left out of legal regulation. The differences between these agreements are conditioned upon the scope, subject matter, content of the rights and obligations of the parties.

The principal factor underlining the agent's intermediary functions is its performance of actions at the expense of the principal. An agency agreement can be implemented in a wider scope of relations than commission and power of attorney. This is a consequence of the coverage by the subject of actions of any nature, subject to their legitimacy and based on the authority granted. Thus, an agency agreement is an independent contractual model that has several specific features that distinguish it from adjacent contractual structures. At the same time, by its legal nature, an agency contract is a type of contract for the provision of intermediary services, where the agent always acts in the interests of the principal, based on the latter's authority and at its expense. Accordingly, it was expedient to place the said agreement within the bounds of Book 5 of the Civil Code of Ukraine by transferring the individual rational ideas of Chapter 31 of the Commercial Code of Ukraine to the Civil Code of Ukraine. For example, as implemented in Anglo-American law, which is described by an understanding of the agency agreement as a generic, where the power of attorney and the commission act as special types subordinate to the agency institution.

Chapter 32 «Legal regulation of freight transportation» duplicates the general provisions on transportation in Chapter 64 of the Civil Code of Ukraine. Furthermore, these relations are governed at various levels of special legislation: transport codes (Air Code[1], Commercial Maritime Code[2]), laws of Ukraine («On Transport»[3], «On Railway Transport»[4], «On Road Transport[5], etc.), sub-legislative acts (Charter of Railways, Charter of Inland Waterways, Rules for Transportation of Freight by Road in Ukraine, Rules for Transportation of Freight by Rail, etc.). Due to the presence of such a wide array of multifaceted acts of the legislation in freight transportation, including the absence of any specific features in the transportation of goods that would not be covered by the Civil Code of Ukraine and the abovementioned special acts of legislation, the analysed chapter of the Commercial Code of Ukraine is subject to abolition.

Chapter 33 *"Capital Construction"* must be excluded as such that is not based on a unified legislative approach

[1] Air Code of Ukraine. (2011, May). Retrieved from https://zakon.rada.gov.ua/laws/show/3393–17

[2] Code of Merchant Shipping. (1995, May). Retrieved from https://zakon.rada.gov.ua/laws/show/176/95- %D0%B2%D1%80

[3] Law of Ukraine "On Transport". (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/232/94-%D0%B2%D1%80

[4] Law of Ukraine "On Rail Transport". (1996, July). Retrieved from https://zakon.rada.gov.ua/laws/show/273/96-%D0%B2%D1%80

[5] Law of Ukraine "On Road Transport". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2344–14

and causes numerous legal conflicts both in the titles of these agreements under the Civil Code of Ukraine and the Commercial Code of Ukraine and in the content of this chapter of the Commercial Code of Ukraine. For example, in the very content of Chapter 33 of the Commercial Code of Ukraine there are terminological contradictions. Art. 324 of the Commercial Code of Ukraine exemplifies this issue, where, compared to the Civil Code of Ukraine, the same agreement has different names, does not stipulate the possibility of involvement of third parties to perform certain stages of work, consolidates the obligation to conduct both prospecting (according to commercial law terminology – exploratory) and design works, the possibility is included for applying the provisions of the agreement for capital construction to the legal relations for the conduct of both prospecting and design works. The same applies to provisions concerning the legal regulation of capital construction relations that would not be covered by the Civil Code of Ukraine. Therefore, Chapter 33 of the Commercial Code of Ukraine "Capital Construction" should be abolished as such that is not based on a unified legislative approach and causes numerous legal conflicts both in the titles of these agreements under the Civil Code of Ukraine and the Commercial Code of Ukraine, and directly in the content of this chapter.

Chapter 34 *"Legal Regulation of Innovation"* in fact reproduces the provisions of Chapter 62 "Performing research, development and technological works" of the Civil Code of Ukraine. The said chapter of the Commercial Code of Ukraine is fragmentary, and on certain aspects, contrary to the provisions of the Civil Code of Ukraine, regulates scientific and technical activities. This creates shortcomings in the contractual regulation of research, development, and technological works. Moreover, Articles 325–330 of the Commercial Code of Ukraine cover not the agreement, but the innovative activities and their "state" regulation (as defined in Art. 328 of the Commercial Code of Ukraine). At the same time, several special laws, such as the Law of Ukraine "On Innovative Activity"[1], the Law of Ukraine "On Scientific and Technical Activity"[2], and the Law of Ukraine "On Scientific and Technical Information"[3] cover the legal settlement of these relations. Accordingly, the expediency of a "summary" review of something that has a detailed regulation within the framework of the Civil Code of Ukraine (regarding an agreement for the implementation of research or development and technological works) and special legislative acts (on the legal regulation of innovation activity) is devoid of any sense. Therefore, the abolition of Chapter 34 of the Commercial

[1] Law of Ukraine "On Innovation Activities". (2002, July). Retrieved from https://zakon.rada.gov.ua/laws/show/40–15

[2] Law of Ukraine "On Scientific and Scientific and Technical Activities". (2015, November). Retrieved from https://zakon.rada.gov.ua/laws/show/848–19

[3] Law of Ukraine "On Scientific and Technical Information". (1993, June). Retrieved from https://zakon.rada.gov.ua/laws/show/3322–12

Code of Ukraine will in no way affect the mechanism of legal regulation of these relations.

Chapter 35 *"Features of Legal Regulation of Financial Activities"* consists of 5 paragraphs, each of which duplicates the provisions of the Civil Code of Ukraine and contains a summary of the special legislation.

Thus, *§ 1 "Finance and Banking"* covers the definition of the legal status of banks and their financial activities. With that, the legislator, within the framework of this paragraph, allowed the combination of the legal status of banks, their legal forms, bank deposit, credit, settlement, factoring, leasing operations agreements, effectively combining the uncombinable. For instance:

1) definition of the legal status of banks, their legal forms, etc. is covered by separate laws of Ukraine "On Banks and Banking", "On the National Bank of Ukraine";

2) legal regulation of financial activities and financial services is covered by several special laws, such as: "On Financial Services and State Regulation of Financial Services Markets", "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate", "On Financial Leasing", "On State Aid to Business Entities", etc.[1];

3) Chapters 71–74 of the Civil Code of Ukraine cover banking operations.

§ 2 "Insurance" duplicates the provisions of Chapter 67 of the Civil Code of Ukraine and the provisions of special laws ("On Insurance", "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles"[2]). It is therefore doubtful whether Articles 352–355 of this paragraph should be retained.

§ 3 «Mediation in Securities Transactions. Stock Exchange" covers the intermediary relations in the stock market of Ukraine and directly the legal status of the stock exchange. As for brokerage agreements, these relations are governed at the level of the general provisions on representation by Chapter 17 of the Civil Code of Ukraine and the Law of Ukraine "On Securities and Stock Market"[3], which stipulates both the legal status of such an intermediary and the stock exchange. Accordingly, the expediency of retaining this paragraph is doubtful.

§ 4 "Audit" is an attempt to regulate the audit activity and the legal status of its entities. At the same time, these legal relations are governed both by the general provisions on services (Chapter 63

[1] Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets". (2011, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2664–14; Law of Ukraine "On Financial and Credit Mechanisms and Property Management in Housing and Real Estate Transactions". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/978–15; Law of Ukraine "On State Aid to Business Entities". (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1555–18

[2] Law of Ukraine "On Insurance". (1996, March). Retrieved from https://zakon.rada.gov.ua/laws/show/85/96-%D0%B2%D1%80; Law of Ukraine "On Compulsory Insurance of Civil Liability of Owners of Land Vehicles". (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1961–15.

[3] Law of Ukraine "On Securities and Stock Market". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3480–15

of the Civil Code of Ukraine) and by the updated Law of Ukraine "On Audit of Financial Reporting and Auditing"[1]. In this regard, the expediency of retaining this paragraph is also doubtful.

Placing *§ 5 "Lottery activity"* in the structure of the Commercial Code of Ukraine raises serious questions, since Art. 365–1 has no regulatory effect, as it immediatelyrefers to a special law in this area "On State Lotteries in Ukraine"[2], which establishes the basic principles of state regulation of lottery activity in Ukraine with the purpose of creating favourable conditions for the development of the lottery market based on the principles of state monopoly on the issue and holding of lotteries, meeting the needs of the state budget, rights, and legal interests of citizens.

Chapter 36 *"Use of the rights of other business entities in entrepreneurial activity (Commercial Concession)"* duplicates the provisions of Chapter 76 of the Civil Code of Ukraine. Thus, the content of the provisions of the analysed chapter of the Commercial Code of Ukraine superficially, and in certain aspects contrary to the provisions of the Civil Code of Ukraine, regulates the contractual relations on the use of intellectual property rights. Furthermore, chapter 76 "Commercial Concession" of the Civil Code of Ukraine is placed after chapter 75 "Disposal of Intellectual Property Rights" of the Civil Code of Ukraine, which altogether creates a common conceptual framework for regulating relations of disposition of intellectual property rights.

Thus, the analysed content of Chapters IV–VI of the Commercial Code of Ukraine suggests that there is no need to retain them, given the existence of such a wide array of multi-level legislative acts, as well as the absence of any specific regulation of the above relations that would not be covered by the Civil Code of Ukraine and special acts of legislation.

Section VII *"Foreign Economic Activity"*, in particular Chapter 37 *"General Provisions"*, and the provisions of Articles 377–389 duplicate the rules of other legislative acts. Thus, provisions on the definition, entities, types, licensing and quotas, foreign economic agreements, their state registration, customs regulation, principles of taxation in the implementation of foreign economic activity, foreign currency accounts of entities, foreign exchange earnings, obtaining loans by subjects in foreign financial institutions, state protection of rights and legitimate interests duplicate the provisions of the Law of Ukraine "On Foreign Economic Activity"[3], the Civil Code of Ukraine (in terms of the subject composition), the Customs Code of Ukraine, the Tax Code of Ukraine, including the Law of Ukraine "On State Control of International Transfers of Military Goods

[1] Law of Ukraine "On Audit of Financial Reporting and Auditing". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2258–19

[2] Law of Ukraine "On State Lotteries in Ukraine". (2019, September). Retrieved from https://zakon.rada.gov.ua/laws/show/5204–17

[3] Law of Ukraine "On Foreign Economic Activity". (1991, April). Retrieved from https://zakon.rada.gov.ua/laws/show/959–12

and Dual Use", Law of Ukraine "On State Defence Order"[1].

Thus, Articles 377–389 of Chapter 37 "General Provisions" in Section VII "Foreign Economic Activity" of the Commercial Code of Ukraine are subject to exclusion in the absence of direct regulatory impact. The provisions of Chapter 38 *"Foreign Investment"* (Articles 390–400) duplicate the provisions of the Law of Ukraine "On the Foreign Investment Regimes" dated May 7, 1996. Thus, in particular, the first part of Art. 390 of the Commercial Code of Ukraine duplicates the provisions of part 1 of Art. 1 of the Law of Ukraine "On Foreign Investment Regimes"[2]. Art. 391 of the Commercial Code of Ukraine duplicates Art. 2 of the abovementioned law. Part 2 of Art. 391 of the Commercial Code of Ukraine contains a reference to the law and also has no independent regulatory effect. Art. 394 of the Commercial Code of Ukraine duplicates the provisions of Art. 7 of the same Law. Thus, given that the Law of Ukraine "On Foreign Investment Regimes"[3] regulates the types, forms of implementation, objects of foreign investment, prohibition and restriction of any forms of foreign investment, determines the territories where the activity of foreign investors and enterprises are restricted and prohibited, we shall conclude that Articles 390–400 of Chapter 38 of the Commercial Code of Ukraine are subject to be excluded as such that duplicate the provisions of the Law of Ukraine "On Foreign Investment Regime". In Section VIII *"Special Economic Modes"*, Chapter 39 *"Special (Free) Economic Zones"* of the Commercial Code of Ukraine, namely provisions of Articles 401–405 duplicate the content of the articles of the Law of Ukraine "On General Principles of Establishment and Functioning of Special (Free) Economic Zones"[4]. In particular, Art. 401 duplicates the provisions of parts 1–2 of Art. 1 of the specified Law, Art. 402 duplicates the provisions of Art. 2 of the said Law, Art. 403 duplicates Art. 3 of the Law, Art. 404 duplicates the provisions of Art. 13 of the same Law, and Art. 405 duplicates the provisions of Art. 4 of the same Law. Thus, given that the special regulatory act regulates the special economic regimes in detail, in particular the special (free) economic zones, Chapter 39 of the Commercial Code of Ukraine, namely Articles 401–405 of the Commercial Code of Ukraine, should be excluded as they duplicate the provisions of the articles of the Law of

[1] Customs Code of Ukraine. (2012, March). Retrieved from https://zakon.rada.gov.ua/laws/show/4495–17; Law of Ukraine "On State Control over International Transfers of Military and Dual-Use Items". (2003, February). Retrieved from https://zakon.rada.gov.ua/laws/show/549–15

[2] Law of Ukraine "On Foreign Investment Regime". (1996, March). Retrieved from https://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80

[3] Law of Ukraine "On Foreign Investment Regime". (1996, March). Retrieved from https://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80

[4] Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2673–12

Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones"[1].

Considering that the Law of Ukraine "On Concession"[2] was adopted on 03.10.2019, which defines the legal, financial, and organizational foundations for the implementation of concession projects to modernize the infrastructure and improve the quality of socially significant services, Chapter 40 *"Concession"*, in particular, Art. 406 of the Commercial Code of Ukraine should be excluded as a provision which duplicates the provisions of the abovementioned law. Regarding Chapter 41 *"Other Types of Special Regimes of Economic Activity"* (Articles 411–418 of the Commercial Code of Ukraine), we shall note that the Law of Ukraine "On Exclusive (Marine) Economic Zone"[3] dated 23.05.1995 regulates the legal regime of exclusive (maritime) economic zone Ukraine, subject to the relevant provisions of the 1982 United Nations Convention on the Law of the Sea. Consideringthe fact that this law was adopted in 1995, we shall state that at the time of adoption of the Commercial Code of Ukraine in 2003, its provisions were already duplicating the provisions of the Law of Ukraine "On Exclusive (Marine) Economic Zone". For example, parts 1–2 of Art. 411 of the Commercial Code of Ukraine duplicate the provisions of part 1–2 of Art. 2 of the Law of Ukraine "On Exclusive (Marine) Economic Zone"[4]. Part 3 of Art. 411 of the Commercial Code of Ukraine duplicates Part 1 of Art. 9 of the same Law. Part 4 duplicates Art. 10 of the above law. Part 5 contains a statutory reference to other regulations and has no regulatory effect. Art. 412 of the Commercial Code of Ukraine completely duplicates the provisions of Art. 18 of the Law of Ukraine "On State Border"[5] dated 18.12.1991. Part 3 of this article duplicates Art. 19 of the Law of Ukraine "On State Control"[6]. The provisions of Art. 413 of the Commercial Code of Ukraine contain provisions referring to special legislation, in particular the Land Code of Ukraine[7] and the Law of Ukraine "On the status and social protection of citizens affected by the Chornobyl disaster"[8]. The provisions of Art. 414 of the Commercial Code of Ukraine contain no regulatory impact, since they refer to other regulations, namely the Law of Ukraine "On

[1] *Ibidem*, 1992.

[2] Law of Ukraine "On Concession". (2019, October). Retrieved from https://zakon.rada.gov.ua/laws/show/155–20

[3] Law of Ukraine "On Exclusive (Marine) Economic Zone". (1995, May). Retrieved from https://zakon.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80

[4] Law of Ukraine "On Exclusive (Marine) Economic Zone". (1995, May). Retrieved from https://zakon.rada.gov.ua/laws/show/162/95-%D0%B2%D1%80

[5] Law of Ukraine "On State Border". (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1777–12

[6] Law of Ukraine "On State Control". (2017, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2042–19

[7] Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14

[8] Law of Ukraine "On the status and social protection of citizens affected by the Chornobyl disaster". (1991, February). Retrieved from https://zakon.rada.gov.ua/laws/show/796–12

the Armed Forces of Ukraine", the Law of Ukraine "On economic activity in the Armed Forces of Ukraine", which are special acts and determine the conditions of economic activities in the Armed Forces of Ukraine. Furthermore, Part 1 of Art. 414 of the Commercial Code of Ukraine establishes a general rule that specifies the powers of the Cabinet of Ministers of Ukraine, which are governed by the Law of Ukraine "On the Cabinet of Ministers of Ukraine" and the Resolution of the Cabinet of Ministers of Ukraine No. 950 "On Approval of the Regulation of the Cabinet of Ministers of Ukraine" dated 18.07.2007[1].

Art. 415 of the Commercial Code of Ukraine has a blanket form under which the law may specify the territory where, under certain conditions, a special regime of investment activity can be introduced. The relevant procedure and conditions are regulated by the Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones"[2]. Thus, there is no need for additional regulation of this issue, and therefore Art. 415 should be excluded as such that does not contain an applicable law and has no independent regulatory impact.

Art. 416 of the Commercial Code of Ukraine contains a referential provision and has no regulatory effect, given that the procedure for conducting business activities in a state of emergency, environmental emergency is established in Part 2 of Art. 64 of the Constitution of Ukraine[3]. Parts 2 and 3 of this Art. contain a referential provision to special legislation, in particular the Law of Ukraine "On the Legal Regime of State of Emergency"[4] dated 25.04.2000 and the Law of Ukraine "On the Zone of Emergency Ecological Situation"[5] dated 25.08.2000.

The provisions of Art. 417 of the Commercial Code of Ukraine also refer to special legislation, namely the Law of Ukraine "On the Legal Status of Martial Law" dated 10.06.2015, which regulates relations in the event of declaration of martial law, including the Law of Ukraine "On Defence of Ukraine" dated 25.12.1991. Art. 418 of the Commercial Code of Ukraine contains a contradictory rule, since the special economic regime is governed by a number of special laws, which are adopted upon the submission of the Cabinet of Ministers of Ukraine in case of stabilization or acceleration of development of certain sectors of the economy. Part 2 of this article has no regulatory impact, because according to

[1] Law of Ukraine "On the Armed Forces of Ukraine". (1991, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1934–12; Law of Ukraine "On Economic Activity in the Armed Forces of Ukraine". (1999, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1076–14

[2] Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2673–12

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

[4] Law of Ukraine "On Legal Regime of Emergency". (2012, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1550–14

[5] Law of Ukraine "On the zone of emergency environmental situation". (2000, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1908–14

Art. 55 of the Constitution of Ukraine, everyone is guaranteed the right to challenge the decisions, actions or inaction of state authorities, local self- government bodies, officials and officers in court.

Thus, Chapter 41 *"Other Types of Special Economic Activity Regimes"*, in particular Articles 411–418 of the Commercial Code of Ukraine contain blanket rules, which duplicate the provisions of special legal acts, have no regulatory impact in their content, and therefore should be excluded in full.

CONCLUSIONS

The analysis of the provisions of the Commercial Code of Ukraine, its comparison with certain provisions of the Civil Code of Ukraine, individual laws and other regulations gives grounds to conclude that most of the rules of the Commercial Code of Ukraine are referential or blanket, and therefore have minimal regulatory impact and, as a rule, duplicate the provisions enshrined in other regulations. In such circumstances, to simplify the legal regulation of entrepreneurial activity, as well as in view of the obligations of our country (in particular, to bring the Ukrainian legislation in conformity with the legislation of the EU countries in legislation on the establishment and activity of companies, corporate governance, protection of shareholders' rights, lenders and other stakeholders on the further development of corporate governance policies in line with international standards, as well as the progressive approximation with rules and recommendations of the EU in this area), feasibility of the abolition of the Commercial Code of Ukraine raises no doubts.

Finally, it can be stated that the dispute of civilists with economic executives has long been resolved in favour of freedom by life itself in the post-Soviet space and by the experience of all countries with market economy. Therefore, any revival of economic executives, wherever it takes place, should always be regarded as an attack on freedom. The modern school of business law, with the help of the Commercial Code of Ukraine, seeks to narrow the freedom, the field of private law… It must be clearly understood that the concept of business law is a legal instrument of neo-totalitarianism.

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SOME PROBLEM ASPECTS OF IMPLEMENTATION AND PROTECTION OF PROPERTY RIGHTS OF SPOUSES

Abstract. *The relevance of research on the problems associated with the implementation by spouses of enshrined in family law property rights and their protection in case of non- recognition, contestation or violation due to the fact that the property rights of spouses form the basis of the legal status of spouses and their implementation serves to strengthen the family's the material well-being of both spouses and children. The purpose of the study is to identify gaps in legislation governing spouses' property relations and to determine their impact on securing the enjoyment and protection of their property rights. Various methods of scientific knowledge were used in the research. Thus, the historical method was used in the analysis of the provisions of the Code of Laws on Marriage and Family of Ukraine, which regulated the property rights of spouses and determined ways to protect them. The comparative legal method was used to compare the norms of the CC of Ukraine and the FC of Ukraine governing alike or similar relations, in particular regarding shared ownership, invalidation of contracts and the like. Methods of analysis and synthesis were used to identify the shortcomings and gaps in current family law and in the practice of its application. On the basis of the formal-logical method, proposals for improvement of some provisions of the family law of Ukraine were formulated. The paper considers the general rule that a husband, wife disposes of the property, which is the subject of the joint property right of the spouse, by mutual consent. Another aspect of spousal property rights concerns the maintenance and legal regulation of a spouse. No less problematic aspect of the exercise and protection of property rights of spouses, which is considered in the paper, is the issue of property division. In particular, in case law, when considering cases of separation of property of a spouse, difficulties arise in the event of deviation from the principle of equality of spouses in the circumstances of significant importance. Such circumstances, which were analysed in the article, may be the reasons for both a decrease and an increase in the share of one of the spouses, including the former.*

The results obtained can be used to improve family law and the practice of its application, in further scientific studies concerning the property rights of spouses, as well as in teaching the course of family law in higher education.

Keywords: *joint property, invalidation of a contract, support of one spouse, separation of property, marriage contract.*

INTRODUCTION

An important area of application of the rules of family law, designed to regulate relations between spouses, is the sphere of property relations, characterised by certain characteristics. The specificity of these relations is, in particular, that they are regulated, in addition to the norms of the Family Code of Ukraine[1] (hereinafter – the UK Code), by a number of general rules on property, means, property rights, protection of property rights, etc. of the Civil Code of Ukraine[2] (hereinafter – the CC of Ukraine), as well as rules of other laws governing obligations, corporate relations, inheritance relationships, and more. In the literature, attention has been paid to the unequal application by the courts of the provisions of the Civil Code of Ukraine and the Ukrainian Criminal Code in cases when it comes to the exercise of their property rights by spouses [1; 2]. One of the problems that needs to be resolved is to ensure that the property rights of spouses are properly exercised by them and to protect the said rights in case they are not recognised, violated or contested.

Among the principles of family law, some authors refer, in particular, to the principle of judicial protection of family rights and interests [3–6]. One of the arguments of this statement is called the norm of Part 10 of Art. 7 of the Criminal Code of Ukraine, according to which "every participant in family relations has the right to judicial protection".

The right to defence (not only judicial but also in extrajudicial form, including the right to self-defence of the infringed right and interest) in the general theory of law and in the science of civil law is considered by most scholars to be one of the competences within the subjective law. Therefore, it can be assumed that the exercise of the subjective right of a participant in family relations also includes the possibility of protecting that right. Therefore, the allocation of the right to defence as an independent subjective right and as a principle of family law is considered to be unjustified. At the same time, the issues related to the implementation of spouses' property rights are inextricably linked to the issues of their protection.

Despite the fact that Part 1 of Art. 18 of the IC of Ukraine, in contrast to Part 1 of Art. 15 of the Civil Code of Ukraine, does not indicate in which case a participant of family relations has the right to appeal to a court for the protec-

[1] Family Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14

[2] Civil Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15

tion of his right or interest, it is clear that there are cases of its violation, non-recognition or contestation. Similarly, in this part of Art. 18 of the FC of Ukraine should not be about any interest, but interest protected by law. However, the wording of Part 1 of Art. 18 of the IC of Ukraine is built in such a way that the main focus is on the attainment of a family member of a certain age, which gives him the right to apply to a court for the protection of his right or interest. In this regard, the author proposes to formulate part 1 of Art. 18 of the IC of Ukraine as follows: "1. Every member of a family who has attained the age of fourteen has the right to a direct appeal to a court for the protection of his or her right in the event of its non-recognition, violation or contestation, and protected by law interest.

1. MATERIALS AND METHODS

Background materials for the study of some of the problematic aspects of the implementation and protection of property rights of the spouses were the provisions of the CC of Ukraine, the FC of Ukraine[1] and other regulatory legal acts, materials of court practice, as well as sources of special literature on family law. The methodology of this study is based on the combination of different methods of scientific knowledge. Their application has made it possible to establish that the implementation of spouses' joint property rights should be performed in accordance with the provisions of the FC of Ukraine, as a special legal act, and not in accordance with the CC of Ukraine, which contains general provisions on shared ownership. Thus, the historical method was used to find out the content of the marriage and family laws of the Code of Laws on Marriage and Family Law, which regulated the property rights of spouses and determined the procedure for appealing to the court for protection of the violated right, before the adoption of the CC of Ukraine. The comparative legal method was used to compare the norms of the CC of Ukraine and the FC of Ukraine governing alike or similar relations, in particular regarding shared ownership, invalidation of contracts and the like. This made it possible to conclude that the legislator unjustifiably not included in the grounds for acquiring the right to withhold the refusal of one spouse to financially support the other.

Methods of analysis and synthesis were used to identify the shortcomings and gaps in current family law and in the practice of its application. Thus, based on the analysis of Art. 76 of the FC of Ukraine, which established the right of a spouse to financially support the other after a divorce, it was found that the legislator did not foresee the possibility of concluding a contract of custody for them. Instead, the Principles of European Family Law stipulate that spouses should be able to enter into a post-divorce custody agreement, which may specify the amount of an allowance, the procedure, duration and conditions of termination of the maintenance obligation and the possible waiver. In view of this, the rel-

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

evant changes to the FC of Ukraine were proposed.

On the basis of the formal-logical method, proposals are made to improve certain provisions of the family law of Ukraine, in particular, concerning: the right of one spouse to apply to court with a request for financial support from the other spouse; the right to the financial support of a spouse with whom a child with disability lives after a divorce; the right of the spouses to conclude a contract of custody not only during the marriage, but also after divorce.

2. RESULTS AND DISCUSSION

1.1. Recognition of invalid property contracts

One of the aspects that should be addressed is the invalidation of contracts for the disposal of property owned by q husband and wife on shared ownership, concluded by one spouse without the consent of the other. As established by Art. 63 of the FC[1], a wife and a husband have equal rights to own, use and dispose of property belonging to them according to the right of shared ownership, unless otherwise agreed by an agreement between them. In view of this Part 1 of Art. 65 of the Criminal Code of Ukraine establishes that a husband and a wife dispose of the property, which is the subject of shared ownership of the spouses, by mutual consent. Consequently, when 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). These norms 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 shared ownership, but the main difference is that, as set out in Part 2 of Art. 68 of the FC of Ukraine, the disposal of property that is the subject of the right of shared ownership, is carried out by the co-owners only by mutual consent, in accordance with the Civil Code of Ukraine *after a divorce*. Thus, the provisions of Art. 369 of the Civil Code of Ukraine cannot be applied to relations concerning the exercise of the right of shared ownership of spouses.

On this basis, the FC of Ukraine and the CC of Ukraine establish different legal grounds for invalidation of contracts for disposal of property, which is the subject of shared ownership. Thus, if according to Part 4 of Art. 369 of the Civil Code of Ukraine a transaction concerning the disposal of joint property, made by one of the co-owners, may be declared invalid by the court upon the claim of the other co-owner in the absence of the co-owner who has performed the necessary powers, then according to Part 2 of Art. 65 UK of Ukraine, wife, husband has the right to go to court with a claim to declare the contract void as such, concluded by the other spouse without her, his consent, if this agreement goes beyond the limits of a small household. Thus, the ground for invalidation of a contract for the disposal of property that is the subject of shared ownership rights concluded by

[1] Family Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14

one spouse is the *absence of consent* of the other spouse.

This fact is not taken into account not only in jurisprudence but also in scientific research. Thus, N.A. Dyachkova and F.A. Tuchin consider that the provision that a transaction concluded by one spouse without the consent of the other cannot be challenged in court (since in Part 2 of Article 65 of the FC such the opportunity is given only for transactions that go beyond the limits of a small households), contrary to Part 2 of Art. 4 of the CPC of Ukraine (an obvious mistake here, since Article 4 of the CPC of Ukraine does not contain part 2). Accordingly, the authors believe that even a small household transaction made by one spouse without the consent of the other can also be challenged in court [7]. The author of this paper believes that this conclusion of the authors can be extended to small household contracts concluded by one spouse, but the reason for their invalidation will be not the absence of consent of the other spouse, but other grounds provided by the CC of Ukraine.

Without prejudice to the question of the form and notarisation of such consent (Part 3 of Article 65 of the Criminal Code of Ukraine), although they are important enough for the observance of property rights of spouses, it is worth noting that if the definition of small household contract can be used by analogy of law the concept of small household transactions, placed in Part 1 of Art. 31 of the CC of Ukraine, then the question what contract can be considered as an agreement on valuable property, are not answered by either the CC of Ukraine nor the FC of Ukraine. Case law, ignoring the direct reference in Part 2 of Art. 65 of the UK 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 those of the spouse who entered into the joint property agreement and the third party contracting party under such agreement acted in bad faith, in particular that the third party knew or could not have known, under the circumstances of the case, that the property was owned by the spouse under the shared ownership right, and a spouse who concluded a contract, has not received the consent of the other spouse". Thus, the appeal of the Supreme Court of Ukraine to the principle of integrity in considering cases of invalidation of contracts concluded without the consent of another spouse, is characteristic of a number of its resolutions (of 07.10.2015, of 30.03.2016, of 07.09.2016, of 22.02.2017 etc.).

The author believes that the reasons given by the court in these and other decrees are based on the statement made by Yu. S. Chervonyi about the possibility of invalidating a transaction, if it is proved that the other party to the transaction acted in bad faith, that is, knew or should have known of the absence of consent to the exercise such transaction by other co-owners or one of them [8], cannot be ap-

plied for recognition as invalid contracts concluded by one spouse without the consent of the other. It is quite clear that a spouse who concludes a contract without the consent of the other spouse can no longer act in good faith. Regarding the behaviour of a contractor under a contract, the legislator does not take it into account at all when determining the basis for the contract's invalidation in accordance with Art. 65 of the FC of Ukraine. It is only about relationships between spouses. Therefore, the court's reference to good faith, as one of the principles of civil law (although such a provision under Article 7 of the CC of Ukraine is also inherent in family law), according to which the parties to a contract should act, in this case is groundless.

Today, such erroneous practice has been altered by the legal opinion of the Grand Chamber of the Supreme Court of November 21, 2018 in case No. 372/504/17 [9], which was reflected in the following practice (Supreme Court's Order of 30 January 2019 in case no. 552/17826/16-c [10], of February 11, 2019 in Case No. 308/2205/16-c [11], etc.). Courts now proceed from the fact that the law does not link the presence or absence of consent of the co-owner to conclude a contract with good faith of the spouse who concluded the joint property contract or of the third contracting party under such agreement and does not raise the issue of the appeal of a contract in dependence on good faith of the parties to a contract. True, there is some doubt as to the reference of the courts in the above cases to Articles 369 and 215 of the Civil Code of Ukraine in the presence of a special provision established by Part 2 of Art. 65 IC of Ukraine.

1.2. Rights of a spouse for allowance

An important aspect in the context of problems in the exercise of property rights of spouses is the issue of legal regulation of maintenance. As Part 1 of Art. 75 of the FC of Ukraine established, wife, husband should financially support each other. Maintenance relations are regulated, in particular, by the rules of Chapter 9 of the FC of Ukraine, entitled "Rights and Obligations of Spouses", although in reality the provisions of this Chapter regulate not only the rights and duties of the spouse, but also the right of a person to be supported after a divorce (Article 76 of the FC of Ukraine) and the right to support women and men who are not married to each other (Article 91 of the Civil Code of Ukraine).

Given that the FC of Ukraine has for the first time settled the property relations of a woman and a man who live in the same family but are not married to each other or in any other marriage, the author considers it appropriate to supplement the FC of Ukraine with Chapter 9–1, to which, in particular, include Article 74, which, in author's view, is unreasonably set out in Chapter 8, "The right of shared ownership of spouses", and Article 91 of the FC of Ukraine on the right to retain these persons, as well as to better regulate property relations between these persons [12–14]. As the existing title of Chapter 9 of the FC of Ukraine contains

different rights and obligations – "right to withhold" and "duty to withhold", and the chapter itself regulates the relationship of maintenance both between spouses and between former spouses, it seems that such corresponding to the content of the norms contained therein after the implementation of the above amendments (regarding Chapter 8–1) would be another title of Chapter 9, namely: "Rights and Obligations of Spouses and Former Spouses".

It should be noted that the term " former spouses" is used in the Principles of European Family Law governing divorces and allowances between former spouses[1] (hereinafter referred to as "Principles"), and the very principles of retention between former spouses are enshrined in Part II. However, the Principles do not contain provisions governing the relationship between a spouse or a wife and husband who are not married.

The CC of Ukraine establishes *general* (Article 75) and *special* (Articles 84, 86, 88) grounds for the acquisition of the right of allowance and conditions for its implementation. Thus, according to Part 2 of Art. 75 of the FC of Ukraine the right to allowance (alimony) has those of the spouse who: a) is incapacitated, b) needs financial assistance, provided that the other spouse can provide financial assistance. In this case, a spouse who has reached the retirement age, established by law, or is a person with a disability of group I, II or III (Part 3 of Article 75 of the Insurance Code of Ukraine) is considered incapacitated. One spouse is in need of financial assistance if his salary, pension, income from the use of his property, other income do not provide him with the subsistence minimum required by law. For example, having considered a statement of PERSON_1 on the Supreme Court of Ukraine's review of the Supreme Specialised Court of Ukraine's decision on civil and criminal cases of October 15, 2015 in a case against PERSON_1 to PERSON_2 about recovering alimony from a disabled wife, the Court Chamber of Ukraine on the Resolution of April 13, 2016, in Case No. 6-3066ts15 stated, in particular, that the materials of the case indicate that the amount of the pension of the claimant as a disabled person of group I is 1 149 hryvnas 72 kopecks.

Article 7 of the Law of Ukraine "On the State Budget of Ukraine for 2015"[2] stipulates for 2015 the living wage for persons with disabilities from January 1, 2015 – UAH 949, from September 1 – UAH 1,074. Therefore, PERSON_1 receives a disability pension in the amount that provides its subsistence minimum, established by law for persons who have lost their ability to work, and therefore cannot be considered as a person in need of financial assistance in the sense of Article 75 Part 4 of the Criminal Code

[1] Principles of European Family Law regarding divorce and maintenance between former spouses. Retrieved from http://ceflonline.net/wp-content/uploads/Principles-English.pdf

[2] Law of Ukraine "On the State Budget of Ukraine for 2015". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/main/294-IX

of Ukraine. Taking into account the established circumstances, the court of cassation in the case being reviewed reasonably agreed with the court of appeal of the refusal to satisfy the claims of PERSON_1 on the recovery of alimony for her allowance as a disabled wife[1].

Due to changes in the current legislation concerning the setting of minimum social standards for which the minimum wage exceeds the living wage per person (see, for example, Law of Ukraine of November 14, 2019 No. 294-IX "On The State Budget of Ukraine for 2020"[2]), obviously, one should expect a decrease in the number of people in need of financial assistance, but this does not solve other problems of support. For example, a systematic analysis of the above provisions of Art. 75 of the FC of Ukraine[3] on the one hand, and Art. 55 of the Criminal Code of Ukraine (concerning the obligation of the wife and husband to jointly care for the financial support of the family), Art. 60 of the Criminal Code of Ukraine (concerning the right of shared ownership of property acquired by the couple during the marriage) and Art. 63 of the Civil Code of Ukraine (concerning the equality of the rights of the wife and the husband in the exercise of the spouses shared ownership rights) – on the other indicates that the legislator unjustifiably not included in the grounds for acquiring the right to withhold *the refusal of one spouse in material support of the other* (as it was established by Part 1 Art. 32 of the Code on Marriage and Family of Ukraine), since according to part 1 of Art. 75 of the FK of Ukraine, wife, husband should financially support each other.

The current Ukrainian Family Code does not contain a rule that a spouse who requires such maintenance has the right to go to court, although a similar provision was contained in Part 1 of Art. 32 of the Marriage and Family Code of Ukraine. On this basis, the author proposes to formulate part 2 of Art. 75 of the FC of Ukraine in the following wording: "2. In case of refusal of such support, the spouse who is incapacitated, needs financial assistance, has the right to allowance, provided that the other spouse can provide financial assistance, has the right to go to court to request allowance." Thus, in author's view, the spouses will be better informed about the possibility of protecting their violated right [15; 16]. The above grounds for the occurrence and conditions for the exercise of the right of spouses to allowance are established by law. At the same time, expanding the dispositive principles of regulation of family relations in general (Part 2 of Article 7, Part 1 of Article 9 of the FC of Ukraine), and relations of spouses, in particular (Article 64 of the

[1] Resolution of the Supreme Court of Ukraine in Case No. 6-3066css15 (2016, April). Unified State Register of Judgments. Retrieved from http:// www.reyestr.court.gov.ua/

[2] Law of Ukraine "On the State Budget of Ukraine for 2020". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/main/294-IX

[3] Family Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14

FC of Ukraine), created the possibility of contractual regulation of the relationship of spouses on allowance both in the marriage contract and in the spousal contract. Thus, according to Art. 99 of the FC of Ukraine, the parties may agree to grant allowance to one spouse regardless of disability and the need for financial assistance on the terms stipulated in the marriage contract.

If the marriage contract specifies the terms, amount and terms of payment of alimony, then in case of failure of one of the spouses to fulfil their obligations under the contract, alimony may be charged on the basis of a notary's executive inscription. The marriage contract may stipulate the possibility of termination of the right to support one of the spouses in connection with the receipt of property (monetary) compensation. The marriage contract may stipulate the possibility of termination of the right to support one of the spouses in connection with the receipt of property (monetary) compensation. In addition, in accordance with Art. 78 of the FC of Ukraine spouses have the right to enter into an agreement for the maintenance of one of them, in which to determine the terms, amount and terms of payment of alimony. The contract is made in writing and notarised. In case of failure of one of the spouses to fulfil their obligations under the maintenance agreement, alimony may be charged on the basis of a notary's executive inscription. In this case, the execution of executive inscriptions by a notary shall be governed by the provisions of Chapter 14 of the Law of Ukraine of September 2, 1993 "On Notary"[1], Chapter 16 of the Procedure for Notary Acts by Notaries of February 22, 2012[2], and Clause 1 of the List of Documents on which indebtedness is enforced indisputably on the basis of executive notaries dated June 29, 1999[3].

Having established the right to allowance after the dissolution of marriage (Article 76 of the Criminal Code of Ukraine)[4], the legislator did not foresee the possibility of concluding a contract of allowance between them. Instead, the Principles (Principle 2:10) stipulate that the spouses should be able to enter into a post-divorce custody agreement, which may specify the amount of the allowance, the order of exercise, the duration and conditions of termination of the allowance obligation and the possible waiver of the application for the allowance. Such an agreement must be in writing.

In view of this, the author considers it expedient to provide in the FC of Ukraine the right of spouses to conclude a contract for their maintenance not only

[1] Law of Ukraine "On Notary" of September 2, 1993. Retrieved from http://zakon3.rada.gov.ua/laws/show/3425–12

[2] Order of the Ministry of Justice of Ukraine «Procedure for Notary Acts by Notaries of Ukraine». (2012, February). Retrieved from http://zakon2.rada.gov.ua/laws/show/z0282-12

[3] List of documents on which indebtedness is enforced indisputably on the basis of executive notaries: Decree of the Cabinet of Ministers of Ukraine. (1999, June). Retrieved from http: // zakon3.rada.gov.ua/laws/show/1172–99-п/ed20150407

[4] Family Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14

during marriage but also after divorce, for which to exclude from the name of Art. 78 of the Criminal Code of Ukraine the word "spouses" and add part 1 after the first sentence with the sentence of the following content: "The former spouse has the right to enter into such a contract even after the divorce". In author's view, making the proposed changes will allow a claimant to meet his or her needs, at the expense of a person who has the ability to satisfy them, not only during marriage but also after divorce. It is also advisable to grant the right to conclude an allowance contract to a woman and a man who are not married (Article 91 of the Criminal Code of Ukraine). Some special features characterise the special grounds for acquiring the right to allowance and the conditions for its implementation.

1. Thus, according to Art. 84 of the FC of Ukraine, the wife has the right to be supported by her husband during pregnancy, and the wife with whom the child resides – from the husband-father of the child – until the child is three years old. However, if the child has a physical or mental disability, the term increases to six years.

2. The man with whom the child lives has, according to Art. 86 of the FC of Ukraine, the right to be supported by the wife-mother of the child until the child is three years old, and in the case of the child's physical or mental development – until the child is six years old.

3. If one of the spouses, including the able-bodied, lives with a child with a disability, who cannot cope without permanent care of a third party, he or she is entitled to allowance (Part 1 of Article 88 of the Criminal Code of Ukraine).

In spite of different subject composition and different grounds for holding the right to withhold, all three cases share the following characteristics:

a) a person has the right to allowance irrespective of his financial position;

b) the condition for the exercise of the right to allowance is the ability of a husband (wife, spouse) to provide financial assistance.

It should be noted that Art. 84 and Art.86 of the Criminal Code of Ukraine stipulate that a pregnant wife, the wife with whom the child resides, the husband with whom the child resides, have the right to maintenance even after the divorce. Art. 88 of the Criminal Code of Ukraine does not contain such a rule, but some scholars suggest that the right to maintain the spouse with whom the disabled child lives: a) is not terminated in the event of divorce; b) may occur after divorce [17; 18]. Since this is merely an assumption that is not based on law, it would be advisable to supplement Art. 88 of the Criminal Code of Ukraine part 3 as follows: "3. The spouse with whom the child with a disability resides has the right to maintenance even after divorce."

2.3. Division of property of spouses

According to the general rule established by Part 3 of Art. 368 of the Civil Code of Ukraine[1], property acquired by spouses during marriage is their joint compatible property, unless otherwise

[1] Civil Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15

stipulated by the contract or law. This provision of the CC of Ukraine was developed in Part 1 of Art. 60 of the FC of Ukraine[1], according to which the property acquired by the spouses during the marriage, belongs to the wife and husband on the right of shared ownership, regardless of the fact that one of them did not have for a valid reason (study, housekeeping, child care, illness, etc.) self-employment (income). In practice, often the question arises which rules of the codes – the CC of Ukraine, or the FC of Ukraine

– should be used in deciding whether to divide the property of a former spouse? Relationships regarding the division of jointly owned property are regulated by Art. 372 of the CC of Ukraine, according to which: jointly owned property may be shared between co-owners by agreement between them, except in cases established by law (Part 1 of Article 372). In the case of division of jointly owned property, it is considered that the shares of the co-owners in the common joint ownership are equal, unless otherwise agreed by the agreement between them or the law (Part 2 of Article 372).

"Other", relating to the determination of the size of the shares of co-owners in the right of shared ownership, is established by Part 1 of Art. 70 of the FC of Ukraine, which regulates relations regarding the division of property of spouses. The author believes that this rule also applies to the division of property of a former spouses, since even after the divorce, the property acquired during the marriage is owned by the former spouse on the right of shared ownership. As noted in Part 1 of Art. 70 of the FC of Ukraine, in the case of division of property subject to shared ownership of the spouses, the shares of property of the wife and husband are equal, unless otherwise determined by the agreement between them or the marriage contract (note the incorrect use of the terms "agreement" in this case and "marriage contract" because the latter is also an agreement).

Thus, both civil and family law presuppose the equality of shares in the property of the spouse, which is joint property. Exceptions to this rule may be established by an agreement between the co-owners or the law (Part 2 of Article 372 of the Civil Code of Ukraine), or an agreement between the wife and the husband (including the marriage contract), as stipulated by Part 1 Art. 70 of the FC of Ukraine. Thus, the spouses can deviate from the principle of equality of shares in the right of shared ownership by entering into an agreement. However, in the case of a dispute over the division of property belonging to the co-owners of the shared ownership, the share of the co-owner may be increased or reduced by the court decision, taking into account the circumstances that are significant (par. 2 p. 2 Article 372 of the CC of Ukraine). However, the CC of Ukraine does not disclose the content of the concept of "circumstances that are of significant importance". Obviously, this

[1] Family Code of Ukraine. (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14

shortcoming is appropriate to remedy in the process of updating civil law by defining in the code an approximate list of these circumstances.

Unlike the CC of Ukraine, Part 2 of Art. 70 of the FC of Ukraine, states that in resolving a dispute over the division of property, the court may deviate from the principle of equality of spouses in circumstances of significant importance, in particular if one of them did not care for the financial support of the family, evaded participation in child support (children), hiding, destroying or damaging common property, spending it to the detriment of the family. In other words, the norm of using the word "in particular" lists an approximate list of circumstances to reduce the share of one of the spouses in shared ownership. Thus, the court, when deciding the issue of separation of property, may take into account, in particular, the following circumstances, which are essential: the evasion of one spouse from the support of the child; fulfilment by one of the spouses of obligations to pay the loan under the loan agreement by transferring the money earned by it; failure to fulfil and/or improper performance by one of the spouses of the obligation to repay the funds obtained under the loan agreement, although in accordance with Part 4 of Art. 65 of the FC of Ukraine, a contract concluded by one of the spouses for the benefit of the family creates obligations for the other spouse if the property acquired under the contract is used for the benefit of the family. In addition to the grounds for reducing the share of one of the spouses, the FC of Ukraine (Part 3, Art. 70) provides that by the decision of the court the share of the property of the wife, the husband may be increased if the children, as well as the incapacitated adult son, daughter, reside with him/her, provided that the amount of alimony they receive is insufficient to support their physical, spiritual development and treatment [19]. In deciding which code – the Civil or Family Code – should be followed in the division of property of a former spouse, in author's view, it is necessary to take into account the jurisprudence, in particular, the practice of the Supreme Court.

Thus, in the decision of May 24, 2017, in the case No. 6-843ts17, the Supreme Court of Ukraine applied the rules of the FC of Ukraine regarding the division of property belonging to a former spouse on the right of shared ownership. The Supreme Court of Ukraine noted that in order to settle disputes arising from property relations between spouses, including the former, they are subject to the application of the rules of the Family Code of Ukraine. The position regarding the application the rules of the FC of Ukraine to the division of the former spouses' property belonging to them on the right of shared ownership is confirmed also by the content of the decision of the Supreme Court of January 31, 2019, in case No. 686/23104/17 [20]. It should be noted that according to the provisions of family law, only the following property is divided: a) acquired during the marriage; b) that is the subject of the shared ownership of spouses. Property

which is the personal private property of a wife, a husband, is not subject to division between them.

Types of property, which is the personal private property of a wife, husband, defined by parts 1–5 of Art. 57 of the FC of Ukraine. The court may also recognise the private property of a wife, a husband acquired by her/him during their separate residence in connection with the actual termination of a marriage (Part 6 of Art. 57 of the FC of Ukraine). For the application of the provisions of Part 6 of Art. 57 of the FC of Ukraine presence of at least the following facts is required: 1) separate residence of husband and wife; 2) acquisition of property by the wife during separate residence; 3) the actual termination of a marriage. These facts can be confirmed, in particular, by a court decision in another case. In case if in property was invested, in addition to common funds, funds belonging to one of the spouses, the share in this property, according to the size of his/her contribution, is its personal private property (Part 7 of Art. 57 of the FC of Ukraine).

CONCLUSIONS

Thus, the study allows to formulate some conclusions. The right of shared ownership of spouses should be implemented in accordance with the requirements of Art. 65 of the FC of Ukraine, not Art. 369 of the FC of Ukraine, and therefore case law in cases of invalidation of contracts concluded by one spouse without the consent of the other, requires compliance with the provisions of family law. This conclusion also applies to the exercise of right to shared ownership of property acquired during the cohabitation of a man and a woman who live in the same family but are not married to each other or to any other marriage. Husband and wife, though, are considered co-owners of property acquired by them during the marriage, in the sense of Part 2 of Art. 372 of the CC of Ukraine, however, the provisions of Art. 70 of FC of Ukraine should be applied to property division, considering that the legal regime of their property acquired during the marriage period has not changed after the termination of the said marriage. In general, the issues raised in this article require further in-depth research in order to formulate proposals to improve the existing civil and family law and to ensure consistent case law.

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ALIMONY OBLIGATIONS OF FAMILY MEMBERS IN THE FAMILY LAW OF UKRAINE: PROBLEMATIC ISSUES OF THEORY AND PRACTICE

Abstract. *The relevance of the study of alimony obligations of family members in the family law of Ukraine is conditioned by both the latest approaches of the legislator to the regulation of alimony relations, and the problems of law enforcement practice in this area. The purpose of the study is to determine the features of alimony obligations of family members in the family law of Ukraine, to identify problems of legal regulation and enforcement of these obligations and to develop recommendations for their elimination. Methodologically, the study of alimony obligations of family members is divided into separate structural parts, which cover the general features of these obligations in the family law of Ukraine and the features of their individual types. The methodological basis for the study of alimony obligations of family members in the family law of Ukraine is developed at the philosophical, general scientific and special scientific levels. The study proves that the alimony obligations of family members are in essence family law monetary obligations that arise on the grounds specified by law or contract, are long-term and personal. It is proposed that one of the spouses be considered in need of financial aid if their monthly income (salary, pension, income from the use of their property, other income) is less than the minimum wage established by law. It is proposed to apply similar provisions to identify parents in need of financial aid in alimony obligations for the maintenance of disabled parents by adult children. It is argued that the change of the minimum amount of alimony to be collected from the alimony payer per child is not a basis for applying Article 192 of the Civil Code of Ukraine, but is a basis for changing the minimum amount of alimony specified in the writ of execution and alimony recovery, and is taken into account*

when determining the amount of alimony or alimony arrears. Other changes to the Family Code of Ukraine have been proposed to improve the procedure for collecting alimony for family members. The analysis of theoretical provisions of alimony obligations of family members and practical problems of law enforcement in this area and the development of proposals to improve family law is important for further research of family law obligations, will contribute to the development of an effective mechanism for exercising and remedy of the rights of parties in family legal relations and the establishment of the unity of judicial practice.

Keywords: *Family Code of Ukraine, participants of family legal relations, alimony payer, social insurance, monthly allowance.*

INTRODUCTION

More than fifteen years have passed since the entry into force of the Family Code of Ukraine on January 10, 2002. In this time, the practice of applying the latest family law provisions has established, in particular, in the field of alimony obligations of family members. However, certain provisions of Ukrainian family law still raise questions about law enforcement. In particular, debatable are the provisions on the establishment of one of the spouses in need of financial aid, on the recovery of alimony after divorce for the maintenance of the former spouse who is able to work, on the recovery of alimony from parents for the maintenance of adult children who continue their education by correspondence. Notably, the sphere of alimony obligations constantly attracts the attention of the legislator, as evidenced by repeated changes to the Family Code of Ukraine[1] in order to strengthen the protection of the child's right to adequate maintenance. Therewith, in the current conditions of development of Ukrainian society and the legal system of Ukraine, it is necessary to conduct a «revision» of the current family legislation of Ukraine and determine the main directions of its renewal, including in the field of alimony obligations of family members. One of such areas is the harmonisation of domestic legislation with EU legislation.

An important step towards the approximation of family law of Ukraine with the modern European legal system is the ratification of international regulations and Ukraine's accession to international regulations governing alimony, which also become part of the national family law of Ukraine in accordance with Part 1 Article 13 of the Family Code of Ukraine. Thus, Ukraine acceded to the Convention on the Recovery of Alimony Abroad of June 20, 1956[2], the Convention on the Recognition and Enforcement of Decisions Concerning Maintenance Obligations

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

[2] Law of Ukraine No 15-V «On Accession to the Convention on the Recovery of Alimony Abroad». (2006, July). Retrieved from https://zakon.rada.gov.ua/laws/show/15–16#Text

of October 2, 1973[1], and the Convention on the International Recovery of Child Support and Other Family Detention of November 23, 2007[2]. Therewith, Ukraine still has many unresolved issues in legal regulation of alimony relations with a foreign element, despite the existence of unified legal provisions in this area. Thus, Ukraine has not acceded to the Convention on the Law Applicable to Maintenance Obligations, adopted in Hague on 2 October 1973, Article 8 of which provides that the law applicable to divorce in a Contracting State in which divorce is granted or recognised, regulates alimony obligations between divorced spouses and review of decisions concerning these obligations[3].

There are also some approaches to the legal regulation of alimony in the scientific literature, but most of the studies of alimony obligations of family members were conducted in relation to the maintenance of the child by mother or father until it reaches the age of majority. Thus, alimony obligations of family members have been studied in the Ukrainian legal literature in the scientific articles of V. K. Antoshkina [1], L. V. Afanasieva [2], I. V. Zhylinkova [3], T. P. Krasvitna [4], Ya. V. Novokhatska [5], Z. V. Romovska [6], L. V. Sapeiko [7], V. I. Truba [8] and other legal scholars. In foreign literature, the following scholars studied alimony obligations of family members: J. Nevado Montero [9], N. Letova [10], I. Artemyeva [11], E. Ivanova [12], J. E. Crowley [13], P. Chiappori [14], N. D. Katz [15], A. G. Valverde [16], O. A. Yavor [17], L. S. Rzhanitsyna [18], T. A. Gurko [19]. However, the development of family law in Ukraine, problematic issues of law enforcement practice in alimony obligations of family members necessitate further study of theoretical provisions on the legal nature and essence of these obligations, identification of problems of their legal regulation and development of proposals for improving the family law regulation of alimony relations of family members.

The purpose of this study is to determine the features of alimony obligations of family members in the family law of Ukraine, to identify problems of legal regulation and enforcement of these obligations and to develop recommendations for their elimination.

1. MATERIALS AND METHODS

Determination of the specific features of alimony obligations of family members in the family law of Ukraine is impossible without the use of basic tools of the methodology of the doctrine of private law. The methodology of legal science means the system of method-

[1] Law of Ukraine No 135-V "On Ukraine's Accession to the Convention on the Recognition and Enforcement of Decisions Concerning Maintenance Obligations". (2006, September). Retrieved from https://zakon.rada.gov.ua/laws/show/135–16#Text

[2] Law of Ukraine No 26-VII «On Ratification of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance». (2013, January). Retrieved from https://zakon.rada.gov.ua/laws/show/26–18#Text

[3] Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. Retrieved from https://www.hcch.net/en/instruments/conventions/full-text/?cid=86.

ological principles, techniques, means, tools, and methods of scientific cognition, which is used to obtain data in the study of state and legal reality in the context of the problems of legal practice. Describing the family law methodology, O. Yu. Ilyina notes that it is based on three basic preconditions: first, the "agreement" of most family ties; secondly, the special state interest in ensuring the normal functioning of the family as the most important social unit, a "cell" of the social organism, and most importantly – in the most effective protection of the rights and interests of children; thirdly, the impossibility of legal technologies to penetrate deeply into the fabric of family relations – the inner essence of which is more regulated through morality, custom, tradition, and other forms of social influence. Therefore, the family law methodology is quite difficult to combine private and public principles, dispositive and imperative provisions [20]. Undoubtedly, it is difficult to accept O. Yu. Ilyina's approach to the preconditions of the family law methodology, although it can be agreed that alimony obligations of family members may arise based on an agreement between participants in family legal relations, in particular, the spouses have the right to enter into a maintenance agreement with respect to one of them, in which to determine the conditions, amount, and terms of payment of alimony (Part 1 Article 78 of the Family Code of Ukraine[1], etc.

Regarding the difficulties in combining private law and public principles in the family law methodology, the following should be noted. The maintenance obligations of the mother and father in relation to the child are aimed at the most effective protection of the rights and interests of children. Therewith, these responsibilities have long been regulated from the standpoint of public law regulation, in particular, the conclusion of alimony agreements, termination of the right to child support in connection with the acquisition of ownership of real estate, etc. However, in modern conditions, the private law framework for the regulation of alimony obligations is becoming widespread. Thus, the Family Code of Ukraine contains provisions that indicate the dispositive legal regulation of these obligations: alimony is paid monthly, and by mutual consent they can be paid in advance (Part 3 Article 77); the parties may agree to provide maintenance to one of the spouses, regardless of disability and the need for financial aid under the conditions specified in the marriage contract (Part 1 Article 99). Notably, in the legal literature attention is paid to the specifics of family ties between the parties to the alimony relations. In terms of subjects, object, and purpose, alimony obligations are inherent only in family law, but in their structure and method of protection they are remarkably similar to civil law obligations [21]. Thus, according to V. I. Truba, the analysis of the provisions of Chapter 15 of the Family Code of Ukraine allows to classify alimony as obligatory [8].

