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Collection of scientific papers
Founded in 2008

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НАЦІОНАЛЬНА АКАДЕМІЯ ПРАВОВИХ НАУК УКРАЇНИ

ЩОРІЧНИК
УКРАЇНСЬКОГО ПРАВА

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У науковому виданні «Щорічник українського права» зібрані найкращі статті, які були опубліковані у 2021 р. науковцями Національної академії правових наук України, інших навчальних і наукових закладів у галузі правознавства, з проблем теорії та історії держави і права, державно-правових наук і міжнародного права, цивільно-правових наук, екологічного, господарського та аграрного права і кримінально-правових наук.

Засновник – Національна академія правових наук України

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FOREWORD

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

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

Yearbook aims to become a guide in the field of various scientific information that has already been printed in domestic and foreign journals during the previous year. "Yearbook of Ukrainian law" is a unique legal periodical dedicated to the widest range of legal science's problems striving to become a concentrated source of modern scientific and legal thought on current issues in the theory and history of state and law, constitutional, criminal, civil, economic, international and other branches of law, that has no analogues in Ukraine. The journal's pages contain modern legal concepts and theories of the further development of Ukraine as a democratic, social, law-governed state, full of the most provoking contemporary ideas, fundamental and substantial issues of jurisprudence.

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

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

Honorary President
of the National Academy
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THEORY AND HISTORY OF STATE AND LAW

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THE PROBLEM OF NON-IMPLEMENTATION OF JUDGEMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN UKRAINE IN THE CONTEXT OF THE RULE OF LAW (METHODOLOGICAL AND COMPARANIVE ASPECTS)

Abstract. *The article is devoted to the problem of non-implementation of the decisions of the ECtHR in Ukraine in the context of the rule of law. The relevance of the subject matter is substantiated by the critical situation regarding Ukraine's compliance with its international obligations. The objective of the study is to develop a set of prin-*

ciples and policies to be implemented in Ukraine to strengthen the rule of law (as a fundamental democratic institute), as an essential factor for ensuring human rights in the context of re-establishing a proper international cooperation with the key European institution in the feld of human rights. According to the analysis of the degree of coverage of the issue, the existing papers on the mentioned problem are rather described by point-by-point recommendations aimed at "damage control", rather than at an in-depth resolution of the situation. The methodological basis of the research consists of the complex of general and special research methods, while philosophical methods were used to ensure the understanding of the essence, characteristics, and features of the phenomena under study. The research resulted in the development of a set of theses that demonstrate the depth of the problem under study that manifests through untimely and inconsistent normative-legal regulation, lack of tangible means of protection of human rights in Ukraine, inappropriate approach to the adoption and execution of international obligations. The authors argue in favour of the need to ensure three key aspects of the implementation of the rule of law – guaranteeing consistency of state policies and actions of ofcials; the formation of a stable system of administrative management; accountability, and responsibility of decision-makers. The practical relevance of the study is manifested through a set of recommendations, including the creation of a system to assess the effectiveness of reforms in terms of the rule of law; the formation of a mechanism for implementing the responsibility of decision-makers; the revision of procedures for the adoption of legal acts; the need to restart and complete the reform of the justice system, to involve NGOs in the processes of forming such; to create rules of cooperation between the state and the elites

Keywords: *ECtHR, ECHR, basic human rights, democracy, judicial enforcement*

INTRODUCTION

The problem of non-enforcement of ECtHR judgements has remained signifcant since the end of 2009 when the Court handed down its pilot judgement in the case No. 40450/04 "Yuriy Nikolayevich Ivanov v. Ukraine"[1]. Ukrainian academics have addressed this problem mostly in the context of the Court's protection of the rights enshrined in Article 6 of the ECHR and the consequences that this decision entailed (followed by the judgement "Burmych and others v. Ukraine" app. nos. 46852/13 et al.[2]). However, revisiting this problem in 2021 makes it possible to conclude not only the failure of Ukraine to respond appropriately, and the undue implementation of its obligations under the Plan of Action [1], but also the aggravation of the situation in the light of other articles.

The non-execution of the decisions of domestic courts led to further reaction of the ECtHR, and the non-capture

[1] HUDOC. Case of Yuriy Nikolayevich Ivanov v. Ukraine (Application No. 40450/04). (2009, October). Retrieved from http://hudoc.echr.coe.int/fre?i=001–95032.

[2] HUDOC. Case of Burmych and others v. Ukraine (Applications nos. 46852/13 et al.). (2017, October). Retrieved from http://hudoc.echr.coe.int/fre?i=001–178082.

of the general situation concerning the problems of interaction between Ukraine and the Court gave rise to several new problems in ensuring the rights set out in other articles of the Convention (the cases "Nevmerzhytskyi/Sukachov v. Ukraine" (Article 3)[1], "Zelenchuk and Tsytsyura v. Ukraine" (Article 1 of the First Protocol)4[2]. Parliamentary Assembly of the Council of Europe's Resolution 2075 (2015) "Implementation of judgements of the European Court of Human Rights" dated September 30, 20155[3], the Court's public statements and forced measures on the strike-out and transmission to the Committee of Ministers of more than 12,000 Ukrainian cases fully reflect the lack of progress in solving this issue. Separately, it is worth recalling the signifcant delays in the implementation of ECtHR judgements, which in the case of Ukraine (the average period of implementation of a judgement reaches 7 years) is effectively reduced to its non-implementation.

Such interaction between Ukraine and the ECtHR cannot be considered appropriate for two reasons. Firstly, the adoption of Ukrainian constitutional amendments on February 7, 2019 [2], which enshrine the Euro-integration and Euro-Atlantic course. Secondly, the strengthening of mutual cooperation with the EU in the framework of the Association Agreement, both lose their practical meaning and potential when it is not only impossible to ensure implementation of international obligations in Ukraine under the Convention but also to meet the political eligibility established by the Madrid criteria in the context of ensuring the necessary level of democracy and the rule of law of a candidate country. The inconsistency of Ukrainian policy on this issue with the deterioration of the situation with human rights provides the relevance of this study.

Ukrainian scholars, such as P. Pushkar, S. Chorna, and A. Romanova have conducted comparative studies of the implementation of ECtHR judgements in European countries, attention was also paid to the procedural aspects of such a process. This problem was brought up in the aspect of the subjectively unsuccessful Ukrainian judicial reform of 2016 (although subjective, this view is supported by the events of the so-called constitutional crisis in Ukraine of 2021 [3] and the President's statements about the urge to revive the reform [4]). However, the issue of ensuring an appropriate level of the rule of law and democracy in the framework of the implementation of the state's Eu-

[1] HUDOC. Case of Sukachov v. Ukraine (Application No. 14057/17). (2020, January). Retrieved from http://hudoc.echr.coe.int/spa?i=001–200448.

[2] HUDOC. Case of Zelenchuk and Tsytsyura v. Ukraine (Applications nos. 846/16 and 1075/16). (2018, May). Retrieved from http://hudoc.echr.coe.int/eng?i=001–183128.

[3] Resolution of the Parliamentary Assembly of the Council of Europe 2075 "Implementation of judgements of the European Court of Human Rights". (2015, September). Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fleid=22197&lang=en.

ropean integration course has been not given sufcient coverage.

In addition, the third nationwide survey "What Ukrainians Know and Think about Human Rights" [5] was conducted in 2020 to demonstrate how perceptions of human rights have changed in Ukraine over the past four years. The results of the survey confrm the demand and need of Ukrainians for human rights protection, but also give mixed results regarding their attitude toward the effectiveness of judicial protection, as the top 3 effective mechanisms include appealing to the media (23.3%, 2020), the ECtHR (19.6%, 2020) and state courts (20.9%, 2020).

Moreover, the consequences of the Constitutional crisis demonstrate that it is public attention and manual control of the situation (in violation of the established legal procedures) that is most effective. Thus, the established low level of confdence of the population with the failure to implement the rule of law negatively affects the state system, reduces its international credibility, and destabilises the mechanisms of engagement with the population, which has expressed unequivocal support for the new president and the government. However, it should be noted that the problems addressed in the article concern a prolonged process of deterioration of the situation and are not limited to the current formation of parliament or government, which does not negate its relevance in the absence of positive change.

The purpose of the study was to develop a set of principles and policies to be implemented in Ukraine to strengthen the rule of law (as a fundamental democratic institute), as an essential factor for ensuring human rights in the context of re-establishing a proper international cooperation with a key European institution in the feld of human rights.

In contemporary legal science, certain theoretical and legal aspects of ensuring human rights and problems of establishing the due level of the rule of law in Ukraine have been addressed by S. V. Bobrovnyk [6], P. M. Rabinovych [7], M. V. Buromenskyi [8], M. I. Koziubra [9], V. P. Kolisnyk [10], V. V. Lemak [11], S. V. Shevchuk [12], D. O. Vovk [13], O. R. Dashkovska [14], V. S. Smorodynskyi [15], O. O. Uvarova [16] and others. However, according to the analysis of the degree of coverage of the issue, the existing papers on the mentioned problem are rather described by point-by-point recommendations aimed at "damage control", rather than at an in-depth resolution of the situation. Nonetheless, the theoretical developments and practical activities of the above authors, including work in the European Court of Human Rights, the Constitutional Court of Ukraine, formed the substantive and informational base of this study.

1. MATERIALS AND METHODS

The subject of the study was defned as the principle of the rule of law in its totality. In its framework, the features of the subject of research, i.e., the interaction of its elements: access to justice in independent and impartial courts and respect

for human rights, determined its methodological basis, represented by the combination of methodological approaches, philosophical (attitudinal), general scientifc and special scientifc methods.

In particular, methodological approaches (phenomenological, hermeneutic, axiological, systemic) were applied in the process of scientifc cognition of the nature, structure, and functional purpose of the state as the guarantor of human rights, and in their totality contributed to the defnition of its role in the formation of an appropriate system of domestic protection and international interaction in this sphere. Philosophical methods formed the foundation of the study. The dialectical method was used in the process of substantiation of the stages of development of ideas and concepts of human rights in independent Ukraine, as well as the corresponding legislative consolidation; the idealistic method provided the formation of the idea of the importance of generally recognised legal ideas and concepts of human rights in modern democratic states; axiological method provided the characterisation of the studied categories as political and legal values.

Using the historical-legal method, the authors suggested a periodisation of the history of the formation of the modern system of judicial protection of human rights in Ukraine; using the formal-logical method, the authors summarised doctrinal approaches to the understanding of ideas, theories, concepts in the sphere of human rights protection and clarifed their content; the systematic and functional method was applied to clarify the functional purpose of intrastate judicial mechanisms of human rights protection and European Court of Human Rights involvement; the prognostic method allowed accumulating recommendations to improve the situation or, in the worst case, to halt the process of aggravation of the problem. The preparation of this study involved a research on contemporary articles of Ukrainian scientists on related issues, monographic publications, international agreements, legal opinions of the European Court of Human Rights on relevant cases, as well as ofcial communiqués of the Council of Europe's institutions on the subject matter. Additionally, the analysis of programmes and Action Plans of the Ukrainian government and the operations of the Government Commissioner for the European Court of Human Rights in Ukraine was conducted, modern research of public opinion on ensuring human rights and their protection was addressed, a scientifc assessment of current developments in the functioning of the Ukrainian judicial system was carried out.

2. RESULTS AND DISCUSSION

Proceeding from the position of the authors of this study, it is important to view the ECtHR judgement not as a penalty for the state (as opposed to the practice of the Russian Federation), but as an indication of how systemic problems that exist in states and consequently have an impact on the overall level of human rights

enforcement should be resolved. That is why the implementation of a judgement in most cases virtually does not require enforcement procedures in European countries, since such enforcement directly affects interstate political relations. In her turn, N.Ye. Blazhivska notes that detailed regulation of the procedure of execution of ECtHR judgements in Western European countries is usually not required in practice, since a sufciently high level of legal and political culture in the respective states (for instance, Germany and Austria) creates the necessary basis for the states' unconditional execution of ECtHR judgements without the need to apply coercive legal mechanisms and procedures [17, p. 84]. It does not, however, bring up the general level of the rule of law, without which the sole existence of any legislative procedure is incapable of such enforcement.

In December 2020 a hearing of the Legal Policy Committee was held in the framework of the Verkhovna Rada of Ukraine, where the problems of implementation of ECtHR judgements by Ukraine were addressed. In particular, the Head of the Department for Enforcement of Judgements of the European Court of Human Rights drew attention to the fact that the institutional system of reaction to the ECtHR judgements is built on the ideas of the 2006 law[1], so the application of the ECtHR practice in modern conditions and, given the modern challenges, virtually no longer operates. The main systemic and structural problems, which should be dealt with through measures of a general nature, have not been resolved over a long period of time.

This, in fact, blocks the implementation of individual measures. The result of the session was the development of legislative initiatives and changes aimed at solving the issue. This is not effectively a solution to the problem at hand, because the existence of statutory regulation is often levelled by the impossibility or problematic nature of its enforcement in practice.

It is necessary to take into account the context of the current situation. For Ukraine, an important event was the ratifcation of Protocol 14 to the Convention[2] containing a new provision (Article 16 amending Article 46 of the ECHR), according to which the role of the Committee of Ministers of the Council of Europe in the feld of monitoring the implementation of ECtHR decisions has increased. Now, if the Committee considers that a participating State is refusing to comply with a fnal judgement in a case to which it is a party, it may address the ECtHR with the question of that State's compliance with its obligation. If the Court fnds such a violation, it will refer the case to the Committee

[1] Law of Ukraine No. 3477-IV "On the Implementation of Judgements and the Application of the Practice of the European Court of Human Rights". (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3477–15#Text.

[2] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention. (2004, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_527#Text.

for the purpose of determining the measures to be taken. These may be political sanctions, such as loss of voting rights or termination of membership. In the current political situation, engaging in negative relations with an established international organisation in the feld of human rights protection will not play into Ukraine's hands, especially taking into account the fact that the Council of Europe has already had the experience of applying harsh restrictive measures against the Russian Federation (without taking into account their effectiveness and consequences).

In order to better understand the problem that has arisen around the provision of human rights in Ukraine, it is necessary to proceed from the periodisation of the constitutional regulation of human rights, which has been developed by us in the publication "Reforming Ukraine: Problems of Constitutional Regulation and Implementation of Human Rights" [18, p. 70]. Conclusions of the mentioned article laid the foundation for the current study, as partially revealed the problem of non-implementation of constitutional provisions and norms of legislation, bringing forward as causes the problems of low level of legal culture, low level of the rule of law, and a number of economic diffculties in the state. Operating within the framework of the rule of law, it is necessary to highlight a number of major challenges, the failure to address which has led to the current situation around the implementation of the ECtHR judgements and the enforcement of human rights in Ukraine in general.

Firstly, the statutory consolidation fails to catch up with the public demand for the regulation of the corresponding relations. Within the established legal system, which implies preventive regulation of possible situations, this approach directly hinders Ukraine's development as a democratic European state, reduces its international credibility, and diminishes its European integration prospects. In addition, an important aspect of this problem lies in the lack of will or the deliberate blocking of legislative initiatives by the current political elites in pursuit of their interests. Despite the economic nature of such an impact, it cannot but affect the overall level of the rule of law in the country, and only time and a renewal of the elites can solve this problem.

Secondly, the lack of tangible guarantees of protection and restoration of violated rights within the state. This problem is multidimensional by nature. Acclaimed scholars A. M. Kolodii and O. V. Batanov through public speaking at scientifc events have attributed to this issue not only the problems of formation of a capable judicial system, corruption, economic factors, but also a sociocultural element, which is manifested in the relatively young nature of Ukraine as an independent state, as well as in a certain "Soviet legacy". Perfectly understanding the consequences of the prioritisation of the state over a person and his/her rights, the collective over the individual within

the Soviet Union, as well as the situation in which a large layer of civil legal relations was effectively prohibited, it should be noted that several post-Soviet states in the Baltic region have demonstrated by example the dubiousness of such an argument (including in the context of interaction with the ECtHR).

Thirdly, the authors addressed the misunderstanding of international integration processes, and, as a consequence, the imperfect treatment of the implementation of international obligations in Ukraine. Based on the above opinion of the authors, it is necessary to emphasise the lack of understanding by the leaders of the state of the seriousness of the problem and the need for a rapid response to the situation. Voluntarily assumed obligations to ensure human rights and taking measures to eliminate systematic violations should be motivated not only by maintaining the image of a democratic state but by a direct manifestation of the will of responsible persons by taking actions aimed primarily at solving the critical situation around human rights that has formed in Ukraine. The decline in human rights that was outlined in the introduction to this article has permeated all political processes in Ukraine for more than a decade, regardless of the present political agenda or the leading political forces.

Thus, there are grounds to assume that the problem is more profound and is not solely the result of the negative impact of the described systemic problems, new challenges, economic difculties, and international conflicts. Therefore, the purpose of this study was determined by the need to demonstrate the role of the rule of law as the foundation of state-building in general. At the same time, it is necessary to note the flipside of the process, i.e., the actual impact of the established course on the decline of the rule of law. Consequently, by combining the above issues, one key can be singled out – **inconsistency**. Despite the slightly different context of the study, to argue this point, it is worth quoting Dr. Cristina Gherasimov and Dr. Iryna Solonenko in their 2020 paper "Rule of Law Reform after Zelenskyi's First Year", – *"reforming the rule of law is a complex endeavour that needs to be backed by bold political leadership and strong administrative capacity. For such reforms to consolidate, it takes decades, multiple governments, coordinated effort, and a widespread pro-reform consensus among major stakeholders"* [19]. Unfortunately, the historical and political process in Ukraine is described by a high level of inconsistency in actions and reforms. The 2000s constitutional amendments alone demonstrate the motives behind such changes, which were far from advancing the course of reforms, but rather were aimed at redistributing powers and spheres of influence. Subsequently, the establishment of a European integration course and the contraction of cooperation with the Russian Federation (and the CIS in general), laid the general appropriate course of development, however, with a number of national peculiarities.

The reforms of the previous administration (2014-2019) were partially sustained by the current administration, which indicates a certain continuity, but still insufcient. For example, the most successful decentralisation reform, for the moment, has lost momentum, although, based on the above public survey, the population still does not see any connection between ensuring their rights and the local self-government. The judicial reform as such was found to be unsuccessful because part of its goal was to consolidate influence in this sphere, rather than to improve its overall state (which led to the blocking of the work of a number of important state institutions and the inability to ensure the proper functioning of the system itself). Police reform has shown a certain level of effectiveness due in large part to the involvement of international partners. Despite the relative success of the latter, it is the consequences of its continuation in the context of consistency that determine its outcome.

In many respects, the problem of inconsistent operation lies in the lack of understanding of the goal-setting, processes, and results of reforms. On the one hand, the authorities elected in democratic elections are primarily trying to strengthen their positions in order to guarantee their re-election. On the other hand, the Ukrainian people, partly saturated with the successful experience of other states in the globalised world, demonstrate insufcient awareness and are not always able to properly assess the established course and ongoing reforms. Thus, by pursuing political goals by eroding the existing level of the rule of law, decision-makers form the rejection of reforms and changes by the population, which leads to a rapid loss of trust and support, resulting in a radical change of course by electing new representatives through the next democratic elections.

Following upon this thesis, two key points can be formed – **stability and accountability.** Both of these should be the basis for establishing the proper level of the rule of law, and their absence has a negative impact on it. After all, according to the natural law theory, the rule of law requires that all regulations (including the Constitution and laws) and all activities of state power are devoted to the protection of human dignity, freedom, and rights. In this context, the problem of the so-called "Soviet legacy" is nevertheless traceable. When, on the one hand, the population does not feel responsible for their elected representatives and, on the other hand, the representatives do not feel any consequences for the decisions made within their cadence. Thus, the authors argue their thesis regarding the necessity of ensuring stability, which is ensured by the rule of law. Creating a proper system for the functioning of the state must ensure consistency by imposing limits and accountability on decision-makers, and must, among other things, create awareness among the population of the importance of their votes.

Thus, today the Ukrainian society faces a situation of consistent weakening

of the processes of state-legal regulation in all spheres, which leads to the deterioration of the state of human rights protection and enforcement, which manifests itself, among other things, through the failure to perform international obligations regarding the implementation of the decisions of the European Court of Human Rights. Arguing that the problem is more complex, and one that is directly related to the mutual process of influence of the reduction of the level of the rule of law on the general state processes (non-execution of the social function of the state as the guarantor of human rights), including in their international manifestation (non-implementation of ECHR decisions), conclusions of this article will focus on more tangible and palpable measures aimed to solve the specifc problem, in order to avoid going beyond the subject of research.

CONCLUSIONS

To restore the proper functioning of the state in general, including the performance of its main function – to ensure the adequate level of life of its population, the ability to exercise, protect and restore their rights (within the state and at the international level) Ukraine today needs to implement above all the changes associated with the establishment of a stable and coherent system of state institutions. In other words, priority should be given to the processes of administrative conduct by individuals performing the functions of the state. The presence of appropriate regulation based on the best practices of European states (the EU members) should ensure the imminence of accountability (at least political at this stage) for the decisions made in order to induce such persons to act primarily in the interests of the state and the people they were elected to serve. In addition, despite the successes of some of the reforms discussed in this study, a clear balance must be struck between pursuing national interests and the proper implementation of the international obligations undertaken. The Ukrainian nation and the Ukrainian people as such, already demonstrate the demand for implementation of such practices, but still do not realise the responsibility for the exercise of their electoral rights, including, in a situation of lack of proper communication with the state cannot properly form an opinion regarding the assessment of the reforms and changes implemented (which largely leads to the strengthening of immigration processes). Foreign partners are capable only of assisting within the framework of international law and are not in a position to fundamentally change the mechanisms of interaction between the state and the population. Thus, having developed a policy of paramount importance of the national interest, and implementing it on the basis of the rule of law and respect for human rights, while ensuring consistency in the implementation of European integration processes, Ukraine in the near future may potentially qualify for deepening cooperation, and perhaps for accession to the European Union. At

this stage, based on the importance and depth of the subject matter, such prospects seem vague.

RECOMMENDATIONS

To ensure the practical value of this paper, it is appropriate to provide a number of specifc steps required to achieve the result, the outlook for which has been outlined above. The primary step is to establish a system of effective assessment of the ongoing reforms in the area of the rule of law. That is, the reforms that have been actually carried out and planned must frst and foremost follow the principle of ensuring the rule of law. To achieve this goal, it is necessary to increase the level of involvement of representatives of the scientifc community in the process of assessment, preparation, and adoption of legislation. Such participation includes the engagement of international experts, but the nature of "taking into account the recommendations" (by the example of the Venice Commission) is insufcient.

Further, among other things, in order to combat corruption, the level of perception of which, admittedly (based on authoritative studies), is extremely high by European standards, an independent and effective system for ensuring accountability must be created. Again, at this stage, given the obvious inability of the judicial system to respond to such manifestations and to avoid the politicisation of the administration of justice, it seems sufcient to revise and strengthen the institute of political responsibility. However, it is necessary to ensure the proper level of public insight and involvement, so that unpopular but justifed reforms do not lead anew to a situation in which, due to lack of comprehension, they cannot be completed, and a change of the state course every 5 years effectively leads to a standstill.

Third, the process of decision-making, including the drafting of legal acts, must be reformed based on new principles of administrative management, and primarily based on the realisation of national interests [20]. Decisions should not be taken under pressure from the international community, but to avoid involvement in negative relations as such. Again, international obligations (especially in the area of human rights) should not be a burden on the state, but rather an incentive to develop and improve intrastate systems and policies.

Fourth, sustained justice reform must be undertaken and continued by successive political powers based on the principles outlined above, rather than for the purpose of consolidating political influence. An important factor for the success of such reform is the following point of recommendations. Involvement of non-governmental organisations in the decision-making process. Lately, in Ukraine, the involvement of such subjects in the sphere of human rights protection has increased signifcantly, which has also been reflected in scientifc research on this topic. Despite the legislative consolidation of the involvement of such subjects in the process of form-

ing the bodies of justice, today one can observe merely the formal character of such involvement.

The last, but not the least important recommendation is to strengthen the fght against corruption at the highest and local levels. At the moment in Ukraine, there is a strong influence on the national processes of the socalled representatives of the elites, whose activity in Ukraine is more characterised as an oligarchic influence. In this context, the authors do not refer to the elimination such influence by illegal means, but rather to creation of rules of conduct and interaction between the authorities and interest groups (again, with a focus on ensuring state interests and the interests of the population).

It is necessary to understand that the above recommendations are not revolutionary, but they are of critical importance for modern Ukraine. By opting for the rule of law at all levels, starting from the highest one, through lengthy and unpopular reforms over time it is possible to achieve a proper level of state functioning, which in turn will manifest itself in ensuring human rights, solving problems with non-execution of local court decisions, and normalising relations with the ECtHR regarding the performance of the obligations undertaken to implement its decisions.

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TECHNIQUE OF GENERALIZATION OF RESULTS OF COMPARATIVE HISTORICAL AND LEGAL RESEARCH

Abstract. *This study investigates the technique of organising the information obtained during the comparative historical and legal analysis. The main methods of data systematisation include classification and typologization. Classification is manifested in the division of objects into certain classes and can be based on a variety of criteria. Therewith, each individual classification should be performed based only on one feature. In contrast to the classification, typologization can be performed on a set of essential features and is aimed at understanding the essence of the phenomena under study. Any historical and legal typologization depends on the selected criteria. The result of comparative historical and legal analysis can be the production of entire arrays of information, to organise which it is advisable to use methods of cluster analysis. Cluster analysis constitutes a set of techniques that allow classifying multidimensional observations, and its purpose is to create clusters – groups of similar objects. This study also provides an algorithm for using cluster analysis. All the above methods of information systematisation serve as the basis for further evaluation of the data obtained, the main element of which is an explanation. It is in the process of explanation that the essential aspects and rela-*

tions of the compared historical and legal objects are covered and the internal causal relationship between the studied state and legal phenomena is established. Evaluation of the results of comparative historical and legal research does not end with a simple explanation, but can also continue in scientific forecasting, the logical basis of which is the method of modelling. The process of modelling at the stage of systematisation and evaluation of the results of comparative historical and legal research takes place in several stages, which are also covered in this study

Keywords: *generalisation of results of comparative historical legal research, classification, typologization, methods of cluster analysis, forecasting, modelling*

INTRODUCTION

Generalisation of the results of comparative historical and legal analysis is the last stage of comparative research; it is at this stage that the scientific terms, concepts and theories are finalised based on the discovered historical and historical and legal facts and the established relations between the compared objects; historical and legal laws are concretised, objective essential communications between the state and legal phenomena and processes are consolidated. Any comparative historical and legal study necessarily contains two components: the empirical basis and abstract-theoretical constructions, which are respectively formed on two levels: empirical and theoretical. The main difference between these levels of knowledge is that the empirical basis of comparative analysis is based on historical and legal factual material, reflecting mainly state legal phenomena and relations between them, and theoretical constructions, based on the data of empirical knowledge, reveal the essential aspects and natural connections of historical and legal reality.

It is characteristic that it is at the last stage of comparative research that the empirical and theoretical levels of scientific cognition acquire their most complete and close interrelation. However, the relationship between the empirical and theoretical levels is so complex and multifaceted that, for example, in historical and legal comparative studies it is often impossible to determine precisely where one begins and another one ends, especially when it comes to systematising and evaluating the results. It should be borne in mind that in the methodology of comparative historical and legal research contains a certain imbalance between its theoretical and instrumental dimensions. The immediate consequence of which is often, on the one hand, the absolute conviction of the comparative historian in his own strength to carry out comparative work in one direction or another, and on the other – his complete confusion when it comes to specific work with historical and legal objects. The reasons for this confusion – in the absence of a reliable tool base for comparative research, which should contain a clear and complete list of those tech-

niques that help in a practical level of comparative analysis.

In the context of what has been said, it is quite clear that the stage of generalisation of the results of the comparison of historical and legal objects is especially difficult. It is at this stage that the researcher has a fairly large amount of data, the organisation of which objectively requires the involvement of additional techniques. Admittedly, a comparative historian, in addition to general methodological knowledge, must have special training. The purpose of this article is to analyse the specifics of the application at the specific problem level of the main methodological tools used in the systematisation and evaluation of the results of comparative historical and legal analysis.

Interestingly, the comparative method is increasingly used in modern research of historical and legal orientation. Thus, we can mention the work of R. Kazak, in which she, developing the author's periodisation of legal protection of nature in Ukraine in the second half of the XX century, relies, inter alia, on a comparative means of scientific knowledge [1]. In his other article, R.A. Kazak uses a comparative approach in the analysis of EU and Ukrainian legislation governing the protection of biodiversity [2]. In this context, it should be noted and the study of D.V. Lukianov, H.P. Ponomarova and A.S. Tahiiev, which examines the historical and comparative aspects of the formation of the Quran and the specific features of its interpretation in different directions of Islam – Sunni and Shiism [3]. Relevant from the standpoint of wide use of the comparative method is the scientific article of D.V. Lukianov, V.M. Steshenko and H.P. Ponomarova, devoted to the study of different understandings of freedom of expression in Islam and the European cultural and legal tradition [4]. The comparative method is used in the scientific work of V.M. Yermolaeva, devoted to the analysis of the opinions of M.S. Hrushevsky on the constituent power of the Ukrainian people in different historical periods [5]. A fairly clear comparative approach can be traced in the study by R.J. Scott, dedicated to the assertion of the concept of equal "public rights" during the Reconstruction in the United States [6]. The research of K. Ramnat is of great scientific and cognitive interest, who uses a comparative method to study the historical and legal aspects of the development of South Asia after World War II [7]. Similar in its problems is the work of P. Saksena, which deals with issues of sovereignty and international law in South Asia at the end of the XIX century. Comparing the understanding of sovereignty in various legal traditions, the author quite convincingly proves that certain state-legal processes are directly related to its corresponding interpretation [8]. At a high scientific level, the comparative method is also used in the scientific article by L. Flannigan, in which she uses a wide range of data summarised in a table, conducts a comparative analysis

of the social composition of plaintiffs who applied to English courts in different time periods [9]. In addition to these scientists, a comparative approach in their work also used O. Lutsenko [10], R. Shapoval, Iu. Bytiak, N. Khrystynchenko and Kh. Solntseva [11], Yu. Vystavna, M. Cherkashyna and M. R. van der Valk [12].

However, despite the widespread use of the comparative method in modern historical and historical and legal works, in most cases there is no clear and consistent method of its use, which considerably reduces the possibility of obtaining results with high heuristic potential. In addition, insufficient development of techniques for generalising the results of comparative historical and legal research often does not allow the researcher to reach the appropriate theoretical level of systematisation and evaluation of the data. This entails the objective need to conduct research in this direction with the involvement of developments in related fields. Since modern science has an interdisciplinary nature, the development of scientific methods, including comparative historical and legal, directly depends on the close interaction between different disciplines. Thus, among those authors who have recently paid attention to the above issues, we should mention such as: V.V. Vasilkova and N.I. Legostaeva [13], J.M. Duran [14], K.A. Lopatka [15], J. Nicholls, B. Allaire and P. Holm [16], N.A. Petrunia-Pyliavska [17], P.R. Putsenteilo and Ya.I. Kostetskyi [18] and others.

1. MATERIALS AND METHODS

The methodological basis of this study is the doctrine of the three-member structure of the scientific method, which provides for its mandatory components such as theory, methodology and technique of application. It is quite significant that in both Western and domestic methodology of historical and legal science there are considerable gaps in the field of quality development and design of its basic methods of cognition. Therewith, if in the methodology of Western historical and legal science the emphasis is more on the methodology of scientific work, then the domestic historical and legal science by inertia deals mainly with issues of theory. Although it should be noted some convergence in this direction, which has emerged recently.

If we consider the state of affairs in the field of historical and legal comparative studies, it is necessary to state its almost critical need to provide techniques used in working with historical legal material. The problem can be reformulated differently: all the techniques necessary for the historian-comparativist have long been known to science, but their adaptation to the conditions of comparative historical and legal research is absent. This determines the task of our article: to identify and try to adapt to the needs of the stage of generalisation of the results of comparative historical and legal analysis of the most important ways of organising information data.

The scientific method as a system of regulatory principles of practical or theo-

retical human activity is never completely arbitrary, because it is determined by the nature of the object under study. However, this does not mean that the methods of one area of knowledge can not penetrate into another area. On the contrary, this process is necessary and is carried out based on the objectively existing commonality between the subjects of study of different sciences, which takes place in reality. The expansion of methods in modern science, including historical and legal, is not a unique phenomenon. Thus, the scope of possible application of any method or technique and the allowable limits of their "expansion" depend on the nature of the studied objects.

All the above applies to historical and legal objects, which are certain state and legal phenomena and processes: the presence of quantitative and qualitative components in their content allows you to successfully attract the means of scientific knowledge from other related (and not quite) sciences. For example, at the stage of systematisation and evaluation of the results of comparative historical and legal analysis, such scientific techniques as typologisation, classification, cluster analysis methods, modeling, etc. can and should be used. However, unfortunately, understanding the possibilities does not mean the ability to use them: in a considerable number of cases during comparative research on historical and legal issues, these tools are either not used at all, or the results of these techniques do not meet their epistemological potential.

In fact, despite the fact that this article is aimed at studying the technique of applying typologisation, classification, modeling, etc.at the last stage of comparative research, this refers to a systematic approach to the comparative study of historical and legal phenomena and processes. And since any historical and legal object that can be compared is multifaceted, there are a number of serious logical and methodological problems of complex research. The essence and formulation of the problem, the establishment of general and special goals of comparative research, the specifics and ways to obtain during its conduct comprehensive knowledge of historical and legal issues, ways to improve the effectiveness of comparative analysis – this is not a complete list of important issues that need to be addressed historical and legal comparative studies.

From the epistemological point of view, the study of the generalisation of the results of comparative analysis means a movement towards the transition of the methodology of historical and legal science to the paradigm of holistic, comprehensive and complex reflection of its objects that have long been the subject of abstract, unilateral and highly specialized scientific studies. Moreover, it is safe to say that a comprehensive approach to the study of the phenomena of historical and legal reality in itself becomes the most important methodological requirement. The growing role of an integrated approach in historical and legal comparative studies is primarily

explained by the fact that the objects of comparative analysis are often extremely complex state and legal systems, comprehensive study of which objectively requires the widest scientific and methodological tools.

2. RESULTS AND DISCUSSION

2.1. Classification and typologization

Bringing the accumulated knowledge in a certain order is one of the most important theoretical tasks of the whole science and any individual scientific research. The problem is to choose a scientifically sound and appropriate method of organising the information data. In particular, it should be such that the result of grouping does not contradict practice and it could be applied in further scientific activity. In this case, the forms of scientific organisation of information about the subject of research are numerous and often depend on the nature of the subject area and exist within their science [19]. The main ways of organising information, which are often used in comparative historical and legal research, are typologization and classification.

Typologization is one of the universal procedures of scientific thinking, which consists in the distribution of objects and their grouping using a generalised, idealised model or type [20]. However, the concept of "typology" is not identical to the concept of "typologization", although they are interrelated. Typologization of state and legal phenomena and processes during a comparative historical and legal study involves their typology. Typologization and typology differ in terms of process and result. If typologization means the process of grouping the studied phenomena based on a theoretical model (type), then typology is the result of this process.

Typology as a result of typologization gives a holistic knowledge of the object, reveals the systemforming connections between its various aspects, distinguishes its essential features and properties from the whole system of connections [21]. Classification, which is also used at the stage of systematisation of the results of comparative historical and legal research, is expressed in the division into classes of plurality of objects of a particular subject area based on their similarity in certain properties. It should be clarified that the classification as the division of objects into certain classes is carried out in such a way that each class occupies a specific place relative to other classes [22]. During the comparative historical and legal research, and especially at the stage of systematisation of the obtained results, the classification can be carried out based on many criteria. Among the latter, in particular, we can name ethnic, religious, psychological, racial, geographical, ideological, socio-cultural, etc. Therewith, each individual classification should be carried out on one basis, which is its basis. If there are several features, they are the basis for several classifications. At the same time, the classification is neutral to the essence of the studied phenomena, because it cannot be carried out

according to a set of essential features, and thus differs from the typologization [23]. Quite clearly the essence of the classification can be traced in the work of D. V. Lukianov, where he based on various criteria distinguishes the following classifications of legal systems: 1) pure legal systems and legal systems of mixed type; 2) developed and underdeveloped legal systems; 3) maternal and child legal systems [21].

The main advantages of classification as a method of systematisation include the fact that it involves a variety of real objects; unites some objects and excludes others, thus contributing to the disclosure of real connections and relations of the objective world; has the ability to group objects in almost an unlimited number of directions. Therewith, with all the advantages of classification, it has certain disadvantages. Thus, any classification feature singled out by it is relatively necessary, and the grouping done on this basis is conditional, because the same objects can be distinguished by other features. In addition, the classification does not allow to identify patterns of the ratio of different classification planes, as each of them is completely autonomous. Finally, the classification, which is manifested in the separate and sequential consideration of features, is not able to identify the internal organisation of the grouped plurality, as a result of which it remains a simple set of different phenomena and is not revealed by the researcher as a whole and (or) system.

In the context of the above, it becomes quite clear that the importance of classification and typologization cannot be underestimated or exaggerated: each of these methods of cognition is in demand at the stage of systematisation of the results of comparative historical and legal research. However, it should still be recognised that when working with complex and contradictory historical and legal matter, typologization is more significant than classification. It is the typologization, which is expressed in the dismemberment of objects and their grouping using a generalised, idealised model or type, helps to organise the multiplicity of heterogeneous historical and legal phenomena and processes, as well as to establish certain patterns of their deployment in time and space. In addition, typological analysis has a higher degree of generalisation compared to simple grouping and classification. There are empirical and theoretical typologizations [24].

Characteristically, any typologization depends on the chosen criterion. For example, N. A. Petrunia-Pyliavska within the civilisational approach identifies such criteria of typologization as a specific historical period, geographical space, leading production technology, the specifics of political relations, type and type of religion [17]. An interesting typology is the division of cultural mentality (or state of culture of society) into seven types, proposed by T. S. Pronina, Yu. S. Fedotov and K. Yu. Fedotova in his latest work. Thus, they identified the fol-

lowing types: 1) adaptable; 2) passive; 3) the one who transforms; 4) mixed; 5) idealistic; 6) preaching; 7) ascetic. The typology typologization carried out by these scientists was based on several criteria, in particular, the spiritual and sensory components, which were specified in the value-needs and ways of their implementation [25]. In this context, the typology of states proposed by V.D. Tkachenko. Using the principle of legality as a criterion for typologization, the scientist distinguishes between civil and pre-civil types of states [26].

Significant scientific interest from the standpoint of choosing the criterion (criteria) of typologization during the systematisation of the results of comparative historical and legal research is the work of R.A. Romashov, devoted to the typology of states. In particular, the author as a basis for the typologization of states takes the category of cyclicality and the corresponding method, distinguishing such types of states as: city, patrimony (domain), public political and legal order (state). Analysing the following types in detail, R.A. Romashov emphasises that the selected types do not necessarily determine each other and may well coexist within a single historical period. For example, medieval Europe "used" city-states – republics and domain states (kingdoms, principalities) [27].

Thus, as the above examples show, the comparative historian, conducting a typologization of the results of comparative research, has the potential to widely realise their creative potential, admittedly, given the methodological limitations that are characteristic of this logical method of organising information data. And the new typologies of state and legal phenomena and processes, which will be a natural and indispensable result of such activity, are what is critically necessary for modern historical and legal science.

Notably, any historical and legal typology is always a model, a system of orderly ideas and knowledge about the object under study. It is possible to state only the degree of proximity of each created typological construction to the knowledge of this object, because none of the systems contains the whole truth, just as none of them can be considered completely false [28]. Admittedly, this does not detract from the importance of typologisation as a method of ordering information obtained during the comparison of historical and legal objects: any alternative typologies, if they were carried out in compliance with the appropriate methodological procedures, are very positively perceived by historical and legal science, contributing to a deeper and more comprehensive knowledge of state and legal phenomena and processes.

2.2. Methods of cluster analysis

The result of comparative historical and legal analysis, especially in cases where macro-level objects are compared, such as civilisations, states, legal systems, etc., can be the receipt of entire arrays of information. To organise it, it is advisable to use cluster analysis methods,

which are often used in statistical studies. This is largely due to the fact that modern social and historical and legal research is quite closely interconnected at the information level [29]. S. G. Serohina notes that cluster analysis occupies a particularly important place in those branches of science that are related to the study of mass phenomena and processes. The need to develop and use methods of cluster analysis is dictated primarily by the fact that they help to build scientifically sound classifications, to clarify the internal relationships between the units of the population that is observed. In addition, cluster analysis methods can be used to compress information, which is an important factor in the conditions of constant increase and complication of statistical data flows [30].

Cluster analysis is a set of methods that allow you to classify ultidimensional observations. The purpose of cluster analysis is to create clusters – groups of similar objects [31]. In contrast to combinational groupings, cluster analysis uses the so-called political approach to the development of groups, when all grouping features take part in grouping at the same time. However, as a rule, clear boundaries of each group are not specified, and also it is not known in advance, how many groups it is expedient to allocate in the investigated set. The result of cluster analysis is to obtain a comprehensive, multifaceted classification of the studied historical and legal phenomena and processes, which avoids the influence of although substantial but random factors and features, or those whose overall role in characterising a phenomenon is offset by other factors or features [30].

The use of cluster analysis, as a rule, involves compliance with a certain algorithm of actions:

1. Defining a set of characteristics for evaluating objects to which cluster analysis is applied;

2. Finding the optimal number of clusters;

3. Determination of indicators to characterise the degree of similarity between objects;

4. Substantiation of methods and algorithms of cluster analysis;

5. Validation of results;

6. Presentation and interpretation of the obtained results [18].

An important issue in cluster analysis is the establishment of the necessary and sufficient number of clusters. As a rule, this number is determined from the indicators of homogeneity and proximity of clusters.

A rather striking example of the practical implementation of cluster analysis, which can be used in research of historical and legal orientation, is the work of M. G. Shenderyuk, in which she based on a meaningful analysis of a set of indicators taken from the county summaries of zemstvo censuses, identified 19 relative features of the grouping and classified 10 objects – counties of the Novgorod province. Thus, all objects were divided into three clusters, each of which included the most agriculturally similar counties, and each of the clusters was given a con-

ditional name: I – "northern", II – "central", III – "southern" [32].

Thus, the main idea of cluster analysis is the sequential association of grouped objects on the principle of closest proximity or similarity of properties. The result of such grouping is the separation of clusters – groups of objects described by common properties. This method of systematisation of information data is very effective when in the course of comparative historical and legal analysis the internal heterogeneity of the compared objects is established, which requires its grouping, or when the main elements of the compared objects contain a large number of similar indicators with different qualitative content (as an example, we can cite a comparative study of the estate-representative authorities of Medieval Europe, where one of the main components will be the order of staffing of these institutions, which acquired considerable territorial specificity in each case).

2.3. Evaluation of the results of comparative historical and legal analysis

All the above methods of systematisation of information taken during the comparative historical and legal analysis are the basis for further evaluation of the data, the main element of which is an explanation. It is in the process of explanation that the essential aspects and relations of the compared historical and legal objects are revealed, the internal causal relationship between the studied state and legal phenomena is established, as well as their natural conditionality. To explain a state and legal phenomenon means to establish its fundamental properties and relations, the main causal conditionality, to identify the general laws to which it is subject [33].

The objective premise of the explanation is the general connection and interdependence of the phenomena of objective reality. Establishing this connection and interdependence is the main epistemological function of explanation. Explaining, the comparative historian divides historical and legal objects into constituent parts, and then, based on the general laws of this class of objects, synthesises these parts, clarifying the internal connection and conditionality of the elements in the system of the whole. From a logical point of view, the explanation is the inclusion of comparable historical and legal objects in the system of theoretical knowledge, the spread of general provisions and principles of historical and legal science, based on which the most complete and deep understanding of these objects is achieved.

As an example of evaluation of the results of historical and legal comparison, we can cite a comparative analysis of medieval acts of a constitutional nature, conducted by S. M. Zharov. Thus, the scientist, in order to justify the point of view that the first constitutional act in the history of Russia was the "Charter granted to Moscow Archers, soldiers, guests, Posad officers and coachmen" of 1682, conducted a historical and legal comparison of this legal act with

the Magna Carta of 1215. Interestingly, the following criteria were chosen for comparison: the political situation in which the act was adopted; sources of legal norms; structure and content of the text [34]. Thus, after characterising the political situation in which each of the compared documents was adopted, and the sources of their legal norms, S.M. Zharov considers the structure of both acts, noting that it is quite simple. In particular, their authors did not divide the text into any parts, but their construction allows us to distinguish the preamble, main part and conclusion.

Upon completion of the characteristics of the Magna Carta S.M. Zharov notes that despite the general similarity of the structure, the content of the "Charter granted to Moscow riflemen, soldiers, guests, Posad officers and coachmen" is somewhat different from the content of the Carta. Thus, the preamble to the Charter no longer records the "forgetting and forgiving" of murders and robberies committed during the riot (as stated in Article 62 of the Carta), but their recognition as lawful, committed in the name of justice and protection of the throne. As a result, it is forbidden to call rioters "rebels and traitors" and to persecute them for their actions. Explaining the results of the historical and legal comparison, S.M. Zharov concludes on the existence of a very similar Magna Carta of 1215. "Charter of Moscow archers, soldiers, guests, townspeople and coachmen" in 1682 allows us to conclude about the emergence of Russian constitutionalism in the XVII century. In addition, the "Letter of Merit…" demonstrates not only the existence of the constitutional idea of protecting the rights of the population by law, but also the implementation of this idea in a legal act that had legal force. The appearance of this document also marked the emergence in Russia of a new type of socio-political movement for the legal consolidation of rights, and its historical fate – inherent not only in Russia but also in other states dependence of rights and freedoms on their ability to protect and defend them, including force [34].

As you can see, evaluating the results of comparing two historical and legal acts, the researcher does not limit himself only to stating their similarities and differences, but also tries to go beyond the actual comparison as a formal and logical operation and, using its results, explain the influence of one of the documents on the historical development of the country to which it belongs. Note only that if there were more criteria for comparison, and, in particular, they included the category of time, the conclusions of the comparison would be more meaningful and allow to reach the level of isolation of historical and legal laws or construction of scientific theory in general. Thus, the explanation of the results of comparative historical and legal analysis has a fairly large heuristic potential and requires a comparative historian to take a creative approach to his work.

Representative of the modern school of chrono-discrete monogeographic com-

parative legal science O.A. Demichev, characterising the stage of systematisation and evaluation of research results, notes that the indisputable advantage of some historical and legal research is that based on historical experience, the authors offer recommendations for improving existing legislation in one area or another, recommendations for improving law enforcement practice. However, when writing historical and legal works, this is undoubtedly a positive but side effect. According to the scientist, it is incorrect to demand from historians clear recipes for the improvement of modern legal and state institutions. Nevertheless, the historian collects certain materials, makes theoretical generalisations and conclusions on the subject. Specialists in the relevant field of law should make specific proposals to improve the existing mechanism of legal regulation based on these materials [35].

We think that this is a somewhat controversial statement of a well-known scholar, because any scientific study of historical and legal orientation presupposes a corresponding awareness of the scholar who conducts it, both in historical and legal issues. And therefore it is necessary to state (especially since O.A. Demichev does not directly deny this) that at the stage of evaluating the results of a comparative historical and legal study, a comparative historian, in addition to a general explanation of the data obtained, has the right to provide specific proposals to improve a state and legal institution of today. Nevertheless, in contrast to the usual comparative historical and legal research before the representatives of the school of chrono-discrete monogeographic comparative jurisprudence one of the mandatory tasks is: based on comparing the historical experience of legal regulation and functioning of any institution recommendations for improving the relevant modern institution [35].

2.4. Forecasting and modelling method

Evaluation of the results of comparative historical and legal research does not end with a simple explanation, but can also continue in the direction of constructing a theory, as an attempt at a higher – theoretical – level to summarise information about the compared historical and legal objects. In addition, often the results of historical and legal comparisons can be used as a basis for scientific forecasting. The essence of historical and legal forecasting is not that the comparative historian based on the comparison should accurately determine future trends in the development of certain state and legal phenomena and processes, but to provide an exhaustive list of adequate scenarios for their deployment in the future. Historical and legal explanation and forecasting are quite closely related, but the logical basis of the latter is the method of modelling.

The essence of the modelling method, which along with classification and typologization is widely used at the stage of generalisation of the results of comparative historical and legal analysis, is

to study the object (original) by creating and studying a copy (model) that replaces the original. That is, the specificity of modelling in comparison with other methods of cognition is that with its help the object is studied not directly, but with the help of another object [36]. It is significant that computer modelling has recently acquired its development, which in the future can be used in historical legal research, including comparative. Typically, computer modelling is used in cases where the mathematical model or system under study is too complex for independent analysis by the researcher [14].

The method of modelling is quite similar to the method of typologization; their similarity is manifested, in particular, in the fact that both the type and the model reproduce the object of study. At the same time, they are not identical, as they differ in the objectives of the study. Thus, the purpose of typologization is to study various aspects of the object by identifying individual features and qualities of the communication system as a whole (this refers, above all, to the development of an ideal type as a model of reality). Thus, the researcher is abstracted from a number of real qualities for the purpose of definition of the signs necessary for the development of ideal type; when modelling, on the contrary, the real qualities of the object are considered. Thus, typologization is described by schematism and abstraction, and modelling – the focus on reflecting the essence of the object under study [24].

The model always corresponds to the object – the original – in those properties that are to be studied, but at the same time differs from it in a number of other features, which makes the model convenient for studying the development of a modern state and legal phenomenon or process. All models used in scientific knowledge can be divided into two major groups: material and ideal. The first are natural objects that obey the laws of nature in their functioning. The second are ideal formations, consolidated in the appropriate sign form, and functioning according to the laws of logic of thinking that reflects the world [33]. Admittedly, in comparative historical and legal works, ideal models will be used. For example, the information obtained during a comparative study of the processes and results of reforming various spheres of state and legal life in western European countries of the XX century is a reliable basis for building several ideal models that can be used to study and develop realistic scenarios for such reforms in modern states, the conditions and vector of development of which are similar to those countries whose historical and legal experience was taken to develop appropriate models. This way of obtaining knowledge about the studied objects based on the construction of historical and legal models can be characterised as modelling with the help of idealised representations.

Characteristically, an integral structural component of any form of scientific modelling used in comparative historical

and legal research is analogy. On the one hand, analogy means the objective correspondence of the model of the fragment of historical and legal reality that is reflected, on the other – it is a kind of inference, when the conclusion is logically produced based on similarities and differences in model and prototype properties. In this dual function of analogy, both the epistemological and the logical aspect of modelling historical and legal phenomena and processes find expression. The logical process as a reflection of the objective process is revealed through a certain form of cognitive activity – modelling, as a result of which this process of thinking by analogy becomes a method of model construction, extrapolation and substantiation of model knowledge. This explains the necessary unity of modelling and analogy [37], which is manifested, in particular, in the fact that the development of historical and legal models, as well as analogies, requires critical thinking and proper methodological training of the scientist [38].

I. D. Andreiev, in turn, notes that in a certain sense modeling is a kind of analogy. As a result, thescientific knowledge obtained through modelling is not absolutely true, because a complete analogy between the object of study and its model is impossible to achieve. Therewith, modelling is of great importance in scientific research, as the use of the model allows to obtain knowledge that is difficult or impossible to obtain in the direct study of the object under study [39]. We must agree with the opinion of K.A. Lopatka, which is the main thing in modelling – to avoid complications and simplifications, for which in each case it is necessary to conduct a thorough and comprehensive analysis of the modelling process, the degree of conformity of the model and the studied process or phenomenon. Only based on such analysis the legitimacy of transfer of the received results of modelling on object can be found out [15].

The process of modelling at the stage of systematisation and evaluation of the results of comparative historical and legal research takes place in several stages. Thus, at the first stage the search and selection of a modern state-legal phenomenon or process that has a certain similarity or commonality with one or all (depending on the results of the comparison) historical and legal objects being compared. In this case, commonality or similarity can be established not only between qualitative but also between quantitative aspects and characteristics. At the second stage, the model is built and its research: based on information obtained during the comparison of the historical and legal object (objects), which acts as an analogue, builds a "substitute" of the studied object (modern state and legal phenomenon or process) – model. In epistemological terms, the model acts as a kind of image of the object, free from all the secondary and non-essential. By studying the model, all aspects, aspects and properties of the object are studied. In this aspect, the

work of P. Ekamper, G. Bijwaard, F. Van Poppel and L. H. Lumey is very interesting, where modelling method is used to investigate the causes of increased mortality in the Netherlands in 1944–1945 [40]. In the third stage, the information obtained during the study of the model is extrapolated to the object under study (modern state and legal phenomenon or process) [41].

Thus, the modelling of historical and legal phenomena and processes based on the results of comparative historical and legal analysis, as in any other field of scientific knowledge, is based not on the relations of formal-logical identity, but on the relations of analogy. The inference by analogy characterises the model in terms of objective correspondence to the real system under study. Therewith, the method of analogy leads the creative thought of the comparative historian further by optimising the process of reflection of this system in the model, by implementing the results of modelling in some existing system, similar to what does not yet exist in reality, but which can theoretically be activation of a scenario. This predictive function of the historical and legal model is based primarily on inferences by analogy. In other words, to investigate the future of state and legal phenomena is possible only by carrying out certain operations on their past. To reproduce the results of historical and legal comparison of past state and legal systems and possible realistic scenarios for their development (and similar systems) in the future – this is where the historical and legal modelling is manifested.

CONCLUSIONS

Generalisation of the results of comparative historical and legal analysis is the last stage of comparative research. Despite the fact that the general method of systematisation and evaluation of data obtained during the comparison of historical and legal objects is in principle clear and we have repeatedly covered in previous articles, the technique of working with historical and legal information and its generalisation remained insufficiently studied. To fill this gap, we have used and adapted to the needs of historical and legal comparative studies developments in related fields and disciplines.

The main techniques that can and should be used by the comparative historian in systematising the results of comparative analysis to increase their information impact, are classification, typologization, methods of cluster analysis and modelling. The application of these techniques allows not only to extract more information at the last stage of comparative research, but also to reach the level of a broad theoretical generalisation of the obtained data.

Thus, the use of classification and typologization allows to divide historical and legal phenomena and processes into multiple classes and, accordingly, to form meaningful typologies, which together helps to better understand the reasons for similarities and differences between compared objects, and depend-

ing on selected criteria to identify deep connections between the studied phenomena. In this case, typologization, in contrast to the classification, has a higher level of generalisation, as it is carried out based on the most important features and may contain several criteria, which makes it more significant in the context of organising the results of comparative historical and legal analysis.

Methods of cluster analysis, in turn, allow to systematise the results of multidimensional research, which in most cases also include historical and legal comparisons. The application of cluster analysis involves compliance with a certain algorithm of sequential actions, and its result is to obtain a comprehensive, multifaceted classification of the studied historical and legal phenomena and processes. Finally, the method of modelling, based on the application of analogy, at the stage of systematisation of the results of comparative historical and legal analysis allows to move from simple grouping of data and construction of historical theories to forecasting historical and legal phenomena and processes. Therewith, the result of modelling based on the results of historical and legal comparison can be the receipt of ideal models of the state and legal future with a fairly high degree of probability.

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CONCEPTS OF STATE FORMATION IN THE ERA OF NATIONAL LIBERATION STRUGGLES (1917–1920)

Abstract. *The article considers the concepts of state formation in the era of national liberation struggles (1917–1920) of M. Hrushevskyi, V. Vynnychenko, M. Tugan-Baranovskyi, P. Skoropadskyi, S. Petliura, S. Dnistryanskyi. They are based on the idea of building a sovereign, democratic, parliamentary republic (UNR) or an alternative to it, the Hetman Ukrainian state or a democratic state governed by the rule of law (ZUNR). They enriched the state and legal thought, theoretical models of Ukrainian statehood, accumulated the program principles of political parties and public organizations. The short existence of the Ukrainian People's Republic (hereafter – UPR) and the Western Ukrainian People's Republic (hereafter – WUPR) does not cancel out the fruitful state-building experience of its leaders and people, democratic law-making. Theoretical models of the UPR as a democratic, parliamentary form of government (M. Hrushevskyi, V. Vynnychenko, M. Tugan-Baranovskyi), "labor monarchy" (V. Lypynskyi), parliamentary-presidential republic as a democratic, legal, social state (S. Dnistryanskyi) are compared. Particular attention is paid to the political journalism of M. Hrushevskyi and V. Vynnychenko, the constitutional projects of domestic statesmen. They are based on short but fruitful state-building experience, hopes for a real prospect of establishing Ukrainian national statehood with the support of the international community. Attention is drawn to the simplified idea of some researchers about the "federalism" of M. Hrushevsky and other figures of the Ukrainian Central Rada (hereafter – UCR), the main reasons for its fall, the impact of geopolitical factors on state-building processes in Ukraine, which is a violation of methodological principles of historicism and objectivity. The positive potential of state formation in 1917–1920 and its unresolved theoretical and practical problems will remain an instructive example for current and future domestic statesmen*

Keywords: *parliamentary model of statehood, autonomy, sovereignty, federation, UPR, Directorate, WUPR*

INTRODUCTION

The study of the concepts of state formation in the era of national liberation struggles reveals the content of state projects, political journalism, memoirs of the Central Rada, the Directorate, the Ukrainian National Rada, the Hetmanate. Their constitutional projects, legislative initiatives, models of statehood advocated by them, proposed ways of solving socio-economic problems, assessments and conclusions from the practice of state-building are still of scientific interest.

Concepts of the revival of national statehood from the spring of 1917 acquire a democratic direction, initiate the constitutional process. According to V. Vynnychenko, the National Congress convened by the UCR was the first step towards the organization of statehood. The formation of organizational structures and competencies of the UCR, the active legislative process became decisive in its transformation into the highest representative body, the temporary, "revolutionary parliament". It was the first national parliament. The Bolshevik coup in Petrograd in November 1917, and then the Bolshevik aggression deprived the UCR activists of autonomous illusions, stimulated the development of the UPR, and active law-making. The UCR elected a model of a parliamentary republic with a unitary state system. In less than five months of its first period of existence, the Ukrainian statehood was revived, and its political and legal system was created and functioned. Chairman of the UCR M. Hrushevskyi, Chairman of the General Secretariat V. Vynnychenko in their works reflected the complexity of state formation, the constitutional process in the UPR, its geopolitical position. They covered and substantiated the direction and content of state and legal development, development of the state mechanism, settlement of land relations, solving the problem of protecting the sovereignty of the UPR from Bolshevik aggression. Their critical assessments of the state-building experience of the era of national liberation struggles have acquired important scientific significance.

P. Skoropadskyi aimed to extinguish the flames of the revolution, restore order in the country, the right of private property, to establish an authoritarian regime. Hetman was the author of the draft Basic Laws of the Ukrainian state, which provided for the preservation and transformation of the hetman's power into a hereditary constitutional monarchy with a bicameral parliament. However, the authority of the hetman and his reforms was rapidly declining – the dependence of the government on the German-Austrian occupation regime became apparent.

Activists of the Directorate restored the UPR, continued democratic state-building, proclaimed the unity of the Ukrainian lands, tried to revive the democratic constitutional process. At the initiative of V. Vynnychenko, the

Congress of the Working People as a pre-parliament chose the dictatorship of "labor councils" as a form of government in Ukraine, which should ensure true people's representation, "revival and development of our nationality." The unbearable war with the White and Red armies and the Polish occupation of part of Ukraine did not cancel out the positive experience of state-building in the Directorate era.

The short duration of the WUPR was also marked by the fruitful experience of its leaders and people in reviving Ukrainian statehood in Western Ukraine, their unity, building central and local authorities, administration, prosecutors and armed forces. The aspirations of the statesmen of the WUPR testified to their conceptual and practical solution of democratic law-making, constitutional consolidation of human and civil rights and freedoms, and solution of the national question.

In terms of the scale of socio-political transformations in Ukraine and their historical significance, the events of 1917–1920 are commensurate with the events of the development of our independent state in the early 1990s. The lessons of this experience in theory and practice remain relevant today. Among them are the consistent reform of the state mechanism, the solution of urgent socio-economic problems, the consolidation of society and its political forces, the reform of the judiciary, ensuring the rule of law in the state, strengthening its defense capabilities.

ANALYSIS OF RECENT RESEARCH AND PUBLICATIONS

The main principles of historical and legal historiography of nation-building of 1917–1920 were laid by journalistic, historical works and memoirs of prominent domestic statesmen – M. Hrushevskyi, V. Vynnychenko, D. Doroshenko, I. Mazepa, P. Khrystyuk, O. Shulgin, P. Skoropadskyi, K. Levitskyi and others. Written in the heat of the day or with a temporal distance from the state-building processes, these works retain great historiographical and source value for modern researchers.

Modern research on the conceptual treasury of domestic statesmen of the era of national liberation struggles was initiated by O. L. Kopylenko [1], O. M. Myronenko [2], V. F. Soldatenko [3], V. F. Verstyuk [4], D. B. Yanevskyi [5], V. M. Yermolaiev [6]. Thus, O. L. Kopylenko first studied the state ideas of M. S. Hrushevskyi, gave an objective scientific assessment of political and legal concepts of the scientist, the core of which was the "Ukrainian idea". O. M. Myronenko thoroughly studied the origins of Ukrainian revolutionary constitutionalism, constitutional projects developed by figures of the UCR, ZUNR, Hetman P. Skoropadskyi. Among new publications, only my articles are thematically close [7; 8]. In the complex, the proposed topic has not yet been studied.

The aim of the article is a brief analysis of the concepts of state formation of the era of national liberation struggles of 1917–1920, the separation of state-build-

ing ideas in journalism, constitutional law-making M. Hrushevskyi, V. Vynnychenko, V. Lypynskyi, S. Dnistryanskyi. Their works reflected not only important pages of the historical experience of national statehood, but also contain many relevant ideas about democracy, democratic traditions, self-government, the historical development of national constitutionalism.

PRESENTING MAIN MATERIAL

The article uses general scientific and special scientific research methods. The historical and legal nature of the topic has led to the use of methodological principles of historicism, objectivity and social dimension of political and legal phenomena in the study of the works of prominent statesmen. The historical approach in the analysis of state-building concepts allows to establish the circumstances and conditions that determined their direction and content. Thus, the violation of the principle of historicism has led some modern researchers to frivolous accusations of M. Hrushevskyi, V. Vynnychenko and other UCR figures in "federalism", underestimation of the influence of geopolitical factors on state-building processes in Ukraine. Objectivity in the analysis and evaluation of state-building ideas requires avoiding subjectivism and simplification in their interpretation. Their works prove, in particular, that despite the defeat of the Ukrainian revolution, the short existence of the Ukrainian People's Republic and the Western Ukrainian People's Republic, they revived the tradition of national statehood, democratic state-building, contributed to the formation of the modern Ukrainian nation, the establishment of European foreign policy priorities, the legal certainty of the territory of the Ukrainian state.

Research methods are dictated by the specifics of its topic. The social dimension of concepts allows us to identify their ethnographic content, the existing level of public consciousness and its reflection in the works of statesmen, and to evaluate their ideas from the standpoint of social interests and expectations, universal morality. The comparative-historical method reveals a fundamental difference in the concepts, state-building practices of the UPR and WUPR (the path of radical democratic reforms) and Bolshevik Russia. It was widely used, in particular, by M. Hrushevskyi in the analysis of the national millennial history of state formation, its achievements and defeats, in comparing state and law-making processes with European and Russian. The logical method is important in the study of conceptual principles in the works of UCR and the Directorate and their sequence in the implementation, state-building. This method requires the establishment of causal links in the study of state-building processes, their reflection in the works of state-builders. Thus, the proclamation of the Third and Fourth Universals of the Central Rada was considered by them not only as a natural stage of Ukrainian statehood, the establishment of sover-

eignty and independence of the UPR, but also as a logical response to changes in Ukraine's international position.

The use of legal and dogmatic method in the article helps to identify conceptually new in the works of statesmen, analyze the peculiarities of their legal understanding, study the legal reality and vision of problems and prospects of revival of Ukrainian statehood, building its political and legal systems. Such analysis allows us to establish the legal content of the constitutional drafts that were formulated by the statesmen of the concepts of the Ukrainian state. The scientific methodology of studying the concepts of state formation reveals the diversity of the ideological heritage of their authors.

With the fall of the autocracy in Russia, on March 2, 1917 the Provisional Ukrainian Revolutionary Committee in Petrograd in its address to Ukrainian citizenship, stated: "The fullest expression of the idea of national liberation is national-state independence." And as the "closest stage to this ideal to put the slogan together with the democracy of other peoples of Russia, the restructuring of the Russian state into a federal democratic republic with the broadest rights of individual nations and the broadest national territorial autonomy of Ukraine" [9, p. 257]. The ideas of autonomy of Ukraine, convening the All-Russian Constituent Assembly were formulated on March 25–26 in the resolutions of the Congresses of the Union of Ukrainian Autonomists-Federalists, and on April 4–5 by Ukrainian Socialists-Revolutionaries [9, p. 264–265, 266–267]. These ideas are becoming universally recognized for Ukrainian democracy.

On March 19 M. Hrushevskyi returned from exile in Kyiv and spoke in Ukrainian about the prospects of "free political work", the establishment of democracy and democratic autonomy within the Russian Federal Republic" [10, p. 4]. Elected Chairman of the Ukrainian Central Council, he saw the organization of state formation as a priority in its transformation into the highest representative body of Ukraine, without waiting for the Constituent Assembly and their sanctions for Ukrainian autonomy. On April 5–7 the All-Ukrainian National Congress joined the UCR, legitimized its national, social and party representation, determined the prospects for building the national-territorial autonomy of Ukraine [9, p. 283–285; 11, p. 60–70].

V. Vynnychenko, elected Deputy Chairman of the UCR, also shared the focus on the autonomy of Ukraine within the "federal-republican Russia" in view of the historical, economic and cultural ties between them [13, p. 4]. Knowing the tragic consequences of such illusions, it is easy for us to condemn UCR activists for their "federalism", but it was a part of the programs of all then political parties represented in the Rada, legal and social consciousness in revolutionary Ukraine. The Federation of Europe, and then the Federation of the World, was seen as the near future. Another important argument in favor of M. Hrushevskyi's federalism

gave at a meeting of the Small Council of the UCR before the announcement of the Third Universal: "Let's save the Russian Federation! She is in danger of collapse. We cannot allow that… Federal Russia is valuable and necessary for us, and we must save it in every way" [10, p. 62, 74]. The chairman of the Central Rada could not allow Russian troops to be in Kharkiv in a month to "save" Ukraine. However, M. Hrushevskyi already then foresaw the possibility of alternative state development of Ukraine: "either the Federation of the Russian state, and if not, the full independence of Ukraine" [14, p. 10–11].

According to the memoirs of V. Vynnychenko and D. Doroshenko, the Central Rada from the very beginning was thought of as a "parliamentary-type organization" [13, p. 43–46; 15, p. 85–86]. UCR Secretary General P. Khrystyuk mentioned that with the completion of its formation at the fifth general meeting on June 30, it was decided to begin the process of transforming the Central Council into the "Provisional Regional Parliament" [16, p. 86]. The impossibility of holding territorial elections during the war did not stop the activity of parliamentarians in forming its organizational structures and competencies, but most importantly, with the proclamation of the Ukrainian People's Republic after the October Bolshevik coup in Petrograd, active law and state-building.

Despite difficult circumstances (presence of fronts on the territory of Ukraine, opposition of the Provisional Government, Bolshevik aggression, beginning of the civil war, German occupation), the Central Rada adopted about 130 laws and other regulations. Among them about 100 – with the proclamation of the UPR and its independence [17, p. 277–278]. "Those foundations of the social order," said the Chairman of the UCR, "which have so far been laid down by the legislation of the Central Rada, were not dictated by fear of Bolshevism, they were based on the fact that the foundations of New Ukraine really lay" [14, p. 32–33]. According to M. Hrushevskyi, the adopted laws, the Constitution of the Ukrainian People's Republic opened up prospects "to move to a normal parliamentary life, thus ending the era of revolutionary creativity. It is better to go forward than backward" [10, p. 12–13].

For V. Vynnychenko, a writer and politician, Ukrainian statehood is not so much a goal as a means of realizing the main task: the revival of the nation. "… Our goal, a significant, fundamental goal, was not statehood itself. Our **goal was to revive, develop our nationality**, awaken our national dignity in our people, acquire these forms and ensure them "[13, p. 177].

Statehood, the state life of the nation for the socialists – a temporary phenomenon that will disappear with the victory of socialism in the world. The theoretical model of transitional "state socialism" for Ukraine was developed by the then Minister of Finance of the UPR government, Academician M. Tugan-Baranovskyi [18, p. 342–369]. Political

power will become a "cultural organization", the state – a cooperative socialism, with "the broadest development of local government." However, the socialist experiments of the Central Rada activists, the abolition of private property deprived it of broad social support, and hampered its democratic state-building.

The coup d'etat of April 29, 1918, supported by the German command in Kyiv, clearly showed the weakness of the UPR's power and its social support. Hetman P. Skoropadsky in "Letter to all the Ukrainian people" defined the task of building such a state power, "which would be able to provide the population with peace, law and the opportunity for creative work" [19, p. 82–83]. However, in his commitments to the German command he promised: "… new elections to the legislature will take place no earlier than complete appeasement of the region and the term of their convocation will be set in agreement with the German command" [20, p. 101]. Hetman personally corrected the "Draft Basic Laws of the Ukrainian state", compiled according to the text of one of the versions of the "Basic Law of the Russian Empire" [21, p. 224–258].

The draft hetman's constitution provided for the transformation of the hetman's power into a hereditary constitutional monarchy.

Hetman's Ambassador to Vienna V. Lypynskyi also developed a theoretical conservative-monarchical model of Ukrainian statehood. He envisioned the organization of political power at three levels: the hetman as the guarantor of the nation's sovereignty, the head of state defense, and the executive branch; territorial and labor, upper and lower houses of parliament, where the lower house represents the lands of Ukraine, and the upper – the elected aristocracy, labor organizations (trade unions, etc.); Local Government. In his concept of "labor monarchy" hetman power is limited by law, protection of human and civil rights and freedoms are given a paramount importance, decentralization of public administration and developed local government [22, p. 65–470].

On November 14, 1918, the anti-Hetman Ukrainian National Union, consisting of representatives of various political parties and groups, approved a plan for the uprising and elected a Directorate headed by V. Vynnychenko. He recalled later: "The Directorate, starting the revolution, put it under the banner of democratic slogans: the restoration of the Ukrainian People's Republic, the return of all democratic freedoms, the destruction of old age and the revival of democratic local, urban and provincial self-government" [13, p. 132]. At the suggestion of the Chairman of the Directorate, it was decided that the political system of the restored UPR would be a system of "labor councils". "The highest body of power," he wrote, "was approved by the Labor Congress on the same principle: only labor elements had the right to elect, but the big bourgeoisie, parasitic classes, exploitative classes were deprived of this right" [13, p. 134–135, 142]. This

model of statehood – "dictatorship of the working people" – was laid down in the "Declaration of the Directorate of the UPR" [19, p. 100–101].

The Directorate and the government formed by it restored the laws of the Ukrainian People's Republic adopted during the Central Rada, 66 laws and about 100 resolutions were adopted during January 1919 [23, p. 100]. On January 22, 1919, on Sofiyivska Square in Kyiv, the Universality of the Directorate proclaimed the unification of the Ukrainian lands – "the unification of the Western Ukrainian People's Republic with the Dnieper People's Republic – into a single, sovereign People's Republic" [19, p. 107].

The first and the last session of the convened Labor Congress took place on January 23–28. It began to perform the functions of the pre-parliament: legitimized the power of the Directorate and its government, replenished the Directory, gave it the right to issue laws with their subsequent approval by Congress, initiated constitutional legislation, passing the Act of Unification of the UPR and WUPR, which delegates called the provisional Constitution of the UPR [24]. However, the Congress was forced to suspend its work under the threat of capture of Kiev by the Bolsheviks.

The decision of the State Meeting of the Directory in Vinnytsia on February 8 to start negotiations with the Entente led to the withdrawal of V. Vynnychenko from the Directorate and the resignation of its government. The Directorate approved the new composition of the Council of Ministers, adopted the Provisional Law "On the procedure for introducing and approving laws in the Ukrainian People's Republic" [25]. The law limited the legislative powers of the government to the de facto unlimited powers of the Chairman of the Directory S. Petliura. By that time, it had already lost the entire territory of Dnieper Ukraine. However, in the appeal "To the population of the whole cathedral of Ukraine" the Chairman of the Directorate promised: "This parliament, and no one else, will solve the problem of our state system and finally give peace, order and strength to the State" [26, p. 235].

A kind of body that temporarily performed some parliamentary functions were state meetings with representatives of the Directorate, the government, the Labor Congress, political parties and others. In December 1919, the Ukrainian National Council was founded in Kamianets-Podilskyi, occupied by the Poles, with the aim of convening the State Sejm to restore democracy and build a parliamentary republic. Deputy Chairman of the Ukrainian National Rada S. Baran prepared a draft constitution, which became the basis for the A. Nikovskyi's government commission and its draft "Basic State Law of the Ukrainian People's Republic" [27, p. 184–188]. It consisted of 10 chapters, 158 articles (articles) and provided for the revival of the state "with a democratic-republican, based on parliamentarism, system." The

draft provided for precautionary measures against strengthening the personal power of the Head of the Directorate.

After a long three-month work, the government commission prepared two bills, which were approved by the Chairman of the Directorate on November 12, 1920 – "Law on Provisional Supreme Government and Legislation in the Ukrainian People's Republic" and "Law on the State People's Council of the Ukrainian People's Republic" [19, p. 114–116, 117–122]. These constitutional laws carefully prescribed the division of powers between the Directorate, the State People's Council and the Council of Ministers, and contained a normative and legal definition of the procedure for the work of the pre-parliament.

The laws passed by the Directorate turned out to be the last ones: S. Petliura's "Warsaw Pact" with J. Pilsudski led to the Polish occupation of most of Ukraine, peasant uprisings, and the Red Army offensive. V. Vynnychenko wrote: "Once again we must sincerely and openly say that if there had not been an uprising of our own peasantry and workers against us, the Russian Soviet government would not have been able to do anything against us…." [13, p. 180–182].

The state-building process in Western Ukraine was also historically short. The concept of state formation was clearly formulated in the Manifesto of the Ukrainian National Council of October 19, 1918, on the eve of the formation of the parliament: the only Ukrainian territory, which was constituted as the Ukrainian state; all national minorities were invited to elect their representatives to the Ukrainian National Rada, that will develop a draft constitution [19, p. 93] With the collapse of the Austro-Hungarian Empire, the Ukrainian National Rada took over all power in the region, determined the official name of the state – Western Ukrainian People's Republic (according to the spelling of the time – V. E.), formed a government, organized local elections. The constitutional principles of the Western Ukrainian People's Republic were determined by the Ukrainian National Rada on November 13, 1918 in the "Provisional Basic Law on State Independence of Ukrainian Lands" [19, p. 96]. the Ukrainian National Rada initiated the conclusion of an agreement on the unification of the Western Ukrainian People's Republic and the Ukrainian People's Republic and the unification of Ukrainian lands. However, in the late 1920s and early 1921s, the process of national revival was interrupted by the victory of Soviet power in most of Ukraine and the occupation of western Ukrainian lands by Poland, Romania, and Czechoslovakia.

The government of the Western Ukrainian People's Republic, while in exile, continued to prepare a democratic draft of the Basic Law. On his instructions, at the end of 1920, Professor S. Dnistryanskyi developed a draft Constitution of the Western Ukrainian People's Republic, which generalized and developed democratic concepts of

national statehood [28, p. with. 375–381; 29, p. 165–185]. The main features of the project are the provisions of the Western Ukrainian People's Republic as a sovereign, legal, democratic nation-state, which recognizes the person with his rights and freedoms as an important social value. Power in the state is based on the constitutional principle of division into legislative, executive and judicial with broad local self-government.

In order to "substantiate the long-term people's power in the state", the scientist believed, it is necessary to convene a Constituent Assembly on the basis of universal, direct and secret ballot regardless of gender. Simultaneously with the elections to the Constituent Assembly, the elections of the President of the Republic must take place. The Assembly adopts the Constitution of the Western Ukrainian People's Republic, approves the administrative-territorial division of the republic, develops a law on elections of deputies to parliament and local representative bodies, adopts the necessary tax and financial laws. The organization of public power under the project provided for a unicameral parliament – the People's Chamber, elected for four years on the basis of universal, equal and direct suffrage by secret ballot. A special representative body, the National Rada, is convened to amend the Constitution on the initiative of parliament or as a result of a republican referendum. In addition to revising or amending the Basic Law, it decides on emergency measures in the state in the event of war or early termination of the powers of the President of the Republic.

The system of executive bodies includes the President of the Republic, the government – the State Rada and local executive bodies. The president is elected for a term of four years and is the head of state, heads the executive branch, appoints members of the government, and "monitors the legality of governance." The judicial system includes general and special courts, the State Judicial Tribunal and the head of the State Justice. "Judges are appointed by the President of the Republic, or his deputy Chairman of the State Justice, permanently and for life." The participation of the people in justice is ensured by justices of the peace with the participation of lay judges or jurors. The Supreme Court belongs to the State Judicial Tribunal, which also includes overseeing the constitutionality of laws, observing the competences of representative bodies, performing the duties of members of parliament, approving its decisions on political charges, and others.

S. Dnistryanskyi's constitutional draft contains important provisions on the organization and legal basis for the activities of representative bodies on the ground, on the status of civil servants, on the procedure for holding referendums at various levels, and others. "As the political owner of the national territory, the Ukrainian people are the bearers of territorial supremacy in the state… All other peoples who permanently reside in the state, take a proportional part in the creation and organization of the will

of the people, and its implementation". The draft Constitution of the Western Ukrainian People's Republic remained unimplemented, but its norms and principles corresponded to the most perfect constitutional doctrines of the time and paid homage to national constitutionalism.

CONCLUSIONS

The concepts of state formation in the period of national liberation struggles of 1917–1920 reflected the complexity of state formation, the internal and geopolitical position of Ukraine. Activists of the Ukrainian Central Rada initiated the development of the Ukrainian People's Republic, democratic state-building, and domestic parliamentarism. The most significant is the contribution to the development of the conceptual foundations of state building of M. Hrushevskyi and V. Vynnychenko, who with their political journalism and leadership of the UCR and the General Secretariat, contributed to the state-building process, solving its pressing problems. The peaks of the constitutional process in the UPR were the III and IV Universals, the fundamental laws, the Constitution of the UPR. An important role in the restoration of the UPR was played by its Directorate with the model of "labor democracy", in defending the territorial integrity of Ukraine, the unity of its lands.

For the leaders of the Western Ukrainian People's Republic was characterized by an attraction to the classical models of European parliamentarism, the rapid creation of democratic institutions of the state. Legislative and constituent measures of the Ukrainian National Rada namely the formation of the government, building a system of local government, the "Provisional Basic Law", the union with the UPR became a real embodiment of the sovereignty of the Western Ukrainian people, its statehood. S. Dnistryanskyi's constitutional draft embodied the basic provisions and principles of the rule of law.

Assessing the consequences, significance and lessons of the national liberation struggles of 1917–1920, M. Hrushevskyi wrote that despite the huge painful losses, the people threw off the shackles, the heaviest yoke of Moscow, put an end to spiritual slavery, servility of a slave, restored, albeit briefly, state independence, a broad social program, our national existence is confirmed [10, p. 158–160, 229–236, 238–243]. He argued for the importance of historical ties with the West, "Western orientation", our own Ukrainian law – "you will not make the same law for Siberia and Ukraine." In the brochure "On the Threshold of New Ukraine" he concluded that "a certain moral rigorism is essential for its achievement… absolutely necessary for the success, development and firmness of democracy… Only when the state, the community becomes not an empty sign, but a real center of thought and will, the object of worship, religion, which it was for the ancient Greeks or Romans, only then the Great Ukraine will be built…" [10, p. 248–252].

The lessons for today's statesmen are the unresolved socio-economic problems in the UPR a century ago, the loss of social support of power, the uncertain legal status of the opposition, and unjustified hopes for foreign aid.

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EFFECTIVE CONTROL OVER ENSURING HUMAN RIGHTS AND FREEDOMS AS A DIMENSION OF A DEMOCRATIC SOCIETY: SOCIAL CONTEXT

Abstract. *This research aims to study the problem of ensuring effective control over the implementation and observance of human rights and freedoms, in particular, in the format of social rights. The relevance of the stated topic is determined by the expediency of rethinking the nature and significance of social human rights in the context of modern realities, recognising the fact that the quality of life of each individual depends on the possibility of timely implementation of these rights, and therefore special attention should be paid to ensuring effective control over the observance of social rights in the context of democratic legal development. The basis for the research were the following problems: ensuring a sufficient standard of living for citizens in today's challenges and threats, legal certainty as a prerequisite for a stable law and order, lack of clear guarantees to ensure effective control over human rights and freedoms and more. The purpose of this study is to analyse the role and importance of the nature of social human rights as a component of social policy in order to justify the need to improve control in all its forms and manifestations of the effectiveness of their observance, protection and provision in today's conditions. Important methodological tools in the study were the provisions of the dialectical approach, which provided an opportunity to reveal the nature and purpose of social hu-*

man rights, as well as areas for improving control over their provision and protection. The main results obtained during the research were: coverage of the essence of social rights at the present stage; study of the nature, levels of manifestation and types of control over the implementation and observance of human rights, freedoms and legitimate interests. The value of this work lies in obtaining practical recommendations for finding ways to improve control over the provision and protection of human rights and freedoms in the context of modern democratic development

Keywords: *human rights, social rights, state control, public control, legislation, legal system*

INTRODUCTION

One of the most difficult tests of today, admittedly, is and remains the problem of ensuring human rights, freedoms and legitimate interests. And this refers to the whole palette of rights in general and the segment of social rights in particular. For more than a year now, the thesis that secondary human rights do not exist has been emphasised (singled out) in scientific circles. All rights are paramount, paramount, with the appropriate degree of need to guarantee and secure them. However, it is clear that today "front rights" are first of all social rights. The greater or, unfortunately, lower quality of life of the average person depends on their provision, possibility of timely realisation. In addition, it should also be borne in mind that the functioning and development of modern states and their legal systems takes place in conditions of strengthening the multilevel relationships between public and private actors aimed at achieving concrete results in a particular area of public life. These relationships lead, among other things, to the strengthening of relevant interstate integration processes, which require proper organisational and legal support in order to prevent various social conflicts or, at least, to minimise their negative consequences. In these circumstances, in particular, in the context of Ukraine's European integration, the solution of various issues related to ensuring high-quality national and international control over the stable progressive development of many important spheres and sectors of public and state Life, which are subject to reform and renewal in connection with such integration, becomes of particular importance. In this context, we must state that the basis for control at the national (domestic) and international levels should be based on common approaches to understanding control as a general social phenomenon, its essence and functions, as well as regulatory sources within certain temporal-spatial dimensions. It is the theoretical, conceptual perspective of understanding control as a general social phenomenon that makes it possible to systematically explore its basic forms or varieties, in particular, through the prism of their holistic teleological de-

termination, their common value basis, the origins of which must be sought in the socio-normative culture.

In this regard, the problem of ensuring effective control over the observance of social human rights, through which the individual has the opportunity to first realise their skills, abilities, skills in the process of employment in order to ensure a decent standard of living, as well as receive from the state and other identified entities appropriate social services, in particular medical, which it needs to ensure social well-being.

The aim of the article is to analyse the role and significance of the nature of social human rights as a component of social policy in order to justify the need to improve control in all its forms and manifestations of their effectiveness, protection and security in today's conditions. In accordance with the purpose of the study, we consider it necessary to solve the following tasks: to highlight the essence and purpose of social policy in a democratic, legal state; determine the role of the legal system in ensuring the social rights of the individual, in particular, the right to an adequate standard of living; to study the nature of control as a social phenomenon, its levels and varieties (forms of expression); identify problems of ensuring the effectiveness of control over the observance of human rights and freedoms; substantiate the priority areas for improving the mechanism of social human rights in the context of modern realities, as well as control over their proper implementation.

1. MATERIALS AND METHODS

During the study, the key methodological tools were the provisions of the dialectical approach, which provided an opportunity to reveal the nature and purpose of social human rights, as well as areas for improving control over their provision and protection. The dialectical approach provided an opportunity to comprehend the multifaceted nature of social human rights, to predict the consequences of the asymmetric development of their components, as well as to identify factors that contribute to improving the mechanism of control over their provision. Philosophical and ideological basis of knowledge are the key provisions of anthropocentrism as a paradigm of social development. The axiological method directly related to it made it possible to reveal the nature of human rights and freedoms, as well as control over their observance as values of democratic law and order, which affect the quality of life of citizens. With the help of the synergetic method it was possible to establish the influence of social and other factors on the social rights of the individual and the mechanism of control over their observance. The method of systematic analysis was used, in particular, in determining the relationship and interaction of social human rights with the concept of "social policy", as well as in characterising the types of control as a means of ensuring effective implementation of human rights, freedoms and legitimate interests.

Such foreign legal scholars as: F. Blok, B. Deacon, R. Robertson, D. standing, L. Taylor, M. Freeman and others have devoted their works to various issues of ensuring effective control over ensuring human rights and freedoms, including social rights. A special place is occupied by the works of the American researcher D. Rawls, who developed the principles of social justice, which should be the basis for determining the rights and obligations of the main institutions of society and thanks to which social benefits should be distributed among all subjects on the same principles acceptable to all. Such Ukrainian scientists as S. Bobrovnik, E. Borshchuk, S. Gusarev, N. Dobreva, A. Kopylenko, T. Koretskaya, S. Kosinov, V. Kravchuk, N. Onishchenko, A. Petrishin, Y. Shemshuchenko and other scientists have also devoted their works to the problems of ensuring control over the observance of human rights and freedoms.

2. RESULTS AND DISCUSSION

In modern Ukraine, in the period of formation of legal bases of the state and public life, the problem of efficiency of the legislation which shortcomings are connected first of all with the mechanism of realisation, absence of necessary institutional forms sharply arises. In addition, the legal forms of normative material are insufficiently elaborated (imbalance of rights and obligations, lack of proper sanctions, inconsistencies between 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. 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 appropriate 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 realising 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 of society. This task is quite difficult, because legal and social principles are designed to ensure the well-being of the individual, that is, above all his social rights. In this context, it should be noted that the social policy pursued by the state can not be understood only as the protection of socially vulnerable groups. After all, social policy includes, in particular, a number of measures aimed at ensuring the effectiveness of social effectiveness of economic transformations, ensuring the social component of law enforcement, investment, financial, tax policy of the state, etc. The strategic goal of the state's social policy is to create a favor-

able social climate and social harmony based on balancing different social interests through mechanisms that meet the basic needs of the population and increase the quality of life of all citizens. Social policy affects the processes of labor reproduction, increasing labor productivity, educational and qualification level of labor resources, the level of scientific and technological development of productive forces, the cultural and spiritual life of society. This is a system of relationships between the basic elements of the social structure of society on the preservation and change of social behaviour of the population in general and its constituent classes, strata, communities. Social policy includes the most important social institutions of education and science, culture and art, social protection and employment, etc. [1].