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

The methodological framework for the study of alimony obligations of family members in family law of Ukraine is developed at the philosophical, general scientific, and special scientific levels. The dialectical method, anthropological, axiological, and institutional approaches were predominantly used. The dialectical method allowed to consider the alimony obligations of family members in their development and to identify the characteristics of their individual types depending on their subject composition. However, the specific features of alimony obligations of family members cannot be considered separately from philosophical anthropology. The German philosopher of law Gustav Radbruch notes that only family law, also in the era of individualism, comes from a different image of a person, derived not only from reason and self-interest. Family law makes provision for the husband's right to trust in his wife, the right of parents to trust in children, with the hope that they will fulfil their duty back. In the person of husband and parents, it considers the presence of love and responsibility [22]. Admittedly, providing maintenance to family members is a sign of love and responsibility between them. D.A. Hudyma fairly points out that only the unity of the conclusions of the philosophical doctrine of law and person with the "current" theoretical developments of legal science can create a solid methodological framework for the development of legal science and practice, deprive the science of dogmatism and commentary on legislation, and law enforcement – of some shortcomings of its operation [23]. Axiological and institutional approaches provide an opportunity to consider in combination and unity of such basic categories of family law as family, marriage, parenthood, kinship, and legal values, which constitute the basis for building family relationships to provide maintenance to family members.

General scientific methods of analysis and synthesis, induction, and deduction contributed to the formulation of the concept of alimony obligations of family members, provided an opportunity to identify gaps in their legal regulation, to formulate proposals to improve family law in Ukraine. The basis of the special scientific level of study of alimony obligations of family members was historical legal and comparative legal methods. D.A. Kerimov rightly argues that outside the historical context that connects the phenomena and processes of modernity with those phenomena and processes that preceded them, as well as with those that will arise on their basis and in a more or less distant perspective, it is impossible to know this very modernity. And this is quite natural, because in society there are always remnants of the past, the foundations of the present and the beginnings of the future [24]. The comparative legal method of studying the alimony obligations of family members is of particular importance in the current conditions of development of the legal system of Ukraine and the recodification (update) of civil and family legislation of Ukraine. The legal doctrine of Ukraine correctly notes that the scientific rec-

ognition of the comparative approach, which has recently been actively developed and applied in almost all social and humanitarian sciences, as well as its methodological potential, suggest that it should soon take a place in the structure of the methodology of science on a par with the structural, functional, systemic, synergistic, and other general scientific methodological approaches [25]. The comparative legal method of studying the alimony obligations of family members allows to conclude that the family law of Ukraine can preserve the national traditions and features of legal regulation of these obligations, although, admittedly, a progressive phenomenon nowadays is the unification of international law provision in the field of recovery of alimony for family members.

The empirical material of the study used the materials of judicial practice on the recovery of alimony for family members, which provided an opportunity to identify problems of law enforcement in this area and suggest ways to solve them.

2. RESULTS AND DISCUSSION

2.1. The concept and typical characteristics of alimony obligations of family members in family law of Ukraine

The Family Code of Ukraine does not contain a legal definition of the term "maintenance obligations". Instead, it uses such concepts as "the rights and responsibilities of the spouses for maintenance", "the obligation of the mother or father to maintain the child and its performance", etc. Meanwhile, alimony obligations as a legal category are well-established in the science of family law. It is the relations of family members about the provision of maintenance that is called alimony. In the Family Code of Ukraine[1] the term «alimony» is used both as a synonym for maintenance and as allowance. Thus, the right to maintenance (alimony) has the spouse who is incapacitated, needs financial aid, provided that the other spouse can provide such material aid (Part 2 Article 75); maintenance of one of the spouses is provided to the other spouse in kind or in cash with their consent. According to the court decision, alimony is awarded to one of the spouses, usually in cash (Parts 1, 2 Article 77); the ways in which parents perform their obligation to maintain the child are determined by agreement between them. By agreement between the child's parents, one of them who lives separately from the child may take part in its maintenance in cash and (or) in kind. By court decision, child support (alimony) is awarded in proportion to the income of its mother or father or in a fixed amount of choice of the parent or other legal representatives of the child with whom the child lives (Parts 1–3 Article 181); the share of earnings (income) of the mother or father, which will be collected as child support, is determined by the court (Part 1 Article 183).

In the science of family law, there are different views on the concepts of maintenance and alimony. Thus, O.O. Deriy defines alimony, on the one hand, as allowance, which is provided voluntarily

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

by one family member to another and which can be in food, clothing, care, etc., in kind and in money, and on the other hand, alimony is money or property provided by a person liable for alimony for the maintenance of another person [26]. V.I. Truba believes that "maintenance" is a broader concept, as it includes a mutual obligation to care for, provide family members with means of subsistence, which is performed both voluntarily and compulsorily, or forced in case of a right to support one of the participants in the family relationship, who is unable to support themselves due to violation or lack of personal abilities. Alimony obligations ("alimony") are related to the concept of "allowance" as a part of the whole, as they reflect the forced or involuntary performance of the maintenance obligation [8].

If alimony is collected in cash based on a court decision or an agreement between alimony payers, then there is a transformation of maintenance obligations into alimony obligations. Alimony obligations are legal relations where one party, the debtor – the payer of alimony – is obliged to take in favour of the other party (creditor – the recipient of alimony) a certain action, which is to pay alimony in cash, and the creditor has the right to demand from the debtor the performance of its duty. Such understanding of the alimony obligation suggests its essence as a monetary obligation, albeit conditioned by the specific features of family legal relations [27].

T.P. Krasvitna notes that in the case when the maintenance of one of the spouses is provided to the other spouse in cash, the obligation of the spouses to maintain can be defined as monetary, because it mediates the movement of funds as a legal tender [4]. Therewith, the author believes that the maintenance obligation of the spouses is a special type of civil obligations, to which the provisions of the law of obligations of the Civil Code of Ukraine[1] may be applied in the alternative, insofar as it does not contradict the essence of the maintenance obligation [4].

Indeed, based on the analysis of the provisions of Article 8 of the Family Code of Ukraine[2], the provisions of the Civil Code of Ukraine[3]. can be applied to certain personal non-property and property relations of participants of family legal relations. However, considering that the maintenance obligations of family members are conditioned by the personal family relations of their parties, it can be argued that they are not civil in nature, although they are monetary in nature. Thus, V.A. Belov understands monetary obligations as civil relations, the content of which is the right of the creditor and the corresponding legal obligation of the debtor to make a settlement or payment, i.e. action(s) to transfer a certain (significant) amount of money (currency) [21]. The definition of a monetary obligation is

[1] Civil Code of Ukraine. (2020, August). URL: https://zakon.rada.gov.ua/laws/show/435–15#Text

[2] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

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

contained in legislation of various industries. Thus, Article 1 of the Bankruptcy Procedure Code of Ukraine of October 18, 2018 No. 2597-VIII (hereinafter referred to as the Code) defines a monetary obligation as an obligation of the debtor to pay the creditor a certain amount of money in accordance with a civil transaction (agreement) and other grounds stipulated by the legislation of Ukraine. Monetary liabilities also include liabilities for the payment of taxes, fees (mandatory payments), insurance premiums for compulsory state pension and other social insurance; liabilities arising from the inability to perform obligations under contracts of storage, work and labour, lease (rent), etc. and which must be expressed in monetary units[1]. Thus, the Code provides a definition of a monetary obligation in a broad meaning. In cases where the performance of the obligation involves the debtor's obligation to pay the creditor a sum of money, it is a monetary obligation. Alimony obligation to pay money for the maintenance of family members is a monetary obligation.

An analysis of the current Family Code of Ukraine[2] indicates that the family law of Ukraine is already in some way "interspersed" with rules on liability for breach of a monetary obligation, although it is not a maintenance obligation as a monetary obligation. Thus, according to para. 1 Part 4 Article 196 of the Family Code of Ukraine in case of overdue payment of additional expenses for a child due to the payer's fault, such payer is obliged to pay the amount of arrears of additional expenses with consideration of the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. It is considered expedient for the legislator to extend the provisions of Article 625 of the Civil Code of Ukraine[3] on liability for breach of monetary obligation, despite the fact that parts 1–3 of Article 196 of the Family Code of Ukraine established a penalty for late payment of alimony [27]. In this meaning, a maintenance obligation is a monetary obligation. It is proposed to extend the provisions of Article 625 of the Civil Code of Ukraine on liability for breach of monetary obligation in terms of the possibility of recovery of the amount of debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount.

One of the hallmarks of a family member's alimony obligation is its long-term nature. The legal literature states that this is performed by providing a family member who is in need of maintenance with periodic (monthly) maintenance, but for a long period. The duration of the maintenance of a family member depends on the conditions that served as the basis for the emergence

[1] Bankruptcy Procedure Code of Ukraine. (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2597–19#Text

[2] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

[3] Civil Code of Ukraine. (2020, August). URL: https://zakon.rada.gov.ua/laws/show/435–15#Text

of alimony legal relations. The alimony obligation will continue until the conditions under which the family member needs maintenance disappear. It should be added that the duration of the maintenance obligation of family members, in particular, the maintenance obligation between the child and its mother or father may be conditioned by the age of the child, as parents are obliged to perform their obligation to provide maintenance until child is of legal age, and in the presence of certain conditions specified by law or contract, the maintenance obligation may arise for parents in relation to the maintenance of adult children.

The alimony obligation of family members cannot be considered a legal relationship with a plurality of persons on the debtor's side, for example, the alimony obligation of the mother or father and child, because there is an independent alimony relationship between the authorised person and the alimony debtor, in particular between father and child and between mother and child, which indicates the personal nature of the alimony legal relations.

Thus, alimony obligations of family members to provide maintenance in cash are family legal monetary obligations that arise on the grounds specified by law or contract, they have a long-term and personal nature.

2.2. Problematic issues of recovery of alimony for spousal support

It is generally accepted in the legal literature that the basis for the maintenance obligation of the spouses is the legal structure, which includes the following legal facts: 1) the fact that the wife and husband are in a registered marriage; 2) incapacity of one of the spouses; 3) the need of one of the spouses; 4) the solvency of the other spouse. The right to maintenance of the spouses in case of child living with one of them depends on the age and health of the child [4]. Admittedly, the contract of matrimony on the provision of maintenance may determine other conditions for the provision of maintenance to one of the spouses by the other spouse.

An analysis of law enforcement practices regarding the recovery of alimony for the maintenance of one of the spouses indicates that changes in the socio-economic development of the state and increasing social guarantees of Ukrainian citizens that occurred in Ukraine after the entry into force of the Family Code of Ukraine[1], have led to the fact that today only in rare cases it is possible to recover alimony for the maintenance of one of the spouses by a court decision due to the fact that there are practically no categories of disabled persons who can be recognised as needing financial assistance from another spouse. Thus, according to Part 3 Article 75 of the Family Code of Ukraine, a spouse who has reached the retirement age established by law or is a person with a disability of I, II or III category is considered incapable of work. In accordance with Part 4 Article

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

75 of the Family Code of Ukraine, one of the spouses is in need of material aid if the salary, pension, income from the use of their property, other income do not provide them with a living wage established by law.

Analysing the conditions of alimony for the maintenance of one of the incapacitated spouses in need of financial aid, it should be recalled that in 2004 the subsistence level for persons who lost their ability to work was 284.69 UAH[1], and the resolution of the Cabinet of Ministers of Ukraine No. 544 of April 15, 2003 established that the minimum old-age pension from 01.07.2003 is 50 UAH[2]. On January 1, 2004, the Law of No. 1058-IV "On Compulsory State Pension Insurance" of July 9, 2003 came into force, Article 28 of which stipulated that the minimum old-age pension was set at 20 percent of the average wage of workers employed in the sectors of the Ukrainian economy, if men had 25 years, and women had 20 years of qualifying period. According to the provisions of Article 28 of the Law of Ukraine "On Compulsory State Pension Insurance" (as amended on 12.01.2005), if men have 25, and women have 20 years of qualifying period, the minimum size of the old-age pension is established in the amount of the subsistence minimum for persons who have lost the ability to work and is as follows: from 12.01.2005–332 UAH; from 01.01.2006–350 UAH; from 01.04.2006–359 UAH; from 01.10.2006–366 UAH; from 01.01.2007–380 UAH[3].

Thus, since January 2005, persons who were considered disabled due to reaching the retirement age established by law have already been provided with a pension at the subsistence level. Only for persons with disabilities and persons who did not acquire the right to a labour pension for valid reasons, the minimum pension was set at the level of a social pension in an amount less than the subsistence level. Thus, according to paragraphs a), b) Article 94 of the Law of Ukraine No. 1788-XII "On Pension Provision" of November 5, 1991, social pensions are assigned in the following amounts: the right to a labour pension without a valid reason; b) 50 percent of the minimum old-age pension: to persons who have reached the age of: men – 60 years old, women – 55 years old and have not acquired the right to a labour pension for valid reasons; disabled persons of III category[4].

Furthermore, according to Article 6 of the Law of Ukraine No. 1727-IV "On

[1] Law of Ukraine No 1704-IV "On Approval of the Subsistence Minimum for 2004". (2004, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1704-IV#Text

[2] Resolution of the Cabinet of Ministers of Ukraine No 544 «On increasing the size of labor pensions». (2003, April). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP030544.html.

[3] Law of Ukraine No 1058-IV «On Compulsory State Pension Insurance». (2003, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1058–15#Text

[4] Law of Ukraine No 1788-XII «On Pension Provision». (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1788–12#Text

state social aid to persons who are not entitled to a pension and persons with disabilities" of May 18, 2004, the amount of state social aid to persons who are not entitled to a pension and persons with disabilities for conditions stipulated in Part 1 Article 4 of this Law, is established based on the subsistence level for persons who have lost their ability to work: persons with disabilities of I category, women who have been awarded the title of "Mother-heroine", per one child of the deceased breadwinner – 100 percent, per two children – 120 percent, per three or more children – 150 percent; persons with disabilities of II category – 80 percent; persons with disabilities of III category – 60 percent; clergymen, ecclesiastic dignitaries, and persons who, for at least ten years before the Law of Ukraine "On Freedom of Conscience and Religious Organisations" came into force, held elective or appointed positions in religious organisations officially recognised in Ukraine and legalised in accordance with the legislation of Ukraine, the presence of archival documents of the relevant state bodies and religious organisations or testimony of witnesses confirming the fact of such work, – 50 percent; persons who have reached the age established by Article 1 of this Law – 30 percent[1].

The above provisions indicate that the recognition of one of the spouses as in need of financial aid, depending on the provision of the subsistence level for the recovery of alimony from the other spouse, no longer meets the needs of today. It is considered that in the current conditions of economic development and legal system of Ukraine it would be appropriate to use other state social standards to determine the state of one spouse in need of financial aid, or the state of the other spouse who can provide such material aid. Thus, the basic state social guarantees include the minimum wage, providing a person with income in this amount could be used to determine one of the spouses in need of material aid. In this regard, Part 4 Article 75 of the Family Code of Ukraine[2] should be amended as follows: "4. One of the spouses is in need of financial aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law".

Obligations to maintain the former spouse are stipulated by the legislation of Ukraine and the legislation of other states. Thus, according to § 1584 of the German Civil Code, after a divorce, one of the spouses who is obliged to pay alimony is liable to the relatives of the eligible person. If the obligated person is insolvent, their relatives are liable instead. § 1585 of the German Civil Code stipulates that current alimony is paid in the form of cash rent. Rent must be paid before the beginning of the calendar month. The obligor must pay the

[1] Law of Ukraine No 1727-IV "On State Social Assistance to Persons Not Entitled to a Pension and Persons with Disabilities". (2004, May).

[2] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

full amount of the monthly rent even if the right to alimony is terminated due to remarriage or death of the authorised person. Instead of an annuity, the eligible person may demand payment of the capitalised amount of payments, if there is a serious reason for this and if the obligated person will not be unfairly burdened as a result. Therewith, European countries have recently registered a decrease in the number of disputes over the payment of alimony by a husband for the maintenance of his ex-wife after divorce. As noted in the scientific literature, the reduction in the number of such disputes was the result of a deliberate reorientation of alimony legislation, which, by limiting the payment of alimony, sought to promote divorce and ensure greater economic equality of the former spouses [28].

With the entry into force of the Family Code of Ukraine, the provisions of Part 4 Article 76 of the Family Code of Ukraine became an innovation in alimony obligations: if in connection with the upbringing of a child, housekeeping, care for family members, illness or other significant circumstances, one of the spouses was incapable of getting an education, work, occupy a corresponding job, they have the right to maintenance in connection with the divorce and when they are able to work, provided that they need financial aid and that the ex-husband (wife) can provide financial aid. However, in law enforcement the provisions of this article raised questions: How to prove in court that one of the spouses did not have the opportunity to occupy the corresponding job, get an education, etc. precisely because of raising a child, housekeeping or other significant circumstances, and not because of lack of sufficient knowledge, life and professional experience, professional skills, insufficient qualifications? Therefore, when assessing specific life circumstances in cases of recovery of alimony for the maintenance of one of the former spouses, courts usually do not see a causal link between the inability of one spouse to find employment with their responsibilities for housekeeping, caring for family members, etc. Thus, the Desnianskyi District Court of Chernihiv in its decision of May 27, 2015 in the case No. 750/3717/15-ц noted: "Considering that the plaintiff has a higher education and is an able-bodied person, the plaintiff owns a three-room apartment and a land plot, which does not indicate the plaintiff as a person in need of financial aid, in the absence of evidence confirming the fact that the plaintiff cannot be employed in connection with the household and caring for family members or with other circumstances of significant importance, the court concludes that the plaintiff is not a person entitled to maintenance in accordance with the requirements of Part 4 Article 76 of the Family Code of Ukraine, in connection with which the claim is unfounded and cannot be satisfied" [29]. It appears that Part 4 Article 76 of the Family Code of Ukraine should be excluded from the Family Code of Ukraine, which will contribute to the clarity of legal provisions and unification of judicial practice.

Consequently, the definition of such conditions for the alimony of one of the spouses, such as their need for material aid, and the solvency of the other spouse or their ability to provide material aid, currently requires changes. This study proposes to consider one of the spouses in need of material aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law. Accordingly, the second of the spouses is the one who can provide financial aid if their monthly income (salary, pension, income from the use of his property, other income) exceeds the amount of the minimum wage established by law.

2.3. Problematic issues of collecting alimony for child support

Alimony obligations of a mother or father to support a child until they reach the age of majority are one of the most common obligations to support family members. Looking at the history of this issue, in the pre-Soviet period only individual legal regulations stipulated the obligation of parents to support children. Thus, clause 118, part 1 of chap. IV of the Civil Code of Eastern Galicia in 1797 prescribed that the father maintains the children until they can feed themselves [30]. More detailed legal regulation of such obligations was acquired in Soviet family law. The Family Code of Ukraine made provision for many innovations in the legal regulation of alimony obligations for mothers, fathers and children, for example, it significantly expanded the possibilities of contractual regulation of maintenance relations, established responsibility for late payment of alimony, payment of additional costs for a child, etc. Alimony obligations of the mother or father to support the child are based on the principles of equality of responsibilities between mother and father in relation to the child and equal responsibility of parents to the child, in some foreign countries, in particular in Italy – within the framework of the general legal guardianship of the mother and father over the child [31].

Given that the problem of alimony obligations for the maintenance of the child's parents until they reach adulthood constantly attracts attention [6; 7], this study will focus only on those problematic issues of recovering alimony for child support, which have recently become widely discussed among lawyers.

1. Thus, the legislator has repeatedly changed the minimum amount of child support, in connection with which the question arises: Is there a need to appeal to court with a separate claim to change the amount of alimony in case when the court decision indicated the minimum amount of alimony that was established at the time of the court decision?

The Grand Chamber of the Supreme Court in its ruling of March 4, 2020 in case No. 682/3112/18 stated that the legislator's change of the minimum amount of alimony to be recovered from the alimony payer per child is not grounds for changing the amount of alimony in accordance with Article 192 of the Fam-

ily Code of Ukraine[1], but is the basis for changing the minimum amount of alimony specified in the writ of execution in the procedure of execution and recovery of alimony, and is taken into account when determining the amount of alimony or debt. Law of Ukraine No. 2475-VIII of July 3, 2018 amended Part 1 Article 71 of the Law of Ukraine "On Enforcement Proceedings" with the second paragraph, which stipulates that the executor collects alimony from the debtor in the amount specified in the enforcement document, but not less than the minimum guaranteed amount stipulated by the Family Code of Ukraine. That is, the legislation prescribes a mechanism that makes provision for the payment of alimony in the amount not less than the minimum guaranteed amount stipulated by the Family Code of Ukraine, even in the presence of previous court decisions on recovery of alimony in the amount lower than the minimum guaranteed amount of alimony established by law. Thus, the courts of first and appellate instances came to a reasonable conclusion that the state executor, calculating the alimony arrears, correctly proceeded from the minimum alimony limit at the level of 50% of the subsistence minimum for a child of the appropriate age [32].

2. Recovery of alimony from the mother or father for child support must be distinguished from the collection of additional costs for the child from parents, which in essence are not alimony. In particular, the Resolution of the Civil Court of Cassation of the Supreme Court of 10 May 2018 in case 2–1161/2011 states that when deciding on the amount of funds to be recovered for additional costs, the courts must take into account the extent to which each parent is obliged to take part in these costs, considering the financial and family situation of the parties and other interests and circumstances that are significant. In case the financial situation of the parents does not allow to ensure full payment of additional costs, they can be reimbursed only in part. Considering these circumstances, the court determines the amount of additional costs for the child conditioned by special circumstances for one of the parents in a fixed amount. The existence of such additional costs must be proved by the claimant for recovery. These funds are additional, in contrast to the funds received by one parent for child support. In these cases, the costs are actually incurred or estimated, therefore they must be determined in a fixed amount. Additional costs are not an additional collection of child support. Alimony is necessary to ensure normal material conditions for the child's life. In some cases, in exceptional circumstances, apart from the usual costs for the child, additional ones are required. The amount of additional costs should be determined depending on the estimated or actual costs incurred by the child. The law refers to the jurisdiction of the court to determine the circumstances that may be considered

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

significant. In any case, such important circumstances include the state of health, financial situation of the defendant, the presence of other minor children, disabled wife, husband, parents, adult children, etc. Additional costs per child may be financed in advance or covered once incurred, periodically or permanently. The amount of additional costs for the child must be justified by relevant documents (for example, the cost of special medical care – a certificate of medical institution on the cost of medical services; treatment costs, spa treatment – extracts from the child's medical history, doctor's prescriptions, certificates, checks, travel documents, etc.). When collecting funds for additional costs that must be incurred in the future, the court must provide a calculation or justification of the need for future costs [33].

Thus, the change of the minimum amount of child support by the legislator does not require an appeal to the court with a separate claim for a change in the amount of child support. Additional costs for the child caused by special circumstances (development of the child's abilities, illness, disability, etc.) are not alimony, but are aimed at providing the child with the appropriate standard of living necessary for its physical, mental, spiritual, moral, and social development.

2.4. Problematic issues of recovery of alimony for the maintenance of an adult child

Alimony obligations for the maintenance of an adult child are divided into two types: 1) for the maintenance of adult disabled children; 2) regarding the maintenance of adult children who continue their education. Alimony obligations of parents for the maintenance of adult incapacitated children arise in the presence of a set of the following legal facts: 1) adult children are incapable of work; 2) adult children are in need, i.e. those in need of financial aid; 3) parents can provide financial aid. Alimony obligations of parents for the maintenance of adult children who continue their education arise from the obligatory combination of the following legal facts: 1) the daughter, son coming of age of over 18, but less than 23 years old; 2) their continuing education; 3) the need in material aid in connection with education; 4) parents have the opportunity to provide such aid.

In law enforcement practice, many questions arise regarding the recovery of child support for an adult child who is continuing its education and therefore needs financial aid. In particular, the question arises about the possibility of recovery of alimony from parents for the maintenance of adult children who continue their studies by correspondence. Notably, the form of education of an adult child to collect child support from the mother or father does not matter. Thus, the Civil Court of Cassation of the Supreme Court in its decision of April 17, 2019 in the case No. 644/3610/16-ц critically assessed the conclusions of the courts of first and appellate instances and did not agree that studying in correspondence department, an adult plaintiff has

the opportunity work and earn a living, which relieves parents of the obligation to maintain it [34]. Furthermore, parents are not released from the obligation to maintain an adult daughter or son, who continue their education, during the holidays. At present, the judicial practice has developed an approach where a person who has been deprived of parental rights over a child is not released from the obligation to maintain an adult child who continues its education. Although some scholars, in particular A. A. Lesko, believe that the obligation of parents to maintain an adult daughter or son, who continue their studies, is defined by Article 199 of the Family Code of Ukraine, which makes provision for the maintenance of an adult daughter or son until the age of twenty-three, does not arise for parents deprived of parental rights [35].

Admittedly, deprivation of parental rights is a sanction in family law applicable to the mother or father for non-performance or improper performance of their parental responsibilities in relation to the child on the grounds specified in Article 164 of the Family Code of Ukraine, and is carried out only in court. However, deprivation of parental rights does not relieve the parents of the obligation to maintain the child. It is considered that such an obligation cannot be terminated even after the child reaches the age of majority, if there are grounds prescribed by law for the maintenance of the parents of the adult daughter and son. In this regard, it is proposed to introduce in the Family Code of Ukraine a provision on the obligation of parents deprived of parental rights to maintain both adult disabled children in need of financial aid, if parents can provide such financial aid, and adult children who continue their education and therefore need financial aid until they reach the age of 23, provided that the parents can provide financial aid.

2.5. Problematic issues of recovery of alimony from adult children for parental support

In accordance with Part 1 Article 202 of the Family Code of Ukraine[1] an adult daughter and son are obliged to support parents who are unable to work and need financial aid. The obligation of children to support their parents in need of financial aid is also known to other legal systems in the world. Thus, K. S. Pearson notes that the Virginia Parental Support Act is a typical law, the existence of which can be traced back to the history of the adoption of social security laws in colonial times. The law, codified in the Annotated Code of Laws of the State of Virginia, section 20–88, begins with a statement of general obligation, stating that "it should be…an obligation of all able-bodied persons over 18 years of age, once that person has sufficiently provided for their family, to help and support their mother/father if she/he finds himself in a difficult situation". This law gives courts the power to determine and oblige to make payments

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

to parents, including the distribution of costs among several children [36].

Alimony obligations of adult children for the maintenance of their parents under the laws of Ukraine arise in the presence of legal composition, which includes the following legal facts: 1) determination of the origin of an adult child from specific mothers, fathers, 2) incapacity of the mother, father; 3) the need of the mother or father for financial aid.

The most problematic issue of modern law enforcement practice is the definition of mother or father in need of financial aid. The approach reflected in the decision of the Civil Court of Cassation of the Supreme Court of December 5, 2018 in case No. 570/3274/15-ц has been established for a long time: the need for financial aid is determined in each case depending on the financial situation of parents. The court considers the parents' receipt of pensions, state benefits, subsidies, the presence of parents' property that can bring income, etc. The mere fact of the incapacity of the parents does not presuppose that the children have the obligation to provide them with maintenance – the state of incapacity for work must be accompanied by the need to receive third-party financial aid. Evidence of this need is the receipt by the mother or father of income below the subsistence level. According to the current legislation, the state provides the necessary maintenance for disabled people – old-age pension, disability pension, state aid, etc. Therefore, when issuing a court decision, the amount of such state maintenance should be considered and made dependent on the subsistence level [37].

However, at present the judicial practice departs from this approach, as evidenced by the decision of the Supreme Court of the Joint Chamber of the Civil Court of Cassation of September 5, 2019 in case No. 212/1055/18-ц, which states that in the case, the court of first instance, having correctly established the circumstances of the case and applied the rules of substantive law, came to the reasonable conclusion that the plaintiff is a pensioner, incapable of work, has a serious illness, needs treatment, and therefore needs financial aid, which the defendant, her son, does not provide, although he is able to work, is officially employed and has the opportunity to pay child support. The appellate court's reference to the fact that the plaintiff, although incapable of work, nevertheless receives a pension in the amount significantly exceeding the subsistence level established by law for persons who have lost their ability to work and therefore does not require third-party financial aid is unfounded, since Articles 202, 203 of the Family Code of Ukraine, which regulate the disputed legal relations, do not make provision for consideration only of the subsistence level established by law, as an absolute condition for recovery or refusal to collect alimony [38].

It is considered that such an interpretation of family law on the maintenance obligations of adult children to support their parents will lead to a lack of unity of judicial practice in this category of

family disputes. It would be expedient for the legislator to determine more specifically which of the parents can be considered in need of financial aid. In this category of family law disputes, similar provisions could be applied to the recognition of a person in need of financial aid as to one of the spouses, as discussed above in this study.

2.6. Problems of alimony obligations of other family members and relatives

The Family Code of Ukraine in the provisions of Chapter 22 also regulates the alimony obligations of other family members and relatives, making provision for a fairly wide scope of alimony payers, which allowed some lawyers, in particular L. V. Afanasieva, to classify them as alimony obliged subjects of the second group. Thus, spouses (ex- spouses), parents and children are obliged to support each other in cases established by law, regardless of the obligations of other persons to provide maintenance. The law imposes maintenance obligations on other family members and relatives only in the absence of first-degree alimony payers [2].

Notably, the changes to the family legislation of Ukraine in terms of strengthening the protection of the child's right to maintenance did not affect the second group of alimony obligations of persons. In particular, the legislator did not amend Article 272 of the Family Code of Ukraine[1], which prescribes that the amount of alimony collected from other family members and relatives for children and disabled adults in need of financial aid is determined as a share of earnings (income) or in a fixed amount. In determining the amount of alimony, the court takes into account the material and family status of the payer and recipient of alimony. If the claim is not filed against all liable persons, but only against some of them, the amount of alimony is determined with consideration of the obligation of all liable persons to provide maintenance. In this case, the total amount of alimony to be collected may not be less than 30 percent of the subsistence level for a child of the appropriate age. The court may determine the period during which alimony will be collected.

Thus, the minimum amount of alimony collected from other family members and relatives per child is 30 percent of the subsistence level for a child of the appropriate age. Therewith, Part 2 Article 182 of the Family Code of Ukraine already refers to the minimum guaranteed amount of alimony for one child, which cannot be less than 50 percent of the subsistence level for a child of the appropriate age. These legal provisions indicate unequal opportunities for the child to exercise its right to maintenance. In this regard, it is proposed to amend Part 2 Article 272 of the Family Code of Ukraine and to prescribe that the total amount of alimony to be collected from other family members and relatives may not be less than 50 percent of the subsistence level for a child of the appropriate age.

[1] Family Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text

CONCLUSIONS

Thus, the alimony obligation of family members is a legal relationship in which one party (the debtor – the payer of alimony) is obliged to perform in favour of the other party (creditor – the recipient of alimony) a certain action – to pay alimony in cash, and the creditor has the right to demand from the debtor to perform their duty. In this meaning, the alimony obligation is by its nature a monetary obligation, and by its essence – a family law obligation. It is proposed to extend the provisions of Article 625 of the Civil Code of Ukraine on liability for breach of monetary obligation in terms of the possibility of recovery of the amount of debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. It is proved that the recognition of one of the spouses as in need of financial aid, depending on its provision at the subsistence level for the recovery of alimony from the other spouse, no longer meets the needs of today. It is proposed that one of the spouses be considered in need of financial aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law. It is proposed to apply similar provisions to identify parents in need of financial aid in alimony obligations for adult children to support their disabled parents in need of financial aid.

It is established that the legislator's change of the minimum amount of alimony to be collected from the alimony payer per child is not a basis for changing the amount of alimony in accordance with Article 192 of the Family Code of Ukraine, but is the basis for changing the minimum amount of alimony specified in the writ of execution in the procedure for executing and collecting alimony, and is taken into account when determining the amount of alimony or debt. It is argued that the form of education of an adult child who continues its studies and therefore needs financial aid does not matter for collecting alimony from a mother or father, and also that parents are not exempt from the obligation to support an adult daughter/son continuing education, including during the holidays.

It was proposed to amend the Family Code of Ukraine and stipulate the obligation of parents deprived of parental rights to support both adult disabled children in need of material aid, if parents can provide such material aid, and adult children who continue their education and, in this regard, need material aid, until they reach the age of 23, provided that parents can provide such material aid.

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RECOGNITION OF THE FACT OF BIRTH OR DEATH IN THE TEMPORARILY OCCUPIED TERRITORY UNDER THE RULES OF SPECIAL PROCEEDINGS

Abstract. *This study investigates the practice of application of the special civil proceedings, in particular the recognition of the fact of birth or death of an individual in the temporarily occupied territory of Ukraine. The study analyses certain regulations and legislative changes adopted to protect the rights and subjects of legal relations in connection with the armed aggression of the Russian Federation, committed to violate the sovereignty and territorial integrity of Ukraine, which is considered relevant to this subject. Attention is drawn to the difficulties of proving this fact, the specific features of the procedure for consideration of cases of this category, the subjective composition of procedural legal relations and the consequences of the entry into force of a court decision. In addition, the category of cases considered in the study is described by specific rules of jurisdiction. The purpose of the study is to analyse the practice of applying the rules of civil procedural law in cases of the specified categories. In this regard, attention is drawn to the application of the so-called Namibian Exception, developed in connection with the need to provide evidence related to their issuance in the temporarily occupied territories of the state. Therefore, the methods used to achieve the purpose of the study are conditioned by the need for scientific cognition of the described phenomena. Therefore, in preparing the study, a comparative legal method of legal regulation was used, which lies in a comparative analysis of the negative consequences of social and legal phenomena associated with armed aggression against Ukraine and other states, including the Republic*

of Cyprus. Hermeneutic interpretation was used to represent the legal provisions of other states. An analytical-synthetic approach was also used, which involves analysis and synthesis, in particular parametric synthesis. It lies in substantiation of necessity and sufficiency of set of indicators. The results and recommendations of the author include proposals for legislative consolidation of the specific features of consideration of civil cases by courts related to the protection of legal relations that have arisen (exist) in the temporarily occupied territory of Ukraine, and for improvement of the proof of certain legal relations.

Keywords: *special proceedings, armed aggression of the Russian Federation, jurisdiction, evidence, proceedings.*

INTRODUCTION

On February 20, 2020, the seventh year of the armed aggression of the Russian Federation against Ukraine began. During this period, Ukraine faced violent challenges caused by the indicated criminal acts of the neighbouring state. First of all, these are significant human losses, broken destinies, the need to provide material support to repel the armed aggression of the Russian Federation and overcome its consequences, etc. Therewith, Ukraine was faced with the need to regulate a number of legal relations concerning the legal regulation of this aggression, ensuring the rights and freedoms of citizens living in its temporarily occupied territories, as well as adopting regulations to ensure the rights and freedoms of internally displaced persons [1–5].

The author has previously published one of the studies on this subject [6]. However, due to the need for scientific development of this area of study, it is considered necessary to approach the analysis of this issue more carefully and thoroughly. Thus, the previously published studies left out the characteristics of the means of proof and the procedure for proving the facts of birth or death in the temporarily occupied territories of Ukraine, the specifics of notification of the time and place of consideration of the case of persons interested in the resolution of the case, as well as evidence of the need to record some personal data in court decisions. Therewith, the objective and subjective limits of acts of justice in the specified categories of cases of separate proceedings require in-depth study. These circumstances, among others, necessitate the return to the scientific study of the specific features of civil cases on the establishment through judicial procedures of the facts of birth or death in the temporarily occupied territories of Ukraine.

At the same time, one cannot ignore the need to legally record certain facts that have legal significance and take place in the temporarily occupied territories of Ukraine as an integral part of the territory of the state covered by the Constitution and laws of Ukraine. Thus, according to Part 3 of Article 5 of the Law of Ukraine No. 1207-VII "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily

Occupied Territory of Ukraine" of April 15, 2014[1], the Russian Federation as the occupying power is responsible for violating the rights and freedoms of a person and citizen defined by the Constitution and laws of Ukraine in accordance with the provisions and principles of international law. According to Article 2 of the Law of Ukraine "On the Features of National Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts"[2], the legal status of the temporarily occupied territories in the Autonomous Republic of Crimea and Sevastopol, Donetsk and Luhansk Oblasts along with the legal regime in these territories, are determined by the specified regulation, the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens in the Temporarily Occupied Territory of Ukraine"[3], other laws and international treaties approved by the Verkhovna Rada of Ukraine, principles and provisions of international law.

The annexation of the territory of a sovereign state by a neighbouring state as a result of an alleged violation of the rights of a group of the population ethnically close to the titular nation of the aggressor state is not new in world history. For example, on July 20, 1974, as a result of Turkish military aggression against the Republic of Cyprus due to alleged violations of the rights of Turkish Cypriots, about 40% of the territory of a sovereign island state was annexed. 40 years later, on February 20, 2014, the Russian Federation began its armed aggression against Ukraine as a result of the alleged protection of the Russian-speaking population in the territories of the Autonomous Republic of Crimea, Sevastopol, Donetsk, and Luhansk Oblasts. The negative consequences of the armed aggression of the 20th and 21st centuries have not gone unnoticed by the international democratic community. In addition, the European Court of Human Rights (hereinafter referred to as "the ECHR") provided a legal assessment of the consequences of aggressive actions of neighbouring states in a number of its decisions. Examples include Loizida v. Turkey, Eugenia Michelidou, Michael Timvios and Dimeids v. Turkey, Cyprus v. Turkey [7–11], etc. Along with violating the rights of the population of sovereign states, the aggressor state maintains separatist sentiment in the occupied territories during military intervention. During the Moldovan conflict of 1991–1992, as stated in the Grand Chamber's decision in Ilashku and Others v. Moldova and Russia, the forces of the former 14th

[1] Law of Ukraine No 1207-VII "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207–18#Text

[2] Law of Ukraine No 2268-VIII "On the features of national policy to ensure the state sovereignty of ukraine in the temporarily occupied territories in Donetsk and Luhansk Oblasts". (2018, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2268–19#Text

[3] Law of Ukraine No 1207-VII "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine", op. cit.

Army, which was first a formation under Soviet rule, then the CIS and later the Russian Federation), stationed in Transnistria, participated in operations on the side of the separatist forces of Transnistria. Many weapons from the 14th Army were voluntarily handed over to the separatists, who also had the opportunity to seize other weapons, which was not opposed by the Russian military. In addition, throughout the period of these clashes between the Moldovan authorities and the Transnistrian separatists, Russian leaders supported the separatist government with their political declarations" [12].

1. MATERIALS AND METHODS

The materials used in the preparation of the study include both regulatory and scientific framework. Therewith, it was considered possible to investigate the specific features of the application of legal provisions in the consideration of cases by both national courts and an international judicial institution whose jurisdiction is recognised by Ukraine. The use of foreign and regulatory sources in the study of the subject of this study will shed light on the practice of legal regulation of similar legal relations in the legislation of another state, faced with similar problems, the need to solve which is currently relevant in Ukraine [13]. At the same time, it is quite interesting to describe the modern legislation of the Republic of Cyprus, which operates in this country after the republic's independence from Great Britain and after the end of the active phase of Turkish aggression [14]. The methods of scientific cognition used in this study are materialised in the elements of the legal regulation mechanism of those relations where a particular method manifests itself. This conclusion is based on the position of a fundamental study of the specific features of the method of legal regulation of civil procedural legal relations. In this method, in addition to the above, as V. V. Komarov points out, the elements of the legal regulation mechanism, in which the method of the above legal relations is manifested, include both the specific nature of legal relations and legal facts, along with rights, obligations, and sanctions [15].

Apart from the above features of the method of legal regulation of civil procedural legal relations, the preparation of this study would not be possible without the use of one of the modern sources, where O. G. Danilyan and O. P. Dzoban published advice on the proper organisation of scientific research, along with the application of their adequate methodology. The use of their research allowed, in the context of this study, to answer the questions of scientists regarding the need to guide the researcher in the use of epistemological concepts, which, at times, contradict each other. The application of the methods of scientific cognition took place primarily in view of phenomenological principles, existentialism, and particularism. A special place was occupied by the use of the method of socio-legal experiment as a method of studying socio-legal phenomena and processes,

which is carried out by observing changes in the subject under the influence of those factors that control and guide their development [16]. In this aspect it is also necessary to note the attempts of active use of a comparative legal method. The need for its use in the preparation of this study was conditioned by the existence of phenomena that constitute the subject matter of the study, in other countries and internationally.

The need for a comparative legal study of the legislation of different states, the territorial integrity of which was compromised by the armed aggression of another state, led to the use of comparative legal method of legal regulation. In this regard, the interpretation of the provisions of law of the states affected by aggression was combined with the use of hermeneutic interpretation of the idea of foreign legal provisions. Analysis and synthesis led to the presence of an analytical-synthetic approach to solving issues related to achieving the purpose of the scientific study. The historical legal method of scientific cognition helped investigate the historical origins of certain phenomena, in particular the "Namibian exception". The methods of scientific cognition used allowed to provide knowledge about the studied objects. The process of their cognition is conditioned, among other things, using historical preconditions for the need to introduce courts of international jurisdiction over the leaders of armed aggression of the last century (Nuremberg, The Hague).

2. RESULTS AND DISCUSSION

Legal relations, in particular those governed by branches of civil law, require constant updating due to the need for legal regulation of social relations that arise at different times. For some time after the emergence, these legal relations remain unregulated by law. For example, this refers to the legal regulation of surrogacy and related legal relations, e-commerce, artificial intelligence, etc. Therewith, along with these positive changes in social life, civil science and legislation need to be updated due to the specific features of regulation and resolution of legal relations caused by the armed aggression of the Russian Federation, the activities of illegal groups in Donetsk and Luhansk Oblasts and the impossibility of implementing national legislation in the temporarily occupied territories of Ukraine.

The impossibility of actual exercise of power by public authorities and local governments in these territories of Ukraine necessitates the implementation of legally significant actions and the establishment of legal facts on which depends the emergence, change, or termination of personal or property rights of individuals by public authorities (in particular, judicial) outside the temporarily occupied territories of Ukraine. Such a need is required by the statutory rule that any bodies, officers, and officials, as well as their activities, are considered illegal if such bodies or persons are established, elected, or appointed in a manner that is not stipulated by national legislation.

Any act (decision, document) issued by these bodies (persons) is invalid and does not create legal consequences. Thus, the establishment of legal facts of birth or death of an individual in the temporarily occupied territories by illegal (within the meaning of Article 9 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal

Regime in the Temporarily Occupied Territory of Ukraine"[1]) bodies and their officials entails, on the one hand, the legal consequences for the legitimate legal relationship that is associated with it. The provision of the events of the birth or death of a person in the temporarily occupied territories of Ukraine with the opportunity to obtain legitimate legal confirmation was reflected in the provisions of the Civil Procedural Code of Ukraine[2], while the provisions of civil substantive law have not undergone additions in connection with the social relations of this branch, taking into account the specifics of establishing and legal registration of facts of birth or death of individuals in the temporarily occupied territory of Ukraine.

It is quite logical for the legislator to assign this category of civil cases to special civil proceedings. In this regard, V. V. Komarov fairly pointed out that in all periods of codification of civil procedural law the catalogue of cases of separate proceedings was different. The legislator only determined their list. Such a technical and legal method of assigning certain cases to the sphere of civil jurisdiction has not found a proper scientific interpretation, and the analysis of the composition of cases of separate proceedings indicated their obvious heterogeneity [17].

The provision of civil procedural legislation, which stipulates the establishment of facts of birth or death in the temporarily occupied territories of Ukraine, is located in Chapter 6 of Section IV of the Civil Procedural Code of Ukraine3, which contains the procedure for civil courts to establish facts of legal significance in general. Despite the lack of statutory consolidation of the fact of birth or death of a person in the temporarily occupied territory of Ukraine in Part 1 of Article 315 of the Civil Procedural Code of Ukraine, the possibility of considering cases of this category follows from the content of Part 2 of Article 315 of the Civil Procedural Code of Ukraine. In accordance with this provision, other facts may be established in court, on which the emergence, change, or termination of personal or property rights of an individual depends, unless otherwise specified by law. Article 317 of the Civil Procedural Code of Ukraine4 establishes the procedural features of the proceedings in cases of establishing the following facts: 1) birth in the temporarily occupied territories of Ukraine; 2) death of a person in the specified territories. Based on this, the purpose of

[1] Law of Ukraine No 1207-VII "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207–18#Text

[2] Civil Procedural Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15#Text

this study is to investigate the features of consideration of civil cases of the specified categories. Parents, relatives, their representatives, or other legal representatives of the child are *the subjects of appeals to the court* to establish the fact of birth in the temporarily occupied territories. An application for establishing the fact of death of a person in the abovementioned territory of Ukraine may be filed by the relatives of the deceased or their representatives.

The jurisdiction of the subject matter of both categories of these cases is not clearly defined and does not apply to any of the types of jurisdiction recognised in the legal literature [18]. Article 317 of the Civil Procedural Code of Ukraine enshrines the possibility for applicants to apply to any court outside the temporarily occupied territories, regardless of the applicant's place of residence. This approach of the legislator appears logical based on the following. Establishing these facts and giving them the proper legitimate legal status necessitates the recognition of the legal consequences of such facts. Proceeding from this, the granting of the right to apply to the court with statements on establishing the facts of the birth or death of a person in the temporarily occupied territories of Ukraine to any court of civil jurisdiction, regardless of the applicant's place of residence, contributes to ensuring the individual's right to access to justice in the most approximate or for other reasons convenient location of the court in terms of the convenience of ensuring attendance, providing factual material, etc. The analysis of court decisions on the indicated categories of civil cases, according to the Unified State Register of Court Decisions, suggests that there is a fairly considerable number of decisions of the courts of first instance in such cases (55, 523 decisions) in the period from the moment of consolidation of the legislative ability to establish such facts by the judicial authorities throughout the territory of Ukraine [19].

Part 2 of Article 317 of the Civil Procedural Code of Ukraine stipulates *the urgency of consideration of cases of these categories* from the date of receipt of the application to the court. This specific feature of the trial does not necessitate prior and proper notification of the parties to the time and place of the trial, which takes place in civil cases involving the need to summon to court persons residing in the temporarily occupied territory. The armed aggression of the Russian Federation against Ukraine has made changes in the specific features of the courts' actions regarding the proper informing of the subjects of civil procedural legal relations about the time and place of consideration of the case. The lack of postal communication with the temporarily occupied territories makes, unfortunately, impossible the conventional notice of the participants in the case living in the specified territory by sending summons. Given this circumstance, the procedure for summoning to court and notification of the court decision stipulated in Article 12–1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal

Regime in the Temporarily Occupied Territory of Ukraine"[1]. Specific features of these procedural actions lie in their implementation through announcements on the official website of the judiciary of Ukraine with reference to the website address of the relevant judicial act in the Unified State Register of Judgments. The latter must be posted no later than twenty days prior to the date of the hearing. At the same time, it should be recognised that not all subjects of civil procedural legal relations living on the territory of Ukraine have sufficient experience in the use of electronic resources. This circumstance sometimes leads to the fact that individuals do not receive information about the summons to court. However, the judiciary, based on the regulations of the above content, place ads on the official website of the judiciary of the state in compliance with the terms of such placement, which is considered appropriate notification of the parties about the time and place of the trial [20].

The difficulty of proof in this category of cases lies in the possible consideration by the court of documents issued by bodies (persons) operating in the temporarily occupied territories. The above reference to Article 9 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" indicates the absence of any legal force in the content of documents issued by illegitimate officials and bodies. This position is sometimes taken by the judiciary, but the conclusions of local courts are corrected by the courts of appeal, which decide to grant applications to establish the facts of birth or death in the temporarily occupied territories[2]. As appropriate and admissible evidence, the court, as an exception, taking into account the key importance of establishing the fact of a person's birth for the exercise of the applicant's rights, considers the medical birth certificate, medical documents issued by institutions operating in the temporarily occupied territory of Ukraine, where the authorities of Ukraine temporarily do not exercise their powers, namely the information contained in the specified documents and confirmed in the aggregate and interrelation with other evidence in the case. However, Part 3 of Article 2 of the Law of Ukraine "On Features of National Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts"[3] stipulates the illegality of the activities of the armed formations of the Russian Federation and the occupation administration in the Donetsk and Luhansk Oblasts since it contradicts

[1] Law of Ukraine No 1207-VII "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207–18#Text

[2] Resolution of the Donetsk Court of Appeal (2020, March). Retrieved from http://www.reyestr.court.gov.ua/Review/88539634.

[3] Law of Ukraine No 2268-VIII "On the features of national policy to ensure the state sovereignty of Ukraine in the temporarily occupied territories in Donetsk and Luhansk Oblasts". (2018, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2268–19#Text

the international law provisions. As a result, any act issued in connection with the activities of such entities is rendered invalid and does not create any consequences. Exceptions are documents confirming the facts of birth or death in the temporarily occupied territories in Donetsk and Luhansk Oblasts, provided they are attached to the application for state registration of birth of an individual and the application for state registration of the death of a person.

The possibility of giving legal force to documents of illegitimate occupation authorities is quite problematic. In this regard, the world experience knows the so-called "Namibian exception", the rules of which are applied in Ukrainian judicial practice. In one of the rulings, the Supreme Court pointed to the defendant's objection that the court could not consider the evidence issued in the temporarily occupied territory that the courts of first and appellate instance had reasonably reached the following conclusion. The legal relations that were the subject of judicial review by the judicial authorities of Ukraine were subject to the so-called "Namibian exception" of the International Court of Justice. This means that documents issued by the occupying power must be recognised if their non-recognition will lead to serious violations or restrictions on the rights of citizens. The fact is that in 1971 the UN International Court of Justice in its document "Legal Implications for States on the Continuing Presence of South Africa in Namibia" stated that UN member states must recognise the illegal and invalid continued presence of South Africa in Namibia, but "at the same time, official actions taken by the Government of South Africa on behalf of or against Namibia after the termination of the mandate are illegal and invalid, such activities cannot be applied to actions such as birth, death and marriage registration".

The ECHR also disclosed this principle in its practice (for example, Loizidou v. Turkey, 18 December 1996, para. 45), Cyprus v. Turkey (10 May 2001), Moser v. Republic of Moldova and Russia" (February 23, 2016). Judges of the said international judicial institution consider that the obligation to ignore and disregard the actions of existing de facto institutions and bodies [of the occupying power] is far from absolute. For people living in such an area, life goes on. And it needs to be made more tolerable and protected by the de facto authorities, including their courts. Only in the interests of the inhabitants of the said territory, the actions of the said authority, which are relevant to the above, cannot be ignored by third countries or international organisations, in particular by courts, including the ECHR. Otherwise, to solve such a problem would be to deprive people living in the occupied territories of all rights whenever such rights are discussed in an international context. This meant depriving them of even the minimum level of rights they had. Therewith, the recognition of acts of the occupation power in a limited

context in exceptional cases when protecting the rights of residents of the occupied territories in no way legitimises such power[1].

It is considered appropriate to address the absence of an obligatory requirement in the provisions of civil procedural law (Article 317 of the Civil Procedural Code of Ukraine2) to specify in the content of the court decision on establishing the fact of death in the temporarily occupied territories *the data on the date and death of a person, the fact of which the applicant requires to establish*. On the other hand, part 3 of this provision stipulates the obligatory indication of data on the date and place of birth of a person and information about this person's parents. The specific features of the proceedings to establish the facts of birth or death of a person in the temporarily occupied territories include *the obligation to immediately enforce the court decision*. In this regard, an appeal against an act of justice does not suspend the execution of a court decision.

The court decision on the specified categories of civil cases constitutes the basis for the state registration of birth or death of an individual on a place of acceptance of the act of justice. Based on this, it appears that the establishment of a court decision does not entail automatic state registration of these facts. The opposite situation is observed in the dissolution of marital relations in court. In this situation, in the case of divorce by a court, the marital relationship is terminated on the day of entry into force of the court decision on divorce, and not after its state registration.

CONCLUSIONS

The information stated in this study does not exhaust the problems of applying civil procedural legislation regarding legal relations that arose in the temporarily occupied territory of Ukraine with the participation in the civil process of its citizens who live in this territory. Consideration of civil cases related to inheritance of property and acceptance of inheritance in the above territories requires special attention, with the specific features of appellate and cassation challenging court decisions. Outside of civil proceedings, it is also worth investigating the specifics of resolving disputes related to social payments to residents of the temporarily occupied territories, with the execution of court decisions, the issue of the legitimacy of letters rogatory to illegal bodies operating in the occupied territories (there is a precedent), etc.

The authors of the study does not aspire to obtain the final solution to the issues highlighted in this study. Therewith, the problems of applying the national civil procedural legislation in the context of ensuring the rights and freedoms of subjects of legal relations associated with the armed aggression of the Russian Federation should be given more attention in the pages of legal literature.

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CONFLICT OF LAW REGULATION IN CROSS-BORDER COPYRIGHT INHERITANCE

Abstract. *Inheritance is one of the legal means that ensure the effective implementation of copyright, therefore the protection of the interests of testators and their successors in cross-border matters is an important task of international private law. Modern national systems of inheritance and copyright operate independently. Due to the influence of economic, political and socio-cultural factors, the unification of substantive law of these industries is unlikely, so the conflict of law method of regulation remains dominant in this area. The paper highlights the main problems of conflict of law regulation of cross-border copyright inheritance and offers approaches to overcoming them. The authors address such issues as forms of manifestation of a foreign element in the relations of copyright inheritance; problems of distinguishing between intellectual and inheritance statutes; features of the application of the point of contact lex loci protectionis; the principle of territoriality, etc. Based on the analysis, it is concluded that the subordination of key issues of copyright inheritance to the conflict rules of the intellectual statute extends the principle of territoriality to these relations and necessitates multinational protection of these relations. The paper supports the opinion of scholars who criticise the concept of territoriality in matters of copyright protection, proving its ineffectiveness. Ultimately, the*

authors suggest that the tools of private international law allow for flexible approaches and do not equate copyright, which is more related to personal status, and industrial property rights, aimed at achieving commercial interests. It is proposed to achieve greater flexibility by detailing the scope of the conflict of law rules and establishing a system of conflict bindings, which will allow to choose the law that is more related to the circumstances of the case.

Keywords: *international private law, inheritance statute, intellectual statute, lex loci protectionis, territoriality.*

INTRODUCTION

The rapid development of communication technologies, freedom of movement of goods and services radically change the forms of creation and use of the results of human intellectual activity. In the EU, USA, Japan, and South Korea, the profitability of the so-called intellectual-spending industries is growing rapidly and currently they constitute the main part of foreign trade of these countries [1], therefore some countries and the international community at large should strive to stimulate creativity and create legal conditions for the effective implementation and protection of intellectual rights of citizens.

One of the legal means that ensures the effective exercise of these rights is the ability to testate copyright to descendants and have confidence in the protection of intangible and exclusive rights *mortis causa*. But to ensure a high level of guarantees in the era of globalisation and technological revolutions is quite difficult, especially considering the intangibility of copyright, which determines many complex legal issues. Nowadays, the main role in copyright protection is played by the system of international agreements administered by the World Intellectual Property Organisation. The provisions and standards established by international treaties generally create conditions for cross-border exchange of creative results, but they do not overcome the so-called *territorial nature* of intellectual property rights. International agreements can only minimise the negative consequences of the territorial nature of intellectual property rights: to ensure access of foreigners to national legal protection systems, to guarantee minimum standards of protection, to reduce material or time costs in the registration of rights in several countries, etc. [2]. Therewith, national legal systems of copyright protection function independently of each other, and the domestic legislation of countries contains conceptual differences. National systems of inheritance law, which is one of the most conservative branches of private law and is significantly influenced by socio-cultural, socio-economic, and religious factors, also function independently, therefore unification in this area is unlikely in the near future. The unwillingness of the vast majority of countries to unify and harmonise inheritance law clearly illustrates the state of accession to the Hague Convention on the Law Applicable to

Inheritance of the Deceased of 1 August 1989, which has so far been signed by only four countries: Argentina, the Netherlands, Luxembourg, and Switzerland, and ratified only by the Netherlands[1].