Thus, we can preliminarily conclude that the essence of the social policy pursued by the state can be broadly defined as the activities of the state to create the most favorable conditions for the comprehensive development of each individual and ensure the well-being of society in various spheres and spheres of public life. In this regard, it is impossible not to notice a certain limitation of purely legal and accompanying organisational measures to influence the relevant social relations in the social sphere. At the same time, such a limited right and related organisational impact, in particular, on such components of the social sphere of public life as employment, health care, housing, transport, education and other provision of daily normal activities of individuals, is primarily about objective nature, the existence of which does not depend on the will and consciousness of citizens, but follows from the necessary existing and permanent relationships between various phenomena of the real world, including at the level of elements of a complex system of social regulation of human behaviour. The legal system of the social, legal state is designed to ensure the stability of civil solidarity 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 in the mode, so to speak, of the "regular" course of events. However, today it is also such general social tasks as ensuring national security, eliminating the effects of pandemics, environmental disasters, implementation of social programs that will reflect the position of "everything necessary taken into account", support for rehabilitation measures, etc. [2; 3, p. 17–18].

It is extremely important in these conditions what "cross-section" of social rights should be provided by the legal system today, guaranteed by the state and defended by the judicial authorities:

those that will now be built for decades on a residual principle, or, indeed, those that will help in modern Ukrainian realities to live not only with "bread alone", but also to have sufficient conditions for self-realisation of the individual, 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. This is the duty of the state, according to which it recognises the right of everyone to a sufficient standard of living for himself and his family [4]. It should be noted that the concept of "sufficient standard of living" is, at least to some extent, evaluative, i.e. 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. It is up to the state to define and set minimum standards below which the living standards of citizens cannot fall.

Admittedly, ensuring a sufficient standard of living is a difficult problem even for wealthy countries. The realisation of the right to an adequate standard of living, admittedly, 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; opportunity to have the means to receive quality food, etc. In the current conditions of the global pandemic "COVID-19" the right to an adequate standard of living acquires special relevance and importance, in particular, in the conditions of necessary vaccination.

In this context, it should be emphasised that the appropriate level of provision and protection of social human rights is an indicator of the effectiveness of the social management system in general, which is expressed, inter alia, in effective control at its various levels (eg national, international, etc.) and appropriate forms or varieties (for example, state and public control). Therefore, a separate component of ensuring the effective implementation of social rights of the individual should be recognised the exercise of proper control by the relevant actors over the implementation of social policy in the state. General theoretical understanding of the category "control" or the ratio of the terms "Control" and "supervision" regarding their identifica-

tion or providing criteria for their differences, as well as the allocation of control in an independent branch of government, the grounds for recognition and existence of a control branch of government, etc. – issues covering the necessary format of theoretical understanding and study. The practical section of the plane of control in democratic, legal states covers the functional ability to ensure human rights, freedoms and legitimate interests, and hence the legitimacy of the government that effectively protects these rights (welfare state). It is a state that is able to answer to civil society and the individual for the consequences of its activities [5].

If we turn to modern doctrinal legal sources, we can see that there are no common approaches to understanding the concept of control, including in the context of the relevant state activities. For example, control in the system of state activity can be considered in broad and narrow meanings. In a broad sense, control is a special kind of state activity, which includes a system of political, economic and ideological processes and methods aimed at achieving stable functioning of society and the state, social order, influence on the mass and individual consciousness. In the narrow sense, control is an activity of the state, which consists in verifying the implementation of decisions of higher organisations, compliance with technical, economic, organisational standards for the implementation of tasks, compliance with labor discipline and legal norms [6, p. 102]. As we can see, the above definitions are essentially focused on the concept of "state control", which has a power-binding nature and the subject of which are public authorities. It should be noted that one or another sphere of state activity in the conditions of democratic development can also be the object of appropriate types of public control, as well as international.

In addition, in the legal literature, the nature of control in the system of state activity is also defined through the concept of "functions of the state", as well as one of the forms of legal activity of the state. Thus, some authors distinguish the legislative, executive-administrative, judicial, control-audit and supervisory functions of the state according to the methods of exercising state power [7, p. 87]. At the same time, in our opinion, the control (control-audit) function of the state as a separate main direction of its activity can be discussed only conditionally, because, as previously noted, control to some extent accompanies any socially significant activity, especially that which is associated with the exercise of state power. After all, it is obvious that certain control functions are constantly carried out in the process of implementation by the authorised state bodies, in particular, the legislative, executive and administrative, and even more so the judicial function of the state. In the domestic scientific literature in this context, it is fair to say that control in itself is not a primary activity, but applies to actions that can be carried out independently of control. The control function includes,

in particular, "identification and analysis of the actual state of affairs, comparison of this provision with the set goals and objectives, evaluation of controlled activities, taking measures to eliminate the identified shortcomings and prevent them in the future. Such a comprehensive understanding of control is not limited to observing, checking, recording deviations and informing about them" [8, p. 164–165]. It should be recognized that in the activities of specific government agencies, control may be predominant or fundamental, which gives grounds for the separation of the so-called controlling or supervisory bodies in the state apparatus (for example, the Accounting Chamber).

Another is the approach according to which control is considered as a form of legal activity of the relevant entities, including the state. In particular, S. Kosinov considers control as a special legal form of activity, consisting of a set of actions aimed at establishing compliance of actions and decisions of legal entities with certain principles, standards, rules of conduct. In this case, social control as a generic concept, according to the scientist, has a broad meaning and combines the following elements: 1) state control, i.e. internal control exercised by public authorities against each other within the system of public authority; 2) public control exercised by entities not endowed with public authority; 3) international control [9, p. 19–25]. In general, agreeing with this elemental composition of the concept of social control, we believe that state control can not be limited only to its so-called internal hardware variety, as state control is implemented primarily in the process of public administration, i.e. power-organising activities of authorised entities (state bodies), aimed at ensuring the stable functioning and progressive development of certain spheres and branches of public life. After all, public control, the subjects of which are various organisations, public associations and individuals (for example, journalists), also goes beyond the relevant structures, extending its effect, inter alia, to public administration relations, as this type of control occurs in the process of interaction between civil society and the state.

Thus, control in a broad sense is a democratic institution, because democracy is, among other things, control over the exercise of public power in society. In our opinion, control in terms of historical and legal paradigm is a form of governing society, which consists in: a) the establishment of certain behavioural rules; b) their appropriate consolidation, which will ensure publicity and awareness of them; c) the need to comply with the requirements of society in the context of legitimation of public authorities. In addition, it should be noted that the control activities of various subjects of public relations (state and public) at the present stage of development of Ukraine, is carried out in terms of intensification of the European integration course of our state, a new impetus was given in connection with the signing of the Agreement on

the Association between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member

States, of the other part (hereinafter referred to as the Association Agreement). The provisions of this Agreement address a large number of issues of cooperation between Ukraine and the EU in many important areas and spheres of public life. Admittedly, their content also includes the issue of implementing control, which should accompany almost every essential aspect of the implementation of the association agreement (for example, control in the field of public finance management, tax control, health control, arms control, preferential treatment control, customs control, etc.).

After a kind of definitive understanding of the category of "control", we want to note that the scope (instrumental dimension) of control can be considered, in particular, as: state control, public control and international control. All three systems of control in a modern democratic, legal and social state are united by common functions, have a common denominator – the protection of human rights, freedoms and legitimate interests. Each individual system of social control is a value-oriented vector of democratic development of modern states, in particular, Ukraine in the context of transforming the declarative constitutional provision "man is the highest social value" into a real, legally protected constitutional principle. Thus, state control in the field of human rights and freedoms in Ukraine today is exercised through the use of powers of state bodies and officials defined in the Constitution and laws of Ukraine. In this context, we can talk, in particular, about presidential control, parliamentary control, control by the Cabinet of Ministers of Ukraine and other executive bodies, judicial control, etc. In this case, each of these concepts is quite voluminous in scope, as it includes a number of functions and powers, the implementation of which directly or indirectly indicates the implementation of the relevant government control activities, which in many cases is not directly defined as such.

Human rights and freedoms, including social, and therefore, at least to some extent, control over the state of their provision and observance, is taken care of essentially by the entire state apparatus, which, exercising the relevant powers, should act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine. In this context, we note that the presence of a large number of state authorities, to one degree or another authorised to perform certain control functions aimed at ensuring and protecting constitutional human rights and Freedoms, does not mean and does not presume their effective activity in this direction, even in the conditions of high-quality legal regulation of relevant relations. After all, the effectiveness of control in any important area or sphere of public life depends not only on the specific objective parameters of its establishment and implementation, but also

on certain subjective factors that are associated, inter alia, with different states of will and consciousness officials of state bodies authorised to perform these functions, with the level of their moral and legal culture, with their value orientations, etc.

Speaking of state control, it should be borne in mind that the specifics of control relations in the coordinate system "state-person" is, in particular, that they are mostly governed by law. As you know, the value approach to law involves its delimitation of the right ideally, i.e. the level of formal and substantive freedom in legal relations, and the level of law in action, i.e. the effectiveness of law in certain temporal-spatial coordinates. With this in mind, it should be noted that human freedom cannot and should not be excessively restricted by any means of control, including those to which the relevant state bodies are subject. After all, control in democratic legal systems is a blessing, not an oppression. At the same time, it is at the state level that the dichotomy (dualism, duality) of control will always find its most manifestation, which is associated, on the one hand, with the objective need to exercise state-power control over the relevant relations and processes taking place in society, that is, in fact, with the restriction of the freedom and will of individuals, and on the other – with the creation of conditions for the comprehensive development of the individual, expanding the boundaries of his individual freedom, etc. That is why only the legislative or legal detailing of control functions and the redundancy of control institutions, first of all state ones, are unlikely to contribute to the stability of both the general social order in general and the legal one in particular. The latter follows, in particular, from the fact that quantitative control does not contribute to quality of life.

Along with state control, public control plays an extremely important role in the national dimension of every democratic state. First of all, it is control over the redistribution of social space between the state and civil society, coverage of problems that arise between the state and citizens, and most importantly – control over the responsibility of the rule of law to civil society. Thus, to some extent, public control is "control over controllers". Public control is a function of civil society, a way to involve the population in the management of society and the state. It is an important form of democracy, as it provides the population with the opportunity to participate in public administration, in solving state and public affairs, to actively influence the activities of public authorities and local governments [10, p. 74]. Thus, we can trace the appropriate unity between state and public control over the implementation of social tasks, ensuring the effectiveness of social policy, and therefore – the effective protection of social rights and legitimate interests of citizens.

In the domestic scientific literature it is noted that public control is "a tool for public assessment of the degree of

performance of public authorities and other controlled objects of their social tasks". In other words, "the characteristic differences between public control and any other type of control are in the subject-object sphere and consist in the fact that, firstly, public control is carried out precisely by the public (organised and unorganised) and, secondly, in the process of public control, the performance of social tasks directly related to the implementation and protection of citizens 'rights and freedoms, satisfaction and coordination of social needs and interests of the population is checked" [11]. Among the main features of public control are usually the following:

1) public control is a means of ensuring the balance of interests of different social groups;

2) the purpose of public control – ensuring and protecting human rights, freedoms and legitimate interests by uniting and coordinating the efforts of civil society institutions;

3) public control is a guarantor of the implementation of not only legal but also other social norms;

4) public control extends to various spheres of activity of subjects of power;

5) public control is massive, as it involves various social groups and segments of the population;

6) participation in the implementation of public control is voluntary [12, p. 91].

At the same time, unlike state control, public control has no legal and authoritative content, as the subjects of its implementation do not have the power to enforce the relevant decisions taken as a result of observations and inspections of certain aspects of government activities. This feature significantly reduces the effectiveness of this type of social control in general. In this regard, natural questions arise: can public control in general be an effective way to ensure and protect human rights and freedoms, a means of counteracting the usurpation of state power and its separation from the interests and needs of citizens? What are the main prerequisites for ensuring the effectiveness of public control?

In our opinion, public control, admittedly, can and should be an effective means of ensuring human rights and freedoms, a way to ensure the rule of law and discipline in public administration. However, it is unlikely that this effectiveness can be ensured only through appropriate legal means, in particular, perfect legal regulation of certain important social relations. In this context, if we turn to the legal regulation of various issues of public control in Ukraine, we can be sure that in general it meets European democratic standards in this area. In particular, there are several laws of Ukraine in force in Ukraine, which enshrine essentially the basic, fundamental provisions of public control, its tasks and means of implementation. These include, first of all, the Laws of Ukraine "On Public Associations" [13], "On citizens' Appeals" [14], "On Information" [15], "On Access to Public Information" [16]. These and some other laws provide

an opportunity for citizens and relevant institutions of civil society to use the legal means enshrined in them, through which public control over the activities of public administration.

In addition, Ukraine also has other laws and regulations that define the features of public control in specific areas or spheres of public life, as well as forms and types of public control and procedural aspects of its implementation. Among these regulations it is necessary to allocate first of all the Laws of Ukraine "On Public Procurement" [17], "On Prevention of Corruption" [18], "On the National Police" [19], "On Improvement of Settlements" [20], "On Trade Unions, Their Rights and Guarantees of Activity" [21], "On principles of state regulatory policy in the field of economic activity" [22], etc., as well as the resolution of the Cabinet of Ministers of Ukraine dated 03.11.2010 No. 996 "On ensuring public participation in the formation and implementation of national policy" [23] and the resolution of the Cabinet of Ministers of Ukraine dated 05.11.2008 No. 976 "On approval of the Procedure for facilitating public examination of the activities of executive bodies [24].

It should be noted that the main shortcoming of the legal regulation of public control in Ukraine, which significantly reduces its effectiveness and, in many cases, turns it into a purely declarative phenomenon, is the lack of proper detailing of procedural support for its implementation. For example, paragraph 4 of part 1 of Article 21 of the Law of Ukraine "On Public Associations" [13] enshrines the right of public associations to participate in the development of draft regulations issued by authorised state bodies and relating to the activities of public associations and important issues of state and public life. But, unfortunately, the specified norm has, rather, declarative character in connection with absence of the normatively defined order or procedure of its realisation. In this case, the law, as a normative regulator, somewhat loses its formally defined quality, which distinguishes it from other important socio-normative systems, in particular, morality.

Thus, it should be agreed that the formation of only a model of public control without detailing the procedural support in most cases is an obstacle to its practical implementation. As a result, the subjects of the relevant public relations have only a general idea of the system of public control in Ukraine. The result is low efficiency of public control, insufficient public initiative in this area and uncertainty of public authorities in the legal relations that arise during such control. Collectively, this situation only exacerbates the existing problem, and "any public activity to control public authorities is often de facto on the shaky border of legality and legitimacy" [25, p. 302]. However, in our opinion, the problem of the effectiveness of public control is not limited to the legal dimension, and therefore, even in terms of ensuring clear and high-quality legal regulation of relevant public relations,

public control may not be implemented effectively enough. The fact is that the effective implementation of public control depends not so much on the availability of high-quality legislation in this area, but on the degree of solidarity of citizens of the relevant society, its moral climate, a significant number of structural elements of which are more or less involved in the process of implementing this type of social control.

Public control, regardless of the specific subject of its direct implementation, objectively requires the presence in the relevant society of strong solidarity principles of its functioning, ie the unity of interests, objectives, standards and mutual understanding between its institutions and entities. After all, it is obvious that outside such principles, ie in the conditions of "atomicity" of society, when its individuals as primary subjects realise themselves only as an autonomous, independent, free from society and binding social relations of the individual, it is impossible to talk about achieving declared goals of public control, aimed ultimately at ensuring the achievement of national consensus and social harmony in society. That is why a necessary prerequisite for the practical effectiveness of public control is the presence of strong solidarity between members of society, which should ensure awareness of their own identity through the prism of a particular socio-cultural identity in which they were born, raised, educated and professionally engaged in certain activities. If citizens, as direct subjects of public control, interact with the outside world only through the prism of personal self-identity, i.e. as subjects who are guided in their actions only by their own selfish preferences, recognise personal authority and at the same time reject any other, they will carry out any important activity not to ensure the common good, but only for their own closed comfort [26]. The solution to the problem of formation and development of such a person who would be able to be fully responsible for their actions and activities, associated with the whole system of spiritual and material values of society, with the correct perception and awareness of their hierarchy by its representatives.

Thus, we want to note that the task of civil society, admittedly, is to protect people from excessive state control. Thus, the positions of detailing or consolidating control bodies and strengthening public order, including the legal one, do not always coincide, because the amount of "control" does not mean the quality of life itself. However, control, admittedly, is the benefit of democracy, the institution of a democratic state, which must serve the interests of the average person. In the context of the separation of the third type of control (international control), in our opinion, it should be noted that it is a relatively new tool to ensure the implementation of states' international legal obligations, which began to be widely used after World War II and the Organisation of the United Nations. International control plays a special place

in the field of human rights (international human rights protection system, European human rights mechanisms) [27; 28; 29]. In general, control over the provision of human rights, freedoms and legitimate interests in modern democratic realities is an orthodox, classical slice of understanding this phenomenon of social reality in general. After all, the practical slice of the plane of control in democratic legal systems covers the functional capacity for real rather than declarative provision of human rights, freedoms and legitimate interests, which fully ensures the legitimacy of power in the state. Effective enforcement of human rights means effective governance and, consequently, the legitimacy of power.

According to Article 67 of the Treaty on the Functioning of the European Union ("the Treaty"), the Union is an area of freedom, security and justice, in which fundamental rights and different legal systems are respected. Article 68 states that control is a means of operational planning in the area of freedom, security and justice [30, p. 104]. In particular, it should be noted that many articles of this Treaty provide for control in various spheres of human life, in particular, in the field of health care and adequate access to medicine (Articles 114, 168 of the Treaty, etc.). It is axiomatic to recognise that health care is an area that needs the most careful attention from the state and civil society. Thus, Article 3 of the Charter of Fundamental Rights of the European Union of 7 December 2000 regulates the right to the integrity of the person, which, in addition to information on medical procedures, includes the right to quality vaccinations and pills (quality medicines). One of the interpretations of this consideration may be the right to quality fresh drinking water [31], quality medicines, etc. It is clear that the "second hand" in the medical field is impossible. In view of this, one of the essential directions of such control is control in the field of health care. Thus, the European Union has the competence to take measures to support the control, coordination or complementarity of the actions of the Member States. Areas of such action at European level are the protection and promotion of human health (Article 6 of the Treaty, point "a").

Despite this, today in Ukraine, unfortunately, there are still many cases of selling in pharmacies and kiosks drugs with a short duration, "unsuitable" pills or vaccinations with expired vaccines. In this regard, we consider it necessary to improve the current legislation of Ukraine (Law of Ukraine "On Medicines" [32], "Fundamentals of Legislation of Ukraine on Health Care" [33]) in the context of ensuring the effectiveness of control over the sale of substandard medicines, as well as to introduce effective control from the quality of medicines and procedures to a balanced pricing policy for them. One that deserves close attention in the context of personal health and safety is the use of international experience regarding the Prohibition of experiments in the field of eugenics, that is, artificial transformation

of human nature; the Prohibition of trade in organs and parts of the human body for profit; the Prohibition of reproductive cloning of human beings, etc. (Article 3 of the Charter of the European Union on fundamental rights of 7 December 2000).

Thus, an essential component, which, admittedly, plays a priority role in modern state-building processes, is the provision and protection of human rights. However, it seems to us that today we should talk not only and not so much about the potentially granted rights, but about the reality of their use, implementation, compliance, application, and hence – the "realism" of their implementation. Especially important in these conditions is the effectiveness of law: a sense of security for everyone, guarantee of rights and legitimate interests, opposition to arbitrariness in the process of regulating public relations, the undoubted operation of mechanisms for introducing legal order in all spheres of public life, ensuring and ensuring a security system related to social activities, especially those that pose a potential threat to the vital interests of the individual, society and the state. This is by no means a complete list of our expectations of modern law. To a large extent, the success of democratic transformations depends on the extent to which the law in society is supported and respected by different societies and each individual in particular. It is clear that legal issues, legal forecasting, legal development programs, in particular, the directions of formation of modern legal systems always more or less affect the related political, economic and social processes.

There is no doubt that in the domestic legal field, or in the phenomenon that reproduces the essential features of national law, an important role today must be played by effective law and effective legal regulation as necessary conditions for improving state-building processes. The vocation, "mission" of law in general and its "constructive" burden, in particular, today, first of all, is to achieve social stability, and hence – proper social protection in society, without which the functioning of welfare state institutions is impossible. Moreover, the effective implementation and enforcement of constructive law guidelines will certainly determine the role of a democratic European state governed by the rule of law, the role of social arbiter, "organiser of many cases", its ability to relieve social tensions, avoid acute social conflicts [34], etc. Modern jurists have repeatedly turned to the consideration of certain possibilities that seem to "reproduce" the translation of potential proclaimed rights into a real practical plane. It should be noted that it is quite clear that sometimes the implementation of a particular right requires at least one but several opportunities, such as economic, educational, social, gender, etc., existing in the relevant space-time continuum. Moreover, there is an indisputable thesis that there are no secondary or non-first-class or type of human rights, so every unrealised, untimely or not fully realised right, no

doubt, is based on the lack, first of all, of the relevant real opportunities.

Given that state, public and international control are special types of social control, their concept, nature and purpose can not be considered in isolation from the latter. In any society and in any organisational entity, there are always diverse social relationships or social relations that must be predictable, not chaotic or unpredictable. That is why there is a need to ensure the creation of an effective mechanism for maintaining social order in general, which implies not only the existence of an appropriate sociorormative system, the rules of which determine the standards of actions, behaviour and activities, but also purposeful activities aimed at maintaining harmony and peace in society through the use of a certain system of means and procedures. The basis of social control is a system of social norms prevailing and / or enshrined in society, the content of which includes socially useful and acceptable rules, patterns, standards, principles governing human behaviour and activities. Despite the fact that in modern democratic realities the main and most important role in regulating social relations relies on the law, the content of which goes beyond, in fact, formal state institutions and includes appropriate timeless and universal principles of proper organisation of public life, in under no circumstances should the importance of other social regulators be diminished, some of which (for example, morality) are able to lay a much stronger foundation in building consensus and solidarity principles for the functioning of society and the state.

In our opinion, the value, role and importance of non-legal social regulators, primarily morality, grows in the implementation of not only state but also public control over certain socially important processes, including those that take place in government institutions. The extreme importance of morality in the exercise of public control is explained, in particular, by the fact that the latter does not have a power-binding character, and therefore, its implementation objectively cannot fall under the same detailed legal regulation that takes place at the public-legal level. In view of this, there is a need to strengthen the influence of other social regulators on the behaviour of social control entities, which through the activities of relevant social institutions (family, school, church, etc.) form a positive value-normative dominant of individual behaviour.

In addition, the norms of morality to the greatest extent ensure the formation of a sense of self-control and discipline in all subjects of social relations. At the same time, the elements of such self-control are primarily the will and conscience of a person, which, on the one hand, help the individual to overcome his internal subconscious desires and needs, the external pressure of life circumstances, control personal emotions and thoughts, make clearly conscious, meaningful decisions and implement them, and on the other-to correlate his

behaviour with the moral and legal principles of due and not violate conscious personal beliefs and attitudes. In view of the above, the systematic action of traditional social regulators for the respective society is extremely important not only to ensure the proper quality of public control, but also state control, as the direct or primary subjects of the latter are relevant officials of state bodies whose powers and activities the tasks and functions of specific state bodies and the state in general are activated. The practice of recent years and even decades, in our opinion, has convincingly proved the impossibility of ensuring effective public administration, including control, only through legal means, even those whose content appeals to universal universal values.

CONCLUSIONS

Thus, finally, we note that the purpose of social policy is to ensure the material and spiritual well-being of citizens, achieving stability and security of life in society, the integrity and dynamism of its development. Therefore, it is extremely important to ensure social rights, as noted by leading legal practitioners and representatives of the scientific community, to work out the following areas, namely:

1. Prevention of poverty, changes in the quality of life in the direction of deterioration.

2. Creation of state, first of all legal, guarantees for prevention of natural disasters, epidemics, epizootics, technogenic catastrophes, for immediate liquidation of their consequences, help to the affected population.

3. Creation of education, health care, pension, other social issues accessible to a wide stratum of the population, taking into account the issue of security of citizens, population groups, etc.

In addition, we must keep in mind that conducting a "sound" social policy is impossible today without the following statements: it is important to emphasise that to ensure social human rights in practice it is necessary to doctrinally develop and implement the category of "social responsibility" of the state, business and other civil society institutions. Without proper rights corresponding to the rights, as well as the appropriate level of social responsibility of the relevant institutions, it is impossible to raise the question of proper social rights either in the theoretical sense or in practice. Ensuring the effectiveness of national and international control in the context of European integration implies the need for a set of organisational, legal and other measures aimed primarily at forming a comprehensively developed personality with a high level of spiritual culture in general, not just legal culture and legal awareness. After all, any control activity at the national and international levels is always implemented in specific actions and deeds of entities authorised to do so by law or international treaties. It should be borne in mind that many values of spiritual culture, despite their universal significance for humanity in general, al-

ways have a certain socio-cultural context, which affects the specifics of their perception and understanding within a society and state, and therefore, including efficiency control activity, which is manifested in the achievement of socially useful results of its implementation.

The proper quality and effectiveness of national and international control cannot be ensured by legal means alone, including the adoption of "best" or "perfect" laws, as well as relevant international treaties. After all, laws and international treaties, like any other source of law, are not a closed "thing in itself", but are created, exist and are implemented only in connection with the perception and knowledge of the surrounding diverse reality. In this regard, social control in general includes a holistic system of interconnected and mutually agreed mechanisms for maintaining order and harmony in society through a set of social regulators, the most important, most influential and most universal of which are law and morality. At the same time, the systematic and coordinated action of law and morality, and in some societies and the relevant religious tradition, provide the most effective influence on the relevant socially significant activities, in particular, on control in the field of public administration. This, in turn, means that in the context of modern democratic realities of building a legal, social state, in which the rule of law prevails, the moral (ethical) factor of ensuring proper quality and effectiveness of control over proper implementation and observance of social and other human rights. This necessitates special attention to the human potential of control activities, highly professional formation of which must contain an element of moral (ethical) education, through which the greatest achievement of the individual's ability to "go beyond himself" and thus, aim at their actions not only personal aspirations and desires, but also the interests of other actors.

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INTEGRATION OF LEGAL UNDERSTANDING AS A METHODOLOGICAL ISSUE

Abstract. *The relevance of the study is conditioned upon the pluralisation of the ideological, philosophical, and methodological foundations of legal science and attempts to theoretically overcome the competition of "positivist" and "natural" approaches to understanding law as part of an integrative legal understanding taking place against the background of such pluralisation. The purpose of the study is to identify the epistemological difficulties in constructing integral concepts of legal understanding, suggest solutions for them, and justify the option of integrative understanding of law based on a combination of dialectical and need-based methodological approaches. Main research methods. Based on dialectical logic, the essence of integrative legal understanding is covered as an attempt to synthesise contradictory approaches to understanding law, the process of integrating legal understanding is interpreted as removing contradictions in the development of legal phenomena, and integration appears as including individual moments of such development in the dynamic integrity. Based on the need-based approach, the study*

justifies the criterion for understanding certain phenomena as legal. Importance of the present study. It is proved that the integration of different legal understanding is a task that can be performed based on dialectical rather than formal logic, meanwhile preserving differences and contradictions between the combined conceptual elements. The study proves that during upon satisfying the needs, the properties of certain phenomena are integrated into human existence, acquiring the status of vital, and therefore normatively significant components of such existence. Therefore, the rule of law becomes the result of activity-practical integration of the phenomena serving as necessary components of human life in society

Keywords*: integral legal understanding, dialectics, need-based approach, monism, pluralism, synthesis*

INTRODUCTION

One of the most popular trends in the Ukrainian philosophy of law and general theoretical legal science is the aspect designated as integrative ("integral", "synthetic") legal understanding. Its emergence is primarily due to the pluralisation of the methodological foundations of theoretical legal science; the desire to update and expand its cognitive tools, overcoming the bipolarity of classical conceptual approaches to understanding law – "positivist" and "natural", methodological limitations and one-sidedness of each of them. At present, one of the intentions that can feed integration trends in legal science is also the desire to take "the correct" path of understanding law. In this context, research-to-practice events devoted to it can be an additional evidence of the relevance of this issue in the post-Soviet space [1; 2]. At the same time, it would probably be unfair to attribute the above-mentioned pragmatic motivation to all participants of these forums, since the problem in question exists regardless of the intentions of their organisers and has a general methodological significance. Nevertheless, the above demonstrates the urgency of the problem of integrativity in legal understanding for philosophical and theoretical legal science in the post-Soviet space, in particular in Ukraine. In the electronic version of the Encyclopaedia of Modern Ukraine, the concept of integration (Latin integratio – replenishment, restoration) is interpreted as "combining any elements into a single whole, as well as combining and coordinating the actions of various parts of an integral system; the process of rapprochement and interaction of individual structures" [3]. In the philosophy of law, some of the above definitions of integration receive a specific semantic content. Thus, integrative ("synthetic") philosophical and legal concepts first emerged at the end of the 19th century in the works of B. O. Kistiakivskyi, O. S. Yashchenko, P. G. Vinogradov as a "means to reconcile" [4] the competing areas of understanding law, primarily jusnaturalism and legalistic positivism,

and later received further development in the United States (J. Hall, G. J. Berman et al., P. R. Teachout) [5–7].

The authors of the present study have reasons to believe that integrity as an attribute of the concept of legal understanding should describe the state of unity and indissoluble semantic integrity of its structural parts (ideas, concepts, principles, etc.) as components of those concepts whose elements have been integrated. This state should reflect the emergence of a fundamentally new quality and heuristic in the newly formed version of the understanding of law, which was absent from the original concepts. Currently, various aspects of the problem of integrativity in legal understanding attract the attention of representatives of both legal and philosophical sciences [8]. In particular, some integrative opinions of Ukrainian and Russian philosophers of legal science of the late 19th – early 20th centuries (O.A. Prybytkova, V. M. Zhukov, M. P. Alchuk, etc.), modern integrative theories of legal understanding and problems of synthesis of methodological approaches have already been investigated [4; 9–12]. Attempts to create original integrative-oriented concepts of both legal understanding and socionormatics in general were made both in the West (A. Kaufmann, R. Dworkin, R. Alexi) and in the post-Soviet space (G. V. Maltsev, R. A. Romashov, V. M. Shafirov, V. I. Pavlov, etc.). Nonclassical ontologies of legal reality developed in Ukraine (S. I. Maksimov) [13] and in Russia (I. L. Chestnov) have an integrative direction [14]. Among the English-language publications of recent years, particular attention has been is drawn to the consideration of the psychological and typological foundations of inclusive theories of law [15], attempts to substantiate "hybrid natural law" [16], the legal theory of ethical positivism [17] and its deontological versions [18].

Proponents of the integrative aspect in understanding law often employ the concept of law as an extremely broad figurative representation covering ontologically diverse phenomena (ideas, norms, social relations), which, however, are somehow connected by the authors of concepts with a particular semantic dominant (usually legalistic), which, obviously, according to integrativists, should be considered law itself. Researchers have also long used sociologically coloured concepts, such as "legal life", "legal reality" (R. Ering, M. A. Gredeskul, E. Anners, O. V. Malko, M. I. Matuzov, etc.), "legal field" (P. Bourdieu), etc., one way or another aimed at expanding the scope of "legal" beyond the state's volitional decisions. The idea of building an integrative legal understanding has gained not only its adherents [19], but also opponents [20], as well as those who are wary of the ideas of "integrativists" [21]. Therewith, the point of criticism is usually directed against individual attempts to implement integrativity; the lack of an integral definition of the concept of law is indicated as the main drawback [20, p. 8]. In this regard, the authors of this study note that the publications

of critics of the idea of integrativity, and sometimes even its individual supporters, unfortunately, frequently lack methodological self-reflection, which the issues under study admittedly deserve. The essential ones include a) the problem of being and thinking synthesis of opposites and b) the task to develop a specific "legal object of knowledge", formulated by J. Hall [5]. The exceptional complexity of the latter task is the reason that, as is not unreasonably noted by modern researchers, "in most cases, legal reality is the context of scientific reasoning, and not their subject". [22, p. 8]. Considering the specified state of research on the subject matter, the purpose of the present study is to identify the epistemological difficulties in constructing integral concepts of legal understanding, suggest solutions for them, and justify the option of integrative understanding of law based on a combination of dialectical and need-based methodological approaches.

1. MATERIALS AND METHODS

The solution of these research problems requires relying on several interrelated conceptual approaches, general scientific, and special methods and means of research, which together form the methodology of the present paper. Considering the understanding of the conceptual approach as a worldview axiomatic idea based on extremely general categories, which postulates a general research strategy, selection of facts and interpretation of research results [23, p. 138], basic philosophical and ideological methodological approaches, on which further arguments of the authors of this study are based, they became dialectical and necessary.

Thus, based on the dialectical methodological principle of contradiction [24; 25], the authors solved the problem of covering the essence of integrative legal understanding as an attempt to implement a synthetic combination of contradictory approaches to understanding law as an integral phenomenon. Based on the methodological principle of unity of the logical and the historical, the integration of those phenomena that for certain reasons are considered legal into human need-satisfaction activities is interpreted as removing contradictions in the process of their dialectical development. The need to rely on dialectical methodology is conditioned upon the fact that the task of developing a concept of law that would consistently include competing approaches to its understanding seems almost impossible to solve from a strictly positivist and scientific standpoint. Instead, a more optimistic prospect for such a synthesis arises based on turning to dialectical logic [26]. It is from such positions that the formal logical mutually exclusive answers to the question of what is law can be considered as the result of reflecting/constructing various aspects of law as a complex and multifaceted phenomenon: the integration of conceptual elements of excellent legal understanding is the creation of their new and organic unity and integrity and should be the result of an act of synthe-

sis. Therewith, this refers to a synthesis where the contradictions remain – and, consequently, to a synthesis performed based on the methodological principle of unity of being and thinking, and not by some formal logical procedure that is the opposite of analysis.

The dialectical approach is logically combined with the need-based approach as a special type of activity-based methodological approach. The special significance of the need-based approach here lies in the fact that through its mediation, the present study implements an anthropocentric interpretation of phenomena that are considered legal. The use of the dialectical basis of development in combination with the methodological principle of consistency allows comprehending integration as the inclusion of certain aspects of legal development in the organic integrity that is formed as a result. Further, both methodological approaches – dialectical and need-based – are based on the use of philosophical and legal methods as procedures for interpreting and applying extremely general categories upon studying those phenomena that are reflected in the term-concept of law, as well as concepts of legal understanding. Most importantly, this refers to methods of convergence from the abstract to the concrete, with the help of which the idea of synthesis as a combination of opposites is defined in the models of integrative legal understanding constructed by individual legal scientists. The method of convergence from the concrete to the abstract, which is reversed relative to the above, serves, in particular, as a means of identifying the operation of dialectical laws in the interaction of alternative areas of legal knowledge. The method of theoretical modelling is used here to represent law as a universe and a multiverse.

The appeal to the system approach and general scientific methods of system analysis was conditioned upon the need to describe the current state of development of the problems of integrative legal understanding. To clarify the semantic meanings of related concepts of integrativity, integrity, and integrability in the context of the problem of legal understanding of legal science, the study employed the industry methods and techniques (means) of etymological analysis. These philosophical and general scientific methods are implemented using various research methods – conditioned upon the chosen conceptual approaches and corresponding cognitive methods of activity operations aimed at establishing and interpreting those phenomena that are part of the subject of this study. Most importantly, such methods (techniques) include general scientific research techniques of abstraction, comparison, and classification.

2. RESULTS AND DISCUSSION

2.1. Epistemology of integrity: monism or pluralism?

As early as in the legal science of the 19th – early 20th century, the main areas in the development of legal ontology and epistemology were clearly identified:

monistic and pluralistic, metaphysical and positivist, which still determine the divergence of opinions on the problem of integrity in legal understanding. An illustration of a kind of logical-positivist "purism" can be L. Petrazhytsky's criticism of the use of the term "law" as a general designation of positivist and jusnaturalistic ideas [27, p. 380–381]. Justified by the outstanding legal scientist, the "impossibility" of "positively" combining this law with "due", "proper" law follows, evidently, from the Kant's dualism of what exists and what is due. Therewith, L. Petrazhitsky recognised numerous varieties of positive law ("intuitive", "official", "book", "judicial", etc.) [27, p. 410 et seq.].

Another example of law-recognising pluralism is the position of B. Kistiakivskyi, who defended the multiplicity of manifestations and concepts of law: "since there are sociological, psychological, stateorganisational, statutory manifestations of law, therefore, not one, but several concepts of law are scientifically legitimate" [28, p. 179, 191–193]. The realities mentioned by the Ukrainian researcher can be considered both as existentially independent phenomena, and as various manifestations of a certain single essence, a phenomenon of law subject to reflection in its concept. After all, Kistiakivskyi argued the following: "there is no doubt that there should also be such synthetic forms that would combine these concepts into a new type of cognitive unity" [28, p.195]. For his part, A. Yashchenko noted that "it is necessary to abandon artificial, albeit convenient monism from the very beginning and come to terms with pluralism, although more complex and difficult, but more consistent with a diverse reality" [29, p. 58]. At the same time, despite the fact that B. Kistiakivskyi and A. Yavienko put forward the task of combining "causal" and "teleological" interpretations of law, the problem of such a combination in a single concept and creating a certain "synthesis of multidifferences" in the legal understanding remains practically unresolved to this day.

In Soviet legal science, as is known, monistic epistemology and the corresponding approach to the knowledge of law prevailed. Therewith, in general theoretical legal science of the late 1970s – early 1980s, there was a discussion between supporters of two types of monism, which can be designated as synthesizing and distinctively differentiating. The first was represented, in particular, by the positions of V. Nersesyants [30], and the second – by the opinions of S. Alekseev (1983) and P. Rabinovich (1979, 1981). Thus, V. Nersesyants, referring to the well-known expression of Karl Marx: "the concrete is concrete because it is a synthesis of many definitions, and therefore the unity of the diverse", sought to develop a holistic Hegelian approach to understanding the essence and concept of law. According to V. Nersesyanets, theoretical legal science can exclusively refer to different manifestations of the same essence of law

and offer different definitions of a single concept of law [30, p.26].

S. S. Alekseev, on the other hand, wrote: "attempts to construct a single multidimensional concept that would cover all the previously described meanings of law are hardly justified. On the contrary, a differentiated approach is needed, wherein in each case of employing the term "law" it is necessary to see the scientific status of the problem and, accordingly, correctly, scientifically accurately use the corresponding terminology and special scientific methodology" [31, p.116]. In contrast, V. Nersesyants was advocating for "…combining analysis with synthesis, complementing differentiation with integration of convergence from distinctive abstract definitions of law (by synthesising them) to its concrete concept" [30, p. 33] (at present, V. Nersesyants' approach is being developed by his students (V.A. Chetvernin et al.). A peculiar example of the development of a dialectical-materialistic approach to building legal understanding was the L. S. Yavich's concept of the multi-stage essence of law. Similarly to V. Nersesyants, the researcher believed that the essence of law as a complex and multi-level phenomenon is somewhat unique and inherent in many-sided manifestations of law [32]. At the same time, L. S. Yavich relied on the principle of contradiction, which served as a cognitive means of transition from one to another, a deeper moment of the essence of law. In this regard, the researcher believed that science can contain at least three different definitions of the concept of law, which reflect the essence of different procedures that unfold in the process of legal genesis [32, p. 45].

At present, the well-known Ukrainian legal theorist M. I. Koziubra is also asking questions about the synthesis of approaches to the knowledge of law, drawing attention to the complementarity of cognitive and value-based ways of mastering legal reality [33, p. 10–11]. It gives a negative answer to the question of the possibility of combining differing ideological and value methodological positions on which the three classical types of legal understanding are based, and to develop a single integrative (multidimensional) understanding of law on this basis: "These positions are so different, even antagonistic, that any attempts to overcome differences between them are doomed" [33, p. 20] (the authors of this study add: doomed provided that this refers to preservingthe differences in the initial principles of legalism, the sociology of law, and jusnaturalism (i.e., their identity), and, at the same time, about overcoming these differences in the act of integrating the mentioned types of legal understanding (i.e., accordingly, their non-identity). Therewith, M. I. Koziubra notes as follows: "if we abstract from the ideological attitudes on which the relevant concepts are based, and focus on the forms of existence of law, on which the attention of these concepts is focused, then its understanding as a phenomenon that exists in various manifestations, forms, and guises will

undoubtedly be enriched. And in this respect, the synthesis of the achievements of these concepts is not only possible, but also necessary" [33, p. 20].

At first glance, there may be some inconsistency in the position under consideration. Thus, on the one hand, here, yet again, the pluralism of forms and manifestations of the existence of law as a single phenomenon is recognised. The synthesis of achievements in question actually involves not so much their fusion, but rather mutual complementarity. On the other hand, there is an obvious cognitive pessimism in the issue of theoretical and conceptual synthesis of conceptual approaches, since the contradiction between the identity and non-identity of the methodological foundations of legal concepts is insurmountable. However, it appears that this contradiction can be removed in the process of dialectical development of legal thinking. The idea of the unity of law as a polymorphic phenomenon, perhaps should suggest the possibility of synthesising specific conceptual foundations on which classical types of legal understanding are based [34]. And even though M. I. Koziubra leaves the question of the unity or multiplicity of concepts of law open, the thesis of the unity of the phenomenon of law with the multiplicity of its "manifestations, forms, and hypostases" seems to correlate in a certain way with synthesising monism in the legal understanding.

Notably, two different ontologies of legal reality – pluralistic and monistic – correspond to the distinction between two ideas about the universe – as a universe and a multiverse (H. Ortega y Gasset, M. Epstein). The latter idea correlates with the idea of a multiplicity of legal realities, legal worlds, the idea of a multiverse of law – as opposed to the idea of law as a certain formally and logically closed universe. The structure of the universe of legal realities appears as a multiplicity of figurative and conceptual distinctions that are not fundamentally integrated [35, p. 46–48]. And even theough the modern foreign research of the logical-positivist direction justifies the existence of pluralism of various logics is [36; 37], the sacramental question "Is an internally integral, and not a total integrative definition of law possible?" [2, p. 65], the authors of this study believe they one can only answer that the criteria for the integrity and organicity of the combination of features of law are beyond purely formal logic, and, apparently, beyond cognitive forms of cognition in general. Consequently, the tension between integrative concepts of understanding law and antagonistic "unary" (V. I. Kuznetsov) and discrete-monistic philosophical legal concepts forms two groups of cognitive attitudes. The first of these groups includes attitudes to a broad socio-humanitarian synthesis, bridging the gap between scientific and non-scientific knowledge, law-cognising optimism, universalism, and generally conciliatory intentions. The second category includes rationalistic scepticism, sometimes brought to agnosticism, multiversalist interpretation

of socionormatics, distinctivism, relativism, and theoretical positivist purism.

The existing pluralism of integrity appears to be quite inevitable, given the fundamental impossibility (and, ultimately, the absence of the need) of combining "any and all" versions of legal understanding. Instead, it is possible to combine only their individual conceptual elements. Thus, sometimes the conceptual components of legalistic positivism are combined with individual semantic elements of jusnaturalism, which can be evidenced, in particular, by the concepts of "inclusive positivism" or "ethical minimum in law". Next, the authors of this study address another point that concerns understanding the meaning of the concept of integrity. In most cases, the concepts of integrative orientation are based on an understanding that can be called unifying: this refers to combining two or more features of legal nature. A substantial disadvantage of this understanding is that it allows concealing the eclectic and mechanical nature of the combination of these features behind the appearance of a certain "synthesis".

2.2. Integral human-centred legal understanding in the light of the dialectic of need-satisfaction

Therefore, it appears necessary to clarify the meaning of the attribute of integraty, which should be endowed with the legal understanding sought by many legal scientists. The authors of this study believe that such integrity, first of all, is the result not of an abstract logical-theoretical (often arbitrary) combination of some one-order conceptual elements, but, instead, a manifestation of activity-practical transformation, "humanisation" of natural and social reality in the process of human satisfaction of the most important needs of its existence and development. In this regard, it is the need-based approach that allows presenting social and, in particular, institutional and legal practice as the basis for integration, inclusion of certain elements (ideal or material) in such practice, their value and theoretical understanding. Secondly, it appears that the answer to the following key question should be decisive here: which phenomenon is integrated into the composition of another phenomenon, i.e., it becomes an integral component, an element of the latter? [38, p. 84].

The most common methods of constructing an "integral" legal understanding nowadays are two intellectual operations: the first is that from several long-known variants of multi-semantic legal understanding, certain attributes of the phenomenon are removed, wherein each of them is proposed to reflect the term "law", and the second is that several such attributes are sequentially arranged in one sentence (most often separated by commas – as its homogeneous members), and the judgment obtained this way is declared an "integral" legal understanding. The eclecticism (mechanisticness) of such a set of features seems obvious – especially in cases where their selection and even the sequence of presentation are not justified in any way. In

such a sentence, the noun certifies that meaningful, system-forming core, on which, as it were, various adjectives are strung, which specialise (diversify) the declared allegedly updated, "fresh" legal understanding. However, the abovementioned core can usually be identified with one of the long-known classical variants of legal understanding, primarily with legalistic-positivist or with natural.

But the currently proposed integral version of legal understanding (according to such working titles as, for instance, "human-centred", "human-dimensional", "anthroposocial", "anthropological", "humane") is built in a fundamentally different way, developed according to a different content criterion – the human-need one [38, p. 84]. In this regard, the authors of this study recall that according to the long-existing sociomaterialistic need-based approach justified by P. M. Rabinovich, the term "law" should reflect certain opportunities to meet the needs of a person in their existence and development in society, predetermined by the achieved level of their development and provided by the responsibilities of other subjects of society. Therefore, the ***legal nature*** (pertinence to the law) of certain phenomena is determined by their ability to serve as conditions or means of satisfying human needs. This property of such phenomena is formed only in the process of social practice of people, that is, their interrelationships, interaction. Consequently, the law is a social phenomenon (and not, for instance, biological, chemical, cosmic). It, therefore, arises in the process of human social life, as a result of "meeting" of human needs with external phenomena that are capable of satisfying these needs. In other words, the process of need satisfaction involves the ***integration*** (inclusion, entry) of certain properties of real phenomena (both natural and social) in the existence of human individuals and their groups. And then such properties, having acquired (in accordance with the specified legal understanding) a legal nature, are immersed, embedded in the very existence of a person, which, thanks to this, is improved and optimised. Therewith, the satisfied need of a certain person disappears (at least temporarily), but the ability to serve the satisfaction of similar needs of other people remains a corresponding phenomenon in the future, and this is considered as the general, i.e., normative, nature of such opportunities. Thus, human rights as its certain opportunities are realised, used by it, becoming a necessary, natural component of human existence. An adequate reflection of such a situation can be the terminological expression "law in a person". This gives grounds to consider the need-based legal understanding to be integral, i.e., it is a person who is recognised as the system-forming core generating the legality of certain phenomena as necessary tools for satisfying one's ontological, existential needs – phenomena that are integrated into the existence, life activity of a person in society. The human-need interpretation of the integrity of legal

understanding proposed herein can, admittedly, be the subject of further discussion. However, be that as it may, the humanism and humanocentrism of such a legal understanding appear to be implicit [38, p. 85].

The possibilities of conceptual integration and the viability of the synthesis of various elements and foundations of various concepts of legal understanding directly depend on the performance of several conditions: the distinction of integrity as an organic integrity, on the one hand, and mechanical, eclectic, and semi-random combination of elements – on the other hand; understanding the idea of integrity from the standpoint of dialectical logic, in particular with the reliance on the principle of contradiction as the fundamental law of social development, the principles of identity of being and thinking, unity of logic and historical, theoretical, and practical [39, p. 211–232; 40].

CONCLUSIONS

The prospect of integrating different legal understanding is a task that can be performed based on dialectical, and not formal logic, while preserving the differences and contradictions between the combined conceptual elements, the synthesis of which becomes possible based on the dialectic of the existing and the due both as content and form, essence and phenomenon. At the same time, insurmountable methodological limitations on the path towards building an integral legal understanding are the fundamental inconsistency of umerous methodological approaches, such as, in particular, state-legal monism and legal pluralism, value-normative absolutism and relativism. Scientific-positivist consideration of socionormative phenomena is difficult to combine with syncretism of value-coloured legal representations that seek to cover substantially different quality phenomena: this is how the tension between the ideas of complementarity of contradictory positions, wherein each of them retains its meaning and its scope of application, and such an integrative project, wherein individual combined elements "dissolve" is revealed. Given the possibility of combining only individual conceptual elements in different versions of legal understanding, but not mutually exclusive methodological approaches to understanding law as such, pluralism of integrals in legal exchange is inevitable.

Recognition of the existence of a multiverse of legal realities as their differentiated multiplicity makes possible the coexistence of various concepts of law, each of which, in turn, can be the result of a synthesis of legal features. Although there may be a certain complementarity relationship between such concepts, these concepts nevertheless remain autonomous and non-integrated. The meaning of integrity in legal understanding is most fully and adequately expressed by activities to meet human needs – social practice. The latter can reveal the semantic objectivity of integrity, cover the social and individual significance (utility or

harmfulness) of a particular combination of conceptual elements of understanding law to meet the needs of human existence and development. It is in the process of need satisfaction that the humanistic understanding and activity transformation of natural and social phenomena takes place, the integration of their certain properties into human existence, their acquisition of the status of vital, and therefore statutorily significant components of this process. Thus, legality becomes the result not of an a priori or abstract-theoretical, but of activity-practical – meaning-making and meaning-converting – integration of the phenomena serving as integral components of human existence in society.

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FORMATION OF THE IDEA OF NATURAL LAW IN ANCIENT GREECE AND ANCIENT ROME

Abstract. *The article analyzes the formation of the idea of natural law, which has an important theoretical and applied significance, as it makes it possible to better understand the essence of law, its connection with egalitarian and humanistic teachings. The research is based on modern philosophical worldview approaches, such general scientific research methods as axiological, anthropological, phenomenological, comparative-historical, comparative-legal, system-structural, hermeneutical, functional, institutional, as well as formal-legal method are used. The article examines the works of representatives of the Milesian school founded by Thales in the first half of the 6th century BC, whose analysis of human consciousness, human ability to create, transform the world, formulate ideas and implement them led to the idea of a universal Logos, a universal divine Mind, and the Law of Nature. The article reveals the contribution of sophists to the development of the idea of the natural law who justified the differences between natural and human law, defended the idea of equality of all people, called for not discriminating against citizens, depending on their origin, and denied slavery. The role of representatives of the stoicism school in substantiating the idea of natural law based on awareness of the fundamental difference between human nature and nature, justifying the existence of the unchangeable law of nature (lex naturale) in the form of common sense, equality of all people, recognition of slavery contrary to human nature, the need for recognition of human rights by law to preserve human dignity is highlighted. The article examines the influence of the ideas*

of the philosophers of Ancient Greece on the development of Roman law, the role of the Scipio group in this influence, and the essence of the then rational understanding of natural law as a true law, namely, common sense, which, in accordance with nature, concerns all people, is unchangeable and eternal

Keywords: *ancient Greek philosophy of law, ancient Roman philosophy of law, lex naturale, natural law, natural law theory, human rights, the essence of the state*

INTRODUCTION

The origin of philosophy as a science is associated with ancient Greece. As Bertrand Russell noted, although Egypt and Babylon "had some knowledge that the Greeks later adopted from them," however, no other country "developed science or philosophy" [1, p. 31]. It was philosophy that gave an impetus to the development of political and legal science. Perhaps the most significant result of political and legal science was the emergence of the idea of natural law. This idea radically changed the understanding of the essence of law, contributed to the formation of the doctrine of natural law and natural human rights, and the progressive reform of European legal systems based on human-centrism in the future. An outstanding contribution to the emergence and formation of the idea of natural law in Ancient Greece, which was later perceived by ancient Rome, belongs to a whole galaxy of philosophers of the pre-Socratic period, namely Thales [2, p. 268–269; 3; 4, p. 15–19], Anaximander [2, p. 270–273; 3, p. 11–14; 4, p. 19–24], Anaximenes [2, p. 273–274; 3, p. 15–20; 4, p. 24–25], Xenophanes [2, p. 292–293; 4, p. 46–49], Heraclitus [4, p. 26–31; 5, p. 5–18], Anaxagoras [2, p. 308–315; 3, p. 61–73; 4, p. 69–76]), sophist philosophers (Protagoras [2, p. 316–318; 4, p. 157–160], Gorgias [2, p. 318–319; 4, p. 160], Antiphon [2, p. 320–321; 4, p. 163–165; 6], Hippias [4, p. 162–163; 7, p. 281–417], Lycophron [8, p. 12–80]), Democritus [9], Socrates [10], Plato [7; 11; 12], Aristotle [7; 13], Stoic philosophers: Zeno [2, p. 296–299; 4, p. 54–57], Chrysippus [3, p. 299–306], Panaetius of Rhodes [3, p. 284]), Polybius [14], Seneca [15], and Cicero [16].

The paper attempts to show the complex and contradictory process of the emergence of the idea of natural law, as it was not perceived equally by all philosophers. In addition, this idea was formed and paved the way not only in the conditions of the birth of science as such and the formation of the philosophical foundations of the process of cognition of social phenomena, but also in difficult socio-economic conditions, bearing the imprint of the concrete historical nature of the era under consideration, as well as the features in the then Greek and Roman States of the forms of government through which these states passed. It is also worth considering the living conditions and influence of the environment

on the historical figures who represented this idea. The idea of natural law, in particular, sharply contrasted with the existence of slavery, periods of authoritarianism and despotic rule, the class nature of society and differences in the status of many segments of the population. Nevertheless, its significance as a civilizational asset, the highest achievement of philosophical and legal thought at that time, went far beyond ancient Rome and Ancient Greece.

The development of the idea of natural law by the philosophers of Ancient Greece and Ancient Rome created the basis for the further formation in the Middle Ages and in modern times of an integral doctrine of natural law by prominent philosophers H. Grotius [17], J. Locke [18, p. 327–351], Ch. Montesquieu [18, p. 387–443], J. J. Rousseau [18, p. 363–385], S. Pufendorf [18, p. 353–359] and many other thinkers. Among the Ukrainian pre-revolutionary researchers of natural law issues, it is worth mentioning M. Drahomanov [18, p. 901–902], B. Kistyakivsky [18, p. 839–895], S. Dnistrianskyi [19], M. Palienko [20], among the pre-revolutionary and post-revolutionary Russian scientists – P. Novgorodtsev [21; 22], F. Taranovsky [23, p. 78–93], V. Chetvernin [24], among Russian contemporaries – V. Nersesyants [25], among the newest Ukrainian scientists – M. Kozyubra [26, p. 12–42], O. Kostenko [26, p. 115–138], S. Maksymov [26, p. 43–65], K. Krasovsky [27], and among foreign researchers – works of such authors as B. Bix [28], R. Dworkin [29; 30], D. Llojd [31], K. Popper [32], L. Fuller [33] and many others.

At many stages of historical development, the idea of natural law opposed the historical school of law [34], legal positivism, normativism and its extreme expressions – Marxist-Leninist understanding of law and proletarian law [25; 33; 35], focusing on the value and humanistic aspects of human relations, human dignity, thereby helping to resist the arbitrariness of the state [36]. This idea helped fight authoritarian regimes, inspired the protection of human rights, returned moral values to the sphere of state power, formed a belief in the ability to limit state power to human rights and put it under the control of society, and was eventually crowned with the recognition of universal natural human rights and their consolidation in the Universal Declaration of Human Rights of 1948 [37], which opened a new era in the possibilities of protecting human rights. After the Second World War, in almost all the constitutions of democratic states, the concept of natural law and natural human rights was reflected in one form or another, becoming the protection of human rights and serving as a real lever for limiting the arbitrariness of state power.

At the present stage of development of legal science, despite fundamental changes in the understanding of natural law, comparing with the period of antiquity, the origins of the idea of natural law, its various aspects continue to at-

tract the attention of philosophers, historians, sociologists, lawyers. Among the research topics of foreign researchers of the last few years in this field, it is worth mentioning the study of the primary sources of natural law [38–40], the concept of law in the context of a better understanding of the phenomenon of law [41; 42], the role of the rule of law as a measure of political legitimacy in Greek city-states [43], the study of the relationship of natural law with ethics and ethical ideals [44], the relationship with state political regimes, the study of historical personalities-carriers of these ideas [45].

Such attention to the study of the primary foundations of the idea of natural law, everything connected with it, is not accidental at all, since the results of the study of the historical conditions of the emergence of the idea of natural law, the study of the relationship between law and natural law in the conditions of Ancient Greece and Ancient Rome and the corresponding conclusions help to better understand the deep essence of modern law, natural human rights, their relationship with forms of government, political regime, more deeply understand the differences and common in the main doctrines of legal understanding. And this, for its part, also contributes to a better understanding of the tasks facing modern science and legal practice, leads to the formation of modern ideas about the purpose of law and the limits of its interference in the public and private spheres.

The purpose of the research is to analyse the origins of natural law ideas in the works of ancient Greek and Roman philosophers, in particular the works of representatives of Natural Philosophy (Philosophy of nature) of the Milesian school, Socrates, Plato, Aristotle, representatives of the school of stoicism, Cicero, revealing and evaluating the ideological foundations of the idea of natural law, tracing the naturalistic, cosmological, theological and rational worldview and its influence on the knowledge of legal phenomena.

The practical value of this work lies in the fact that through the disclosure of the process of the origin of the idea of natural law and the personal contribution of ancient Greek and ancient Roman philosophers to this achievement, it provides an opportunity to better understand the doctrine of natural law, which underlies the modern concept of human rights.

1. MATERIALS AND METHODS

The proposed research is based on modern philosophical worldview approaches to understanding law and its role in modern society, correlation with the state based on the use of ontology, epistemology, axiology, praxeology, anthropology, dialectics (including logic), ethics (morality) as the core of the methodology of law in their interdependence and interrelation. This made it possible to trace, explain and correctly assess the ideological foundations of the idea of natural law, which grew up on a naturalistic, cosmological, theological, and rational

worldview. This also made it possible to assess the advantages and disadvantages of such a philosophical and theoretical understanding and knowledge of law by ancient Greek and Roman philosophers. Rational worldview allowed ancient Greek and Roman scientists to go beyond the existing orders in understanding a just society and explain the nature of man, the relationship of people on civilizational and humanistic principles. Rationalism, as a method of cognition of legal phenomena, has become a powerful methodological tool for evaluating a number of other ideological ideas that have influenced, taking into account the principles of methodological pluralism, the development of law, in particular utilitarianism, positivism, normativism, existentialism and many others.

The authors rethink the existing ideas about the triune understanding of dialectics as a universal method of philosophical consciousness, the theory of development and the method of cognition of the world. Meanwhile, dialectics in the work is considered as one of the general scientific methods of cognition, which helped to consider the studied issues of the formation of the idea of natural law from the point of view of its objectivity, comprehensiveness, concreteness, consistency and historicism.

The paper also uses such general scientific research methods as axiological, anthropological, phenomenological, comparative-historical, comparative-legal, system-structural, hermeneutical, functional, institutional, as well as formal-legal method. A special role was assigned to the axiological method, the application in the process of research of the formation of the idea of natural law of the modern vision of the value aspect of law, since values, namely freedom, justice, equality, dignity, honour of a person, their life, health determine the deep essence of the concept of law, form an idea of the social purpose and hierarchy of goals of law and the role of the state in ensuring them, serve as a criterion for the acceptability of certain means of implementing legal norms and methods of legal regulation.

At the same time, it was also important to apply the anthropological method, which leads to the consideration of all legal phenomena through the prism of the individual, his needs, values and interests (hence the famous Protagoras' statement that man is the measure of all things, the criterion for all actions and deeds). Anthropology is the core of the rationalization of law. Therefore, it was important to evaluate the views of ancient Greek and Roman scientists from the point of view of the modern understanding of human centeredness, human rights and, above all, natural human rights as conditions of human existence and interaction for the sake of preserving one's existence and as conditions for survival, human dignity, equality (in particular gender), justice. The anthropological method also serves to confirm the need for legal regulation itself to normalize human relations, to assess the legitimacy of power, since

the absence of enslavement relations, democratic power, and its responsibility to citizens for its activities correspond to human nature. Conversely, human nature is contradicted by the lack of law and legal nihilism, the ethical-instrumental vision of law and its identification with the state and state power and the police state, the lack of guarantees of human rights, the illegal retention of power, as well as the overregulation of public relations, ignoring the biological needs and interests of people, the low level or lack of social standards, social stratification and its consolidation in legislation.

The significance of the phenomenological method, which served as an additional means of substantiating the idea of natural law, is particularly important from the point of view of recognizing the super-individual, self-sufficient, transcendental phenomenological existence of the phenomenon of equality, justice, and the unified nature of people underlying the idea of natural law.

Comparative-historical and comparative-legal methods were used to assess the idea of natural law, the views of scientists from the point of view of modern understanding and purpose of law, human rights, the purpose of the state and its role in ensuring human life, its interests. The system-structural method was used taking into account the understanding of law as an integral phenomenon that has a complex structure, each element of which is in interaction with other elements. The hermeneutical method and its tools made it possible to reveal the essence of the idea of natural law, consider them taking into account specific historical conditions, and interpret legal concepts from the point of view of their correspondence to the point of view of their authors. Functional, institutional, and formal legal methods contributed to a more accurate analysis of the institutions and institutions available in Ancient Greece, as well as the phenomena of legal reality.

2. RESULTS AND DISCUSSION

2.1. Milesian School, Philosophy of Nature

Ancient Greek philosophy as a science originates from the Natural Philosophy (Philosophy of nature) of the Milesian school, founded in the first half of the 6th century BC. Its representatives Thales, Anaximander, Anaximenes, and later Heraclitus, Anaxagoras, sophists, Democritus justified the cosmological model of the universe, its development according to its own laws, necessity (Fate) and its close connection with logos (law), knowledge through the mind, the "naturalness" of the human being, the inseparability of its knowledge from the knowledge of nature, the changeability of man according to the changeability of nature, and justice – as an expression of equal retribution according to talion principle

Thales was the first to talk about nature; like the earliest philosophers, he adhered to the material principle (he considered water to be such a principle), recognized the unity of the cosmos, the immortality of the soul [46, p. 5–9].

Anaximander, a disciple of Thales, considered the principle and element of existence to be the One Infinite, which is in constant motion. From the boundless nature, all things arise and are destroyed not because of the isolation of opposites and the qualitative change of the elements, but because of eternal movement. He also believed that man comes from the animal world [46, p. 11–14]. The unity and boundlessness of nature, the changeability of the world was also recognized by Anaximenes, a disciple of Anaximander [46, p. 15–20]. The analysis of human consciousness, human ability to create, transform the world, formulate ideas and implement them led the Greek philosophers of the pre-Socratic period to the idea of a universal Logos, a universal divine Mind, and the Law of Nature.

Logos (Greek: λόγος) – comes from the word λέγειν (Greek) – to speak, originally meant a word or language, later the very idea that is expressed in the language. In the epic of Homer, it meant μύθος (myth) or επος (epic), and later, through the efforts of philosophers, first Xenophanes, who believed that the eternal God, who does not have a human or animal form, directs with the help of Reason, turns into a "reasonable word", "discretion" [2, p. 292–293]. The content of the Logos becomes the essence of all things, the structure of the world, its laws. Heraclitus continued his research on the laws of the development of the world, who formulates this law of nature (logos) as follows: "1. This logos holds always but humans always prove unable to ever understand it, both before hearing it and when they have first heard it. For though all things come to be in accordance with this logos, humans are like the inexperienced when they experience such words and deeds as I set out, distinguishing each in accordance with its nature and saying how it is. But other people fail to notice what they do when awake, just as they forget what they do while asleep. 2. For this reason it is necessary to follow what is common. But although the logos is common, most people live as if they had their own private understanding" [5, p. 2]. Purely materialistic is Heraclitus ' understanding of the cosmos: "This world, which is the same for all, no one of gods or men has made. But it always was and will be: an everliving fire, with measures of it kindling, and measures going out", "Listening not to me but to the logos, it is wise to agree that all things are one") [5, p. 3]. This law of nature is characterized by a measure ("The sun will not overstep measures, otherwise, the Erinyes, Justice's helpers, will find it out" [5, p. 5]. It is interesting to compare this with the expression in Parmenides' poem "On Nature": You will know now… The sky from where it has gone, all that surrounds it, – how immutable, it by force of Ananka, holds the boundaries of the luminaries…" [46, p. 52]).

Important for further understanding of the idea of natural law is Heraclitus' assessment of the human mind and thinking, his recognition of the human

ability to know. If the mind "is the one that controls everything with the help of everything" [5, p. 2], the thinking that is inherent in all – "great dignity, and wisdom consists in saying the true and listening to nature, acting according to it" [5, p. 6], and therefore "[in] God everything is wonderful, and everything is good, and just, but people consider one thing unfair, the other just" [46, p. 5].

So, initially, Greek philosophers mostly did not see the difference between natural laws and the laws of the social environment, extending the effect of natural laws on society itself. This period, as defined by K. Popper can be called the stage of biological naturalism, which, in turn, is the first stage of the transition of society in views on the relationship between natural and normative laws from naive or magical monism to critical dualism [32, p. 84]. According to biological naturalism, there are certain eternal unchangeable laws of nature, from which moral and state laws are derived. Biological naturalism has served to justify diametrically opposed ethical views, both for egalitarianism (a society with equal opportunities) and for a society dominated by the right of the strong. In the form of ius naturale, biological naturalism is still quite popular among jurists [47]. To a large extent, the signs of biological naturalism are absorbed by the anthropological approach in law, which considers man in the unity of biological, moral, religious and other components and synthesizes a scientific and value vision of the human phenomenon.

Anaxagoras, who was called "Mind" for his wisdom, was the first to recognise reason and matter rather than fate (necessity) as the cause of the world order. According to Aristotle, Anaxagoras should be understood in such a way that everything arises from the existing, but from the existing in possibility, but in reality it does not exist, that is, that he, if he developed this idea, would form a new teaching, recognizing as principles the one (since it is simple and not mixed) and another, which can be called indefinite before taking certain forms [46, p. 67]. As a nature explorer, Anaxagoras was thrown into prison, from where he was not easily released by Pericles.

Democritus' materialist teaching was based on Protagoras' rational doctrine of perception. Admitting the relativity of sensory perception "a person should cognise based on the rule that he is far from reality"), he proved the possibility of knowing absolute reality, which has space and geometric shapes (through "true knowledge"). Democritus denied the role of the supernatural, the divine, believing that everything has its own reasons, develops due to necessity [9, p. 213]. It is knowledge that turns randomness into necessity (knowledge by thought gives reliability in the judgment of truth [9, p. 226]. Thus, for example, the ancients came to the conclusion that there is a God, "while in fact there is no other god besides them who would have an immortal nature" only because idols of "gigantic size" approached people, "foreshadowing the future for people

with their appearance and sounds" [9, p. 323], moreover, the human race itself is almost the only one, among the animals known to us, "most involved in the divine principle…. due to the divinity of its nature and essence…the property of the most divine – to think and reason" [9, p. 355].

In contrast to natural phenomena, that is, what exists "in truth", "by nature", in Democritus society, the polis, the system of government and laws are the result of natural development. The law is "a bad invention", because "what contradicts the truth is unfair" and therefore "a sage should not obey the laws, but live freely" [9, p. 371]. These social phenomena have emerged in the process of evolution and therefore can and should be improved in accordance with the requirements of justice, the interests of the state, the needs of people, etc. [46, p. 93–110]. Democritus founded a secular system of morality and ethics, which before him was completely religious. What is unfair is what is contrary to nature. All moral requirements are motivated not by external religious influences, but by internal motives of a person (Democritus first introduced the concept of conscience – "people have on their conscience the bad deeds they have committed" [9, p. 358], "the ability to be ashamed is the greatest virtue" [9, p. 368]). According to Democritus, all people are equal by nature, although it is impossible not to note his negative attitude towards women, their role in society, and the peculiarities of relationships with men, characteristic of Greece at that time [9, p. 369–370]. The Democrat condemned the wealth acquired by "bad ways", supported the democratic structure of the state as opposed to the monarchy, because even "poverty in a democratic state should be preferred to what is called a happy life in the monarchy, as freedom is better than slavery." However, Democritus believed that "it is not proper for a ruler to be responsible to anyone other than himself" [46, p. 93–110], although, on the other hand, "it must be arranged so that if he has not committed any injustice, and even severely punished those who have done it, he will not be subjected to their power in the future; it is necessary that the law or other establishment should stand in defence of him who does the work of justice" [9, p. 362].

In the middle of the fifth century BC, in Ancient Greece, there was a tendency to study the humanities and study the essence of man and distinguish it from nature, which was greatly facilitated by the views of sophists. Protagoras' famous: "man is the measure of all things, what is and what is not" became a reflection of the search for the principles of human relations, human nature, and criteria of justice. The contribution to the development of the ideas of natural law also belongs to other sophists, among whom it is worth mentioning Gorgias of Leontini, Antiphon, Hippias of Elis, Lycophron. Sophists argued for the distinction between natural and human law, which may be contrary to nature. Thus, Antiphon argued: "By nature, we are

all arranged in the same way in everything – both Barbarians and Hellenes… we all breathe air through our noses and eat with our hands " [9, p. 63]. Hippias believed that it is not necessary to distinguish between citizens of different polises and discriminate them according to their origin, arguing that all relatives and fellow citizens "by nature and not by law: because such a family is similar in nature, the law – a tyrant over people, forces many things that are contrary to nature" [7, 337c]. In this respect, Hippias should be considered one of the exponents of the idea of egalitarianism.

2.2. Socrates' Idea of Man as a Moral Being and Plato's Biological Naturalism

The teachings of Socrates (469–399 BC), one of the most famous philosophers of Ancient Greece, have not come down to us in the form of his works and have been preserved only in the works of Xenophon, Plato and Aristotle. Starting as a sophist, Socrates considered man as a moral being and studied not nature, but exclusively ethical issues from humanistic and anthropological positions: the reason-based morality of human behavior, the existence of objective truth, the absoluteness of the difference between good and evil, the meaning of human conscience, human virtues (justice, courage, prudence, beauty, etc.). By singling out such forms of state as monarchy, tyranny, aristocracy, plutocracy, and democracy, Socrates preferred the aristocracy, which was favorably appreciated by Plato. Democracy was criticized by him because of the need to choose not by lot, but only according to the abilities and knowledge of a person [10].

Since the end of the 5th century, as noted by G. H. Sebain and Thomas L. Thorson, two ideas of the opposite between nature and convention are being developed:

1) nature as a law of justice and law, organically inherent in people and the surrounding world, so the order is reasonable and beneficial, moralistic or at least religious, which could allow criticism of abuse;

2) nature is independent of morality, manifests itself as self-affirmation or selfishness, the desire for pleasure or power (it could be developed as the Nietzsche doctrine of self-expression either in varieties of utilitarianism or in forms of anti-social orientation) [48, p. 59].

On the basis of these two ideas, the formation of two basic concepts of human rights began, which had a key impact on the perception and understanding of human rights and on human destinies. On the basis of the first idea, the idea of natural human rights was formed. The second idea served as the basis for positivism, the formal rule of law, and the justification of the right of force. During the entire subsequent period of the existence of civilization, there is a rivalry, opposition, and in some periods – a fierce struggle of these two ideas based on different approaches to understanding the origin of law, its sources, connection with the individual, relationship with the state and role in regulating public rela-

tions. With the change of cosmological views, knowledge about what is proper changes. Justice is made dependent on the actions of specific individuals and knowledge of the forms of social life and professional, rather than generic, differentiation of society. Political discourse arises as a conversation of equal people about equality [48, p. 10]. The natural law teaching of this period has an individualistic, atomistic and mechanistic character. According to Professor Palienko, a person in such a natural-legal philosophy "is considered in itself as an abstract individual, an isolated person, without any influence of the environment and historical conditions" [20, p. 32]. This is how the state was imagined – a mechanical union of individuals, and the individual and their mind, natural properties and rights were considered the basis of the state.

The teachings of Plato (427–347 BC) on man, society, law, politics and the state, which he substantiated in his works, deserve special consideration. In his view of these phenomena, he generally tends towards a religious worldview based on the idea of order and harmony. Observing the terrible destruction caused by the Peloponnesian War of Athens against Sparta and the subsequent power of Thirty Tyrants, Plato became disillusioned with the existing state system, believing that the fluidity and cyclicity inherent in society, like all nature, inevitably leads from birth to decay and decline in order to be reborn in a new round of development. Plato distinguished five successive state structures [11, 543a-594e]: aristocracy (the rule of the best), timocracy or timarchy (based on ambition), oligarchy (the power of the rich), democracy (the power of all), tyranny, each of which corresponded to five different structures of the human soul [11, 545a-546]. The aristocracy leads to timocracy by virtue of discord in the power elite, which arises due to the degeneration of the aristocratic family and the emergence of successors who will no longer have natural inclinations and after appointment will neglect their duties, in which a tendency to rivalry and rage will reign. In a timocracy, charity is less respected, profit and wealth are more valued, and therefore people begin to admire the rich and appoint them to public positions. There are qualifications. The oligarchy is increasingly based on power or intimidation. There are practically two states: the poor and the rich. In such a state, many criminals appear, and the state itself becomes weak and cannot defend itself from external attacks, because the oligarchs are afraid to put weapons in the hands of the poor, so that they are not turned against themselves. The greed, selfishness, and shamelessness of the oligarchs in enrichment, the weakness of the spoiled and lazy oligarchic youth, on the one hand, and the hatred of the poor for those who own their property, on the other, are preparing for the defeat of the oligarchic state. The victory of the poor leads to the elimination of oligarchs, the equalization of all in civil rights and the state of freedom, that is, "the ability to

do what one wants", which Plato defines as an essential feature of democracy. And just as the insatiable desire for wealth destroys the oligarchy, so the "insatiable" desire for freedom in a democracy, according to Plato, prepares the need for tyranny. How does this aspiration manifest itself? According to Plato, from the art of music began the general wisdom and lawlessness, followed by freedom, which gave rise to fearlessness and shamelessness, followed by "unwillingness to obey the rulers", unwillingness to obey father and mother, elders and their admonitions [11, 545a-546]. Parents get used to liking their children and being afraid of their sons, immigrants are equalized with natives, schoolchildren do not respect their teachers, but extreme freedom is in equalizing the rights of free and slaves, women and men, which ends with the fact that they "stop considering even laws – written or unwritten" [11, 562a-563d]. Therefore, "excessive freedom, obviously for both the individual and the state, turns into nothing more than extreme slavery" [11, 564a], hence the conclusion that "complete freedom and independence from any government is much worse than moderate submission to other people", and that complete freedom from any government is much worse than moderate power restricted by other institutions [12, 698b].

As can be seen, freedom is interpreted by Plato very arbitrarily. In a Democratic state, as Plato understood it, "there is no need to participate in governance", "it is not necessary to obey", "if any law prohibits you from governing or judging, you can still govern and judge", and a person is "given respect for his attachment to the crowd". This is a system that "does not have proper management "[11, 557e-558a]. The democratic system in its pure form, with all its shortcomings, like all other types of state structure, cannot exist for a long time without degenerating and experiencing decline. Therefore, the only way out for Plato is to create an ideal state. The model of Plato's ideal state, a stable state that has stopped, is described, in particular, in the works "Republic" [11, p. 79–420], "Laws" [12, p. 71–459] and "Politician" [12, p. 3–70], is an attempt to reverse the negative course of events and offer the foundations of an ideal state, devoid of existing shortcomings in the real state, including those inherent in the democratic system.

Plato's ideal state is a state in which everyone would have to live according to the laws of nature, where the body would be given a certain natural structure, one part of the body would rule over another, and accordingly, in the soul this would generate justice [12, 698b]. An ideal state has four main virtues: 1) wisdom, 2) courage, 3) prudence, and 4) justice [11, 427e-439]. In an ideal state, women should be common, like children, their upbringing should be common, military and peaceful activities should be common, and philosophers should rule such states, because "until philosophers reign in states, or the present kings and rulers philosophize nobly and thoroughly and

it does not merge together, the state will not be free from evils and the ideal structure of the state will not see the sunlight" [11, 473d-473e].

Plato is not a supporter of excessive democracy and therefore an ideal state cannot be built solely on the foundation of such democracy, because "to achieve freedom and friendship combined with reasonableness, one must be due to both types of state structure from which all other types were born, namely, monarchical and democratic [12, 693d]. The ideal of a ruler for Plato is clearly traced in the question to the legislator in what state he needs to give the state so that he can arrange it himself. The legislator replies: "Give me a state with a tyrannical structure. Let the tyrant be young, memorable, capable of learning, courageous, and naturally generous; let the soul of this tyrant also have the qualities that accompany each of the parts of charity, as we said earlier. Only then will his other properties be useful" [12, 709d]. This position of Plato becomes clear in the totality of his assessments of the main state-legal phenomena. Plato argues, in particular, that a state must have rulers and subalterns, the noble ones must rule the non-noble, slaves must obey their rulers (slaves should be punished fairly and not pampered like free people with exhortations, they should not joke with slaves – neither women nor men), the strong must rule over the weak [12, 689e-690b, 777c]. As can be seen, Plato is a supporter of socio-political aristocracy, a closed caste society, and social inequality. However, nature corresponds not to the nonviolent power of the law, but to voluntary submission to it, and the rulers must also obey the law [12, 690b-c]. The latter assertion is one of the fundamental statements that formed the basis of the concepts of the rule of law, however, in a certain formal form.

Plato's idea of the natural is based on the concept of biological naturalism, which recognizes the existence of the laws of nature, which should also underlie the laws of the state. Plato talks a lot about the natural and its significance for the state and society. The legislator must raise his voice, "come to the aid of law and art itself and show that they are both creations of nature or not below nature, at least because they are products of reason" [12, 890d]. Relationships between people are of natural character. However, as it was rightly pointed out by K. Popper, with the help of biological naturalism, Plato defends not an egalitarian, humanistic version of it, as the sophists, Hippias of Elis, Euripides, Elkidam or Lycophron did, arguing that the human natural law is the equality of all and that no one is a slave by nature, but sanctifies his elite version, namely, that by nature there is a biological and moral inequality of man [32, p. 86]. Plato took a step back in his perception of the ideas that formed the basis for understanding natural law, namely, the idea of human nature, the principles of human relations, comparing them with sophists.

Trying to construct a model of an ideal state, Plato passes through the

prism of such a state all the key ethical concepts: freedom, justice, happiness, truth, harmony, beauty, virtue, the highest good, the categories of true and eternal. How should a person live to achieve happiness? The answer lies in the understanding of measure: anyone who wants to be happy must have a sense of measure, which is mainly God, and follow the law that God holds the beginning, middle, and end of all things, according to nature. Justice takes revenge on those who deviate from the divine law, and those who deviate from this law destroy themselves, their home and their state [12, 716a-b].

This understanding of measure in Protagoras, Plato and other philosophers should be considered the cornerstone in the formation of rules of due, rules of human behavior, although with different assessments of this measure. From the ethical requirements regarding the attitude to wealth, honors, attitude to rulers, to other people, an understanding of good and bad actions is derived, and from here – the direction of people to the desired actions through the appropriate rules of human behavior. Plato's examples of good behavior include serving god, sacrificing to the gods, honoring sacred rites, paying a debt to our parents, hospitality, and following virtues.

Next in importance to the gods, Plato places the soul, since it is closest to man, and only after it – the body. And who does not want to refrain from what the legislator decided to consider shameful – "extremely dishonestly and abominably treats the most divine – his soul" [12, 728a]. At the head of all the benefits for people, Plato put the truth. The truth becomes a means of preventing injustice on the part of other people, because "there is only one way to avoid serious, incorrigible and even completely incorrigible injustices on the part of other people – this is to fight them, fight them off, win them over and steadily punish them" [12, 731b]. The truth also serves Plato's purpose of building an ideal state. To live truthfully is not to lie, to live honestly, sensibly, intelligently, to promote the growth of the state, to strive for charity, the greatest submission. To live truthfully is also not to commit injustice. Justice consists in giving everyone their due, but at the same time everyone should do their own thing [11, 432b-433B], poverty and wealth boundaries should be set [12, 744d-e], equality should be observed in the state, which consists in what is given to everyone in proportion to their nature, "especially to virtuous people". Realizing that the majority will be dissatisfied with such equality, Plato suggests applying equality by drawing lots, and praying "to God and a good fate" that "they will arrange the draw according to the highest justice" [12, 757e-758a].

In the "Definitions", justice is formulated as "the appeasement of the soul in itself and of the parts of the soul as one in relation to the other and as a whole; a resolution giving to each their own merit; an ability whereby one who possesses it preferentially chooses what seems just to them; the ability to obey

the law in life; equality in cohabitation; the ability to obey the right laws" [12, 411d-e]. Plato's justice, despite the fact that it contains separate humanistic ideas (setting the line of poverty and wealth, calling for charity), is generally based on anti-humanistic principles, in particular the justification of slavery, the differentiation of classes and the strict maintenance of each person in his class, the imposition of responsibility for the fate of the state exclusively on the ruling class, the justification of actual inequality and the justification of natural privileges, the superiority of collectivism over individualism, the humiliation of women.

The ethical assessment of a person's attitude to moral actions turns into criteria that determine the degree of severity of these actions and punishment for them, retribution, suffering that accompanies injustice (for example, Plato distinguishes cases when a person becomes unfair by their own or not by their own will, when a person can be corrected or not). Depending on this attitude, Plato also suggests appropriate "purification", in other words, punishment. When issuing appropriate laws, Plato emphasized, the legislator should use conviction and force to achieve their goal [12, 722c].

Plato's legislation totally interferes in all relations, leaving nothing private. These include the state decreeing marriage and the communion of wives and children, the abolition of private property, the introduction of caesura, and strict regulation of the arts. The law is elevated to the absolute and becomes a means of eradicating all the imperfection of human essence, the measure of human pleasure and suffering for the sake of building an ideal state. Realizing that in many cases it will be difficult for the legislator to regulate such relations, he still encourages the legislator to show skill and not stop and look for adequate legislative means to regulate them. This desire for an ideal state becomes so dominant, absolute, that for its sake Plato declares the need for heavy punishments, up to death, to all "ungodly" who "deny the existence of the gods", the sanctity of sacrifices, sophists. For the most serious crimes of incorrigible criminals – death or exile, for speaking out against the haves – expulsion or resettlement [12, 735e]. It is difficult to call the justification for this rigid approach the fact that Plato's attitude to the role of the state, as well as the law in society, to the assessment of slavery, the attitude towards women also lies in the plane of the foundations that prevailed in Greece at that time. Numerous external threats and wars, in which Ancient Greece was forced to get involved, predetermined the needs of national cohesion and therefore everything that did not work for these needs, and this undoubtedly belonged to the occupation of rhetoric, philosophy, ethics, quite often caused irritation among the Athenian slave authorities and the conservative part of society and accusations of freethinking. There are known cases of strict liability for disbelief or disrespect for the gods recog-

nized by the state, which occurred with Protagoras, Anaxagoras and Diagoras of Melos, Socrates was even executed for educating young people in the spirit of "disrespect for tradition" and existing rules of conduct, and Seneca – forced to suicide.

2.3. Aristotle's Teaching and His Idea of Natural Law

The idea of natural law is also given a certain place in the works of Aristotle (384–322 BC), who was a disciple of Plato. Considering the concept of justice, Aristotle distinguishes between natural and legalized law: "State justice is partly natural…, and partly legalized …. It is natural if it has the same power everywhere and does not depend on recognition or non-recognition." [49, 1134b, 18–35, 1135, 1–7]. These arguments of Aristotle gave reason to some scientists to believe that for him there is no natural law, since immutability disappears as a criterion of naturalness. Thus, when Aristotle answers the question of " whether it is harmful or useful for the state to change the ancestral laws, even when some law turns out to be better," he argues that "people do not strive for what is sanctified by ancestral traditions, but for what is happiness in itself." Therefore, "written laws should not be left unchanged. Both in the rest of the arts and in the state system, it is impossible to present everything perfectly. It is necessary to present the laws in a general form, but human actions bear the imprint of the individual. It follows that some laws have to be changed from time to time." However, for Aristotle, natural, human customs are important, which have the form of parental attitudes (*patrioi nomoi*), unwritten laws (*agraphos nomos*), *unwritten laws*, and their meaning lies in the fact that "the law will not have any weight if it does not force obedience to existing customs", and therefore the matter of changing the laws "should be decided with the greatest care" [8, 1269a], for "when changing the law leads to a slight improvement or, conversely, when it is already easy to violate the existing law, causing harm, then, of course, it is better to endure certain mistakes of legislators or officials, for there will be not so much benefit when the law is amended as harm from a learned habit of disobeying the existing authorities" [8, 1269a]. From these fragments, it may seem that Aristotle speaks only of the natural in the sense of ancestral customs, which should be respected, treated with caution, but which can change if necessary. A deeper analysis of his positions shows that progressive ideas of equality were shared to a certain extent by Aristotle.

For Aristotle, law is something that serves the common good. Joining the opinion of all, Aristotle argues that law is a certain equality (and, according to Democrats, is identical to equality), that "concerns the individual" and that "equals should have equally" [8, 1282b]. Personal differences (physical data, skin color, etc.) do not play any role, although the "measure in claims (for a larger or

smaller share of political rights)" should be those components without which the state cannot exist. However, equality in Aristotle is not for everyone, and above all, not for slaves, because slavery was common at that time in Ancient Greece. It would seem that he departs from Plato's position in this respect, arguing that 'the very power of the master over the slave is unnatural; for by nature there is no distinction, only by law one is a slave, the other is free. Therefore, the power of the master over the slave, based on arbitrariness, is unfair" [8, 1253a]. After all, who "naturally does not belong to himself, but to another person – he, although a person, is by nature a slave." But in the end, Aristotle justifies the existing state of slavery, since "domination and subordination are not only necessary, but also useful, and from birth some beings have differences: some are intended for domination, others for submission" [8, 1254a]. Therefore, "one by nature should rule, the other – to obey, and it is to those who are endowed by nature with power – are destined to be masters" [8, 1255c]. Therefore, even virtues such as modesty, bravery, or justice are necessary for a slave only to the extent that "their arbitrariness or lethargy does not manifest itself in the work they perform" [8, 1259b].

Aristotle analyzed monarchy, oligarchy and democracy as possible forms of polity in terms of which state is suitable for which form of polity and how they should be arranged, without determining which is best. At the same time, he pointed out the need to take measures to preserve the existing structure, "to try to protect the state, protecting, on the one hand, from those factors that destroy it, and on the other – to issue such laws, written and unwritten, that would contain orders that especially contribute to the preservation of the state structure" which can ensure the state's longest existence." Equality, according to Aristotle, finds a specific manifestation in democratic states, where there is the supreme power of the decisions of the people, and where the main basis of the democratic system is freedom, which is based on the principles of equality. In a democracy there must be "first of all the free status of slaves, women and children – to the extent, of course, that it is not considered harmful as well as giving everyone the freedom to live as he pleases and without fear" [8, 1319c].

However, despite the fact that democracy, according to Aristotle, had many vices, including the threat of demagoguery, the misinterpretation of freedom as the right to do what one wants and the desire not to obey anyone, his attitude to democracy looks more positive, comparing with Plato's, where "tyranny arises from no other structure, but only from democracy, in other words, from extreme freedom arises the greatest and wildest captivity" [11, vol. 3, 564a], for although "in a democratic state the common idea is that freedom is above all, and that only in such a state is it appropriate for a person to live free by nature", but "the insatiable aspiration of one and contempt

for all others distorts this system and prepares the need for tyranny" [11, 562c] and "when a tyrant appears, he grows out of this root – that is, from the position of a people's deputy" [11, 365d].