When in practice emerges the matter of inheritance of copyrights abroad, scholars are faced with the intersection of such complex legal relations as inheritance and copyright, as well as with the presence of a foreign element in their actual composition. In such situations, it is impossible to overcome the labyrinths of various legal systems and complex conflict of law issues without prior analysis of such fundamental matters as the multiplicity of statutes, the territorial nature of intellectual property rights, the qualification of conflict rules, etc. The problem of cross-border inheritance of copyright, as well as intellectual property rights in general, has not been the subject of comprehensive research by domestic and foreign lawyers. Some aspects of this subject were studied in the papers of leading Ukrainian scientists A. Dovhert [2], O. Orliuk [3]; at the dissertation level, certain issues were studied in the papers of O. Karmaz [4], S. Butnik-Siverskyi [5], Ye. Beltiukova [6], etc. Among modern foreign researchers, P. Goldstein and B. Hugenholz [7] should be mentioned, a group of specialists from the Max Planck Institute for Comparative and International Private Law, headed by prof. Yu. Bazedov [8], including A. Dutta, M. Fornaiser, A. Kur and others, and Russian scientists V. Dozortsev [9], S. Krupko [10], O. Lutkov [11]. These studies are mainly focused on the international legal regulation of copyright and copyright law in individual states, individual papers in international inheritance law have a general theoretical, regional, or comparative focus, but the problem of choosing the law applicable to the relations outlined above obtained next to no coverage.

The purpose of this paper is to highlight the main problems of conflict regulation of cross-border copyright inheritance at the national and international levels and to try to identify the most effective approaches to overcoming them from the standpoint of *de lege ferenda*.

1. MATERIALS AND METHODS

The general methodological framework of this study was the dialectical-materialist method of scientific knowledge, which allowed to study the conflict of law regulation of cross- border copyright inheritance in its inseparable connection with other legal institutions, based on the case law of different countries. The authors used general scientific research methods, such as analysis and synthesis of doctrinal, statutory, and law enforcement materials; systematisation of scientific and practical approaches to the studied problems; structural and functional approach to clarifying the features of the forms of legal regulation of cross-border inheritance relations. Comparative analysis was performed for provisions of in-

[1] Official site of the Hague Conference on Private International Law. Retrieved from https://www.hcch.net/en/instruments/conventions/status-table/?cid=62

ternational agreements comparable in the field of regulation, for acts of legislation of individual states and the European Union, decisions of national courts in identical cases, as well as conflict of law principles of non-state regulators, typical and unique approaches to the legal regulation of cross-border inheritance of copyright were identified, and tendencies in rule-making were identified in the given subject matter.

Special legal methods of cognition were applied in the study. In particular, the historical legal method was used to study the evolution of scientific concepts of copyright and the principle of territorial protection of intellectual property rights; method of systematic interpretation of legal provisions was used to identify the features of intellectual and inheritance statutes in private international law, textual analysis of the scope and points of contact of rules governing the choice of law in inheritance and intellectual property relations complicated by foreign elements. To summarise the results of modern scientific achievements, the papers of Ukrainian and foreign scholars were analysed, special attention was paid to current dissertation research on the problems of conflict regulation of inheritance relations and intellectual property rights of Ukrainian law schools. The articles of the author's team of the Max Planck Institute for Comparative and International Private Law, which cover the problems of intellectual property law in the context of globalisation and expert opinions on draft EU legislation on the unification of inheritance and tort law; a monograph by Professor Paul Goldstein, Professor at Stanford University and Adviser to the European Commission on Intellectual Property Rights, Professor Bernt Hugenholz of the University of Amsterdam, on contemporary issues of substantive and conflict regulation of international copyright law, including overcoming copyright protection issues. The paper pays considerable attention to the analysis of regulations of foreign countries, including the United States, Germany, Great Britain, Canada, France, Italy, etc. Crucial to the subject matter was the study of EU regulations, i.e. EU Regulation No 650/2012 of 4 July 2012 "on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession" (Rome IV)[1] and EU Regulation No 864/2007 of 11 July 2007 "On the law applicable to non-contractual obligations" (Rome II)[2].

Without touching on the fundamental aspects of the reform of international copyright, the paper focuses on such is-

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. (2012, July). URL: http://data.europa.eu/eli/reg/2012/650/oj.

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). (2007, July). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2007:199:TOC

sues as forms of manifestation of a foreignelement in the relations of copyright inheritance; problems of distinguishing between intellectual and hereditary statutes; features of the application of the point of contact lex loci protectionis; prospects for weakening the principle of territoriality in the settlement of cross-border inheritance of copyright, etc. It should also be noted that the format of this paper does not allow to describe all the problems that arise in this area; therefore, the study concerns the inheritance of only copyrights that do not require registration or compliance with other formalities.

2. RESULTS AND DISCUSSION

Inheritance of intellectual property rights has been developing for more than three hundred years. Lawyers of the 18th and 19th centuries considered the subjective right to literary and artistic works to be a real right, and in the same way it passed to heirs. The heirs had the opportunity to dispose of their work with the same freedom as the author: to republish, cede to another person, make changes, remove, etc. The freedom of the heir could be limited by a will and some mandatory rules of civil legislation [12]. A new order of inheritance has started taking shape only at the beginning of the 20th century, when the theory of exclusive rights and the theory of moral rights were gradually developed. Until the end of the last century, disputes related to cross-border copyright inheritance were isolated, but with the development of the technological environment, growing demand for intelligent products, with the emergence of new forms of turnover, the exclusive rights of authors began to be considered as highly profitable assets.

Stable profitability of commercial use of copyright and the availability of legal protection mechanisms have led to an increase in the number of litigation and cases in notarial and legal practice, as the heirs of famous artists are actively defending their rights around the world. To date, U. S. courts have heard cases of copyright inheritance for the song "*Happy Birthday to You*", which generates more than 2 million US dollars in royalties per year [13]. Litigation continues over the heirs of world-renowned painting geniuses, as copyright to works of Pablo Picasso expire in 2043, Henri Matisse – in 2024, and Auguste Renoir (co-authored with Spanish sculptor Richard Gino) – in 2043. Ukraine also has several cases related to the inheritance of copyright and their protection by heirs both within the country and in foreign jurisdictions. Among the most resonant is the case of copying without permission of the heirs of the painting «Rat on the Road» by the famous Ukrainian artist Maria Pryimachenko. An exact copy of fragments of this painting was placed on the fuselage of FinAir as a design work of the Finnish company «Marimekko», which became the basis for a copyright claim [14]. No less famous is the precedent with the porcelain statuette «Sitting Ballerina» by Ukrainian master Oksana Zhnikrup, reproduced by an American artist J. Koonsin in an installation in front of the Rockefeller Centre in New York without reference to the author of the

original work of art [15]. In both cases, the rights of the heirs were protected and the personal non-proprietary rights of the authors were restored. However, for the most part, heirs do not have information about the infringement of their rights abroad, or are unable to properly protect them due to the complexity of procedures, differences and gaps in national legislation, unregulated forms of copyright exploitation in the digital environment, etc.

The specific feature of copyright inheritance is that its object constitutes a set of rights to the object, not the object itself. According to the general rule of the continental legal tradition, only the property (exclusive) rights of the authors are inherited – the right to use the work and the permission or prohibition to use the work. The moral rights of the author are inalienable and are not inherited, but the heirs have the right to protect the authorship of the work from encroachment that may damage the honour and reputation of the author. At present, it is especially important to guarantee authors and their heirs the exclusive right to grant permission for any distribution of works to the general public through wired or non-wired means of communication, to protect the right to inviolability and integrity of works published on the Internet.

2.1. Basic approaches to solving the problem of multiple statutes in cross-border copyright inheritance

Cross-border copyright inheritance constitutes a separate type of international inheritance. In the doctrine of international private law, the essence of international inheritance is considered as an act of succession that crosses the territorial boundaries of two legal orders. The paper of Ukrainian researcher Ye. Fursa contains a detailed definition of international inheritance as a "set of legal relations with a foreign element, which arise in the case of transfer of rights and obligations (inheritance) from a natural person who died (testator) to other persons (heirs) and as a result of such a transition, the latter have a set of rights and obligations within the inheritance, which are regulated by both international and national (foreign) legislation" [16]. In Ukraine, cross-border inheritance issues are governed by Section X of the Law of Ukraine "On International Private Law" (Articles 70–71), which establishes two formulas of attachment – the personal law of the testator (*lex personalis* in the form of *lex domicilii* or *lex patrie*) and the law where the property is situated (*lex rei sitae*) in relation to inheritance of immovable property[1]. As for the protection of intellectual property rights with a foreign element, according to Art. 37 of the above Law, applicable is the law of the state in which the protection of these rights is required (*lex loci protectionis*).

A foreign element in intellectual property relations may occur in the form of a subject, the author (right holder) may be a foreign person in relation to the country where the results of intellectual

[1] Law of Ukraine No2709-IV "On Private International Law". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2709–15#Text

activity are protected; in the form of a legal fact – physical acts concerning the use of the results of intellectual activity are performed abroad. As for hereditary legal relations, a foreign element can be represented therein in all known forms. In case of a combination of these relations, the following manifestations of a foreign element may be inherent therein:

– according to subject composition: the author-testator is a foreign citizen or a citizen of Ukraine permanently residing abroad; the heirs are foreigners;

– according to object: the work that is part of the hereditary mass, in any form is outside Ukraine;

– the legal fact that became the basis for the discovery of the heritage took place abroad [17].

If there is at least one of the listed features in the legal relations, it will refer to their international (cross-border) nature and the need to apply the conflict of law regulation mechanism. In case of cross-border inheritance of copyright, two types of legal relations collide, requiring independent conflict of law regulation. Such a situation in international private law is quite common and is called *plurality of statutes*, and *statute* is usually understood as the competent legal order of a country chosen based on conflict of law provisions. Thus, in this case, the intellectual and inheritance statutes intersect, thereby requiring a clear distinction. The difficulty of distinguishing between these statutes is that, at the level of national law, their scope is usually not defined. Nowadays, only EU legislation contains rules that to a greater or lesser extent reveal the scope of the chosen law on the principles of *lex successionis* (inheritance statute), *lex loci protectionis* (law of the country of protection), *lex loci originis* (law of the country of origin). Conflict regulation of cross-border copyright inheritance is complicated not only by the problem of multiple statutes, but also by the so-called "*splitting*" of each of them. This situation differs from the plurality of statutes in that it constitutes relations of the same nature, but to which more than one legal order can be applied. In the science of international private law, to define the situation when the regulation of cross-border private relations is subject to several legal orders, the terms "*statute bifurcation*", "*splitting of the conflict*", or "*depecage*" (from the French – *dépeçage*) can be used. Thus, the authors further attempt to consistently consider these issues. The hereditary statute is considered in the doctrine as a legal order determined by the provisions of international private law, to which the hereditary relations connected with several national legal systems gravitate by their nature, and which regulates them in essence. As noted above, in the vast majority of national legal systems, the scope of the inheritance statute is not defined, although there are a few exceptions. A major step forward in the development of inheritance law was EU Regulation No 650/2012 of 4 July 2012 "On jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Cer-

tificate of Succession", this document is also known as "Rome IV", it continued the line of so-called "Romes" (I, II, III), dedicated to the unification of private law of the EU[1].

For our study, Part 2 Article 23 of the said Regulation is significant, since it contains a unified provision on the scope of law applicable to inheritance relations. It includes the following issues: (a) the grounds, time and place of the inheritance release; (b) the identification of the beneficiaries, the shares inherited by them and, accordingly, the obligations that may be imposed on them by the deceased; (c) hereditary legal personality;

(d) deprivation of inheritance and incapacity to inherit due to misconduct; (e) the transfer to heirs and waivers of property, rights, and obligations forming part of the common inheritance; (f) the powers of heirs, executors of the will, and other guardians of the estate,

(g) liability for inherited debts; (h) the free share of the inheritance; mandatory share in the inheritance and other restrictions imposed on the disposal of property; (i) any obligation to return funds, to account for gifts, to provide property by way of anticipation of a hereditary share or in cases of testamentary renunciation in determining the shares of different beneficiaries; and (j) distribution of inherited property[2].

There is no direct indication in the text of the Rome IV Regulation[3] regarding its extension to the inheritance of intellectual property rights or their exclusion from the scope of regulation of this document. But the general analysis of the text suggests the following: Regulations do not extend to definition of the nature of the rights of proprietary nature – "rights *in rem*" (item k Article 1.3 of Regulations); and establishes a rule according to which, when the domestic law of the Member States provides that certain objects or rights have a special regime of inheritance, such rules shall take precedence in application and be considered *overriding mandatory provisions* (Article 30 of the Regulation). This approach has been the subject of debate in academia, and the agreed position is contained in a comment by a task force of the Max Planck Institute for Comparative and International Private Law on the draft text of the Rome IV Regulation of 26 March 2010. Proceeding from a careful comparative analysis of the domestic legislation of EU Member States and neighbouring countries, experts noted: "Some national laws contain an exhaustive list of persons who can inherit after the author's death, in some countries the transfer of copyright after the author's death is completely excluded or severely restricted. Such rules form an integral part of the copyright of a particular na-

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. (2012, July). URL: http://data.europa.eu/eli/reg/2012/650/oj.

[2] Ibidem, 2012

[3] Ibidem, 2012

tional legal system and the application of other rules on succession will interfere with the structure and content of such rules if they contain rules of succession based on the principle of *lex loci protectionis*. Therefore, the Institute proposes to exclude intellectual property rights from the scope of the Regulation insofar as they define special rules of succession. This approach ensures that a decision made with the use of the conflict of law rules will be recognised in the country where protection is sought, especially in non-EU countries" [18; 19]. Thus, the attribution of key issues of cross-border inheritance of copyright to the regulation of intellectual property, at first glance, simply solves the issue of delimitation, this allows to refer to application of the classical principle of interpretation of the *lex specialis derogat generali*, if the law on copyright protection contains special provisions as to its inheritance, they are given priority over general provisions. Therewith, issues that do not have special regulation within the framework of intellectual property rights remain within the regulation of the inheritance statute. However, the simplicity of such a distinction is imaginary, and this approach creates other inherent complications: firstly, intellectual property relations are governed by the law of the country of protection (*lex loci protectionis*), a conflict of law formula that has no single interpretation and uniform application. Secondly, there are numerous differences in domestic law on copyright inheritance, thirdly, the factor of so-called *ubiquitous copyright infringement* on the Internet is ignored, which cannot be localised by means of the aforementioned principle.

2.2. Territoriality an the lex loci protectionis principle

The first of the above arguments has long been the subject of debate in the science of international private law. The *lex loci protectionis* principle is considered fundamental in the choice of the right to regulate intellectual property relations with a foreign element, it is closely related to the principle of territoriality established in the Berne Convention for the Protection of Literary and Artistic Works (Article 5.2)[1]. The special connection of this conflict of interest with the principle of territoriality is confirmed at the European level, in particular, in the EU Regulation "On the law applicable to non-contractual obligations" («Rome II»)[2]. Paragraph 26 of the Preamble states: "As regards intellectual property rights, the universally recognized *lex loci protectionis* should be maintained". In this regard, the German researcher A. Kur wrote: "A serious argument for choosing the law of the country of defence as a guiding concept is the territorial principle with its main purpose of preserving the sovereignty of the legislator over specific rules of

[1] Berne Convention for the Protection of Literary and Artistic Works. (1971, July). URL: https://zakon.rada.gov.ua/laws/show/995_051#Text

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). (2007, July). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2007:199:TOC

delimitation of the scope and content of protection provided within the borders defined by international law" [19].

The introduction of the territorial principle of protection of intellectual property rights was conditioned by the economic policy of individual states, intellectual property provides de facto monopoly rights, which are necessary to stimulate investment of market participants in intellectual achievements, with state support primarily to its own citizens and organisations. Even at present, the literature contains the opinion that the territorial nature of the rights in general excludes the conflict issue and extraterritorial application of legislation in this area is impossible because it is incompatible with existing international mechanisms [20]. But with the advent of the era of globalisation, the development of the world virtual space and due to other factors, the scientific literature increasingly criticizes the territorial nature of intellectual property rights, which is currently considered as an anachronism. Prof. J. Bazedow expressly states that "intellectual property rights still remain artifacts of positive law, and exclusive rights continue to be considered as derived from the power of the sovereign" [8]. In German academic circles, over forty years ago prof. Haimo Schack, in his dissertation research on the relations between copyright and international private law, expressed the need for a universalist approach to cross-border aspects of copyright protection, which completely denies territoriality, considering such a right to be universal, as it emerges from the moment of its creation on territory of the entire Earth, is a natural right and in essence can be attributed to fundamental human rights [21]. Such approach does not recognise the territoriality-extraterritoriality dichotomy of copyright and has supporters [22].

A more compromising position was expressed by American scientists P. Goldstein,

S. Symeonides, and D. Chisum [23], who argue the need for a so-called flexible approach based on modern interpretation of territoriality as "reasonable" or "elastic". Prof. Donald Chizum, expert in patent law, noted that due to the growing interdependence of the global economy and the cost of multinational protection of intellectual property rights, "territorialism is becoming an unacceptable obstacle to international trade. The principle of territoriality requires "reconfiguration" with consideration of the features and differences of individual intellectual property rights" [23]. Online technologies are forcing the judiciary to gradually change its previously unshakable position, for example, in one case the European Court of Justice pointed to the need to strike a balance between the complexity of the national territorial nature of exclusive rights and the potentially widespread nature of infringements over the Internet. Summarising the above, the authors conclude that the principle of territoriality is increasingly criticised in the scientific literature, as noted by A. Solovyov, at this stage, "the idea of territoriality actually contradicts reality, especially in matters of copyright

and related rights, where protection provided automatically from the moment of creation of the work" [25]. But at the legislative level, the principle of territoriality of intellectual property rights continues to prevail, as preference is given to the public law component of intellectual property relations and economic interests of individual states. The logical continuation of this approach and the guarantee of preventing the manifestations of extraterritoriality in conflict regulation is the preservation of strict formulas of attachment, and, above all, the *lex loci protectionis* point of contact. Therefore, it is relevant and important to clarify the issues that fall within the scope of law, which is determined based on the above conflict of law principle, i.e. issues of intellectual statute.

Currently, the scope of the intellectual statute is not regulated, so researchers approach the analysis of case law, as well as project documents and recommendations for conflict of law regulation developed by national and international legal associations, expert groups and research institutions: leading research centres in Germany – Institute of Innovation and Competition and the Max Planck Institute for Comparative and International Private Law, the American Institute of Law, the Association of Private International Law of Korea and Japan, etc. [26–28]. Among the studied literature sources, the most detailed and convincing analysis was proposed by M. Suspitsyna in a dissertation study on the conflict of law regulation of intellectual property relations. The researcher includes the following issues in the scope of the intellectual statute:

"1) the emergence of exclusive rights, including the definition of types of individual protected results of intellectual activity and means of individualisation and rights to them; criteria for granting protection; compliance with formalities for the provision of legal protection;

2) the effect of exclusive rights, including existing restrictions on exclusive rights and their termination;

3) the ability of the right holder to dispose of the exclusive right and the form of such order;

4) non-contractual obligations in intellectual property and available remedies" [29].

As noted above, the *lex loci protectionis* point of contact of the intellectual property law is one of the most vague and ambiguous formulas. Prof. J. Bazedow addressed the complexity of the qualification of this provision in the study "Intellectual property on the world stage" [8], which provides about ten interpretations of the *lex loci protectionis* contained in legislation and case law. It can be interpreted as follows:

– the law of the State for which (or "in respect of which") protection is sought;

– the law of the state where (or "in which") protection is required;

– the law of the state under the laws of which the result of intellectual activity is protected by intellectual law, the violation of which is subject to proof;

– the law of the state with which intellectual activity has the closest connection, etc.

These differences in interpretation are crucial for case law. Previously, the binding *lex loci protectionis* point of contact was mainly understood as the law of the state where protection is required, which led to its confusion with the *lex fori* (the law of the country of the court). If the case is heard by a court of the state where the claim was filed and the copyright infringement also took place in that state, the results of the choice of law will coincide. However, if the dispute is heard in another country, such as the defendant's place of residence, the choice of law will be different, with restrictions on the copyright of the court of the country that have nothing to do with the substance of the dispute without any grounds. Therefore, foreign doctrinal sources and case law often prefer to understand the *lex loci protectionis* as the law of the country in respect of which protection is sought. Considering the strict territorial approach and appropriate conflict regulation, the recognition and enforcement of inheritance rights is complicated not only by the problems of interpretation of the conflict rule, but also by the need for multinational protection, i.e. protection in each state where the violation occurred or recognition is required. To have an idea of the features of multinational protection, a brief analysis of the main differences between domestic legislation in this area is given below.

2.3. Conflict of law in copyright inheritance

Nowadays, there are two main models of inheritance in the world, which are based on different interpretations of the legal nature of inheritance relations. In continental Europe, inheritance is based on the principle of universal succession, known from Roman law, according to which the property passes to others unchanged as a whole at the same time, the heir is considered a continuation of the legal personality of the testator. The doctrine and practice of common law countries is based on the fact that the legal personality of the deceased disappears during the inheritance, therefore the property is administered (liquidated) under judicial supervision with the payment of debts, performance of tax and other obligations. The heirs receive only the net estate. These differences and conceptually different approaches to intellectual property also lead to differences in the legal regulation of copyright inheritance. Article 90 of the 1988 Copyright, Designs and Patents Act of the Great Britain stipulates the transfer of copyright by inheritance as personal or movable property, after the death of the author, his moral rights to the work pass to heirs (Article 95)[1]. Under the 1985 Copyright Act of Canada, both moral and exclusive copyright rights can be inherited, and moral rights can be inherited by legal entities [30]. Copyright in the United States, based on the utilitarian concept, establishes only the lowest standards of moral rights of authors and to a greater extent protects the rights that have economic meaning. Article 204 of the 1976 Copyright Law of the United

[1] Copyright, Designs and Patents Act. (1988, November). Retrieved from http://www.legislation.gov.uk/ukpga/1988/48/contents

States regulates the transfer of ownership of copyright, including inheritance[1].

Among the countries of the continental legal system, the procedure of copyright inheritance is most detailed in the Code of Intellectual Property of France of July 1, 1992. Apart from the possibility of inheritance of exclusive rights, Article L.121–1 stipulates the possibility of succession in respect of personal moral rights: "The author shall have the right to respect for their name, their authorship and their work. These rights apply to their person. They are lifelong, inalienable, they are not subject to the statute of limitations. In case of the author's death, they are passed on to their heirs»[2]. Some researchers see a contradiction in the text of this article, because personal inalienable rights, which are inalienable in nature, are transferable and inherited. Article 28 of the German Copyright and Related Rights Act of 9 September 1965 also stipulates the possibility of transfer of copyright by inheritance, Article 30 states that the successor of the author shall have the same rights as the author, unless otherwise provided[3].

Articles 23–24 of the Law of Italy on Copyright of April 22, 1941 establishes the scope and order of heirs of copyright, contains several provisions on the right to publish previously unpublished works of the testator[4]. The Danish Consolidated Copyright Act of 23 October 2014 contains two sections on inheritance and debt proceedings, paragraph 61 stipulates that copyright may be subject to inheritance legislation and that the author shall have the right to give instructions to another spouse or third party on the implementation of copyright; paragraph 62 stipulates the impossibility of creditors' claims for copyright, regardless of whether they belong to the author or their successors as a result of marriage or inheritance[5].

The above examples suggest large differences in approaches to regulating copyright inheritance in different countries. The copyright laws of some countries thoroughly regulate the scope and lines of heirs, establish a list of rights that can be inherited and which cannot. In other states, there is only an indication that copyright is inherited, without any details of succession. The need for multinational copyright protection leads

[1] A Copyright Law of the United States. (1976, October). The U. S. Copyright Office. Retrieved from https://web.archive.org/web/20111009143055/http://www.copyright.gov/title17/circ92.pdf

[2] Law on the Intellectual Property Code No. 92–597 of July 1, 1992. WIPO Database. France. (1992, July). Retrieved from https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf

[3] Copyright Act of 9 September 1965. Germany Federal Ministry of Justice and Consumer Protection. Retrieved from http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.

[4] Italian Copyright Statute. Law for the Protection of Copyright and Neighbouring Rights No. 633 of April 22, 1941. WIPO Database. Italy. (1941, April). Retrieved from https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf.

[5] Consolidated Act on Copyright No. 1144 of October 23 rd, 2014. (2014, October). The Ministry of Culture of Denmark. Retrieved from https://kum.dk/fileadmin/KUM/Documents/English%20website/Copyright/Act_on_opyright_2014_Lovb ekendtgoerelse_nr._1144 ophavsretsloven 2014 engelsk.pdf.

to the fact that in one state, the same persons can be recognised as the author's heirs and have the appropriate rights, and in another country – they cannot. An example of the diametrically different approaches to the heirs' exercise of the right to protect the author's non-property rights abroad is the well-known 1994 case of Turner Entertainment Co. v. Houston. The company defended the right to colour the black-and-white film "Asphalt Jungle", directed by J. Houston in 1950, in a US court, because it received the exclusive rights to the film. The director's foreign heirs considered colourisation a violation of the author's right to the integrity of the work, but in the United States the director is not recognised as the author of a cinematographic work, for this and other reasons, protection was denied. Instead, when a French television channel announced the rental of a painted version of The Asphalt Jungle and the director's heirs filed a lawsuit banning the rental, they were found to be proper plaintiffs and the claim was satisfied. Similar examples can be provided in other categories of cases: heirs' disputes of the transfer of a work to the public domain or free use, disputes over relations with companies for collective management of copyrights, distribution and use of works on the Internet, etc., where heirs in each individual case must apply for the recognition and protection of their rights to the next jurisdiction, which requires high costs in the absence of confidence in the outcome of the consideration

CONCLUSIONS

Inheritance constitutes one of the most important guarantees of the right to private property and in many countries is one of the constitutionally guaranteed human rights. The presence of a foreign element in inheritance relations, as a rule, does not reduce the level of legal protection, the established conflict mechanisms ensure the effective implementation of the inheritance rights of foreigners. But in case of cross-border copyright inheritance, there are problems with the multiplicity of statutes, the interpretation of the *lex loci protectionis*, the territorial nature of intellectual property rights and the associated need for multinational protection, etc. The authors conclude that the main reason is the dominance of the doctrine of intellectual property, which was formed more than a hundred years ago under the influence of political and economic factors. At present, the author's personal inalienable rights are closely linked to human rights, and forms of exercising exclusive rights in the digital environment need to be reviewed as soon as possible, rather than trying in any way to maintain biased approaches, subjecting legal regulation to the economic interests of individual countries.

The tools of international private law allow the use of flexible approaches and do not equate copyright, which is more related to personal status, and industrial property rights, aimed at achieving commercial interests. By maximising the scope of conflict of law rules, it is

possible to achieve differentiated regulation, to establish an extensive system of conflict of laws, which will allow to choose the law most closely related to the relations and appropriate to the circumstances of the case. Thus, the current mechanism of conflict of law regulation of copyright inheritance requires in-depth research and raises issues that still need to be addressed.

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RECODIFICATION OF CIVIL LEGISLATION OF UKRAINE: A PARADIGM OF IMPROVEMENT

Abstract. *Ukraine's course for integration with the European Community determins the adaptation of domestic civil law to the European concept of private law. Since the realization of this task is impossible without theoretical support, it is relevant to study ways to improve the regulation of civil relations. Recently, in this context, the problem of recoding Ukraine's civil legislation has become more problematic. However, questions of its conceptual support lack the attention of jurists, without which changes cannot be effective.*

The purpose of the article is to characterize recodification as a paradigm for improvement of Ukrainian civil law and to determine the directions of its implementation.

The methodology of the study was determined by the fact that it was focused on the problems that need to be voiced in the process of preparation of the recoding and its implementation. This led to the use of methods of historical, dogmatic and comparative analysis, as well as to determine the logic of submission of research material: from the general characteristics of forms of systematization of civil law – through the experience of European codifications and recodifications – to the analysis of problems of recodification of Ukrainian civil legislation.

According to this logic, the differences between codifications and recodifications are examined, and it is argued that codifications take place when significant changes occur in the community that is not in line with the outdated concept of legislation. Instead, recodification is possible in cases where the concept of civil law meets the challenges of time, and the codes created under it are "passionate".

Passionary codes are characterized by the fact that they are not the result of simply systematizing and modernizing the accumulated legislative material, but were created on a fundamentally new concept of law. Such codes are a realization of a concept that is substantially different from what existed before. They make significant changes to the level of regulation of a certain type of public relations, translating it into a new quality, and thus affecting the social relations that are regulated. Examples of "Passionary Codes" are the French Civil Code (Napoleon Code), the General Civil Code of Austria (ABGB).

The article proves that the Civil Code of Ukraine is also a passionary code because it was created following the requirements of a society that needed a code capable of protecting the property and property rights of an individual, servicing market civil relations, etc. This leads to the conclusion that the shortcomings of the Civil Code of Ukraine, discovered during its application, can be eliminated by recodification on the updated conceptual basis. At the same time, one of the main tasks of recodification is to determine the private legal status of a person that would meet European standards. The rules of the Civil Code of Ukraine in this area reflect a post-Soviet approach. Therefore, they need more attention during the recodification of the civil code. This vision is in line with the recommendations of Western specialists for the post-Soviet countries: keep in mind that when creating new civil codes, they cannot immediately reach the level of private-law structures that exist in Western countries, and therefore must progress to this level gradually.

In any way, the terms of the Draft Common Frame of Reference (DCFR) should serve as guidelines for recodification and its methodological basis. However, adapting to the solutions recommended by the DCFR in this field can be quite complicated and will require not only the recoding of national legislation but also the corresponding adaptation of legal consciousness.

Keywords: *recoding, civil law, civil code, Ukraine, law improvement, codification*

INTRODUCTION.

Ukraine's course for integration with the European Community determins the adaptation of domestic civil law to the European concept of private law.

As the realization of these tasks is impossible without proper theoretical support, it is important to study the ways of improving the regulation of civil relations. Recently, several conferences have been held in Ukraine on the issues of updating civil law in the context of its European integration aspirations (Kharkiv, 2019; Odesa, 2019). Relevant issues on the Web are being actively discussed.[1] However, the problem of recodification as a legal category was practically not investigated. Only in some cases was it mentioned in the context of the study of problems of

[1] Спасибо-Фатєєва І. В. З приводу концепції щодо модернізації Цивільного кодексу України (рекодифікації). URL: https://sud.ua/ru/news/blog/157375-z-privodu-kontseptsiyi-schodo-modernizatsiyi-tsivilnogo-kodeksu-ukrayini-rekodifikatsiyi; Спасибо-Фатєєва І. В. Щодо реформування окремих інститутів цивільного права. URL: https://sud.ua/ru/news/publication/157461-schodo-reformuvannya-okremikh-institutiv-tsivilnogo-prava

codification of legislation, its modernization, etc.[1]

At the same time, the conceptual problems of recodification, as a form of improvement of Ukrainian civil law, remain out of the attention of legal scholars. The articles contained in the Web of Science generally refer to the problems of recoding national civil legislation, which differs from those in Ukraine.

The purpose of the article is to characterize recodification as a paradigm for improvement of Ukrainian civil law and to determine the directions of its implementation.

The methodology of the study was determined by the fact that it was focused on the problems that need to be voiced in the process of preparation of the recoding and its implementation. This led to the use of historical, dogmatic methods, the method comparative analysis, as well as to determine the logic of presentation of research material: from the general characteristics of forms of systematization of civil law – through the experience of European codifications and recodifications – to the analysis of problems of recodification of Ukrainian civil legislation.

According to this logic, the differences between codifications and recodifications are considered and it is proved that codifications take place when there are significant changes in society that are not in line with the outdated concept of legislation. Instead, recodification is possible in cases where the concept of civil law corresponds with the challenges of time and the codes created under it are "passionary".

1. Forms of civil legislation systematization.

Improvement of legislation implies simultaneous systematization of legislative acts, that is, their ordering for the purpose of instrumental use, improvement, qualitative change, supplementation, scientific treatment, forecasting of social consequences of regulatory influence on public relations.

Traditionally, there are three main types of systematization: incorporation, consolidation, and codification, of which codification is the most important. Codification is a legal form of legal acts systematization, which is associated with the adoption of new ones, with the change of obsolete regulations, with their availability and more effective application.[2]

We do not present here other points of view regarding the forms of systematization and do not analyze the question of

[1] Кабрияк Р. Кодификации / Пер.с фр. Л. В. Головко. М.: Статут, 2007. 476 с.; Музика Л. А. Що є актуальним для сучасного цивільного законодавства України: модернізація, системне оновлення чи рекодифікація? Науковий вісник Львівського державного університету внутрішніх справ. Серія юридична. 2015. Вип. 1. С. 145–154; Довгерт А. Рекодифікація Цивільного кодексу України: основні чинники і передумови для старту. Право України. 2019. № 1. С. 27–41.

[2] Общетеоретическая юриспруденция: учебный курс: учебник / под ред. Ю. Н. Оборотова. О.: Феникс, 2011. С. 137–139.; Гетьман Є. А. Кодифікація як форма систематизації законодавства України. *Пробл. законності*. 2008. Вип. 99. С. 228–236.

their correlation since their analysis goes beyond the issues of interest to us. Let us note only that it seems to be the right position that codification is the highest step of systematization. [1]

At the same time, the problem of distinguishing of such concepts as codification, modernization, systematic updating, and recoding of civil legislation is considered urgent. Among them, over the last twenty years, the attention of foreign and domestic legal experts has been increasingly drawn to recodification, which is characterized as a legislative activity, a significant change in the structure and scope of legal regulation that is included in the source code (the group of codes), taking into account the practice or its (their) use, and change (including additions or exclusions) of the fundamental and other most important provisions of the code (the group of codes).[2]

Although the proposed characteristic includes such important features of recodification as the existence of an "original code", "substantial modification of the structure and scope of legal regulation", "taking into account the practice of its application of the original code", it does not sufficiently distinguish codification and recodification.

In this context, we recall the point of view that the development of codification is subject to a certain cycle, which has its own internal logic. According to Cabriac, schematically such a cycle can be divided into four phases: the period of creation of codes, their period of validity, the period of crisis, and the period of reforms.[3]

In general, one can agree with this (noting, as appropriate, that a similar scheme was proposed earlier to explain the repetitive nature of the receptions of Roman private law[4]). At the same time, it is doubtful that the actual identification of the "reform period" with "recodification" is justified, for which Cabriac, characterizing the mentioned period, states: "recodification always means something other than codification – every recodification can be done only with the current code…[5]"

This approach gives the impression that every "reform period" causes improvements to the current code, which is a "recodification".

However, the "reform period" can be both the final phase of codification (recodification) and the first phase/period

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[1] Музика Л. А. Окремі питання кодифікації: цивільно-правовий аспект. Наука і правоохорона. 2014. №2. С. 268–274. URL: http://nbuv.gov.ua/UJRN/Nip_2014_2_44.

[2] Музика Л. А. Що є актуальним для сучасного цивільного законодавства України: модернізація, системне оновлення чи рекодифікація? *Науковий вісник Львівського державного університету внутрішніх справ. Серія юридична.* 2015. Вип.1. С. 147–149.

[3] Кабрияк Р. Кодификации / Пер.с фр. Л. В. Головко. М.: Статут, 2007. С. 113.

[4] Харитонов Є. О. Рецепція римського приватного права (історико-правові та теоретичні аспекти). Одеса: Одес. ун-т, 1997. 51 с.; Харитонов Є. О. Концепція циклічного розвитку цивілізацій як методологічна основа рецепції римського приватного права. *Актуальні проблеми держави і права*. 1998. №4. С. 48–54.

[5] Кабрияк Р. Кодификации / Пер.с фр. Л. В. Головко. М.: Статут, 2007. С. 201

of "preparation for new codification". The attribution of it to the first or second case depends, first and foremost, on the circumstances that Cabriac himself qualifies as conditions for the "birth and development of codification": a social need for legal certainty and a strong political will aimed at codification.[1]

However, with the clarification that "social needs" is a generalizing concept, encompassing several "creative" social, anthropological and other factors, among which may be: change of social order, ideology, political regime, the concept of legislation, legal doctrines, etc., which form the "critical mass" of a radical reform of the system of law and legislation (codifications). If, however, such "creative" factors are absent and the current code has a stock of "passionarity", then the legislation can be updated within the limits of recodifications.

We call the code "passionary" if it is not the result of simply the systematization and modernization of accumulated legislative material, but was created on a fundamentally new concept of law. Passionary codes are a realization of a concept that is significantly different from what existed before. They make significant changes to the level of regulation of a certain type of public relations, transferring it into a new quality, and thus affecting the social relations that are regulated. Often, they can serve as a model for lawmaking in other countries, inspiring developers to take new decisions (and sometimes to borrow directly). The French Civil Code (Napoleon Code), the General Civil Code of Austria (ABGB), the Civil Code of the Province of Quebec, the Netherlands Code are examples of "Passionary Codes".

The Civil Code of Ukraine can be classified as an act of legislation of the "passionary type". It was created on a new conceptual basis as a code of civil society, the rule of law and a code of private law, taking into account current European trends and experience. [2]

Speaking of the "passionarity" of civil codes, we should also note that this feature is not a purely legal category, but is based on the requirements of the perspective of the methodological (ideological) basis of the Code. In other words, the methodological basis of codification must also have its stock of "passionarity", conditioned by the existence of an appropriate worldview basis, the nature of social values, the upbringing of an appropriate level of legal culture, legality, justice, understanding, etc.

The provisions outlined above, using the technique from the popular work cited above, by Cabriac, illustrate with several examples the codifications and recodifications of civil law, including the "source material" and the result of the latter.

2. Experience in classical recoding of civil law

The most radical way to improve civil law is to formulate a modern concept that is based on more sophisticated

[1] Кабрияк Р. Вказ.твір. С. 113–114.

[2] Харитонов Є. О. Новий Цивільний кодекс України як кодекс «пасіонарного» типу. *Вісник Хмельницького інституту регіонального управління і права.* 2002. № 2. С.16–20.

principles that meet the challenge of time and, consequently, codify it.

The "Great European codifications", which took place mainly during the nineteenth and early twentieth centuries, are of considerable interest in terms of the use of their experience, since they were carried out in circumstances relevant to Ukraine: combining new revolutionary ideas with the "old" law, which led to the emergence of an "intermediate law", which became the beginning for the creation of a new Code (France); the need for adequate legislative regulation against the backdrop of economic liberalism and the conviction that overall prosperity will grow by itself unless the development of free enterprise is hampered by state interference, burdened, however, by attempts to pursue social policy within a paternalistic way of thinking (Germany); the need for national alienation from the empire burdened by the idea of universal imperial regulation of civil relations, and the search for variants of the concept of civil law to select more liberal, "private" models for imitation, without yielding to the interests of trade (Switzerland); overcoming the confusion of law and particularism of the right-mindedness of residents of different parts of the state (Austria).

However, because even a good concept of civil law does not always guarantee a perfect result, the problem of further improvement/updating of the old new legislation sooner or later arises. Then the concept of "recodification" as a significant revision of existing codes emerges, to adapt to the current needs of today.

Useful here is the experience of the Eastern Roman Empire (Byzantium), which can be said to lead the way in the recoding of civil law. It should be noted that the role of law in the Eastern Roman Empire (Byzantine society) was more "down to earth" than in ancient Rome, with which it is genetically linked. Here, the law does not function as an element of public consciousness. Byzantines are not usually interested in the philosophical basis of law. More important to them is the socio-political aspect – law plays the role of the political and social regulator in a state that concentrates lawmaking in the hands of the central government.

A feature of the Byzantine (Greco-Roman) system of law is also the emergence of systematic collections – codes of laws that were not known to the classical Roman law of the Antiquity. At the end of the 3rd century, the Gregorian Code appeared, followed by the Germogenian) Code, which were informal collections. During the reign of Emperor Theodosius II, an official collection of imperial constitutions was created, supplemented with excerpts from the works of classical lawyers (Theodosius Code). Overall, this Code was a comprehensive piece of legislation that covered both private and public law.

The first, and in fact, the only codification of the Byzantine legislation was the creation of the Justinian Code. On April 7, 529, Justinian I approved the Code, which came into force on April

16 of that year. As the practice of applying the Code revealed many shortcomings, a new commission, chaired by the Tribonian, was created, which revised the text of the Code and incorporated into it many new constitutions of Justinian I. The Code of the Second Edition came into force on December 29, 534. Justinian's Code is divided into 12 books. Books from 2 to 8 are assigned to private law, the 9-th is devoted to criminal law, 10–12-th – to administrative law.

The Cordi constitution allowed to Justinian law-making on issues that were thematically included in the Code outline: "if suddenly the changing nature of things creates something that needs to be approved by the emperor, new constitutions will be issued (Novella constitutions)."

Life has proved the need to supplement and interpret the rules of the Second Edition of the Code. Therefore, in the following years, the reign of Justinian I (up to 565) was issued about 170 short stories, mainly on public and church law. Only a few novelties concerned private law spheres. Rest of them concerned marital family and hereditary relations. As the Novels were not subject to Justinian's systematization but had the character of current lawmaking, they could be considered a continuation of the Code. We think that this is how the material for the third edition of the Code (more precisely, "recodification") was formed, which Justinian never did.

Although the proportion of private law in the Code of Justinian was considerable, Digesta (a collection of fragments of the work of Roman jurists) and the Institution (a textbook of Roman law, which was given the force of law) served more as material for subsequent recodifications.

In our view, a significant factor in recodification was the mismatch between the level of legal mentality and the legal consciousness of the Romans and Byzantines. Although Justinian I was very proud of the "sacred temple of Roman justice" he had created, but the collections he had created were of little use for practice because they were too "qualified" for jurists of the time. Therefore, there is a need to prepare simpler collections, more convenient for practical needs. There is a time of "recodifications" – a reworking of existing codified legislative acts in order to adapt them to the current needs of today. Their characteristic features were: vulgarization of law and its adaptation to practical daily needs, "publicization" of civil relations, Christianization of law.

In 740 (or in 726), "Ekloga ton nomon" or "Ekloga Leonis", commonly referred to as "Eclogue", appears.[1] It consisted of 18 titles covering issues of matrimonial property law, gift-giving, inheritance law, guardianship and custody, slave status, sale, loan, emphitheusis, hiring, testimony, property relations of stratiotes and other officials, punishment

[1] Эклога. Византийский законодательный свод УШ века. Византийская Книга Эпарха. Рязань, 2006. С. 49–90. Коментар до Еклоги Є. Е. Ліпшиць див.: Вказ.твір. С. 9–48, 91–226.

for crimes, martial law. The placement of the material is marked by a departure from a number of principles of Roman private law, which is reflected, in particular, in the refusal of classification on a formal principle (personal law, property law, lawsuits), and its replacement by another, more specific and simplified principle, according to which "facts are located the way they are represented in human life, starting with betrothal and marriage, where you can find the elements of all these rights – personal law, property law, lawsuits." In the content of Eclogue, there is a marked desire to adapt the Roman law to the needs of modern times, to move away from formalism, rituals, and to give "publicity" to private torts. It is the desire to expand the public sphere (through state or religious intervention) that is the most characteristic feature of the collection.

The imperfection of Eclogues' norms led to attempts to improve it, partly returning to the principles of "Justinian law". Therefore, in the middle of the ninth century, a collection of Private Extended Eclogue was created, which, in most cases, relies on Justinian's legislation. It was an act of transitional type – a kind of a "bridge" between pre-classical and classical Byzantine law.

At the end of the IX century, Emperor Vasily the Macedonian modified the Justinian's Collection for its improvement, unification, and modernization. The works were continued and completed already during the reign of his son – Emperor Leo VI the Wise at the beginning of the tenth century. The merit of these emperors of the Macedonian dynasty is that they understood the need for change, embraced the idea of legal reform and supported it with the authority of the imperial power.

A grand program of "purification of ancient laws" was developed, which aimed not only to remove the "layers" of the law of the Isaurian dynasty but also to revise the rules of Justinian's compilation from their possible application in new conditions, the elimination of contradictions, Hellenization, etc. It was about the replacement of the Latin Corps of Justinian with the Greek Code of Laws, the creation of his own "Greek Justinian".[1] This can not be called "codification" (because it is about working out existing codes), but it may be – "recodification".

This program envisaged a minimum program and a maximum program.

The minimum program envisaged the creation (in parallel with the implementation of the maximum program, designed for decades) of a compact and publicly available collection of laws that would contain the materials needed by practitioners – judges, lawyers, etc. According to this program, the commission, headed by Patriarch Totti, created the collection "Isagoge" ("Introduction"), which traditionally covers Byzantium procedural, private and criminal law. In February 907, Emperor Leo VI took the opportunity to reconsider the Isagoge, and was instead issued a Prohiron, devoid of the restrictions on imperial sover-

[1] Культура Византии. С. 227.

eignty that saturated the Isagoge. Leo VI wrote the preface to Prohiron by himself. First outlining the importance of law, justice, and legal education, he formulated Prokhoron's task: to eradicate the fear of laws from the minds of people, to make the assimilation of laws more accessible by reducing unnecessary and concentrating the necessary legislative material. The essence and content of Prohiron were determined by its designation as a "handbook of laws."

The maximum program was designed to create a universal Code of Laws (a kind of encyclopedia of law). Eventually, its implementation led to the creation of Basilika – a collection of laws in 60 books, to which several volumes of scholia (commentary) were later added.

Since the main purpose of the Basilica was to recodify – the systematization of legislative material scattered across parts of the Code of Justinian – the prevailing principle in the Basilika was the systematic and chronological principle of norm placement. According to this conceptual approach, each Basilika title begins with a fragment of the works of Roman jurists contained in Digestas, followed by the provisions of the Code, the Institutions, and Novels, which confirm or supplement Digest's provisions.

Following the instructions of Leo VI, everything "superfluous", what is repeated in the new laws is not used, abolished by later laws, should be removed from the Basilica. [1] The Digestas were incorporated into the Basilika almost completely, even many of those provisions that were amended or repealed by the Justinian Constitutions.

The works on the creation of Basilika were, in essence, a revision of the legal acts (which is a sign of recodification) that have accumulated over the last centuries. At the same time, the purpose of the audit was not to abolish Justinian's old law but to restore its basic provisions while modernizing the latter, which would make them usable in the new conditions. Therefore, after the publication of the Basilika in court, it was possible to refer to both the Basilika and the "Code of Justinian" (in its Greek version).

The last legal monument of Byzantine law is considered by Hexabiblos (Six Books), which was published by Byzantine jurist and judge Constantine Armenopoulos around 1345. Hexabiblos contained extracts of civil and criminal law from Basil, compiled in 6 books.

Hexabiblos are often criticized for being primitive. Nevertheless, it is logical to assume that the level of the assembly was determined primarily by the needs of the practice. Unlike previous collections, Hexabiblos has virtually no public law rules. This gives reason to consider it as an unofficial Byzantine Civil Law Code, created by recoding.

3. The relevance of civil law recodification in Ukraine

Therefore, it should be noted that the creation of a theoretical basis for codification is a lengthy process, but

[1] Азаревич Д. И. Из лекций по римскому праву. Вып. 1. Одесса, 1885. С. 70.

one that ensures that the desired result is achieved with the least loss in the future. This applies, to a large extent, to the problems of developing a methodological basis for the codification of civil law in Ukraine that its developers had to overcome.[1]

Since the USSR ceased to exist in December 1991, partly becoming the CIS, the enactment of the Fundamentals of Civil Law has depended on the goodwill of the former Soviet republics. Ukraine did not go this way, so the mentioned Fundamentals in our country never came into force. The question of creating basic laws that would regulate civil relations and, consequently, of legal adaptation in the field of regulation of civil relations was raised.

In the face of the threat of a "legal vacuum" in Ukraine in the early 1990s, the creation of the concept of civil law development began, based on which new ideas about the concept of law should be based on the ideas of civil society and the rule of law.

When drafting the Civil Code, the problem of sample selection arose, which, in turn, resumed discussion between supporters of «civil law concept» and «commercial law concept."[2]

Under the influence of the desire to adapt to the European legal systems in the process of discussions, the concept of modern civil law of Ukraine was formed based on European ideas about private law.[3] It was noted that the ideas are largely based on the reception of Roman private law, which is the primary source of most Western codifications, [4] adjusted following national perceptions of the phenomenon of law, civil law, and its institutions.[5]

After all, the main features of the concept of modern civil law in Ukraine are as follows:

1. The civil law of Ukraine is by its very nature a private law, covering all relations with the participation of a private person – both property and non-property;

2. "Private person" is the main category of civil (private) law. All civil law institutes are directed to protect the rights of such a person;

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[1] Кодифікація приватного (цивільного) права України / За ред. проф. А. Довгерта. К., 2000. 336 с.; Харитонов Є. О. Новий цивільний кодекс України – завершення кодифікації чи її початок. *Суспільство. Держава. Право.* 2002. Випуск І. Цивільне право. С. 7–12; Харитонов Є. О. Формування сучасного цивільного права України: вплив західної та східної традиції права. Правова система України: історія, стан та перспективи : у 5 т. Х. : Право, 2008. Т. 3: Цивільно-правові науки. Приватне право / За заг. ред. Н. С. Кузнєцової. С. 79–121.

[2] Харитонов Є., Харитонова О. Деякі особливості концепції так званого «господарського права». *Українське право.* 2000. Число 1. С. 25–31.

[3] Кодифікація приватного (цивільного) права України / за ред. А. Довгерта. К.: Укр. центр правн. студій, 2000. 336 с.

[4] Харитонова О. І., Харитонов Є. О. Порівняльне право Європи: Основи порівняльного правознавства. Європейські традиції. 2-ге вид., доп. Х., 2006.

[5] Див.: Підопригора О., Харитонов Є. Римське право і майбутнє правової системи України. *Вісн. Акад. прав. наук України.* 1999. № 1. С. 95–103; Харитонов Є. О. Рецепція римського приватного права як підґрунтя сучасної цивілістики. *Вісн. Акад. прав. наук України.* 1998. № 2. С. 104–111.

3. All parties to civil relations shall be equal in this respect;

4. Civil law proceeds from the possibility of the comprehensive civil legal protection of non-property relations;

5. The core of the civil law of Ukraine is the Civil Code, which by its very nature is a code of private law and is intended to regulate the totality of relations in this field;

6. In the regulation of civil relations, both private and public legal means are used;

7. In determining the means of civil law regulation, preference is given to contracts over acts of legislation.

The concept of civil law of Ukraine was reflected in the process of drafting the Civil Code, the dynamics of which, at that time, testified that by the concept it was approaching the best European models, conceptually based on the Western tradition of law.

At the same time, the forecasts for harmonization (at that time it was about "harmonization", which reflected hopes for the successful completion of the codification of national legislation on a fundamentally new ideological basis) of Ukrainian legislation with European as a long-term process were confirmed.

In particular, in the final stage of the discussion of the Civil and Commercial Codes of Ukraine, the proponents of the development of separate commercial legislation (Commercial Code) actively made various arguments in favor of such a decision, proved the error of applying of the "general civilistic approach" in solving issues of regulation of relations in the "economic activity."[1]

After the adoption of the Civil and Commercial Codes, the dispute gained new momentum,[2] which was facilitated by the fact that, among other things, the scope of civil and commercial law was not clearly delineated[3].

Another "stumbling block" on the path of harmonization of domestic law to the European concept of private law was the regulation of family relations, where the Byzantine tradition,[4] in which family relations are considered outside civil relations, still prevailed. Although the 1996 draft of the Civil Code of Ukraine envisaged the regulation of family relations by the rules incorporated into the special book Family Law, it was opposed by supporters of the Ukrainian legal traditions and opponents of the regulation of private relations by a single Civil

[1] Мамутов В. І знову про загальноцивілістичний підхід. *Право України*. 2000. №4. С.93–94.

[2] Мамутов В. К. Отзыв на статью И. В. Спасибо-Фатеевой «Последняя попытка расшифровать «Код да Винчи», т.е. Хозяйственный кодекс Украины. *Юридичний радник*. №4. 2006. С. 94; Розовский Б. Г. Хозяйственное право: с эмоциями и без: моногр. Луганск, 2008. 230 с.

[3] Посполітак В. В., Ханик – Попсолітак Р. Ю. Аналіз наявних суперечностей та неузгодженостей між Цивільним та Господарським кодексом України. К., 2005. 264 с.; Проблемні питання у застосуванні Цивільного і Господарського кодексів України / Під редакцією Яреми А. Г., Ротаня В. Г. К., 2005. 336 с.

[4] Харитонов, Є. О. Історія приватного права Європи: східна традиція. Одеса, 2000. С. 13–44.

Code. As a result, the Family Code was adopted separately and even earlier than the Civil Code.

As a result, the concept of the Civil Code of Ukraine (as a single code of private law) suffered losses, which eventually, due to the development of social relations, determined the updating of Ukrainian civil law. This naturally raises the question of which of the ways to update the legislation is appropriate to choose: the gradual introduction of fragmentary changes, codification or recodification.

Here it is advisable to mention the division of codes depending on their effectiveness into 1) self-created and 2) borrowed. The first includes those that are adequate expectations of the morality of the people whose lives they are intended to regulate (French Civil Code). The latter include those who have been forcibly or voluntarily transferred from one legal field to another, with little regard for the realities of life in the country.

Analyzing the relationship between self-created and borrowed codes, Cabriac notes the benefits of self-created codes but rightly notes that "borrowed" (transplanted) codes can be both ineffective and effective. A code transplant is more likely to succeed when its country of origin and the country that implements the code are almost indistinguishable from one another's lifestyle. In addition, partial, not complete, transplantation is the key to success. In any case, the success of the code depends on where the will is directed: to integrate transplanted legal norms into an element of national law, or to abandon integration by abandoning them as much as possible [1].

Assessing the Civil Code of Ukraine from such an angle, we can conclude that it is a passionate code, created in accordance with the requirements of a society that needed a code that is able to protect the property and property rights of the individual, serve market civil relations, etc. Partial transplantation of some provisions of the codes, which successfully regulate similar public relations on a private conceptual basis, took place. The criticism of the Civil Code of Ukraine for its alleged "originality" seems unreasonable. It was not a simple borrowing of individual decisions, but a consideration of the general trends in the development of private law in Europe. The mentioned tendencies were reflected in the civil codes of a number of states that arose in the post-Soviet space, including the Civil Code of Ukraine.

The "passionarity" of the Civil Code of Ukraine gives grounds for the assumption that the losses in question could be easily eliminated in the future since there are a necessary conceptual basis and a "margin of safety" for regulatory material.

In any case, the principles of, the Definitions and Model Rules of European Private Law, the Draft Common Frame of Reference (DCFR), should serve as guidelines for recodification and its methodological basis.[2] Their mis-

[1] Кабрияк Р. Кодификации / Пер. с фр. Д. В. Головко. М., 2007. С. 440–459.

[2] Principles, Definitions and Model Rules of European Private Law. Draft Common Frame

sion is to provide a basis for improving the concept of private law under the basic values of European civilization. This should be taken into account by all European countries when defining the purpose and objectives of developing modern private law.

Despite the rather consistent orientation of the CC of Ukraine to the European standards, we should be prepared for significant differences between the DCFR principles and the decisions of domestic legislators. Some of them can be overcome relatively quickly and painlessly, the transformation of others looks quite problematic. It is suggested to take this into account in the process of recoding. It should also be noted that adapting to the solutions recommended by the DCFR in this field can be quite complicated and will require not only recodification of national legislation, but also an appropriate adaptation of justice.

CONCLUSIONS.

As the experience of European codifications and recodifications shows, if circumstances, primarily economic, political, cultural, ideological, may be factors of codification and recodification, then the political will, legal culture, mentality, legality, etc. are the factors of their successful completion and implementation. Therefore, when defining the concept of modernization of civil law, the values of society should be taken into account, as well as its possible response to codification/recodification.

Due to the popularity of public-law means of influencing of the economy in Ukrainian society, the thesis that the abolition of the Economic Code of Ukraine is the precondition for recodification is doubtful.[1] The moral obsolescence of this act is obvious. Nevertheless, it should also be borne in mind that most Ukrainians are in favor of a combination of government and market methods, and one-third of Ukrainians support a return to a planned system with full state control. Therefore, the abolition of the Commercial Code of Ukraine should not be a prerequisite for recodification, but an element of this process.

The proposal to return the Family Law Book to the Civil Code does not take into account the peculiarities of the national mentality. In our opinion, instead, it should be about updating, in addition to civil law, also the family law of Ukraine, with appropriate adjustments to the rules concerning the definition of the private legal status of a person.

One of the main tasks of updating (recoding) civil law should be to determine the private legal status of a person who meets the European standards in this field. Unfortunately, the rules of the Civil Code in this area appear to be morally outdated and reflect the post-Soviet approach. Therefore, their refinement in the process of recodification should be

of reference (DCFR). Full Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) / Ed. by Christian von Bar and Eric Clive. Vol. I–VI. Munich, 2009.

[1] Довгерт А. С. Рекодифікація Цивільного кодексу України: основні чинники і передумови для старту. *Право України.* 2019. № 1. С. 27–41

paid no less than that of any other civil relationship. We think that this approach is in line with the recommendations of Western specialists for the post-Soviet countries: to take into account that when creating new civil codes, they cannot immediately reach the level of private-law structures that exist in the western countries, and therefore should progress to this level gradually.

Since the improvement/updating of civil legislation is proposed to be carried out primarily as a recodification, a careful study of European concepts on this issue is advisable, given that recodification itself is not such an indisputable option.