Philosophical ideas of equality, human nature, its role and place in nature prepared the ground for the justification of the idea of natural law by the stoicism school (ca. 300 BC). The law of nature was conceived by the Stoics as independent of positive law, and nature itself as a psychophysical or only physical structure of man. It was the Stoics who formulated several different concepts of natural law, including naturalistic – cosmological, theological and rational [50, p. 10–11]. The idea of natural law has long developed in the form of absolute natural law, based on the belief in the existence of general and unchangeable laws of world life and human relations. It was believed that every living being has natural properties that inevitably manifest themselves in their behavior, and the natural law is an unchangeable and universal ethical or legal norm of human behavior. Absolute natural law got its ideas from the metaphysical perception of world life, the atomism of Democritus, and the absolute justice of Aristotle. It was based on relativism, sensualism, practicality, and anthropology. The natural law teaching of this period has an individualistic, atomistic and mechanistic character.

However, even in the time of Chrysippus, the idea of a fundamental difference between human nature and nature as such, the existence of an immutable law of nature (Lex Naturale) in the form of common sense, equality of all people regardless of wealth and slavery as contrary to human nature, the need to recognize human rights law to preserve human dignity.

2.4. The Influence of the Natural Law Ideas of Ancient Greece on the Development of Roman Law

The natural law ideas of the philosophers of Ancient Greece, not being implemented in practice in Greece, had a huge impact on the development of Roman law after the absorption of all state entities that emerged from the Empire of Alexander the Great by the Roman state from the middle of the second century BC. A significant role in the reception of the doctrine of natural law was played by the Scipio group, which included the Greeks Panaetius of Rhodes, Polybius and Roman aristocrats led by Scipio Aemilianus. Being somewhat modified by Panethius, the doctrine of Stoicism on natural law was inculcated on Roman soil, based on reason as the law for all people, their equality, albeit a certain inevitable difference in states, ranks and natural abilities, the recognition of a certain minimum of rights for people as a condition of preserving human dignity [32, p. 158–159]. This is clearly traced in the works of Seneca (4–65 ad), one of the most prominent representatives of late Roman stoicism, an exponent of the spirit of the New Stoic (Empire), who saw the main purpose of the Stoics, who

"were removed from public affairs… to improve one's life and create legal bases for the human race" [15, p. 71]. Seneca emphasized the equality of the nature of all people "a slave is a person equal in nature to other people; the soul of a slave contains the same principles of pride, honor, courage, generosity that are given to other human beings, whatever their social position" [4, p. 737], the unity of human nature. Defining the essence of human duty, Seneca emphasized: "Nature brought us into the world related to each other, because from the same principles it created us, for the same purpose it appointed us. She put mutual love into us, encouraged us to communicate. She determined what is right and just; by her command, the one who does evil is more unhappy than the one who suffers evil; by her command, a person is ready to lend a helping hand to another person. Let this verse be in our hearts and on our lips: nothing human is alien to me, to man" [15, p. 408–409].

Polybius, for his part, supplemented the teachings of the Stoics with the idea of the essence of the state, which should be based on justice, a mixed form of government with monarchical, aristocratic and democratic factors based on the principles of stable balance and mutual restraint (the right of veto) [14, p. 159].

The introduction of the ideas of stoicism into Roman law led to them being distinguished along with **FAS** – God-given, original law and such types of law as **JUS GENTIUM** (right for all the peoples known to Rome), **JUS CIVILE** (from civitas – city), **JUS PUBLICUM** (law in relation to management that was religious in nature), **JUS PRIVATUM** (law in relation to property and family relations), as well as **JUS NATURALE** – natural law. Moreover, such a right was considered a directly valid right.

Cicero in his work "Republic" concentrated on the essence of the then understanding of natural law, first defining this concept: "In fact, there is one true law, namely – common sense, which in accordance with nature applies to all people, is unchanging and eternal (from A. Z). By its commands, this law encourages people to fulfill their duties, and by its prohibitions, it keeps them from doing evil. His commands and prohibitions always have an impact on good people, but they have no power over evil ones. The deprivation of this law by human legislation is certainly, from the moral side, erroneous, the restriction of its operation is unacceptable, and the complete abolition is impossible" [16, p. 270].

In real life, human rights in Roman law are considered as privileges associated with rank, which are not personal, but collective in nature, designed to ensure the proper performance of functions that are assigned to the individual by society. Human rights are inseparable from responsibilities or services, and responsibilities are not imposed by the state, but help people realize their potential. The duty of the state was not to ensure and protect individual rights, but

to assist in meeting life needs, providing certain services to members of society [50, p. 75, 80]. There was no concept of legal capacity for voluntary action, human rights were not recognized as rights in the legal sense, which continued until the end of the Middle Ages [51, p. 34]. The perception of man as an inviolable bearer of inalienable and sacred rights in ancient times has not yet occurred [52, p. 59–60].

CONCLUSIONS

The crystallization of natural law ideas in Ancient Greece and Ancient Rome had several stages. Important achievements of Greek philosophers of the pre-Socratic period was the development of the foundations of the theory of knowledge, which was used to explain the cosmological model of the universe, substantiating the idea of the existence of a universal logos, the law of nature, uniform for the natural and social environment, where man, as a "natural" being, was not known separately from nature. The eternal Natural law was not established by people, because it was based on the divine mind and its power and was the law of justice and law inherent in nature and society. It was not evaluated as good or evil, due to its objective nature, and therefore its observance was considered true and wise.

The development of humanitarian knowledge, the formation of a secular system of morality and ethics, the study of the essence of man contributed to the distinction between human and natural law, the further development of ideas of natural law, namely recognition of the equality of all people, the prohibition of discrimination based on origin, the requirement of morality in human behaviour. Sophists were among the first on the basis of the distinction between natural and human law, which may contradict nature, began to recognize the equality of all in nature, denied slavery and traditional notions of the "naturalness" of nobility by origin. The main contribution to the understanding of natural law (jus naturale) was made by the Stoics, who proved that it is based on the fundamental difference between nature and human nature, on the understanding of the place and role of man in nature, on the existence of the unchangeable law of nature (lex naturale) in the form of the power of reason, common sense, which demand justice in the form of equality of people regardless of wealth, the recognition of slavery as contrary to human nature, the recognition by law of human rights to preserve human dignity. These humanistic and human-centered ideas were used to study the essence, nature and justice of the state at that time, to distinguish between the concepts of natural and legalized law and were also used as criteria for evaluating written laws.

Progressive natural and legal ideas of the philosophers of ancient Greece, not being implemented in the homeland, from the middle of the second century BC were adopted, developed jointly by Roman Greeks and philosophers and im-

plemented in Roman law as directly applicable law (jus naturale), along with other types of Roman law, as a rational law of common sense, consistent with the moral principles of society, immutable and eternal natural law.

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TYPES OF LAW-MAKING POWERS OF THE UKRAINIAN PEOPLE

Abstract. *The relevance of this problem is considered in the fact that in modern conditions of the state's process of developing a sovereign and independent, democratic, social, and legal state, the people's awareness of its place and role is one of vital aspects. The Ukrainian people's awareness of their rights and obligations, in this case law-making ones, will contribute to a real opportunity for the people to take part in the management of state affairs. Despite the fact that the problem of the powers of the Ukrainian people is extremely relevant at this stage of the Ukrainian history, it is understudied by Ukrainian researchers. Therefore, considering the above, this study is investigates such types of law-making powers of the Ukrainian people as the rights to: people's initiative, and within its framework – people's legislative initiative and people's referendum initiative; people's veto; people's survey, including regarding regulations; people's examination of regulations and draft regulations. The purpose of the present study is to consider theoretical material concerning the state of possibility of using the above-mentioned types of law-making powers of the Ukrainian people, as well as foreign practices in their implementation. The methodological framework of this study included an integrated approach, which involves a combination of numerous philosophical, general scientific, and special scientific methods. Based on the obtained conclusions and generalisations, the study aims to develop original proposals and recommendations for improving national legislation on this matter*

Keywords*: law-making, unitiative, survey, examination, Ukrainian people*

INTRODUCTION

Before considering this problem, it would be appropriate to refer to the study by V. V. Mukhin, which refers to the famous Canadian philosopher of legal science B. Melkevik, who claims that "there is a movement towards democratic autonomous legislation, more precisely, towards the implementation of the idea of autonomous law-making of citizens. This refers to the fact that subjects of law should be able to establish themselves realistically and mutually through the process of autonomous law-making as authors and legislators of their norms, their rights and their institutions, both legal and political. The question of legitimacy factually comes down directly to the real ability of subjects of law to consider themselves as authors of rights, confirming and asserting this. Where subjects of law are considered to be partially or completely deprived of the opportunity to be the authors of their rights, we have nothing but obsolete "legal" systems, obviously autocratic or "ideological". Where subjects of law do not have the opportunity to be "authors" of their "rights", as, for example, in religious systems with or without the text given in Revelation, we cannot discuss "rights" seriously, without being mistaken or deceived in this regard" [1, p. 12]. In other words, in democratic countries, we are actually in favour of implementing the idea of autonomous law-making of citizens, and legal systems that do not make provision for this are recognised as obsolete, autocratic, or ideologically biased.

Before directly considering the subject under study, it is advisable to analyse the definition of "lawmaking", "law formation" and "law-making powers of the Ukrainian people". Thus, "Lawmaking is the activity of competent state bodies, state-authorised public associations, labour collectives or (in cases stipulated by law) the entire people to establish, change, or cancel legal norms" [2, p. 52]. In addition, it is emphasized that "law-making is understood as an organisationally regulated, special form of activity of the state or directly to the people, as a result of which the needs of social development and the requirements of justice acquire a legal form that manifests itself in a certain source of law (regulation, precedent, customs, etc.)" [3, p. 321]. Furthermore, the Legal Encyclopaedia notes that "law-making is closely linked to legislation. The latter, however, is a narrower concept, since it exclusively concerns the adoption of laws, while law-making covers the process of adopting both laws and other regulations" [4, p. 51]. "Law formation is a relatively long process of forming legal norms, which begins with the recognition of certain public relations by the state, awareness of the necessity of their legal regulation, formal consolidation and state protection of legal provisions". The process of law formation comprises several stages. The first is "an establishment of certain social relations, which as a result of repetition acquire statutory nature"; the second, which can be called law enforcement, is "state authorisation

of public and national (in the historical aspect – primarily judicial) practice, its detailed legislative consolidation"; and the third, where the state "independently creates a wide scope of legal provisions. It is this stage that is called law-making" [3, p. 320].

As for the law-making powers of the Ukrainian people directly, it is most important to pay attention to the above-mentioned definitions of law-making, where the people is always specified among other subjects. After all, in democratic societies, the state cannot be a single subject of law-making, since it is the participation of the people, national minorities, indigenous peoples, public associations, labour collectives, and local selfgovernments in this process that ensures democracy and the development of civil society. Given the above, the authors of this study must admit that those authors who claim that "an inherent feature of modern law-making in Ukraine is the search for such forms that would not only be effective, but also have the highest level of legitimacy both in society and in the eyes of the foreign partners of Ukraine. Evidently, to solve this problem, it is necessary to use the potential of direct law-making of the people" [5, p. 19]. Considering all the above and analysing and synthesising the understanding of the terms "law formation" and "law-making", the fundamental constitutional provisions regarding the law-forming and law-making powers of the Ukrainian people, it is possible to state with full confidence that the law-making powers of the Ukrainian people constitute a set of their primary, fundamental rights and obligations assigned to them in regulations or exist objectively to ensure the ability to initiate, discuss, adopt, introduce changes and amendments, cancel regulations of various legal force and territorial scope of application. The following features of the law-making powers of the Ukrainian people can be distinguished from this definition:

– they are a set of rights and obligations of the Ukrainian people or a certain part of it, i.e., most importantly, collective rights and obligations;

– the law-making powers of the Ukrainian people are primary, fundamental, inaugural, inalienable, meaning that by implementing them, the Ukrainian people determine the main regularities of the law-making powers of all other subjects;

– they are consolidated in regulations or exist objectively;

– they are provided to ensure the ability to initiate, discuss, adopt, introduce changes and amendments, and cancel regulations;

– these regulations may have different legal force. Namely: the Constitution and laws of Ukraine, sublegislative acts, charters of the territorial community, etc.;

– these regulations may have different territorial scope of application. This means that they can be national, adopted at an all-Ukrainian referendum, by the Ukrainian people and local, adopted

at a local referendum, by the territorial community of a village, settlement or city, as part of it.

The scientific basis of this study includes the works of the following researchers: P. M. Rabinovich, T. O. Chernezhenko, N. M. Aleshina, M. V. Marchenko, V. V. Mukhin. However, there are not enough studies on this subject.

1. MATERIALS AND METHODS

Most importantly, "methodology is the study of the rules of thinking upon creating science, conducting scientific research. The methodology of science is mainly understood as the doctrine of the scientific method of cognition or a system of scientific principles which underlie research and justify the choice of means, techniques, and methods of cognition. There is another, narrower view of the methodology of science, when it is considered as the theoretical basis of some special, partial techniques and means of scientific cognition, for example, management methodology, pricing methodology, etc., but in this case it is apt to imply the methodology of knowledge and actions" [6, p. 14]. Thus, a full-fledged investigation of the subject of types of law-making powers of the Ukrainian people requires the use of a comprehensive approach, that is, a set of philosophical, general scientific, special scientific approaches and methods. After all, such an integrated approach will allow for a comprehensively investigation of the concept of law-making, as well as the distinguishment of the concept "law-making powers of the Ukrainian people" based on the data obtained. The use of an integrated approach will allow covering the subject of a study and analyse the types of law-making powers of the Ukrainian people. Considering the above, it is necessary to define the methodological framework of the paper "Types of law-making powers of the Ukrainian people", as a complex one, and which in the most general form comprises methodological approaches, principles, philosophical, general scientific, and special scientific research methods. Thus, it is important to use an idealistic approach in the investigation of the types of law-making powers of the Ukrainian people, especially upon developing proposals and recommendations for improving legislation.

It should be followed by the principle of anthropocentrism, which, considering the subject under study, reveals that the powers of the Ukrainian people are one of the main criteria for the development of the Ukrainian state, and also that the types of these powers are created by the people as a subject of law, reflect the level of development of legal thinking, culture, and consciousness. This list should also mention the dialectical method. This method helped consider the subject under study, including its origin, development, and use in the past, in interrelation with various spheres of public life and phenomena of legal reality. The system method determined the analysis of various types of law-making powers of the

Ukrainian people as an integral system that is developed and implemented according to relatively identical rules and patterns. Furthermore, the use of the system method gave a clear understanding that law-making powers of the Ukrainian people should be organically combined and interact with other legal phenomena, and only in this case they will have the right to exist. The method of analysis and synthesis was used considering the fact that analysis constitutes the dismemberment, decomposition of the object of research into its component parts, while synthesis constitutes the connection of individual sides, parts of the object of research into a single whole, for the process of highlighting the concept "law-making powers of the Ukrainian people". Induction and deduction, as methods of scientific search, were used in the formulation of the introduction, the results of discussion and in the development of conclusions of a study, since induction is a way of contemplation from the particular to the general. It is used to gain general knowledge based on knowledge about the particular. Deduction is a way of reasoning from the general to particular conclusions. For example, based on general knowledge, proposals were developed to improve the current legislation.

The method of forecasting, the essence of which is to obtain knowledge about future trends in the development of certain social phenomena, was used to justify the need to introduce changes to the current regulations. The historical stages of the institution of law-making powers of the Ukrainian people were investigated using the historical legal method. This method allowed identifying historical trends in the establishment and development of these powers, use the positive experience of the past of foreign countries, and improve Ukrainian legislation at the present stage of its development. The comparative legal method was used to process the available Ukrainian data on this problem and compare the texts of constitutions, laws, and other regulations of the world's countries to investigate the success accumulated in legal science and practice, to identify the most effective mechanisms for implementing the experience of other states in Ukrainian legislation.

2. RESULTS AND DISCUSSION

Most importantly, one should pay attention to such law-making powers of the Ukrainian people as the right of people's legislative initiative. Unlike national legislation, the right of people's legislative initiative is stipulated in the constitutions of many countries around the world. In general, it is believed that it was first proclaimed in the "Declaration of human and civil rights" of August 26, 1789, Article 6 of which stipulated that "the law is an expression of the universal will. All citizens have the right to take part personally or through their representatives in its creation. It should be the same for everyone, whether it protects or punishes. All citizens are equal before it and therefore have equal access to all titles, places,

and occupations, according to their abilities and without any distinctions, except those conditioned upon their virtues and talents" [7]. Furthermore, Part 1, Article 64 of the Constitution of the Kyrgyz Republic of May 5, 1993 stipulates that the right of legislative initiative belongs to 30 thousand voters and this is indicated by the term "people's initiative", while Part 2, Article 96 specifies that changes and amendments to the current Constitution require the initiative of at least 300 thousand voters [8]. According to Paragraph 4, Article 29 of the Fundamental Law of the Federal Republic of Germany of May 23, 1949, "If in an interconnected limited population and economic space, parts of which are located in several lands and which has at least one million inhabitants, a tenth of the voters who enjoy the right to vote in the Bundestag, will demand by popular initiative the introduction of a single land affiliation in this territory, then the federal law must determine within two years whether the pertinence of this territory to a certain land will be changed in accordance with Paragraph 2 or a popular survey will be conducted in the lands interested" [9, p. 90].

Part 2, Article 41 of the Constitution of the Republic of Austria of the Federal Constitutional Law of November 10, 1920, regulating the procedure for making proposals to the National Council, which together with the Federal Council exercises legislative power, stipulates that every proposal coming from one hundred thousand citizens with the right to vote, or from one sixth of the citizens of the three lands with the right to vote (people's initiative), must be submitted by the Central Election Commission for discussion by the National Council. A person with the right to vote in the implementation of a people's legislative initiative is someone who, on the day of participation in the people's legislative initiative, is granted the right to vote in the National Council and has the main place of residence on the territory of the community in the Federation. A proposal put forward in the order of a popular initiative should be presented in the form of a draft law [10]. Article 65 of the Constitution of the Republic of Latvia of February 15, 1922, stipulates that draft laws can be submitted to the Saeima: the president of the Republic, the Cabinet of Ministers, various commissions of the Saeima, groups of deputies comprising at least five people, as well as in cases and in accordance with the procedure stipulated by the Constitution, one tenth of voters [11]. Part 2, Article 71 of the Constitution of the Italian Republic of December 22, 1947 establishes that the people exercise legislative initiative by making a proposal on behalf of at least 50 thousand voters, drawn up in the form of an article-by-article draft [12, p. 423].

Parts 1 and 2, Article 71 of the Constitution of the Republic of Macedonia of November 17, 1991 stipulates that every deputy in the Assembly of the Republic of Macedonia, the Government of the Republic of Macedonia or a group of voters numbering at least 10 thousand

people has the right of legislative initiative. Every citizen, group of citizens, institution, or association can apply for a legislative initiative to a person with authority. In addition, Article 130 stipulates that "the president of the Republic of Macedonia, the Government, at least 30 representatives or 150 thousand citizens have the right of initiative to amend the Constitution of the Republic of Macedonia" [13, p. 174]. Part 1, Article 141 of the Constitution of the Republic of Moldova of July 29, 1994, which entered into force on August 27, 1994, regulates that the initiative to review the Constitution can come from at least 200 thousand citizens of the Republic of Moldova with the right to vote. Citizens who give rise to the initiative to review the Constitution must represent at least half of the second-level administrative-territorial units, each of which must collect at least 20 thousand signatures in support of this initiative [14]. Part 1, Article 67 of the Constitution of Georgia of August 24, 1995 stipulates that the right of legislative initiative belongs to the president of Georgia, a member of Parliament, a parliamentary faction, a parliamentary committee, the highest representative bodies of Abkhazia and Adjara, at least thirty thousand voters. Furthermore, Part 1, Article 102 states that the right to introduce a draft law on general or partial revision of the Constitution is granted to: a) the president of Georgia; b) more than half of the total number of members of Parliament; c) at least two hundred thousand voters [15].

Analysing the above, it can be concluded that it is necessary to amend the Constitution and laws of Ukraine, making provision for the institution of the right of people's initiative, and within its framework – the right of people's legislative initiative and the right of people's referendum initiative, as well as the possibility of combined use of the above-mentioned two rights. Admittedly, the right of people's referendum initiative is stipulated by Part 2, Article 72 of the Constitution of Ukraine, but it raises a lot of questions. It would be more appropriate to call the right of people's legislative initiative the right of people's law-making initiative, since, within its framework, the adoption, introduction of changes and amendments to the Constitution, laws, sub-legislative acts, and international legal regulations can be initiated. But the most important is the particular settlement in the future Law of Ukraine "On the People's Law-Making Initiative" of the following points: the number of citizens or voters who are the initiators; the requirements put forward to the initiators (right to vote, term of residence, belonging to a certain territorial unit); the subject of the initiative (Constitution, laws, sublegislative acts, international legal regulations); reservations to the subject of the initiative (do not initiate draft laws on taxes, amnesty, budget, ratification of international treaties); the procedure for submitting a proposal (requirement, justification, draft law); the procedure for implementing the

proposal (through Parliament or referendum); legal consequences of the people's law-making initiative.

Investigating the people's initiative, which is implemented by adopting a law or other regulation on the initiative of the people in a referendum or the right of people's Referendum Initiative, it should also be mentioned that Part 2, Article 72 of the Constitution of Ukraine introduced the proclamation of an all-Ukrainian referendum on the people's initiative at the request of at least three million citizens of Ukraine who have the right to vote, provided that signatures on the appointment of a referendum are collected in at least two-thirds of the regions and at least one hundred thousand signatures in each region [16]. This law-making power of the Ukrainian people, which can be not only law-making, is crucial, because it actually combines two of its rights – the right to people's initiative and the right to a referendum. And there is no alternative but to agree with the opinion of O. M. Chernezhenko, according to which "the institutions of direct democracy in Switzerland (referendum and the right of people's initiative) are complementary tools that allow the people and subjects of the Federation (cantons) to most effectively and directly take part in the exercise of public power, as well as in making important decisions for the state and society" [17, p. 5].

Therewith, a lot of questions arise regarding its constitutional consolidation. Firstly, why this refers only to signatures that need to be collected in at least two-thirds of the regions and at least one hundred thousand signatures in each and fails to mention the Autonomous Republic of Crimea, the cities of Kyiv and Sevastopol, which was particularly relevant at the time of the adoption of the Constitution of Ukraine – June 28, 1996, and even in the modern period of Ukraine's existence. Secondly, the conditions for proclaiming an all-Ukrainian referendum on the people's initiative are as follows: a) the requirement of at least three million citizens of Ukraine; b) they must have the right to vote; c) signatures on the appointment of a referendum must be collected in at least two-thirds of the regions; d) at least one hundred thousand signatures must be collected in each region. But these conditions are frankly difficult to perform, since this procedure is cumbersome, excessively complicated, and financially costly, as a result of which its implementation in practice is possible only if many formal and substantive conditions are met simultaneously. Admittedly, the current low activity of civil society institutions, a low level of legal consciousness and legal culture of Ukrainian citizens are an obstacle to its implementation. Furthermore, it is advisable to submit only those laws that have the most important social and national significance to the All-Ukrainian referendum, which is an additional evidence of the need to introduce the right of people's law-making initiatives in Ukraine, the implementation of which is much easier.

In addition, the conditions for proclaiming an all-Ukrainian referendum on the people's initiative frankly do not meet generally recognised standards, and especially those of European democracy. Thus, Part 1, Article 74 of the Constitution of the Republic of Belarus of March 15, 1994, with changes and amendments adopted at the Republican referendums of November 24, 1996 and October 17, 2004, stipulates that Republican referendums are appointed by the president of the Republic of Belarus on his personal initiative, as well as on the proposal of the House of Representatives and the Council of the Republic, which are adopted at their separate meetings by a majority vote of the constitutionally composition of each of the chambers (in full session), or on the proposal of at least 450 thousand citizens vested with the right to vote, including at least 30 thousands of citizens from each of the regions and the city of Minsk. And Article 75 stipulates that local referendums are appointed by the corresponding local representative bodies on their own initiative or on the proposal of at least ten percent of citizens who are granted the right to vote and live in the corresponding territory [18]. Part 3, Article 73 of the Constitution of the Republic of Macedonia of November 17, 1991, upon regulating the status of the Assembly of the Republic of Macedonia, which is a representative body exercising legislative power, stipulates that the assembly is obliged to declare a referendum if the proposal comes from at least 150 thousand people [19].

Differentiation of requirements for its implementation would contribute to improving the right of the people's referendum initiative in Ukraine. In particular, the number of votes demanding its proclamation should depend on the issues that are initiated for popular voting, that is, the subject of the referendum. After all, it is clear that it is one thing to adopt a new constitution, or a new version of the Constitution, make changes and amendments to it, resolve issues on changing the territory of Ukraine, and quite another to adopt a law, a sublegislative act, approve national development programmes, etc. It is also possible to optimise the subject of an all-Ukrainian referendum by clearly defining the issues that can be initiated by the Ukrainian people and decided by them in a referendum. Therewith, guided by the theory of popular sovereignty, democracy, primacy of the constituent power and powers of the people, it is sensible to supplement Article 72 of the Constitution of Ukraine with Part 3 in the following wording: "An all-Ukrainian referendum on a popular initiative can be proclaimed on any matter that falls under the jurisdiction of Ukraine, with the exception of matters that are directly prohibited by the Constitution and legislation of Ukraine." Therewith, it is critical to find out the differences between a referendum and a people's legislative initiative, which can be seen in the following aspects. Firstly, if any issue, including a draft law, can be put to a referendum, then the implementa-

tion of a people's legislative initiative concerns only a particular draft law that is submitted to the legislative body or submitted for consideration by a referendum. Secondly, the entire people (a national referendum) or a certain part of it (a local referendum) take part in a referendum, and for the implementation of a people's legislative initiative, the participation of a clearly defined number of representatives of the people is sufficient.

Very close to the previous point, law-making powers of a part of the Ukrainian people, namely the territorial community of a village, settlement, city, municipal district, is the right to local initiative. After all, Part 1, Article 9 of the Law of Ukraine No. 280/97-BP "On Local Self-Government in Ukraine" of May 21, 1997 establishes that "members of a territorial community have the right to initiate consideration in the council (in the order of local initiative) of any issue referred to the jurisdiction of local self-government" [20]. In other words, this refers to the right to initiate consideration of any issue in the Council, including a regulation. Therewith, Part 2, Article 9 of this Law of Ukraine regulates, although very schematically, the procedure for submitting an initiative to the Council for consideration, Part 3 – the procedure for its consideration, and Part 4 – the procedure for publishing a decision of the Council. Therewith, it is noteworthy that Part 4 refers specifically to the decision of the Council as its regulation, which is also proof that this right is, first of all, of law-making nature. The right to local initiative undoubtedly requires its more detailed regulation by a nationwide regulation. It is clearly not enough for its full approval and implementation to stipulate only that "the procedure for submitting a local initiative for consideration by the council is determined by a representative local selfgovernment body or the Charter of a territorial community, considering the requirements of the Law of Ukraine "On the Fundamentals of National Regulatory Policy in the Sphere of Economic Activity" [20]. A single national standard for initiating, collecting signatures, the procedure for submitting, reviewing, appealing, and the legal consequences of a local initiative should be worked out. In any other case, this right will be ineffective – proclaimed, but not implemented.

An example of detailed regulation of the right to local initiative, albeit still at the local level, can be the "Charter of the Territorial Community of the City of Odesa", approved by the decision of the Odesa City Council No. 1240-VI "On Approval of the Charter of the Territorial Community of the City of Odesa" of August 25, 2011, Certificate of State Registration of the Charter of the Territorial Community No. 1 issued by the Odesa City Department of Justice of October 7, 2011, the Article 22 "Local Initiatives" of which regulates in detail as follows: understanding; introduction; subject; subjects of initiation; collection of signatures in support; familiarisation with the essence; deadline for collecting

signatures in support; registration of subscription lists; checking the completeness of their filling and reliability; refusal to register a local initiative; correction of detected violations and re-submission of subscription lists; registration of a local initiative; preparation of a draft decision of the city council; consideration of a draft decision submitted in the order of a local initiative; mandatory consideration at an open plenary session of the City Council; publication of the decision of the City Council [21]. In confirmation that the right of the territorial community of a village, settlement, city, municipal district to local initiative and many other rights of this part of the Ukrainian people should be regulated in more detail by the nation-wide regulation, the authors of the present study note that a proposal to adopt the Law of Ukraine "On Territorial Communities" and the unified "Model Charter of Territorial Communities of Ukraine" has been repeatedly introduced in Ukrainian legal sources for approval [22, p. 8].

The Constitution of Ireland of 29 December 1937 makes provision for an entire section called "Passing a Draft Law to the People's Decision", Part 1, Article 27 of which establishes that a majority of members of the Senate and at least two-thirds of the members of the House of Representatives, by a joint petition addressed to the President, may require the president to refuse to sign and promulgate as law any draft law, on the grounds that the draft law contains provisions of such national importance that the will of the people must be heard. And Part 5 of the same article stipulates that in every case where the president decides that a draft law containing a proposal of such national importance that it is necessary to hear the will of the people, he must inform the Prime Minister and the Head of each of the Houses of Parliament in writing, signed and stamped, of the refusal to sign and promulgate such a draft law as a law, unless and until the proposal is approved by the people in a referendum within eighteen months from the date of the presidential decision or by a resolution of the House of Representatives adopted in the same period after the dissolution of a new meeting of the House of Representatives. The right to the people's veto is stipulated in Article 47 of the Constitution of Ireland of December 29, 1937 and for amendments to the Constitution itself [23]. Therewith, a reservation should be made that the people's veto, as a law-making power of the Ukrainian people, which concerns exclusively regulations and is implemented through popular voting, i.e., by holding a referendum, should be distinguished from the right to a referendum on the people's initiative in general, to which any issue can be submitted.

In summary, upon introducing amendments to the Constitution of Ukraine, it is advisable to inherit the provisions of Article 72 of the Constitution of the Republic of Latvia of February 15, 1922; Part 1, Article 75 of the Constitution of the Italian Republic of December 22, 1947; Articles 42 and 88 of the Constitu-

tion of the Kingdom of Denmark of June 5, 1953; and Parts 1 and 5, Article 27 and Article 47 of the Constitution of Ireland of December 29, 1937, since they clearly define the subject of suspension of the publication of the law; the grounds for mandatory detention; the period during which suspension may occur; the basis for initiating a mandatory people's veto; the legal consequence of not providing the basis for a mandatory people's veto; the procedure for implementing the institution of a people's veto (mainly through a referendum); the mechanism for the complete or partial repeal of laws or acts that have the force of law; the procedure for voting and determining the results of a people's veto; the basis for which the people's veto does not take place. Another reservation to be made on this matter is, admittedly, that the introduction of the institution of the people's veto in Ukrainian constitutional legislation, especially in practice, will considerably democratise them, providing an opportunity for the Ukrainian people to influence the government, the legal system, the system of national legislation, and will generally strengthen the constitutional legal status of the Ukrainian people. From these positions, a fair opinion is that "One of the ways to strengthen the role of the bearer of sovereignty – the people – in legislative activity is to introduce mechanisms of people's legislative (law-making) initiative and people's veto. People's legislative initiative is a form of direct participation of the people as the bearer of sovereignty and the source of public power in the implementation of the legislative function of the state by submitting draft laws on their behalf to the parliament and then mandatory consideration by the legislative body as a matter of priority. People's veto is a form of direct participation of the people as the bearer of sovereignty and the source of public power in the implementation of the legislative function of the state by rejecting (or denying) a draft law (law) previously adopted by the parliament" [24, p. 11].

The law-making power of the Ukrainian people is the right of people to poll, including in relation to regulations. Upon considering it, it is sensible to emphasise that Paragraph 5, Article 29 of the Fundamental Law of the Federal Republic of Germany of May 23, 1949, which governs changes in the territory of the Federation, establishes that "the purpose of a people's survey should be aimed at establishing whether or not the change of ownership of the territory to the land proposed by law is approved. The law can submit various proposals for the people's survey, but there should be no more than two of them. If the majority accepts the proposed change of land ownership, then within two years the federal law must establish whether the land ownership changes in accordance with Paragraph 2", and Paragraph 6 of the same Article stipulates that "The majority in a referendum and in the people's survey is recognised as the majority of votes cast, if it covers at least a fourth of the voters eligible to vote in Bundestag elections. The details of holding

a referendum, the people's initiative, and the people's survey are governed by federal law; the law may also stipulate that a people's initiative cannot be repeatedly proposed earlier than in five years" [9, p. 90]. This suggests that the above-mentioned paragraphs of Article 29 of the Fundamental Law of the Federal Republic of Germany of May 23, 1949 make provision for the purpose, method, and number of making proposals for the people's survey, its legal consequences, determining the majority of votes in a referendum and in a popular poll, and even the details of holding a referendum, the people's initiative and the people's survey, which, admittedly, deserves to be borrowed in Ukrainian legislation. Furthermore, it is absolutely safe to say that the Fundamental Law of the Federal Republic of Germany of May 23, 1949 distinguishes between a referendum, the people's initiative, and the people's poll. Investigating such a law-making power of the Ukrainian people as the people's survey, it is impossible not to recall that Chapter VI, unfortunately, of the no longer current Law of Ukraine "On All-Ukrainian and Local Referendums" of July 3, 1991 No. 1286-XII, which was called "Advisory survey of citizens of Ukraine", made provision for two types of advisory survey of citizens of Ukraine, namely:

a) an advisory survey of citizens of Ukraine or (a consultative referendum), which was stipulated by Article 46, Part 1 of which noted that to identify the will of citizens when solving important issues of national and local significance, all-Ukrainian and local advisory surveys of citizens of Ukraine (consultative referendums) can be conducted in accordance with the procedure stipulated by the aforementioned law. The results of the advisory survey are reviewed and considered upon decision- making by the corresponding state bodies. Part 2 thereof stipulated that if draft laws, other decisions of the Verkhovna Rada of Ukraine, or decisions of the local council of people's deputies do not correspond to the results of the All-Ukrainian or relevant local advisory survey, then such laws, decisions can only be adopted by a majority of at least two-thirds of the total number of People's Deputies of Ukraine or Deputies of the corresponding local Council of People's Deputies;

b) public opinion survey, which was consolidated in Article 47, established that public opinion surveys are conducted in a different order than stipulated by the Law of Ukraine No. 1286-XII "On All-Ukrainian and Local Referendums" of July 3, 1991, or on issues that, according to the aforementioned Law of Ukraine, cannot be submitted to all-Ukrainian and local referendums, do not have the status of an advisory survey of citizens of Ukraine (consultative referendum) and the legal consequences that follow from this [25].

The analysis of the above suggests that 1) at that time there were two types of advisory survey of citizens of Ukraine: a) advisory survey of citizens of Ukraine (consultative referendum); or b) Public

Opinion Survey; 2) the first of them – advisory survey of citizens of Ukraine or (consultative referendum): a) was considered as the will of citizens of Ukraine; b) was conducted to solve important issues of national and local significance; c) was divided into all-Ukrainian and local; d) its results were considered and reviewed by the corresponding state bodies upon making decisions; e) if the draft laws, other decisions of the Verkhovna Rada of Ukraine, or decisions of the local Council of People's Deputies did not correspond to the results of the All-Ukrainian or local advisory survey, then such laws, decisions could only be adopted by a majority of at least two-thirds of the total number of People's Deputies of Ukraine or deputies of the corresponding local Council of People's Deputies and this gives grounds to assert that they had legal force and caused legal consequences. Considering the above, taking care of improving the constitutional legal status of the Ukrainian people, it is necessary to make provision for and restore the right to the people's survey in the Constitution of Ukraine, including in relation to regulations. For example, Part 2, Article 40 of the Constitution of the State of Argentina of May 1, 1853 (as amended in 1860, 1866, 1898, 1957, and 1994) stipulates that the Congress or the President of the State, in accordance with their powers, have the right to declare a consultative popular referendum and in this case voting is not mandatory [26]. The law-making power of the Ukrainian people is the right to national examination of regulations and draft regulations. National examination of regulations and draft regulations is sometimes called public or social. Upon investigating the people's examination of regulations and draft regulations as the law-making powers of the Ukrainian people, it is impossible not to mention the Resolution of the Cabinet of Ministers of Ukraine No. 61 "Issues of Conducting Anti-Discrimination Examination and Public Anti-Discrimination Examination of Draft Regulations" of January 30, 2013, which stipulates that public anti-discrimination examination is performed by public organisations, individuals and legal entities within the framework of public discussion of draft regulations [27]. In addition, Paragraph 3, Part 1, Article 21 of the Law of Ukraine No. 1700-VII "On Prevention of Corruption" of October 14, 2014 stipulates that public associations, their members or authorised representatives, as well as individual citizens, in their activities on combatting corruption have the right to "… conduct, order public anti-corruption examination of regulations and draft regulations, submit proposals to the corresponding authorities based on the results of the expert examination, and receive information from the corresponding authorities on the accounting of submitted proposals" [28]. In this regard, it can be argued that the people's examination of regulations and draft regulations is a requirement of the time, which is conditioned upon the modern level of democracy, the need to organise interaction between the Ukrainian people

and public power institutions, establishing their common responsibility for the future development of society and the state. Therefore, this right of the Ukrainian people should undoubtedly find its constitutional consolidation, especially since it is being intensively popularised.

CONCLUSIONS

To summarise the above, the law-making powers of the Ukrainian people constitute a set of their primary, fundamental rights and obligations, which are assigned to them in regulations or exist objectively to ensure the ability to initiate, discuss, adopt, introduce changes and amendments, cancel regulations of various legal force and territorial scale of application. Attributes of law-making powers of the Ukrainian people include:

– a set of rights and obligations of the Ukrainian people or a certain part of it, i.e., most importantly, collective rights and obligations;

– the law-making powers of the Ukrainian people are primary, fundamental, inaugural, inalienable, meaning that by implementing them, the Ukrainian people determine the main regularities of the law-making powers of all other subjects;

– they are consolidated in regulations or exist objectively;

– they are provided to ensure the ability to initiate, discuss, adopt, introduce changes and amendments, and cancel regulations;

– these regulations may have different legal force. Namely: the Constitution and laws of Ukraine, sub-legislative acts, charters of the territorial community, etc.;

– these regulations may have different territorial scope of application.

The types of law-making powers of the Ukrainian people include their rights to: people's initiative (people's law-making and people's referendum initiative); local initiative; people's veto; people's discussion of draft regulations; people's survey on regulations; people's expertise of regulations and draft regulations. Furthermore, it is necessary to amend the Constitution and laws of Ukraine, making provision for the institution of the right of people's initiative, and within its framework – the right of people's legislative initiative and the right of people's referendum initiative, as well as the possibility of combined use of the abovementioned two rights. Admittedly, the right of people's referendum initiative is stipulated by Part 2, Article 72 of the Constitution of Ukraine, but it raises a lot of questions. It is also necessary to make provision for and restore the right to the people's survey in the Constitution of Ukraine, including in relation to regulations. Ultimately, the law-making powers of the Ukrainian people cannot completely fail to exist, they cannot be symbolic or such that exist only for the legalisation of regulations that have been developed in advance and are beneficial to public authorities. They should be fully consolidated in regulations. In any other case, the authorities will not understand, estrange itself from and conflict with the Ukrainian people.

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RULE OF LAW AND STATE OF EXCEPTION: THE GENESIS OF THE PROBLEM

Abstract. *The purpose of this study was to clarify the correlation between the concepts of the rule of law and the state of exception in the context of the question of the nature of law and its correlation with force. The relevance of the study is explained by the need to reinterpret the idea of the rule of law and its boundaries in the context of modern challenges, in particular in the context of a pandemic. The study is of an interdisciplinary nature, which lies in combining legal, philosophical legal, and historical-philosophical perspectives using methods of philosophical legal reflection, comparison, analysis and synthesis, and historical-philosophical reconstruction. The correlation between the rule of law and the state of exception was clarifed in three steps. First, the fundamental idea of the rule of law was explicated, which unites its numerous interpretations: law was considered as the antithesis of the arbitrariness of the powerful. Accordingly, the rule of law turned out to be a requirement immanent to any legal system. At the same time, the internal limitation of the rule of law associated with the statutory nature of the latter was emphasised, which inevitably necessitates striking a balance between the rule of law and justice, and the radicalisation of which brings to life the idea of a state of exception. The second part of this study contains a critical analysis of the theory of the state of exception, which, in contrast to the idea of the rule of law, identifes law and force, and ultimately denies law as such, normalising lawlessness. Finally, in the third step, three approaches*

to the correlation between the rule of law and the state of exception were analysed: 1) the priority of the state of exception, 2) a weak version of the priority of the rule of law, and 3) a strong version of the priority of the rule of law. It was concluded that the fundamental opposition between the rule of law and the state of exception renders their consistent combination impossible, and the corresponding attempts always turn out to be a compromise not favouring the former. However, according to the authors of this study, it is necessary to recognise the limitations of the law itself, without abandoning the discourse of the rule of law and the fundamental grounds for it

Keywords: *nature of law, law and power, human rights, state of emergency, state of exception*

INTRODUCTION

Along with human rights and democracy, the rule of law is currently one of the key ideals that inspires liberal societies. The Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms mentions the rule of law as part of a common European heritage1[1], and Article 3 of the Charter of the Council of Europe – as a principle that every member of the Council of Europe must necessarily recognise2[2]. As Tom Bingham notes, in a world divided based on nationality, race, skin colour, religion, and wealth, the rule of law is one of the key unifying factors, which, perhaps, most brings us closer to a universal secular religion, an ideal, but an ideal that should be sought in the interests of good governance and peace, at home and in the whole world [1, p. 172]. In this sense, the rule of law is more of an aspiration than an existing state of affairs, an excessive ideal to which a particular society can approach to a greater or lesser extent. At the same time, this concept refers to a set of specifc requirements for the legal system, generally aimed at curbing power arbitrariness by establishing certain limits of discretion for holders of public power. For its part, the concept of a state of emergency problematises precisely these boundaries, and therefore the rule of law as such, bringing to the fore the question of appropriateness of using the rule of law as an evaluation criterion for the way in which society tries to cope with an emergency [2]. In other words, the question is whether such a situation constitutes an exception to the law, or whether it remains subject to legal regulation.

The generally accepted answer to this question, which is respected by current international law and almost all national legal systems, is formulated, in particular, by the Venice Commission in the arguments provoked by the fght against the COVID-19 pandemic regarding compliance with the principles of

[1] Convention for the Protection of Human Rights and Fundamental Freedoms. (1990, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

[2] Charter of the Council of Europe. (1949, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001#Text.

democracy, human rights, and the rule of law in a state of emergency. This answer lies in the fact that "a state of emergency is itself a legal institution, which is subject to legal regulation, though the rules applicable to it might be somewhat different from those applicable in times of normalcy", and therefore, "even in a state of public emergency the fundamental principle of the rule of law must prevail" [3], although this refers to a weakened version of the rule of law [4, p. 115]. A stricter position is that it is in emergencies that the need for the rule of law is greatest, and therefore difcult times require not to weaken the rule of law, but on the contrary, to strengthen it [5, p. 1004]. However, in any case, the rule of law and the state of emergency are considered to be such that can be consistently combined.

However, despite the governments' declaration of commitment to the rule of law under any circumstances, in practice one can observe a widespread deviation from its requirements with reference to the exclusivity of the current situation. In this sense, the state of compliance with the obligation stipulated by the European Convention for the Protection of Human Rights and Fundamental Freedoms to notify the Secretary-General of the Council of Europe of a derogation from human rights obligations is quite demonstrative. Due to the COVID-19 pandemic, almost all Member States of the Council of Europe are now resorting to such a retreat, but only 10 countries out of 47 have ofcially announced this1[1]. Given the scale of such disregard for law in the modern world, the Italian philosopher Giorgio Agamben defends an alternative to the generally accepted concept of a state of exception as a zone of absolute anomie, or a kind of legal vacuum, and concludes that law today has actually lost all meaning, since the state of exception has turned from an exception to the norm [6, p. 134].

It can be assumed that the polar interpretations of the above-mentioned problem are related to different opinions on the nature of law as such, in particular on the nature of its connection with force, and rethinking the correlation between the rule of law and the state of exception from the standpoint of legal understanding will explain the paradox of the state of exception.

The purpose of this study was to clarify the correlation between the rule of law and the state of exception in the context of the question of the nature of law. For this, the following tasks were set: to describe the available approaches to understanding the rule of law, to explicate the fundamental idea of the rule of law, which combines its numerous interpretations, and to identify the limits of the rule of law (2.1), to conduct a critical analysis of the concept of a state of exception in the versions of Carl Schmitt and Giorgio Agamben (2.2), as well as to

[1] Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms. (2021, June). Retrieved from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations.

describe the connection between different opinions on the correlation between law and power and the corresponding ideas about the nature of the state of exception and to analyse three approaches to the correlation between the rule of law and the state of exception, which can be conditionally designated as the priority of a state of exception, weak and strong versions of the priority of the rule of law (2.3).

1. MATERIALS AND METHODS

This study is a philosophical-legal and at the same time a historical-philosophical exploration, and as such has an interdisciplinary nature. The authors' approach to understanding the problem of correlation between the rule of law and the state of exception is to combine legal, philosophicallegal, and historical-philosophical perspectives.

The legal component of the study comprises analysis of individual elements of statutory consolidation and practice of applying the concepts of the rule of law and the state of exception in the modern world to formulate the problem of their correlation as both a theoretical and practical issue. The philosophical-legal perspective involved the interpretation of the problem in the light of the main question of the philosophy of law – the question of the nature of law. Based on this instruction, the fundamental idea of the rule of law and the idea of a state of exception were considered from the standpoint of the correlation between law and power and compared in a synchronous dimension. For its part, the study of the genesis of the problem of correlation between the rule of law and the state of exception involves placing it in a broad historicalphilosophical context, consistently reconstructing the corresponding concepts, their basic ideas, and key concepts that embody these ideas. However, for historical-philosophical research as a study of the history of ideas, it is not the reproduction of the chronology of events that is of primary importance, but their theoretical reconstruction, the identifcation of semantic connections between ideas that can unfold in the nonlinear space of thought. Here, along with the method of phenomenological reduction, elements of hermeneutical interpretation of the semantic core and semantic ties between ideas are used. Thus, the diachronic measurement of research is associated with a method that can be referred to as the method of historical reconstruction, through which two key lines of understanding the nature of law and its correlation to power are connected with the concepts of the rule of law and the state of exception.

The main method of study was the philosophical-legal reflection, which lies in the desire to cover the ultimate foundations of the studied phenomena of the rule of law and the state of exception, in particular through problematisation and identifcation of dialectical oppositions of law andforce, revealing their interpenetration and insurmountable boundaries. At different stages of this study, the method of philosophical-legal reflection

was supplemented by logical methods of comparison (the logical composition of the "strong" and "weak" versions of the rule of law and its correlation with the state of exception), analysis and synthesis (conceptual components and their combination into a complete concept), as well as the method of historical reconstruction of ideas, notions, and concepts that fll the semantic constructions of the rule of law and the state of exception with content that goes considerably beyond their usual empirical perception.

The study was conducted in three stages. At the first stage, the authors analysed and compared two main approaches to understanding the rule of law – narrow (formal) and broad (substantive), generalised the main interpretations of the rule of law and identifed the fundamental idea for all of them. Next, proceeding from the proposed interpretation of the idea of the rule of law, its limits were identifed. For its part, the problematisation of the latter allowed outlining the scope of questions that set the internal dynamics of the problem under study, and the main areas of answering these questions in the Western intellectual tradition. The second step was to analyse the concept of a state of exception, the basic motives of which were compared with the fundamental idea of the rule of law in terms of the correlation between law and power. In particular, the theories of the state of exception by Carl Schmitt and Giorgio Agamben were consistently reconstructed, their comparison and critical interpretation was made from the standpoint of the philosophy of law. At the third stage, the problem of correlation between the rule of law and the state of exception was updated in the light of recent history and three main approaches to solving this issue were analysed and compared: the theory of priority of the state of exception, weak and strong versions of priority of the rule of law. Finally, reconstructing the genesis of the problem of the correlation between the rule of law and the state of exception in the light of the question of the nature of law allowed concluding on the nature of this opposition and its signifcance for law.

2. RESULTS AND DISCUSSION

2.1. The idea of the rule of law in the light of the questionof the nature of law

The history of the rule of law goes back to the origins of the Western intellectual tradition, but even today this expression means different things for different people, remaining an "essentially contested concept" [7]. Thus, narrow concepts of the rule of law connect it with numerous formal and procedural requirements for the legal system. Consequently, according to Joseph Raz, "an undemocratic legal system based on the denial of human rights can, theoretically, meet the requirements of the rule of law better than any of the legal systems of more educated Western democracies" [8, p. 211]. But the proponents of broad (substantive) concepts refer to the rule of good law [9, p. 118], and therefore, respect for human rights is a determining

condition for the implementation of the rule of law [10, p. 23; 11]. However, despite such serious differences, this does not refer to different "rules of law", but rather to "many faces of the rule of law" [9, p. 117], since they are all united by one fundamental idea.

Such a common denominator is the view of law as the antithesis of the arbitrariness of the strong, which has already been expressed in the best way possible by Plato and Aristotle in the famous principle of "rule of laws, not people" [12, p. 51–59; 13, p. 477–478]. In this sense, the observations of the German historian Reinhart Kosellek, who describes the gradual displacement of the idea of justice beyond history as a history of power, or force, are interesting. Thus, if the stories of Herodotus always contain an element of justice as a fate that punishes evil, then Thucydides emphasises the balance of power rather than justice, demonstrating that the stronger wins wars, and insisting on the priority of law in the face of force, on the contrary, can lead to death. Eight hundred years after Thucydides, Augustine came to the conclusion that all states are essentially great robbers, and true justice will be established by God only at the end of all earthly stories. Nevertheless, the right remains a necessary condition for survival of the humankind, despite the need for its daily reproduction. According to Kosellek, all these schemes of interpretation of the correlation between law and force should be addressed precisely because they remind of the burden that falls on a person's shoulders when they are forced to assert the right as opposed to violence [14, p. 368–377]. The idea of the rule of law is essentially an attempt to think of justice in a world dominated by force.

The radical opposition between force and law, which is brought to life by the idea of the rule of law, is a key motive of the philosophy of law, which still dictates

internal dynamics for the latter. If force is considered as the source of an individual volitional act, then law represents a universal impersonal mind. In the modern world, the embodiment of this reasonableness, which can resist the arbitrariness of those in power, is human rights. For its part, the rule of law appears as a means of "saving fundamental rights from the clutches of political decisions" [15, p. 148]. It is worth agreeing with Mortimer Sellers, who noted that the general history of law in the West is the history of the struggle to establish the rule of law against competing attempts by rulers to be above or outside the law. Moreover, according to sellers, this idea is present in every legal system – at least declaratively – since it is "the essence of what justifes or could justify the existence of any legal system, if it is justifed at all" [16, p. 198–199]. Indeed, history convincingly proves that the strong do not need justice – the weak always appeal to justice. Therefore, the struggle for the rule of law is also a struggle for law as such, which is an alternative to force.

Along with the strong support for the rule of law in Western culture, there are also various forms of criticism of this idea, primarily due to its internal limitations, which, in turn, is conditioned by the nature of law as such. The key argument is that no abstract provision can guarantee a fair result in each particular case, and therefore it is worth focusing rather on the contextual practice of judgement from case to case, based on the virtue of practical wisdom, which theoretically cannot be codifed [9, p. 129].

Aristotle has already emphasised this: "every law is drawn up for a general case, but some things cannot be said correctly in a general form", so "the error is found not in the law or in the legislator, but in the nature of the subject because this is the matter of actions" [17, p. 168]. This, however, implies not a rejection of the rule of law, but the need to balance it with justice: a judge can deviate from the strict application of the general rule to avoid injustice in a particular case [17, p. 168]. This refers not to the absolute freedom of discretion, but to careful balancing between the rule of law and equity – a motive that persists in the modern philosophy of law. Thus, John Tasioulas formulated several rules for this balancing: 1) equity should be applied by an authorised judge; 2) the judge should consider the true purpose of the rule, even if it does not draw from the literal interpretation of the latter; 3) a fair decision should be based on objective moral grounds for derogation from the law, and not on the subjective preferences of the judge; 4) the injustice prevented through derogation from the requirements of the rule of law should be serious enough to justify such a derogation; 5) derogation from the requirements of the rule of law for equity is less excused in areas where these requirements are particularly important (e.g., the requirement of foreseeability in criminal law) than in those where they are less important (e.g., the same requirement in family disputes); 6) derogation from the requirements of the law in favour of a person, especially in a criminal law context, is more justifed than one that worsens the person's situation in comparison with the current law [18].

Thus, the famous saying Summum jus, summa injuria ("The greatest law (is) the greatest injustice") reflects the internal limitation of the rule of law, which is associated with the tradition of practical wisdom in philosophy and legal science founded by Aristotle. Another line of thought, focused not on mitigating the mentioned paradox, but on radicalising it, revolves around the idea of a state of exception.

2.2. State of exception concept

In the most general sense, the idea of a state of exception is that a situational decision as an act of individual will terminates the general norm. In the legal context, the holistic concept of a state of exception was frst formulated by Carl Schmitt. According to Schmitt, from the very beginning there has been a gaping pit between the norm and real life,

between the rule and its application, to overcome which an intermediary is needed – the decision of the sovereign. Thus, developing the famous thesis of Thomas Hobbes that "authority, not truth, creates law", Schmitt bases law exclusively in an act of violence, a strong-willed decision, considering the latter as a specifc legal act. According to Schmitt, each provision is by defnition designed for normal living conditions and cannot be applied in a state of chaos. In other words, the actual order is not a consequence, but a prerequisite for the operation of the provision. A situation where a normal state is threatened is an exception that it is not described in the provision and cannot be described in it. And in such a situation, the sovereign decides whether a normal situation really prevails or whether there is a state of exception in which the provision can be suspended. Accordingly, the sovereign is outside the normal legal order and still belongs to it, since he is competent enough to decide whether the rule can be suspended. Thus, Schmitt essentially leaves the question of what is law and what is not, at the mercy of an absolute decision of the sovereign, which is based only in himself [19, p. 15–29]. It is in this ex-nihilo decision that, in his opinion, the essence of law lies: "authority proves that to produce law it need not be based on law" [19, p. 27]. Schmitt gives it a meaning similar to the meaning of a miracle in theology, and connects the idea of a state governed by the rule of law with the loss of ideas about transcendence, "bunishing the miracle from the world" and rejection "not only the transgression of the laws of nature through an exception brought about by direct intervention, as it found in the idea of a miracle, but also the sovereign's direct intervention in a valid legal order" [19, p. 57].

According to Schmitt, the act of violence and the state of exception established therein are not just inscribed in the law, but constitute the very essence of the latter, which, however, becomes indistinguishable from violence. Accordingly, the idea of the rule of law loses all meaning. In this regard, the current popularity of Schmitt's concept, the most famous interpretation of which belongs to Giorgio Agamben, is quite demonstrative. Agamben does not just update the theory of a state of exception, but shows that in the modern world, a state of exception has become the norm: "Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally" [6, p. 134].

At the anthropological level, this refers to bare life, that is, not to a specifc way or form of human life, but to the very fact of life that is common to all living beings: in a state of exception, a sovereign decision suspends the provision that recognises a person's dignity

and rights, and resumes human life in the form of a simple biological fact, an object of pure manifestation of power, a life that is completely unprotected, since it can always be taken away with impunity [20, p. 114]. Developing Michel Foucault's concept of "bio-politics", according to which, in the course of history, natural life is gradually included in the mechanisms and processes of state power, Agamben argues that politics is not just historically transformed into biopolitics, but is initially such [20, p. 13]. As an example of the maximum politicisation of life, he considers the situation of prisoners of Nazi concentration camps, who, along with their citizenship, lost any legal identity: "Auschwitz marks the death and destruction of any ethics based on dignity and compliance with the norm" [21, p. 74–75]. According to Agamben, it is the concentration camp, where the future determined by the authorities appears to a person in the form of absolute inevitability, that makes up the biopolitical paradigm of modernity [20, p. 151–229].

Agamben considers the state of exception not as a special right (like the law of war), but as a space of absolute anomie, a legal vacuum, "an empty space where an action that does not relate to law in any way collides with a norm that does not relate to life in any way" [6, p. 134]. Unlike Schmitt, Agamben is extremely concerned about the revealed totality of the state of exception, but is forced to state that "from the camps it is impossible to return to classical politics" [20, p. 238], and from the state of exception in which we live, it is impossible to return to the rule of law [6, p. 135].

Consequently, the inability of Schmitt and Agamben to distinguish between law and power leads to their identifcation, and then to the complete denial of law as such and the elevation of lawlessness to the norm. In the end, this refers to the gradual disappearance of law due to the destruction of the corresponding experience [22]. Thus understood, the idea of a state of exception poses a radical challenge to the dominant idea of the development of modern law as a global promotion of the rule of law [23, p. 687].

2.3. The problem of correlation between the rule of law and the state of exception

If the idea of the rule of law is based on the opposition of power and law, aimed at protecting the dignity and rights of everyone, especially the weak, then the concept of a state of exception proceeds from completely opposite ideas about power as a source of law. In the modern era, these two visions of law became the basis for the theory of absolute natural human rights and the theory of absolute sovereignty. The question of how these two "absolutes" can be consistently combined remains at the centre of philosophical and legal discourse, and the answer to it from the doctrine of supremacy is primarily the institution of judicial control over political decisions [12, p. 142–147]. Notably, Agamben practically ignores the role of the judiciary in his concept, although it is

often at the centre of modern debates around the state of exception, which is fairly emphasised by researchers of the philosopher's work [23, p. 684].

Therewith, neither the institution of judicial control nor other tools of the rule of law are sufcient to meet all the modern challenges of the latter, and therefore the theory of a state of exception is experiencing a new wave of popularity today. In particular, it turned out to be surprisingly popular after the events of September 11, 2001 and the outbreak of the war on terrorism, which was declared by the United States and other countries. The unprecedented deviations from the requirements of the rule of law and restrictions on constitutional rights resorted to by governments could not be explained otherwise than by the uniqueness of the situation, which required extraordinary solutions [5]. Such an event was also the COVID-19 pandemic, which once again focused the attention of philosophers and lawyers on the relationship between the rule of law and the state of exception.

There are three main approaches to solving this issue. Representatives of the frst of them (followers of Schmitt) argue that in an emergency, one should rely on general flexibility and sensitivity to circumstances in the actions of the state, which is also desirable in normal times. According to this approach, the rule of law is not in itself the main reference point for the authorities in the face of danger. The second position (presented, for example, by Kim Lane Scheppele) is that in the name of the rule of law, the available constitutional guarantees must remain in force; moreover, in emergencies, they are most needed. Finally, representatives of the third approach (for example, Veronique Champeil-Desplats) propose to protect the rule of law by adopting special emergency rules that make provision for reduction of civil liberties or provision of ofcials with broad discretion in matters that are usually governed by general legal provisions [2]. These positions can be conditionally designated as a priority of the state of exception, a strong and weak version of the priority of the rule of law, respectively. Evidently, the frst approach partially follows the line of Schmitt and Agamben and takes the state of exception beyond the law and order, treating it as an exception to the rule or a state of exception. Accordingly, under the permanent state of exception declared by Agamben, there is no place for either the rule of law or the law as such.

The strict version of the rule of law priority was an idiosyncratic response to the practical application of the frst approach, in particular the disproportionate US response to the 2001 terrorist attacks. As Kim Lane Sheppele notes on this occasion, the experience of fascism, communism, and world wars in the 20th century forced society to significantly reconsider Schmitt's theory of the state of exception, but the Bush administration's response to the events of September 11 was based on Schmitt's logic, and therefore foresaw a world that had not existed for a long time, and that

is why it was not supported by many European allies of the United States [5, p. 1003–1004]. It should be added that the radical changes in legal understanding discussed by the researcher primarily concern the establishment of the idea of human dignity and human rights, which cannot be stopped by any political decision. In this sense, the new enthusiasm of lawyers regarding the idea of a state of exception cannot but cause concern of lawyers, which was surprisingly aptly expressed by Bjarne Melkevik when he said that "this subject is introduced as a Trojan horse in order to accept the unacceptable" [24, p. 7].

The third of the described approaches is a kind of compromise and considers the state of emergency as part of the available law and order, a critical but predictable situation for the latter (state of emergency, however, no longer an exception). At present, it is this approach that is generally accepted at the level of international law and most national legal orders. Its obvious advantage is predictability, and its disadvantage is that it introduces a lite version of the rule of law, which may eventually infect or even displace the concept of the rule of law, which should be fully applied [2]. Such a process is described, for example, by Veronique Champele-Desplats, who, using the example of the state of emergency introduced in France in 2015–2017, demonstrates how the very concept of the rule of law is transformed and weakened: 1) the state prioritises security requirements; 2) the government that interferes with the rights and freedoms that it must respect in accordance with the classical concept of the rule of law promises to compensate for such interference; 3) in the persecution of its enemies, the state builds a legal regime around the deviation from the provisions that concern these enemies. Consequently, the concept of the rule of law transforms into a formal, security-oriented, compensatory, and discriminatory concept [4, p. 115–117]. However, can the concept of the rule of law, even if formal, be discriminatory? And would it still refer to the same phenomenon?

The analysis of the main approaches to the correlation between the state of exception and the rule of law highlights the fundamental opposition between the relevant ideas, which makes their combination in practice quite problematic.

CONCLUSIONS

Placing the problem of the correlation between the rule of law and the state of exception in a broad philosophical context allows clarifying the ideological foundations ofboth concepts and, taking this into account, look in a new way at the connection between them. The study of the genesis of both concepts in the Western intellectual tradition suggests that the modern debate around the emergency in law is based on a fundamental conflict between the idea of the rule of law, where law is thought of as the antithesis of power, and the idea of a state of exception, which is based on the idea of power as the only source of law. If

power is considered as the source of an individual volitional act, then law represents a universal impersonal mind, and the modern embodiment of this intelligence, which can resist the arbitrariness of those in power, is human rights. Thus, if the idea of the rule of law emphasises the fundamental anti-authoritarianism of law based on human dignity, then the theory of the state of exception, on the contrary, roots law in authority, which, for its part, makes it impossible to distinguish it from violence.

Proceeding from the opposite grounds, these two concepts represent two different traditions of dealing with the paradox of normativity of law, which lies in the impossibility of equally fair application of the general provision to individual cases. On the one hand, this refers to the tradition of practical wisdom derived from Aristotle, focused on carefully balancing the abstract requirements of the general provision and situational justice, considering the purpose of law, and on the other hand, on the tradition of absolutising the decision as the only way to apply the provision by stopping it, resulting in the idea of a state of exception.

The analysis of the main approaches to the correlation between the state of exception and the rule of law (the priority of the state of exception, the weak version of the priority of the rule of law, the strong version of the priority of the rule of law) highlights the aboveidentifed essential contradictions between the relevant concepts. In particular, such an analysis demonstrates that the fundamental opposition between the rule of law and the state of exception makes it impossible to combine them consistently, and the corresponding attempts always turn out to be a compromise not in favour of the former in a lightweight version of it, which can later completely replace the concept of the rule of law. Instead, it is necessary to recognise the limitations of the law itself, without abandoning the discourse of the rule of law and the fundamental grounds for it.

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UKRAINIAN CENTRAL COUNCIL AS REVOLUTIONARY PARLIAMENT OF UKRAINE

Abstract. *The revolution of 1917–1921 is a bright page in the centuries-old history of the Ukrainian state. The special place in it belongs to Ukrainian Central Council (CCU), under the leadership of which Ukraine went through the difficult path of building its own state from autonomy to the proclamation of Ukrainian National Republic and its full state independence and sovereignty. Therewith, the CCU attempted to introduce democratic institutions and parliamentary forms of government. The relevance of the study is explained by the fact that this experience left a noticeable mark on the legal consciousness of Ukrainians and the attempt to build a parliamentary model has a considerable impact on the solution of modern problems of state creation. The purpose of the study is to analyse the organisation of Ukrainian Central Council as a parliamentary institution in the conditions of the revolution. A retrospective study of the CCU experience reflects the political interests of different groups of society, is useful for understanding modern problems*

of parliamentarism, the interaction of civil society and the state. The methodological basis for studying the structure, composition of the CCU, its legal forms of activity is based on philosophical, general scientific, and historical-legal methods of scientific knowledge. These methods allowed determining the main task of the CCU – the revival of Ukraine. It is concluded that state revival, as a constituent task which could be carried out only by a representative body that would be established on democratic principles, its composition would express the will of the people, and, if it had sufficient organisational and legal resources to fulfil this task (a stable structure, organisational and legal forms of activity, an effective auxiliary apparatus, the corresponding status of the deputies, the optimal work schedule)

Keywords: *Central Council of Ukraine, Small Council, representative body, electoral system, composition, sessions, commissions, party factions, status of members*

INTRODUCTION

The February Revolution of 1917 led to the fall of Tsarism, the transformation of Russia into a republic, and the beginning of the national revival of its national outskirts. The Central Council of Ukraine (hereinafter referred to as the CCU) became the driving force of this process in Ukraine. It was established in the spring of 1917 as a socio-political centre and very soon transformed into a representative body – a kind of revolutionary parliament of Ukraine. The CCU identified the national and state revival of Ukraine as its main task. Its fulfilment is constituent and could be ensured, firstly, only by a representative body that would be established on a democratic basis and express the will of the people, secondly, if there were sufficient organisational and legal resources to implement: a stable structure, organisational and legal forms of activity, an effective auxiliary apparatus, optimal rules of work, the status of deputies. These issues are extremely important in the context of the development of the state and have not lost their relevance since the emergence of the first parliaments. Therefore, the idea of V. Tatsiy and S. Serohina is quite appropriate: "The problem of choosing the optimal structure of the parliament, in particular, the decision on the number of its chambers, the order of their development and competence, belongs to the category of those that accompany the theory and practice of state construction since the appearance of the first parliamentary institutions and the concept of representative government" [1, p. 102]. From the standpoint of the importance of the creation and functioning of the CCU for the development of the paradigm of constitutionalism, this body had the importance of the first parliamentary-type body in Ukraine [2, p. 38]. The Central Council of Ukraine received broad popular support and became an inspiration for the development of the National Liberation Movement [3].

The main task of the CCU in creating a state was formulated by M. Hru-

shevsky at the beginning of its activity and consisted in an active struggle for the national and state revival of Ukraine in those conditions, for its autonomy as part of the Russian Federal Republic. The development of events led to the proclamation of the Ukrainian People's Republic (hereinafter – UPR), and later its state independence and sovereignty. Such huge constituent changes were made possible by the transformation of the CCU into an all-Ukrainian revolutionary parliament, which represented and expressed the interests of the Ukrainian people and had sufficient organisational and legal means to create a state.

The first important step towards transforming the CCU from a socio-political centre into a representative body of power was the convocation in April 1917. The Ukrainian National Congress (hereinafter – the Congress), which became a representative body, elected a new composition of the CCU and, thus, gave it its representative character. However, the CCU was not elected based on universal suffrage, which would have given it irrefutable legitimacy in solving key issues of state creation. Researchers see the reasons for replenishing the CCU through co-optation in the following: first, holding general elections at that time was a political and technical utopia [4, p. 95]; secondly, the Ukrainian socialist parties and factions from which the Central Council was recruited, anticipating the unfavourable consequences of the general election, postponed this important matter from day to day, and such elections did not take place [5, p. 76]. The latter can be explained by the fact that the majority of CCU members defended the federal principles of building a state.

In the future, the CCU was replenished by co-opting representatives from all-Ukrainian congresses of peasants, military, workers, and other public associations. Describing the professional composition of the CCU, V. Yermolaiev notes that the deputies were mostly: peasants, military personnel, representatives of workers' and cooperative organisations [6, p. 268]. This made its composition even more representative, but not typical of the parliament since also general elections did not take place. However, the social, national, and party composition of the CCU gives grounds to assert that the Council sufficiently reflected the structure of Ukrainian society at that time and reflected its needs and aspirations.

Along with this, the structures and organisational and legal forms of activity of the CCU as a parliament were established and improved: sessions as a collegial form of work, a Small Council as a permanent body, commissions, technical apparatus, party factions, rules of work, and the status of members. At the beginning of the activity of the CCU, the procedure for the work of its general meeting was established. It was built on the model of parliamentary session work. The CCU was divided into factions based on party characteristics, proposals were made on their behalf,

various commissions were created and worked. With the expansion of the CCU, the efficiency of the general meeting has decreased, which has made it necessary to create a permanent authorised body in the period between its general meetings. Such a body was the Small Council (until July 1917 – the CCU Committee), which absorbed the organic attributes of a parliamentary institution. An important structural element subordinate to the Small Council was the permanent and temporary commissions and the office. All this gave the CCU clear signs of a parliamentary-type institution [7, p. 20] and ultimately became the key to successful state creation in Ukraine.

In a short, almost year-long period of time, Ukraine has come a long way from autonomy and laying the foundations of a parliamentary form of government to the proclamation of the Ukrainian People's Republic, its state independence and sovereignty, and the recognition of the UPR in the international arena. The study of this experience fills a certain gap in the history of national parliamentarism and will be useful for relevant issues of the parliamentary form of government in the country.

1. MATERIALS AND METHODS

To ensure a comprehensive, complete, and objective analysis, the study used a set of methodological tools, namely philosophical, general scientific and special legal research methods; the set of methodological tools was determined by the subject and scope of research.

Philosophical scientific methods are universal and are widely used in the study of any historical phenomena and processes. The leading place among them belongs to the dialectical method, which provides for the recognition of the existence of objective state-legal laws and the possibility of their cognition. The use of the dialectical method allowed establishing the relationship between parliamentarism and such categories as: a form of government, popular representation, political regime of exercise of power. Upon using the historical and genetic method, the socio-legal prerequisites for the appearance of the Ukrainian parliament of the CCU era are discovered, and its state-legal essence is substantiated.

The narrative method is used to comprehensively describe the facts and events that accompanied and determined the emergence of the CCU, and the process of turning the latter into a parliamentary-type institution. This method established that to solve the key task – the development of the autonomy of Ukraine – the transformation of the CCU from a socio-political centre to a representative body – the Revolutionary Parliament of Ukraine-began; the method of such transformation was the convocation of the Ukrainian National Congress and the election of the CCU by it and the expansion of the composition of the CCU in the future by co-optation.

The analogy showed that the choice of this particular method of replenishment of the CCU is not associated with the political and technical impossibility

of holding elections. The formal-legal and interpretation methods were used to review individual legal regulations and clarify the content of their prescriptions.

The use of the comparative analysis contributed to the identification of the most considerable factors in the organisation of the CCU as a parliamentary-type institution. Indeed, the CCU had the forms of work and organisational structures inherent in the Parliament: sessions as a collegial form of work, the Council as a permanent body, commissions, technical apparatus, party factions, rules of work, and the status of members.

The synthesis of different opinions and the identified principles of functioning of the CCU allowed offering its new understanding as the Revolutionary Parliament of Ukraine, since: firstly, the main task of the CCU was to determine the national-state revival of Ukraine, which is a constituent task; secondly, the CCU was established on a democratic basis and expressed the will of the people, although direct elections did not take place.

When disclosing the organisational and legal forms of the CCU's activities, a structural and functional method was used, which determined that the organisational form of the CCU's work was the general meeting, which was based on the model of parliamentary session work; the CCU was divided into factions that made proposals, created various commissions; between the sessions of the general meeting, there was a permanent authorised body – the CCU Committee (Small Council). The sociological approach helped to establish the dependence of the CCU structure on the social conditionality of political, economic, and social phenomena that influenced the development and expansion of the Revolutionary Parliament. The statistical method contributed to the collection of materials on the representativeness of the national, social, and party composition of the CCU.

The content analysis of the main sources of research allowed giving a balanced assessment of various documents and studies, considering their appearance and writing in the difficult political situation in Ukraine in 1917–1921.

The pluralism of scientific knowledge and an interdisciplinary approach to the study of the problem of giving the CCU a more representative character allowed identifying contradictory views, divergent ideas about the form of building a state, the structure of a representative body, its social orientation and development prospects.

The theoretical basis of the research is official documents, regulations, considerable conceptual sources on the research subject, achievements of national historical and legal thought, in particular, on the problems of the history of the organisation and activities of the CCU, materials of representative sociological research.

2. RESULTS AND DISCUSSION

The development of statehood is a complex and lengthy process associated with the need to address important issues, in

particular the establishment of state institutions. Therewith, parliaments are in the centre of public life. The parliament embodies the forum of public opinion, where a consensus decision can be made that suits all parties to the political process [8, p. 84, 85]. The complex process of creating a representative body discovers the features of the historical moment, social and state existence of each particular country, national traditions, legal culture, and political will of the people. This is evidenced by the history of the struggle for the national and state revival of Ukraine in 1917–1921 [9].

The CCU, which was established as a Ukrainian socio-political centre, was gradually transformed into a representative body – a kind of revolutionary Parliament of Ukraine. "The starting point of the beginning of the era of revolutionary constitutionalism in Ukraine, – rightly notes O. Myronenko, – can be considered, perhaps, the moment of creation of the Central Council" [10, p. 23]. The implementation of the idea of the national revival of Ukraine was a problem of constituent importance and could be solved by a representative body that expressed the will of the people and had sufficient organisational and legal resources for this. Only under such conditions was it possible to respond to the challenges that arose on the way to the national revival of Ukraine.

The main task of the CCU in the field of state creation was formulated by M. Hrushevsky at the beginning of its activity. He spoke not in favour of passively waiting for concessions for Ukraine from the Russian Provisional Government, but for an active struggle for its autonomy as part of the Russian Federal Republic. Organically, this task required changing the status of the CCU, namely, transforming it from a Kyiv city socio-political organisation into an all-Ukrainian socio-political body that would represent and express the interests of the Ukrainian people, primarily in the issue of state creation.

The convening of the Ukrainian National Congress in early April 1917 was an organizational means of transforming the CCU from an organisational and political centre into a representative body. "To give the Central Council the character of a true representation of the entire Ukrainian population, it was decided to convene a Congress of representatives of the organised Ukrainian population of the whole of Ukraine as soon as possible" [11, p. 7].

When establishing the Congress, deputies were elected from ethnic Ukrainian provinces. Territorial representation was supplemented by representation from various segments of the population, political parties, and public organisations, which made the Congress a representative body.

The central issue on the agenda of the Congress was the granting of a new, legitimate, indirect representative status to the CCU by electing a new Congress. Almost half (60 seats) of its members were to be elected on a territorial basis from the provinces, 20 seats were as-

signed to public, military, professional, scientific-educational, and cooperative organisations. Party representation was determined in 1–5 seats. The number of members of the CCU elected at the Congress is 118 people [12, p. 63–65].

The election of a new composition of the CCU by the Congress shows that the first step in the revival of Ukrainian statehood was taken: the CCU from a small group of Ukrainian intellectuals became a representative body, a kind of revolutionary parliament, which, reflecting the mood of much of Ukraine's population, demanded autonomy. In the memoirs, V. Vynnychenko wrote: "The Congress was the first step in the revival of the nation on the path of statehood. Being strong organising and campaigning tool, it became the first, preparatory stage in the creation of both the idea of Ukrainian statehood and in its partial implementation. Namely: the Congress, as a full-fledged body of national will, officially transferred all its full power to its chosen body: the new Central Council. From that moment, the Central Council became a truly representative, legitimate (according to the laws of the revolutionary time) body of all Ukrainian democracy" [13, p. 93–94].

Congress granted the CCU the right to co-opt new members, which continued the process of forming the composition of the CCU as a representative body. This right was detailed in the "Order of the Central Council of Ukraine" (hereinafter referred to as the Order), approved on April 23, 1917 [12, p. 71–73]. CCU used it extensively. During May-July 1917, the All-Ukrainian peasant, two military, and workers' congresses were held. They elected the All-Ukrainian Councils of the military, peasant, and workers' deputies, which like the CCU and the All-Ukrainian General Military Committee, co-opted its composition. These additions expanded the composition of the CCU to 588 people [12, p. 138–142]. After the agreements between the Provisional Government and the CCU, enshrined in Second Universal, representatives of national minorities were granted the right to elect 202 full members of the CCU and 51 candidates [12, p. 207, 208]. This action transformed the CCU from a national body to a temporary regional revolutionary parliament [11, p. 29].

According to the mandate Commission of the sixth session, the CCU had 798 mandates. From that moment, the main representation in the CCU was considered to be the councils of peasant (212 people), military (132 people), and workers' (100 people) deputies, and the General Military Committee (27 people). The territorial representation remained unchanged and amounted to 81 mandates, the rest was distributed among political parties and public organisations. Yet not all of these mandates were used. The mandate Commission of the sixth session registered 639 full members and 4 candidates [12, p. 233–241].

All these measures gave the CCU a more representative character, but it should be stated that it was never elected based on universal suffrage, which could

only confirm its absolute legitimacy in solving such important constituent issues as changing the form of the state structure of Russia, declaring the autonomy of Ukraine, and determining the form of its government. Its leaders were well aware of this. In the summer of 1917, the CCU began work on holding a territorial congress, but it did not take place, as the idea of holding an All-Ukrainian Constituent Assembly arose in the fall. The fact that the CCU was not elected by the general will of the Ukrainian people, M. Hrushevsky saw its weakness. In his memoirs, he complained that he was not destined to "become a representative elected by universal suffrage" [14, p. 123]. And this failure to hold general elections was the "Achilles' heel" of the CCU in the revival of Ukrainian statehood [5, p. 76].

Today, it is difficult to determine why the CCU chose the option of replenishing its composition by co-opting and did not follow the path of holding general elections. As noted above, the researchers point to two reasons: first: the holding of general elections at that time was a political and technical utopia; second: the Ukrainian socialist parties postponed the holding of general elections for fear of adverse consequences for them.

Recognising the right to exist behind such considerations, it is difficult to agree with them. Firstly, the allegations about the impossibility of holding elections in the summer of 1917 seem unconvincing, as elections to the All-Russian Constituent Assembly took place in the autumn of 1917, when decay and anarchy deepened, secondly, the CCU never rejected the idea of convening the Ukrainian Constituent Assembly based on universal and equal suffrage; thirdly, in the spring and summer of 1917 it reached the apogee of its authority and it can be assumed that the vast majority of its members would receive convincing support from voters. The point was different: the overwhelming majority of CCU members defended the federal principles of building a state. Since the idea of federalism was very popular in the second half of the 19th – early 20th centuries, in this form of state-building, figures of the Brotherhood of Saints Cyril and Methodius, led by M. Kostomarov, leading public and political figures and lawyers of the time: M. Drahomanov, S. Podolynskyi, I. Franko saw the possibility of national development. The ideas of the federation were leading in the programme documents of Ukrainian political parties at the turn of the 19th-20th centuries. This idea was professed by the direct participants of the revolutionary events of 1917–1921, M. Hrushevskyi, S. Shelukhin, O. Eikhelman, et al [15, p. 333]. L. Kamarovskyi considered the federal principle "a further step in the development of the principle of nationality", "without destroying the independence of states, it connects them into new political groups with certain goals and bodies" [16, p. 44]. Thus, being supporters of the idea of federalism, members of

the CCU recognised the right of the All-Russian Constituent Assembly "to establish an autonomous system in national territories and a federal structure in the Russian republic, and this republic itself" [11, p. 100]. Therefore, holding elections to one's own supreme state body would run counter to this provision. The proof can be the CCU's defence of the idea of a federation in its first three universals. Even the Third Universal, together with the proclamation of the UPR, fixed the preservation of the federation with the Russian Republic. After the Bolsheviks seized power, the Russian People's Commissar began peace talks in Brest with the central powers, and the CCU was forced by the Fourth Universal to declare the independence of the UPR to consolidate its status as a subject of international law.

The above is the reasoning of today, yet in the context of the Congress and the election of a new composition of the CCU, it meant that the organisational period of the Ukrainian national-state revival was over: the struggle for its implementation was beginning. It was the CCU, having become a representative body, that took over the implementation of constituent functions in the field of Ukrainian state creation.

The next question is whether the national, social, and party composition of the CCU was representative of the will of the Ukrainian people. According to incomplete data, it is known that 75% of the mandates belonged to Ukrainians, the rest – to national minorities. Yet it is more difficult to determine the distribution of mandates between Russians, Poles, and Jews since representation in the CCU was provided not based on nationality, but through quotas of the party and public organisations. As a result, Russians had 14% of places, Jews – 6%, Poles – 2.5% [12, p. 12].

The expansion of the CCU by representatives of various social and national groups continued. This was due to the division of representatives of national minorities into full members and candidates. The latter were part of the CCU with an advisory vote and established a reserve from which representatives of national minorities were selected. Thus, the mandate Commission proposed to introduce one representative from Belarusians and Czechoslovaks into the CCU at the seventh session. At the same session, the Maritime General Council of 20 members was included in the CCU and won one seat in the Small Council on November 21, 1917. On December 12, 1917, the Kyiv United Council of Workers' and Soldiers' Deputies delegated 4 representatives to the CCU. The CCU added members with an advisory vote, elected deputies of the All-Russian Constituent Assembly in Ukraine.

Regarding the social status of CCU members, it is worth highlighting the following. Of the original composition – 118 people elected by the Congress, at least 100 were representatives of the intelligentsia. After the development of the CCU, 471 seats (out of 798) belonged to the All-Ukrainian Council of Military,

Peasant, and Workers' Deputies. However, it is difficult to understand which representatives of social groups really stood for these mandates. The All-Ukrainian Council of Peasant Deputies was the first to join the CCU. They held 212 seats, but only 134 deputies were elected at the All-Ukrainian Peasants' Congress [17, p. 30–34]. It is likely that most of these members of the CCU represented the poorer peasantry, which constituted the social basis of the Peasant Union. Little is known about them personally, and they did not play a considerable role in the activities of the CCU. The All-Ukrainian Council of Peasants' Deputies was led by many well-known figures of the USDLP and the USRP (V. Vynnychenko, B. Martos, A. Levytskyi, M. Kovalevskyi, P. Khrystiuk, A. Stepanenko, M. Stasiuk, etc.). The peasants include a large number of delegates to the All-Ukrainian Military Council, at least soldiers, sailors, non-commissioned officers, and ensigns. Of the 132 elected members of the CCU, 60% were them. While the members of the Ukrainian General Military Committee were only two soldiers and one sailor, the rest were officers [18, p. 44]. In reality, only 100 members of the Council of Military Deputies took part in the work of the CCU, the rest returned to their units and lost contact with Kyiv.

As for the professional composition of the CCU, among the deputies, representatives of the intelligentsia constituted a small part of the CCU – 16 lawyers, 26 researchers, more than 30 publicists and journalists [6, p. 268]. The composition and activities of the All-Ukrainian Workers' Congress make it possible to characterize its representatives in the CCU only in fragments. The Congress was small in number, with 300 delegates representing about 40,000 workers, mostly the agricultural proletariat. Admittedly, this was a small part of the 3.5 million workers in Ukraine. During the election of the All-Ukrainian Council of Workers 'Deputies, controversy erupted, but a compromise was reached: out of 100 members of the All-Ukrainian Council of Workers' Deputies, 75 were elected on a territorial basis, 25 – personally, with 70 seats given to USDLP and 30 to USRP [19, p. 38].

The composition of the CCU did not always correspond with the composition of the Small Council. Thus, if there were several workers in the CCU, then in the Small Council their interests were represented, respectively, by a doctor, publisher, cooperative, and process engineer [19, p. 39]. Even one of the leaders of the USDLP, V. Vynnychenko recognised that the congresses were used by the Ukrainian party democracy to strengthen its position in the CCU [13, p. 218].

If there was a party representation in the CCU, party factions were created in their infancy, which indicates the attraction of the CCU to classical parliamentary forms of activity. Formally, the parties had relatively little representation. When forming the composition of the CCU by the Congress, the Union of

Federalist Autonomists won 5 seats, the USDLP – 4, the USRP – 3, and Independents – 1. According to the resolution of the fifth session on the reorganisation of the CCU, party quotas have not changed: the USDLP had 5 seats, the USRP – 5, the UPSF – 5, the Trudoviks – 5. However, in reality, the first three parties had a much larger number of mandates due to their membership in the CCU through peasant, military, workers' congresses and territorial representation. In general, the "Ukrainian political parties, mostly socialist", determined the activities of the CCU [13, p. 79].

The minutes of the CCU general meetings give an idea of the fierce party struggle in which they took place. Thus, O. Holdenveizer once wrote: "Ukrainian deputies were divided into three main factions: Ukrainian SRs, Ukrainian Social Democrats, and Socialist Federalists. The Ukrainian SRs were the strongest party in the Council; M. Hrushevsky, who remained non-partisan for a long time, joined them at the end. Therewith, this faction was the poorest for people; even for the prime minister, it could not nominate anyone but Holubovych. The Ukrainian Social Democrats, to which Vynnychenko, Petliura, Tkachenko, Porsh, etc., belonged, were small in number, but the incomparably greater personal composition of this faction somewhat smoothed out the quantitative advantage of the SRs. Finally, the Federalist Socialists represented the most prominent and cultured element of the Ukrainian public. The leader of this party was the respected writer S. Yefremov, whose newspaper (Nova Rada) was edited by A. Nikovskyi. As the most prominent nationalist group, the Federalist Socialists lived relatively in harmony with the representatives of "minorities". The most socially hostile to the Ukrainians, the opposition party, were the Russian Socialist-Revolutionaries, represented in the Council by the energetic and capable O. Zarubin. The Mensheviks, led by M. Balabanov, were independent and sometimes courageous. Rafes, who represented the Bund, spoke and acted the most; he was at this time in opposition to the Ukrainians, who were quite afraid of his sharp tongue. Other Jewish parties were rather poorly represented" [20, p. 31].

Therefore, the largest representation in the CCU was held by the factions of the parties of the Ukrainian SRs and Social Democrats. Throughout its existence, they set its activities, controlled all structures, starting from the Presidium, the Small Council, the General Secretariat and ending with individual commissions. The political experience of the leaders of the Ukrainian Social Democrats allowed them to play a major role in the SR-Esdek tandem during 1917. M. Porsh is in talks with J. Stalin in November 1917 called himself a representative of the "party that occupies a governing position in the Council" [12, p. 455–459]. Having more or less agreed on positions in relations with the Provisional Government regarding the autonomy of Ukraine, these parties had

quite serious differences in their views on socio-economic policy. Eventually, the Ukrainian SRs, using their numerical advantage in the CCU, took over the leadership of the UPR government in January 1918, and they succeeded in reorganising the Smal Council, where they won an overwhelming majority. On this occasion, V. Vynnychenko recalled: "It was all the easier for the factions to fulfil my wish to leave the government, and at the same time the SR faction of the Central Council began to show a strong desire to take the leadership of all politics into its own hands. It had a formal right to do this every now and then because it covered all other factions with the number of its votes" [13, p. 224].

The transformation of the CCU into the Revolutionary Parliament of Ukraine in those conditions, in addition to the expansion of its composition, which made it a representative body of the Ukrainian people, an expression of their will, took place by the Central Council acquiring the features of a parliamentary institution through improving its structure, organisational and legal forms of activity, clear regulation of work, determining the status of members.

The development of organisational structures of the CCU in the area of acquiring parliamentary characteristics began from the first days of its existence. The report on the creation of the CCU referred to its structural divisions: Presidium (chairman of the Council, two deputies, scribe, and treasurer) and nine commissions [21].

On the day of the CCU's election as Congress, April 8, 1917, its first general meeting was held, which became the highest body and leading organisational form, which ensures collegial, democratic work.