As Smith noted, "the creation of a European Civil Code is more political than legal issue … In national systems, legal positivism has largely been abandoned. Even in the Netherlands, where with the entry into force of the new Civil Code in 1992, it could be expected that the rules adopted would be clearly enshrined, judges are given such discretion that such courts do indeed form law. The formation of European private law by imposition does not conform to the legal spirit of the time (Zeitgeist). Such an imposition is the result of a belief in a centralized political power: the idea that the European Union can create a single law characterized by legal certainty and predictability only by introducing the same text is… a simplified statement formed by proponents of positivism during the Napoleonic era".[1]

This, in our opinion, shows that the process of improvement of domestic civil legislation (recodification) on the way to its Europeanization is a process no less complicated than the codification of the civil legislation of Ukraine at the turn of the millennium.

[1] Смітс Я. Європейське приватне право як змішана правова система. *Європейське право.* 2012. №2–4. С. 219.

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ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

UDC 349.6

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HUMAN LIFE AND HEALTH AS AN OBJECT OF ENVIRONMENTAL LAW IN THE GLOBALISED WORLD

Abstract. *The article examines the issues of legal protection of human life and health in the latest globalisation processes, which have covered all spheres of political, economic, financial, social, geographical and cultural life and are becoming a basic factor of humanity on the planet. These processes set new trends in the ecological development of the state, redefine the problems of environmental security due to the changing nature of the challenges and threats facing humanity. The unfavourable state of the environment and the need to ensure environmental safety require the adoption of adequate legal, organisational and other measures. It is believed that in these conditions a human, his life and health should be at the centre of the mechanism of legal regulation of protection and defence, environmental safety, especially the establishment of the legal status of citizens affected by the negative consequences of environmental danger and guarantees of such citizens. The state has a number of obligations to human to create conditions for his "environmental comfort". Such obligations should be reflected in the environmental legislation of the respective states. Recently, urban areas have been becoming threatening, the uncontrolled expansion of which inevitably leads to disruption of the normal functioning of the biogeotic cover of the planet, and consequently – a negative impact on health and life of mankind and especially that part of it living in large cities or other cities. It turns out that the general unfavourable state of the environment makes new demands on environmental security, which in the context of globalisation and internalisation of environmental problems is becoming a dominant factor in global security, as the environmental situation worsens, requiring effective policies to improve it.*

Keywords: *climate protection, legal provision of ecological safety, anthropo-protective law, state ecological policy.*

INTRODUCTION

In modern conditions, the concentration of industrial and chemical production, man-made activities, dangerous natural processes have a negative impact on human life and health. The greatest risks are agriculture, ferrous and nonferrous metallurgy, nuclear industry, transport and energy, which are carriers of air pollution, high noise levels, greenhouse gas emissions, drinking water shortages, reduction of green areas, land pollution. It is also about changes in land use, toxicity of the biosphere, loss of biodiversity, disruption of natural cycles, lack of natural soil and wetlands in residential, industrial and other places of permanent human habitation. Waste generation leads to land being used for landfills. The concentration of small particles in the air has an adverse effect on health. Noise pollution is exacerbated by the compaction of activities, including transport, as well as the use of hard, sound-reflecting materials, as a result of which a person is constantly faced with problems affecting his internal psychological state. That is why human life and health are considered in the environmental legislation of Ukraine as a priority object of legal protection of the environment, as evidenced by Part 3 of Art. 5 of the Law of Ukraine "On Environmental Protection"[1].

The protection of human life and health in the latest globalisation processes, which have covered all spheres of political, economic, financial, social, geographical and cultural life and become a basic factor in human evolution on the planet, should become a trend in modern doctrine of environmental law and legislation of Ukraine. Traditionally, globalisation is considered in interrelated aspects, the main of which are: economic, mental or cultural-ideological, territorial, information-communication and ethnic. If economic and cultural-ideological (mental) globalisation is a union of capital, labour resources, goods, services and related corporations and firms, unification and integration of traditions, culture, ideology, then, in contrast, territorial globalisation is the process of consolidation of states and supranational entities, which results in the weakening of nation-states and the reduction of their sovereignty. The latter is closely linked to the centralisation of power, as modern states delegate more and more powers to influential international organisations, including the European Union, Ukraine, the World Trade Organisation, the North Atlantic Treaty Organisation, the International Monetary Fund, the World Bank and others. In addition, global environmental globalisation processes have recently become increasingly important, requiring a consistent, effective and timely solution to global environmental problems related to climate change, ozone depletion, biodiversity conservation, chemical and radioactive pollution, including acid rainfall, desertification, reduction of natural resource potential, increase in the number of man-made disasters, increase

[1] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264–12

in the probability of loss of biosphere stability era, the economic capacity of which is finite [1].

The processes of globalisation set new trends in the ecological development of the state, redefine the problems of environmental security due to the changing nature of the challenges and threats facing humanity. The unfavourable state of the environment and the need to ensure environmental safety require the adoption of adequate legal, organisational and other measures [2]. According to experts, three quarters of the world's population lives in countries where consumption is so high that ecosystems simply do not have time to recover. Such "environmental debtors" have to borrow forest, water and other natural resources from other countries, sometimes to the detriment of their "creditors". "If our demand for Earth's resources grows at the same rate, we will need two such planets to meet all our needs by the mid-2030s," said James Lip, CEO of the World Wildlife Fund. According to him, today humanity uses 1.5 times more resources per year than nature can restore. Continuation of this practice threatens detrimental environmental consequences [3]. And such consequences are negative not only for the environment, but, first of all, for a human who lives in this environment. Thus, the aim of the article is to study the legal mechanism of providing favourable conditions for human life and health in the current conditions of globalisation processes taking place in the world. The current environmental legislation of Ukraine recognises the ultimate goal of environmental protection is the protection of human himself, but so far, at the level of general declarations. Therefore, the analysis of existing in the legal literature doctrinal provisions, laws and regulations on these issues is extremely important for the further development of relevant scientific proposals and recommendations.

1. MATERIALS AND METHODS

The versatility and complexity of the research issues led to a comprehensive approach to solving the scientific goal. For a detailed study of the stated topic, the author used a variety of general and special methods of cognition, the choice of which is determined by the characteristics of the object, subject, purpose and objectives of the scientific article. The study was conducted in line with the dialectic of general and special, which is extrapolated to the sphere of human life and health as an object of environmental law in the context of globalization challenges. Thus, it was found that the protection of human life and health in the latest globalisation processes, which have covered all spheres of political, economic, financial, social, geographical and cultural life and are becoming a basic factor in human evolution on the planet, should become a modern trend doctrines of environmental law and legislation of Ukraine. It is emphasised that the current environmental legislation of Ukraine recognises the ultimate goal of environmental protection is the protection of human himself, but so far at the level of general declarations.

In accordance with the outlined theoretical tasks, a set of methods of scientific cognition is used, the use of which confirms the multifaceted nature of the obtained results. Formal-logical and systemic methods allowed to study the features of ensuring the sustainability of environmental security of the state in the context of globalisation, as recently there has been an increase in environmental danger to human health and life in different regions of Ukraine due to man-made activities, dangerous natural processes and other anthropogenic changes. The use of this method made it possible to find out that a new stage in the evolution of the biosphere is taking place – the transformation into a biotechnosphere. This process is a complex and unique phenomenon characterised by a set of dynamic biological, social, economic, informational and technical processes occurring on the planet. Among all other methods of research, the method of modelling was used, which provided an opportunity to consider the scientific and legislative problem of human life and health as an object of environmental law in a globalised world that serves to improve Ukrainian legislation. The forecasting method was used in the study of globalisation of environmental processes occurring in the world. The reasons for these processes are associated with the need to meet the growing material needs of mankind, which leads to the expansion of economic activity. As a result, the problems of its global pollution, global climate change, depletion of the planet's natural resources, increasing the number of man-made disasters and accidents, increasing the likelihood of losing the resilience of the biosphere are exacerbated.

The formal-legal method is used in the analysis of legal norms that exist in the mechanism of legal regulation of protection and defence, environmental safety, features of establishing the legal status of citizens affected by the negative consequences of environmental danger and guarantees of rights of such citizens. Scientific knowledge of legal phenomena should be based on the principles of scientific objectivity, a combination of theory and practice, which eliminates the bias of research results, their dependence on various subjective factors. The method of formal logic allowed the use of general methods in the field of economic law. Thus, one of the dominant in the methodological approach is the comparative legal approach, which allowed to determine the content of such concepts as "human life and health", "biogeotic cover of the planet", "environmental problems" and others. Using the method of analysis and systematisation, the sources of environmental law were monitored in order to determine the existence of norms on human safety, protection and defence of his lifehood in the process of carrying out the relevant types of special nature management. The presence of such norms in the legislative acts of the resource direction (Land, Water, Forest Codes, Subsoil Code, laws "On flora", "On fauna", "On air protection",

"On nature reserves", "On ecological network", "On the Red Book", etc.) is extremely important for the implementation of the mechanism of protection of human life and health in the natural environment.

These and other methods were used in conjunction, which contributed to the conceptuality of the study and the validity of the formulated scientific conclusions and recommendations. The presented scientific ideas of the author in the conditions of modern development of ecological law include target, methodological, substantial, organisational-legal and effective components.

2. RESULTS AND DISCUSSION

Recently, urban areas have been becoming threatening, the uncontrolled expansion of which inevitably leads to disruption of the normal functioning of the biogeotic cover of the planet, and consequently – a negative impact on health and life of mankind and especially that part of it living in large cities or other cities. Today it is obvious that the natural and urban environment cannot develop autonomously. On the contrary, their relationship is becoming increasingly complex. There is a new stage in the evolution of the biosphere – it is transformed into a biotechnosphere. This process is a complex and unique phenomenon characterised by a set of dynamic biological, social, economic, informational and technical processes occurring on the planet. Urbanisation as one of the main components of the balance of the bio- and technosphere occupies a decisive place in these processes [4].

The pace of urbanisation in the modern world is unprecedented: since 1950, the urban population of the Earth has increased tenfold. The fastest pace of urbanisation is observed in developing countries and the most developed countries, where they together account for three quarters of the world's urban population. Cities are part of the natural environment, are habitats and ecosystems, and like any ecosystem, are dynamic and interconnected with other elements of the environment [5]. As humanity's understanding of the complex relationship between human well-being and the integrity and stability of the ecosystem deepens, it is becoming clear that the great global challenge of urban development in the 21st century is to find ways in which urban planning and governance not only meet the needs of urban dwellers in large, fast-growing cities, but meet those needs in a way that recognises the interdependent relationships of the cities and ecosystems of which they are a part. There is a growing consensus that a reductionist approach to the command form of control is not the best way to interact with what is essentially a dynamic system of adaptive living; sustainability and adaptation are a factor in the well-being of cities. This requires a significant review of the traditional model of urban development and legal regulation of relevant processes [6].

According to some researchers, the number of cities, their population, spatial

extent, growth rate and degree of environmental impact are unprecedented. Today, there are a huge number of serious environmental problems in cities related to food production, energy, water supply, waste management and pollution, as well as social problems related to jobs, poverty and human health. Some researchers predict that as a result of the current speed and scale of urbanisation around the world, humanity is on the verge of a new "urban revolution". This has led to the fact that cities are largely built as separate objects, in which buildings, roads, natural, energy objects, financial resources were studied separately from each other that ultimately has a negative impact a the person who is in this city (permanently or temporarily) [1; 7; 8]. Unfortunately, the Sustainable Development Strategy "Ukraine 2020", which was approved by the Decree of the President of Ukraine of January 12, 2015, did not contain any environmentally oriented items, including it did not mention the legal provision of environmental protection in cities[1].

However, in recent years, settlements are increasingly seen as complex ecosystems, which implies the need to consider them as a complex system of components that are in constant interaction with each other. The boundaries of each ecosystem are not fixed. Therefore, the whole city can be considered as an ecosystem or its smaller components, such as lake ecosystems, housing ecosystems, green ecosystems, etc., each of which can be an independent subject of study and object of management. At the same time, according to experts, a healthy ecosystem is stable and persistent as long as it retains its organisational structure and autonomy. Accordingly, the key tool to achieve the goal of the new "urban revolution" is to incorporate environmental knowledge and principles into urban governance and development processes to ensure the development of healthy, viable, sustainable urban ecosystems that will create comfortable living conditions for all urban populations. To date, a draft for Sustainable Development Strategy of Ukraine for the period up to 2030 has been developed, which includes the following elements of protection of human life and health in the urban environment:

– introduction of energy efficient and environmentally friendly public transport systems in cities based on the use of electric vehicles;

– ensuring balanced and interconnected spatial development of cities and rural settlements and opportunities for integrated planning of settlements with public participation and management;

– ensuring the effective functioning of the early warning system, prevention and elimination of the consequences of natural and man-made disasters in settlements;

– reduction of negative anthropogenic impact on human health in cities by improving air quality and disposal of municipal waste;

[1] Presidential Decree "On the Sustainable Development Strategy "Ukraine – 2020". (2015, January). Retrieved from https://zakon.rada.gov.ua/laws/show/5/2015

– ensuring general access of all segments of the population to safe, accessible and open green areas and water bodies and establishing the share of green areas in the settlements of at least 20% of the total area;

– significant increase in the number of cities and other settlements that have adopted and implemented comprehensive strategies and plans for sustainable spatial development and aimed at eliminating social barriers, improving the efficiency of natural resources, mitigating the effects of climate change, adapting to its changes and resilience natural disasters.

The setting of such goals is due to the fact that one of the features of modern urbanisation is the concentration of a significant number of people mainly in large cities and, accordingly, their further growth. Thus, there is the formation of an urban environment or urban ecosystem, which is a qualitatively new physical and geographical state of the geo-environment, which arises as a result of long-term development of a city. During its formation all components change: atmosphere, climate, vegetation, fauna, soils, surface hydrosphere, geodynamic state of territories. In this case, the larger the size of a city, the time of its existence and the degree of development of industry in a city – the more significant changes in its environment [9–14]. In these conditions, a human, his life and health should be at the centre of the mechanism of legal regulation of protection and defence, environmental safety, especially the establishment of the legal status of citizens affected by the negative consequences of environmental danger and guarantees of the rights of such citizens. The state has a number of obligations to human to create conditions for his "environmental comfort". Such obligations should be reflected in the environmental legislation (environmental legislation) of the respective states.

In this regard, it is worth mentioning that the issue of protection of human life and health is an original, but insufficiently implemented problem of environmental law and legislation, which has been repeatedly emphasised in the legal literature. In particular, at the end of the 20th century a monograph was published by well-known specialists in the field of law and economics, professors E. V. Vilenskaya, E. O. Didorenko and B. G. Rozovsky entitled "Legal protection of humans in the environment". According to scientists, "a person is the main subject of legal relations, and the law itself exists to protect people in all spheres of life. Formally, everything is so, but in reality the law has never protected, and even today does not fully protect a human as a personality, without specifying – who exactly and within what limits" [15].

According to E. Vilenskaya, E. Didorenko and B. Rozovsky, in the existing realities, the focus on human protection in his natural environment requires qualitatively new ways to solve problems of both human protection and the environment. The essence of this trend

is manifested in the definition of environmental protection not as the main task, but through the prism of the strategic problem of environmental quality management, in which human is not a passive spectator, but an active subject of positive impact on the environment and neutralisation of its negative changes. Such a conceptual idea can become the basis for the formation of a new ideology in the field of environmental law – human protection in the environment [15]. But, according to the authors of the monographic study, the proposal to consider the purpose of environmental law to protect people in their natural environment is not fully accepted by the theory of this industry, and even less – is not implemented by law and practice [15].

The concept of human protection in the natural environment was further developed on the territory of independent Ukraine in the scientific works of Academician V. I. Andreytsev [16; 17], but in a slightly different sense. In his opinion, the environmental legislation of Ukraine has established legal principles that ensure the protection and defence of human, his life, health and safety in the process of life. The author considers this set of legal norms as a complex interdisciplinary branch of legislation and law – anthropoprotective (anthropodefensive) law of the legal system and the legal system of Ukraine [17]. In addition, to the subject of environmental law, V. I. Andreytsev in his first scientific works on this issue includes anthropoprotective (protection of human life and health from a dangerous environment) legal relations, as well as legal relations for the protection of human life and health from dangerous anthropogenic and negative impact of natural forces and natural phenomena. The author considered the life and health of citizens from a dangerous ecological state to be integrated objects of ecological law; and in the structure of environmental law singled out a complex intersectoral legal institution – the legal ecology of human, or legal support for environmental safety of citizens [16]. V. I. Andreytsev substantiates his conclusions by the existence of an extensive system of legal norms contained in the Constitution of Ukraine, the Charter of Fundamental Rights of Citizens of the European Union, and certain legislative acts: Basic principles (strategy) of state environmental policy of Ukraine until 2020 (as amended) – for the period up to 2030), the laws of Ukraine "On the basis of the legislation of Ukraine on health care"[1]; "On Ensuring Sanitary and Academic Welfare of the Population"[2]; "On Environmental Protection"[3]; "On Ecological Expertise" (expired)[4]; "On

[1] Law of Ukraine "On the basis of the legislation of Ukraine on health care". (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2801–12

[2] Law of Ukraine "On Ensuring Sanitary and Academic Welfare of the Population". (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/4004–12

[3] Law of Ukraine "On Environmental Protection". (1991, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1264–12

[4] Law of Ukraine "On Ecological Expertise". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/45/95-%D0%B2%D1%80

Pesticides and Agrochemicals"[1]; "On Transport"[2]; "On protection of man from the effects of ionizing radiation"[3]; the Civil Code of Ukraine[4]; Criminal Code of Ukraine[5]; Code of Ukraine "On Administrative Offences"[6] and some others [18]. Incidentally, it should be noted that not all sources of environmental law have rules on human safety, protection and defence of human life in the implementation of relevant types of nature. These norms only partially are present in some codes and laws of post-resource orientation [17]. In particular, the Land Code of Ukraine[7], which aims to regulate land relations in order to ensure land rights of citizens, legal entities, territorial communities and the state, rational use and protection of land, human security and protection in land use does not pay the necessary attention and leaves them outside the scope of legal regulation. As an exception, it is worth to consider Art. 5 of this Code, where among the principles on which the land legislation is based, the priority of environmental safety requirements is mentioned, which, of course, in the relevant interpretation is general (abstract). In addition, the creation of zones of special regime of land use around the military facilities of the Armed Forces of Ukraine and other military formations to ensure the protection of the population are provided (Article 115).

The Water Code of Ukraine regulates in more detail the issues related to the safety of human life and health. First of all, water users are obliged to comply with the established standards of maximum permissible discharge of pollutants, as well as sanitary and other requirements for landscaping (Article 44). According to A. S. Yevstihnieiev [19], this can be one of the most important and effective guarantees of safe for human life and health use of water [19]. In addition, the Code provides for environmental safety standards, environmental water quality standards (Article 35), urgent measures to prevent natural disasters caused by harmful effects of water, accidents on water bodies and eliminate their consequences (Article 108). In particular, in emergency situations on water bodies related to their pollution, which may adversely affect the health of people, the enterprise, institution or organisation due to which an accident occurred, or which detected it, must immediately begin to eliminate it consequences and report an

[1] Law of Ukraine "On Pesticides and Agrochemicals". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/86/95-%D0%B2%D1%80

[2] Law of Ukraine "On Transport". (1994, November). Retrieved from https://zakon.rada.gov.ua/laws/show/232/94-%D0%B2%D1%80

[3] Law of Ukraine "On protection of man from the effects of ionizing radiation". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/15/98-%D0%B2%D1%80

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

[5] Criminal Code of Ukraine. (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341–14

[6] Code of Ukraine "On Administrative Offenses". (2020, April). Retrieved from https://zakon.rada.gov.ua/laws/show/80731–10

[7] Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14

accident to the relevant central executive bodies.

Similar provisions are contained in the legislation on subsoil. Thus, the Code of Ukraine on subsoil[1] provides requirements to ensure: in the geological study of subsoil – environmentally safe for human life and health of the environment (Article 38 of the CUS); during the design, construction and commissioning of mining and mineral processing facilities, as well as underground structures not related to the extraction of minerals – measures to ensure the safety of people (Article 50 of the CUS); in the development of mineral deposits and processing of mineral raw materials – safe for people to conduct work (Article 53 of the CUS). The bodies of state mining supervision of geologicalexploration, their use and protection are empowered to verify the correctness and timeliness of measures to ensure the safety of people from the harmful effects of work related to subsoil use (Article 63 of the CUS). In addition, failure to comply with the requirements for the safety of people from the harmful effects of work related to subsoil use may result in disciplinary, administrative, civil or criminal liability under the laws of Ukraine (Article 65 of the Criminal Code). A large number of normative documents in the field of subsoil protection, the list of which is given in the Index of normative legal acts on labour protection, approved by the order of the State Service for Mining Supervision and Industrial Safety of Ukraine dated April 12, 2012, № 74, contain instructions on limiting negative impacts subsoil use for human health. However, according to A. S. Yevstihnieiev, most of them were developed and adopted in Soviet times and are obsolete, which makes it impossible to effectively use them in modern conditions [19].

The Law of Ukraine "On Protection of Atmospheric Air"[2] provides for certain legal measures regarding human safety in the environment [20; 21]. In particular, in order to create a favourable living environment, prevent harmful effects of atmospheric air on human health, emissions of the most common and dangerous pollutants are regulated, the list of which is established by the Cabinet of Ministers of Ukraine (Article 11 of the Law "On Protection of Atmospheric Air"). In order to ensure optimal living conditions in areas of housing, public recreation and rehabilitation of the population in determining the location of new, reconstruction of existing enterprises and other facilities that affect or may affect the state of the air, sanitary protection zones are established (Art. 24 of the Law "On Protection of Atmospheric Air"). To determine safety for human health during the design, placement, construction of new and reconstruction of existing enterprises and other facilities, environmental impact assessment and state sanitary examination in the manner prescribed by law are conducted

[1] Code of Ukraine on subsoil. (1994, July). Retrieved from https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80

[2] Law of Ukraine "On Protection of Atmospheric Air". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/2707–12

(Article 25 of the Law "On Protection of Atmospheric Air"). Finally, persons guilty of violating the rights of citizens to a safe environment for life and health are liable under the law (Article 33 of the Law "On Protection of Atmospheric Air"). The Forest Code of Ukraine[1] contains only a reference to the protection of human health in the context of the basic requirements for forest management (Article 64). In particular, enterprises, institutions, organisations and citizens carry out forestry taking into account the economic purpose of forests, natural conditions and are obliged to strengthen water protection, defensive, climate regulation, sanitation, health and other useful properties of forests to improve the environment and human health. Declaratively, these issues are announced in the Laws of Ukraine "On Flora" and "On Fauna"[2]. In particular, in order to protect the health of the population, the business entity may take measures to regulate the distribution and number of certain species of wild plants (poisonous, narcotic, quarantine, etc.) (Article 22 of the Law "On Flora"[3]). Work related to the reproduction of natural plant resources is carried out in ways that ensure their reproduction in the shortest possible time and do not harm human health (Article 24). The Law "On Fauna" provides, among the basic requirements and principles of protection, rational use and reproduction of wildlife, the necessity to regulate the number of wild animals in the interests of public health (Article 9) and public safety (Article 32).

Instead, the Laws of Ukraine "On the nature reserve fund of Ukraine", "On the Ecological Network"[4] do not contain provisions for the legal provision of human safety in the natural environment. This is evidence of the limited impact of resource legislation on the creation of safe conditions for human life in the conditions of human's exploitation of natural objects and complexes that can adversely affect its health and life.

CONCLUSIONS

Thus, the general unfavourable state of the environment makes new demands on environmental security, which in the context of globalisation and internalisation of environmental problems is becoming a dominant factor in global security, as the environmental situation worsens, requiring effective policies to improve it. An important direction in the implementation of this process should be the mechanism of legal support of the system of scientifically sound quality standards of

[1] Forest Code of Ukraine. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80

[2] Law of Ukraine "On Flora". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/591–14; Law of Ukraine "On Fauna". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2894–14

[3] Law of Ukraine "On Flora". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/591–14; Law of Ukraine "On Fauna". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2894–14

[4] Laws of Ukraine "On the nature reserve fund of Ukraine". (2019, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2456–12; Laws of Ukraine "On the ecological network". (2018, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1864–15

natural objects, resources and complexes, environmental impact assessment standards, environmental protection, which will ensure safe, as required by Art. 50 of the Constitution of Ukraine, for human life and health environment, and in the long run – favourable and healthy existence of human as a biological species in the natural environment.

Environmental law, especially in its subsectors on natural resources, should be focused on the main goal – ensuring human safety in the environment, its direct protection, respect for environmental rights, freedoms and interests. Ecological safety, environmental protection, rational use of nature and other ideological general ecological factors in the national legislation should be considered through the prism of safe conditions of human existence, life, health and evolution as a biosocial personality.

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DEVELOPMENT OF THE ENVIRONMENTAL LEGISLATION IN UKRAINE AFTER COMING INTO FORCE OF THE ASSOCIATION AGREEMENT

Abstract. *The article is devoted to the analysis of the current state and prospects of development of Ukrainian environmental legislation from the point of view of European integration processes. The impact on the relevant national legislation of the EU-Ukraine Association Agreement is assessed, the fulfilment of its requirements, both successes and lags in certain areas of cooperation are examined. It is emphasized the need to take into account the peculiarities of the national legal system in the process of bringing the environmental legislation of Ukraine into line with EU law.*

Keywords*: environmental legislation of Ukraine, EU law, Ukraine-EU Association Agreement, harmonization of legislation.*

Formulation of the problem. 27.06. 2014 was signed, and 01.09. 2017, 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, entered into force (hereinafter referred to as the Association Agreement or the Agreement) [1]. The agreement replaced the international legal framework of cooperation that existed before and was established on June 14, 1994 by the Partnership and Cooperation Agreement between Ukraine and the European Communities and their Member States [2]. Although the association does not provide any guarantees for the next full membership in the EU, as stated in the Preamble to the Agreement ("The Agreement will not predetermine and leave open the future development of Ukraine-EU relations"), the history of this integration association knows many other ways of rela-

tions development after the association with third countries, the conclusion of the Agreement is a new, deeper format of cooperation; this stage is essential for countries that intend to join this integration association in the future. In terms of its scope and thematic coverage, the Agreement has become the largest international legal document in the history of Ukraine and the largest international agreement with a third country ever concluded by the European Union [3]. 07.02. 2019, the Preamble to the Constitution of Ukraine was amended, according to which the irreversibility of the European and Euro-Atlantic course of Ukraine became constitutional [4]. This put a logical point in choosing the strategic direction of Ukraine's institutional development.

The implementation of the Association Agreement has been going on for more than two years, which makes it possible to evaluate its first results.

The purpose of this article is to analyze the compliance of this process with both, the general commitment of the Parties to approximate Ukrainian legislation to EU law, and the peculiarities of environmental cooperation; identify problems, difficulties and shortcomings of the Agreement in Ukraine, and outline possible ways to overcome them.

Recently, many domestic researchers have turned to certain aspects of the problem of approximation of environmental legislation of Ukraine to EU environmental law: G.I. Balyuk, S.D. Bilotsky, A.P. Hetman, M.V. Krasnova, S.V. Kuznetsova, V.I. Lozo, M.O. Medvedeva, R.A. Petrov, O.A. Shompol and others. Each of the researchers is trying to understand a certain "slice" of the problem of bringing into line the environmental legislation of Ukraine, which together gives a certain idea of progress towards the implementation of the Association Agreement. One of the defining principles of approaching Ukraine to EU membership is to bring national legislation in line with the law of this institutional association. This in the context of our study, in particular, focuses on Art. 363 of the Association Agreement "Gradual approximation of Ukrainian legislation to EU law and policy in the field of environmental protection". This process is difficult and multi-vector, firstly, in terms of covering the areas of legal regulation that should be harmonized, and secondly, given the methodology of harmonization of legal systems.

Regarding the first aspect, i.e. the main vectors or legal areas to be agreed, the answer can be found in the Association Agreement itself, namely on the subject of our interest – in its Preamble, Chapter 6 "Environment" of Title V "Economic and Sector Cooperation". (Articles 360–366) and in Annexes XXX and XXXI to the relevant Chapter 6. It should be noted that certain environmental measures are also set out in Title IV "Trade and Trade-Related Matters", Chapter 13 "Trade and Sustainable Development" (Articles 289–302) and Chapter 4 "Sanitary and Phytosanitary

Measures" of the same Title of Agreement.

Art. 361 of the Agreement declares that cooperation between Ukraine and EU shall aim at preserving, protecting, improving, and rehabilitating the quality of the environment, protecting human health, prudent and rational utilisation of natural resources and promoting measures at international level to deal with regional or global environmental problems, inter alia in 13 areas, namely: (a) climate change; (b) environmental governance and horizontal issues, including education and training, and access to environmental information and decision-making processes; (c) air quality; (d) water quality and water resource management, including marine environment; (e) waste and resource management; (f) nature protection, including conservation and protection of bio and landscape diversity (eco-networks); (g) industrial pollution and industrial hazards; (h) chemicals; (i) genetically modified organisms, including in the field of agriculture; (j) noise pollution; (k) civil protection, including natural and man-made hazards; (l) urban environment; (m) environmental fees.

It should be noted that Annex XXX contains a list of EU acts for the approximation of Ukrainian legislation in the environmental field, which do not fully cover the relevant areas. There are: 1) Environmental Governance and Integration of Environment into other Policy Areas; 2) Air Quality; 3) Waste and Resource Management; 4) Water Quality and water resource management, including marine environment; 5) Nature Protection; 6) Industrial Pollution and Industrial Hazards; 7) Climate Change and Protection of the Ozone Layer; 8) Genetically Modified Organisms. In total, as follows from this Annex, Ukraine must adapt its environmental legislation to the norms of 26 EU Directives and 3 Regulations.

And Annex XXXI, in accordance with Art. 365 of the Agreement, separately focuses on climate change policy, and includes: 1) implementation by Ukraine of the Kyoto Protocol, including all eligibility criteria for fully using the Kyoto mechanisms; 2) development of a long-term (i.e., post-2012) action plan for climate change mitigation and adaptation to climate change; 3) development and implementation of long-term measures to reduce emissions of greenhouse gases.

For each provision of the EU directive / regulation with which Ukraine has to harmonize its legislation, timetable with deadlines are set from the moment of entry into force of the Association Agreement.

Both at the bilateral and national levels, certain institutional and procedural mechanisms have been established to monitor compliance with those requirements.

The establishment of bilateral bodies is defined in the text of the Agreement itself (Articles 461–470). These are: the Association Council, the Association Committee, the Parliamentary Association Committee and the Civil Society Platform.

At the national level, a special coordination mechanism for European integration has also been established in Ukraine to organize the activities of the relevant bilateral bodies. Thus, the Verkhovna Rada of Ukraine has a Committee on Ukraine's Integration with the European Union. The Government has introduced the position of Deputy Prime Minister for European and Euro-Atlantic Integration. In the structure of the Secretariat of the Cabinet of Ministers of Ukraine already on August 13, 2014 № 346 an independent structural subdivision was established – the Government Office for Coordination of European and Euro-Atlantic Integration [5], which, in particular, is responsible for organizational, expert-analytical, information support for the implementation of the Agreement [6]. It is this Office that performs the functions of the secretariat of the Ukrainian part of the bilateral bodies. Quarterly and annually, the Office monitors and evaluates the effectiveness of the Agreement, based on the results of which it submits appropriate recommendations, including on updating the Action Plan for the implementation of the Agreement. The first version of such a Plan was approved by the Cabinet of Ministers of Ukraine in 2014 [7]. Since then, the Plan has been repeatedly updated, and in 2017 a new version was adopted [8]. The last updating of this document was carried out in accordance with the Resolution of the Cabinet of Ministers of Ukraine of 20.11. 2019. [9]. It should be noted that at the level of central executive bodies of Ukraine, plans for the implementation of those EU acts that fall under the relevant sphere of governance are also adopted. The planning and implementation of such plans is the responsibility of specialized units. Thus, the Ministry of Energy and Environmental Protection of Ukraine (Minecoenergo) has a Deputy Minister for European Integration, which is under the control of the Department of Strategy and European Integration [10].

In the context of our study, it is important to note that the issue of aligning Ukraine's environmental legislation with a significant number of EU legal acts is under double scrutiny: not only by EU institutions and specially created mechanisms for implementing the Agreement, but also by international governing bodies of treaties, for the implementation of which an EU directives was adopted (Article 292 of the Agreement). Thus, the obligations associated with the introduction of the so-called "Horizontal" EU directives (acts that are not limited to regulating the protection and use of certain natural resources or one sector of the economy or public life, but permeate all sector policies) are under the supervision of the governing bodies of the following International Treaties:

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs

on the environment – Convention on Environmental Impact Assessment in a Transboundary context (Espoo, 1991) and the Protocol on Strategic Environmental Assessment (Kyiv, 2003);

Directive № 2003/4 / EC on public access to environmental information and repealing Directive № 90/313 / EEC and Directive № 2003/35 / EC on public participation in the preparation of certain plans and programs relating to the environment and the introduction of amendments to Directives №№ 85/337 / EEC and 96/61 / EC on public participation and access to justice – Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, 1998).

The same applies to many other obligations of Ukraine under the Agreement.

Unfortunately, it must be acknowledged that over the past 15 years, Ukraine has repeatedly been included in the rehabilitation list of states that improperly comply with the requirements of international environmental agreements. Thus, the Meeting of the Parties to the Aarhus Convention at its 2nd (2005), 3rd (2008), 4th (2011), 5th (2014) sessions stated Ukraine's non-compliance with certain provisions of the Convention, as a result of which the state was warned and other measures were taken against Ukraine [11; 12; 13; 14].

Similar trends in Ukraine's assessment of international environmental obligations have been observed for other international agreements. Thus, the sessions of the Meeting of the Parties to the Espoo Convention have repeatedly stated that Ukraine has violated certain provisions of the relevant Convention, which has led to sanctions against the Government of Ukraine. Relevant violations were noted, in particular, at the 4th (2008), 5th (2011), 6th (2014) sessions of the Meeting of the Parties to the Espoo Convention [15; 16; 17].

The positive impact of concluding the Association Agreement is that the political, institutional and procedural mechanisms created for the organization, coordination and control of its implementation, at the same time stimulate the implementation of the provisions of those international agreements in which Ukraine has previously participated. Although this process is not can be considered successful in all parts.

If we assess the effectiveness of Ukraine's progress towards approximation to EU environmental law, we should pay attention, on the one hand, to the formal aspects, and on the other – to the actual, derived from the methodology and organizational and legal mechanisms of approximation.

Formal aspects are usually stated in the reports of those bilateral and national institutions that are specifically designed to monitor the implementation of the Agreement, where compliance with the deadlines and adopted implementation plans is noted. These issues are constantly analyzed, covered in the media, both the success of the process and the lag in certain areas are noted [18].

Therefore, within this study, it makes no sense to focus on this. It is more im-

portant and productive to identify problems of a substantive nature related to the methodology of harmonization, domestic approaches to amending the environmental legislation of Ukraine in order to bring it into line with EU law. Some of these problems are already apparent today.

One of the important aspects that must be in the field of view when amending national legislation is the need to take into account not only the immediate needs of legal development, but also the EU's strategic guidelines for the long term. After all, the EU legal system (and environmental law as its component) is not a rigid system that is not developing. And the analysis of Ukraine's specific obligations under the relevant annexes to the Agreement shows that a significant part of the directives that appear here, and to which the legislation of Ukraine should be brought into line, have undergone further changes since the ratification of the Agreement. For example, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC – since the adoption of Annex XXX is already applied in the EU with changes made on 14.12. 2016 by Directive № 2016/2284 / EU [19].

The same can be said for Directive № 2008/98 / EC on waste, which is included in Annex XXX. In the EU, this Directive has already been amended by Regulations (EU) № 1357/2014 and № 2017/997 and Directives (EU) № 2015 / 1127 and № 2018/851 [20].

About half of the EU acts listed in the environmental annexes to the Agreement have already been modified during its implementation. In this context, it is very important, when amending the legislation of Ukraine, to take into account both those innovations that have already entered into the body of *acquis communautaire*, and, ideally, those draft of EU acts that are in the legislative process. This will avoid further need to revise the relevant legislation of Ukraine, will give it more stability.

But even this, I think, is not enough to strategically ensure the harmonization of environmental legislation of Ukraine with EU law. Here it is expedient to distinguish 3 levels of making in compliance: in addition to the first level, which was mentioned above and which is closely monitored by the institutional mechanisms of the Association Agreement, there are two more levels.

This is, first of all, the whole environmental block of the "acquis communautaire", with which the legal systems of the states that have already applied for accession to the EU must be brought into line; today such acts are three times more than those defined in the Agreement [21]. And thinking about the prospect of EU membership, we should already coordinate our legislative actions with this part of European law.

Finally, when updating the environmental legislation of Ukraine, it is im-

portant to focus on the entire system of EU environmental law, its "spirit and letter", development trends, taking into account both legal and policy environmental documents [22, p. 76–79].

It should be noted that today's legislative efforts to harmonize Ukraine's environmental legislation with European law are aimed solely at meeting the requirements of the EU-Ukraine Association Agreement. The other two levels highlighted above are hardly taken into account. It is important to note that the levels of harmonization presented here should not be considered as stages of legislative action, i.e. first, where the implementation of the requirements of the Association Agreement should be completed, and only then, perhaps, to move on. With this approach, we will constantly "catch up" with EU law, spending additional financial, human, institutional and other resources. I consider such a position wrong.

Fulfilling the obligations under the Association Agreement, one should keep in mind and already take into account at the macro level both the entire environmental part of the "acquis" and the general trends in the development of the EU legal system. For example, the general trend of the current development of EU environmental law is the systematization of legal acts of a similar direction, their consolidation by combining "under one roof" the legal regulation of related relations. This can be illustrated by the examples of EU water law, waste management and others, when previously separate directives and regulations are gradually being replaced by codified enlarged EU acts, more accessible and convenient in law enforcement.

Assessing in this context the formal and legal approaches of the domestic legislator aimed at implementing the Agreement, we will see the efforts to adopt a separate law or other legislative act from almost every position. Of course, the approach proposed here in the short term will complicate the legislative process, will require the involvement of specialists with knowledge of both EU law and environmental law of Ukraine, its systemic links within general system of Ukrainian law. But in the strategic dimension, this would be appropriate and justified.

Another problem that arises during fulfilling Ukraine's obligations under the environmental section of the Association Agreement is that a significant part of the directives and all three regulations with which the ecological legal system of Ukraine should be harmonized are aimed at EU Member States. Regulations are generally acts of direct action that do not require EU Member States to take legal action to implement, but are directly applicable. At the same time, for Ukraine, which is not a member of the EU, there are currently no legal grounds for the direct application of EU regulations. The Association Agreement itself does not explain the relevant mechanism. Some EU directives are directly aimed at protecting the EU's natural components or resources. This is especially true of the scope of directives, which directly indicate the protection of the specific natural

areas of the Member States or of wildlife in that area (for instance, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – "The Habitats Directive" and Directive 2009/147/EC of the European Parliament and of the Council on the Conservation of Wild Birds – "The Birds Directive").

I believe that for Ukraine the scope of harmonization of the relevant directives should be extended to the borders of the territory of our state and to the species of fauna and flora that are here; and the relevant explanations should be included in the Agreement.

Another important condition that should be taken into account when adapting the environmental legal system of Ukraine to EU law is the need in the process of legislative reforms not to blindly copy EU legal provisions, but to enter the necessary provisions into the general system of legislation in Ukraine, taking into account domestic principles of its organization, system links, which are embedded in its structure and content. Unfortunately, in this part we have clear miscalculations. An example is the draft Law of Ukraine "On the Territories of the Emerald Network" (for harmonization with Directive № 92/43 / EC) (so-called "Habitats Directive"). This draft was developed as if from scratch, abstracting from the existing system of legal regulation in Ukraine, separated from the relevant provisions of the laws of Ukraine "On Environmental Protection", "On the Nature Reserve Fund of Ukraine", "On the Red Book of Ukraine", " On the ecological network of Ukraine ", relevant norms of natural resource legislation, legislation on the Red Book of Ukraine, on urban planning and spatial planning, monitoring, environmental impact assessment and others. At the same time, the explanatory note to this draft, in my opinion, unreasonably states that the principle of conservation of biodiversity at the level of natural habitats (habitats) is not implemented in the national legislation of Ukraine [23], which leads to the conclusion proposed for introduction in Ukraine "Emerald Network »Does not take into account the existing ecological network of Ukraine, does not give guidelines on how these two networks will coexist: will they replace each other, or the newly created network will somehow complement the existing one. I believe that to bring the environmental legislation of Ukraine into line with the EU legal system it would be sufficient not to develop an independent law, but to make some changes to the Laws of Ukraine "On Nature Reserve Fund of Ukraine", "On the Ecological Network of Ukraine" and some other laws, the provisions of which regulate the relevant area.

And finally one last remark. In the vortex of bringing the environmental legislation of Ukraine into line with the requirements of the Association Agreement, the general development of the relevant national legislation, that part of it which is inert in relation to the motivating factors of harmonization, cannot be neglected. After all, the Association Agreement reflects only those aspects of the convergence of legal systems that

are currently important for the EU and Ukraine's cooperation. At the same time, the domestic development needs of the relevant area of legislation are much broader and cannot be limited to these aspects.

Conclusions. After the entry into force of the EU-Ukraine Association Agreement, the development of environmental legislation in Ukraine has undergone systemic changes associated with its complete reorientation to fulfill its obligations under the Agreement. This was greatly facilitated by the establishment of bilateral and national mechanisms for monitoring the implementation of the Agreement at the institutional, organizational, legal and procedural levels; analysis of the implementation of Ukraine's commitments is carried out on a permanent or periodic basis. At the same time, along with the unconditional successes, the process of bringing Ukraine's environmental legislation in line with EU law has revealed many difficulties, weaknesses and problems that need to be addressed both by amending the Agreement and by improving approximation technology. In addition, it is important to remember that the development of Ukraine's environmental legislation should not be limited to fulfilling its obligations under the Agreement. There are many environmental issues, the regulation of which is inert in relation to the factors of harmonization with EU law, but important for domestic regulation.

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LAND LAW AND LEGISLATION OF UKRAINE: A SYSTEM CRISIS OR A MODIFICATION OF THE PARADIGM IN THE CONDITIONS OF REALIZING THE SUSTAINABLE DEVELOPMENT GOALS IN UKRAINE BY 2030?

Abstract. *The article deals with the methodological, scientific-theoretical, constitutional and legislative foundations of the current state and prospects of the evolution of the land law doctrine and legislation in the context of the Sustainable Development Goals in Ukraine for the period up to 2030. It is argued that for reasons of objective and subjective nature there is a need to revise the ideas, views, concepts established in the theory of land law, the legal nature of modern land law and legislation, and the gradual transition to a new paradigm for the legal regulation of land and related public ones. relations in view of Ukraine's commitment to implement the CDG by 2030. It is established that in the current doctrine of land law of Ukraine the theoretical and practical questions of legal support of realization of such Sustainable Development Goals, such as overcoming poverty, preventing famine, ensuring the ecosystem approach to the use of land and other natural resources in agriculture, forestry and water management are not explored. Therefore, the current land and related agrarian, environmental and other legislation do not find their legislative expression and normative fixing of legal, institutional and functional and other means of ensuring the implementation of the CDG. It is concluded that the change of the paradigm of legal regulation of land relations in accordance with the Constitution of Ukraine in the context of the implementation of the CDG necessitates a revision of the system and structure of land legislation in view of the planned measures for the recoding of the civil legislation of Ukraine. It is proposed to revise the whole system of land legislation for compliance with its Constitution of Ukraine, to refuse from further codification of land legislation in the form of the Land Code, to develop and adopt the following fundamental laws: On land ownership of the*

Ukrainian people, On land use in Ukraine, On land protection as the main national Wealth of the Ukrainian people, On state regulation of land relations in market conditions, as well as functional laws on public administration land relations.

Keywords: *land law doctrine, land legislation, land relations, sustainable development goals, systemic crisis, poverty reduction, hunger, ecosystem approach, recodification.*

Problem setting. Land reform in Ukraine for almost 30 years has not only positive but also negative consequences for the economy, society, state and nature, as land law and legislation enshrined various legal models of land reform, none of which was brought to logical completion and processes of legislative consolidation of new, often, scientifically unsubstantiated legal models continue even now. Moreover, over the past two years in Ukrainian society and in the state there have been resonant events in the field of land rights, land use and protection, state regulation of land relations. It refers, in particular, to the decision of the European Court of Human Rights in May 2018 in the case of Zelenchuk and Tsytsyura v. Ukraine, which established that the ban on the alienation of agricultural land enshrined in the Land Code of Ukraine violates human rights[1]. By law, the state of Ukraine, represented by the Verkhovna Rada of Ukraine, is obliged to comply with this decision of the European Court of Human Rights. However, the Parliament not only does not implement it, but adopts a law on the extension of the moratorium on agricultural land until January 1, 2020 and thus continues to violate the guaranteed in Art. 13, 14, 41 of the Constitution of Ukraine the right of ownership of land by more than 7 million citizens of Ukraine. Moreover, the Verkhovna Rada of Ukraine failed to adopt a law on the circulation of agricultural land by the beginning of this year, as well as failed to adopt another law on lifting the moratorium, resulting in legal uncertainty in Ukraine regarding the alienation of agricultural land which is a gross violation of the principle of the rule of law enshrined in the Constitution of Ukraine.

In June 2019, the Constitutional Court of Ukraine declared as unconstitutional the Resolution by the Cabinet of Ministers of Ukraine of June 7, 2017 № 413 on some issues of improving the management of agricultural lands of state ownership and their disposal[2]. Decentralization creates new problems with the definition of the legal regime of the lands of the United Territorial Communities. In

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September 2019, the Verkhovna Rada of Ukraine adopted the law on stimulating investment activity[1], which provides for the introduction of entrusted land ownership in land legislation without resolving the conceptual problems of land ownership in accordance with the Constitution of Ukraine.

The above and other state-legal trends and social phenomena in the field of legal regulation of land relations gives us reasons to talk about the existence of systemic problems in modern land law and legislation, due to the fact that the principles and legal norms enshrined in land legislation, as well as methods and means of legal regulation of land relations do not provide effective functioning of land law and legislation. It means that modern land law does not fully perform social-regulatory, regulatory, preventive, protective and other functions for exercising the right of land ownership of the Ukrainian people, the implementation of each citizen of Ukraine constitutional guarantees of access to land use in various legal titles, jurisdictional protection of land rights, legal protection and protection of land as the main national wealth, the establishment of legality and legal order in the land sphere.

One of the reasons for the low efficiency of land law is that the current Land Code of Ukraine has not set legislative regulation of methodological principles and theoretical conclusions that are crucial for the development and implementation of "progress energy" economic theory and legal model of property rights on the land of the Ukrainian people and on other natural resources, land use and protection, providing everyone with access to land use on various legal titles in combination with human labor on the land and the use of human knowledge in accordance with the Constitution of Ukraine.

In modern doctrines of land, agricultural, environmental law of Ukraine, issues of legal nature, system, structure, functional purpose and effectiveness of land law and legislation were studied in dissertations, monographs, scientific publications in accordance with outlined by the authors goals and objectives of scientific research, based on theoretical conclusions and practical recommendations for improving the subject, system, sources, content, functions, methods, mechanism of legal regulation of land relations at each stage of reforming land and other related social relations[2]. However, the conclusions and recommendations of scientists, with some exceptions, are not taken into account in the legisla-

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tive activity of public authorities, in the practice of land legislation usage.

In modern conditions, the doctrine of land law faces new problems in the field of land relations, due to global, national, regional and local challenges of natural, economic, social, socio-political, state-legal significance. In particular, in the Ukrainian doctrine of land law remain to be unexplored theoretical and practical problems of land rights, land use and protection, protection of land rights, institutional and functional regulation of land relations in the context of Ukraine's commitments in 2015 to implement the Sustainable Development Goals by 2030, and thus the possible changes in the paradigm of land law and legislation remain scientifically unproven, given the new challenges in fulfilling the tasks in achieving the Sustainable Development Goals[1].

The purpose of the study is to conduct a scientific-theoretical analysis and to make a professional assessment of the current state of land law doctrine, system and structure of land law and legislation and their functional purpose as components of the national legal system in providing a mechanism for legal regulation of land relations in the context of Sustainable Development Goals and on this basis to formulate conclusions and make recommendations on the development of land law, improving the system, structure and content of legislation in accordance with the Constitution of Ukraine in the context of SDG in Ukraine as a democratic, legal and social state.

Presentation of the main material with substantiation of the obtained scientific results. The final document "Transforming our world: the 2030 Agenda for Sustainable Development" approved by the UN Summit on Sustainable Development on September 25, 2015 approved 17 goals and 169 tasks for the global process of sustainable development[2], which Ukraine has committed to adapt and to implement taking into account national economic, ecological, social, state-legal and other features of ensuring the strategy of balanced (sustainable) development of Ukraine until 2030. In this regard, the President of Ukraine issued a Decree "On the Sustainable Development Goals of Ukraine until 2030" of September 30, 2019[3], which decided to ensure compliance with the SDG until 2030 in order to ensure national interests in sustainable economic development, civil society and the state for achieving an increase in the

[1] Носік В. В. Проблеми земельного, аграрного, екологічного права у забезпеченні реалізації цілей сталого розвитку в Україні // Правове забезпечення соціально-економічного розвитку: стан та перспективи: Матеріали Всеукраїнської науково-практичної конференції, присвяченої 35-річчю кафедри господарського права Донецького національного університету імені Василя Стуса (м. Вінниця, 11–12 жовтня 2019 р.). Наук. ред. А. Г. Бобкова, А. М. Захарченко. Вінниця: Донецький національний університет імені Василя Стуса, 2019. С. 231–233.

[2] Цілі сталого розвитку: Україна / Національна доповідь 2017 // Ел.ресурс: http://un.org.ua/images/SDGs_NationalReportUA_Web_1.pdf

[3] Офіційний вісник Президента України, 2019. №21. Ст. 890.

level and quality of life of the population, observance of the constitutional rights and freedoms of human and citizen. This Decree of the President recommended the National Academy of Sciences of Ukraine (hereinafter – NAS) and the National Academy of Legal Sciences of Ukraine (hereinafter – NALS) to take into account the SDG for the period up to 2030 when determining the directions of scientific research, and also established that the SDG is a guidelines for the development of regulations to ensure balanced economic, social and environmental measurements of sustainable development of Ukraine.

The following SDGs are considered to be the most significant for the doctrine of land law and the practice of applying land legislation: 1) overcoming poverty; 2) overcoming hunger, achieving food security, improving nutrition and promoting sustainable agricultural development; 8) promoting progressive, inclusive and sustainable economic growth, full and productive employment and decent work for all; 13) taking urgent measures to combat climate change and its consequences; 15) protection and restoration of land ecosystems and promotion of their rational use, rational forest use, combating desertification, stopping and reversing (deployment) the process of land degradation and stopping the process of biodiversity loss; 16) promoting a peaceful and open society in the interests of sustainable development, ensuring access to justice for all and creating effective, accountable and participatory institutions at all levels. The implementation of these and other goals necessarily requires scientific and theoretical understanding and study of methodological, scientific and constitutional principles of legal regulation of land and related agricultural, property, investment, environmental and other social relations and legislative consolidation of the mechanism of legal regulation of land relations through the prism of tasks to achieve SDG.

In particular, the issues of ensuring the implementation of the first SDG – overcoming poverty through land, agricultural, natural resources, environmental legislation, institutional-functional mechanisms of legal regulation of land relations, jurisdictional protection of land rights, land protection, as in the national legal doctrine the problems of overcoming poverty are considered mainly through the prism of employment, social assistance, health care, pensions, etc.

At the same time, the norms of land, agricultural, natural resources, and environmental legislation do not reflect and enshrine legal institutional, functional, jurisdictional imperatives, rules, methods and legal mechanisms for overcoming poverty through the prism of providing everyone with legally guaranteed access to land, water, forests, natural resources in order to production activities, provide services, satisfy personal needs in food, drinking water, etc.

As a result of the implementation of scientifically unsound, different in pur-

pose, direction and objectives of legal models of land and agrarian reforms, the rural population, which is privately owns more than 25 million hectares of agricultural land, lives below the poverty line. One of the reasons for this situation is that the owners of agricultural land for almost 20 years by law were deprived of the right to freely dispose of their property according to Art. 41 of the Constitution of Ukraine and could not satisfy their material needs by alienating such areas. In addition, the Land Code of Ukraine enshrines the grounds, conditions, methods and mechanism of free acquisition of land in private ownership for various purposes. At the same time, the theory of land law expresses views on the need to abolish the ability of free privatization of land by Ukrainian citizens, because, according to such scholars, it creates corruption in the field of land relations. It is seen that the provisions of the current Land Code of Ukraine on free privatization of land by citizens of Ukraine could be considered as one of the areas of legislative support to overcome poverty for a certain category of citizens. The same could be said about the proposals of some scientists to remove from the law the right to permanent use of land, or the obligation to lease land only at land auctions. It is difficult to agree with such views given the need to ensure the implementation of the SDG on poverty overcoming, as the implementation of such initiatives will not allow the majority of the people of Ukraine to access land use to meet needs and interests and will be contrary to Art. 13 and 14 of the Constitution of Ukraine imperatives to provide every citizen with such access to land use as an object of property rights of the Ukrainian people and the main national wealth, which is under special protection of the state[1].

According to Part 1 of Art. 13 of the Constitution of Ukraine, every citizen has the right to use natural objects of property of the people in accordance with the law. Analysis of the content of this imperative allows us to state the following. Firstly, this norm applies only to citizens of Ukraine, as the word "everyone" refers to individuals as biosocial beings to whom the land belongs according to natural property rights and positive property rights as citizens of Ukraine, which together constitute the Ukrainian people. Secondly, the term "use" should be understood as the legally provided opportunity and ability of everyone to use the functional purpose and useful properties of land and other natural resources to meet one's own needs and interests. Legal forms of land use should be defined by the law. Therefore, this norm of the Constitution of Ukraine should not be

[1] Носік В. В. Проблеми земельного, аграрного, екологічного права у забезпеченні реалізації цілей сталого розвитку в Україні // Правове забезпечення соціально-економічного розвитку: стан та перспективи: Матеріали Всеукраїнської науково-практичної конференції, присвяченої 35-річчю кафедри господарського права Донецького національного університету імені Василя Стуса (м. Вінниця, 11–12 жовтня 2019 р.). Наук. ред. А. Г. Бобкова, А. М. Захарченко. Вінниця: Донецький національний університет імені Василя Стуса, 2019. С. 232.

interpreted as one that provides for the citizens of Ukraine only the opportunity to use land on the title of land use rights and does not allow citizens of Ukraine the opportunity to acquire land. Thirdly, natural objects mean land with all other natural objects and resources, which are listed in the first sentence of Part 1 of Art. 13 of the Basic Law of the state. Fourthly, as a constitutional guarantee of equality of all citizens of Ukraine in access to the use of land and other natural objects and resources.

In this case, the principle of equality in ensuring access to land use applies only to citizens of Ukraine and does not cover legal entities as independent subjects of access to land use, and therefore Part 2 of Art. 14 of the Constitution of Ukraine on the acquisition and implementation by legal entities of land ownership exclusively in accordance with the law must be interpreted through the prism of the fact that only citizens have equal rights in access to land use.

Therefore, legal entities may acquire ownership of land only through citizens of Ukraine who are the founders or ultimate beneficiaries of legal entities of Ukraine. This statement is based on the analysis of ECtHR decisions on the understanding of the principle of equality among the subjects of the same name[1]. Therefore, in cases where the law establishes a general rule that the subjects of ownership of agricultural land are citizens of Ukraine, legal entities of Ukraine, the state, territorial communities, then in such cases the principle of equality among the same entities is violated which may serve as a basis for declaring such a norm to be unconstitutional.

In addition to the above signs of understanding the content of the third sentence of Part 1 of Art. 13 of the Constitution of Ukraine, enshrined in this provision of the Basic Law of the state imperative must also be considered as a principle of justice and the rule of law in ensuring access to land and other natural objects, as well as a constitutional principle according to which the use of land and other natural objects should be regulated exclusively by the law in the sense of how the ECtHR interprets the concept of "the law", namely: as norms of positive law, as well as rules formed in case law[2]. Therefore, from the point of view of ensuring the overcoming of poverty in the current land legislation should be enshrined provisions on the principle of equality in access to land use by the same subjects, taking into account the functions performed by land in nature, economy, society. At the same time, equality of everyone in access to land use does not mean the introduction of social equality by dividing the entire area of land within the territory by population. The principle of equality in access to land use in different legal titles should be ensured between those

[1] Фулей Т. І. Застосування практики Європейського Суду з прав людини при здійсненні правосуддя. Науково-методичний посібник для суддів. 2-ге вид. випр. допов. К., 2015. С. 24.

[2] Ibid, P. 15.

entities of the same name which show genuine will, have real material, financial, physical and other opportunities and are legally and professionally able to ensure functional land use and protection to satisfy private and public needs and interests.

Overcoming poverty is organically combined with the implementation of the second SDG – overcoming hunger, achieving food security, improving nutrition and promoting sustainable agricultural development. In the legal sense, the achievement of this SDG should include the implementation of tasks related to the legislative principle of equality in access to land use as the main means of production in agriculture and forestry, the use of water bodies, implementation of constitutional imperatives and norms on recognition of human life, health and security as the highest social values, the right of everyone to an adequate standard of living for oneself and one's family, including adequate nutrition, protection of the rights of all subjects of property and commerce, social orientation of the economics, environmental security, the right to safety environment for life and health etc.

The analysis of the current agrarian, land, ecological legislation shows that the modern land, agrarian, natural resource legislation remains not systematized, not coordinated with other laws and has no orientation on ensuring overcoming of poverty and hunger, creation of conditions for sustainable development of rural social sphere, functioning of agriculture in existing natural ecological systems in different regions of the state.

Conducted in the Ukrainian theory of land, agricultural, environmental law research on theoretical and practical legal issues covered by the content of the second SDG, show that the main attention by scientists is paid to the legal regime of agricultural land, legal protection of soil, legal status of agricultural production, ensuring the production and economic activity of agricultural producers before and after Ukraine's accession to the WTO, the introduction of innovative technologies in agriculture, sustainable development of agriculture and rural social sphere, greening of agricultural production, etc. The results of these studies substantiated the conclusions and recommendations on the need to develop and adopt laws on agriculture, soil protection, food security, sustainable development of rural areas and other important laws[1]. However, these and other scientific recommendations remain not implemented in the current land and agricultural legislation of Ukraine.

One of the main reasons for this state is seen in the fact that in the doctrine of land law and land legislation remains

[1] Сучасний стан та перспективи розвитку екологічного, земельного та аграрного права в умовах Євроінтеграції: матеріали «круглого столу» (Харків, 8 груд. 2017 р.) / за заг. ред. А. П. Гетьмана. Х., 2017. 322с; Розвиток аграрного, земельного та екологічного права на зламі тисячоліть: матеріали Міжнародної науково-практичної конференції (м. Київ, 18–19 травня 2018 р.) / За заг. ред.. д.ю.н., проф. В. М. Єрмоленка. К., 2018. 427 с.

undisclosed legal content of the first sentence of Article 13 of the Constitution of Ukraine that land is the object of property of the Ukrainian people and the content of the first sentence of Art. 14 of the Constitution of Ukraine that the land is the main national wealth, which is under state special protection. Given that overcoming poverty and hunger are considered the primary SDG, the recognition of land as the main national wealth at the level of the Constitution of Ukraine means that these provisions of the law should be the key ones to developing an institutional and legal mechanism for regulating land relations aimed at SDG realization.

Important for the science of land, agricultural, natural resource, environmental law are theoretical and practical problems of legal support for sustainable development in the field of prevention of negative anthropogenic impact on climate change and overcoming the negative effects of such changes, conservation, restoration and rational use of terrestrial, marine and ecosystems in Ukraine, promoting rational forest use, ensuring accessibility and sustainable management of water resources and sanitation, as in modern conditions the systems of land, natural resources and environmental legislation are built on the delimitation of legal regulation of public relations in the use and protection of nature and their resources. In this regard, relevant issues for environmental law are the possibility of legislative consolidation of the ecosystem as an object of legal regulation of public relations in the field of land use and protection, other natural objects and their resources given their functions in nature, economics, society[1].

The above considered theoretical and practical problems of legal regulation of land relations in the context of the implementation of certain goals of sustainable development of Ukraine show that there is a need for systematic analysis of land legislation of Ukraine to bring its structure and content in line with the Constitution of Ukraine and harmonize with norms of agricultural, environmental, civil and other legislation.

In August 2019, the President of Ukraine issued a Decree providing for the establishment of a Commission on Legal Reform. The main task of this advisory body should be to prepare proposals for further development of the legal system on the constitutional basis of the rule of law, the priority of human and citizen rights and freedoms, taking into account Ukraine's international obligations[2].

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[1] Носік В. В. Проблеми правового забезпечення реалізації цілей сталого розвитку у сфері збереження, відновлення та раціонального використання екосистем в Україні // Особливості правового регулювання екологічних, земельних, аграрних, природо ресурсних відносин в умовах глобалізації: збірник матеріалів Всеукраїнської науково-практичної конференції (м. Івано-Франківськ – м. Яремче, 20–22 вересня 2019 р.) / відп. Ред.. Н. Р. Кобецька, Івано-Франківськ: Прикарпат. Нац.. ун-т ім.. Василя Стефаника, 2019. С. 23–26.

[2] Питання Комісії з питань правової реформи: Указ Президента України від 07 серпня 2019року // Офіційний вісник України. 2019. № 64. Ст. 2209.

At the same time, the Resolution of the Cabinet of Ministers of Ukraine of July 30, 2019 provides for a radical update (recodification) of civil legislation[1]. In particular, the tasks of the working group created by this resolution include a comprehensive analysis of current civil law, identification of areas of private law relations which need to be harmonized with global trends in civil law, study the experience of European countries in civil law recodification (updating), developing legal acts on civil legislation updating, etc.

In systematic terms the update of civil legislation will apply to private – legal relations, the objects of which under the current Civil Code of Ukraine (Chapter 27) are recognized, among others, land (land plots), as well as the implementation of subjective property rights to land plots and normative regulation of land relations within the limits and in the order prescribed in Art. 2 and 9 of this Code in cooperation with the Land Code of Ukraine, the provisions of which were agreed with the Civil Code of Ukraine in April 2007.

Therefore, theoretical and practical questions naturally arise regarding the admissibility, necessity, and possibility of recodification (updating) of land legislation, provided that the tasks outlined in the Government Resolution on updating civil legislation will be implemented into legal reality. It is undoubtable that in the process or after making radical changes to the Civil Code of Ukraine, the Family Code of Ukraine, other legislative acts, which will enshrine regulations aimed at ensuring the acquisition and implementation of property rights to land, as well as legal regulation of private land relations within certain limits, the current Land Code of Ukraine and the laws and bylaws adopted for its development will also need to be updated through the prism of coordination and interaction of principles, norms, methods of legal regulation of land relations.

In essence, the renewal of civil legislation can be regarded as an impetus that will necessarily lead to recodification (updating) of land legislation, because for all 30 years of land and agrarian reforms in the state and society there are objective and subjective prerequisites of economic, social, demographic, political, environmental and legal nature, which do not provide citizens of Ukraine with a quality living environment on the basis of sustainable development of society.

The solution of the outlined problems is complicated by the fact that the Land Code of Ukraine does not comply with the Constitution of Ukraine; legislative and other regulations on land, property, economic, agricultural, natural resources, tax and other relations are not properly coordinated, the system and structure of land legislation is incomplete, current legislation and other regulations are likely to create problems, rather than solve existing in the exercise

[1] Про утворення робочої групи щодо рекодифікації (оновлення) цивільного законодавства України: Постанова КМ України від 17 липня 2019 року // Офіційний вісник України. 2019. № 60.Ст. 2067.

of land rights, regulation of land relations, provoke citizens and legal entities to commit offenses or to find possible ways to circumvent the law, create preconditions for corruption in the field of land relations, etc.

Thus, the above theoretical and normative bases for updating civil and land legislation give us reason to state that in modern legal theory recodification could be considered as one of the ways to systematize civil, land and other related legislation of Ukraine, in conditions that there are objective and subjective preconditions for changing the paradigm of legislation in a one or another historical period. It is seen that the recodification of land legislation of Ukraine at the present stage, when land reform is not completed, would be appropriate to carry out through set of measures aimed at improving the system, structure, form and content of land legislation.

Conclusions. Summarizing the methodological, scientific-theoretical, constitutional and legislative bases of the current state and prospects of land law and legislation considered in the article in the context of the implementation of the SDG, the following generalizations could be made.

In the development of the doctrine of land law of Ukraine comes a new era of scientific and theoretical understanding and study of social and state-legal phenomena in the field of land rights, use and protection of land in view of current changes in nature, economy, society and states on a global, international, national, regional and local levels, which necessitates a revision of established in the theory of land law ideas, views, concepts on the legal nature of modern land law and legislation and a gradual transition to a new paradigm of legal regulation of land and related other social relations in view of Ukraine's commitment to implement the SDG by 2030.

Development of the subject, system, structure of land law and legislation should be based on the mandatory provisions of Articles 13 and 14 of the Constitution of Ukraine on the exercise of land ownership of the Ukrainian people and protection of land as the main national wealth, in which every citizen of Ukraine is guaranteed equal access to use of land for its functional purpose on the basis of ensuring a balance of private and public interests, creating conditions for a quality living environment, the right to a safe environment for life and health, food security, implementation of the social function of land ownership aimed at overcoming poverty, preventing hunger, preservation of ecological systems, achievements of other SDGs.

Changing the paradigm of legal regulation of land relations in accordance with the Constitution of Ukraine in the context of the implementation of the SDG necessarily requires a review of the system and structure of land legislation in view of the planned measures of the civil legislation of Ukraine recodification. In this regard, it is considered appropriate to suggest possible ways to update land legislation. Firstly, it is nec-

essary to review the entire system of land legislation for compliance with its Constitution of Ukraine. Secondly, to abandon the further development and adoption of a codified land law in the form of the Land Code, because due to the incompleteness of land reform, the current Land Code of Ukraine does not perform its codification function. Thirdly, it is necessary to refuse to adopt laws that are proposed to be developed and adopted in accordance with the current Land Code of Ukraine. Fourthly, in accordance with the Constitution of Ukraine, the following fundamental laws: On land ownership of the Ukrainian people, On land use in Ukraine, On land protection as the main national wealth of the Ukrainian people, On state regulation of land relations in market conditions should be developed and adopted. It does not preclude the adoption, if necessary, of some functional laws on the regulation of land relations.[1]

[1] Носік В. В. Право власності на землю Українського народу : монографія. Юрінком Інтер, К.: 2006. С. 150–157.

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RENEWAL OF THE LAND LEASE AGREEMENT: PROBLEMS OF THEORY AND JUDICIAL PRACTICE

Abstract. *Land is the most important object of the environment. It is an indispensable means of production in agriculture, the territorial basis for the location of various objects. It is argued that the proper functioning of land lease relations is a guarantee of sustainable economic circulation, a guarantee of the exercise of rights and performance of duties by both the lessor and the lessee of the land. The issue of renewal of the land lease agreement after its expiration is debatable. The purpose of the study is to outline the existing theoretical and law enforcement problems regarding the renewal of the land lease agreement, to make proposals to eliminate the latter. To achieve this purpose, a system-structural method of scientific knowledge was used, which helped analyse the prescriptions of the legislation on renewal of the land lease agreement, their relations and interaction were highlighted. The study proves that the lessee's pre-emptive right exists to renew the land lease agreement only for the same period and on the same terms and in the absence of objections to such renewal by the lessor. If the lessee tries to change the essential terms of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated. It is emphasised that in each dispute it is necessary to establish the good faith of the lessor's actions to refuse to renew the land lease agreement with one person (lessee) and the subsequent conclusion of the agreement with the new lessee. The use of the category of «less protected» party in land lease legal relations appears debatable, because depending on the subject composition of the parties to these legal relations, such a party can be both a lessee and a lessor. It is concluded that the Supreme Court should unify the practice of applying the provisions of the law on the renewal of the land lease agreement (only in combination with other regulations or autonomously, with the use of the principle of «tacit consent»). The possibility of autonomous application of such instructions is indicated by the provisions of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Counteraction to Raiding". The revealed*

shortcomings of the legal regulation of the renewal of the land lease agreement after its expiration indicate the directions of improvement of the legislation in land lease, which has practical significance.

Keywords: *land plot, legislation, legal relations, special type of real estate, property rights.*

INTRODUCTION

Land is the most important object of the environment, is an indispensable means of production in agriculture, the territorial basis for the placement of various objects. The use of land can take place on various legal titles, a prominent place among which is the right to lease land (land plot). This right is based on the agreement term paid possession and use of land necessary for the lessee to conduct business and other activities (Part 1 Article 93 of the Land Code of Ukraine of October 25, 2001 No. 2768-III[1], Article 1 of the Law of Ukraine of 6 October 1998 No. 161-XIV "On Land Lease"[2] (hereinafter referred to as "the Law No. 161-XIV"). The lessee is obliged to use the land in accordance with the terms and conditions of the agreement and the requirements of land legislation. The lease agreement is described by, among other things, maturity, as the date and term of the lease agreement is one of its essential conditions. Due functioning of relations regarding the land lease is a guarantee of fulfilment of the rights and performance of duties both by the lessor and the lessee of the corresponding land plot.

Legal issues of leased contractual land relations were the subject of scientific research by scientists V. M. Yermolenko, I. I. Karakash, P. F. Kulinich [1], V. V. Nosik, V. I. Semchyk, V. D. Sydor [2], M. V. Shulga, Y. Mirwati [3], J. Lee, D. Rodriguez [4], A. Popov, O. Knyaz [5], N. Akram [6], M. R. Taylor [7], G. Lyakhovich [8], M. Matveeva [9], V. A. Mayboroda [10], F. Lazar [11], etc. However, there are still unresolved issues, and a number of issues have not yet been properly regulated, resulting in difficulties in law enforcement. One of the debatable issues is the renewal of the land lease agreement after its expiration. Thus, some researchers generally deny the need for regulations on such renewal of the land lease agreement, while others outline the shortcomings of regulations and abuse that occur in the practical implementation of the lease, both on the part of the lessor and the lessee.

The issue of renewal of the land lease agreement after its expiration has gained new relevance due to the adoption of the Law of Ukraine of December 5, 2019 No. 340-IX "On Amendments to Certain Legislative Acts of Ukraine on Combating Raiding"[3] (hereinafter referred to as

[1] Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14#Text

[2] Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

[3] Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation

"the Law No. 340-IX") by the Verkhovna Rada, which introduced regulations on the renewal of the land lease agreement. This statutory act re- regulated the issue of renewal of the land lease agreement, introduced the conditions for the application of such a procedure, regulated the specific features of entering information on the renewal of the agreement into the State Register of Real Property Rights, and prevented such renewal of state and communal land plots.

The purpose of the study is to outline the existing theoretical and law enforcement problems regarding the renewal of the land lease agreement, to make proposals to eliminate the latter. The objectives of the study are to investigate the views of scholars on the essence of renewal of the land lease agreement, their critical analysis, and study the existing case law of the Supreme Court (Grand Chamber and individual courts of cassation, functioning in its composition) on the application of the legislation on renewal of the land lease agreement after its expiration.

1. MATERIALS AND METHODS

The study of lease contractual relations and the issue of renewal of the land lease agreement required the application of a system-structural method of scientific knowledge. This method analyses the provisions of the legislation on the renewal of the land lease agreement, highlights their correlation, the corresponding internal relations. In particular, this refers to the provisions of the Land and Civil Codes of Ukraine[1], the laws of Ukraine No. 161-XIV[2] and No. 340-IX[3] in their interaction.

The method of analysis and synthesis was used to establish the content of the law on the renewal of the land lease agreement, the implementation of their interpretation. The use of the method of analysis contributed to the acquisition of knowledge about the individual elements of the object of knowledge, and the method of synthesis contributed to the development of an idea of its structure and system features. Thus, the requirements of Art. 33 of Law No. 161-XIV[4] with a distinction of the relevant grounds for termination of the lessee's pre-emptive right to enter into a land lease agreement for a new term. The content of the new Article 126–1 "Renewal of land lease agreement, land easement agreement, agreements on granting land use rights for agricultural purposes or for development" of the Land Code of Ukraine has been clarified, which allowed to for-

of Ukraine for anti- raiding". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-IX#Text.

[1] Land Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14#Text; Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15/page20#Text.

[2] Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

[3] Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-IX#Text.

[4] Law of Ukraine No. 161-XIV "On Land Rent", op. cit.

mulate certain rules for renewal of land lease agreement.

The empirical basis of the study included the judgements of the court of cassation on lease agreements and renewal of the land lease agreement, in particular, the Grand Chamber of the Supreme Court, its Commercial Court of Cassation, and the Civil Court of Cassation. An analysis and synthesis of the composition of court decisions in Ukrainian judicial institutions was conducted. It is found that the imperfection of the legislative regulation of relations for the renewal of the land lease agreement after its expiration causes a significant number of problems in law enforcement.

The basis for studying the subject of renewal of land lease agreements was the combination of basic methods of scientific knowledge. A set of methods allowed to consider the main provisions and legislation on the renewal of the land lease agreement in Ukraine. An analysis of legal provisions, which are the main source of regulation of relations between the parties to renew the land lease agreement, was carried out. The main legal document regulating legal relations regarding land lease in Ukraine is the Land Code of Ukraine and the Law of Ukraine "On Land Lease".

General scientific methods of cognition were used in studying the basic issues of legal regulation of land lease. These methods include dialectical method, Aristotelian method, systematic data analysis, methods of information analysis and synthesis. The formal legal method, the method of legal modelling and the comparative legal method were also used.

The dialectical method of scientific knowledge was used to specifically and objectively consider legal phenomena on land lease in Ukraine, as well as on the renewal of land lease agreements. Dialectical method helped identify the main provisions, as well legal regulation of land lease in terms of qualitatively and quantitatively. The basic methods of cognition of information by the dialectical method are the principle of ascension from abstract concepts to concrete, as well as the synthesis and analysis of information. The Aristotelian method was used to study the legal regulation of land lease more accurately and specifically. This method is based on a set of laws and techniques of correct thinking. Synthesis of information is another method of scientific cognition used in this study. It involves the material or imaginary integration of the features and parameters of a particular object, such as combining the properties and characteristics that have been determined by data analysis into one system. Systematic data analysis or a systematic method of scientific knowledge is used in the study for a more detailed acquaintance with the system of land legal regulation. With the help of a systematic analysis, the legal aspect of land lease in Ukraine, the components that describe this process, the land lease agreement and the legal aspects of renewal of the land lease agreement are considered. The system method is one

of the basic methods of studying state and legal phenomena, regulations and laws. The analysis of relevant legal facts and regulations on land lease agreements in force in Ukraine was performed by applying the formal legal method. This method is based on a consistent and logical study of legal provisions and laws. A common method for studying legal provisions is the method of legal modelling. This method allowed to construct models of theoretical legal situations, and the search for ways to solve them in the future is performed. This method involves solving hypothetical legal situations. The final method of scientific knowledge in this work was comparative law. This method involves comparing and studying different legal documents and court decisions.

Thus, the conclusions on the application of the rules of law of the Grand Chamber of the Supreme Court on the binding nature of the additional agreement on land lease for a new term (renewal of the land lease agreement), the Commercial Court of Cassation within the Supreme Court on the content of the lessee's letter , the good faith of the lessor in resolving the issue of renewal of the land lease agreement, the use of "tacit consent" in the renewal of such an agreement, the procedure for objection in the renewal of the agreement on the part of the lessor. The legal positions of the Civil Court of Cassation in the Supreme Court on the legal facts required for the renewal of the land lease agreement also eased the investigation of the subject under study.

2. RESULTS AND DISCUSSION

The special legal literature indicates that the lease of land is described by the following important components: the allocation of land as an object of lease; contractual terms of the lease; restriction of land lease for a certain period; paid rent; the existence of only the right to own and use land; provision of land for certain activities, etc. [2]. It is the land lease agreement that serves as the basis for acquiring the right to lease a land plot in case of mutual expression of will by both parties. Such an agreement is a document certifying the right to lease land and the basis for state registration of the right to lease land [12].

Article 13 of the Law No. 161-XIV[1] stipulates that a land lease agreement is an agreement under which the lessor is obliged to transfer the land plot to the lessee for possession and use for a certain period, and the lessee is obliged to use the land plot in accordance with the terms and conditions of the agreement and requirements of land legislation. The statutorily essential conditions of the land lease agreement define: (a) the leased object (cadastral number, location and size of the land plot); (b) the date of conclusion and term of the lease agreement; (c) rent indicating its amount, indexation, method and conditions of calculations, terms, procedure for its payment and revision and liability for non-payment (Part 1 of Article 15 of the Law No. 161-XIV).

[1] Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

Considering the subject matter, the study will highlight the legal aspects of the renewal of the land lease agreement (extension of the lease agreement of land after the expiration of the relevant lease agreement). General provisions on the lease (rent) of property are contained in Paragraph 1 Chapter 58 "Rent (lease)" of the Civil Code of Ukraine of January 16, 2003 No. 435-IV[1], which refers, inter alia, to the pre-emptive rights of the lessee of the corresponding thing. Thus, Part 1 of Art. 777 of the Civil Code of Ukraine contains the following provisions: (a) the lessee, who duly performs their duties under the lease agreement, after the expiration of the agreement has a pre-emptive right over other persons to enter into a lease agreement for a new term; (b) the lessee, who intends to exercise the pre-emptive right to enter into a lease agreement for a new term, is obliged to notify the lessor prior to the expiration of the lease agreement within the period specified in the agreement, and if it is not established therein – within a reasonable time; (c) the terms and conditions of the new lease agreement shall be established by agreement of the parties. In case of failure to reach an agreement on payment and other terms and conditions of the agreement, the lessee's pre-emptive right to enter into the agreement is terminated. Notable, these general approaches to the lessee's pre-emptive right over other persons to enter into a lease for a new term are applied in case of renting both movable and immovable property.

Considering that land plots are a special type of real estate, described by a specific legal regime, the issue of the lessee's pre-emptive right to enter into a land lease agreement for a new term (renewal of such an agreement) is regulated by special legislative provisions on land lease. Thus, Law No. 161-XIV[2] holds a separate Article 33 on the renewal of the land lease agreement.

At one time P. F. Kulinich expressed a well-founded opinion about the inappropriateness of this article, which should regulate the issue of renewal of the right (and not the agreement) of land lease [1]. This idea was supported by other researchers, noting that the exclusion of Article 33 "Renewal of the land lease agreement" from the Law No. 161-XIV[3] is justified. This would lead to the fact that the procedure for renewal of the agreement would be applied to Article 764 of the Civil Code of Ukraine[4][13].

Despite this, Article 33 "Renewal of the land lease agreement" of the Law No. 161-XIV[5] (before its amendment by the Law No. 340-IX[6]) regulated the considered public relations as follows.

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15/page20#Text

[2] Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

[3] *Ibidem*, 1998.

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

[5] Law of Ukraine No. 161-XIV "On Land Rent", op. cit.

[6] Law of Ukraine No. 340-IX "On the introduction of amendments to acts of legislation of Ukraine for anti-raiding". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/340-IX#Text.

Thus, according to Part 1 Article 33 of the No. 161-XIV[1], the lessee has a pre-emptive right to extend the contractual lease of land (to conclude a land lease agreement for a new term, renewal of the land lease agreement – as this right is called by the legislator). The precondition for the emergence of such a pre-emptive right of this person is the proper performance of obligations by the lessee under the land lease agreement. Such proper performance of obligations by the lessee is named by some researchers to be the main requirement of the law, which gives the lessee the right to renew (extend) the land lease agreement [14]. The lessee may exercise this pre-emptive right only after the expiration of the land lease agreement.

In turn, Parts 2–5 Article 33 of No. 161-XIV[2] hold the conditions for the exercise of the outlined pre-emptive right of the lessee, which include:

a) lessee's notice to the lessor about the intention to exercise the pre-emptive right before the expiration of the term of the land lease agreement. The term of such notice must be established in the land lease agreement, but in any case, it must be made not later than one month before the expiration of the land lease agreement;

b) such notice must be made in writing by the lessee sending a letter to the lessor. The obligatory appendix to such letter-notice on renewal of the land lease agreement is the draft of the additional agreement to the land lease agreement;

c) after receiving a notice with a draft additional agreement, the lessor must consider them within a month, verify for compliance with the law, agree with the lessee (if necessary) the essential terms of the agreement and, in the absence of objections, decide to renew the land lease (in relation to state and communal lands), to conclude an additional agreement with the lessee on renewal of the land lease agreement.

The rewith, it is statutorily stipulated that an additional agreement to the land lease agreement on its renewal must be concluded by the parties within one month. Both refusal and delay in concluding an additional agreement to the land lease agreement may be appealed in court (parts 8, 11 Article 33 of Law No. 161-XIV). Notably, the need for an additional agreement on the conclusion of a land lease agreement for a new term (renewal of the land lease agreement) has been confirmed by judicial practice. Thus, the Grand Chamber of the Supreme Court, deciding the dispute on the renewal of the land lease agreement, in paragraph 61 of the decision of May 26, 2020 in the case No. 908/299/18 (proceedings No. 12-136rc19) indicated that Article 33 of the Law of Ukraine "On Land Lease"[3] defines both the conditions and grounds for renewal of the land lease agreement, and the obligation of the parties to enter into an additional

[1] Law of Ukraine No. 161-XIV "On Land Rent". (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

[2] *Ibidem*, 1998.

[3] *Ibidem*, 1998.

agreement to the land lease agreement on its renewal[1].

It should be emphasised that the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated on the following grounds:

a) the lessor's objection to the renewal of the lease agreement. In this case, the lessor must send the lessee a letter of notice of objection to the extension of the land lease agreement;

b) failure to reach an agreement between the lessee and the lessor on the rent and other essential terms of the land lease agreement (Part 4 of Article 33 of the Law No. 161-XIV).

In other words, the lessee's pre-emptive right exists to renew the land lease agreement only for the same period and on the same terms and conditions and in the absence of objections to such renewal by the lessor. Therefore, if the lessee attempts to change the essential terms and conditions of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated.

Notably, the application of the above legislative provisions on the renewal of the land lease agreement raises several issues that are not regulated. In such circumstances, the answers to them are developed in the process of law enforcement. Thus, the Commercial Court of Cassation within the Supreme Court in paragraph 5.3 of the decision in the case No. 908/2314/18 dated September 16, 2019 indicated that the lessor's objections regarding the inconsistency of the letter-notice of the lessee with the draft supplementary agreement to the law cannot be submitted without giving reasons, but must be substantiated and contain specific references to violations of the law, specified in the letter of notice or draft supplementary agreement, or contain specific essential terms and conditions of the agreement, in respect of which the lessor proposes changes[2]. Sometimes there are situations when the lessor first objected to the renewal of the land lease agreement with a particular lessee (indicating the relevant reasons), and then after some time entered into a new lease agreement with another person. Again, the current legislation does not regulate this situation.

Instead, the Commercial Court of Cassation within the Supreme Court in paragraph 5.7. of the resolution in the case No. 920/739/17 dated September 10, 2018 indicated that in accordance with Article 3 of the Civil Code of Ukraine[3], the principles of justice, good faith, and reasonableness constitute the fundamental principles of civil law, aimed, inter alia, at establishing the rule

[1] Judgment of the Grand Chamber of the Supreme Court in case No 908/299/18 (proceedings No 12-136gs19). (2020, May). Retrieved from http://www.reyestr.court.gov.ua/Review/89825064

[2] Resolution of the Commercial Court of Cassation of the Supreme Court in case No 908/2314/18. (2019, September). Retrieved from http://www.reyestr.court.gov.ua/Review/84944522

[3] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15/page20#Text.

of law in the legal system of Ukraine. In this case, good faith means the desire of a person to honestly use civil rights and ensure the performance of civil duties, which is confirmed in particular by the content of Part 3 Article 509 of this Code. Thus, citing this principle in the text of the Civil Code of Ukraine, the legislator established a certain limit of behaviour of participants in civil relations, so that each of them is obliged to honestly exercise their civil rights and perform civil obligations, including the possibility of their actions (inaction) harming the rights and interests of others. This principle is not purely formal, as its non-compliance leads to a violation of the rights and interests of participants in civil turnover. That is why in specific legal relations, in particular regarding the renewal of the land lease agreement based on Article 33 of the Law of Ukraine "On Land Lease", the good faith of the landlord in essence constitutes a guarantee of compliance with the rights of the less protected party, which in the disputed legal relations is the lessee[1].

The above should be generally supported and, notably, in each dispute it is necessary to establish the good faith of the lessor's actions to refuse to renew the land lease agreement with one person (lessee) and the subsequent conclusion of an agreement with a new lessee. Unfairness of the lessor's actions may serves as grounds for recognition and protection of the lessee's pre-emptive right to continue the contractual lease of land in court as violated and, accordingly, to conclude that the new land lease agreement is invalid.

Notably, in the above court decision, the court of cassation applied the category of "less protected" party, which in the disputed land lease is determined by the lessee. Such an approach requires additional consideration, is debatable, and may be justified in the presence of the following contractual structure: the lessor – a public authority or local government, the lessee – a legal entity under private law, an individual – an entrepreneur, an individual. However, when considering a lease where the lessor is an individual as the owner of the land, and the lessee is a legal entity (farm, agricultural holding, other business entity), it is possible to draw the opposite conclusion about the "less protected" party in such contractual relations, which is likely to be the lessor.

A considerable number of questions arise in connection with the implementation of the provisions of Article 33 of the Law No. 161-XIV[2] (until amendment by Law No. 340-IX), according to Part 6 of which if the lessee continues to use the land after the expiration of the lease and in the absence of a lessor's letter-notice one month after the expiration of the agreement on the objection to the renew-

[1] Resolution of the Commercial Court of Cassation of the Supreme Court in case No 920/739/17. (2018 September). Retrieved from http://www.reyestr.court.gov.ua/Review/77748947

[2] Law of Ukraine No. 161-XIV "On Land Rent" (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

al of the land lease agreement, such an agreement is considered renewed for the same period and on the same terms and conditions as provided by the agreement. Some researchers consider this provision discriminatory against the landlord of the land [15], while others point out that it contradicts Article 31 of the Law No. 161-XIV, which determines the expiration of the term for which the agreement was concluded, as one of the grounds for its termination [16]. Furthermore, in this case the law makes provision for the conclusion of an additional agreement on the renewal of the lease of state-owned land, which is performed by the authorised head of the executive body, determined by the decision of this body, without the decision of the executive body to renew the land lease. N. V. Ilkiv thinks that there is an increase in the term of the lease of state-owned land due to improper performance of obligations by the lessor to dispose of state property and avoid the procedure of land auction [17].

There are various approaches to the application of Part 6 of Article 33 of Law No. 161-XIV[1]. Thus, according to one of them, it should be applied only together with other provisions of Article 33 of the Law of Ukraine "On Land Lease". That is, the lessee may not continue to use the land after the lease agreement if they, intending to exercise the pre-emptive right to enter into a land lease agreement for a new term, failed to timely notify the lessee in writing (letter-notice with a draft supplementary agreement). In other words, according to this approach, Part 6 of Article 33 of Law No. 161-XIV may be applied only in combination with other provisions thereof, in particular, with parts 2–5. Confirmation of this position can be found in case law. Thus, for example, the Civil Court of Cassation of the Supreme Court in the decision of June 27, 2019 in the case No. 312/275/17 noted that to renew the land lease agreement on the grounds stipulated by Part 6 of Article 33 of the Law of Ukraine "On Land Lease" requires the following legal facts: the lessee duly performs its duties under the lease agreement; before the expiration of the agreement, they timely notify the lessor of their intentions to exercise the pre-emptive right to enter into an agreement for a new term; the lessee added a draft additional agreement to the letter-notice; the lessee continues to use the allocated land plot; the lessor failed to notify the lessee in writing of the refusal to renew the lease agreement[2].

According to another approach, the provisions of Part 6 Article 33 of Law No. 161-XIV can be applied autonomously, they enshrine the principle of "tacit consent". According to this opinion, the lessee's notice to the lessor about the intention to exercise the right to renew the land lease agreement on the grounds stipulated by Part 6 Article 33 of the Law of Ukraine "On Land Lease" is not required. The essence of the renewal

[1] *Ibidem*, 1998.

[2] Resolution of the Civil Court of Cassation of the Supreme Court in the case No 312/275/17. (2019, June). Retrieved from http://www.reyestr.court.gov.ua/Review/82798011

of the lease agreement under this part of the article is that the lessee continues to use the land after the lease, and the lessor, accordingly, does not object to the renewal of the agreement, in particular in connection with the proper performance of the land lease. The absence of such an objection may manifest itself in "tacit consent". These legal conclusions are formulated by the Commercial Court of Cassation of the Supreme Court in paragraph 5.2. of the resolution in the case No. 920/739/17 dated September 10, 2018[1]. In another case, the Supreme Court further emphasised that the construction of Part 6 Article 33 of the Law of Ukraine "On Land Lease" stipulates the absence of a written notice of the lessor to object to the renewal of the lease agreement, i.e. crucial for the renewal of the agreement for the same period and on the same terms and conditions is only the fact of the lessor's objection to renewal, without any substantiation (paragraph 27 of the decision of the Commercial Court of Cassation of the Supreme Court in the case No. 912/1712/17 dated November 29, 2018[2]).

Discussing the content of Part 6 Article 33 of Law No. 161-XIV[3], some researchers note that it launched a mechanism of continuous renewal of the agreement through prolongation without the actual possibility of terminating the agreement. According to O. I. Baran, the rules of procedural law cannot limit the rules of substantive law, which is the right of ownership of land. Therewith, the refusal to extend solves the main problem of the lessor – eliminates the complex mechanism of returning the land in its use [18]. However, it is hardly possible to agree with the above considerations.

Thus, Part 6 Article 33 of the Law No. 161-XIV makes provision for the possibility of preventing the "automatic" renewal of the land lease agreement by the lessor – they only need to object (without any justification for such objection) in the renewal of the agreement. Moreover, it is hardly correct to assume that Part 6 Article 33 of Law No. 161-XIV contains the rules of procedural law. After all, the provision of procedural law is considered to be the rule of law that regulates social (procedural) relations between the court, on the one hand, and the participants in the trial, on the other hand, and aims to address procedural and organisational issues of substantive law to protect rights and legitimate interests of the subjects of material legal relations [19]. Part 6 Article 33 of Law No. 161-XIV does not comply with such attributes.

Instead, O. V. Kot is correct in pointing out that it cannot be considered that the continuation of the lease is possible against the will of the lessor, as it would violate the basic principles of civil procedure, including the principle of freedom of agrrement and free will. Currently,

[1] Resolution of the Commercial Court of Cassation of the Supreme Court in case No 920/739/17. (2018, September). Retrieved from http://www.reyestr.court.gov.ua/Review/77748947

[2] *Ibidem*, 2018.

[3] Law of Ukraine No. 161-XIV "On Land Rent" (1998, June). Retrieved from https://zakon.rada.gov.ua/laws/show/161–14#Text.

the will of the lessor is manifested in the form of silence [20].

The possibility of autonomous application of the regulations on the renewal of the land lease agreement is indicated by the latest amendments introduced by Law No. 340-IX. Thus, this regulation, which will enter into force on July 16, 2020, changed the name of Article 33 of the Law No. 161-XIV to "The preemptive right of the lessee to enter into a land lease agreement for a new term", as well as introduced a new wording of its text, excluding the provision on the renewal of the land lease agreement. In other words, Part 6 was excluded from Article 33 of the Law No. 161-XIV while leaving other regulations in force.

Furthermore, a new Article 32–2 "Renewal of land lease agreements" was added to the Law of Ukraine "On Land Lease", according to which the renewal of land lease agreements is performed in accordance with the procedure prescribed by Article 126–1 of the Land Code of Ukraine. That is, these changes differentiate the categories of "pre- emptive right to continue the contractual lease of land" and "renewal of the land lease", which should be assessed positively. Therewith, the Law No. 340-IX[1] supplemented the Land Code of Ukraine with a new Article 126–1 "Renewal of land lease agreement, land easement agreement, agreements on granting the right to use land for agricultural purposes or for construction", which contains, in particular, the following rules for renewal of land lease agreement:

a) the condition for renewal of the land lease agreement may be established in such an agreement. That is, the lessor and lessee must agree on the possibility of renewing the land lease agreement and enshrine it directly in the text of the agreement;

b) such a condition may be contained only in the lease agreement of private land. Conversely, such a condition cannot be established in the lease agreement of land plots of state and communal property. However, there are exceptions, such as placement of buildings or structures owned by the user or acquirer of the right to use the land on state or communal lands;

c) the land lease agreement may be renewed only for the same term and under the same conditions.

The following mechanism was introduced to renew the land lease agreement after its expiration: renewal of the agreement is considered as such without the parties to the same performing a written transaction on its renewal in the absence of a statement of one of the parties to exclude information from the State Register of Real Rights to Immovable Property. Thus, performance of other actions for its renewal by the parties to the agreement is not required. It is obvious that the basis for renewal of the land lease agreement is the proper performance of the terms of such agreement by the lessee during its term.

[1] Land Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14#Text.

The right of the parties to the lease agreement to refuse to continue further contractual relations is also statutorily regulated. Thus, Parts 3 and 4 of Article 126–1 of the Land Code of Ukraine[1] stipulate that a party to the agreement who wishes to exercise the right to refuse to renew the agreement no later than one month before the expiration of such agreement, submits to the State Register of Real Rights to Immovable Property an application for exclusion of agreement renewal information from this register. In the absence of such a statement prior to the expiration date of such agreement after the relevant expiration date of the agreement, the state registration of property rights is extended for the same period.

Relevant changes to this procedure for renewal of the land lease agreement and possible waiver of this have been introduced to the legislation on state registration of real rights to immovable property. Thus, in the current wording of Part 1 Article 26 of the Law of Ukraine No. 1952-IV of July 1, 2004 "On state registration of real rights to immovable property and their encumbrances"[2] stipulates that in case the party submits an application for exclusion of information on renewal of the agreement from the State Register of Real Rights to Immovable Property, the state registrar excludes such information from the State Register and, after the expiration of the agreement, the state registration of the property right derived from the right of ownership shall be terminated by software for register accounting. In the absence of such a statement, subject to renewal of the agreement after its expiration, the state registration of real rights is extended for the same period by software of the above State Register.

In the legal literature, some critical remarks have been made about these new regulations. Thus, L. V. Leiba points out that the innovations provided in Law No. 340-IX are not indisputable. For example, the provisions of Article 126–1 of the Land Code of Ukraine to some extent contradict the provisions of Article 33 of the Law "On Land Lease", which in turn further reduces the guarantees of enjoyment of the pre-emptive right of the lessee. These provisions are entirely aimed at protecting the interests of lessors. For example, in a situation where the lessee intends to exercise their pre-emptive right, they apply to the lessor with a letter notifying on the extension of the lease, meanwhile, the lessor, based on the provisions of Article 126–1 of the Land Code of Ukraine[3], applies to the State Register of Real Rights to Immovable Property to exclude information about the renewal of the lease agreement. Thus, the unprotected party is the lessee, who cannot be sure of the effectiveness of guarantees of enjoyment of the pre-

[1] Land Code of Ukraine. (2020, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2768–14#Text.

[2] Law of Ukraine No 1952-IV "On state registration of real rights to immovable property and their encumbrances". (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1952–15#Text.

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

emptive right to enter into a lease of land for a new term [21].

Additionally, attention should be paid to the inconsistency of the provisions of Article 126–1 of the Land Code of Ukraine that the renewal of the agreement is considered as such without the parties to the same performing a written transaction on its renewal in the absence of a statement of one of the parties to exclude information from the State Register of Real Rights to Immovable Property and Part 1 of Article 26 of the Law of Ukraine "On state registration of real rights to immovable property and their encumbrances"[1] to extend the state registration of real rights for the same period with the use of software tools of the State Register of Rights in the absence of such application and only if the agreement is renewed after its expiration. After all, in itself, the absence of a statement from the lessee or lessor to exclude information about the renewal of the agreement from the State Register of Real Rights to Immovable Property will indicate the renewal of the land lease agreement, and hence there is no need for additional confirmation of renewal.

CONCLUSIONS

The imperfection of the legislative regulation of relations on the renewal of the land lease agreement after its expiration raises numerous issues in law enforcement. When renewing the land lease agreement, the conclusion of an additional agreement between the lessor and the lessee is mandatory. The lessee's pre-emptive right to renew the land lease agreement exists only for the same period and on the same terms and conditions and in the absence of objections to such renewal on the part of the lessor. If the lessee attempts to change the essential terms and conditions of the land lease agreement and in the absence of the lessor's consent to such changes, the lessee's pre-emptive right to enter into a land lease agreement for a new term is terminated. The actions of the lessor to refuse to renew the land lease agreement must be bona fide. Unfairness of the lessor may serve as grounds for recognising and protecting the violated lessee's pre-emptive right to continue the contractual lease of land and, accordingly, to conclude that the new land lease agreement is invalid.

The use of the category «less protected» party in land lease legal relations appears to be disputable, as depending on the subjective composition of the parties to these legal relations, such party may be both the lessee and the lessor. The Supreme Court must unify the practice of applying Part 6 Article 33 of the Law No. 161-XIV (only in combination with other regulations or autonomously, with the use of the principle of «tacit consent»). The latest procedure for renewing the land lease agreement is also not without flaws. In particular, the rights of the land lessee are in fact unprotected in case the lessor applies to the State Register of Real Rights to Immovable Property to

[1] Law of Ukraine No 1952-IV "On state registration of real rights to immovable property and their encumbrances". (2004, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1952–15#Text.

exclude information on the renewal of the lease agreement when agreeing on an additional agreement to such an agreement between these parties.

Elimination of the identified shortcomings of the legal regulation of renewal of the land lease agreement after its expiration will contribute to the proper functioning of relevant public relations, and these shortcomings themselves indicate areas for improvement of legislation in land lease, which has practical significance.

The study of the experience of legal regulation of renewal (prolongation) of a land lease agreement after its expiration in other countries should be considered as promising.

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THE RIGHT OF JOINT PARTIAL OWNERSHIP TO A LAND PLOT IN THE LAND–LEGAL DOCTRINE OF UKRAINE

Abstract. *The reform of land ownership, initiated with Ukraine's independence, has primarily affected land ownership. The need for research is due to the fact that in the current reform of land relations in the country and because of the active processes of land market formation there is a need of important theoretical and practical resolution of the problems of the legal regime of land plots that are in joint ownership.*

The purpose of the article is to analyze the features of the procedure for the emergence of the right of joint partial ownership of land, considering the features inherent in the object of this right.

The article notes that the updated domestic land legislation has enshrined at the level of special laws the multi-subject ownership of this object. Separately the relations of joint ownership of land are regulated. Recently, the interest of the subjects in regulating the regime of the right of joint partial ownership of land, in particular the emergence of such a right for the purpose of joint economic and other activities. Instead, a number of issues concerning the grounds and procedure for the emergence of this right remain open and require special attention.

It was found that the object of the right of joint partial ownership of land can be only a single land plot, which should be formed, for example, by combining several (two or more) independent land plots into one, which will be owned by several co-owners.

It is established that the acquisition of land ownership by a particular entity, i.e. the transformation of objective law into subjective, is carried out in the presence of the grounds enshrined in law, namely – the relevant legal facts. The right of joint partial ownership of a land plot in comparison with the right of such ownership of other property objects is characterized by a certain specificity due to the peculiarity of the object-subject composition.

It is presumed that the legal regulation of the right of joint ownership of land, in particular joint partial ownership of this natural object by the civil and land legislation of Ukraine necessitates the determination of the relationship between the relevant provisions

of this legislation. In this case, we must talk about general (civil) and special (land) legislation. And the norms of the land legislation should carry out full and detailed standardization of the relevant relations and determine the legal regime of this property, considering the peculiarities of the land as an object of law.

Keywords: *land plot; ownership; joint ownership of land plot; joint partial ownership of land plot; land law.*

In the conditions of modern reform of land relations in the country and considering the active processes of land market formation, the problems of the legal regime of land plots that are in joint ownership acquire important theoretical and practical significance. Recently, the interest of the subjects in regulating the regime of the right of joint partial ownership of land, in particular the emergence of such a right for the purpose of joint economic and other activities. Instead, a number of issues concerning the grounds and procedure for the emergence of this right remain open and require special attention.

The purpose of the study is to analyze the features of the procedure for the emergence of the right of joint partial ownership of land, considering the features of the object of this right.

Problems of the right of joint partial ownership of property objects have been the subject of research by representatives of civil law. Some aspects of this issue were considered in the works of such domestic authors in the field of land law as V. I. Andreytsev, I. I. Karakash, I. O. Kostyashkin, P. F. Kulynych, A. M. Miroshnychenko, V. V. Nosik and others.

Undoubtedly, the legal regime of objects of joint property is the subject of research, primarily by representatives of civil law, because traditionally the right of ownership is defined as a person's right to a thing (property), which he exercises in accordance with the law of his own free will, regardless the will of other people. The Civil Code of Ukraine (Article 355) provides the concept and types of joint property rights. In particular, it is established that property owned by two or more persons (co-owners) belongs to them on the right of joint ownership. Such property may belong to persons on the right of joint partial or on the right of joint common ownership.

The right of joint partial ownership is determined by Article 356 of the Civil Code of Ukraine (2003) as the property of two or more persons with the definition of shares of each of them in the right of ownership. A similar definition of such a right is contained in Article 86 of the Land Code of Ukraine (2001), according to which the land may be in joint ownership with the determination of the share of each of the participants in joint ownership (joint partial ownership). It should be noted that the civil law enshrines the presumption of the existence of joint partial ownership, which can be changed by contract or law. It follows from the above that the right of joint ownership is the right of ownership

of several entities for one object. Thus, the essential features of this right are the plurality of the subject composition and the unity of the object of this right.

At the same time, despite the fact that the norms of the Civil Code of Ukraine (Chapter 27) regulate, the right of ownership of land (land plots), the Land Code of Ukraine also regulates the relevant relations arising from the right of joint ownership of this object. However, it largely duplicates the provisions of the Civil Code, which relate to the right of joint ownership and its varieties, the construction of certain rules is unsuccessful. Establishing a closed list of grounds for the right of joint partial ownership of land, the Land Code of Ukraine does not focus on the peculiarities of the legal regime of plots that are objects of joint partial ownership. Unfortunately, there is no clear and detailed legal regulation of the right of joint partial ownership of land.

The Constitution of Ukraine (Article 14) stipulates that land ownership is acquired and exercised by citizens, legal entities and the state exclusively in accordance with the law. The procedure for acquiring, exercising and terminating this right is determined by the codification act of land legislation – the Land Code of Ukraine.

The right of joint partial ownership of a land plot, in contrast to the right of such ownership of other property objects, is characterized by a certain specificity, due primarily to the peculiarity of the object of this right. It should be noted that Art. 87 of the Land Code of Ukraine, which was previously called "The emergence of the right of joint partial ownership of land", in terms of the object composition of this type of ownership, did not correspond to the generally accepted approach to defining its object and was changed. The current version of this article meets the requirements of Article 79 of the Land Code of Ukraine, which defines not land, but a land plot as an object of ownership.

The list of grounds for the emergence of the right of joint partial ownership of land is enshrined in Article 87 of the Land Code of Ukraine. This list is restrictive and includes the following grounds: a) voluntary consolidation of land plots by their owners; b) acquisition of land by two or more persons under civil law agreements; c) acceptance of inheritance on the land plot by two or more persons; d) court decision.

Moreover, it should be noted that the norms of the current legislation, as emphasized in the legal literature, in fact expand the established list of grounds for the emergence of the right of joint partial ownership of land. This meets the requirements of Part 3 of Article 355 of the Civil code of Ukraine according to which the right of joint ownership arises on the bases which are not forbidden by the law. This includes, in particular, the emergence of joint partial ownership of land plot in the case of, for example, the acquisition by several persons of houses, buildings or structures located on private land (Part 4 of Article 120 of the Land Code of Ukraine). It is also possible that there may be joint partial ownership of a

private land plot during its privatization, if a residential building owned by several persons is located on this plot. Among the grounds for the emergence of the right of joint partial ownership of land provided by law, an independent place is occupied by voluntary consolidation of land plots by their owners. This is one of the most widespread ways of emergence of this type of joint ownership of land.

The law provides for the possibility of voluntary consolidation of the owners of their separate land plots as independent objects of law into a single object of the right of joint partial ownership. Two or more merging plots of land must meet the requirements established by law. Thus, according to Article 79 of the Land Code of Ukraine land plot is a part of the earth's surface with established boundaries, location and certain rights to it. As an independent object of ownership, the land plot must be formed according to the procedure established by Article 79–1 of the Land Code of Ukraine.

From the above definition it follows that an important feature of land plot as an object of ownership is its designation by location, boundaries and size of the area as part of one of the categories of lands of Ukraine. It is generally recognized that without such separation of part of the earth's surface in kind (on the ground) it is impossible to establish ownership of a particular area. This separation occurs, for example, by establishing the boundaries of the land in kind (on the ground) in accordance with the approved project of its allocation in the order of land management.

Cadastral number of land plot should be considered as an important part of its identification as an independent object. The Law of Ukraine "On the State Land Cadastre" (Article 1) and the Procedure for Maintaining the State Land Cadastre (paragraphs 29; 30), approved by the Resolution of the Cabinet of Ministers of Ukraine of October 17, 2012, define the cadastral number of a land plot as individual, does not repeat throughout the territory of Ukraine, the sequence of numbers and signs, which is assigned to the land during its state registration and is stored for it throughout its existence.

The purpose of the cadastral number of the land plot is that it provides its unambiguous identification in databases and cadastral plans. The uniqueness of the cadastral number within the territory of Ukraine and in time, its invariability throughout the life of the land, as well as the ability to carry information about the location of the land gives grounds to argue that its presence in conjunction with other features of land plot indicates the unity of the land as an independent object of law.

It is known that joint ownership is characterized not only by the unity of the object (land plot), but also by the plurality of subjects. Therefore, as the object of the right of joint partial ownership of a land plot can be only a single land plot, which must be formed by merging several (two or more) independent land plots into one, which will be owned by several co-owners in the future. The range of subjects of joint ownership of land is outlined in Article 86 of the Land Code

of Ukraine. According to this norm, such subjects can be citizens and legal entities, as well as the state, territorial communities. In addition, the subjects of the right of joint ownership of land plots of territorial communities, in accordance with this rule, may be district and regional councils.

Voluntary consolidation of owners of land plots belonging to them requires compliance with the following conditions: 1) the consolidation must be voluntary; 2) it must be carried out on the basis of a contract; 3) only land plots that are adjacent and have the same purpose are combined; 4) as a result of the merger, the maximum size of land plots established by law will not be exceeded; 5) other requirements of the legislation on protection and use of lands should not be violated. Let's analyze each of the conditions.

Voluntary consolidation of land plots presupposes the free will of the owners of these plots: individuals and legal entities, the state and territorial communities. The decision to merge land plots is made independently by each of their owners. In this case, we are talking about administrative actions of land owners or their authorized bodies, depending on the form of land ownership. Thus, with regard to state lands, this right is exercised within the competence of state authorities, communal – local governments, private – directly relevant private owners (citizens or non-state and non-communal legal entities).

The purpose of land consolidation is usually to carry out future joint economic or other activities or to ensure the common interests of the co-owners in the intended use of the combined land. The will of the owners to unite the land plots into a single plot is realized by concluding an appropriate agreement between them.

The agreement on joint partial ownership of the joint land plot is concluded in writing and notarized. This agreement must specify the procedure for possession, use and disposal of the joint land plot, which will be in joint partial ownership, and determine the share of each of the participants of the future joint partial ownership of the joint single land plot. The size of each co-owner's share usually depends on the size of his land plot, which is combined with other land plots. However, with the consent of all co-owners, other options are possible to determine the shares in the joint partial ownership of the combined land, but this must be specified in the contract. The sum of all shares of co-owners per single plot should not exceed one.

Determining the shares of co-owners in joint partial ownership of land plot is of great practical importance. In accordance with Article 88 of the Land Code of Ukraine, a participant of joint partial ownership of land has the right to receive in his possession or use a part of the whole land, which corresponds to the size of his share. The co-owner, in accordance with the size of his share, is entitled to receive income from the use of the land plot, is liable to third parties for obligations related to the land plot, and must participate in the payment of

taxes, fees and charges, as well as the costs of maintenance and storage of the land plot. In addition, the participant of joint partial ownership has the right to demand the allocation of his share from the land both separately and together with other participants who demand allocation, and in case of impossibility to allocate a share – to demand appropriate compensation.

The agreement stipulates that the possession, use and disposal of land plot, which is in joint partial ownership, are carried out with the consent of all co-owners in accordance with the agreement, and in case of disagreement – in court.

Since the formation of a joint land plot is carried out by merging previously formed plots, there is a need to apply for merging the land plots of each of the future co-owners to the address of the State Geocadastre at the location of the land plots. The basis for the formation of a joint land plot is technical documentation. In this case, it is a question of the emergence of a new object (single land plot), which will be in joint partial ownership.

As separate objects, only land plots can be merged regardless the form of their ownership. Ownership of land plots, which were formed from 01.01.2016, must be registered in the State Register of Real Property Rights in accordance with the Procedure for state registration of real property rights and their encumbrances, approved by the Cabinet of Ministers of Ukraine of December 25, 2015 № 1127. If a person's the right of ownership of land arose before 01.01.2013, it must be certified by a state act on the right of ownership. Before consolidating such a land plot with other plots, it must be assigned a cadastral number.

The current land legislation, defining the range of potential subjects of joint partial ownership of land, thus allows that land plots that are in private, communal, state and collective ownership can be consolidated. In this case, a new form of ownership of the consolidated land does not arise. Each of the co-owners acquires ownership of the entire joint land plot.

Consolidation of two or more land plots by their owners as independent objects is possible only if they have a common border, i.e. land plots must be adjacent.

Only under this condition it is possible to create a new object of joint partial ownership – a joint land plot. Independent land plots, which are combined, according to Part 6 of Article 79–1 of the Land Code of Ukraine, must have the same purpose.

The Land Code of Ukraine allows the formation of land as an object of the right of joint partial ownership, by merging previously formed land plots only without changing their purpose and having a common border. In this case, the formation of a joint land plot is carried out according to a simplified scheme – by compiling technical documentation on land management for the association of land plots, which is a set of textual and graphic materials that determine the technical process of land use and protec-

tion without the use of elements design (Article 1 of the Law of Ukraine "On Land Management"). This is an ideal option. Instead, these conditions (identical purpose and adjacent location of land plots) sometimes appear so that they are difficult or even impossible to comply with. Especially when it comes to land plots that are privately owned by citizens and legal entities.

In view of the above, the following approach to this issue seems possible. The procedure of formation of the joint land plot can be combined with change of purpose of the land plot which is carried out with observance of the requirements established by Articles 20–21 of the Land Code of Ukraine. In this case, the formation of a joint land plot as an independent object of the right of joint partial ownership should take place according to the land management project for the allocation of the land plot, the purpose of which is changed in the prescribed manner.

A systematic analysis of the legislation, which deals with the regulation of relations on the formation of land plots by consolidating previously formed land plots, which are owned, shows that such formation includes several relatively independent stages.

The first stage begins with the conclusion of an agreement on the possession, use and disposal of the consolidated land plot, which is in joint partial ownership. At this stage, there is also the conclusion of an agreement on the preparation of technical documentation on land management for the consolidation of land plot. The parties to such an agreement are the owners of land plots (customers) and contractors (licensed land management organization). This agreement determines the conditions and terms of development the technical documentation. According to Article 26 of the Law of Ukraine "On Land Management" as the developers of technical documentation can be: a) legal entities that have the necessary technical and technological support and which includes at the main place of work at least two certified land surveying engineers who are responsible for the quality of land management; b) natural persons – entrepreneurs who have the necessary technical and technological support and are certified land surveyors responsible for the quality of land management.

It should be noted that in order for land management organizations to perform works related to the consolidation of land plots, their owners apply to them with appropriate applications. In this case, the applications must be signed not only by the owners of the respective land plots, but also by the subjects of other rights (including encumbrances).

In the process of considering the application of land owners interested in merging their land plots into one land plot with the formation of a joint partial ownership, the land management organization should analyze the available documents: 1) certifying the ownership of the land to be merged; 2) agreement between the co-owners of land plots on merging these plots into one land plot with the formation of a joint property, it

is mandatory to have the written consent of tenants, mortgagees, easement holders and other rights, restrictions (encumbrances) of land rights, which will be consolidated, etc.

After 1) considering the application of land owners who wish to consolidate land plots, 2) studying the package of submitted documents and 3) checking them for compliance with applicable law, the land management organization enters into an agreement with the applicants to perform the relevant work. The organization may refuse to enter into an agreement if the composition or content of the documents does not meet the requirements of the law.