The order of work of the general meeting of the CCU was established in the first months of its activity and was based on the model of parliamentary session work. The CCU was divided into factions based on party characteristics, and if necessary, the factions were blocked. Proposals were made on their behalf, various commissions were created and worked. Decisions were made, as a rule, by a simple majority of votes [22, p. 299]. The meeting was convened both on a regular and extraordinary basis. They began with the approval of the minutes of the previous meeting, which allowed for mistakes and falsifications. Then, the general meeting proceeded to consider the issues on the agenda. The documents adopted by the Assembly were called universals, declarations, resolutions, decisions [23, p. 373]. At first, the laws had no names, although many of the documents adopted by the General Assembly were laws in their content and meaning and later acquired such force.

These developments in the work of the general meeting were included in the regulations of the CCU – Order [12, p. 71–72]. It noted that the general meetings "determine the area and character of all work" of the CCU. General meetings could be regular or emergency.

The next meeting was to be called once a month. CCU members were invited to the general meeting by agenda and through advertisements in Ukrainian newspapers. Therewith, the agenda of the meeting was submitted. Emergency meetings were called by the Committee "out of urgent need". The order did not establish a quorum for the competence of the next meeting, probably due to the uncertainty at that time of the final composition of the CCU. Emergency meetings were considered "valid for any number of people present."

During the existence of the CCU, nine general meetings (sessions) were held. Their competence was not defined but was established in the course of practical activities. It shows that the competence of the CCU as a parliament covered the most important issues of the state-legal, socio-economic, and cultural life of Ukraine, its actions in the international arena. The list of specific issues that were resolved at the general meeting proved their importance, and therefore a considerable contribution to the process of state creation in Ukraine.

The first general meeting (April 8, 1917) approved the list of members of the CCU and elected its executive body – the Committee [12, p. 65].

The second general meeting (April 22–23, 1917) considered the issue of the Ukrainisation of the army and adopted the regulations [12, p. 71–72].

The focus of the third general meeting (May 7–9, 1917) was on sending a delegation to Petrograd to negotiate on Ukrainian national-territorial autonomy [12, p. 82–84].

The fourth general meeting (June 1–3, 1917) heard V. Vynnychenko's report on the CCU delegation's visit to Petrograd and decided to appeal to the Ukrainian people to "immediately lay the foundations of autonomy in Ukraine," which was done by the First Universal [12, p. 101]. After four general meetings of the CCU, they became known as sessions [24, p. 27, 28].

The fifth session of the CCU (June 20, 1917) approved the new composition of the government, supplemented its composition with representatives of national minorities, proposed to hold a congress of the peoples of Russia, expanded the rights of the Committee, and approved the Second Universal [12, p. 106–156].

The sixth session (August 5–9, 1917) discussed the situation that arose after the refusal of the Provisional Government to approve the "Statute of the Supreme Government of Ukraine" and raised the issue of convening the Ukrainian Constituent Assembly [12, p. 220–254].

The seventh session (October 29 – November 2, 1917) discussed the situation after the fall of the Provisional Government [12, p. 370–383].

The eighth session (December 12–17, 1917) discussed the issue of peace and land and the progress of preparations for the elections of the Ukrainian Constituent Assembly [25, p. 16–38].

The ninth session (January 15–25, 1918) approved the laws on land and the

8-hour working day, amended the law on elections to the Ukrainian Constituent Assembly, discussed the progress of peace negotiations in Brest, the situation due to the Bolshevik offensive, approved the reorganisation of the Small Council, approved V. Holubovych as the head of government, adopted the Fourth Universal [25, p. 108–125].

Despite the fact that the general meetings had broad powers, they were not always an effective structure of the CCU. Political emotions, demagoguery, and populism sometimes prevailed over constructive work. Individual meetings had a rally character, turned into verbal battles between representatives of numerous party factions, and sometimes almost reached the point of resolving cases with fists. The protocol presents the discussion of the Second Universal at the fifth session of the CCU in the following way: "After Kovalevskyi's speech, there was an incident, the mood of those present was very nervous and elevated. Speaker Khrystiuk begins to talk about not holding any negotiations; proposes that the resolution be passed in the sense that the talks are considered suspended. The commotion in the Social Democrats' sector started. Exclamations are heard: "Enough! Don't! Get out!". M. Avdienko runs to the rostrum with clenched fists. Others are holding him up. The commotion continues. The head is spinning for a long time " [12, p. 151]. P. Khrystiuk recalled that when discussing the interim instructions for the General Secretariat at the sixth session, "an unprecedented heated and passionate debate took place" [24, p. 116]. A sharp political confrontation arose between the Ukrainian Social Democrats and the SRs during the discussion of the agrarian bill at the eighth session. S. Petliura gave a rather accurate general description of the meetings, congresses, and other forums that took place in Ukraine during the revolutionary events. It may well be attributed to the sessions of the CCU. In a letter to M. Udovychenko, he wrote that these forums "were for me not an indicator of the strength (real and organised) of our people, but a demonstration of national emotions, which millions of masses still had to realise and which must be transformed into certain volitional movements of the Ukrainian nation, in certain acts of struggle for their national-state competitions. At first, I had the illusion that these congresses could be used to organise a national force. But I quickly became convinced that it is necessary to look for those who are able to create certain real values through rough state work" [26, p. 222]. Further, S. Petliura wrote about the "blindness of parties and circles", which became an obstacle to state-building activities. The minutes of the general meeting (sessions) of the CCU provide many examples of this. The low efficiency of the sessions of the CCU became obvious to its leaders, and in the summer of 1917, the Presidium of the CCU, referring to the formal reason – lack of money, did not convene a regular session for two and a half months,

although this was contrary to the rules of procedure, which provided for calling sessions on a monthly basis. Closing the eighth session, M. Hrushevsky believed that it would be the last, as January 9, 1918, was scheduled to open the Ukrainian Constituent Assembly. However, it happened that the elections to the Constituent Assembly were disrupted on January 11, 1918. The Small Council of the Fourth Universal declared the independence of the UPR, and to approve this historical act, the next ninth session of the CCU was convened. It was the last one. In February-April 1918, the activities of the Ukrainian revolutionary Parliament were provided by the Small Council.

The efficiency of the general meeting (sessions) decreased as the composition of the CCU expanded due to the low manageability of their work. Consequently, there was a need to create a permanent authorised body in the period between its general meetings. Such a body was the CCU Committee, which was its executive body and performed work between general meetings (sessions). The Committee quickly became the CCU's governing body, formulating initiatives on the agenda of the general meeting, drafting major political decisions, and even, as was the case with First Universal, adopting and proclaiming them on behalf of the CCU.

The Committee's finances were concentrated in Committee, all current work was controlled and directed by it, communication with places was carried out [22, p. 300]. The initial composition of the Committee (20 people) was elected by the first general meeting of the CCU on April 8, 1917. It consisted of the Presidium of the Council (the chairman and two deputies) and 17 members. According to the order, the composition of the Committee was expanded to 33 people: the Presidium of the CCU – the chairman and two deputies; 17 members elected by the general meeting; 8 chairmen of commissions. The committee was granted the right to co-opt 5 more members.

The functions of the Committee, according to the order, were related to the organisational support of the activities of the general meeting of the CCU, in particular, the convocation of general meetings, the preparation of reports and materials to them, the management of the work of commissions and the office, and bringing documents adopted at the general meeting to the attention of provincial and county councils. In the period between general meetings, the committee also assumed certain powers of the CCU – it made changes to the composition of the General Secretariat, resolved issues of political and economic life in Ukraine, reporting on them at the next general meeting.

The Committee met once a week. It was considered competent if there were 2/3 of the Committee members if regulations were considered, and at least half when considering other issues.

The development in June 1917 the General Secretariat was not excluded from the political life of the CCU Com-

mittee. Informing the fifth session on the establishment of the General Secretariat, M. Hrushevsky noted that the creation of a new executive body does not eliminate the Committee, which should be "Small Central Council, performing legislative functions between the two sessions" [12, p. 116]. At one of the next meetings, M. Shrag took the initiative to provide the Committee with "all functions belonging to the Central Council" between sessions. The initiative was supported on June 29, 1917, by the decision of the fifth session, the Committee acquired the right to decide "all the most important immediate cases that arise between sessions of the Central Council", namely: to convene regular and extraordinary sessions; prepare materials for them; renew the Secretariat-General between sessions; to resolve all immediate cases that fall within the competence of the CCU [12, p. 143–144]. By the same decree, its composition was expanded to 40 people. At the beginning of July, the committee was replenished by another 30% (18 people) with political figures representing national minorities [12, p. 171]. In 2018, the committee became known as the Small Council.

Further organisation and activities of the Small Council took place on August 1, 1917, when the rules of procedure for the work of the Small Council and its commissions were approved [12, p. 208–210]. Its content indicates an even wider introduction of parliamentary forms of work in the activities of the Small Council. In addition to the existing provisions, mainly procedural issues were determined, in particular, during the meeting none of the members of the Small Council could speak in one case more than twice: the first time – 15 minutes, the second – 5. The speaker was not limited in time and was given up to 20 minutes for the final speech. During the discussion, the speaker had the right to submit remarks after each speech, no more than 5 minutes. The Secretaries-General could always take the floor out of turn, but not for debate. At the request of any member of the Small Council, one or another moment of the meeting was recorded in the minutes. Applications on the agenda were given 3 minutes. The meeting was led by the chairman, yet they had no right to speak out of turn when discussing the issue. The debate was suspended at the request of 5 or more people after voting. Proposals to resolutions were submitted in writing. When discussing them, the speakers had 2 minutes each. If the question was asked from the audience, it should be formulated in such a way that only "yes" or "no" could be said in response. If a discussion began about amendments or additions to resolutions, then the floor was given in turn: to the one who is "for", to the one who is "against". No one had the right to vote for the absent members of the Small Council. Closed voting was held at the request of at least 5 members of the Small Council, roll-call – 10. Decisions were made by a simple majority, and when the number of pros and cons

was the same, the issue was removed from consideration. Amendments to the transcript of the previous meeting could be made within one day after they were submitted.

The regulations defined the powers of the head of the CCU. The head called and led the meeting, proposed the agenda, led the discussion, summarised its results, established the procedure for voting on proposals received from factions [12, p. 208–209]. The incumbent chairman of the CCU and the Minor Council, M. Hrushevsky, managed to keep the Council under his control and lead it in the chosen course. He was an effective chairman, a sophisticated politician, who, if necessary, was able to give the meetings of the Small Council "some parliamentary character" [20, p. 30]. Defending his views, M. Hrushevsky did not stop at the prospect of resigning.

The regulations bypassed the issue of accountability of the Small Council. Although the reports of the Small Council were heard at 6–9 sessions, they were more informative than accountable. In fact, the Small Council played a leading role in the activities of the CCU. "The Council, only it mattered, since the CCU plenum met every few months and, reproducing the same balance of power on an expanded scale, did not introduce anything new" [20, p. 120]. Such detail is also interesting: when at the seventh session the Bundist Zolotarov submitted a proposal to confirm the decision of the Small Council on the riot in Petrograd, Chairman M. Hrushevsky, without proposing a vote, limited himself to saying: "Resolutions of the Small Council have the same force as the full Council." The explanation was accepted without objections [12, p. 374–377].

The composition of the Small Council was established based on proportionality between the factions that constituted the CCU. The non-partisan Chairman of the Council had deputies from four Ukrainian parties, two executive secretaries of the Presidium belonged to the USRP, and two to the USDLP. In August 1917, out of 65 members of the Small Council, 35 belonged to Ukrainian parties, 15 to Jewish parties, 10 to Russian parties, and 4 to Polish parties [27, p. 44]. Most of the seats in the Small Council – 14 – were held by the USDLP and USRP. Quantitative parity in the Small Council between these parties was maintained until the beginning of 1918. On behalf of the faction of Ukrainian socialists-revolutionaries, Shrag proposed "re-electing the Small Council in proportion to the composition of the Central Council at the next plenary session" [25, p. 105]. This reorganisation took place at the ninth session. Commenting on this event, the newspaper Narodna volia reported on January 24, 1918: "In the reorganized Small Council, the factions of the Socialist Independents, the People's Socialists, and the Moldovans (Romanians) are given one seat each. The rest of these seats are given in the Small Council to the Socialist-Revolutionary Faction. In total, the Small Council should have 82 members in accordance with the factional compo-

sition of the large council." Thus, at the beginning of 1918, the Ukrainian SRs doubled their representation in the Small Council, the leadership of the CCU was in their hands, and they headed the Council of People's Ministers.

The Small Council absorbed the organic features of a parliamentary institution, but its meetings were more productive than the general meeting (sessions). Most of the most important political decisions of the CCU were made by the Small Council. Only after the proclamation of the Third Universal, the Small Council adopted laws: on the establishment of a court in Ukraine on behalf of the UPR, on elections to the Constituent Assembly of the UPR, on amnesty, on the exclusive right of the CCU to issue legislation, on the establishment of the General Court, on the Ukrainian Academy of Arts, on UPR state funds, on the Ukrainian State Bank, etc.

Legislative work was further developed after the declaration of independence of the UPR by the Fourth Universal. The Small Council passed laws on the ratification of the Brest Peace Treaty, the UPR State Flag, the UPR Citizenship, the issuance of State Treasury insignia, the election of judges, the UPR administrative-territorial structure, the Gregorian calendar, and Central European Time. The quintessence of the legislative activity of the Small Council was the approval of the Constitution of the UPR (Statute on the state system, rights, and freedoms of the UPR) on April 29, 1918.

A sign of the CCU's attraction to parliamentary forms of the organisation was the status of deputies – members of the CCU. Firstly, the CCU was maintained at the expense of the UPR. Members of the CCU were not subject to responsibility for voting, for opinions expressed, or in general for activities related to the performance of the duties of CCU members both in and out of the parliament itself. Members of the CCU had immunity against arrest, prosecution, and trial without the permission of the CCU.

In many ways, the effectiveness of the legislative body depends on its powerful internal system [28]. An important structural element subordinate to the Small Council was the permanent and temporary commissions of the CCU. They were established at the first meeting of the CCU: financial, legal, school, propaganda, editorial, printing, demonstration, and information bureaus [11]. At that time, the functions of the commissions were not defined, and only their heads were approved.

The legal status of the commissions was outlined in the order. Commissions were established by the Small Council as needed to conduct and resolve specific cases and to prepare various issues for committee meetings and sessions of the CCU. They were under the guidance and supervision of the Small Council. Members of the commissions, their chairmen, may not have been members of the CCU [12, p. 72].

The organisational bases of the commissions' work were also improved.

They were created if necessary in a composition that was determined separately each time. Depending on the importance and complexity of the problem, the main task of the commissions was to prepare decisions for the sessions of the CCU and meetings of the Small Council. Drafts of relevant decisions were distributed in advance to the members of the CCU. The first meeting of the newly established commission was convened by the Presidium of the Small Council. It elected the chairman and the scribe. The commissions were given the right, if necessary, to co-opt other members with an advisory vote. At the end of the work, a rapporteur was elected from the commission. The particular issue was considered at the session of the CCU or Small Council only after the report of the relevant commission.

The commission meetings were open. If there was a need for closed meetings, the issue was decided by a two-thirds majority of votes. Only members of the Small Council, its deputies, secretaries-general, and individual specially invited persons could attend the closed meetings.

On August 9, 1917, the rules of procedure of the Small Council and its commissions were approved at the fourth session of the CCU. It absorbed all the previous practice of organising and operating the Small Council and commissions, contained two innovations regarding the technical aspects of the rules of procedure: first, speeches were not limited in time; secondly, it was established that the next session of the CCU is convened no later than one month after the previous one. The agenda is sent out in two weeks, in a shorter time it was reported by telegraph.

Employees of the CCU were united in an office headed by the director and their assistant. The office was divided into 6 departments: general, codification, publishing, accounting, library, and economic. In turn, the general department consisted of 6 subdivisions (office, stenography, personnel, address, information, and expedition), economic – of 3 subdivisions (garage, printing house, commandant's office), and the publishing house had the editorial board of the newspaper "Visti Ukrainskoi Tsentralnoi Rady". The office of the CCU operated based on the Statute [29, p. 30–31], according to which all its employees were members of the general meeting of the office headed by the staff committee. Such meetings were supposed to be convened annually, only they made changes to the Statute, removed employees from their posts, established monetary funds from employees' contributions, monitored working conditions, etc.

CONCLUSIONS

The creation of the CCU marked the beginning of the era of revolutionary parliamentarism in Ukraine. The first effective steps on the path of state creation were the transformation of the CCU from a socio-political centre into a representative body. This transformation occurred as a result of the convocation in April

1917. The Ukrainian National Congress, which elected the CCU and granted the right to co-opt new members, continued the process of establishing the CCU as a representative body.

In general, the CCU was established on general democratic principles, based on the specific historical conditions of the time, since its composition provided territorial representation, representation of political parties and socio-political movements, which made it a representative body, although it was never elected based on universal suffrage, which would give it indisputable legitimacy. However, this procedure for establishing the CCU made it a body that represented the will of the Ukrainian people, and therefore allowed solving constituent problems, such as the issue of changing the state structure of Russia, declaring the autonomy of Ukraine, subsequently the UPR, determining the form of government, declaring its independence and sovereignty, adopting regulations of international importance.

The transformation of the CCU into the Revolutionary Parliament of Ukraine in those conditions, in addition to a kind of expansion of its composition, which made it a representative body of the Ukrainian people, an expression of their will, took place by the Central Council acquiring the features of a parliamentary institution through improving its structure, organisational and legal forms of activity, clear regulation of work, determining the status of members. The competence of the CCU as a parliament covered the most important issues of the state-legal, socio-economic, and cultural life of Ukraine, its actions in the international arena. The form of work of the CCU was the general meeting, and in the period between them – the Committee (Small Council). Thus, the Small Council adopted laws on ratification of the Brest Peace Treaty, on the State Flag of the UPR, on the citizenship of the UPR, on the issuance of State Treasury insignia, on the election of judges, on the administrative-territorial structure of the UPR. The quintessence of the legislative activity of the Small Council was the approval of the Constitution of the UPR (Statute on the state system, rights, and freedoms of the UPR) on April 29, 1918.

Thus, the foundation of the Central Council of Ukraine, the difficult path to its transformation into a representative body – a kind of revolutionary parliament – ensured the development of state processes and contributed to the establishment of an independent Ukrainian state during the Ukrainian revolution of 1917–1921.

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STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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IMPROVEMENT OF STATE CONTROL OF FOOD SAFETY TAKING INTO ACCOUNT THE REQUIREMENTS OF THE LEGISLATION OF THE EUROPEAN UNION

Abstract. *The article is devoted to the issues of improving the legal basis of state control of food safety in the context of harmonisation of national legislation of Ukraine with the relevant legislation of the European Union. The relevance of the study is due to the need to improve the effectiveness of state control of food safety to guarantee European standards for the protection of human health. The purpose of the study is to clarify the structural features of legislation related to state control of food safety, identify practical*

issues of legal regulation of state control of food safety and develop ways to solve them. The methodological basis of the research consists of the comparative legal method, historical-legal and dialectical methods, methods of analysis and synthesis, system-structural and formal-legal methods. It was found that food legislation and feed legislation have a common goal of legal regulation – the protection of human health, although from a formal point of view they are different areas of law. Insufficient legal certainty of such grounds for unscheduled inspections as reasonable suspicion of non-compliance with legal requirements is due to different approaches to the formulation of powers of regulatory authorities in Ukraine and the European Union. In order to avoid corruption factors during state control of food safety, it is better to introduce information and communication technologies, and not resort to incomplete harmonisation of the legislation of Ukraine with the legislation of the European Union. The introduction of the European concept of food fraud in Ukraine requires its coordination with criminal and administrative legislation, as well as the creation of the necessary organisational and legal conditions for identifying relevant offenses during state control of food safety.

Keywords: *inspection, food legislation, harmonisation with EU legislation, sanitary and phytosanitary measures, European integration*

INTRODUCTION

Ukraine's European integration efforts are historically driven by various factors. However, the main role among them is played by the desire to get closer to the high standards of living characteristic of most countries of the European Union. These standards are primarily based on respect for human rights, among which the protection of human life and health occupies a prominent place. In this regard, food safety issues play a very important role in the policy of the European Union, which is reflected in the acquis communautaire, because food products directly affect human life and health. As Markus Lipp, a representative of the Aood and Agriculture Organisation of the United Nations (FAO), rightly points out, food safety is everyone's business: farmers, food industry workers, retailers, and consumers [1].

The signing of the association agreement between Ukraine and the European Union, the European Atomic Energy Community and their member states has become a powerful impetus for the development of many areas of Ukrainian legislation [2]. One of these areas is food legislation. Thus, in 2014 a revised Law of Ukraine "On Basic Principles and Requirements for Food Safety and Quality" [3] was adopted, which implements the requirements of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002, that lays down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [4]. It was this law that defined the fundamental requirements for ensuring food safety at all stages of their production and circulation, which

formed the basis of the latest food legislation of Ukraine, based on modern European standards.

Although the main goal of harmonising the legislation of Ukraine on food products with the legislation of the European Union is to protect human health, this is not its only task. An equally important expected result of this process is the expansion of opportunities for exporting domestic food products to European and global markets. The logic here is simple – if a Ukrainian manufacturer adheres to the same requirements for food safety during their production as in the European Union, and if the system of state control of food safety in Ukraine works according to European principles, such products inspire confidence, and therefore it is easier to promote them on foreign markets.

The procedural requirements for state control over compliance with food legislation remained insufficiently developed. In order to harmonise the relevant procedural norms of the national legislation of Ukraine with the legislation of the European Union, another important law was adopted in May 2017, namely Law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5]. This law reflects the relevant norms of Regulation (EC) 882/2004 of the European Parliament and the Council of 29 April 2009 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [6].

The adoption of the Law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] was logical, although certainly not the last step towards the practical implementation of the European concept of food safety, based on the principle of "from farm to fork". As noted by H. Schebesta and J. J. L. Candel, the EU's "from farm to fork" strategy aims to ensure the fair provision of healthy and environmentally friendly products [7]. According to this concept, state control should cover all stages of food production and turnover, starting from the moment of production of raw materials and ending with the control of food safety on store shelves and in the network of public catering establishments [8]. State control of food safety should begin at the stage of growing plants and animals, products from which subsequently enter the agro-food chain. It is this approach that has received the widest possible expression in the new Regulation (EC) No. 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [9].

Considering the complex nature of the concept of "from farm to fork", the control of food safety intended for

human consumption should include, among other things, control over the production and turnover of feed intended for productive animals, because through the food products of animal origin produced from them or with their help, there is an indirect impact of feed on human health. In this regard, it is worth noting that for the consistent implementation of this concept, another important European integration law was adopted in December 2017, namely the Law of Ukraine "On feed safety and hygiene" [10]. This law establishes legal norms based on the requirements of Regulation (EC) No. 183/2005 of the European Parliament and of the Council of 12 January 2005 laying down requirements for feed hygiene [11], Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition [12] and Regulation (EC) No. 767/2009 of the European Parliament and of the Council of 13 July 2009 on the placing on the market and use of feed [13]. Consequently, Ukraine, at least at the level of primary legislation, has established a certain legal and regulatory framework for further implementation of European food safety standards.

At the same time, the development of modern national legislation on state control of food safety raises a number of issues of both theoretical and practical nature that require scientific understanding. Thus, the first obvious question that arises in this context against the background of approximation of the legislation of Ukraine in the field of sanitary and phytosanitary measures to the relevant legislation of the European Union is the ratio of food legislation and feed legislation. The relevance of this issue is since the state control of food safety covers not only the safety of food products themselves, but also includes the control of feed, which, although indirectly through food products of animal origin, still affect human health. The answer to this question is important primarily because it allows a better understanding of the structural features and internal relationships of the legislation of Ukraine and the European Union.

At the same time, quite practical issues deserve attention regarding the grounds for carrying out unscheduled measures of state control of food market operators, the introduction of information and communication technologies into the system of state control of food safety to prevent corruption, organise counteraction to food fraud, etc. For example, organisational issues related to combating food fraud are given a lot of attention at the international level, as evidenced by relevant publications in scientific sources of such authors as J. Spink, D. Moyer [14], E. Casadei, E. Valli, P. Panni, J. Donarski [15], H. Kendall et al. [16], S. Meulen et al. [17].

Given the above, the purpose of the study is to highlight the structural features of legislation related to state control of food safety, as well as to identify ways to improve the relevant legislation

for more effective organisation of food safety inspections, prevention of corruption and counteraction to food fraud.

1. MATERIALS AND METHODS

The study of legal issues of improving state control of food safety in the context of harmonisation of the relevant legislation of Ukraine with the legislation of the European Union requires a comparative analysis of a number of acts of national legislation of Ukraine and the legislation of the European Union. In this regard, among the acts of national legislation of Ukraine, it is worth taking into account the law of Ukraine "On basic principles and requirements for food safety and quality" [3], the law of Ukraine "On state control over compliance with legislation on food, feed, animal by-products, animal health and welfare" [5] and the law of Ukraine "On feed safety and hygiene" [10]. At the same time, among the acts of European Union legislation, attention should be paid primarily to Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 [4], that lays down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Regulation (EC) No. 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, regulation (EU) No. 2017/625 of the European Parliament and of the council of 15 March 2017 [9] on measures of official control and other official activities carried out in order to ensure the application of food and feed legislation, regulations on animal health and welfare, plant health and plant protection products, regulation (EU) No. 183/2005 of the European Parliament and of the council of 12 January 2005 [11] laying down requirements for feed hygiene, Regulation (EU) No. 1831/2003 of the European of the parliament and of the council of 22 September 2003 [12] on additives for use in animal nutrition, as well as Regulation (EC) No. 767/2009 of the European Parliament and of the Council of 13 July 2009 [13] on the placing on the market and use of feed. To carry out a comparative analysis of these and other legislative acts, this study uses the comparative legal method of cognition.

Since the regulatory framework of state control of food safety is developing quite quickly and dynamically both in Ukraine and in the European Union, historical, legal and dialectical methods of scientific knowledge were used in its research. This allows better understanding of the general logic of building and developing relevant legislation, its impact on public relations in the field of state control of food safety. In addition, the use of these methods of cognition makes it possible to predict the prospects for further development of the relevant legislation.

This study raises questions about the correlation of various structural com-

ponents of legislation, the purpose of which is to ensure food safety, and therefore protect human health, since the relevant legislation, in turn, is an integral part of legislation in the field of sanitary and phytosanitary measures. In this regard, such general scientific methods of cognition as analysis and synthesis, as well as the system-structural method, are used to cover these issues. Their application gives the opportunity to look at the legislation on food products and feed legislation as an integral system, each of the elements of which performs its own function to achieve a single ultimate goal – the protection of human health.

The method of analysis is also used to study the grounds for conducting unscheduled inspections during the state control of food safety, the powers of the chief state inspectors (chief state veterinary inspectors) to temporarily stop the production and/or turnover of food products and feed, as well as the modern European concept of food fraud. Based on the relevant analysis, a number of proposals for improving state control of food safety were synthesised. To clarify the content of legal norms regulating public relations in the field of state control of food safety, a formal legal method was used.

2. RESULTS AND DISCUSSION

2.1. Correlation between food legislation and feed legislation

Having committed itself to bringing its national legislation in the field of sanitary and phytosanitary measures as close as possible to the relevant legislation of the European Union [2], Ukraine has made a lot of efforts and made significant progress in this direction. At the same time, such an approximation of the legislation cannot be considered absolutely complete. Therefore, it is necessary to first look at the issue raised from the point of view of European Union law. In accordance with the provisions of Regulation (EC) No. 178/2002 laying down the general principles and requirements of food law [4], this legislation includes laws, regulations (rules) and administrative provisions regulating public relations with respect to food products in general, in particular in terms of their safety, both at the level of the European Union and at the national level of member states, and applies to the production, processing and turnover of food products, as well as feed produced or fed to productive animals. So, judging by this definition, EU food legislation includes, among other things, regulations related to feed. From the point of view of food safety for humans, this approach has its own obvious logic, because it is impossible to ensure the safety of food products of animal origin without ensuring the safety of feed for productive animals, given the structure of the agro-food chain (feed – productive animals – animal products – human) [9].

However, the thesis that food legislation includes, in particular, feed legislation is not always consistent with the provisions of other acts of European Union legislation, in which the terms

"food legislation" and "feed legislation" are used in parallel with each other, and therefore are considered different branches, which can be seen even in the title of the already mentioned Regulation (EC) No. 882/2004 [6] and Regulation (EC) No. 2017/625 [9].

It is worth noting that in Ukraine, during the adoption of new legislative acts in the field of sanitary and phytosanitary measures, it was possible to avoid this terminological inconsistency existing in the European Union. Thus, in Law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] the terms "food legislation" and "feed legislation" have separate definitions and are used simultaneously in the text, and therefore can be considered separate branches of national legislation. Although from an essential point of view, this approach cannot be considered perfect, because the ultimate goal of regulatory and legal regulation of public relations both in relation to food products and feed is human health, and therefore it should be a single area of law, from a practical point of view in the Ukrainian reality, the distinction between food legislation and feed legislation is appropriate. The fact is that in Ukraine, a literal interpretation of the law prevails, and therefore, when it comes, for example, to bringing to justice for violating a particular legislation, it would be difficult to prove that the legislation on food products actually also applies to feed.

2.2. Basic principles of state control of food safety

Along with the concept of "from farm to fork" [7], one of the cornerstone principles of the European and now Ukrainian food safety control system is a risk-based approach to organising state control measures at all stages of food production and turnover. The fact is that it is almost impossible to ensure continuous state control of all food products for purely economic reasons, because such control will require too many human, technical and financial resources, and therefore is impractical. Therefore, state control based on a risk-based approach is more rational.

The essence of the risk-based approach is that the frequency of state control measures and their nature should depend on the degree of risk associated with the production or turnover of a particular food product. Thus, in particular, food products of animal origin (meat, milk, eggs, etc.) pose an increased risk to human life and health, since a number of infections (diseases) can be transmitted from animal to human through such products, for example, salmonellosis. Therefore, state control measures in enterprises producing or marketing such products should be carried out more frequently than in enterprises producing or marketing non-animal foodstuffs (bread, biscuits, etc.). Therefore, correct risk assessment is critical for the successful organisation of state control measures [18].

Another important component of the food safety control system is traceabil-

ity. At the moment, the requirements for ensuring traceability are enshrined in the law of Ukraine "On basic principles and requirements for food safety and quality" [3], according to which traceability is the ability to identify the market operator, time, place, subject and other conditions of supply (sale or transfer) sufficient to establish the origin of food products, animals intended for the manufacture of food products, materials in contact with food products, or substances intended for inclusion, or expected to be included in food products, at all stages of production, processing and circulation. According to Article 22 of this law [3], market operators must be able to identify other market operators who supply them with food products on the "step back" principle and are able to identify other market operators to whom they supply food products on the "step forward" principle. Traceability information shall be available to the competent authority which is authorised to carry out national food safety control. Traceability is important because it allows identifying unsuitable food products and withdraw them from the market in the event of an outbreak of diseases or identify risk factors as a result of analysis, thus preventing further exposure to these factors [18].

With the adoption of the law of Ukraine "On state control over compliance with the legislation on food products, feed, animal by-products, animal health and welfare" [5]. Another important tool of the new system of state control is inspection without prior notice of the business entity. Without such unexpected inspections, it is impossible to ensure the effectiveness of state control of food safety, as evidenced not only by European, but also by our own Ukrainian experience [19].

An example of the inefficiency of state control in this area, which existed before the adoption of this law, was given by the chairman of the state service of Ukraine for food safety and consumer protection V. I. Lapa. According to him, in order for representatives of the specified competent authority to be able to go out for inspection, the consumer must buy a doughnut or any other type of food product, make sure that it does not meet the requirements of the law and write a complaint to the relevant territorial body. The complaint is submitted for approval to the central office and then to the policy-making body. In case of food safety hazards, this is the Ministry of Agrarian Policy and Food of Ukraine. On average, the time between the complaint and the actual exit for verification is at least a month and a half, and it is clear that during this time there is already another doughnut or other type of product on the shelves [19].

Therefore, the rule on inspections without prior notice was extremely necessary. It cannot be said that such a legal norm is completely new for Ukrainian food legislation. The previous version of the law of Ukraine "On basic principles and requirements for food safety and

quality" [3] also contained a norm on inspections without prior notice. However, as correctly notes E. M. Horovets these provisions were dead and did not really work, because they contradicted the law of Ukraine "On the basic principles of state supervision (control) in the sphere of economic activity" [20], which provides for the obligation of the supervisory authority to warn the enterprise about the inspection 10 days before it starts. The corresponding conflict between the norms of the two laws is eliminated by the law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5], so businesses must be prepared for previously unannounced visits of state inspectors [21].

At the same time, taking into account European practice and the requirements of the relevant legislation of the European Union, the latest Ukrainian legislation on state control of food safety establishes a norm on mandatory prior notification in the case of such a specific form of control as an audit of permanent procedures based on the principles of HACCP (Hazard Analysis and Critical Control Points). In the case of an audit, such a notice, which should be carried out three working days before its start, is objectively necessary for the preparation of the necessary documentation concerning HACCP, without which it is impossible to effectively conduct an appropriate state control measure [21].

2.3. Reasonable suspicion as a new basis for inspections

Another important innovation of the Law of Ukraine "on state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] is an expansion of the list of grounds for unscheduled inspections that can be carried out in relation to food industry enterprises. It concerns the norm of part four of Article 18 of this law [5], according to which state control measures can be carried out unscheduled in case of detection of non-compliance or the appearance of a reasonable suspicion of non-compliance. So, for example, if during a scheduled inspection of a supermarket, a state (veterinary) inspector recorded a violation of labelling requirements or other legal requirements that a food product must meet, this violation or even suspicion of commission may become the basis for further unscheduled inspection of another manufacturer of this product.

While the rule is generally justified as facilitating a rapid response to food law violations and enhancing the protection of public health, it also carries with it certain risks and the potential for arbitrary and manipulative interpretation. This is especially true of the term "reasonable suspicion of non-conformity". Thus, if everything is more or less clear about non-compliance as a basis for further holding an unscheduled state control event (first, a violation of the law is recorded, which later entails holding an unscheduled state control event), then

such a basis as "reasonable suspicion of non-conformity" can be interpreted in different ways. In particular, it can be an application to the territorial body of the state service of Ukraine for food safety and consumer protection of one business entity for violation of food legislation by another business entity. It is one thing when such a claim is genuinely substantiated and has a factual basis. It is quite another matter when such an appeal for an offence is used by one business entity as a tool in the competitive struggle against another business entity.

In European practice, "reasonable suspicion of non-conformity" as the basis for unscheduled inspections is perceived normally, since in the EU regulatory authorities are traditionally given broad discretionary powers. For Ukraine, where the powers of state bodies are trying to write out as clearly as possible in order to avoid corruption factors, such a norm on reasonable suspicion is new, and only law enforcement practice can answer the question of how justified and effective it is. It is obvious that in the future, this norm will be clarified taking into account law enforcement practice, in particular during the development of an updated version of the law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] based on Regulation (EC) No. 2017/625 of the European Parliament and of the Council of 15 March 2017 [9] on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products,

2.4. Prevention of corruption and introduction of information and communication technologies

It is worth noting that the question raised regarding the interpretation of the term "reasonable suspicion" is to a certain extent related to concerns about the growth of corruption factors, since officials of the relevant regulatory authorities can also resort to arbitrary interpretation of this term. At the same time, it would be impossible to fully implement the basic European principles of state control of food safety without such broad categories as reasonable suspicion. The fact is that in the European Union, the relevant competent authorities of the member states traditionally have very broad discretionary powers regarding state control of food safety. Thus, in accordance with Regulation (EC) No. 882/2004 [6] and later Regulation (EC) No. 2017/625 [9], the competent authorities responsible for food safety control are authorised to suspend operations or close food production and circulation facilities for any period of time necessary to eliminate detected violations.

Unlike the member states of the European Union in Ukraine, the competent authority that exercises state control over food safety does not have such unlimited powers to close down food production and processing facilities. According to Article 67 of the Law of Ukraine "On

state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] the chief state inspector (chief state veterinary inspector) is authorised to make decisions only on temporary termination of production and/or turnover of food products and/or feed, if such production and/or turnover poses a threat to the life and/or health of a person and/or animal for a period not exceeding 10 business days. If the elimination of the detected violation requires a longer period of time, the state inspector (state veterinary inspector) applies to the administrative court to stop the production and/or turnover of food products.

Granting powers to state inspectors (state veterinary inspectors) to suspend the operation of food production and circulation facilities only for a limited period of time does not fully comply with the European model of state control. However, this is due to Ukraine's desire to create preventive legal mechanisms to prevent corruption on the part of civil servants. Thus, this approach to determining the powers of state control can be considered a compromise, because it takes into account the provisions of EU legislation on the one hand, and the realities of Ukraine on the other.

However, in this regard, a natural question arises: can Ukraine fully adapt its national legislation to the relevant norms of the European Union and at the same time prevent the strengthening of corruption factors? This is quite possible if information and communication technologies are widely used to combat corruption. According to modern research, the use of computers, the Internet, and mobile phones to detect and report corruption offences contributes to the openness and transparency of public administration and allows curbing corruption in many countries of the world [22]. Therefore, instead of incomplete implementation of the requirements of the EU legislation on food safety control in the national legislation of Ukraine, it would be necessary to create appropriate organisational and legal conditions for the introduction of additional technical fuses of corruption based on information and communication technologies into the state food safety control system. So, for example, it would be possible to legally provide for mandatory video recording of state control measures by state inspectors and state veterinary inspectors of the State Service of Ukraine on Food Safety and Consumer Protection, because today video recording remains their right, not their duty. In addition, it would be possible to establish the obligation to publish the relevant videos on the official website of this body in case of appeal against the results of state control measures. This would ensure sufficient openness and transparency of the process of state control of food market operators and reduce the associated corruption factors.

2.5. Liability for violations of food legislation and food fraud

Although EU legislation does not contain sanctions for violating food safety

requirements, it also requires EU member states to establish such sanctions in their national legislation and apply them based on the implementation of state control measures [6]. That is why the Law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] in addition to the actual procedural norms regarding state control, contains legal norms establishing liability for violation of legislation on food and feed. Thus, in particular, it provides for the liability of market operators for violation of hygienic requirements for the production and /or circulation of food or feed, for failure to comply with the obligation to implement permanent procedures based on the principles of the hazard analysis and control system at critical points (HACCP), for offering for sale or sale of unsuitable food or feed, offering for sale or sale of food or feed that is harmful to human or animal health, etc.

At the same time, the national legislation of Ukraine does not provide for such a characteristic offence for EU member states as "food fraud" [8; 14]. For Ukraine, it is traditional to understand fraud, first of all, as a crime (Article 190 of the Criminal Code of Ukraine) [23]. At the same time, it does not matter what material values (property) this crime concerns – food, real estate, antiques or money. At the same time, in the European Union, food fraud tends to gravitate more towards our understanding of administrative offences. Although there is no harmonised definition of food fraud at the European or international level, foreign literature sources indicate that food fraud covers cases of deliberate violation of food legislation committed for the purpose of obtaining economic or financial benefits by deceiving consumers [15]. As a collective term, food fraud covers the replacement, addition, forgery or misrepresentation of food products, their ingredients, packaging, or incorrect or misleading statements about food products for the purpose of obtaining property or financial benefits [14]. This raises the question of how to integrate the European concept of food fraud into the legal field, coordinating it with other acts of national legislation, primarily with the legislation of Ukraine on criminal liability and the legislation of Ukraine on administrative offences.

An equally important task in combating food fraud is to create appropriate organisational prerequisites for identifying and clarifying the circumstances of relevant offences, in particular during the implementation of state control measures. In this regard, it is worth paying attention to the experience of the European Union, where the EU Food Fraud Network (FFN) and the Administrative Assistance and Cooperation System (AAC) have been created [15], which facilitate interaction between European countries in the fight against food fraud, which is transnational in nature. In this regard, the possibility of Ukraine joining these European initiatives should be considered.

The settlement of the issue of legal liability for food fraud, the creation of appropriate organisational and legal mechanisms to combat this type of offence would be appropriate during the development of an updated version of the Law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" [5] on the basis of Regulation (EC) No. 2017/625 [9], because the current version of this law is based on the norms of Regulation (EC) No. 882/2004 [6], which has already lost its force.

CONCLUSIONS

In recent years, Ukraine has made significant efforts to bring national legislation on food products closer to the legislation of the European Union. A number of important legislative acts have been adopted that implement the requirements of the relevant EU legislation, such as the law of Ukraine "On basic principles and requirements for food safety and quality", the law of Ukraine "On state control over compliance with legislation on food products, feed, animal by-products, animal health and welfare" and the law of Ukraine "On feed safety and hygiene". From the point of view of the purpose of legal regulation, these laws form the basis of legislation on food products, the purpose of which is to ensure food safety, and therefore protect human health. At the same time, from a formal and legal point of view, there are grounds to distinguish between food legislation and feed legislation.

The current legislation of Ukraine on food products is not without drawbacks related to its approximation to the relevant legislation of the European Union. Some of these, such as the lack of legal certainty of individual grounds for unannounced inspections, namely "reasonable suspicion of non-conformity", are due to different approaches in defining the powers of competent authorities. In the European Union, there is a tendency to give regulatory authorities broad discretionary powers, while in Ukraine, they try to define the authorities as clearly as possible in order to minimise the conditions for corruption offences. Attempts to prevent corruption sometimes lead to incomplete adaptation of the legislation of Ukraine to the legislation of the European Union, as can be seen in the example of the powers of chief state inspectors (chief state veterinary inspectors) to temporarily stop the production and/or turnover of food products and/or feed. However, as the world experience shows, combating corruption in modern conditions could be more effective due to the introduction of modern information and communication technologies, and not by limiting the powers of regulatory authorities.

In addition, the European concept of food fraud needs to be deeply understood in order to introduce it into the national legislation of Ukraine. In this regard, it is important to harmonise modern European approaches to understanding the

entire variety of offences covered by this concept with domestic criminal and administrative legislation, as well as to create appropriate organisational and legal prerequisites for combating the relevant offences.

RECOMMENDATIONS

It is necessary to adopt a law regulating the production, turnover and use of materials that come into contact with food, because they also affect the safety of what a person consumes. In addition, it should be taken into account that the safety of food products of animal origin is significantly affected by the health of productive animals that are used for the production of such products. Therefore, the development of legislation on veterinary medicine also affects food safety and state control processes in this area. Since a new version of the law of Ukraine "On veterinary medicine" was adopted in February 2021, today it is important to develop bylaws based on it, considering the relevant European requirements. Only then will the European model of state control of food safety be fully operational in Ukraine.

Taking this into account, further scientific research should be focused on ensuring the development of the law on contact materials and bylaws in the field of veterinary medicine.

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THEORETICAL FOUNDATIONS AND DEVELOPMENT PRIORITIES OF NATIONAL SECURITY RIGHTS

Abstract. *The legal content of national security is revealed in the law of national security and becomes a crucial area for the development of legal science in modern conditions of the armed aggression unleashed by the Russian Federation against Ukraine and crisis processes in the international security system. The purpose of this study was to determine the features of national security law as a branch of the national legal system and establish prospects for the development of this branch of law. This study employed a set of methods, which include dialectical, Aristotelian, historical-legal, comparative-analytical, sociological methods, as well as methods of structural analysis, legal modelling, and forecasting. National security law is considered an independent branch of law that demonstrates its public signifcance in the legal support of national security. National interests, as generally signifcant interests protected by law, form objects of national security law, are reflected in social communications, which, under the influence of national security law, acquire the features of legal strategic communications. At the same time, the in-*

tegrative qualities of national security law are manifested in interaction with international security law and military law. National security law forms a system of legal support for national security. Priorities for the development of national security law are implemented in a complex of research, organisational and educational measures, which determines the introduction of the corresponding scientific speciality and educational specialisation. The practical value of the study was to cover the features of national security law as a value-normative system of statuses, rules of conduct, communications, which has public recognition and is legitimised to ensure safe conditions for human life, the existence and development of society and the state, and to justify the development of the subject area of national security law towards qualitative indicators of legal support of all components of the national security system, structuring its types, levels – from national to international, entering the legal system of collective international security based on international principles and standards that form such a security system

Keywords: *legal content of national security, national interests, legal strategic communications, system of legal support of national security*

INTRODUCTION

In the modern world, all aspects of ensuring the safety of human life, the existence and development of society and the state are important, which is an essential feature of national security as a state of protection from potential and real threats and at the same time coordinated activities to achieve a social state where security values are of particular importance. The appeal to the axiological foundations of national security [1, p. 248–394] confrms the need to determine the legal content of national security, its international legal dimension, and the influence of the international legal system on the development of national security law. The international legal system contains the basic principles set out in international acts that bring each state closer to the requirements of law [2]. The global legal order and international security system are currently under threat of destruction due to the constant instability of the world. In the processes of solving many international and national problems, which lie in armed conflicts, mass violations of human rights and freedoms, guarantees of stability and order of the state are manifested precisely in law, and international and national security develop the social basis of national security law.