At the second stage of formation of the consolidated land plot the drawing up of the technical documentation on land management concerning consolidation of the land plots according to the concluded contract is carried out. Technical documentation on land management for the consolidation of land plots includes: a) an explanatory note; b) terms of reference for the preparation of documentation approved by the customer; c) cadastral plans of land plots, which are consolidated into one land plot; d) materials of field geodetic works; e) a list of encumbrances on land rights, restrictions on its use and available land easements; f) notarized consent of the pledgees, users of the land plot to consolidate it (in case of its pledge or use) (Article 56 of the Law of Ukraine "On Land Management"). The quality of the work required to form the combined land plot is checked at this stage. The result of such checking is the approval of land management documentation.

The third stage of the procedure for forming a land plot is entering information about the consolidated land plot that is being formed into the State Land Cadastre. The land plot is considered to be formed from the moment of assigning it a cadastral number. It is from this moment that the formed land plot is subject to state registration in the State Land Cadastre. The reflection in kind (on the ground) of the boundaries of the formed land plot before its state registration is carried out according to the land management documentation.

The consolidated land plot becomes the object of the right of joint partial ownership from the moment of its formation and state registration of the property right to it.

The consolidation of two or more land plots, which were previously formed, leads to the termination of the existence of the primary land plots as independent objects. The creation of a joint single land plot as an object of the right of joint partial ownership involves assigning it a separate cadastral number, based on the use of which the land plot is identified and the maximum information about the land plot is provided.

As a result of the consolidation of two or more land plots, a single object of joint ownership is created. At the same time, the consolidated land plots are considered to have ceased to exist. Their cadastral numbers are annulled from the moment of making appropriate changes to the State Register of Real

Property Rights. The land management case concerning the amalgamation of land plots is transferred by the executor of works for the state registration of the applicants' rights to the consolidated land plot. From the moment of state registration of the right of joint partial ownership of the land plot, the latter acts as a single and independent object of this right, which is owned by several co-owners.

Legal regulation of the right of joint ownership of land plot, in particular joint partial ownership of this object of nature, by the civil and land legislation of Ukraine necessitates the determination of the relationship between the relevant provisions of this legislation. In this case, we must talk about general (civil) and special (land) legislation. And the norms of the land legislation should carry out full and detailed standardization of the relevant relations and determine the legal regime of this property, considering the peculiarities of the land as an object of law.

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CRIMINAL–LEGAL SCIENCES

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TASKS OF THE DOMESTIC CRIMINAL LAW SCIENCE IN THE CONDITIONS OF REFORMING THE CRIMINAL LEGISLATION OF UKRAINE

Abstract. *The article highlights the main tasks of domestic criminal law science in the conditions of reforming the criminal legislation of Ukraine. Following the Decree of the President of Ukraine of August 7, 2019 "On the Commission on Legal Reform" within this commission was created a working group on the development of criminal law, which was tasked with updating the criminal legislation of Ukraine. Following this task, the working group is developing three codes of responsibility for public offenses, viz: The Criminal Code, the Code of Misdemeanors, and the Code of Administrative Offenses. The scientific support of legislative work is an important condition for the fulfillment of this task.*

The purpose of the article is to formulate the tasks of domestic criminal law science in ensuring the high-quality preparation of the said codes.

The main results of the study include the formulation and justification of seventeen areas of scientific research for quality scientific support of the preparation of new codes.

The conclusion indicates that the concentration of scientists' efforts on certain areas of scientific research will allow us to prepare future legislation on liability for public offenses, which will respond to the challenges of our time.

Keywords: *reform of criminal legislation, criminal law science, directions of scientific research, compliance with modern challenges.*

1. Following Ukraine's independence, the Criminal Code of the Ukrainian SSR (Ukraine) of 1960 with amendments and additions was in effect on its territory for ten years (from 1991 to 2001), and from September 1, 2001, to the present time the current Criminal Code of Ukraine (hereinafter the CC of Ukraine) remained in effect. Compared with previous criminal laws, the Criminal Code of Ukraine is effective only for no more than 18 years. The previous criminal laws (CC of Ukrainian SSR 1927, CC of Ukrainian SSR 1960) lasted on average twice as long as the current CC of Ukraine and went through periods of radical changes in society and the state (the period after the October revolution, NEP, collectivization, industrialization, the formation of the USSR, the USSR Constitution of 1936, mass repressions, the Holodomor, World War II, the postwar years, the Holocaust, the "Cold War", the period of stagnation, "thaw", *perestroika*, the democratization of the country, the collapse of the USSR, the formation of individual states within the former USSR (CIS), changes in forms of ownership, the first market transformations, the formation of an independent administrative apparatus, etc.).

2. The acting Criminal Code of Ukraine was prepared by a working group of the Cabinet of Ministers of Ukraine, headed by one of the authors of this article, V. Ya. Tatsii. The Code had been under preparation for almost 9 years. This rather long preparation was conditioned by the necessity of formation of the new system of law of Ukraine based on the principles declared in the Declaration of Independence of Ukraine of 1990 and then demanded to bring its provisions to the requirements of the Constitution of Ukraine of 1996, to pass the assessment of international experts, to consider the international obligations of Ukraine, linguistic expertise and so on. This Code preserved the continuity of the classic institutes of criminal law: the concept of crime as the basis of criminal liability; recognition of only a natural person as the subject of a crime; preservation of the principle of liability only in the presence of guilt; development of institutes of incomplete crimes and crimes committed in complicity; expansion of the range of circumstances that exclude criminality of an act; definition of twelve types of punishment and rules of their imposition, as well as institutes of exemption from criminal liability and punishment, criminal record; distribution of crimes in the Special Part of the CC into sections, depending on the value of the objects of criminal-legal

protection: crimes against the foundations of national security, human society, state, and international law and order. Scientists from all higher educational institutions of Ukraine took part in the working group on the preparation of the Criminal Code of Ukraine, the provisions of the draft CC were discussed at many scientific events, the draft CC was highly appreciated by international experts. But the most important thing was that in Ukraine as an independent, autonomous, democratic, and law-based state (Art. 1 of the Constitution of Ukraine) there were fundamental changes in the economic, political, legal, cultural, and other spheres of life. And these changes should have been considered in the new legislation of Ukraine, including the Criminal Code of Ukraine. And if at the first stage of its operation the Criminal Code still maintained the quality of a systematic regulatory act, in subsequent years many changes and amendments were made to the Criminal Code of Ukraine. Most of these changes were based on the unjustified idea that increasing the severity of criminal law is crucial to overcoming the negative phenomena that appear in society. Thus, the surge of organized crime in the 1990s led to changes in the provisions of the Criminal Code of Ukraine concerning responsibility for complicity in crimes. In the first years of this century, the issues of defining responsibility for terrorist crimes emerged. International obligations of Ukraine in the field of combating corruption also entailed numerous changes in the Criminal Code of Ukraine. The signing of the Association Agreement between the EU and Ukraine obliged our state to adapt the national law to the European legislation and the like. Ukraine is a party to many international legal conventions that oblige the state to adopt certain changes in the Criminal Code of Ukraine. The violent events on the *Maidan* in February 2014, the fundamental change in the socio-political situation in Ukraine influenced, among other things, the content of the Criminal Code of Ukraine. Now that Crimea is occupied by the Russian Federation and part of the territories of Donetsk and Luhansk regions are controlled by terrorist groups of the so-called DPR and LPR with the support of the Russian Federation, new challenges arise in terms of criminal regulation of relations arising between the state and Ukrainian citizens and foreigners who commit crimes against the territorial integrity of Ukraine, in the area of operation of United Forces and the like.

The above and other factors have contributed to the fact that from the day of its enactment to the present day more than a thousand changes and amendments have been made to the Criminal Code, while new amendments and additions to the Criminal Code are being prepared. These changes were made by the Verkhovna Rada of several convocations, often without considering the conceptual provisions laid in the CC (as they say, "at the request of the day"), without considering the developments of domestic criminal law science, in the absence of social conditionality of changes,

with violation of rules of criminalization, legislative technique and the like. All these changes and amendments have led to the fact that the current Criminal Code of Ukraine ceased to be a systematic regulatory and legal act; contradictions and inconsistencies, as well as erroneous provisions, appeared in it; it is too overloaded with special crimes and generates unnecessary and uncoordinated competition of criminal law provisions; the Ukrainian Criminal Code does not respond to many questions that the courts face in its application; this act does not fully comply with international obligations of Ukraine, does not consider the emergence of new forms of crime in the field of public communications, the capabilities of artificial intelligence, etc.

3. The course towards building in Ukraine a developed European country with a modern, transparent, well-functioning democracy, sets before the state tasks to further develop the legal system of Ukraine based on the constitutional principles of the rule of law, the priority of human and civil rights and freedoms, considering international obligations of Ukraine under democratic standards and best international practices, in particular, of the Member States of the European Union. Pursuant to this, the Decree of the President of Ukraine of August 7, 2019, established the Commission for Legal Reform, which from among its members formed, *inter alia*, a working group on the development of criminal law. This group included nine scientists from leading higher educational institutions of Ukraine, whose tasks were to ensure the development and submission to the President of Ukraine of agreed proposals to amend the legislation on criminal responsibility, considering the current challenges and needs of a democratic society.

In pursuance of this state task, the working group on the development of criminal law on October 18–19, 2019 in Kharkiv at the International Scientific Conference presented a draft Concept of Reforming the Ukrainian Legislation in Terms of Liability for Public Offenses. According to this project, it is expected to prepare three codes: 1) the Criminal Code, 2) the Code of Misdemeanors and 3) the Code on Administrative Offences. At the same time, the terms of preparation of these draft codes are quite compressed, namely – they are to be prepared within a year.

4. The timely and qualitative implementation of the tasks set for the reform of criminal legislation requires mobilization of efforts of specialists in the field of criminal, criminal procedure, criminal-executive, and administrative-tort law. Such efforts should be focused on solving a set of tasks on the scientific assurance of preparation of these normative-legal acts.

5. An important area concerns the tasks of criminal law science to ensure the criminological, social, and international legal conformity of the new criminal legislation of Ukraine to the modern challenges of crime. The CC should have modern criminal legal means of countering manifestations of transnational crime, crimes in the finan-

cial sphere, in the field of environmental protection, modern forms of organized crime related, in particular, to human trafficking, terrorism, illicit trafficking of drugs, weapons, antiques, counterfeit medicines, etc.

The CC and CPC must contain norms that ensure effective international cooperation in the fight against crime. In this regard, the task of criminal law science is to ensure compliance of the new CC with the international obligations of Ukraine. First of all, we are talking about the implementation of those provisions of international treaties that are binding on Ukraine, since it is clear that not all such treaties are implemented in the criminal legislation of Ukraine. Besides, it is important to provide a scientific rationale for the adaptation and harmonization of domestic criminal legislation with international agreements and conventions to which Ukraine is a party. Thus, following the Association Agreement between the EU and Ukraine and, based on constitutional provisions, according to which the irreversibility of the European and Euro-Atlantic course of Ukraine is reaffirmed (Preamble of the Constitution of Ukraine), the Ukrainian legal science in general and criminal law in particular, face the task of research, substantiation and scientific support of harmonization of criminal legislation of Ukraine with European criminal law, that is, ensuring Europeanization of Ukrainian criminal legislation. This implies the necessity of detailed research of European criminal law, which is reflected in EU directives, Council of Europe standards in the field of substantive criminal law, the case-law of the European Court of Human Rights (ECtHR), which is a source of law in Ukraine, as well as the case-law of the European Court of Justice, Venice Commission conclusions in that part which concern criminal law, Council of Europe experts on certain bills in the field of criminal law, etc. There are different institutions in European structures, which recommendations are taken as a basis for the elaboration of recommendations and decisions of governing bodies of the EU and the Council of Europe (for example, Council of Europe's Council for Penological Co-operation). European partners support various areas of work in Ukraine that overlap with problems of criminal law, for example, the Prison Population Center, the Probation Center, the working group of the Ministry of Justice of Ukraine on the development of criminal sanctions and measures not involving isolation from society and improvement of their application, etc. The developments of the above institutions are subject to scientific reflection and research to formulate proposals for the future Criminal Code of Ukraine. In this connection, the role of comparative studies, including those in the field of criminal law, is increasing. The study of the legislative experience of European countries in the field of criminal law, especially in those countries which have recently changed criminal law, may provide a good effect of drawing on modern approaches to solving problems common to European countries, considering, of course, the specifics of the national legal system of Ukraine.

6. One of the major directions is the study of problems of compliance of criminal legislation with the requirements of the Constitution of Ukraine, which according to part 2 of article 8 has the supreme legal force, while laws and other regulatory legal acts are adopted based on the Constitution of Ukraine and must comply with it. It is known that during the preparation of the Criminal Code of 2001 the text of the draft was subjected to the expertise on its compliance to the Constitution of Ukraine, but the Constitution of 1996 was subjected to numerous additions and amendments and therefore the questions arise again about the compliance to the Basic Law of Ukraine of the institute of release from criminal liability, provisions of criminal law in respect of persons sentenced to life imprisonment without the right "to hope" and others.

According to part 1 of Article 8 of the Constitution of Ukraine "in Ukraine, the principle of the rule of law shall be recognized and effective". The content of this principle requires embodiment in the text of the draft of the new CC. However, in the science of criminal law, there is no unified approach to the understanding of this principle in the penal dimension. Meanwhile, the principle of the rule of law is enshrined not only in the Constitution of Ukraine but also in the constituent documents of many European institutions, such as the Council of Europe, the EU, etc. Therefore, one of the important tasks of domestic criminal law science is the study, formulation, and implementation of the principle of the rule of law in the prescriptions of the new CC, as well as in the practice of its application.

7. The next area that requires a concentration of scholarly efforts is the substantive content of criminal law norms. These norms must meet, above all, the needs of a democratic society. In this regard, the provisions of Presidential Decree No. 722 / 2019 of September 30, 2019 "On the Objectives of Sustainable Development of Ukraine for the period until 2030" are important. This Decree supports the global goals of sustainable development until 2030 proclaimed by the UN General Assembly resolution of September 25, 2015, № 70 / 1 and the results of their adaptation to the specific development of Ukraine. The Decree identifies 17 such goals, including goal No. 16 – "to promote the establishment of a peaceful and open society for sustainable development, ensuring access to justice for all and the creation of effective, accountable and participatory institutions at all levels. Also, the National Academy of Sciences of Ukraine and sectoral academies, including the National Academy of Legal Sciences of Ukraine, were recommended to consider the Sustainable Development Goals of Ukraine until 2030 in determining the directions of scientific research. Finally, the above-mentioned Goals are benchmarks for the development of draft forecast and program documents, draft laws, and regulations to ensure balanced economic, social, and environmental dimensions of sustainable development of Ukraine. The draft Strategy for Sustain-

able Development of Ukraine until 2030 and the National Action Plan through 2020, prepared by the Cabinet of Ministers of Ukraine with the involvement of a wide range of experts, managers, and civil society representatives, envisage, in particular, tasks to promote the rule of law, to ensure equal access for all to the protection of their rights, to counteract corruption, abuse by officials and cruel and degrading treatment by reforming the judicial and law-enforcement systems. The operational goals of promoting peaceful and inclusive communities for sustainable development and State security include significantly reducing all forms of violence and violent deaths by ensuring proper law enforcement with an emphasis on prevention; effectively combating human trafficking; significantly reduce illicit financial flows; combat all forms of organized crime; radically reduce the number of weapons, special means, and explosive materials in illicit circulation; strengthen the system of control over illicit financial flows to prevent and counteract legalization of proceeds of crime, terrorist financing, etc. The set goals and objectives require the concentration of efforts of scientists in the field of sciences of the criminal-legal cycle to achieve the goals of sustainable development, including by criminal-legal means.

8. A permanent direction of scientific studies is to provide academic research justifications for changes to the future CC, associated with the rejection of provisions that do not meet the requirements of our time. At the same time, the continuity of the provisions of the current CC in the new criminal law should be ensured. As noted, the current CC has taken many of the classic institutes of criminal law, which have passed the test of time. Undoubtedly, these institutes have a future in the new CC, considering, of course, the modern challenges of crime, the achievements of scientific thought on the development of such institutes, the materials of many years of practice of their application. And if there are, for example, doubts in the preservation in the new CC of such a characteristic of a crime as its "public danger", and the statement about its replacement with the characteristic of "wrongfulness of an act", the efforts of scientists need to focus on the arguments for such a replacement through comparative studies, as well as predicting the consequences of such a replacement. In general, abandonment of established concepts defined in the Criminal Code or their radical change should be properly justified from a scientific, methodological, practical, and any other point of view.

9. A distinctive feature of modern studies is their interdisciplinary nature. It is obvious that public offenses include not only crimes and misdemeanors, but also administrative violations and disciplinary offenses in the public sphere. The mega-task is to create the concept and its implementation in the texts of laws on responsibility for public offenses, which has already been announced by Lviv criminal scholars. But the immediate tasks in the preparation of drafts of the CC, CM, and CoAO are interdisciplin-

ary research on the distinction of crimes and misdemeanors, as well as administrative offenses; the formation of these codes on a unified methodological basis; ensuring the solution of substantive legal problems concerning the solution of relevant issues of criminal procedure and criminal executive law, and so on. Only a comprehensive solution of problems of establishing legal responsibility for public offenses by the efforts of representatives of sciences of criminal-legal and administrative-tort cycle can give grounds to believe in the effective regulation of relevant relations in the field of legal responsibility for such offenses.

10. When conducting scientific research on problems related to the reform of criminal legislation, the direction related to the study of corruption risks in the definition and application of the criminal law is essential. There is no need to prove that the fight against corruption and a significant reduction of its volume is a pressing problem for Ukraine. And in this sense, corruption risks are often embedded in the texts of legal acts. The task is to subject the expected text of the new CC to anti-corruption expertise, taking into account the forecast of its application. In this case, it is necessary to provide anti-corruption measures both at the stage of preparation and adoption of the criminal law and at the stage of its application. This refers to the justification of such provisions, which would limit the discretion of both the legislator in establishing the basis of criminal responsibility and the types and amount of such responsibility and the discretion of the court in the individualization of criminal responsibility of a particular offender based on the results of consideration of certain criminal proceedings.

11. Noteworthy is such a direction of scientific research as the protection of the interests of the victim of a crime in the Criminal Code. In recent years there has been an active discussion about the inclusion of the victim as a subject of material criminal-legal relations. In contrast to the established representations that the subjects of such relations are, on the one hand, the state, and on the other hand, the person who committed the crime, with the object – the criminal responsibility of the offender, it is proposed to also consider the victim of the crime (physical or legal person) as the third subject of material criminal legal relations. In this regard, it is proposed to provide for an active role of the victim in resolving the issues of release from criminal liability, in sentencing a guilty person by the court, in selecting a probation measure, in the parole of a convicted person from serving the sentence, in the early withdrawal of a criminal record, in the application of pardon. To a certain extent, some of the above-mentioned issues have already been considered in the current CC, while the majority of others are proposed to be actively implemented in the new CC. The task of the science of criminal law is to clearly define and distinguish substantive, procedural, and executive aspects of criminal legal relations, their subjects, rights, duties and powers, the object of such relations, the stages of their implementation, and the

legal consequences of such implementation, taking into account the role of the victim in these relations.

12. The direction of research related to the justification of criminalization and decriminalization of unlawful deeds is essential. It is evident that the current Criminal Code through numerous amendments and additions has become a bulky and uncoordinated act with many special norms, unbalanced sanctions, and the like. The scientific task in this area is to substantiate the criteria for dividing unlawful acts into crimes, misdemeanors, and administrative offenses. Solving this primary task will allow the individual codes to be constructed and structured. The preparation of three codes is a decisive step toward the decriminalization of many unlawful acts and the humanization of responsibility for offenses of varying degrees of severity.

The next step is the penalization of certain offenses. And here again arises the need to develop the doctrine of sanctions, which should be provided for the relevant type of offenses – crimes, misdemeanors, and administrative offenses, that is a task that has not yet been solved by domestic legal science. Closely related to this is the direction of research such as differentiation of grounds and types and amounts of responsibility, as well as its individualization. Obviously, all these problems are also interdisciplinary, and their solution requires complex research of specialists in related fields. Singling out the CC, it is important to draw the attention of researchers to the fact that this act should contain a relatively small list of crimes (the most serious offenses), for which the most severe types and measures of punishment should be provided. Given the fact that some of the existing types of penalties are rarely used (for example, correctional work, restriction on military service), and some of them are advised to refer to as security measures (for example, deprivation of the right to hold certain positions or engage in certain activities), there is the important scientific problem of constructing a system of penalties and security measures for crimes, judicial penalties for misdemeanors, and administrative penalties for administrative violations, that is, developing an interdisciplinary doctrine of the system of sanctions for public offenses. Obviously, the application of harsh sanctions for crimes (e.g., large fines and imprisonment for a fixed term and life imprisonment) should still have the goal of ensuring justice and preventing the commission of new crimes by both the convicted person and others (special and general prevention of crime). Similarly, the purpose of judicial penalties for misdemeanors is to ensure justice and to ensure the safety of society from committing new infringements on the vital objects of legal protection.

13. It is obvious that the preparation of the three codes is based on the idea of humanization of legal responsibility and its differentiation depending on the severity of the offense and the circumstances that act as aggravating and mitigating. At the same time, modern

approaches related to the treatment of offenders by the state give grounds for wide application of punishments (penalties) not related to their imprisonment, namely alternative measures and, above all, the institution of probation. In domestic science, large-scale and comprehensive studies of probation are at a nascent stage. Meanwhile, the criminogenic situation in the country, as well as foreign experience testifies to the high effectiveness of probation measures for persons who have committed non-violent crimes, crimes of small and medium degree of severity. Proposals requiring appropriate scientific substantiation on the application of probation to persons who have been released on parole from further imprisonment (including life imprisonment), when releasing persons from serving their sentence at the end of it, when persons have a high risk of committing new crimes, etc., deserve attention. The subject of scientific research should be the determination of the legal nature of probation measures: whether they are a separate type of punishment, such as probation supervision, or it is a set of supervisory, control, and auxiliary measures applied to persons released from punishment to integrate them into society. Obviously, in the future, scientific monitoring of the effectiveness of such measures, expansion of their list, and the like are required. It is important to focus on measures that encourage people who have committed crimes to law-abiding behavior, stimulate their re-socialization to integrate into society.

14. The preparation of new codes should be based on an analysis of statistical data on the application of the current Criminal Code. The problem of the effectiveness of the application of certain penalties provided for by the CC requires further research. Generalization of the practice of the Supreme Court in criminal cases is essential. This concerns both the problems of criminal law qualification of certain types of crimes and circumstances, which exclude criminality of a deed, as well as the assignment of punishment and other criminal law means. The task is to solve the problems in the future CC, which presently exist in the practice of application of the current CC, and this requires scientific comprehension of the existing problems and substantiation of proposals for their solution in the draft CC.

15. A wide layer of scientific problems lies in the digitalization of the legal system in Ukraine. It is obvious that the digitalization of the three codes of responsibility for public offenses is only part of the national program for the digitalization of the entire legal system. At the same time, the purpose of digitalization of codes is to help, first, a law enforcer (detective, investigator, prosecutor, judge, defender, probation officer, correctional officer, and executive officer, etc.) to make decisions when solving a problem with the help of artificial intelligence. This is due to the construction of codes on a unified methodological basis, which includes: a unified structure (for example, books,

sections, subsections, articles, paragraphs, subparagraphs), terminology, typification (classification) of offenses and their legal consequences, the unification of various registries and other materials in all cases, wherever possible, and the like. Digitalization helps to systematize all information (laws, international acts, European acts, national and foreign practices, scientific achievements, the state of law and order, etc.), to process and analyze it to solve the given problem, to make recommendations for possible solutions, to forecast the consequences that each proposed solution entails, to monitor the implementation of the adopted solution and to adjust this solution to the consequences of its implementation and so on.

Digitalization opens vast opportunities for the creation of automated workplaces for investigators, prosecutors, lawyers, judges, other interested persons, and public figures, for the deployment of relevant scientific research on a new information base, political decision-making, and the like.

16. It is clear that the reform of criminal law requires scientific reflection on the educational training of the next generation of lawyers. In addition to the revision of educational and other programs, there is a need to discuss the matter of lecturing on international criminal law in master's programs, as is done in many European universities. In addition, the preparation, discussion, and future adoption of codes of responsibility for public offenses require changes in the professional development of current law enforcement personnel.

17. It is obvious that a radical change in the legal regulation of responsibility for public offenses requires deliberate and thoughtful steps of the state. Following the mentioned decree drafts of normative legal acts have been prepared, which are subject to broad discussion in the professional community, the public, all interested persons. For this purpose, an appropriate platform based on modern means of communication should be created. Everyone interested in the issues of responsibility for public offenses can express their opinion on this platform, to become something like a co-author of the great work on the preparation of new legislation. In this discussion, a significant contribution should be made by experts. And only after that, the relevant drafts as a package can be presented to the President of Ukraine for submission to the Parliament.

In all the above areas of scientific research in the context of reforming the criminal law, it is advisable to focus the efforts of scientists so that the future legislation on liability for public offenses and the practice of its application would correspond to the challenges of our time.

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CORPUS DELICTI AND VICTIM'S PLACE IN ITS STRUCTURE

Abstract. *The corpus delicti doctrine is a cornerstone of the system of knowledge about crime, about forming and application of provisions of the Criminal Code of Ukraine (CC of Ukraine), criminal liability and its grounds, etc. Amidst the issues relating to the investigation of corpus delicti, the forming of concepts having reference to corpus delicti and its structure is methodologically important. From the perspective of the latter issue, a special role is played by the victim of crime – this concept is interdisciplinary and enshrined in the Criminal Procedure Code of Ukraine (CPC of Ukraine) by the term "victim" (art. 55 of CPC of Ukraine, etc.).*

The purpose of the article is to characterize the concept of "corpus delicti" as a legal phenomenon – a product that results from the cognitive activity of the subject of knowledge and which uses, as its source material, an existing system of indicia cognized and used in practical activities. It is noted that corpus delicti is a logical and legal model consisting of four scaled-up elements: the object, the objective side, the subjective side, and the subject of crime. Each of these elements, for its part, has its specific structure, with the indicium of crime being a criterion of the set-up of such a structure, as well as corpus delicti overall. Based on the logical characteristics of the class of items, the author divides all corpus delicti into general corpus delicti (generic concept) and specific ones (specific corpus delicti of intentional homicide, intentional severe bodily harm, hostage-taking, etc.). It is indicated that when a crime is committed, the actual corpus delicti of the crime is of legal significance – a set of objective and subjective, as well as necessary and sufficient indicia to be established following the specific socially dangerous act committed.

In the theory of criminal law, the indicium of a crime victim is regarded as optional indicia of the general corpus delicti, even though in all cases when a socially dangerous act is committed there will always be a crime victim. Formulating the provision of the

Special Part of CC of Ukraine, the legislator does not always refer to or implies a victim as an indicium of a crime. A victim as a mandatory indicium is prescribed only for certain types of crimes.

The author emphasizes that the CC of Ukraine does not define the victim of a crime. This definition is legally enshrined in part 1, Article 55 of CPC of Ukraine, and the author believes that by its legal nature it may be reckoned in the class of substantive law concepts, and therefore it should be used when applying the provisions of criminal procedural legislation as well as legislation on criminal liability. It is noted that the concept of "victim of crime" given by the legislator in certain provisions of CC of Ukraine may not go beyond the legal framework, and thus it can only be individuals or legal entities. The author concludes that other types of victims (ethnic or social groups, the State, etc.) which are distinguished by the criminal law theory may be the subject in the event when criminal liability law applies only at the level of a criminal law characteristic, i.e., when in connection with a committed crime there arise the issues of a comprehensive assessment of the severity with which it is committed.

According to the terminology introduced on April 13, 2012, with the adoption of the new CPC of Ukraine, the concept of "corpus delicti of a crime" is changed for "corpus delicti of a criminal offense"; gradually this term came to be used in the modern scientific literature on criminal law. On November 22, 2018, the concept of "corpus delicti of a criminal offense" has been introduced by the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine Regarding Simplification of Pre-Trial Investigation of Certain Categories of Criminal Offenses" into CC of Ukraine. However, at the time when the author was writing this article, the innovations of this Law have not yet entered into force. According to Art. 12 of CC of Ukraine as amended by the Law, this concept will embrace two types of criminal offenses – misdemeanors and crimes. At the same time, given the centuries-old history of how the concept of "corpus delicti of a crime" was set in the scientific domain, in this article it is used as the key one in the context of highlighting the views of scholars on the forming and development of its content and place in the structure of victim of crime.

Keywords: *corpus delicti of crime; general corpus delicti of crime; specific corpus delicti of crime; actual corpus delicti of crime; a victim of crime.*

Criminal law professionals, as well as specialists in related branches of criminal law (theorists and practitioners), widely use the concept of *corpus delicti*[1], which holds one of the leading places in the conceptual apparatus of domestic criminal law doctrine. Despite the long-lasting history of the introduction of this concept into the sphere of legal scholars' knowledge and its practical application, it was only at the end of the 18th century that *corpus delicti* became the common property of the criminal law, thanks to scientific research of German lawyers, which, however, were influenced

[1] The term «*corpus delicti*" is derived from the Latin. The Italian jurist Farinacius in 1581, inspired by the term *constare de delicto*, introduced the term *corpus delicti* in order to emphasize more precisely the totality of proven facts of a crime.

by its procedural origin when defining the content of this concept, and therefore the doctrine on *corpus delicti* was usually not supplemented with the provisions on subjective conditions of culpability.[1]

The objective of this study is to provide characteristics of the concept of «*corpus delicti*» as a legal phenomenon – a product of the mental activity of a cognitive subject, which has the source material of an existing system of attributes, which is cognized and used in practical application.

Since the second half of the XIX century, domestic scholars began to develop a view of the crime not only as a material phenomenon of reality, the varieties of which (murder, theft, fraud, etc.) are reflected in the norms of legislation on criminal liability but also as a complex structural formation, which is inherent in both external and internal, each of which has its elements and relevant attributes, which are organically related to each other. This approach allowed us to consider crime as an objective-subjective category. With crime being a phenomenon of reality that exists independently of the subject of cognition, *corpus delicti* is a subsidiary formation, a derivative, a product of the mental activity of the subject of cognition. At the same time, the *corpus delicti* is also a factual system of features, which is cognized and used in practical activities[2]. Currently, the *corpus delicti* in the system of basic doctrinal definitions developed in criminal law is a generalized logical and legal model of the higher level (general model of the *corpus delicti*), which consists of four aggregated elements: object, objective side, subjective side, and subject of crime[3]. Each of the elements of this model has its specific structure, the criterion for the formation of which, as well as the entire *corpus delicti*, is an "attribute of a crime". The most essential for law enforcement characteristics of this model and those that can be unambiguously (literally in their content) be perceived by a law enforcer are enshrined by the legislator in the norms of the General Part of the Criminal Code of Ukraine (hereinafter – the Criminal Code of Ukraine)[4]. Thus, articles 18, 19, 22 of the CC of Ukraine outline the requirements for a common subject of a crime (a sane individual who has reached the age legally specified)[5].

It should be noted that the CC of Ukraine does not define *corpus delicti* at a generalized level, although in the texts of certain norms it is used at the level of a legislative term (part 1 of article 2, part 1 of article 13, part 2 of article 17). The

[1] Tagancev N, Russkoe ugolovnoe pravo. Lekcii. Chast' obshhaja [Russian Criminal Law. Lectures. General Part], t 1 (1994) (in Russian).

[2] Kryminalne pravo Ukrainy: Zahalna chastyna: pidruchnyk [Criminal Law of Ukraine: General Part: Textbook] (Tatsii V ta Borysov V ta Tiutiuhin V red, 5-te vyd, pererobl i dopov, Pravo 2015) (in Ukrainian).

[3] Borysov V, 'Sklad zlochynu yak pravova model' ['Corpus delicti as a Legal Model'] [2009] 1(14) Visnyk akademii advokatury Ukrainy 254–6 (in Ukrainian).

[4] Criminal Code of Ukraine: Law of Ukraine of April 5, 2001 № 2341-III. <https://zakon5.rada.gov.ua/ laws/show/2341–14/page> (accessed on 21.01.2020).

[5] Kryminalne pravo Ukrainy: Zahalna chastyna: pidruchnyk (from #3) 101.

Criminal Procedure Code of Ukraine (hereinafter – the CPC of Ukraine) does not contain a definition of the *corpus delicti* either[1]; this act describes the mentioned term, as already noted, as – "composition of a criminal offense", although it also uses it in its norms (Articles 129, 284, 368, 373). Domestic criminal law doctrine assigns an important role to the concept of "*corpus delicti*", considering it one of the fundamental and key concepts, which performs inherently the function of a scientific category[2], which is of particular (fundamental) importance for lawmaking, law enforcement, and criminal law theory. *Corpus delicti* in the works of scientists is defined mainly as a totality of objective and subjective characteristics (combined into elements), which under the law on criminal responsibility define the committed socially dangerous act as a criminal[3]. However, the *corpus delicti* is not only a totality of characteristics but also, as rightly noted by V. Kudriavtsev, a strict system of these. The composition reflects the character of a crime's internal relations of elements, which are constitutive for it. Therefore, as emphasized by the scholar, *corpus delicti* is a system of such signs, which are necessary and sufficient for the recognition that a person has committed the relevant crime[4].

Logical-legal models of certain types of crimes are formed based on the higher-level model according to the principle of similarity (a specific model of the *corpus delicti* of intentional homicide, intentional grievous bodily harm, hostage-taking, theft, robbery, etc.). General and specific models of *corpus delicti* of a crime belong to the class of compatible concepts, which are in relation to each other in subordination[5]. In this case, the specific model is a subordinate concept in relation to the general model of corpus delicti, which in this respect is a generic, subordinate concept[6]. Both models are legal, essential for the application of norms of the legislation on criminal liability. The specific model introduces the characteristics, which reflect the specifics of the type, which are primarily directly enshrined within the disposition of the norm of the relevant article of the Special Part of the Criminal Code of Ukraine,

[1] Criminal Procedure Code of Ukraine: Law of Ukraine of April 13, 2012 №4651-VI <https://zakon.rada.gov.ua/laws/show/4651–17> (accessed on 21.01.2020).

[2] Panov M, 'Problemy skladu zlochynu ta yoho funktsii u doktryni kryminalnoho prava' ['Issues Intrinsic to Corpus delicti and Its Functions in the Criminal Law Doctrine'] (2013) 1 Visnyk asotsiatsii kryminalnoho prava Ukrainy 103–25 (in Ukrainian).

[3] Trajnin A, Obshhee uchenie o sostave prestuplenija [General Doctrine of Corpus delicti] (Gosjurizdat 1957) (in Russian); Velyka ukrainska yurydychna entsyklopediia [Great Ukrainian Encyclopedia of Law], t 17: Kryminalne pravo [Criminal Law] (Tatsii V holova redkol, Borysov V zast holovy, Pravo 2016) (in Ukrainian).

[4] Enciklopedija ugolovnogo prava [Encyclopedia of Criminal Law], t 4: Sostav prestuplenija [Corpus delicti of Crime] (Izdanie professora Malinina 2005) (in Russian)..

[5] Kondakov N, Logicheskij slovar' – spravochnik [Logical Dictionary-Reference Book] (Nauka 1975) (in Russian) 246, 556.

[6] Zherebkin V, Logicheskij analiz ponjatij prava [Logical Analysis of the Concepts of Law] (Vishha shkola 1976) (in Russian).55–6.

and which actually in their totality act as a normative basis (foundation) for building the model (for example, for the specific model of theft – "property", "theft", "concealed"), as well as the signs inherent in all crimes, which are included in the general model of the crime. Such signs are enshrined in the general part of the Criminal Code of Ukraine (for example, "guilt" and, more specifically, its certain form (or type) which are defined in Articles 23–25 of the Criminal Code of Ukraine). However, to build a specific model of the *corpus delicti* of the crime, the normative provisions explicitly specified in the Criminal Code of Ukraine are insufficient. Based on the description of the deed provided by the legislator in the disposition of the relevant norm of the Special Part of the Criminal Code of Ukraine, the legal theory, considering the experience of the practical application of such or similar norms and analyzing the phenomenon itself as an object of actuality, further elaborates the specific model to the level of necessity and sufficiency. That is why, for example, "consequence" and "causation" as the necessary signs of its objective side, and "motive" and "purpose" – of the subjective side are attached to the characteristics of the crime. The legislator considered these features as necessary components of a crime when constructing the text of the disposition, but for such a claim the normative text is scarce (insufficient), and therefore the conclusion regarding their mandatory nature is provided by the theory of criminal law. The composition of a crime, as noted by V. Zherebkin, is a specific legal term introduced by the science of criminal law to denote the logical content of the generic concepts included in the scope of the concept of "crime"[1].

In its finished form, the specific model of crime becomes a necessary tool in the system of legal means by which the fight against crime is carried out.

Both general and specific models of *corpus delicti* represent (are intended to represent) the essential component of legal knowledge of lawyers professionally involved in the fight against crime; it also represents educational information about *corpus delicti*, which is taught by scientific and pedagogical workers in textbooks, manuals, lectures, practical exercises, etc. – in this way the competence of students, postgraduates, trainees of advanced training courses on this issue is formed; scientists of higher educational institutions and scientific institutions in carrying out fundamental and applied research deepen the understanding of both general model of *corpus delicti* and the specific – based on studies in the field of criminal law experts give recommendations to subjects of legislative initiatives to improve the texts of laws on criminal responsibility in order to more clearly and understandably reflect in them the compulsory features of *corpus delicti* of crimes, both general and rulemaking on a particular type. The ruling of the Constitutional Court of Ukraine in establishing the conformity of Ukrainian legislation on criminal liability with the Constitution of Ukraine has an important

[1] Zherebkin V. (as in # 12) 52.

place in the formation of legal models of *corpus delicti*, especially concerning the content of their characteristics; no less important are the rulings of the Supreme Court on the unequal application of the law in similar legal relations.

In addition to mandatory features in the general model of *corpus delicti*, in the theory of criminal law, some are not obligatory for all crimes, but the level of their typicality and generality is also rather high, and therefore scholars consider them along with mandatory features of a crime and introduce them into the general model of *corpus delicti* as optional elements. However, if such signs are introduced by the legislator into the norms of the Special Part of the Criminal Code of Ukraine, they acquire the status of mandatory (at the specific level) in the system of signs of the specific model of *corpus delicti* of a crime, provided for by the relevant norm of the Criminal Code of Ukraine. They include, in particular: time, place, environment, method of committing a crime, motive, and purpose, characteristics of a special subject of a crime, etc.

The factual element of a crime is of legal significance[1], i.e., the totality of objective and subjective and at the same time necessary and sufficient attributes, which are established under a specific committed act and constitute the preconditions for the emergence of criminal-legal relations, where the legal fact, which begins the criminal-legal regulation, is the commitment of a socially dangerous act by a person. Whereas the prerequisites for the recognition of such an act as a basis for criminal liability is its indication in the Criminal Code of Ukraine and the presence of *corpus delicti* in it (part 1 of article 3). Factual *corpus delicti* of the crime should correlate directly with the specific model of *corpus delicti* of the crime[2], however, in contrast to a specific model, which is a complete and organically integral logical-legal system following nature (type) of a crime (theft, robbery, rape, murder, etc.) described in the law, the actual composition of a crime either fully corresponds to the specific model, or, which is more frequent, only partially, but provided that all four elements of the specific model are reflected in it. As such, if a specific model of the *corpus delicti* from the objective side implies several socially dangerous acts, then following the specific act committed, the actual *corpus delicti* may include only one, for example, the commission of an explosion during sabotage (Article 113 of the Criminal Code of Ukraine). The same can be said about the subjective element of torture (Article 127 of the Criminal Code of Ukraine), which, ac-

[1] Brajnin Ja, Ugolovnaja otvetstvennost' i ee osnovanie v sovetskom ugolovnom prave [Criminal Liability and its Ground in Soviet Criminal Law] (1963) (in Russian) 116–28, The term «de facto corpus delicti» was used in his works by S. Budzinsky. See: Budzinsky S., Beginnings of Criminal Law (Warsaw 1870). 68.

[2] Panov M, Problemy metodolohii nauky kryminalnoho prava [Methodology Issues of Criminal Law Science] (Pravo 2018) (in Ukrainian) 379.

cording to the legislative description, provides for four goals, but in reality, the perpetrator of torture had only one goal, for example, to punish the victim for the actions committed by him. Such a correlation between the actual *corpus delicti* of a crime and the legal models (general and specific) is quite reasonable since the latter are logical-legal abstractions of genus level (for the general model) and species level (for a crime specified in the norm of the Special Part of the CC of Ukraine), the elements of which are an object, objective side, subject side and subject of a crime. The presence of these four elements must be reflected in the actual *corpus delicti* of a crime. As for the signs included in the mentioned elements, it is sufficient for the actual *corpus delicti* of a crime to ascertain only those that existed during the commission of a specific socially dangerous act under the Criminal Code of Ukraine. As for the victim, in the theory of criminal law, this attribute is optional[1]. However, it appears that the status (position) of this attribute differs from other optional attributes of the general model of *corpus delicti* (for example, the purpose of committing a crime). Firstly, a victim of a crime, as well as socially dangerous consequences, exists in all cases of committing a socially dangerous act under the Criminal Code of Ukraine. Other optional features do not have such a universal quality, in any case in the aspect of their influence on the degree of severity of the act. Yes, both time and place are always inherent in human behavior, but in many cases, they do not have criminally relevant properties. The victim and the crime are correlated concepts in criminal law. If there is no crime, there is no victim in the criminal-legal sense of the word[2].

Such a correlation between a victim and a crime does not automatically turn the victim into an obligatory attribute of its *corpus delicti*, both at the level of the general and specific model. The legislator, when formulating a crime, rarely introduces a reference to the victim or has him in mind as a characteristic of the crime, and therefore this characteristic may not in such cases be introduced into the *corpus delicti* model of the corresponding type of crime and thus may not affect the establishment of the basis of criminal responsibility of the specifically committed act. Secondly, unlike obligatory attributes (generative and relatively independent) included in the general model of *corpus delicti* under the attributes of the specific model, the attribute " a crime victim" has no such properties, since it is derived (proceeding) from other attributes[3]. An exact conception of a victim may be obtained only based on analysis of the subjective component of social relations (participants – subjects of relations), which are protected by the

[1] Crime Victim (Interdisciplinary Legal Research) (Baulin Yu. and Borysov V., eds., Crossroads 2008) 77.

[2] Senatorov M, Poterpilyi vid zlochynu u kryminalnomu pravi [Victim of Crime in Criminal Law] (Pravo 2006) (in Ukrainian) 208.

[3] Kudrjavcev V, Obshhaja teorija kvalifikacii prestuplenij [General Theory of Crime Qualification] (Jurid lit 1972) (in Russian) 111–5.

legislation on criminal liability. Therefore, it is not by chance that the majority of researchers refer a victim of a crime to the attributes of the object of a crime[1]. Thirdly, the victim of a crime serves as a peculiar link that unites a socially dangerous consequence (consequences) as a result of a socially dangerous act committed and the harm that is caused to an object of criminal-legal protection. Perhaps due to these considerations, some researchers consider the victim as a sign of the objective side of a crime[2]. However, the analysis of the mechanism of inflicting harm to an object of a crime[3] gives grounds to conclude that in the system of social elements of the object there is always a social subject (participant of social relations), who is exposed to the negative impact of varying degrees of intensity – physical or informational, which makes him the victim of a crime. Such influence can be carried out immediately, at the very beginning of the progression of the mechanism of infliction of harm, when the social subject of relations suffers directly from a socially dangerous act (as a rule, a physical person), or when the social subject suffers as a result of destruction (deformation) of other components of relations, by which his social interests are secured (indirect influence on the subject).

The science of criminal law (fundamental in the system of sciences of the criminal law cycle)[4] has not developed a sufficiently coherent definition of the concept of "victim of a crime. On the contrary, scientists show considerable discrepancies regarding the content of this concept. Thus, there are claims that only an individual may be recognized as the victim of a crime[5], while others also include society[6], and even humanity as a whole, in the circle of victims[7]. Such discrepancies in the definition of this concept are primarily due to the lack of an appropriate legislative definition in the Criminal Code of Ukraine.

Contrary to the legislation on criminal liability, the concept of "victim" is legally enshrined in the CPC of Ukraine. Part 1 of article 55 of this normative legal act specifies:

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[1] Senatorov (as in 17) 110–1.

[2] Radutnyi O, 'Kryminalna vidpovidalnist za nezakonne zbyrannia, vykorystannia ta rozgholoshennia vidomostei, shcho stanovliat komertsiinu taiemnytsiu (analiz skladiv zlochyniv)' ['Criminal Liability for Illegal Collection, Use and Disclosure of Information Regarded as Trade Secret (Analysis of Various Corpus delicti)'] (dys kand yuryd nauk, 2002) (in Ukrainian) 164.

[3] Velyka ukrainska yurydychna entsyklopediia [Great Ukrainian Encyclopedia of Law], t 17: Kryminalne pravo [Criminal Law] (Tatsii V holova redkol, Borysov V zast holovy, Pravo 2016) (in Ukrainian) 511–4 (the term is authored by V. Ya. Tatsii and N. Hutorova).

[4] Panov (as in 15) 34.

[5] Sidorov B, 'Povedenie poterpevshih ot prestuplenija i ugolovnaja otvetstvennost' ['Behavior of Crime Victims and Criminal Liability'] (avtoref dis dokt jurid nauk, 1999) (in Russian) 10–1.

[6] Senatorov (as in 17) 84–5.

[7] Fargiev I, Ugolovno-pravovye i kriminologicheskie osnovy uchenija o poterpevshem [Criminal-Law and Criminological Foundations of the Victim Doctrine] (Jurid centr Press 2009) (in Russian) 88.

a victim in criminal proceedings may be a natural person to whom moral, physical, or property damage was incurred by a criminal offense, as well as a legal person to which property damage was incurred through a criminal offense[1].

It should be noted that this definition by its legal nature refers to the class of substantive criminal law concepts. In general, such legislative transformations (transpositions) occur in inter-branch legal turnover, when a concept of one branch of law is fixed in the legislation of another branch under the objectives of the latter (thus, in article 39 of the Criminal Code of Ukraine there is a definition of extreme necessity and the conditions under which it is recognized as a circumstance precluding criminality of a deed. As is known, extreme necessity is a concept of Civil Law). In such a solution of a legal conflict concerning the victim we should recognize: the legal concept enshrined in the criminal procedural legislation is determinative, it should be used as a guide in the application of both criminal procedural legislation and legislation on criminal liability. And criminal law and other related branches of legal knowledge (criminalistics, criminology) should primarily operate with this very concept, and therefore, in the disclosure of any prescription which refers to a victim in the Criminal Code of Ukraine, its content should correspond to the content of the definition given in paragraph 1 of Article 55 of the CPC of Ukraine. This conclusion is important for the formation of the content of the characteristic "victim of a crime" in the system of elements and characteristics of *corpus delicti*. Obviously, according to the content of the concept of "the victim of a crime", which is specified by the legislator in the norms of the article of the Criminal Code of Ukraine and based on which it was introduced into the specific model of *corpus delicti*, it cannot go beyond the legal limits. At the same time, the criminal procedural legislation is not limited to the definition of "victim" given in part 1 of article 55 of the CPC of Ukraine. Following the tasks of this branch of law, the legislator specifies the moment of emergence of the victim in criminal proceedings under Part 2 of Article 55 of the CPC of Ukraine, according to which it is the submission of a criminal offense in respect of a person or application for his/her involvement in the proceedings as a victim. According to the doctrine of criminal law, a victim as a subject of criminal legal relations appears simultaneously with the commission of a socially dangerous act under the Criminal Code of Ukraine.

According to part 6 of article 55 of the CPC of Ukraine, if a criminal offense resulted in the death of a person or a person is in a condition that precludes him/her from filing a statement, the person from among the close relatives or family members who submitted a statement on bringing him/her to proceedings as a victim shall be recognized as a victim. In criminal law, with the victim

[1] Criminal Procedure Code of Ukraine: Law of Ukraine of April 13, 2012 № 4651-VI <https://zakon.rada.gov.ua/laws/show/4651–17> (accessed on 21.01.2020).

as a characteristic of the *corpus delicti* of a crime, such a transformation is not possible. An objectively existing social phenomenon – the object of criminal-legal protection, a structural element of which are the participants of social relations (its subjects), interaction and interrelation between which ensures the functioning of such an object, becomes primary for its emergence. Within the framework of this phenomenon as a result of committing a crime essentially negative transformations are undertaken, in particular harm that is caused to one or more subjects of public relations. The persons referred to in paragraph 6 of Article 55 of the CPC of Ukraine, are not included in the round of participants of public relations, which were the object of criminal-law protection, and therefore they cannot be referred to as the attributes of *corpus delicti*. Such persons are recognized by part 6 of article 55 of the CPC of Ukraine as victims as a result of the regulatory interaction of criminal-law and criminal-procedural relations, necessary for the solution of a wide range of tasks of the criminal proceedings. Without a victim in the criminal-legal sense, a victim as a participant of criminal proceedings cannot emerge. However, beyond the establishment of the elements of a crime, for example, when deciding on the possibility of exemption of a person from criminal liability (Article 46 of the Criminal Code of Ukraine), such concepts due to the transformation of their content in connection with the implementation of the criminal proceedings may coincide.

As for such types of victims of a crime (e.g., certain ethnic groups, the state, etc.), which are distinguished by criminal law theory, they may be the subject of the application of criminal law at the level of criminal law characteristics, that is, when in connection with the commission of a crime there are issues of a comprehensive assessment of the severity of the offense, which, for example, is important for the imposition of punishment for a crime or the application to the person who committed a socially dangerous act of other criminal law measures under the Criminal Code of Ukraine.

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CRIME MECHANISM AS A CATEGORY OF CRIMINALISTICS

Abstract. *The current stage of criminalistics' development is characterized by the active formation of its general theory, the definition of the object-matter area of research in this field of knowledge. The relevance of the issues studied in the paper is due to the need of a modern scientific concept of the matter of criminalistics development, identifying the range of patterns studied. The paper is aimed at analysing modern scientific approaches to understanding the crime mechanism as a structural element of the matter of criminalistics science. To achieve this goal, general and special research methods such as dialectical, historical, formal-logical, system-structural, legal forecasting, system and semantic analysis were used. It is proved that the crime mechanism as a holistic system of circumstances, processes, factors that determine the emergence of material and other information carriers about the crime event itself, its participants, provides the opportunity to put forward working investigative versions, investigation planning, targeted search for the consequences of the crime, offender's identification, victim's identification, contributes to the criminal legal qualification of the offense, and therefore undoubtedly acts as an object of criminalistics' cognition. It is emphasized that the crime mechanism only determines the occurrence of traces (material and ideal), and therefore traces as consequences and as a result of the reflective process go beyond its internal structure (building). Therefore, the process of reflecting the crime mechanism in the environment, and hence the emergence of information about a crime and its participants should be considered as a separate aspect of the matter of criminalistics. It is noted that the criminalistics teaching on the crime mechanism studies the nature, essence and content of the functional side of criminal activity, patterns of interaction of participants of a criminal event with each other and with the surrounding material situation (environment), as well as patterns that determine the sources of criminalistics' significant information on the crime itself and its participants. The process of direct formation of material and ideal traces, the patterns of reflection of the necessary information in them should be studied by another separate*

criminalistics teaching on the mechanism of trace formation. Attention is paid to the fact that the crime mechanism has connections with other categories of criminalistics and, above all, with the crimes' criminalistics characteristics. It is stated that crimes' criminalistics characteristics is a scientific abstract category, which reflects the qualitative and quantitative information of retrospective orientation as a result of cognition of the mechanism of certain types of crimes, i.e. that the crime mechanism is a reflected object, and criminalistics characteristics is a form of its reflection.

Keywords: *subject, victim, situation, method, weapon, means, vestiges of crime, criminal activity, subject of criminal encroachment.*

INTRODUCTION

Throughout the history of its establishment and development, criminalistics has traditionally studied the functional side of the crime (criminal activity), i.e. it was mainly interested in answers to the questions: where, when, at what time, in what circumstances, in what way, with what tools was a socially dangerous act committed. In general, being well aware of what the subject matter of criminalistics, criminalists for a long time could not offer a universal, unifying term that would most accurately and comprehensively cover the content of the subject matter in this field of knowledge. Such term appeared in the early 1970s and it was the "crime mechanism".

As a scientific category, the concept of "crime mechanism" was first used by O. M. Vasiliev in defining the subject of criminalistics, which he considered as the science of organising a systematic investigation of crimes, effective detection, collection, and study of evidence in accordance with criminal procedure law, and prevention of crimes by special techniques and means developed based on natural, technical, and some other special sciences based on *studying the crime mechanism* (emphasis ours – *V. Zh.*) and development of proofs [1]. Subsequently, R. S. Belkin formulated the definition of criminalistics as a science of *the laws of the crime mechanism* (emphasis ours – *V. Zh.*), the emergence of information about the crime and its participants, collection, research, evaluation, and use of evidence, and special tools and methods of judicial investigation and prevention of crimes based on knowledge of these laws [2]. Later, this concept became dominant and in most of the proposed definitions of the subject of criminology there is an indication of the regularity of the crime mechanism. Summing up, A. F. Volobuev states that "the crime mechanism, being its functional (dynamic) side, is part of the objective reality and therefore acts as an object, and some of its properties act as the subject matter" [3]. Indeed, the mechanism of crime as a holistic system of circumstances, processes, factors that determine the emergence of material and other media about the event of the crime, its participants, provides the opportunity to put forward working investigative versions, planning investigations, targeted investigation, identification of the per-

petrator, the victim(s), contributes to the criminal law qualification of the offence, and therefore should undoubtedly act as the object of criminalistic cognition.

The crime mechanism as a criminalistic category, as well as the specifics of the development of a separate doctrine of this object of criminalistic cognition in different years were studied by such criminalists as O. V. Aivazova, O. P. Antonov, R. S. Belkin,

O. M. Vasiliev, A. F. Volobuev, Y. P. Garmaev, O. Y. Golovin, A. V. Dulov, E. P. Ishchenko, E. I. Zuev, Z. I. Kirsanov, M. K. Kaminsky, S. Yu. Kosarev, V. Ya. Koldin, Yu. G. Korukhov, A. M. Kustov, O. F. Lubin, V. O. Obraztsov, M. V. Saltevsky, O. G. Filipov, O. V. Chelysheva, S. N. Churilov, V. Yu. Shepitko, A. V. Shmonin, M. P. Yablokov, etc. At the same time, regarding the definition and content of the term "crime mechanism", its connections with other criminalistic categories, conceptual approaches to the development of a separate forensic doctrine of the mechanism of crime, scientists have made far ambiguous opinions in modern criminalistic literature. On many issues, criminalists have not yet reached an agreed position. This once again necessitates further independent study of the problems that arise in this area.

1. MATERIALS AND METHODS

These specified problematics relate to the scientific problems of the general theory of criminalistics connected to the definition of its object-subject area, outlining the boundaries of scientific research in this subject area, the development of conceptual approaches to building a separate criminalistic doctrine of the crime mechanism. The basic materials that served as the starting point for the preparation of this study are the dissertations of A. M. Kustova [4] and O. F Lubin [5], as well as a monographic study by A. F. Volobueva [3]. Therewith, unfortunately, the above-mentioned problems are understudied in Ukrainian criminalistics. That is why the emergence of A. F. Volobuev's monograph "The crime mechanism and its connection with the conceptual provisions of criminalistics" was positively received by the scientific community.

To solve the outlined problems, a set of general scientific and special methods of scientific cognition was used in the study. In particular, the dialectical and historical methods of cognition allowed to study the evolution of scientific views on criminalistics, enrichment of its terminology, including with such a term as "crime mechanism". The method of semantic analysis is used to specify the meaning of the term "crime mechanism", its features, structure, integrative functions, differences from other criminalistic categories. The comparative method allowed to analyse the recently proposed approaches in the forensic literature to define the concept of "crime mechanism", the creation of a separate criminalistic doctrine of the crime mechanism, the separation of structural elements of the crime mechanism and its inherent patterns, the cognition of which enriches

the content of criminalistics and serves as the basis for the implementation of technical means, tactics, and methodological recommendations for the investigation of criminal offences.

The use of formal-logical and system-structural methods led to the conclusion that the crime mechanism is a complex dynamic system of circumstances that determines the content of criminal activity and includes the situation of the crime, a set of actions of the offender and their accomplices; the attitude of the subject of the crime towards their actions and their consequences; the behaviour of the victim and the actions of persons who became accidental participants in the crime; links between actions and criminal outcome.

The method of systematic analysis provided a generalisation of the accumulated theoretical knowledge on the development of the term "crime mechanism", its correlation with key categories of criminology, in particular the criminalistic characteristics of crimes. The method of legal forecasting provided an opportunity to identify possible areas for further development of scientific views on the category of "crime mechanism", its integration into the terminology of criminalistics, the prospects of creating a separate criminalistic doctrine of the crime mechanism. Thus, it can be argued that the applied methodology provided objective cognition: a) of the crime mechanism as an integral element of the subject matter of criminalistics; b) patterns of evolution of the establishment and development of this criminalistic category, the development of its content and structure; c) the prospects of creating a separate criminalistic doctrine of the crime mechanism.

2. RESULTS AND DISCUSSION

The term "mechanism" has an interdisciplinary meaning and is used in various fields of legal knowledge, in particular in criminal law and criminology to describe the mechanism of negligent crimes [6], criminal law mechanism to combat offences [7], the mechanism of qualification of crimes [8], the mechanism of legal regulation fight against crime [9]. In criminalistics, the development of the term "crime mechanism" has come a long and difficult way, where, according to A. M. Kustov, the following stages can be distinguished:

1. Inclusion of one of the main elements of the crime mechanism in the subject of criminalistics – the method of its commission – the end of 19th century – 1940s.

2. The beginning of the use of the term "crime mechanism" in criminalistics, as well as in criminal law and criminological aspects – the 1970s.

3. The emergence of the scientific term "crime mechanism", the study of methods of preparation, commission, and concealment of crimes – the late 1970 – early 1980s.

4. The establishment and development of the modern doctrine of the crime mechanism – the 1980s – the present time [4].

Proceeding from the etymology of the term "mechanism" – a system, internal structure that determines the order of

a certain type of activity [10], the special literature offers various definitions of "crime mechanism", where the main features are as follows:

1. The process of committing a crime, including its method and all the actions of the offender, accompanied by the formation of material and non-material traces, which can be used to detect and investigate crimes [1].

2. Dynamic system of illegal behavioural acts, which are implemented in certain conditions, direction, and sequence, and the phenomena caused by them, which have criminalistic significance [11].

3. The set of interacting material systems and processes that form the event under investigation and cause the emergence of sources of forensic information [12].

4. Spatial-temporal development of the crime event, the order, combination of sequence and dynamics of individual elements that create it [13].

5. The set of material objects and processes in the preparation, commission, and concealment of a crime [14].

6. The movement of the elements of the structure of the crime (objects, subjects, instruments of the crime) to the point of interaction; the process of interaction itself; further movement (action) of elements before the onset of the criminal result [15].

7. The system of processes of interaction of the participants of the crime, both direct and indirect, with each other and with the material environment associated with the use of appropriate tools, means, and other individual elements of the situation [16].

8. Complex (multi-element) dynamic system, developed primarily by the actions of the subject of the crime, aimed at achieving a criminal result in relation to a particular object of encroachment, as well as the actions of the victim and others, including those who happened to be at the scene [17].

9. Temporary and dynamic order of connection of separate elements, situation, factors of preparation, commission, and concealment of a crime, allowing to recreate a picture of process of its commission [18].

10. The system of interacting of certain elements (their complexes) in space and time, focused on the occurrence of a socially dangerous consequence in the form of a criminal result, as well as the evasion of the subject(s) of a socially dangerous act from criminal liability and punishment [19].

These and many other definitions of the term "crime mechanism" given in the criminalistic literature eloquently testify to the debatability and ambiguity of the interpretation of the criminalistic category under consideration [20; 21]. Furthermore, the controversy is added by those scientists who use the term "crime commission mechanism" [22; 23] instead of the "crime mechanism", with which it seems impossible to agree, because "commission" is only one aspect, elements of the system of criminal activity (behaviour) along with preparation and concealment as independent acts in the structure of activity, and therefore it

is more apt to speak of "crime mechanism" as a full- fledged structure of the functional side of criminal activity.

Scientists also express far from unambiguous opinions regarding the structural elements of the crime mechanism. Thus, R. S. Belkin defined the elements of the crime mechanism as a complex dynamic system as follows: the subject of the crime; the attitude of the subject of the crime towards their actions, their consequences and accomplices; subject of encroachment; method of crime (as a system of deterministic actions); criminal result; the situation of the crime (place, time, etc.); behaviour and actions of persons who turned out to be accidental participants in the event; circumstances that promote or prevent criminal activity; connections and relations between actions (method of crime and criminal result, between participants of the event, between actions and situation, subject of crime and object of encroachment, etc.) [24].

A. M. Kustov considers the following to be the main elements of the crime mechanism: activity (rarely – individual actions and movements) of the subject of the crime (perpetrator, criminal group, group of persons with prior consent of organised group, criminal group); complex (set) of actions, deeds, and other movements of the victim of the crime; complex (set) of actions, deeds, and other movements of persons who turned out to be indirectly connected with the criminal event; certain elements of the situation used by the participants in the criminal event; subject of criminal encroachment. According to the scientist, these components of the crime mechanism in constant motion and development. With this in mind, information about them can be used in the process of detecting and investigating a particular crime [25].

According to Z. I. Kirsanov, the structure of the crime mechanism includes the following elements: the person(s) implementing the criminal plan by purposeful behaviour (actions); method of crime (preparation, commission, and concealment); the victim, their behaviour related to the crime; the subject of criminal encroachment; tools, means of crime, and other objects used for criminal purposes (such as tools for the manufacture of instruments of crime); persons indirectly involved in the crime, such as those who unknowingly assisted in the acquisition or concealment of the tools or means of the crime; material situation (environment) in which the crime was prepared and took place or measures were taken to conceal it, i.e. areas and premises (for example, the place of hiding), household items, objects or things left by the offender or the victim at the scene, as well as material processes that took place during the crime (e.g. fire, accident, production processes, etc.) [26].

A. F. Volobuev, unlike previous scientists, along with the subject, situation, object of encroachment, victim and method, includes traces of the crime in the structure of the crime mechanism, considering them to be the last element, because traces are a consequence (result) of the crime [3]. In the development of the proposed structure, A. F. Volobuev

identifies two groups of inherent patterns of crime: 1) natural connections between the elements of the crime mechanism and the relations between the specific features of the subject of the crime and their chosen subject of encroachment; the connections and dependencies between the specific features of the subject of the crime and their chosen place and time of the crime and the favourable situation, connections and dependencies between the specific features of the subject and their chosen method of criminal encroachment (including selected means and tools); connections and dependencies between the chosen subject of the method of criminal encroachment and traces of their actions, both material and non-material, 2) natural connections that are manifested in the development and manifestation of individual elements of the crime mechanism (connections and dependencies that appear in the formation of traces, connections and dependencies that are manifested in the formation of the identity of the offender, connections and dependencies that are manifested in the formation of aid to the crime) [3]. Summing up, A. F. Volobuev notes that "in the light of the modern doctrine of the crime mechanism, the indication of the regularity of the crime mechanism and the regularity of information about the crime and its participants in R. S. Belkin's definition of the subject of criminalistics is incorrect, because the origin of information about the crime traces) is a component of the crime mechanism. Therefore, it should be considered more accurate to indicate only the laws of the crime mechanism, which cover the considered dependencies and connections of both levels and are established by forensic science as a result of studying such an object as criminal activity [3].

Admittedly, there is no doubt that material and ideal traces are a means of reflecting the circumstances of the crime and carry forensically significant information about the perpetrator, the victim and their actions. And this is natural, because in criminalistics the description of the crime is performed with consideration of the causal, spatio-temporal, informational, and other connections of individual acts of activity. In particular, the spatial relation reflects the position and interposition of material objects within a particular space, such as the positional relationship of objects at the scene; the nature of the spatial area of individual operations and episodes; the general orientation of the event and related processes in space; lack of spatial connections between individual objects and the event of the crime. Temporal connection describes the sequence of manifestation of certain phenomena and processes, shows the specifics of their course. As for the crime, it shows the ratio of elements of the mechanism of the crime in time, the duration of certain events, their beginning and end, the possibility of committing certain actions in a fixed time interval. Causation can manifest itself in two forms: 1) when all criminal consequences are conditioned by the wilful actions of the offender; 2) when the subject of the crime is a material el-

ement of the mechanism of the investigated event, and the voluntary actions of which do not significantly affect the consequences of the crime. Therewith, K. T. Aitbayev draws attention to the fact that there is an obvious dependence between space-time and causal relations, the so-called space-time isomorphism, when spatial changes of things are also their time changes; space and time covered by motion can interflow [27]. In view of the above, I. Yu. Baimuratov states that the following levels of interaction can be distinguished in the mechanism of crime as a complex structure: elementary simple interaction (reflective act); interaction (paired display systems); complex (multilateral) interaction of three or more objects; all processes of interaction as a part of the mechanism of the investigated event [28]. In this aspect, the opinion of V. E. Kornoukhov is also clear that it is impossible not to investigate the crime mechanism when covering the content of the doctrine of traces of crime, and the mechanism is determined by the characteristics of the offender. Therewith, a person manifests oneself by committing and concealing a crime, the variability of which is determined by criminal situations, which leads to the variability of traces of the crime, which, moreover, is determined by the circumstances [29].

Assessing the feasibility of including traces in the structure of the crime mechanism, it is necessary to assume that the mechanism is an internally closed dynamic system of processes and states of the investigated event that occur during the interaction of persons, material objects and that is, the crime mechanism only determines the appearance of traces. In turn, the traces as consequences and as a result of the reflective process go beyond the internal structure of the crime mechanism and therefore it seems controversial to include them in this structure. A. F. Volobuev himself refers to the connections and dependencies that are manifested in the formation of traces to the second level of patterns of the crime mechanism crime, i.e. to connections that go beyond the internal structure of interacting elements and have an external, side effect [3]. Moreover, the process of reflecting the crime mechanism in the environment, and hence the emergence of information about the crime and its participants, should be considered a separate aspect of the subject of criminalistics. In this regard, A. M. Kustov fairly points out that the laws of the crime mechanism constitute an element (part) of the subject of criminalistics, the second element is the laws of origin (development) of information about the crime and its participants, the third is the laws of law enforcement to detect, investigate, and solve a criminal event [30].

Considering the above, the criminalistic doctrine of the crime mechanism examines the nature, essence, and content of the functional side of criminal activity, the patterns of interaction of participants in a criminal event with each other and with the surrounding material environment, as well as patterns due to which emerge the sources of criminalistically significant information about the

crime and its participants. The process of direct formation of material and ideal traces, the patterns of reflection of the necessary information in them should be studied by other separate criminalistic doctrines (R. S. Belkin mentions the doctrine of the trace formation mechanism [31]; A. M. Kustov – the doctrine of detection, record, and study of sources of criminalistically significant information [25]).

A. F. Volobuev's thesis that "the doctrine of the mechanism of crime should be developed precisely as the doctrine of the object of forensic investigation (and its subject)" also needs some clarification [3]. Undoubtedly, the prevailing scientific concept nowadays is that the mechanism of crime is the object of forensic knowledge. But the mechanism of crime as a functional aspect of criminal activity is only one of the components of the object of forensic knowledge. Therewith, recently there have been constant proposals to expand the object-subject sphere of criminalistics in the criminalistic literature [32]. In particular, O. S. Andreev proposes to supplement the structure of the object of criminology with such an element as "post-criminal behaviour of persons associated with criminal activity" [33; 34]. Moreover, the doctrine of the object of criminology defines only general, conceptual approaches to understanding its components, while a more in-depth study should be carried out within individual criminological doctrines, including the doctrine of the crime mechanism. As A. M. Kustov points out, the criminalistic doctrine of the crime mechanism should deservedly take its place among such separate criminalistic theories as criminalistic identification and diagnosis, the doctrine of the identity of the offender and the victim, investigative situations and criminalistic characteristics of certain crimes and others, which have already been developed, substantiated, and applied [25].

The study of the crime mechanism also presupposes the need to clarify the question of the correlation with other criminalistic categories and, above all, with the criminalistic characteristics of the offence. Notably, two approaches have been developed in criminalistics regarding this matter. According to the first one, the criminalistic characteristics of crimes are actually separated from the crime mechanism and interpreted as an abstract scientific concept that is the result of scientific analysis of a particular type of criminal activity (type or kind of crime), generalisation of its typical features and characteristics [35; 36]. As A. M. Kustov notes, despite some external similarities of the constituent components, the mechanism of the crime and the criminalistic characterisation of crimes are not identical and substitute concepts. These are two independent scientific categories that have the right (according to their significance for the general theory of criminalistics and practice) to exist and further development and research [37]. Among the arguments in favour of his position, A. M. Kustov points out that criminalistic characteris-

tics of crimes contain a system of typical information, data on methods of preparation, commission, and concealment of crimes of a particular kind (genus), but they do not contain information on the dynamics of relations through actions between accomplices, victims, and other participants. In the crime mechanism of a certain type, elements of this system are shown in dynamics, in interrelation, step-by- step, typical actions of the criminal on preparation, commission, and concealment of a criminal event are specified, as well as typical and other behavioural acts of the victim and other persons casually involved in a criminal event [38].

Proponents of the second approach assume that the crime mechanism is the subject of criminalistics, the result of the knowledge of which is the knowledge about it, accumulated in the criminalistic characterisation of crimes. In this regard, O. V. Chelysheva writes that the elements of the crime that could potentially be included in the crime mechanism should be described in the criminalistic characteristics [39]. O. Yu. Antonov emphasises that the development of criminalistic characteristics of certain types of crimes is impossible without studying the essence of the term "crime mechanism", its elemental composition and the natural connections between its elements [40]. E. V. Smakhtin points out that the patterns of the crime mechanism together form a forensic characterisation of the crime as some abstract model [32]. S. N. Churilov proposes to refer to the generalised data on the crime mechanism of a certain type with the term "criminalistic characteristics of the crime mechanism", considering it identical to the concept of "laws of the crime mechanism" [41]. O. V. Aivazova notes that the crime mechanism reflects the dynamic nature of criminal activity, while the systematised results of its scientific cognition in a complete, more static state are presented in the form of criminalistic characteristics of crimes [42]. O. Yu. Golovin emphasises that the crime mechanism should be the object of scientific research, the result of which will be the development of forensic characteristics [43]. Summing up, A. F. Volobuev states that "the crime mechanism is an object of cognition (reality), and criminalistic characteristics are a set of knowledge about this object (part of the content of criminalistics). And this is the only difference between them when the elements coincide, as is the case with adequate reflection" [3].

Thus, criminalistic characterisation of crimes is a scientific abstract category, which reflects the qualitative and quantitative information of retrospective orientation as a result of knowledge of the crime mechanism of certain types, i.e. the crime mechanism is an object that is reflected [44], and criminalistic characterisation is a form of its reflection [45–47].

CONCLUSIONS

The crime mechanism is an internal, systemic, complex, dynamic order of interaction of criminologically sig-

nificant elements of criminal activity of the subject and factors of objective reality that reflect the content of criminal activity and cause the emergence of criminalistically significant information. This system includes the situation of the crime; the subject of criminal encroachment; a set of actions of the criminal and persons related to them to prepare, commit and conceal crimes; the subject's attitude to the crime, their actions and consequences thereof; the behaviour of the victim and the actions of persons who became accidental participants in the crime; links between actions and criminal outcome.

The crime mechanism is an internally closed dynamic system of processes and states of the investigated event, which arise in the course of persons' interaction in the crime, material objects, and which generates the emergence of sources of criminalistic information, i.e. the mechanism of the crime only causes traces. In turn, traces as consequences and as a result of the reflective process go beyond the internal structure of the crime mechanism. Criminalistic doctrine of the crime mechanism explores the nature, essence, and content of the functional side of criminal activity, patterns of interaction of participants in a criminal event with each other and with the surrounding material environment, as well as patterns that determine the sources of criminalistic information about the crime. The process of direct formation of material and ideal traces, the patterns of reflection of the necessary information in them are the subject of study of another separate criminalistic doctrine of the trace formation mechanism.

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RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND ELEMENTS OF CRIME COMBATING POLICY IN UKRAINE: PROBLEMS OF HARMONIZATION

Problem's setting. *The relevance of involving international means of criminal counteraction to criminal threats to the international system of justice, humanity in their projection on Ukraine, is currently beyond doubt, and therefore does not require special argumentation. Much has been already written and voiced in this regard in science, journalism and the media… The life itself dictates the need to turn to all possible tools to protect Ukrainian statehood, liberal and humanistic principles of civilized coexistence on the planet from armed aggression of the Russian Federation (hereinafter – RF), background political and criminal phenomena of the widest range of manifestations. Therefore, it is quite natural and justified to set the problems of Ukraine's recognition of the Rome Statute of the International Criminal Court (hereinafter – ICC) at the highest level of discussion and on numerous polemical platforms. At the same time, the decision to ratify the mentioned Statute does not guarantee effective international criminal justice regarding crimes committed in Ukraine, even if the national criminal law is brought into line with the basic provisions of the Statue, or ensuring their consistency. Moreover, such a solution can create many problems for Ukrainian society, generate additional threats to national security, and significantly aggravate the criminogenic situation. Detailed elaboration and consideration of these circumstances is an urgent task for modern science of criminology.*

Certain theoretical basis for solving these problems is presented by the works of O.M. Bandurka, V.O. Hlushkov, O.M. Lytvynov, H.V. Maliar, Ye.L. Streltsov and some other criminologists. However, there is still no final answer to the question on obstacles and possible risks to Ukraine's ratification of the Rome Statute of the International Crim-

inal Court. The research works do not take into account a number of dynamic circumstances of military and political nature, as well as established practices in the field of counter-terrorism efforts, perspectives for the introduction of transitional justice, etc.

The purpose of the article *is to provide a description of some significant problems for ratification of the Rome Statute of the International Criminal Court in correlation to the elements of policy in the field of combating crime in Ukraine, to suggest the ways to solve them.*

Main part. *It may seem that there is no doubt about the obviousness of the goals for ratification of the Rome Statute of the ICC by the Verkhovna Rada of Ukraine. There is a great temptation in the extremely difficult situation of resistance to armed aggression to "grab" anything that, at least hypothetically, would be positioned at the level of discourse with the possible means of such resistance. If there are crimes, there must be punishment. The logic is simple. But it is the logic in the system of linear action of the "stimulus – reaction" format, when the role of the situation, where the action takes place, is missed. We offer to consider a slightly different logic in the interrogative format "what do we not see?". This format, first of all, corresponds to the multidimensionality of the situation of hybrid war and, secondly, is able to take into account unobvious, but legally, criminologically significant factors in the recognition of the Rome Statute of the ICC. The development of reasoning according to this logic can be represented in three questions: what are we struggling with, how are we struggling and what are we hoping for? Finding answers to these questions allows us to represent several theses and arguments to them.*

I. Uncertainty of domestic criminal and legal policy – an obstacle to the activities of the ICC. This uncertainty can be represented by two positions.

1. "Crimes against Maidan movement" – terrorist attacks or crimes against humanity?

According to the above-mentioned statements of the Ukrainian Parliament on the recognition of the jurisdiction of the ICC, there is a request to bring to international criminal liability the organizers of the killings of protesters during the Revolution of Dignity. At the same time, according to the Prosecutor General's Office of Ukraine, those killings (including those of a mass nature and mainly occurred on February 18–20, 2014) are classified as terrorist acts. That qualification of the prosecution is also supported by the representatives of the victims (united in the Attorney's Advisory Group). There is the problem that the existing law-enforcement practice actually blocks the possibility of involving the ICC in considering the situation with "Maidan crimes", since terrorist crimes, as we know, are not within the jurisdiction to this agency.

Further logic of actions to solve this problem is assumed in one of two scenarios: a) the final legal assessment of Maidan crimes as terrorist attacks and the rejection of the possibility of involving the ICC; b) exclusion of the reference to the Art. 258 of the Criminal Code of Ukraine from the formula of qualification and accusation, re-qualification into

intentional homicides with appropriate aggravating circumstances. At the same time, *it is fundamentally important to ensure a purely legal approach to select scenarios, without relying on political expediency and the desire to transfer the situation to the ICC*.

2. The problem of legal assessment of crimes under the ICC jurisdiction, through the prism of the so-called "DPR" (Donetsk People's Republic) and "LPR" (Luhansk People's Republic).

Similar enforcement problems arise with the qualification of actions related to the deployment of armed aggression in certain districts of Donetsk and Luhansk oblasts (IDDLR). The Ukrainian Parliament and the President of Ukraine in their official documents and regulations have repeatedly called the Russian Federation as an aggressor, as a country that commits international crimes against Ukraine. These talking points are also confirmed by the report of the ICC prosecutor within the preliminary investigation of the situation in Ukraine dated from December 4, 2017, where, the armed confrontation in IDDLR is called among other things as an international armed conflict on the basis of direct combat clashes between the armed forces of Ukraine and RF.

At the same time, this position of state policy contradicts the practice of criminal law enforcement, as well as the recent diplomatic discourse. The following circumstances attract attention:

1) according to the official information of the Secret service of Ukraine, the actions on forming the so-called "DPR" and "LPR" are qualified under the Art. 258–3 of the Criminal Code of Ukraine – "Formation of a terrorist group or terrorist organization". It is the basis that these organizations are referred to as terrorist. It is evidenced by the very title of the statement (resolution) of the Verkhovna Rada No. 145-VIII dated from February 4, 2015, where "DPR" and "LPR" are indicated as terrorist organizations;

2) a set of measures until 2018 to repel armed aggression was carried out as Anti-Terrorist Operation;

3) while determining the legal nature of the so-called "DPR" and "LPR" courts mostly refer to the Art. 1 of the Law of Ukraine "On Combating Terrorism" and define them as terrorist organizations;

4) there is a practice in Ukraine of qualifying a significant number of shelling of civilian objects from the IDDLR not under the control of the Ukrainian authorities as terrorist attacks in regard to the previous circumstance, which is reflected in the statistical picture of terrorist acts. Artillery shelling of Mariupol, a civilian bus near Volnovakha, destruction of the Malaysia Airlines aircraft MH-17 were also qualified as terrorist attacks;

5) 1718 crimes under the Art. 258–3 of the Criminal Code of Ukraine were registered for the period of 2014–2018. 369 people were convicted during the same period. The absolute majority of them were convicted for participation in the terrorist organizations of "DPR" and "LPR". 22 people were convicted for financing terrorism (the Art. 258–5

of the Criminal Code of Ukraine), terrorist organizations of "DPR" and "LPR" for the period 2014–2018. At the same time, court verdicts in some cases record the structural features of the terrorist organizations of "DPR", "LPR", where "political wing", "security wing" are, in particular, distinguished. The creation of illegal armed formations are among other functions of the latter;

6) the activities of the "DPR" and "LPR" at the highest diplomatic level, as well as the Russian Federation's support for them is called terrorist activities. In particular, the Minister for Foreign Affairs of Ukraine Vadym Prystaiko stated the following at the anniversary NATO summit, which was held in London on December 3 and 4, 2019: "I do not see the difference between terrorism and Russia. Terrorism is an action to achieve a political goal through the use of force. It kills Ukrainians, it uses chemical weapons in the EU… Russian aggression against Ukraine is terrorism at the highest, state level…" [1].

Thus, we state the uncertainty and contradiction of the national policy to counteract the encroachment on the national security of Ukraine by the Russian Federation. On the one hand, the armed aggression is emphasized, on the other – the reproduction of the phenomenon of terrorism, the manifestations of which are not in the jurisdiction of the ICC. This uncertainty creates significant obstacles to the successful operation of the ICC, which may also be the reason for the long-term study of the situation without initiating a preliminary investigation.

This uncertainty at the national level should be eliminated by providing a clear signal to the ICC, guiding it within the national assessment of destructive actions against Ukraine. How do we achieve this?

First of all, it should be assumed that the status of hybrid war excludes the linearity of the logic of actions, inherent its binary oppositions, including in the format of "either terrorism or aggression". Not "either… or…", but "both aggression and terrorism". It is necessary to adhere to the logic that Russia is an aggressor country not only at the regulatory level, but at the highest diplomatic levels, and its top leadership are people who are reasonably suspected of committing crimes of aggression, war crimes.

Secondly, terrorism is one of the tools of committing crimes of aggression (waging an aggressive war). Corpus delicti of terrorist and relevant international crimes is in this case not in relation to competition, but in regard to totality, that is not mutually exclusive. This should be reflected in case law, possibly in declarations, information letters sent to the ICC.

Thirdly, "DPR" and "LPR" cannot be identified as terrorist organizations. They are much more complex, quasi-state entities, which operate not only in the areas of criminal terrorism of the state of Ukraine, but also education, medical, social services (disregarding their content), quasi-law enforcement and quasi-judicial activities (termination, "detection", "investigation", "quasi-judicial consideration" of crimes, which are also recognized under the Criminal Code

of Ukraine), etc. This activity cannot be characterized as terrorist one. Otherwise, all those who pay the mandatory fees, payments to the budget of "DPR", "LPR" are persons who finance terrorism. Moreover, all so-called "DPR" and "LPR" citizens, i.e. persons who have the appropriate "passport" should be considered as members of terrorist organizations. Of course, it is not grounded either from a legal or from a humanitarian and political point of view.

We should look for a completely new legal assessment of such entities. They can be conventionally called ***aggressive organizations (or aggressor's organizations)***, the creation and maintenance of which should be considered not as the creation of terrorist organizations and terrorist financing, respectively, but as a crime of aggression – unleashing, waging an aggressive war. Their socio-legal nature, the target-oriented setting is expressed in the capture and retention of the territory of another state under the control of the occupying power, which does not directly indicate its political affiliation with the aggressor state. The issue of separate criminalization of the activities of these organizations, participation in them is a matter of separate research.

Such complexly formed organizations can include and include both non-criminal, humanitarian and criminal structural formations, including – armed, paramilitary formations (both without and with the involvement of military personnel of the aggressor country, private military companies), terrorist organizations not stipulated by the law of Ukraine. And when members of *armed groups not provided by the Ukrainian law operating as part of an aggressor's organization* commit serious violations of international humanitarian law as an element of the policy of aggressor's organization, then such actions should be qualified as crimes of aggression, war crimes, crimes against humanity, but as not terrorist attacks. However, it does not exclude the possibility of committing certain crimes by their representatives that have features of terrorism, terrorist attacks, in particular including those committed outside the territory of direct combat clashes with the Ukrainian soldiers. But these crimes (terrorist attacks) will not be as widespread as currently reflected in the official statistics.

The perception of this suggestion to reorient law-enforcement practice reveals, however, another very serious problem: how to deal with those already convicted for the participation in terrorist organizations of "DPR", "LPR", terrorist financing? The answer to this question – is not plain to see. As a primary solution to this problem, we can offer the following: a) review of criminal proceedings on the basis of newly discovered circumstances (identification of a different nature of the organizations of "DPR" and "LPR"); b) an exclusively differentiated approach to assessing the actions of convicts within newly discovered circumstances with the most careful, detailed description of the characteristics of structural units of aggressive organizations of "DPR" and

"LPR", where the convicts participated in or which were funded.

We believe that bringing criminal law-enforcement practice in line with these provisions will make it possible to prepare a proper and clear legal platform for the deployment of the activities of the ICC in Ukraine.

II. International criminal law-enforcement in Ukraine: strategic and security issues.

Achieving the goals of international criminal justice in Ukraine cannot be considered outside the strategic context that is outside the conditions and goals of implementing a certain strategy to repel armed aggression [2; 3]. What is the strategy of Ukraine? It is very difficult to give a definite answer to this question. At least due to the lack of any published official documents that could indicate a specific strategy to counteract to unfriendly, aggressive actions of the Russian Federation towards Ukraine, and not just appeals, intentions, declarations. And it is hardly possible and appropriate to publish such documents, even if we assume that the strategy does exist. However, this does not preclude the possibility of determine both hypothetical options for strategy on this issue, and by the way of observation, to identify some features of conscious or unconscious (due to external administration) implementation of their elements, namely:

– *strategy of struggle*, which provides the following basic parameters in different variations: a) the establishment of the restoration of state sovereignty of Ukraine throughout its entire territory within the internationally recognized borders, including the Autonomous Republic of Crimea; b) focus on the exclusion of any commercial contacts with the aggressor country as morally unacceptable; c) focus on both internal mobilization and on the mobilization of the international community to fight against aggressor (historical example – Finland, from the beginning of the Soviet aggression in 1939). The latter presupposes the unconditional expediency and necessity of involving international mechanisms of criminal justice that is possible (as a legal reality) *only* in the situation of a capitulating party, a party ready (compulsorily or voluntarily) first of all to prosecute in terms of international boundaries the country's top leadership, other criminals guilty in gross violation of international humanitarian law.

It is not difficult to find out whether Ukraine is guided by this strategy. It is enough to answer the question: is there trade with RF and are there diplomatic relations with this country? It will be superfluous to answer them in this work;

– *capitulation strategy* (the author apologizes for the used meme), which provides the fulfillment of the aggressor's requirements, satisfaction of the claims as a condition for preserving sovereignty in a cautious manner. Recognition of the Rome Statute of the ICC in this strategy is impractical and in fact cannot be implemented because of the external administration of the political process in the capitulating state by the aggressor state. In case of recognition,

there is the risk of one-sided litigation within the logic of "winners cannot be judged";

– *strategy of compromise*, which consists in: a) delimitation of the goals of de-occupation of the Autonomous Republic of Crimea and IDDLR; b) the restoration of state control on the territory of IDDLR while keeping information, economic and political influence of the Russian Federation in a particular configuration. It is important to note that a compromise can be permanent, final, or temporary, i.e. aimed at optimizing the use of time resource in a strategy of higher level – the strategy of struggle. It is impossible to determine with certainty which of its variants is currently being implemented by the top political leadership of Ukraine. However, it is obvious that the strategy of compromise is being implemented. There is a lot of evidence for this. Therefore, the next question is to determine the role of the ICC in the strategy, where we currently find ourselves and what situations this strategy produces.

It is worth paying attention to four points in this aspect. *First*, public administration strategy (including security one) is a purely internal matter, and therefore can be imposed as an international context only by powerful geopolitical players, and we must admit that Ukraine is not among them. At the same time, it should be acknowledged that the key elements of the strategy to repel armed aggression are coordinated by Ukraine with our "foreign partners", relying on allied assistance (financial, technical, political, etc.). Therefore, despite the internal nature of such strategies, if a compromise is a strategic mean of temporarily (freezing) or finally resolving the conflict, it is obvious that agreement can be reached with key foreign allies of Ukraine. Thus, we can assume that the compromise strategy is an international strategic context, and the compromise itself and the dialogue with the Russian Federation are the priorities (and this clearly does not indicate the strategy of struggle, including in the international context).

The second point: the court is not the subject of dialogue, and the compromise does not provide the establishment of the truth with a full range of legally significant consequences. Therefore, t*he precedence in the strategy of compromise to repel the armed aggression of the Russian Federation does not functionally involve the ICC*. Therefore, it is logical to assume that: a) Ukraine's attempts to involve the ICC into the institutional mechanism for combating international crime, which is reproduced in our country, will have significant resistance at the political level from Russian Federation, Ukraine's foreign allies, who also use not the strategy of struggle, but the strategy of compromise, as well as by domestic political and the most influential financial and economic actors who follow the logic of compromise; b) Ukraine's recognition of the Rome Statute of the ICC will entail the risk of Russia's withdrawal from the dialogue, the destruction

of the compromise strategy, and with a high probability, the complication of the situation in the area of the Joint Forces Operation.

The third point: the recognition of the Rome Statute of the ICC contrary to the strategy of compromise may have one-sided consequences in terms of real justice. The ICC is the body that ensures an objective and complete investigation of the crimes under its jurisdiction within defined situations. Therefore, it can be assumed that not only the Russian soldiers and members of other illegal armed groups should be prosecuted, but also servicemen of the Armed Forces of Ukraine, the National Guard, and service members of volunteer battalions who, along with fulfilling a high mission to protect Ukraine's sovereignty, committed war crimes in certain cases. However, there is the risk that Ukrainian "service members" will be prosecuted unilaterally (from the point of view of the parties to the conflict) regarding the situation of actual inaccessibility to justice of criminals from the Russian military men, members of illegal armed groups. There is no doubt that this circumstance will provoke significant socio-political tension, the protests of which are likely to take criminal forms.

Thus, Ukraine's recognition of the Rome Statute of the ICC *at the initial stages of implementing the compromise strategy* will complicate the criminogenic situation due to crimes of a political orientation (against the foundations of national security, against peace, international law and order, terrorist crimes). Instead, such recognition will have less pronounced criminogenic potential and higher efficiency, if carried out at later stages of the implementation of the stated strategy, in the post-conflict phase.

III. International criminal law-enforcement in Ukraine: a look into the perspective of post-conflict relations.

Talking about the later stages of the described strategy, it is a question of starting the mechanism of the international criminal justice in Ukraine *in a situation of real development of the concept and practice of transitional justice*. It should be borne in mind that the nature of the armed conflict on the territory of Ukraine is complex. It is possible to distinguish two of its components: external (international) and internal (non-international). In particular, it is highlighted in the ICC's annual reports and has been repeatedly pointed out by the analysts from the Ukrainian Helsinki Human Rights Union – a key monitoring and research center on the issues of transitional justice in Ukraine. It is the internal, non-international etiology of the conflict in IDDLR is the subject to careful criminological analysis. Of course, such an analysis is possible only within a series of individual monographic studies. But it is already possible to determine in the most general terms that the institutional activities of the ICC should be deployed in the context of such a component of transitional justice as the punishment of those guilty of the most serious crimes of the con-

flict, combined with the establishment of historical truth. And it is fundamentally important, because most of the population of IDDLR according to the results of opinion polls: a) support the policy of the aggressor country, fills it with a specific humanitarian, peacekeeping content, does not recognize the criminal nature of aggressive actions, including the formation of "DPR", "LPR"; b) the reasons for the beginning of the conflict are seen in the Revolution of Dignity and interference of the United States in the internal affairs of Ukraine. Without and before the establishment of historical truth, there is a great risk of perceiving the ICC verdicts as unjust and illegitimate. The latter excludes the possibility of social reconciliation, has the potential to restore the conflict.

On the other hand, it is the judicial activity of the ICC is able to form an appropriate evidence base that will form the basis for refuting the social myths spread by the propaganda of the aggressor country. Thus, international criminal justice is able to complement the establishment of historical truth, but not to play the role of this institution on the exceptional basis. Therefore, the factor of time, strategic and tactical contexts are important for the use of international criminal justice in Ukraine.

Conclusions. Ratification of the Rome Statute of the International Criminal Court by the Verkhovna Rada of Ukraine is a political and legal act, the execution of which can have a number of consequences in the field of criminological security. Before its implementation, it is necessary to take into account existing and perspective (predicted, planned) criminogenic risks, elements of policy in the field of repelling armed aggression, anti-terrorist policy, future reintegration of the currently temporarily occupied territories. Therefore, time is an important factor in deciding on ratification. The latter can take place effectively, with minimal criminogenic risks as an element of the implementation of the strategy of transitional justice in Ukraine. Besides, it is necessary to radically revise the existing practices of counteracting the activities of the so-called "LPR" and "DPR" as exclusively terrorist organizations. We need a fundamentally different approach in determining their legal nature and legal assessment of the activities, based on the structural and functional primacy of ongoing aggression and crimes of the appropriate orientation.

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CRIMINAL–LEGAL IDEOLOGY AND CRIMINAL–LEGAL POLICY

Abstract. *The situation with the current criminal legislation of Ukraine cannot be defined other than as a crisis. The number of amendments and additions to the current Criminal Code of Ukraine over 18 years has reached a critical point. At the same time, it should be recognized that these changes and additions are mostly caused by narrow-clannish, political, opportunistic interests, which are often ill-considered, such that not only fail to solve the problems of combating encroachments on the most important social relations, goods, and interests but, on the contrary, are detrimental to this activity.*

Unfortunately, during the years of existence of the independent Ukrainian state, no nationwide idea has been created, no national ideology has been formed, even though in 1991 there was a change of socio-economic formation, which led to such a need. Consequently, the national legal ideology and a constituent of it, such as criminal law ideology, were not formed. Therefore, the current criminal legislation of Ukraine retains the ideological layers that were inherent in the criminal law of the Ukrainian Soviet Socialist Republic, it remains to a large extent built on the criminal law ideology of the times of the Soviet Union.

This is due to an absence of a national criminal law ideology and criminal law doctrine and concept in the basis of modern national criminal law policy.

Criminal-legal ideology, which is a component (element) of the legal ideology as a whole, for its part, is an element of criminal-legal consciousness. It is a complex of systematized, coordinated criminal-legal ideas, theories, concepts, provisions, and principles, which stand among themselves in appropriate subordination, aimed at the formation of desirable for society (a separate social group) criminal legislation, the practice of its application, formation in criminal-legal consciousness of a positive assessment of the criminal-legal fight against crime, reasonable requirements for its improvement.

Criminal-legal ideology – is an independent political and legal phenomenon, which performs the function of determining the role and limits of distribution of criminal law in the normalization of the behavior of members of society in their subordination to the most

important generally recognized rules of conduct, values, and interests. The purpose of the article is to develop approaches to the understanding of criminal law ideology, its place in the system of legal policy, the concept, and place of criminal law doctrine in the structure of criminal law ideology, the concept of an ideology of criminal law policy and principles of formation of the concept of the criminal law of Ukraine.

Keywords*: criminal legal consciousness; criminal-legal ideology; criminal-legal doctrine; the ideology of criminal-legal policy; criminal-legal policy; criminal-legal ethos.*

Analysis of the modern criminal legislation of Ukraine leads to a regrettable conclusion about its rather deep crisis state. Only the fact that over the 18 years of existence of the current Criminal Code of Ukraine (hereinafter – the CC of Ukraine)[1] more than 1000 amendments and additions have been made to it, is a clear indication thereof. At the same time, attention is drawn to the lack of their scientific validity, the high degree of conflicts, the low level from the standpoint of legal technique, inconsistency, and the like. This leads to the fact that not only ordinary citizens cannot navigate in matters of criminal legal protection, although primarily they are the primary beneficiaries of the criminal law, even professional lawyers occasionally face problems. Almost all scholars who study issues of criminal-legal protection pay attention to this. And that is why the creation by the President of Ukraine V. Zelenskyi of a working group on reforming the criminal law of Ukraine was completely expected[2]

Welcoming this decision and the beginning of work precisely from the analysis of conceptual approaches, it is advisable to note that this activity should begin first with the definition of the foundation on which the concept itself will be developed and, in the future, will be built new criminal legislation of Ukraine. The core of this foundation should be the criminal-legal ideology as a component of the criminal-legal consciousness. Precisely on this basis, the criminal-law doctrine should be developed, the concept of criminal-law policy should be adopted, and lawmaking activities should be carried out.

Regrettably, during the years of existence of the independent Ukrainian state, no national idea, in general, has been developed, no legal ideology of the country and criminal law ideology as its component has been elaborated. This was to a certain extent prevented by the stipulation in Article 15 of the Constitution of Ukraine stating that public life in Ukraine is based on the principles of political, economic, and ideological diversity and the refusal to recognize any ideology as obligatory and the only proper one[3]. It is quite

[1] Кримінальний кодекс України: Закон України від 5 квітня 2001 р. №2341-III (дата звернення: 13.01.2020).

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understandable that this provision was fixed in connection with the desire to avoid by any means repeating our bitter history, when there was officially only one Marxist-Leninist ideology and any attempts to oppose it were recognized as anti-state and, often, criminal. It seemed that such an approach of the Ukrainian legislator should be welcomed. On the one hand, yes. But on the other hand, the refusal to develop a national ideology (and legal ideology in particular) as such was enshrined at the highest legal level, forgetting that no country in the world can exist without its ideology. It is impossible to build a national country without first elaborating its ideology, thereby defining the goals of construction and ways of development. Attempts "to borrow the concept of democratization of the life of society, idealization of its forms of expression in foreign states and their ill-considered borrowing, copying without consideration of Ukrainian mentality" often not only do not lead to the desired positive results but, on the contrary, worsen the social and political situation catalyze negative anti-social manifestations[1].

The uncertainty of legal ideology cannot but harm the functioning of society, its separate spheres, firstly, the legal life of citizens, which leads to offenses, attempts to ignore the law, and the like[2].

The lack of a national ideology and its support by the majority of the population of the country became one of the reasons for separatist movements in eastern Ukraine. At the same time, it should be understood that neither the state nor its legal system can function effectively without an appropriate ideology. As for the legal system, it should be clearly defined that its development without the prior development of a legal ideology is virtually impossible. Unfortunately, the problems of legal ideology in domestic legal science have not been given sufficient attention.

This is particularly relevant to the analysis and development of the problems of criminal-legal ideology. M. Panov M. Nediukha A. Lutskyi M. Khaustova S. Savchenko V. Kalitynskyi and several other domestic scientists addressed the analysis of the influence of legal ideology on the legal doctrine, lawmaking, and law enforcement in some respects. However, these works are devoted to the analysis of problems of legal ideology in general, without specifying the point of view of criminal-legal ideology[3]. This gap leaves the criminal-legal doctrine on the foundation of theoretical developments built on the ideological platform of Marxism-Leninism. Of course, this in no way implies the need to cross out all the achievements of criminal-legal thought of previous times. However, we

[1] В. Грищук, Філософсько-правове розуміння відповідальності людини (2-ге вид, Хмельницький ун-т управління та права 2013).

[2] М. Недюха, Правова ідеологія українського суспільства (МП Леся 2012).

[3] Вже після того, як ця стаття була передана до редакції, вийшла друком монографія: Ю. Коломієць, Кримінально-правова ідеологія: філософсько-правове дослідження (ФОП Петров О С 2019) 467.

should not forget that the development and formation of the legal doctrine are based on the economy and ideology of the dominant class, social group, and the like in society. If the doctrine remains unchanged, if it almost entirely retains the characteristics of the doctrine of the previous formation, then are we entitled to claim that it is novel, corresponds to the ideology of modern society. In Ukraine, in 1991 there was a change of socio-economic formation, which caused the need to develop a national legal ideology, which has not been implemented. If we turn to history, we should give credit (as blasphemous as it may sound), to the Bolsheviks, who, after seizing power, immediately abandoned the legal ideology of their predecessors and began state-legal development based on their ideology. This largely determined the entire long history of the Soviet Union, and generally the possibility of its existence for decades. It will not be a revelation that the law has always been a powerful tool in the hands of the ruling elite, with the help of which it defended its interests. At the same time, an important role was played by the theoretical justification of the place and role of law in the life of society. That is why, with the change of socio-economic formation, there is a change in the understanding of certain institutions of criminal law, which bears the corresponding ideological load. There are more than enough examples of this in the history of criminal legislation of the Soviet Union.

After the change of socio-economic formation in Ukraine, the relevant changes in the understanding and the legislative consolidation of certain institutions of criminal law took place as well, but to be frank, they were quite limited and concerned mainly the institutes of the Special Part of the Criminal Code of Ukraine. Theoretical approaches have not changed in fact, and those that have changed, often do not hold up to any criticism[1].

Of course, we reiterate, we do not call to discard all accumulated throughout the centuries bundle of theoretical achievements of domestic criminal-legal doctrine, because they absorb all the progressive that was accumulated for previous historical epochs. However, by building domestic criminal legislation, developing national criminal legal doctrine, we should move away from the ideological background of the Soviet era. The whole history of Soviet power was a history of class struggle first of a group of rebels, who illegally seized power in the country, and then the nomenklatura class, nurtured by this group, with its people through criminal law. The entire Soviet criminal law was built on the ideological platform of Marxism-Leninism, from the concept of crime to the sanctions of the Special Part of the Criminal Code of Ukraine.

Discussing legal ideology as the foundation of legal doctrine and legal policy, it is necessary, first of all, to define with the very concept of "ideology" (from Greek Ιδεολογία from ιδέα

[1] Прикладом цього можуть бути відомі зміни до законодавства, що запровадили інститут кримінального проступку.

"prototype, idea" + λογος "word, mind, doctrine"). As is well known, the term was used in science by the French philosopher and economist A. L. C. Destutt de Tracy in 1796 to analyze sensations and ideas. As M. Panov notes, legal ideology – is the most important component (element) of legal consciousness, which is a set of ideas, theories, legal concepts, and fundamental principles that in generalized form reflect the philosophical understanding and evaluation of legal reality[1].

The legal system of any state is always extremely sensitive to prevailing in society ideological doctrines, perceives them as "a guide to action". As the conditions of social life change, people's ideas, and feelings, including legal views, change. In a class society, legal ideology is always a class ideology, reflecting (fixing in the norms of law) the social and economic position of the ruling class (social group), their social interests, protection mechanisms, relations with other classes, and social groups. Totalitarian countries are characterized by a monistic ideology. This was vividly manifested in Soviet Ukraine, where Article 6 of the Constitution of 1978 enshrined the provision that: "Armed with the Marxist-Leninist doctrine, the Communist Party determines the general perspective of social development and the line of the internal and foreign policy of the USSR, directs the great creative activity of the Soviet people and gives a systematic, scientifically grounded character to its struggle for the victory of communism."[2]

Totalitarian legal ideology effectively justifies the normative enshrinement of terror against one's people.

In democratic states, there is ideological pluralism, which ensures the democracy of the state regime. At the same time, at the level of the state one legal ideology must be chosen (without any normative consolidation), which will determine the direction of development of the state and its legal system.

Legal ideology, being a part of legal consciousness, determines the legal policy of the state, as it determines the goal that can be achieved by adopting legal regulations. It serves as a theoretical basis of state legal policy.

Criminal-legal ideology, which is a component (element) of legal ideology as a whole, for its part, is an element of criminal-legal consciousness. It is a complex of systematized, coordinated criminal-legal ideas, theories, concepts, provisions, and principles, appropriately subordinated to each other, which aim to form desirable for society (a separate social group) criminal legislation, the practice of its application, the formation of a positive assessment of the criminal-legal fight against crime and reasonable requirements for its improvement in criminal-legal consciousness.

[1] М. Панов, Правова ідеологія і реформи в Україні Юридичний вісник України (Київ, 26 вересень – 2 жовтень 2015) 13.

[2] Конституція (Основний закон) Української Радянської Соціалістичної Республіки. Прийнята на позачерговій сьомій сесії Верховної Ради Української РСР дев'ятого скликання 20 квітня 1978 р. (дата звернення: 13.01.2020). www.pravoua.com.ua

Criminal-legal ideology is an independent political-legal phenomenon, which performs the function of determining the role and limits of distribution of criminal law in the normalization of the behavior of members of society in their subordination to the most important generally accepted rules of conduct, values, and interests. As M. Nediukha notes: "According to this definition, legal ideology becomes monistic, since its essence is determined by the norm of law, unlike, say, political ideology, which is always pluralistic"[1]. The failure to form a criminal legal ideology as such causes, in the end, the anarchy of legislative proposals in the field of criminal legal protection and leads to legislative instability. This is exactly what we are witnessing today. The volume of legislative proposals from the subjects of legislative initiative exceeds all reasonable limits. At the same time, the legal ignorance of the authors of a large number of bills often leads to almost ridiculous cases, when it is proposed to establish, for example, criminal liability for violation of the legislation on beekeeping or improper performance of duties by lifeguards.

Criminal-legal ideology starts with the formation and development of appropriate ideas, is the primary stage of any human activity. It is the idea that determines the ultimate goal of human activity. As R. Lening noted, "a goal is the creator of all law, and there is no legal norm that does not owe its origin to a goal"[2]. However, the goal, as a rule, for activity does not exist as a single concept. As a unit, it enters an aggregate with other purposes, which together form a general purpose, which is the criminal law ideology. "It is in the ideology that the system of values is formed, which then forms the basis of legal behavior. Therefore, ideology acts as a prerequisite and precondition for the emergence and action of legal norms."[3]. The formation of criminal-legal ideology is determined by the task of establishing Ukraine as a legal society-oriented, sovereign, democratic state, which is enshrined in Article 1 of the Constitution of Ukraine[4]. Its purpose is to perform the function of harmonizing the behavior of individuals and the community as a whole in society. This "harmonization" is carried out through the formation of the doctrine and concept of criminal-legal policy and its implementation in specific legal norms. Criminal-legal ideology determines the criminal-legal policy. However, it is not the only one. Sources of criminal-law policy are also criminal-law doctrine, current legislation, decisions of the Constitutional Court of Ukraine, and existing international treaties, consent to which is granted by the Verkhovna Rada of Ukraine.

Criminal-legal ideology bears a double load, acting, on the one hand, as a balanced system of ideologically justified prohibitions of specific actions that are recognized as socially harmful, and on the other hand, as a set of "conceptually justified ideas, principles, and

[1] М. Недюха. (5) 41

[2] Рихард Ленинг, Об основе и природе права (Типография А И Мамонтова 1909) 7.

[3] А.. Васильєв (ред), Государственная идеология (Юрлитинформ 2019) 51

[4] Конституція України (н 3).

provisions, incentives, and motives that contribute to strengthening and approval of lawful principles of state and society functioning."[1]

At the same time, it should be emphasized that criminal-legal ideology cannot be universally binding, cannot be recognized at the normative level as a priority. It must always be open to criticism, be debatable, dynamic.

Criminal-legal ideology:

– represents the basis for the development of criminal law doctrine, the development of the concept of criminal law policy, its strategy and tactics, the implementation of legal regulation;

– is the basis for the formation of a holistic, stable, structural, and functional legal field of the area of criminal law;

– is designed to be an effective mechanism for the protection of the most important social relations, benefits, and interests;

– is designed to ensure a balance of protection between the rules of criminal law and the rules of other branches of law;

– is designed to take into account the national criminal law mentality;

– designed to ensure the democratic nature of criminal law policy;

– is designed to determine the balance between the system of penalties and other measures of criminal-law influence;

– is intended to be the basis for a legislative response to new threats.

Criminal-legal ideology consists of the criminal-legal ethos, criminal-legal doctrine, and the principles of criminal law.

What is the criminal legal ethos? Everyone is likely to have his answer. Some people see it as the creation of a criminal law that is capable of responding quickly to all infringements of social relations, goods, and interests. Others see it as a law that will impose harsh penalties on those who violate it. Thirds perceive it as a small, but sufficiently harsh, statutory act that defines responsibility only for the most dangerous encroachments and the like. The fourth would like to see a criminal law that would be able to eliminate crime in general as a phenomenon. The fifth, the sixth … Of course, the legal ideal should be neither abstract nor utopian in its content. It should be scientifically substantiated, corresponding to the stage of socio-historical development, socio-economic formation. It should be noted that the criminal-legal ethos of society, certain social groups may not always be progressive. For example, not everyone, understanding the low level of preventive potential of punishment, continues to believe that its severity is capable of preventing the commission of crimes, and advocates the restoration of the death penalty in the Criminal Code of Ukraine.

The criminal-legal ethos is based on the corresponding criminal-legal interests. It is on their basis that the corresponding ideology is formed, which, through the development of the relevant

[1] Недюха (н 5) 54

doctrine, is eventually formalized in the form of a corresponding normative act. Determining for the system as a whole remain the interests that shape the criminal-legal policy. The system of these interests is quite complex and multidimensional. However, the interest itself is not primary. It is based on needs. A change in needs leads to a change in the corresponding social interests, which (ideally) find their justification in the legal doctrine and, consequently, cause a change in the criminal law. At the same time, it should be emphasized that changes in criminal law should occur solely given a global change in the needs and interests that have arisen on their basis. Unfortunately, changes in the Criminal Code of Ukraine are often based not on global social interests, but narrow-clan, even individual interests.

In the context of the issue under discussion, the need to reduce crime rates, to achieve public safety, to combat the most dangerous types of anti-social behavior is seen as a necessity. The normative framework, which enshrines the global interest in this issue, is fixed in Article 1 of the Criminal Code of Ukraine, which defines the main objectives of the Code.

It seems that the most important in this context is the interest of achieving a rational balance between the permitted and the prohibited (global interest). Returning to history, it is easy to remember the times of unjustified expansion of criminal repression, which was determined by the interests of a totalitarian state and did not correspond to the objective interests of social development, the interests of mankind. This effectively ensured a policy of criminal-legal terror, because all repressions were appropriately "formalized" as criminal-legal prohibitions. The dynamism of social processes requires a constant analysis of the boundaries of criminal-legal protection, issues of criminalization, and decriminalization. At the same time, there is a risk of instability of legislation even if the unity of approaches to criminal-legal policy is preserved. The situation with the changes in the current Criminal Code of Ukraine, as discussed above, does not allow talking about the stability of the legislation and indicates the presence of problems with the implementation of criminal-legal policy in terms of global interest.

Next to the global, there is a system of special (private) interests in criminal-legal policy, which determine the main directions of further development of criminal legislation. This group of interests can be differentiated into two subgroups: definitive interests – related to the normative fixation of institutes, terms and concepts that define general approaches, boundaries of criminal-legal policy, and special interests – related to the definition of grounds, limits of criminal responsibility for an infringement on specific objects.

Criminal law doctrine – a constituent part of the criminal law ideology represents the second element of criminal law ideology.

"Doctrine" (Latin *Doctrina*) is a teaching, a scientific or philosophical theory, a political system, a guiding theoretical or political principle.

Criminal law doctrine is a rather complex phenomenon. It represents the views, concepts formulated by the relevant schools, the statement of certain approaches to the problems of understanding criminal responsibility, its boundaries and bases, principles as a whole, and concerning certain types of behavior. In more simplified terms, a criminal-legal doctrine is a system of views formulated by criminal-legal science on the problems of criminal-legal regulation and protection. It is essentially a suitable model of positive criminal law, a set of ideas about criminal law, which is created based on relevant public interests.

It should be emphasized that the criminal-legal doctrine is the result of the scientific activity of leading domestic scholars – specialists in the field of criminal law. "By its genesis legal doctrine represents the dominant type of legal thinking and legal understanding, reflecting the legal views of leading legal scholars"[1]. The doctrine includes conceptual provisions formulated because of the relevant research, which can claim "the status of legal axioms, dogmas, principles, and presumptions."[2]

At the same time, one cannot but agree with the point of view of A. Naumov, who believes that: "Scientific doctrines, however, can go beyond the limits of the criminal-legal policy, which are not within it, because they are broader and larger in scope since they are associated with the study of not only private processes, but also general patterns. Therefore, scientific ideas sometimes develop contrary to the existing line of criminal-legal policy."[3]

Doctrine is always more progressive than legislation because it is the product of scientific understanding of social and legal processes and phenomena. The legislation is always conservative, and therefore often develops contrary to the criminal-legal doctrine. The doctrine is dynamic. The legislation is more static. This cannot be assessed unequivocally as something positive or negative. On the one hand, the legislation must be stable, and on the other hand, it must comply with the system of existing needs and interests, which, especially during the global social changes that characterize the current historical era in Ukraine, are quite dynamic, and which are captured by doctrine faster than the criminal law changes. It is necessary to achieve a balance between these rather controversial issues. A way out of this situation may be a proposal made by the participants of the Lviv Criminal Justice Forum in their proposed Concept of Reform of Legis-

[1] [17] В. Сорокин, «Судебная практика как источник права. За и против» (Юридическая Россия, 01.01.2008) (дата звернення: 13.01.2020).

[2] Васильєв (н 12).

[3] А Наумов, Преступление и наказание в истории России, т 2 (Юрлитинформ 2014) 47.

lation on Public Offenses[1]. They find it expedient to enshrine in law the possibility of amending the Criminal Code of Ukraine only once a year. This will allow, on the one hand, to develop a doctrinal justification for the need for certain changes and achieve an understanding of this at the level of lawmakers, and on the other hand – it will contribute to the stability of legislation and the prevention of "anarchy" in this activity.

Principles of criminal law as another element of criminal-legal ideology are "the most prominent, basic provisions (principles) of criminal law that are established by law or directly derived from it, and which have a direct effect, a direct regulatory function."[2] Principles of criminal law reflect criminal law ideology and are based on it. Principles of criminal law are extremely sensitive and change in response to changes in criminal law ideology.

Criminal-legal ideology, which analyzes criminal-legal reality through the current criminal law and practice of its application, is a criterion for the formation of both tactical (adoption of current laws) and strategic (development and adoption of the concept for the relevant perspective) criminal-legal policy.

The need for ideological support of criminal-legal activity becomes especially relevant in the period of global changes in the socio-political life of society when there is a change in legal understanding, legal values, legal requirements. A striking example of this can be the change in approaches to assessing the significance of the most important social relations, benefits, and interests protected by the Criminal Code of Ukraine, which is reflected in the system of the Special Part of the Criminal Code of Ukraine.

However, it should be noted that the ideology of modern criminal law of Ukraine has not completely abandoned the ideological approaches on which Soviet criminal law was built. However, we should not forget that Soviet criminal law, from the beginning of its formation had a pronounced class nature, since it was based on the ideological doctrine of Marxism-Leninism, and eventually turned into a guardian of the *nomenklatura* class formed in the Soviet Union and became its active protector[3]. This was primarily reflected in the understanding of the elements of crime, and more specifically, in the definition of its material attribute – public danger.

This feature of the crime was formulated at the beginning of the development of the Soviet criminal-legal theory by its apologists (A. Piontkovskyi), and it fully met the ideological principles of Marxist-Leninist theory. Formulated in this

[1] 'Концепція реформування законодавства про публічні правопорушення' (Львівський форум кримінальної юстиції) (дата звернення: 13.01.2020).

[2] В Кузнецов та А Савченко, Кримінальне право України: питання та задачі для підготовки до вступних, семестрових та державних екзаменів: навчальний посібник (Центр учбової літератури 2011.

[3] Н Восленский, Номенклатура (Советская Россия 1991); В Чалидзе, Уголовная Россия ("ТЕРРА"– "TERRA" 1990).

form, the material element of the crime, being transferred from the ideological tenets of Marxism-Leninism-Stalinism, allowed for the widest possible interpretation. *The Bolsheviks* quite openly asserted that criminal law protected exclusively their interests, falsely adding that they coincided with the interests of the people.

At the same time, it (especially up until 1953) opened the door to widespread terror against their people. Suffice it to recall such a criminal law concept as "a family member of a traitor to the Fatherland" (Article 541 in the Criminal Code of Ukraine, 1928) and others, which allowed the application of criminal law repression to persons whose actions could not be characterized from the point of view of the "objective side as committed with guilt (in terms of a civilized understanding of the concept of "guilt" in criminal law)".

The public danger is a purely ideological (rather than ideological-legal) construction and cannot be used as a material attribute of a crime. The legislator himself uses as a material attribute of a crime the characteristic of the harm caused by the relevant act. This is evidenced by the analysis of the absolute majority of the norms of the Special Part of the Criminal Code of Ukraine.

It should be emphasized that virtually all of the countries of the former socialist camp when creating modern criminal legislation, abandoned the "public danger" as a characteristic of a crime. At the same time, some countries have refused to formulate the material element of the crime at all, defining it exclusively from a formal standpoint as an act prohibited by criminal law at the time of its commission (Article 1 of the Criminal Code of the Republic of Poland, 1997; Article 1 of the Criminal Code of the Czech Republic, 2009; Article 2 of the Criminal Code of Romania, 2004, etc.). This, in turn, applies to the countries that joined the European Union and amended, under the accession agreement, national legislation.

An analysis of the characteristics of a crime that are used in continental law countries indicates that few of them use public danger as its attribute, but rather define the crime based on the formal aspect. Criminal legislation of the Anglo-American legal family does not enshrine the concept of crime and its characteristics at all. This is accomplished in the doctrine, which characterizes it in terms of the act (Lat. *Actus reus*) (and represents a material attribute) and the subjective side (Lat. *Mens rea*).

This once again emphasizes that the understanding of crime based on its characteristic as a socially dangerous act was applied by Soviet criminal legal theory exclusively in the interests of protecting the social and political system dominant in the country. The ideology of criminal-legal policy should be studied in a paradigmatic dimension: – as a system of criminal law ideas, views, theories, concepts that reflect the ideology of certain social groups; – as a single structure that is designed to ensure the

existence and development of civil society in Ukraine; – as an element of the culture of society (socio-cultural aspect).

The ideology of criminal-legal policy determines (defines) the boundaries of criminal law, directions of criminalization and decriminalization.

The ideology of criminal-legal policy is significantly influenced by the processes of globalization, the path chosen by Ukraine to join the European community. This significantly affects the unification of approaches to the understanding of the principles of criminal law, the criminal and non-criminal, penalties, and their limits, etc. As integration processes intensify, this influence will deepen, which will be reflected in criminal-legal ideology, criminal-legal policy, and the current legislation.

Conclusions. To summarize, it should be noted that the development of the doctrine and concept of criminal-legal policy in Ukraine must be based on the criminal-legal ideology, developed, and supported by the majority of the population of the country, which will correspond to the stage of socio-economic development of society and will take into account the mindset of the people of Ukraine.

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THE ROLE OF THE SUPREME COURT IN THE MECHANISM OF ENSURING THE SUSTAINABILITY AND UNITY OF JUDICIAL PRACTICE: SOME ASPECTS

Abstract. *One of the means of ensuring the stability and unity of judicial practice is the decision of the Supreme Court, which deviates from the conclusion on the application of the rule of law in such legal relations. The current criminal procedural legislation of Ukraine clearly regulates the procedure for such a derogation, which is generally in line with the case law of the European Court of Human Rights and international recommendations in this area. However, this procedure has immanent significant features that require scientific analysis of the current procedural form in this segment with regard to its adequacy to the needs of ensuring the right of everyone to a fair trial and society's expectations for reasonable predictability of court decisions. In view of this, within the framework of this study, the categories "unity" and "sustainability" of judicial practice as a subject of provision by the Supreme Court was carried out. To achieve this purpose, the authors used a set of modern general and special legal methods. The study considers the procedural order for the Supreme Court to deviate from the conclusion on the application of the*

rule of law in such legal relations; the legal nature of the issue of the hierarchy of legal positions of the Supreme Court is analysed. It is established that the key idea embodied by the legislator in the statutory model of the procedure for deviating from the opinion on the application of the rule of law is that the possibility of such a deviation from the opinion, depending on the composition of the court in which it was adopted and determines the «higher degree of significance» of such a conclusion and its application in further judicial practice. These areas were studied with the consideration of the recommendations of the Advisory Council of European Judges, as well as the relevant practice of the Supreme Court.

Keywords: *legal position; Criminal Court of Cassation, sustainability and unity of judicial practice, hierarchy of legal positions of the Supreme Court, conclusion on the application of the rule of law.*

INTRODUCTION

Traditionally, in most states governed by the rule of law, the Supreme Court has a leading role in shaping the stability and unity of judicial practice. It is no coincidence that the legislator of Ukraine has determined the functional purpose of the Supreme Court in the judicial system of Ukraine precisely because of ensuring the stability and unity of judicial practice. Thus, in accordance with Part 1 of Art. 36 of the Law «On the Judiciary and the Status of Judges»[1], the Supreme Court is the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice in accordance with the procedure prescribed by procedural law. For the practice of the Supreme Court to be an example of law enforcement and fulfil its functional purpose, admittedly, the decisions of the Supreme Court must be of high quality (legal, reasonable, and fair) and demonstrate a unified approach of the highest judicial body to resolve disputes [1–9]. In this regard, it should be noted that the Opinion of the Advisory Council of European Judges (ACEJ) No. 20 "On the role of courts in ensuring the uniform application of the law" (Strasbourg, November 10, 2017) [10] (hereinafter referred to as "the ACEJ Opinion") emphasises the need of the existence of mechanisms within the Supreme Court capable of correcting inconsistencies in the practice of that court. Thus, paragraph 24 of this ACEJ Opinion states that the availability of tools to ensure uniformity of practice in one court is particularly relevant for supreme courts. This issue becomes extremely important in cases where the Supreme Court itself is a source of uncertainty and conflicting case law instead of ensuring its unity. Thus, the existence of mechanisms within the Supreme Court that can correct inconsistencies in the practice of this court is of paramount importance. Relevant instruments may include, for example, appealing to the

[1] Law of Ukraine No 31 «On the Judiciary and the Status of Judges». (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402–19#Text.

Grand Chambers or convening larger chambers in cases where the case law of the Supreme Court becomes different, or where it is possible to review and reverse a precedent [10].

It is at solution of this problem that is the mechanism created by the national legislator is aimed – the institution of "overruling" (a special procedure for changing the legal position of the highest judicial body on a particular issue used by the highest courts of the Anglo-Saxon legal tradition). The current criminal procedure law makes provision for the transfer of a case by a panel of the Supreme Court hearing in cassation to a chamber, joint chamber or Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to depart from the conclusion on application of rules of law in such legal relations, set out in a previously adopted decision of the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court (Articles 434–1, 434–2 of the Criminal Procedural Code of Ukraine (CPC))[1].

The introduction of this mechanism has proved effective as a means of overcoming differences in the practice of the Supreme Court. At the same time, the existence of opposing legal positions of a higher judicial body is not uncommon, which negatively affects law enforcement and disorients lower courts in resolving similar legal issues, and thus reduces the functional role of the Supreme Court in the overall mechanism of stability and unity of judicial practice. The above requires a scientific search towards studying the existing mechanism for resolving differences in judicial practice and assessing the existing legal situation to ensure its sustainability and unity.

During the study, it was stated that theoretical and applied issues of sustainability and unity of judicial practice were investigated in the articles of many experts of different times, all of whom studied the legal status of the Supreme Court (Ukraine) and covered issues of ensuring the unity of judicial practice, including N. Bakaianova, I. Beitsun, N. Bobechko, Ye. Bondarenko, S. Bratus, S. Vasyliev, M. Vilhushinskyi, V. Horodovenko, O. Hotin, M. Demenchuk, Ye. Dodin, V. Dolezhan, A. Drishliuk, O. Zhydkov, L. Zuievich, N. Zozulia, S. Kashkin, O. Kibenko, S. Kivalov, M. Kosiuta, V. Kravchuk, N. Slotvinska, O. Kot, N. Krestovskay, N. Kuznietsova, L. Luts, B. Malyshev, V. Marochkin, L. Moskvych, P. Muzychenko, V. Musievskyi, I. Nazarov, L. Nesterchuk, N. Nor, I. Olender, P. Orlovskyi, L. Ostafichuk, N. Pylgun, M. Popovych, Yu. Polianskyi, S. Pohrebniak, S. Prylutskyi, B. Potylchak, B. Poshva, M. Rudenko, D. Radysh, O. Romanov, Ya. Romaniuk, T. Rosik, O. Svyda, M. Siryi, O. Skakun, V. Serdiuk, V. Sukhonos, Yu. Fidria, L. Fesenko, O. Uvarova, S. Shevchuk, O. Sheredko, V. Shyshkin, etc. Among foreign scholars, the problem of ensur-

[1] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada. gov.ua/laws/show/4651–17#Text.

ing the unity of judicial practice by the supreme (higher) courts was studied by A. Bonica, M. J. Woodruff [11], M. Marietta, T. Farley, [12], Yu. A. Dzepa [13], E. P. Parera [14], R. S. Davies [15], J. L. Torres [16], T. Pryor [17], E. Pons Parera [18], and others.

1. MATERIALS AND METHODS

The methodological framework of the study was a set of modern general scientific and special methods used in legal science. Therewith, the study primarily proceeded from the fact that the system of methods should be associated with the recognition of the objectivity of existence and the necessity of developing the legal phenomena – unity and sustainability of case law, Supreme Court decisions resolving existing differences in law enforcement as one of the key means of ensuring the unity and sustainability of judicial practice, social and legal expectations from the quality of judicial practice of the Supreme Court at the present stage of development of society, etc. Discrepancy in law enforcement should be understood as the existence of different legal positions of law enforcers regarding the application of the same legal provision in similar legal relations. In this case, the legal position can be both expressed and formalised in the structure of the content of a particular court decision, and such that is developed in the minds of law enforcement officers only at the stage of a court decision based on the assessment of a legal situation in particular criminal proceedings.

The general level of methodology is represented by the method of materialist dialectics, which has not lost its relevance, as it requires comprehensiveness and objectivity to the knowledge of real phenomena, as well as their links with practical activities in criminal proceedings. The choice and use of specific methods of the research process depended on the stage of cognition and the objective that was set at a particular stage of cognitive activity. Thus, the dialectical method suggested that the unity and stability of judicial practice are closely related to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and ensure reasonable predictability of court decisions. Therewith, the use of the dialectical method allowed to conclude that the consistency of judicial practice reflects the constant state of uniform law enforcement. In other words, it is a «rooted» unity of the same legal issues as a direct indicator of the transition from quantity to quality.

A set of methods of theoretical cognition was used to generalise and develop a holistic vision of the mechanism for resolving differences in judicial practice. The systematic method allowed to consider the sustainability of the practice of the Supreme Court as an important element of the system of legal means to ensure the unity of judicial practice, which is interconnected and interdependent, used to solve a particular problem – ensuring the unity and sustainability of judicial practice in criminal proceedings. in fact, it acts as an integrative quality that describes the very system of these

means. The method of abstraction was used to present the relevant legal positions of the Supreme Court in schematic language, to determine the main and reject the insignificant to demonstrate the existence of opposing decisions of this body, and thus the lack of unity of its practice on a particular issue.

The formal legal method was used to clarify the framework of categories and concepts of this study (in particular, with regard to the concept of sustainability of judicial practice); to formulate the existing statutory mechanism for overcoming the conflict of legal positions of the Supreme Court in the way the court directs criminal proceedings for consideration by a chamber, joint chamber or the Grand Chamber of the Supreme Court, depending on who formulated the conclusion on application of law in such legal relations; to determine the position of the legislator on the hierarchy of legal positions of the Supreme Court. The logical method (methods of analysis, synthesis, and induction) allowed to analyse the problematic issues of uniform application of the provisions of law by the Supreme Court in similar legal relations and to determine legal means to ensure the unity of judicial practice, which is a necessary condition for overcoming the problem of diametrically opposed judicial positions.

The comparative legal method was used to study the vision of the phenomenon of sustainability and unity of judicial practice of the highest judicial body at the international level. The method of idealisation and modelling allowed to develop an ideal theoretical model of the mechanism for resolving differences in judicial practice. In this case, all scientific research methods were used in the interrelation and interdependence, which contributed to the comprehensiveness, completeness, objectivity of the study and allowed to lay the foundation for further possible directions of development of theoretical ideas about the subject matter.

2. RESULTS AND DISCUSSION

2.1. Regarding the sustainability of judicial practice

As noted in the introduction, Part 1 Article 36 of the Law of Ukraine "On the Judiciary and the Status of Judges"[1] stipulates that the Supreme Court is the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice in accordance with the procedure prescribed by procedural law. In contrast to the current version of the law, prior to 2016 amendment, Part 1 Article 38 of the Law of Ukraine «On the Judiciary and the Status of Judges»[2] stipulated as follows. The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction of Ukraine, which ensures the unity of judicial practice in the accordance with the procedure prescribed by procedural law. Thus, apart from the unity of judicial practice, which means its identity, uniformity, the sub-

[1] Law of Ukraine No 31 «On the Judiciary and the Status of Judges». (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402–19#Text.

[2] *Ibidem*, 2020

ject of the Supreme Court, in accordance with current legislation of Ukraine, is the consistency of judicial practice.

Paragraph 14 of the above-mentioned ACEJ Opinion [10] states that in the countries of continental law, as a rule, a consolidated and coordinated number of court decisions on a certain issue (jurisprudence constant) is required for a certain position to be relevant. Admittedly, this does not preclude a decision from having legal force when the Supreme Court adopts it for the first time in a corresponding legal matter, the practice of which has not yet been established. A common fact is the lack of a formula according to which it is possible to determine the moment when the case law can be considered as established. Many supreme courts in continental law are currently empowered to select cases to set standards to be applied in future cases. Therefore, in these cases, even a single decision of the Supreme Court, which was adopted to set a precedent, can be considered as authoritative case law. Analysis of the concept of "established case law" by

S. Shevchuk points out that in most legal systems of countries there are different doctrines to justify the binding force of case law. The Anglo-Saxon doctrine of obligation is based on the stare decisis doctrine, according to which judges are bound by precedents in previous cases, while in Romano-Germanic countries doctrines similar to the French jurisprudence constant are applied, according to which a set of previously adopted and agreed court decisions are considered as convincing evidence of the correct interpretation of the legal provision [19].

Although the countries of continental law do not officially recognise the judicial precedent a source of law, the European Court of Human Rights (hereinafter referred to as "the ECHR"), upon analysing the existence of grounds for restriction of the right under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (hereinafter referred to as "the CPHRFF"), in accordance with French law (Kruslin v. France) stated that the relevant established case law cannot be disregarded. Paragraph 2 Article 8 of the Convention and other similar provisions have always interpreted the Court not as "formal" but as "substantive"; in the Court's view, it covers both regulations of a lower category than legislation, and unwritten law. It is undisputed that decisions in the cases of De Wilde, Ooms, and Versip concerned the United Kingdom, but, as the Government rightly pointed out, it would be wrong to exaggerate the discrepancy between countries with a legal system based on common law and continental countries. Statutory law, admittedly, is also important in a country with a common law system. Conversely, in continental countries, case law has traditionally played a major role, to such extent that entire branches of positive law have largely emerged from court

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

decisions. The Court has repeatedly taken into account the case law of such countries. If the Court had disregarded the case law, it would have undermined the legal system of the mainland States, almost as the judgment in the Sunday Times of 26 April 1979 would have the legal system of the United Kingdom "shaken to its foundations" if the Court had excluded the common law from the concept of law (paragraph 29) [20].

Considering the etymological content and statutory context in which the concepts of "sustainability" and "unity" of judicial practice are used, it appears that the stability of judicial practice reflects the constant state of uniform law enforcement. In other words, it is the "rooted" unity of the same legal issues as a direct indicator of the transition from quantity to quality; the more identical court decisions on a disputed legal issue, the more grounds there are to describe such law enforcement as permanent. The unity and permanence of judicial practice are closely linked to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and ensure reasonable predictability of court decisions.

2.2. Regarding ensuring the sustainability and unity of judicial practice by a decision (ruling) of the Supreme Court, which resolves the existing differences in judicial practice

A separate means of ensuring the sustainability and unity of judicial practice are decisions (rulings) of the Supreme Court that resolve differences existing in judicial practice. Notably, there have recently been many cases of contradictory and even polar legal opinions of the highest judicial body on the application of certain provisions of law. One of the clearest examples of controversy in law enforcement is the resolution of the issue of the legal consequences of the absence of a resolution on the appointment of an investigator or prosecutor in the materials of criminal proceedings. Thus, in the decision of the Supreme Court of Cassation of 19.05.2020 in the case No. 490/10025/17 the position of the court on the non-binding nature of the decision to appoint a particular investigator or prosecutor, in connection with which its absence in the criminal proceedings per se does not mean that the investigator or prosecutor did not have the appropriate authority. After analysing the current legal regulation of this issue, the court noted in that based on the rule *casus omissus pro omisso habendus est*, it sees no grounds for amending the text of the law with the requirement that is not stated in it and considers that the lack of relevant provisions directly related to regulation this issue, mentioning the need for a resolution, means that such a resolution is not necessary to determine the particular investigator or prosecutor who is entrusted with the exercise of relevant powers in a particular case. The court also noted that information on which investigators were conducting the pre-trial investigation and which prosecutors were conducting the proceedings had been entered into the Unified Register of Pre-Trial Investigations. Prolonged pre-trial investigation,

use of resources by investigators and prosecutors and other factors of proceedings indicate that the investigation and procedural management of these persons was carried out according to the respective decisions of their managers[1].

However, in the decision of the Supreme Court of Cassation of 17.06.2020 in case No. 754/7061/15 the court of cassation reached the opposite conclusion on this matter. It emphasised the mandatory nature of the duly executed decision on the appointment of a prosecutor, which empowers a particular prosecutor to supervise compliance with laws during the pre-trial investigation in the form of procedural guidance of the pre-trial investigation in a particular criminal proceeding. Therefore, it is necessary to deviate from the conclusion on the application of the rule of law in such legal relations, set out in the previously adopted decision of 19 May 2020 (proceedings No. 51-6116км19) of the Supreme Court in the panel of judges of the First Judicial Chamber. In these circumstances, to ensure the unity of judicial practice, the criminal proceedings against PERSON_1 is subject to transfer to the joint chamber of the Criminal Court of Cassation of the Supreme Court based on Part 2 Article 434–1 of the Criminal Procedural Code of Ukraine[2].

It should be added that the latter position of the Supreme Court on the obligation to issue a decision on the appointment of an investigator or a prosecutor was also formulated in several other earlier decisions (in particular, the decisions dated 19.04.2018 in the case No. 754/7062/15-к; dated 17.12.2019 in the case No. 235/6337/18; dated 05.02.2020 in the case No. 676/5972/17, etc.). This example not only demonstrates the existence of opposing decisions of the Supreme Court, and hence the lack of unity of its practice on this matter, but also necessitates an analysis of the mechanism of ensuring the unity of case law by the Supreme Court, because in one case, as shown above, a decision made is contrary to the current practice of the Supreme Court on this issue, in another – if necessary to deviate from the position of the panel, the court decides to transfer criminal proceedings to the joint chamber of the Criminal Court of Cassation of the Supreme Court. This also raises the question of the obligation of the court of cassation to refer to the procedure of transfer of criminal proceedings stipulated by Article 434–1 of the CPC of Ukraine[3], if it deems it necessary to depart from the conclusion on the application of law in such legal relations. Furthermore, the problem of

[1] Resolution of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 490/10025/17. (2020, May). URL: http://www.reyestr.court.gov.ua/review/89621459 (access date: 25.05.2020).

[2] Criminal Procedure Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text. Resolution of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 754/7061/15. (2020, June). Retrieved from http://www.reyestr.court.gov.ua/review/89929110

[3] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text.

the existence of opposite decisions on the application of the rule of law decisions of the Criminal Court of Cassation in the Supreme Court is clearly illustrated in many recent articles, in particular, the lawyer O. Gotin's study [21; 22].

As already mentioned, the current criminal procedure legislation makes provision for the transfer of a case by a panel of the Supreme Court hearing in cassation to a chamber, joint chamber, or Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to deviate from the conclusion on the application of the rule of law in such legal relations, set out in a previously adopted decision of a chamber, joint chamber or Grand Chamber of the Supreme Court (Article 434–1). Since the adoption of these legislative provisions, this institution (which, in fact, is the essence of the above-mentioned institution of "overruling") is actively used in practice and has proven to be an effective means of ensuring the unity of judicial practice.

Analysing the issue of the quality of the law in the context of Article 1 of Protocol No. 1 to the Convention, the ECHR in its judgment in Serkov v. Ukraine dated 07.07.2011 noted: The Court recognises that, indeed, there may be compelling reasons to reconsider the interpretation of the legislation to be followed. The Court, applying dynamic and evolutionary approaches in the interpretation of the Convention, may, if necessary, depart from its previous interpretations, thus ensuring the effectiveness and relevance of the Convention. However, the Court sees no justification for changing the legal interpretation encountered by the applicant. In fact, the Supreme Court did not put forward any arguments to explain the corresponding change in interpretation. Such a lack of transparency was bound to affect public confidence and faith in the law. In the circumstances of the present case, the Court considers that the manner in which the domestic courts interpreted the relevant provisions of the law adversely affected their predictability (paragraph 39, 40 [23]. In paragraph 49 of Opinion No. 11 (2008) of the Advisory Council of European Judges to the Committee of Ministers of the Council of Europe on the quality of judgments states that judges must generally apply the law consistently, but when a court decides to depart from previous practice, this should be clearly stated in its decision [24].

In the context of considering the issue of the mechanism stipulated by national legislation for the Supreme Court to ensure the sustainability and unity of its own practice, it makes sense to address the statutory structure of Article 434–1 of the CPC of Ukraine[1], imperatively makes provision for the need to refer the case to a chamber, a joint chamber or the Grand Chamber of the Supreme Court, if the court deems it necessary to depart from the conclusion on the application of the rule of law in such legal relations.

[1] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text

In other words, the procedure established by Article 434–1 of the CPC of Ukraine[1] for overcoming the legal position previously formulated in the relevant opinion of the Supreme Court does not provide the court's decision with the opposite position, but directs the court to use another procedural way – transfer consideration of a chamber, a joint chamber or the Grand Chamber of the Supreme Court. Observance of this procedure excludes the situation of diametrically opposed legal positions of the Supreme Court panels on the same issue, which has a negative impact on law enforcement practice, creating a situation of legal uncertainty and grounds for possible abuses in this area. It is important to emphasise that the initiator of the deviation from the conclusion on the application of the rule of law can be not only the court but also the parties to the criminal proceedings (who in adversarial criminal proceedings bear the burden of proving cassation claims), citing the grounds for this complaint, although only the court decides on the need to resort to the procedure stipulated by Article 434–1 of the CPC of Ukraine[2], if it considers this derogation justified.

In view of the above, experts fairly point out that in this way the legislator has created a procedural mechanism for overcoming differences in the legal approaches of the Court by creating extended panels for "trial over court" [7]. Continuing this thesis, it is logical to assume that if the only way to overcome the conflict of legal positions of the Supreme Court is to direct criminal proceedings by a court, a joint chamber or the Grand Chamber of the Supreme Court, depending on who actually formulated the conclusion on the application of law in such legal relations, the legislator has thus established a certain hierarchy of legal positions of the Supreme Court, which must be followed in law enforcement. Therefore, the position formulated by the panel of judges of the Supreme Court of Cassation in the decision of 13.02.2019 in the case No. 130/1001/17, namely – based on teleological (target), logical and systematic interpretation of the provisions of Articles 434–1–434–2 of the CPC of Ukraine[3] and Articles 13, 36 of the Law of Ukraine "On the Judiciary and the Status of Judges"[4], it can be concluded that the criminal procedural law defines procedural mechanisms to ensure the unity of judicial practice, which lies in the application of a special procedure for derogating from the rules of law in previously ruled decisions of the Supreme Court. The logic of construction and purpose of the existence of these procedural mechanisms indicates that to apply the law in such legal relations in the presence of opposing legal conclusions of the court of cassation should be based on the fact that the conclusions contained in court decisions of the Criminal Court

[1] *Ibidem*, 2020
[2] *Ibidem*, 2020
[3] *Ibidem*, 2020
[4] Law of Ukraine No 31 «On the Judiciary and the Status of Judges». (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1402–19#Text.

of Cassation take precedence over the conclusions of the panel of judges, the conclusions of the joint chamber of the Criminal Court of Cassation – over the conclusions of the chamber or panel of judges of this court, and the conclusions of the Grand Chamber of the Supreme Court – over the conclusions of the joint chamber, chamber and panel of judges of the Court of Cassation[1].

The above conclusion of the court fully complies with the statutory structure of Article 434–1 of the CPC of Ukraine[2] and, in fact, reflects the basic idea laid down by the legislator in this legal provision:

a) deviation from the conclusion on the application of the rule of law in such legal relations in view of the specific circumstances is quite justified;

b) such derogation should be carried out only in accordance with the procedure established by law;

c) the possibility of deviating from the opinion, depending on the composition of the court in which it was adopted, is given to a court composed of a larger number of judges of the Supreme Court, which determines the "higher degree of significance" of such an opinion.

A more detailed consideration of these provisions implies the need to address the following. Firstly, the deviation from the previously formulated legal position of the court in some cases is quite natural, considering the existence of circumstances that directly affect such a legal position. According to V. Kravchuk, a judge of the Administrative Court of Cassation of the Supreme Court, different decisions constitute the immanence of practice that is inherent in all judicial systems. The unity of judicial practice aims to ensure the same interpretation, in other words, to give a template, which will then find practical application in such cases [25]. Paragraph 30 of the above- mentioned ACEJ Opinion states that ensuring equality, uniform interpretation and application of the law should not lead to inflexibility of the law and the emergence of obstacles to its development. Thus, the requirement "such cases should be treated similarly" should not be taken as absolute. The development of judicial practice as such should not run counter to the proper administration of justice, as the failure to develop and adapt judicial practice will create a risk of impeding the reform or improvement of the law. Changes in society may necessitate a new interpretation of the law and thus lead to the abandonment of a precedent that already exists. Moreover, decisions of national courts and bodies established under international treaties (such as the Court of Justice or the ECHR) often also have the effect of adjusting national case law [10].

Secondly, deviation from the court's conclusion on the application of the rule of law in such legal relations in accordance with current legislation should be

[1] Resolution of the Second Judicial Chamber of the Criminal Court of Cassation of the Supreme Court No 130/1001/17. (2019, February). Retrieved from http://reyestr.court.gov.ua/Review/79957847.

[2] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text.

carried out only by transferring criminal proceedings in which the court deems it necessary to transfer the case for the consideration of a larger number of judges. Such a derogation is stipulated by law only for the Supreme Court, in connection with which Articles 434–1, 434–2 of the CPC of Ukraine[1] introduced grounds and separate procedures for the transfer of criminal proceedings from the court panel to the chamber, the joint chamber and the Grand Chamber of the Supreme Court. In accordance with Part 3 Article 434–2 of the CPC of Ukraine, the issue of transferring criminal proceedings to the Chamber, the Joint Chamber or the Grand Chamber of the Supreme Court may be resolved before the decision of the court of cassation.

This approach appears to be a fairly clear guide for the law enforcer, who must make a decision in the presence of different conclusions of the Supreme Court on the application of the rule of law in such legal relations. Finally, the issue of applying the legal positions of the Grand Chamber of the Supreme Court in case of deviation from the conclusion on the application of the rule of law was resolved in the decision of the Grand Chamber of the Supreme Court of 30.01.2019 in case No. 755/10947/17. According to this ruling, regardless of whether all rulings setting out the legal position from which the Grand Chamber of the Supreme Court has departed are listed, the courts must take into consideration the last legal position of the Grand Chamber of the Supreme Court upon resolving identical disputes[2].

CONCLUSIONS

1. One of the legal means of ensuring the stability and unity of judicial practice is the decisions of the Supreme Court, which resolve the existing differences in law enforcement.

2. The unity and permanence of judicial practice are closely linked to ensuring the right of everyone to a fair trial, creating the necessary basis for this, which is to implement the principle of legal certainty and to ensure reasonable predictability of judicial decisions. Therewith, the constancy of judicial practice reflects the constant state of a single law enforcement, in other words, it is a "rooted" unity of the solution of the same legal issues as a direct indicator of the transition from quantity to quality.

3. In accordance with the current criminal procedure legislation of Ukraine, deviation from the conclusion on the application of the rule of law in such legal relations is allowed only under the procedure stipulated by Articles 434–1, 434–2 of the CPC of Ukraine, i.e. for judges of the Supreme Court.

4. The performance of the functional role of the Supreme Court in ensuring the sustainability and unity of judicial practice presupposes the requirement of stability and unity of its own practice, which excludes the existence of differences in

[1] Criminal Procedural Code of Ukraine. (2020, September). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text.

[2] Resolution of the Grand Chamber of the Supreme Court No 755/10947/17. (2019, January). Retrieved from http://reyestr.court.gov.ua/Review/79834955.

its legal positions. That is why Articles 434–1, 434–2 of the CPC of Ukraine clearly define the mechanism for resolving such differences, imperatively making provision for the necessity of transferring criminal proceedings from the Supreme Court considering the case in cassation to the Chamber, the Joint Chamber, or the Grand Chamber of the Supreme Court, if the court hearing the case in cassation deems it necessary to depart from the conclusion on the application of the rule of law in such legal relations set out in a previously adopted decision of the Chamber, the Joint Chamber, or the Grand Chamber of the Supreme Court. Observance of this order excludes the situation of diametrically opposed legal positions of the panels of the Supreme Court on the same issue, which has a negative impact on law enforcement practice, creating grounds for legal uncertainty and possible abuses in this area.

5. This legal mechanism for resolving differences in the practice of the Supreme Court reflects the position of the legislator on the hierarchy of legal positions of the Supreme Court. The key idea is that the possibility of deviating from the opinion on the application of the rule of law, depending on the composition of the court in which it was adopted, is given to a court composed of more judges of the Supreme Court, which determines the "higher degree of significance" of such a conclusion and its application in further judicial practice.

6. Another type of ruling of the Supreme Court that resolves existing differences in judicial practice is the decisions of the Grand Chamber, which are aimed at resolving an exclusive legal problem and ensuring the development of law and the development of a unified law enforcement practice. Only the Grand Chamber of the Supreme Court has the power to resolve disputes over legal positions in this area. Considering the specifics of the procedure for transferring criminal proceedings to the Grand Chamber of the Supreme Court and the criteria for establishing the exceptional nature of the legal problem, this matter requires separate consideration.

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METHODOLOGICAL PROBLEMS OF THE CONCEPTUAL FRAMEWORK DEVELOPMENT FOR INNOVATION STUDIES IN FORENSIC SCIENCE

Abstract. *The paper investigates the development issues associated with the conceptual framework of the innovation studies in forensic science as a new research area in forensic science. The author studies the methodological problems of developing and grouping categories and concepts of the subject matter. It is substantiated that the level of development and validity of any scientific theory, including the innovation studies in forensic science, is determined according to the degree and level of development of its theoretical and methodological principles and the framework of categories and concepts of this theory. In particular, this refers to such concepts as forensic innovation, innovative forensic product, their functions, classifications, stages of the innovation process, etc. The study analyses the scientific approaches to understanding the basic categories of the matter under consideration, which are innovative forensic product and forensic innovation. The author offers their definitions, describes essential features and properties, and analyses the correlation of these concepts. Furthermore, the author analyses the general and universal dialectical method of rising from the abstract to the concrete and from the concrete to the abstract, including their role in the development of the conceptual framework of innovation studies in forensic science. The study notes that the methodological framework for the development and implementation of innovative forensic products and the application of forensic innovations in law enforcement also includes activity-based, system-structural, and technological approaches, the use of which is promising both in the study of basic concepts of innovation studies in forensic science and in the development of this forensic theory. The author articulates proposals and individual insights in the solution of particular debating points associated with innovations in forensic science and law enforcement practice. The study substantiates that a comprehensive approach to the development of basic concepts and categories of innovation studies in forensic science constitutes a meth-*

odological foundation for further research on this subject, which determines the promising areas for the development of forensic science.

Keywords: *emerging tendencies, global scientific and technological progress, law enforcement, crime prevention, technologisation.*

INTRODUCTION

In modern reality, the aggravation of socio-economic and political problems in society, along with the tendencies emerging in global scientific and technological progress, have led to changes in quantitative and qualitative indicators of crime, as well as to new negative manifestations in its dynamics and structure. Such circumstances have posed new challenges to forensic science, which are related to the so-called social procurement of practice, aimed at actively seeking effective means, techniques, and methods to combat modern challenges of crime. In this regard, the creation and introduction of innovative forensic products in law enforcement, as noted in the literature [1; 2], currently constitutes one of the priority tasks of forensic science and urgent necessity for practice.

To successfully solve this and other issues, forensic science integrates and synthesises modern advances in science and technology [3; 4]. As V. Yu. Shepitko notes, in modern conditions of development of forensic science, this process depends on scientific and technical progress of the human society. The development of forensic science and its tendencies are conditioned by the influence of global information flows, the integration of knowledge about the possibilities of combating crime by means of the scientific and technological achievements of modern society. The computerisation of the social environment has led to the "technologisation" of forensic science, the development and implementation of information, digital, telecommunication, and other technologies. in this regard, radical changes are currently underway and innovative approaches are being introduced in the forensic support of law enforcement agencies [5].

In such modern realities, forensic science should intensify its prognostic function and methodologically ensure the process of criminal proceedings with forensic recommendations for the effective use of modern innovative technologies in pre-trial investigation and legal proceedings. Admittedly, the planning and implementation of the innovation process, which involves the development, implementation, and application of innovations can be ensured to the fullest only with an integrated approach and in such unity and interrelation of the emerging and solved tasks. Furthermore, without innovative technologies and the latest tools to solve organisational, legal, scientific and technical issues of development and implementation of forensic methods, tools and recommendations, such support of law enforcement agencies will not meet the requirements of efficiency [6]. In this regard, a whole

host of issues in forensic science requires a critical scientific reinterpretation, and in some cases a revision. This refers to the issues concerning the study of innovative principles of forensic science and the practice of development and implementation of forensic innovations in law enforcement to improve the efficiency of the latter.

In this regard, the study of methodological problems of developing the conceptual framework of innovation studies in forensic science as a new scientific concept becomes of particular importance. To solve this problem, the scientific approaches to understanding the main categories of the studied scientific concept must be analysed. This concerns such categories as innovative forensic product and forensic innovation. Being based on methodological principles, the solution of the said problem necessitates an in-depth study and development of these concepts, highlighting their essential features, properties, as well as their correlation. This comprehensive approach constitutes the methodological foundation for further research on this subject, which, in turn, identifies promising areas of research in forensic science.

1. MATERIALS AND METHODS

To study the methodological problems of developing the conceptual framework of innovation studies in forensic science and to outline the main categories of this scientific concept, a set of scientific methods and practices of their application was used. Thus, the study used philosophical approaches, general and special scientific methods of scientific knowledge, as well as scientific provisions of the general theory of forensic science, which analysed the different approaches to the interpretation of innovative product in forensic science, as well as of such phenomenon as forensic innovation, highlighted their advantages and disadvantages. Therewith, the study and analysis of literature demonstrates that forensic science has a different understanding of innovative forensic products and forensic innovations, sometimes offering various pseudo-innovations that are questionable and do not meet the requirements of either innovative forensic products or forensic innovation. In this regard, an important task at hand is the problem of developing and unifying the framework of categories and concepts of forensic science in this subject area. The author applies a dialectical method, which is used at all stages of this study to discover the essence of such forensic categories as innovative forensic product and forensic innovation, to outline their features and properties, determine their interrelations, interdependence, mutual influence, and correlation. The general and universal dialectical method of ascent from the abstract to the concrete and vice versa was used to develop and form the basic concepts of this scientific concept, their role in the development of such forensic categories and concepts is considered. The Aristotelian method was used to analyse the corresponding concepts and categories, formulate conclusions and recommendations on the

methodological foundations of the development of concepts and categories of innovation studies in forensic science and their use in law enforcement practice. Categories and methods of formal logic have been widely used in the study: concepts, definitions, proofs and refutations, judgments, analysis, synthesis, comparisons, generalisations, etc. The study also employed other methods conventional for forensic and legal sciences.

The method of analysis and synthesis allowed to conclude that the development of basic concepts and categories of forensic innovation should involve application of a comprehensive approach that includes a system of general and special scientific methods of scientific knowledge, as well as scientific provisions of general forensic theory. Consideration of such provisions and various aspects in the development of scientific understanding of the basic concepts of forensic innovation should also be based on system- structural, technological, activity-based, and functional approaches, which comprise the methodological foundation for the creation of preconditions for a separate forensic theory development [7].

2. RESULTS AND DISCUSSION

2.1. Discussion problems of the methodology of development of the conceptual framework of innovation studies in forensic science

In the doctrine of forensic science and practice of combating crime, the problems of development, implementation, and application of innovations in practice have always been and remain one of the priorities of forensic science. Therewith, in modern realities there is a host of debatable problems in this subject area, especially with regard to research of innovative products in forensic science and issues of their introduction in practice of the investigative, judicial, and forensic activities. Methodological problems of the establishment, development, and unification of the framework of categories and concepts of forensic innovation as one of the emerging research areas in forensic science require a separate in-depth study, critical analysis, and further scientific developments.

Innovation studies in forensic science is a rather broad, complex concept, which, on the one hand, includes a set of innovative forensic tools and methods of their use for collecting, researching, evaluating, and using evidence, and the activities of evidence to create appropriate conditions for effective use of these tools in law enforcement practice. On the other hand, it constitutes a system of scientific provisions that study the patterns of such innovation (including the impact of criminal activity), the results of which are aimed at solving practical tasks in the application of forensic innovations in law enforcement. As is evident, forensic innovation should be considered as *a research area*, as well as *a specific activity* of the subjects authorised by law. As a new research area in forensic science, innovation studies contain a system of theoretical and practical knowledge about forensic innovations, their features, types, role and purpose,

stages of development, implementation and application, features of functioning, connections and relations between the subjects of such innovations (developers and consumers). This system is based on the study of patterns of development, introduction, implementation, and application of such innovations, their reflection in sources of information that form the basis of innovative tools, techniques, and methods of collecting, researching, evaluating, and using evidence to optimise, improve quality and the effectiveness of law enforcement practice and the solution of forensic problems [8].

As is known, any scientific theory can be recognised as such only when not only its theoretical foundations are conceptually formed and substantiated, but also its framework of concepts and categories is developed [9]. Therefore, to develop innovation studies in forensic science into a separate forensic theory, it is important to develop concepts and categories of this theory, in particular, such as forensic innovation, innovative forensic product, their functions, classification, stages of innovation process, factors determining the development and use of such innovations and innovative products, etc. As is evident, the main categories of the theory under study are the concepts of innovative forensic product and forensic innovation. In the theory of forensic science and law enforcement practice, the question of the concept of innovative forensic product and forensic innovation and their features remains debatable. Nevertheless, it is obvious that the vast majority of forensic scholars, who studied this problem, define the concept of innovation as the ultimate result of innovative activity, acquired and embodied in the form of *an innovative product* (new or improved) or a new approach to the technological process, decisions, organisation, provision of services, tools for solving problems that are used in practice and aimed at optimising and improving the efficiency of such activities. Typically, such innovations are associated with the creation of a new or improved innovation product in forensics and its implementation in law enforcement. Thus, such product is considered both in narrow, and in wide meaning.

In a narrow meaning, it is a material new product in criminology in the form of n*ew modern technical means, devices, equipment, tools, and technologies* developed and introduced in practice, which constitute the results of research and development, and the purpose of which is to optimise the investigation and prevention of criminal offenses, to improve the quality and efficiency of investigative activities, significantly reducing errors, effort, and costs. In this case, the innovative product is a *materialised result* of innovative activity in the form of developed and created a new materialised object (product), the future use of which will be aimed at solving certain forensic problems, improving law enforcement. The form of such a developed and proposed innovation is a materialised product, which can include *the latest forensic means, devices, equipment, tools*, etc., i.e. materialised

objects. As is evident, in this case there is a materialisation of the developed and proposed product, the result of which is embodied in a particular material carrier in the form of new materialised products or material substance that is embodied in products or technology

In a broad meaning, an innovative product in forensic science is a set of materialised and non-materialised new modern methods, techniques, tools, products, technologies, operations, solutions, services, etc., which are developed, proposed, and *implemented and applied in practice* by qualified special subjects, and are aimed at the effective solution of forensic problems, ensuring the improvement of the quality and effectiveness of law enforcement activities. Therewith, non-materialised innovative products in criminology should include new or improved *services, solutions* (technical, tactical, methodical, organisational), the newest approaches to the *organisation of work* of subjects of such activity (investigative, judicial, expert, etc.) which constitute the result of developed and implemented research and development, scientific, and forensic solutions. As is evident, along with materialised objects (means) there are also intangible, in particular such as services, solutions, etc. that can be new (newly created, or newly used, or improved). Practical application of such products is performed by special subjects (investigator, expert, judge, etc.), which ensures qualification and efficiency of their use

The formulation of the definition and essential features of the concept of innovative forensic product involves an analysis of the essence of such a concept, considering its interpretation in the theory of innovation, forensic science and its legislative definition in the Ukrainian legislation. In the explanatory dictionary of the modern Ukrainian language, a product is an object that is a material result of human labour and activity; consequence, product, result of something; a substance obtained or formed chemically or otherwise from another substance; a substance that serves as a material for the manufacture of something [10]. In the theory of innovation studies [11], an innovative product is a research or development of a new technology or product with the manufacture of an experimental sample or experimental batch. In this case, innovation is understood as an ultimate result of innovative activity, embodied in the form of new or improved products (services, equipment, technology, production engineering) of a new or improved technological process, intended for practical use in a particular field of activity to profit, meet needs, and achieve beneficial effect [12].

In accordance with the Law of Ukraine "On Innovative Activities"[1], an innovative product is the result of scientific and (or) research and development efforts, which meets the requirements set out in Art. 14 of this Law[2]. Notably, according to the legislative approach,

[1] Law of Ukraine No. 5460-VI "On Innovative Activities". (2012, December). Retrieved from https://zakon.rada.gov.ua/laws/show/40–15.

[2] *Inbidem*, 2012.

only technology or products can be the object of an innovative product. Neither services nor organisational and technical solutions are included in this concept. As is evident, in the domestic legislation, along with innovation, there is another object of innovation – an innovative product which, *in fact, is an intermediate object between a new solution, idea, and the result of its implementation* – the innovation proper. An innovative product is created and exists at the stage of research and development, as it emerges as a result of a set of research and development work to clarify, create conditions, and provide the necessary form for the implementation of the idea, bringing development to implementation [13]. As noted by Yu. Ye. Atamanova, the concept of "innovation" under Ukrainian law is not connected to intellectual property or to the results of research, which allows for a very broad interpretation of the concept of "innovation". Furthermore, unlike many scientific definitions of innovation, the legal definition does not directly link them to the introduction, use, and commercialisation of newly created intellectual objects, although it is built in such a way that innovation actually recognises the end result of the introduction or implementation of new developments, ideas (products, services, technology, organisational and technical solutions) [14]. Evidently, the imperfection in the defined concepts of "innovation" and "innovative product" significantly complicates the process of creating and implementing innovative forensic products in practice.

In our opinion, different approaches to understanding the "forensic product" among forensic scientists acquire special and methodological significance in the study of this concept. Thus, V. O. Obraztsov notes that the concept of forensic product is generic in relation to two types of objects: forensic scientific product and forensic practical product [15]. The first type is the result of research activities in forensic science, which is addressed to investigators, prosecutors, experts, as well as other researchers, persons who teach and study forensic science, based on its use by them in their scientific, educational, or practical criminal procedural activities. The second type is the direct application and implementation of recommendations, tools, and techniques by practitioners in investigative activities [15; 16]. Therefore, the forensic product is considered in two aspects: theoretical and practical. O. Yu. Drozd supports this position, stating that a forensic product constitutes a set of all developments, designs, programmes, technologies that are *products of forensic science, focused on achieving practical tasks* [17]. In turn, M. T. Koilybaiev and Z. R. Dilbarkhanov used the term "product of forensic science" [18].

In view of the above, it should be borne in mind that the forensic product can be considered as: 1) the result of scientific and (or) research and development efforts, which is a product of forensic science, the result of research activities in forensic science; 2) a set of new scientific recommendations, tools, technologies, techniques, methods that derive

from forensic science (new tools); 3) the result of a comprehensive process of development, proposal, and implementation by developers (scientists, etc.) and the use of new products in forensic science and practice by consumer entities (investigators, detectives, judges, experts, etc.), i.e. as a result creation of an innovative forensic product. The study and analysis of the approaches to understand the concept of innovative forensic product, proposed by scholars in forensic science, acquires a certain scientific interest and methodological significance. Thus, N.V. Zhyzhyna, exploring the essence of such innovative products, notes that their use in investigative and judicial practice must meet the following conditions: 1) the use of innovative products in practice must be permissible, while not violating the rights and legitimate interests of citizens, moral, ethical standards; 2) in application it is necessary to ensure the preservation of sources of evidentiary information and the prevention of distortion of fixed information; 3) scientificity and reliability of such products, i.e. the product itself must be based on scientific data, be tested, and if necessary – certified and recommended for practical use; 4) the qualification of the use of such products, which should be carried out by the relevant special entities (investigator, judge, expert, operatives); 5) safety and efficiency of application of forensic innovative products; 6) it is necessary to reflect the conditions, procedure and results of the use of such products in procedural documents (protocols of actions), etc. [19].

In turn, M.I. Dolzhenko and D.K. Tarianyk, researching this forensic category, note that the result of innovative forensic activity is the creation of an innovative product. Furthermore, such innovation is closely linked to the innovation process of creating, implementing, and applying such a product in practice. According to the authors, an innovative product in forensic science must correspond to the following features: relevance, efficiency, practicality, significance, feasibility, legality [20]. Interesting opinions regarding the understanding of innovative forensic product and innovation were expressed by N.B. Niechaieva [21], according to whom, innovation in criminology should be understood as the *implementation* of such a *component* that differs from the previously used principles of action, intellectual and technological parameters, methods of organisation and management, in order to increase the overall potential of criminal investigation [22]. This refers to creation of innovative forensic products in a broad meaning, as the author notes, precisely "such component" at which such forensic innovation, according to the author, should have certain properties: to be significant and capable of serving the purposes of criminal prosecution; meet the requirements of the law; be timely and easy to use [22].

The analysis of scientific approaches to understanding the essence of the studied categories indicates that the develop-

ment and formulation of such concepts must consider the methodological principles of this process, among which the main provisions are as follows:

1. Any science or scientific theory can be recognised as such only when not only its theoretical foundations are conceptually formed and substantiated, but also its framework of concepts and categories is developed, which reflects its subject matter. In their unity, concepts and categories form the framework of any science or individual theory. This fully applies to innovation studies in forensic science.

2. The formulation of concepts and categories of science or theory involves a certain procedure and system of methods of scientific knowledge. The essence of this procedure is expressed in the *formalisation of knowledge* about individual phenomena and objects, which lies in abstracting or distracting from insignificant, atypical features and properties of such phenomena, in identifying and fixing patterns of development and in establishing *the most important general (typical) features*, according to which they differ from others.

3. The general and universal method of forming concepts is *the dialectical method of scientific cognition*, which includes the necessary stages of rising *from the abstract to the concrete*, and then – *from the concrete to the abstract*. In this process, the role of logical and epistemological procedures, such as "abstraction-idealisation", and "abstraction- identification" and the category "concrete" in the development of categories and concepts of the subject matter should be considered [23; 24]. This process also applies to the development of the conceptual framework of innovation studies in forensic science.

4. The development of new concepts and categories in forensic science should consider the scientific developments of the studied problematic and requirements for forensic categories and concepts [25; 26], since they, as scientific abstractions, constitute the result of cognitive activity, should reflect the essential aspects and natural connections of the studied phenomenon, its objects, facts, events in a generalised form, i.e. reflect the essential features of the studied concept. The above provisions form the methodological foundation of such research.

2.2. Problems of development of basic concepts of innovation studies in forensic science

After analysing scientific approaches to understanding the essence of the studied categories of innovation studies in forensic science and clarifying the basic methodological principles of their development, we the concepts of "innovative forensic product" and "forensic innovation" can be developed, with their features characterised. The variety of features of an innovative forensic product, their different interpretations necessitate their classification according to the degree of significance. Considering this criterion, it is appropriate to divide the features into significant and insignificant ones. *Significant* features are those

that are reflected in the definition of an innovative forensic product. *Insignificant* features, albeit not included in the content of such a concept, constitute a priori knowledge about them, which determines the essence of this forensic category.

The essential features of an innovative forensic product include the following: 1) scientific and technical *novelty* of such a product, which can be newly created, or newly used, or improved, so this feature is primarily associated with the creation and emergence of new properties of innovative product, improving its parameters and capabilities; 2) such an innovative product is *developed and proposed for practical use*, but so far it *has not been introduced and applied* and it is embodied in the form of a new materialised product or technology; 3) it is developed, *created, and exists at the stage of scientific and research and development efforts*, as it emerges as a result of their implementation so as *to clarify, create conditions, and provide the necessary form for the implementation of the idea and bring the development to implementation*; 4) such an innovative product, in comparison with the already applied innovation, *occupies an intermediate place (is an intermediate object) between the new proposed idea, solution (innovation), and the result of its implementation*, i.e. already applied forensic innovation; 5) *demand in practice* and *the ability to meet the demands and needs of practice* and individual subjects of their application; 6) *the focus of such a product on the solution of forensic and other tasks* in a particular field of activity or tasks on certain issues or situations of investigation, trial and enforcement; 7) *development and proposal of forensic innovative products for the practical use* is calculated for their further use by special entities (investigator, detective, prosecutor, judge, expert, etc.), which must be qualified and aware of the prospects for their use; 8) a clear focus of such an innovative product on *a lasting positive effect* in the process of its further (possible) application, in particular, such an effect may be to improve the quality and effectiveness of law enforcement activities, its optimisation or solving certain forensic problems, etc. Thus, *an innovative forensic product* is a new product or technology developed and proposed for implementation, which is the result of scientific or research and development efforts, which is designed for their further use by qualified special entities and aimed at solving forensic problems and ensuring optimisation, improving the quality and effectiveness of law enforcement activities.

In this regard, literature notes that innovative forensic products should include developments in forensic techniques, tactics, and methods of crime investigation, namely: newly created or already existing and adapted to the needs of investigative practice forensic tools, modern information technology, electronic knowledge bases, methods of recording, analysis, and evaluation of evidence, new tactics, their complexes,

tactical combinations and operations, algorithms of priority investigative (search) actions and verification of typical investigative versions, methods of investigating new types of crimes, etc. [27; 28]. It is considered that such an approach is reasonable and can serve as a methodological foundation for further forensic research on this subject matter [29]. Clarifying the meaningful understanding of the concept of "innovative forensic product" allows to proceed to the study of such a phenomenon as "forensic innovation". Evidently, knowledge of the essence of this forensic category involves the study and research of the properties and features of this concept. In this case, the properties should be understood as a quality that is a distinctive feature of the object or phenomenon [30]. The properties of forensic innovation include the following: innovation (novelty), objectivity, subjectivity, purposefulness, demand, practical applicability, efficiency. All these properties fully apply to forensic innovative products, except for one – practical applicability – because only the practical orientation of such a product can be referred to. This means that it has been developed and proposed for practical use, but it has not yet been implemented and used in practice. Furthermore, it is important to factor in that innovative forensic products are embodied only in the form of new materialised products or technology; however, intangible objects (neither services, nor organisational and technical solutions, etc.) are not included in the concept of this product and its understanding [31; 32].

The main essential features of forensic innovation are as follows: 1) the *novelty* of products, technologies, services, and solutions developed, proposed, and implemented in practice, is manifested in the fact that they are associated with the creation andemergence of new properties improve its parameters and features, therefore they are newly created, or newly applied, or improved; 2) the latest technical, tactical, methodological, and forensic tools (innovative forensic tools) *developed, proposed and applied* are *in demand and are constantly used in practice*, they are embodied in the form of new products, technologies, solutions; 3) the latest technical, tactical, methodical, and forensic tools developed, proposed, and introduced into practice *are the result of scientific or research and development efforts*; new products, technologies, solutions are in demand and applied forms of implementation (application) of such innovative forensic tools; 4) the application of such innovations is *carried out by special subjects* (investigator, judge, etc.), which ensures the qualification and efficiency of the use of innovative tools developed and implemented in practice; 5) the *focus* of innovative tools on the effective solution of forensic problems, ensuring optimisation, improving the quality and effectiveness of law enforcement practice and further innovative development of forensic science. Thus, *forensic innovation* is the latest technical, tactical,

methodological and forensic tools developed, implemented, and applied as the result of scientific or research and development efforts, embodied in the form of a new product, technology, service, solutions used by qualified special subjects in practice and aimed at effective solution of forensic problems, ensuring optimisation, improving the quality and effectiveness of law enforcement practice and further innovative development of forensic science.

In this regard, an important area of improvement of the conceptual framework of the studied theory is the clarification and unification of terms, since innovations in forensic science are denoted differently: "innovative tools", "innovations in forensic science", "innovative technologies", "innovative forensic product", "innovations in the methodology of crime investigation", "innovations in forensic tactics". It is considered that such terminological discrepancy is associated with the stage of development of the concept of innovation, the development of this category of forensic science, but it negatively affects both their research and the practice of their application. The author believes that the well- established term "forensic innovation" should be recognised as the most successful and optimal for designating the process of development, implementation and application of innovations in law enforcement practice, which corresponds to the above criteria, thereby emphasising its focus on solving the problems of forensic science, obtaining the effect of their practical application and performing functional destination, i.e. ensuring optimisation, improving the quality and effectiveness of investigative, judicial, and expert activities.

CONCLUSIONS

Thus, one of the promising areas of scientific development in modern forensic science is the research of the problems of innovation study in forensic science as a fairly new scientific concept that is being developed. For its further study it is important to develop a framework of concepts and categories of this theory, in particular, such concepts and categories as forensic innovation, innovative forensic product, their functions, classifications, stages of the innovation process, etc.

The main categories of the studied theory are the concept of "innovative forensic product" and "forensic innovation". The analysis of the essence of these concepts gives grounds to assert that the innovative forensic product and forensic innovation are separate types of means of innovation studies in forensic science. Firstly, they constitute relatively new, specific activity categories, they reveal the functional side of innovative forensic tools that are used by qualified subjects (investigator, judge, expert, etc.) and are subjects-consumers of such innovations, and on the other hand, this is a development process, proposals and implementation of innovative products, which is carried out by the subjects- developers

(scientists, innovators, etc.) in the form of the results of research, experimental, and design developments. Secondly, forensic innovation product and forensic innovation should not be considered as competing forensic categories, but rather as complementary ones, which together create a single, most effective mechanism for obtaining and collecting evidence, optimisation, quality and efficiency of law enforcement and solving forensic problems. However, each of these categories have their own properties, essential features, content, role and purpose and their own tasks in the process of their application in practice. Successful solution of practical problems of innovation studies in forensic science involves the development of the framework of categories and concepts of this scientific concept and must consider the methodological principles of this process and prospects for development, implementation of innovative forensic products and application of forensic innovations in law enforcement. When developing the basic concepts and categories of this forensic theory should apply a comprehensive approach, which includes a system of general and special scientific methods of scientific knowledge, as well as the scientific provisions of the general theory of forensic science. Considering such provisions and various aspects in the development of scientific understanding of the basic concepts and categories of this scientific concept should be based on system-structural, technological, activity-based, functional approaches, which constitute the methodological foundation for creating prerequisites for the development of a separate forensic theory – innovation studies in forensic science. Operating with such approaches in the development of the concept of forensic innovation can become a new paradigm of forensic science, capable of raising to a higher theoretical and methodological level of research in this subject area.

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