An important aspect in understanding the law of national security is the versatility of its action in strategic communications, where the state combines efforts with other social actors to achieve certain strategic goals and solve security problems. At the same time, applied issues of legal support for the security and defence sector remain relevant [3, p. 480–534], determining the status nature of the security and defence forces and the systemic legal influence on the exercise of their powers to ensure national security, the establishment of the rule of law [4] in the regulatory, institutional

components and functional purpose of the security and defence sector. The law of national security demonstrates its specifc features in the system of national law and identifes general patterns, having signs of an independent branch of law, which is confrmed by the corresponding legal regime [5, p.71]. Another urgent and no less critical issue that the national security law of Ukraine solves by its means and resources is ensuring safe conditions for human life, realising the human right to security as an absolute right and at the same time a subjective right in legal relations that exist in the feld of national security.

In legal science, a wide scope of national security issues, in particular their philosophical aspects, are considered in the studies by V. Bachynin, V. Bielievtseva, O. Danilian, O. Dzoban, S. Maksymov, I. Tykhonenko. Ensuring national security by means and resources of constitutional law was investigated by V. Antonov. Information aspects of legal support of national security are covered in the studies by O. Baranov, K. Beliakov, O. Dovhan, O. Zolotar, T. Tkachuk. Criminal law support of national security was investigated in the studies by V. Borysov, M. Karchevskyi, D. Mykhailenko, N. Savinova, O. Chuvakov, O. Sotula. Legal issues of military security have become the subject of scientifc development by V. Kryvenko, S. Poltorak, and Ye. Streltsov. General theoretical aspects of the legal content of national security are reflected in the studies by P. Westerman, A. Gromytsaris, S. Holovatyi, R. Dvorkin, L. Diuga, R. Yering, M. Koziubra, A. Kryzhanovskyi, Yu. Oborotov, N. Onishchenko, R. Paund, O. Petryshyn, P. Rabinovych, S. Udartsev, K. Feddeler, G. Hart, Yu. Shemshuchenko, P. Shlah, O. Yushchik, O. Yarmysh. Special legal branch problems of national security law were developed by S. Daikus, D. Moore, V. Lipkan, H. Novytskyi, V. Raihorodskyi, S. Chapchikov.

However, the state of research on national security law indicates the need for theoretical generalisation of scientifc developments, identifcation and coverage of branch features of national security law of Ukraine, its content characteristics and features of operation in modern conditions. The theoretical foundations of national security law determine a certain line of development of modern legal science – from understanding the doctrinal features of national security law to developing a system of industry knowledge and principles, determining the features of action in a globalized world, which is of applied importance for ensuring national security.

The purpose of this study was to cover the features of national security law as a branch of the national legal system and identify prospects for the development of this branch of law. The study solved the tasks concerning the establishment of the national security law as a systemic integrity, regarding topical issues of organising scientific research in the feld of national security law, the development of an appropriate scientifc special-

ity and academic discipline for training specialists for subjects of the security and defence sector, the application of national security law and its actions in the context of ensuring national, regional, and international security, achieving an effective level of legislative regulation of the activities of subjects of the security and defence sector in the context of European and Euro-Atlantic integration of Ukraine.

1. MATERIALS AND METHODS

To achieve the purpose of this study, the authors used the empirical materials concerning public relations, social communications in the feld of national security, legislation in the feld of national security and defence of Ukraine, international legal acts, analytical and review materials, results of scientifc developments of Ukrainian and foreign researchers. The research materials consistently cover the basics of national security, guide in determining priorities for countering threats, and focus on new qualities of state sovereignty as a central issue of ensuring national security, which is reflected in law. Social communications in the sphere of national security determine the need for legal influence, the need to apply legal means in accordance with the purpose of such social communications, which leads to the development of an appropriate legal regime of national security and determines the ontological features of national security law.

At the same time, the epistemological justification of the methodology for studying national security law make provision for the defnition of appropriate scientific approaches. For this purpose, the study used a considerable methodological potential of an interdisciplinary scientific approach, as well as philosophical views, political, sociological, and legal knowledge about law and the state, as well as their interaction. To cover the legal content and legal form of national security as a systemic integrity, the features of industry and applied scientifc developments were used. The features of national security law were studied using systematic and institutional-functional approaches. The scientifc development of the law of national security as integrity is carried out based on the possibilities of a comprehensive approach, which is focused on the integrity of the national security system. The axiological features of national security law were determined using an axiological approach, provided that there is a value-normative legal understanding and the development of an appropriate epistemological research platform. Non-linear features of national security law as a non-linear system were studied using a synergistic approach and the rhizome paradigm; this approach allowed covering the features of self-organisation of the national security law system, which manifests itself in the interaction of law, the state and civil society under the indispensable condition of recognising and ensuring human subjectivity.

The study employed dialectical, Aristotelian, historical legal, comparative-

analytical, sociological methods, as well as methods of structural analysis, legal modelling, forecasting, etc. In particular, the dialectical method contributed to solving the issue of conceptualising the law of national security, defning its principles and functions based on objectivity, interrelation, and interaction with other components of the national legal system and with international law. The historical legal method was used to investigate the establishment issue of the theory of national security law and its further development, to determine the problems of scientifc reflection of the legal content of national security and their solution by modern legal science. The Aristotelian method allowed identifying the features of national security law, its content properties, and the terminology inherent in this branch of law. The comparative legal method was used to establish the unity and interaction of national security law and military law, national security law and international security law. The method of structural analysis was used to highlight the regularities and features of the structure of national security law, determine its network nature, horizontal interaction in the context of types of national security that develop the unity and integrity of national security law. Sociological and statistical methods were applied both independently and in interaction with the dialectical method to evaluate the importance of national interests as objects of national security law. The method of legal modeling was used for a variable assessment of scenarios for the development of intra-industry formations of national security law, its operation under special regimes, the use of tools and resources of international security law to solve problems of overcoming potential and real threats to national security. The forecasting method was used to determine the prospects for the development of national security law and its operation in modern conditions of global transformations, institutional impact on the national legal system in the processes of legal acculturation, the effectiveness and necessity of legal reception, the consequences of such processes to ensure legal security.

2. RESULTS AND DISCUSSION

2.1. Establishment of the concept of national security law

The concept of national security law of Ukraine goes through a rather complex path of establishment and development in the context of the shaping of paradigms of modern law and the state, considering the achievements of philosophical, historical, sociological, political, and other branches of science and lies in the scientifc development of the entire complex palette of theoretical and applied aspects of this complex issue for legal science by branch legal sciences, which allows reaching the conceptual level of its solution [5, p. 11–29].

The establishment of the concept of national security law takes place in the context of statutory and institutional defnition of activities to ensure national security and protect national interests

[5, p. 326–327]. Legal science based on a world-view understanding of national security and its essential-content features focuses on the development of research areas necessary for the practice of ensuring national security, which relate to the constitutional and legal nature of national security [3], administration in the feld of national security [6], criminal law problems of ensuring national security [7], features of ensuring national security in the information sphere [8] and in other areas of national security, in particular military security [9].

Conceptualisation of the law of national security of Ukraine lies in awareness of the empirical basis of national security with its subsequent ontological interpretation in the legal dimension based on appropriate methodological foundations to develop an appropriate concept. The empirical basis of national security law is the totality of all factors that ensure the security of a person, society, and the state, namely public relations, social communications in the feld of national security, constitutional provisions and rules of legislation on the legal status of subjects of the security and defence sector and the organisation of activities in the feld of national security, international relations in the international security system [5, p. 30]. The development of national security law is focused on the application of a certain model of national security, considering the specifc features of the national legal system, as well as economic, political, cultural, military, information, anthropogenic, and other features of society. At the same time, the model of national security and national security law of the United States deserves attention [10], using the relevant standards of the EU and NATO Member States.

The concept of national security law of Ukraine is based on a security culture, which in the legal sense is considered as a legal strategic culture that serves as the basis for legal strategic thinking, in particular, awareness of the essential features of national security, its purpose and appropriate governance decision-making [11]. Legal strategic culture and legal strategic thinking are described as competent and professional, must meet the requirements of activities in the feld of national security. At the same time, the right of national security consolidates the activities of the state, civil society, and citizens to ensure national security and operates in all social areas related to ensuring national security. However, the most important for its subject area are safe conditions of human life, sovereignty, territorial integrity, and the constitutional order of the state [12].

The development of national security law in Ukraine is influenced by the international legal system and international security law. The fundamental principles of international law – non-use of force or threat of force; peaceful resolution of international disputes; non-interference; cooperation; equality and self-determination of peoples; sovereign equality of states; conscientious performance of obligations under international law;

territorial integrity; respect for human rights; inviolability of borders – defne the principles of national security and exercise organisational influence on the national security law. In the context of the international security system crisis, the national security law fnds its development in the coordination of regulatory provisions and institutional activities with international law [13], confrms its social value as a regulator of public relations, strategic communications to protect national interests in the context of performing the international obligations of the state, ensuring the protection of human rights and fundamental freedoms.

The national security law forms the legal content and legal form of national security and asserts the integrity of national security in all its varieties, sets the legal standardisation and general binding nature of social requirements and regulations on national security issues, defnes and ensures the protection of national interests. The national security law identifes the most stable meaningful connection with the legal order [14], which is essentially combined with the state of national security. Consequently, the right of national security is dependent on the legal order and affects the legal order due to the development of legal infrastructure and legal support for the protection of national interests.

The concept of national security law of Ukraine has its axiological basis, which contains a considerable number of interests and values that are important for society and a person, the achievement of which brings social existence to a level accessible to meet individual and group needs conditioned by the need for sustainable development. The axiology of national security [1, p. 250–304] looks multifaceted, passes from one quality of human and social existence to another, combines values of spiritual and material origin, is covered in the aspect from individual features to general, demonstrating its presence in the centre of the value reality of a person and their needs.

The legal regime of national security law identifies special features, contains a subject (public relations and social communications between subjects in the feld of national security), a method that constitutes a set of imperative techniques and means of legal influence (legal regulation) on certain public relations and social communications, as well as the purpose of ensuring national security, which is specifed depending on the sphere and safe living conditions of a person, society, and the state [5, p. 93–94]. The legal regime of national security is described by rather strict rules for governing public relations, which provides a mandatory method of legal regulation. Such a legal regime may acquire special features of a state of emergency or martial law, which, in particular, describes its exclusive public-legal nature, focused on the protection of generally signifcant interests. Based on the subject and purpose of legal regulation (legal impact), national security law consolidates the corresponding regulatory requirements of constitutional law, administrative,

criminal, information, environmental, and other branches of law related to the legal support of national security, reaching the level of consistency that allows effectively and successfully ensuring the operation of law in the feld of national security. The origins of national security law are contained in constitutional law, and the most stable are the links of national security law with military law, where the commonality of objects and subjects, the unity of the legal regime for ensuring military security, protecting sovereignty and territorial integrity make it necessary to combine scientifc developments and law enforcement practice [15].

Defnition and coverage of the features of national security law in the system of law becomes possible based on value-normative legal understanding [16], thanks to which it turns out that the state is dependent on law and ensures its operation using appropriate mechanisms, the legitimacy of which is obtained in law as in the value-normative system. For its part, legal standardisation demonstrates the general obligation of legal prescriptions provided with the possibility of legitimate coercion, which gives grounds for the operation or the validity of law. Important for substantiating the concept of national security law is a sociological approach that asserts the activity-based foundations of law [17]. The need characteristics of the law cover the issue of interests that fnd their implementation in the national security law as national interests [18]. At the same time, the communicative theory of law [19] allows substantiating the influence of social and strategic communications on the development of the national security law.

National security law has clear features of a nonlinear system, which is manifested in its interaction with related branches of the national legal system and international law. The development of national security law in the system of national law occurs because of linear and non-linear processes, where the main standards do not have pre-programmed forms and content and are stated proceeding from the general need for the development of legal provisions in particular social communications. But social and moralethical, value standards are reflected in the joint interaction of social subjects, when consciousness perceives and reflects these standards precisely as legal provisions and generally binding rules of conduct [20].

2.2. Signs of national security law as a value-normative system

The concept of national security law of Ukraine is based on the general features of law as a social phenomenon, covering its social, value-normative, need-based, communicative, and other features, and at the same time focuses on the features of the subject security sphere [21]. Such approach allows identifying the national security law as a branch of law, a value-normative system of generally recognised and publicly defned statuses, rules of conduct and communications in the national legal system aimed at ensur-

ing safe conditions for human life, the existence and development of society and the state.

The subjects of national security law of Ukraine are the state, society, and the individual. These subjects are societally individualised and specifed in accordance with the specifc features of communications in the feld of national security. The law of national security recognises a person as the most important subject of law [22], the subjectivity of which is justifed by the legal nature and directly depends on the possibilities of ensuring national security. The most important right of human existence – the right to life – actually proclaims the main idea of national security in its anthropological meaning and orients the corresponding activities of the state.

The right of national security of Ukraine has its objects – certain material and non-material benefts, which include national interests, achievements, needs and values of a person, society, and the state in the feld of national security – from state and military to economic, information, anthropogenic security, etc. In the law of national security, its objects – national interests [23] – acquire general significance for society, individual and collective subjects, since they are law-oriented, protected by law or secured by law and are public, legally protected interests.

The unity of objects of national security law is based on a common goal, which is national security. The specifcation of objects in certain types of national security confrms its integrity, which determines the actual integrity of national security law. Objects of national security law exist as corresponding to the systemic multiplicity of national interests – vital interests of a person, society, and the state, the implementation of which ensures safe living conditions and the well-being of citizens, the sovereign existence of the state and society, and the democratic development of the state organisation of society. The main objects of the right of national security are a person's life in the social space, their physical existence and well-being. In these circumstances, the human-centrism of law is confrmed and revealed in the law of national security. Other important national interests, in particular the sovereignty and territorial integrity of the state, relate to the spatial conditions of human and social life, which is reflected in the law of national security.

The national security law of Ukraine as an independent branch of law is based on the corresponding principles. The principles of national security law consider the fundamental, initial ideas and provisions that determine the essence and content of the influence of law on ensuring national security. The basic principles of national security law should include the rule of law; legality; protection and guarantee of human rights and freedoms; priority of protecting national interests that are generally important for society and the state; compliance of branch provisions and regulations with the requirements of international law and

international treaties to which the state is a party.

The functions of national security law of Ukraine specify the functions of national law [24] in its interaction with international law in the feld of national security and cover all areas of ensuring national security and protecting national interests. Consequently, the functions of national security law are regulatory, security, information, preventive, predictive, as well as the function of legal support of national security. Considering scientifc opinions regarding the pragmatic nature of the paradigm of legal functions and their relevance for influencing public relations, the allocation of other functions of national security law is not excluded [5, p. 79–92].

The function of legal support of national security is of particular importance in modern conditions. At the same time, legal security remains relevant for the national legal system, which should be developed through the use of a legal regime containing resources, methods, and means of influencing all components of the national legal system based on the rule of law to ensure their compliance with national culture, traditions, national identity, national needs, property, and interests. National security law as a nonlinear system reflects the content of this branch of law in its structure. The structure of national security law is developed as a result of the specifcation of the legal regime, where the subject – public relations and social communications in the feld of national security – is a determinant, and the purpose of legal influence on such public relations and social communications is specifed.

In such circumstances, the structuring of national security law reflects its specialisation and occurs in a horizontal combination, in the interaction of institutional regulatory communities focused on static branch features – system groups of legal provisions, as well as on its dynamic features – statuses and legal communications developed as a result of the action of such groups of legal provisions [5, p. 333–334]. The structure of national security law of Ukraine is a certain network of regulatory and institutional entities oriented horizontally in the national system of law, interdependent and connected by functional links to the legal support of the relevant type of national security, including international law.

The law of national security unites such (but not exclusively) inter-branch system formations: the law of information security law, the of national security law, the environmental and anthropogenic security law, the economic security law, the military security law, etc. The structure of national security law is dynamic, and the interaction of intra-industry entities is subject to constant changes in accordance with the specifcs, status basis and social communications in the feld of national security.

The law of national security of Ukraine reveals its essential and content features in the system of strategic communications [25], which are of particular importance in the feld of national security

and defence in the context of Ukraine's Euro-Atlantic integration. Strategic communications ensure cooperation between state institutions, society, and citizens in solving security issues and have a corresponding legal content. The application of national security law in the resolution of social conflicts allows coordinating and synchronising the actions of security and defence sector actors, in particular, in the manner of legal and necessary coercion to protect security in the interests of reaching a general compromise. As a result of the operation of national security law, strategic communications in the feld of national security acquire the features of legal strategic communications.

Strategic communications in the feld of national security are carried out considering national interests, and the national security law aligns the interests of individuals and individual social entities with national interests. That is why the national security law effectively affects bringing group interests in line with national interests, and in the case of a socially recognised and statutorily supported need to develop corporate interests, the national security law brings them to a level that ensures national security [5, p. 336–338].

At the same time, the national security law of Ukraine primarily ensures the subjectivity of a person in the sphere of national security and develops a legal barrier to the implementation of possible threats to their life. Subjective rights, freedoms, legitimate interests and legal obligations, as indispensable signs of human subjectivity, in this case are directly dependent on the solution of security issues and at the same time are determined by the level of safety of human life and the state of protection of national interests.

Among the basic human rights in the context of ensuring the right of national security of its subjectivity is the right to security [26], which has the features of an absolute right, but in particular legal relations in the feld of national security it is a subjective right. The right to security in the concept of human subjectivity has an axiomatic meaning as the initial formula of human-centrism of legal reality. Therewith, the human right to security forms the corresponding institution of national security law. Normative-value prescriptions of national security law are implemented in social practice by the state and society as active subjects of national security law.

The subjectivity of the state in legal relations and strategic communications is stipulated in the provisions of the Constitution of Ukraine and specifed in the legislation defning the tasks, functions, and powers of state institutions in the feld of ensuring national security. Such institutions form the security and defence sector of the state, have a legal status defned by law and act in accordance with it within their competence. The subjectivity of society in legal relations and strategic communications in the feld of national security is exercised through certain institutions of civil society. These institutions, in accordance

with the legislation and their statutory provisions, exercise democratic civilian control over the security and defence sector, can take part in strategic communications, conduct analytical, predictive, and other activities to solve systemic national security issues.

2.3. Development of national security law of Ukraine

In the modern conditions of globalisation of the world order, the national security system also becomes the basis for the legal security of society and the state, which lies in introducing the rule of law in the national legal system and developing the rule of law. In these circumstances, the purpose of national security law is updated towards ensuring legal security, that is, the protection of the national legal system from negative factors of regulatory and institutional origin, which objectively accompany global changes in the world order [5, p. 249–251]. At the same time, the national security law receives qualitatively new features, developing a system of legal support for national security. In this system, the law of national security forms the regulatory, and determines the institutional and organisational components [5, p. 252–285].

The regulatory framework of the system of legal support for national security comprises the corresponding constitutional provisions, national legislation, and provisions of international law. Its institutional component makes provision for the activities of special services and law enforcement agencies, prosecutor's ofces and justice bodies, and other subjects of the security and defence sector. For the organisational component of the system of legal support of national security, the system of training specialists for subjects of the security and defence sector, the development of a competent legal culture [27] and a conscious attitude of citizens towards national security as a vital basis for the existence of society and the state are relevant.

The development of national security law is topical in the context of a hybrid war [28], which has been waged by the Russian Federation against Ukraine for a long time. At present, the actions of hybrid warfare have gone beyond the Russian-Ukrainian armed conflict, and a number of states of the world have actually become participants in this confrontation using information, economic, energy, military, and other components, which certainly increases the importance of national security law.

Violations of the provisions and principles of international law by the Russian Federation in the creation of the so-called "security belt of the Russian Federation" ("managed conflict zones") on the territory of former Soviet Union republics that have embarked on the path of development of sovereign states require a suitable legal assessment to protect the national interests of such states. Notably, since the end of the 20th century, with the direct participation or support of the Russian Federation, longterm military and political conflicts began on the

territory of Azerbaijan, Armenia, Georgia, Moldova, Tajikistan, and now – in Ukraine. There were also attempts by the Russian Federation to interfere in the internal affairs of the Baltic States, which managed to protect their peoples by gaining membership in the EU and NATO. In this context, scenarios for the development of events in the post-Soviet space deserve attention, which area addressed by Ukrainian researchers – specialists of the National Institute for Strategic Studies [29, p. 185–195], in particular:

1) "chaos scenario" – the emergence of a continuous conflict zone in the former Soviet Union;

2) "imperial scenario" – the creation of a regional postSoviet empire with the possible repetition of well-known negative historical consequences;

3) "split scenario" – the emergence of the Eastern European democratic and Eurasian imperial segments in the post-Soviet space.

Active attempts to implement the second scenario began 20–25 years ago. However, the events of the last 10–15 years indicate a steady trend towards the development of the Eastern European democratic space, which in the process of "hybrid confrontation" and as a result of such a process, can spread to the entire post-Soviet space. The development of the Eastern European democratic space can also be facilitated by the de facto unifcation of the Member States of the European Union, NATO, and other states of the world to jointly recognise the gross violations of the fundamental principles of international security and the provisions of international law by the Russian Federation.

With adoption in 2018 of the Law of Ukraine "On National Security of Ukraine"[1], the process of developing a new model of the security and defence sector of Ukraine has commenced, which includes the following main components: 1) the system of governance and democratic control; 2) the security forces; 3) the defence forces; 4) the military-industrial complex. In the order of comparison, the authors of this study noted that according to Article 17 of the Constitution of Ukraine[2], the following areas of national security are to be ensured: 1) protecting the sovereignty and territorial integrity of Ukraine; 2) economic security; 3) information security; 4) defence of Ukraine (military security); 5) national security; 6) protecting the state border.

At the same time, in 2018, based on proposals provided by scientists of the Section of National Security Law and Military Law of the National Academy of Legal Sciences of Ukraine, the Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine, and the Military Institute of the Taras Shevchenko Kyiv National University, a list of subject areas of re-

[1] Law of Ukraine No. 2469-VIII "On National Security of Ukraine". (2018, June). Retrieved from http://zakon.rada.gov.ua/laws/show/2469–19 #Text.

[2] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/rada/show/254к/96-вр.

search within the speciality 081 – "Law" was prepared and approved by Order of the Ministry of Education and Science of Ukraine No. 1477 of December 28, 2018[1], which introduced a new area – "national security law; military law". In 2019, the introduction of educational specialisations "national security law" and "military law" in higher education institutions began.

The formula for specialisation "national security law; military law" in accordance with the provisions of the specifed Order of the Ministry of Education and Science of Ukraine was proposed in the following wording: "Research of public relations in the feld of national security and defence, as one of the main functions of the state; legal bases of state sovereignty, constitutional order, territorial integrity and inviolability of the borders of Ukraine, legal support of state and military security and border security; system and state-legal mechanisms for ensuring national security and defence of Ukraine; statutory regulation of the activities of the security subjects and security sector, military law enforcement agencies and military justice bodies; legal issues of implementation of standards of the Member States of the European Union and the North Atlantic Treaty Organisation in the legislation of Ukraine".

Considering the above and other transformation processes taking place in Ukraine and the world, during 2018–2021, researchers of the Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine (currently the State Scientifc Institution "Institute of Information, Security and Law of the National Academy of Legal Sciences of Ukraine") together with representatives of the Section of National Security Law and Military Law of the National Academy of Legal Sciences of Ukraine, Ivan Chernyakhovskyi National Defence University of Ukraine, Military Institute of Taras Shevchenko Kyiv National University, Military Law Institute of Yaroslav Mudryi National Law University, National Academy of Security Service of Ukraine, Bohdan Khmelnitskyi National Academy of State Border Service of Ukraine, National University "Ostroh Academy" and other institutions and establishments of Ukraine with the participation of specialists from the security and defence sector entities and representatives of a number of EU and NATO Member States, topical issues of ensuring national security and international legal order were elaborated and priority areas for the development of legal science in this area were proposed. Based on these and other scientifc achievements [5; 15; 30], the Development Strategy of the National Academy of Legal Sciences of Ukraine

[1] Order of the Ministry of Education and Science of Ukraine No. 1477 "On the Statement of the Approximate List and the Description of Subject Directions of Research within a Speciality 081 "Law". (2018, December). Retrieved from https://mon.gov.ua/ua/npa/prozatverdzhennya-primirnogo-pereliku-ta-opisu-predmetnih-napryamiv-doslidzhen-v-mezhah-specialnosti-081-pravo.

for 2021–2025[1], approved by the General Meeting of the National Academy of Legal Sciences of Ukraine on March 26, 2021 (defnes priority areas, tasks, and principles of further development of legal science, scientifc support for the modernisation of state-legal relations in Ukraine, promoting the growth of legal culture among the population) was supplemented with a separate section "Legal Support in the Field of National Security and Defence". Research in the medium term can be based on corresponding areas, in particular:

– theoretical and legal grounds for ensuring national, information, and cyber-security, protecting the sovereignty, constitutional order, territorial integrity of Ukraine, human and civil rights and security;

– legal basis for the development and implementation of national policy on national security and defence, development of the national security system, reform and development of subjects of the security and defence sector and the military-industrial complex in the context of EuroAtlantic integration of Ukraine;

– theoretical foundations of the development of national security law, international security law and military law; methodological and applied principles for the development of legislation on national security and defence, legal support for the organisation and activities of security sector entities, the functioning of non-state security sector entities as a component of the national security system of Ukraine;

– legal principles for ensuring national security in the foreign and domestic political spheres, in the sphere of national security, in the military sphere and in the sphere of state border security; modernisation of the legal policy of Ukraine regarding economic, energy, and environmental security strategies in the context of global and regional transformations;

– problems of combating terrorism, as well as cybernetic and organised crime and corruption, countering crimes against the foundations of national security, against the peace and security of humanity and the international legal order; legislative support of intelligence and counter-intelligence activities;

– relevant issues of ensuring information security of Ukraine as one of the main functions of the state; legal grounds for ensuring cyber-security, combating cybercrime, cyber espionage, and cyberterrorism;

– legal support for the protection of personal data, information with restricted access, technical protection of information, prevention and counteraction of negative information influences and influences of information technologies to the detriment of a person, society, the state, and international law and order;

– legal aspects of the establishment and development of democratic control

[1] Development Strategy for National Academy of Legal Sciences of Ukraine for 2021–2025. Retrieved from http://www.aprnu.kharkiv. org/doc/strategiya_2021.pdf.

over state and non-state actors of the security and defence sector; legal grounds of civil-military cooperation, establishment and development of the strategic communications system of the security and defence sector and Euro-Atlantic integration of Ukraine;

– legal issues of establishment and development of systems of regional (subregional) and international security, international cooperation in this area and harmonisation of national legislation with the provisions of international law, EU legislation, and NATO standards in the feld of security and defence.

CONCLUSIONS

Consideration of the theoretical foundations and priority areas for the development of national security law allows drawing the following main conclusions and proposals. National security law forms an independent branch in the national legal system that governs public relations in the feld of national security of Ukraine. Its regularities and features, essential and content characteristics, features, principles, and functions create a system of knowledge about national security law. The national security law defnes the objects of protection – national interests and the system of subjects of the security and defence sector. The applied signifcance of national security law lies in the development of a system of legal support for national security, which includes regulatory, institutional, and organisational components. The national security law is also the basis for the development of appropriate strategic thinking and legal culture, as indispensable organisational components of the system of legal support for national security. The law of national security, along with military law and international security law, in the conditions of hybrid war and international armed conflict, global transformations

and crisis processes in the system of international security, performs relevant tasks of legal support for the security of a person and citizen, society and state and international law and order at the national, regional (subregional), and international levels and is a vital area for the development of legal science. The national security law in Ukraine is established and developed considering the introduced model of national security, the features of the legal system and the system of state government, national historical and cultural values, as well as political, informational, economic, military, and other factors. At the same time, the national security model and national security law of the United States and the corresponding standards of the EU and NATO Member States deserve attention.

Legal support of the strategic communications system and the system of democratic civilian control over the security and defence sector, considering the experience and standards of the EU and NATO Member States, constitutes an extremely relevant area for the development of national security and military law in the context of Ukraine's European and Euro-Atlantic integration. Identify-

ing priority areas of development and relevant fundamental and applied research is a prerequisite for the effective implementation of functions and public purpose by the national security law in the interests of ensuring the security of a person, society, the state, and the international community.

RECOMMENDATIONS

The practical value of the study was to cover the features of national security law as a value-normative system of statuses, rules of conduct, communications, which has public recognition and is legitimised to ensure safe conditions for human life, the existence and development of society and the state, and to justify the development of the subject area of national security law towards qualitative indicators of legal support of all components of the national security system, structuring its types, levels – from national to international, entering the legal system of collective international security based on international principles and standards that form such a security system.

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STRENGTHENING OF THE INSTITUTIONAL CAPACITY OF THE CONSTITUTIONAL COURT OF UKRAINE IN THE CONDITIONS OF MODERN SOCIETY AS A SCIENTIFIC AND PRACTICAL PROBLEM

Abstract. *Modern scientific research of the problems of constitutional jurisdiction in Ukraine is conditioned not only by their established theoretical and practical significance for legal doctrine and law enforcement. In the context of modern global challenges and threats that inevitably affect the domestic legal order of Ukraine, taking into consideration the national problems in the field of human rights and freedoms, interaction between state and society, lawmaking, law enforcement and administration of justice, etc., the need to strengthen the institutional capacity of the Constitutional Court is an important scientific and practical task. It is aimed at strengthening the stability of the institution of constitutional jurisdiction in difficult sociopolitical situations, restoring public confidence in the Constitutional Court and the state in general, improving the legal protection of the Constitution of Ukraine and ensuring its supremacy, reviving respect for the Basic Law and the rule of law, accommodating the functioning of the Constitutional Court to the best international standards of constitutional jurisdiction. The purpose of the article is to sub-*

stantiate the study of the problem of strengthening the institutional capacity of the Constitutional Court of Ukraine as a complex scientific andapplied issue, which provides for its solution in the interdisciplinary scientific space. General scientific research methods, sociological method, structural-functional, as well as interdisciplinary approaches, are used. The institutional capacity of the Constitutional Court of Ukraine is considered as an institutional property of a body of constitutional jurisdiction, which reflects its organisational and functional ability to ensure the implementation of its tasks, functions, and powers under certain conditions and resources. Indicators of the institutional capacity of the Constitutional Court are efficiency, stability, and adaptability to changes. Strengthening the institutional capacity of the Constitutional Court should take place through legal support for strengthening its independence from political influence, improving mechanisms for selecting candidates for judges, modernising constitutional proceedings, developing a mechanism for the Court's interaction with the public, and so on. The main directions of the study of the institutional capacity of the Constitutional Court are determined

Keywords*: civil society, rule of law, constitutional jurisdiction, complex problem, interdisciplinary approach*

INTRODUCTION

The institution of constitutional jurisdiction is an integral feature of the democratic, social, legal state that Ukraine has proclaimed itself to be. The body of constitutional jurisdiction is called to protect the Constitution and constitutional values – man, his life and health, honor, dignity, inviolability, security, his decent living conditions, rule of law, freedom, equality, justice, the sovereign will of the people, democracy and other ideals of civil society. Therefore, since the founding of the institute of constitutional jurisdiction, then still in the Ukrainian SSR, the study of theoretical problems, and with the beginning of the actual activity of the Constitutional Court of Ukraine (1996) – and practical, play a priority significance in domestic legal science.

In addition, the need for modern scientific understanding of the problems of constitutional jurisdiction is caused not only by their established theoretical and practical significance. Scientific approaches to the problems of the Constitutional Court of Ukraine (hereinafter – the Constitutional Court, the Court) must be adjusted under the influence of dynamic changes in society because "social structures are partly sources of influence on the restriction or formation of power relations, determine power relations" [1]. Therefore, based on a solid theoretical basis and the methodological basis laid down in scientific works, further scientific research on ways to solve the problems of constitutional jurisdiction in Ukraine should consider modern global challenges and threats, as well as the conditions of modern Ukrainian society.

The negative tendencies of violation of human and civil rights and freedoms are deepening in Ukraine. In particular, according to the VRU Commissioner for Human Rights, the number of reports of

violations received by the Ombudsman during 2020 increased by 40% compared to last year [2]. The situation with human rights violations against human rights defenders, journalists, volunteers, and other representatives of civil society has also worsened [3]. Vulnerability to human rights contributes to developmental delays, and efforts to restore stability can create the conditions in which social and economic recovery and development can begin or resume [4]. Objectively, this highlights the problem of strengthening absolutely all elements of the human rights mechanism of the state, including the Constitutional Court as one of its key elements.

Therefore, effective constitutional and jurisdictional protection of rights and freedoms is the cornerstone of today. It should be noted that the quantitative annual figures for appeals to the Court with constitutional complaints traditionally exceed similar data for other forms of constitutional appeals. However, against the background of the need to increase the role of the body of constitutional jurisdiction in the system of protection of human rights and constitutional values of civil society, the Court at the end of 2020 gained a high level of public distrust (69% [5]).

It should be borne in mind that in pursuing the European course, the irreversibility of which is enshrined at the constitutional level, Ukraine must maintain the stability of the institution that ensures the rule of law, at the appropriate level in terms of EU membership. After all, in the framework of cooperation between Ukraine and the EU in the field of justice, freedom, and security, special importance is attached to strengthening the rule of law and strengthening institutions at all levels in the field of governance in general and the judiciary in particular. Cooperation is aimed at strengthening the judiciary, increasing its efficiency, guaranteeing its independence and impartiality, and combating corruption, and should be based on the principle of respect for human rights and fundamental freedoms.

In addition, the new legal conditions for the functioning of the Constitutional Court should be considered. The constitutional reform of 2016 in the field of justice was the starting point for the next stage in the history of the formation and development of the institution of constitutional jurisdiction in Ukraine and gave additional impetus to the study of the organisation and operation of the Court. But socially useful, at first glance, legislative innovations in the institution of constitutional jurisdiction potentially carry risks of inefficiency and need to be tested over time. In addition, any legislative transformations in the status, organization, and functions of the authority objectively affect the state of its institutional capacity. In particular, the 2017 year of the Court's work was significant, during which the Court (including due to the inability to elect the President of the Court) considered only 3 cases, compared to the usual statistics: on average about 10–13 cases per year.

Thus, in modern society, the need to strengthen the institutional capacity of the Constitutional Court of Ukraine is an important scientific and practical task aimed at restoring public confidence in the Court, reviving respect for the Constitution of Ukraine and the rule of law, strengthening the stability of constitutional jurisdiction in complex sociopolitical situations, bringing the work of the Constitutional Court closer to the best international standards of constitutional jurisdiction.

The purpose of the article is to substantiate the study of the need to strengthen the institutional capacityof the Constitutional Court of Ukraine as an important complex scientific and applied problem and the prospects for its solution using interdisciplinary methodological tools.

1. MATERIALS AND METHODS

During the writing of the article, general scientific research methods (analysis, synthesis, analogy, generalisation) were used, which were the theoretical basis for forming the concept of institutional capacity of the Constitutional Court of Ukraine and determining its key parameters. In particular, in the course of scientific research using the methods of analysis and generalisation, the basic characteristics of institutional capacity extrapolated to the sphere of constitutional jurisdiction were identified. Scientific research of the problem of institutional capacity of the Constitutional Court involves the application of the structural and functional approach, which allows to analysing the problem through the prism of the general features of the Constitutional Court as a body of state power and its features as a body of constitutional jurisdiction with assigned tasks, functions, powers, personnel composition, organisational structure, administrative procedures, constitutional proceedings, namely as a state institution.

The analysis of the problem of strengthening the institutional capacity of the Constitutional Court of Ukraine is based on the provisions of the Constitution of Ukraine, the Law of Ukraine "On the Constitutional Court of Ukraine", the Rules of Procedure of the Constitutional Court of Ukraine, the Communication Strategy of the Constitutional Court of Ukraine for 2019–2021, project on Strategy for the Development of Justice and Constitutional Judiciary for 2021–2023, bills on the constitutional jurisdiction reform. In the process of developing a theoretical model for a comprehensive study of this problem, the authors considered the results of research conducted over almost a quarter of a century of the existence of the institute of constitutional jurisdiction in Ukraine.

At the same time, from the published scientific sources on the problems of organisation and activity of the Constitutional Court of Ukraine, the new resource of scientific knowledge is largely concentrated in dissertations. Their systematised data (search, selection, and systematisation of data is the result of analysis of bibliographic records of scientific works contained in the system of electronic and

traditional catalogs and files of the Vernadsky National Library of Ukraine and the National Library of Ukraine named after Yaroslav the Wise) showed that the priority role in solving the problems of constitutional jurisdiction belongs to the theory of constitutional law. Each of the dissertations contains adequate proposals for improving the organisation and activities of the Court, increasing the efficiency of its work.

However, through the prism of the category of institutional capacity of the body of constitutional jurisdiction, basic research has not been conducted, which, among other reasons, attracted the attention of the authors to explore the scientific perspectives of this topic.

2. RESULTS AND DISCUSSION

2.1. A systematic view of the category of institutional capacity in modern society

A complex scientific problem is a system of various theoretical and practical tasks that belong to the subject field of research and are united by its common goal. Objectively speaking, almost all the problems that modern social development poses to science are complex, systemic in nature. Their solutions require the joint efforts of representatives of different fields of knowledge and/or scientific specialties of one field. The application of an integrated approach is traditionally used by modern legal science in the study of the phenomena of state and legal reality. Thus, complexity is an important component of modern scientific thinking. This category means taking into account the relationships and integrity of social life, the deep internal connection of its various spheres.

The problem of strengthening the institutional capacity of the Constitutional Court in modern society is no exception. The complex nature of this problem is due to the multifactorial dependence of the institutional capacity of the Constitutional Court, as well as the specifics of the concept of "institutional capacity" itself as one of the essentials in the study. As shown further, it is multidimensional and requires a systematic approach. Using the categories of terminology, the authors characterise the combination of terms "institutional capacity" as a multicomponent, formed by two tokens: "institutional" and "capacity". In this case, the adjective "institutional" refers to "institution" (meaning agency, establishment) and is derived from it [6]. In English, a society, organisation, institution is translated as "institution" [7].

The noun "capacity" means a property in the sense of capable, namely having the ability to perform, to act, to do something; who can, has the ability to do anything; the ability to do something; the presence of conditions conducive to something, circumstances that help something; possibility [7]. The English translation of the word "capacity" is also multivariate: capacity, capability, volume; ability, readiness, competence, opportunity, designation, position, legal capacity [7]. At the international level, institutional capacity is treated in the context of the national development of

states. The publication of the United Nations Development Program (UNDP, UNDP, the Agency for Assistance to Countries in Achieving Sustainable Development Goals), "Measuring Capacity" offers a general understanding and structure for measuring institutional capacity.

UNDP defines capacity as the ability of individuals, institutions, and societies to perform functions, solve problems and set and achieve goals on a sustainable basis. Capacity (or potential) development, according to the UNDP approach, means "how" to make development work better. In other words, it is about making institutions more capable (effective) of providing and promoting human development. UNDP notes that the strength of national institutions (formal, informal, public, private) is crucial to achieving national development goals, the progress, and achievement of which is due, inter alia, to changes in the efficiency, stability, and adaptability of institutions. Hence, the key to achieving the goals of national development is the constant improvement of the efficiency, stability, and adaptability of national institutions. **Efficiency** is seen by UNDP as the ability of an institution to turn invested resources into productive use, **stability** means to seek solutions to problems and remove barriers, **adaptability** means to adapt to changing realities [8]. UNDP calls efficiency, stability, and adaptability the institutional qualities to be demonstrated by key government systems, especially in crisis situations [9].

2.2. Essence of institutional capacity in the context of national development

Analysing theories of social development, Stanford University professor Stephen D. Krasner concludes that the theory of institutional capacity in strengthening the state plays an important role in the state apparatus, which is able to concentrate and effectively develop power for social purposes, and be able to establish order and rule law [10]. Without effective institutions, chaos can appear and sustained economic growth will not be possible [10]. The stance of the capacity of state and public institutions has a direct impact on the stance of state institutional capacity ("state capacity"). In this context, Hanna Klipkova develops the concept of the capacity of state institutions as a tool for studying the institutional quality of the state. The use of the category of the capacity of state institutions, as the researcher notes, allows studying the real capabilities of the state, to find out who actually manages them, using power mechanisms to achieve private goals. The capacity of the state-institutional system is a key factor for the possibility of reforming, developing, and eventually the existence of a society with the current form of the political system. This category determines the level of viability of the state [11]. In the context of the institutional capacity of the state, Hanna Bäck (University of Mannheim) and Axel Hadenius (Lund University) use the term "functioning state", referring to its first feature – statehood (the ability of public authorities

to maintain monopolistic control in the military, legal and financial terms) [12].

In turn, Kateryna Zarembo also identifies the concept of "institutional capacity" with the concept of "statehood", and considers institutional failure as a key factor in the weakness of the state [13]. Oleksiy Valevsky attributes institutional capacity to a high level of institutionalisation (the process of forming stable models of social interaction), which ensures the proper performance of its functions by the authority. In contrast to institutional capacity, a low level of institutionalisation (institutional failure) indicates a weak impact of the institution on the social situation. Therefore, institutional capacity ensures the implementation of effective policies, and institutional failure always produces conflicting and ineffective policies [14].

According to Mykhailo Savchyn, the institutional capacity of the state is declared in Article 3 of the Constitution of Ukraine. Based on this, the meaning of the functioning of the Ukrainian state is to provide conditions for the free development of the individual. This fundamental postulate establishes requirements for the state to act in accordance with stable and predictable rules of the game, which determine the legal certainty and validity of government decisions [15]. That is, human rights themselves determine the requirements for the quality of organisation and operation of public institutions [16]. Thus, the ability to consistently enforce power decisions focused on human rights indicates the institutional capacity of the state [15]. The general concept of institutional capacity is given by the authors of the scientific-analytical report "Institutionalisation of public administration" (2019): institutional capacity is organisational and functional ability of the institution to implement its objectives and achieve the goals of activity [16].

Hence, the essence of institutional capacity is revealed through the categories of quality, efficiency, productivity (resultativity), firmness, sustainability, stability, etc., which reflect a certain state of public or private institutions. This concept is multidimensional, through which it is possible to systematically approach the study of institutional problems of the state in the context of the relevant goals of national development, to consider these problems in the context of the "concept of stabilisation". Foreign analysts Steven A. Zyck and Robert Muggah have noted that stabilisation requires a combination of tools and approaches, and should be understood as the result of a combined multi-component strategy [4].

2.3. The concept of the institutional capacity of the Constitutional Court of Ukraine

In relation to a public authority, institutional capacity can be considered as:

a) its institutional property;

b) institutional capacity (reserve);

c) the total indicator of efficiency, stability, adaptability;

d) the institutional component of the mechanism of the state;

e) the parameter of its institutional capacity;

f) the condition of national development;

g) the factor of formation of institutional trust.

Extrapolating the characteristics of institutional capacity to the sphere of constitutional jurisdiction, it can be noted that **the institutional capacity of the Constitutional Court is an institutional property of a body of constitutional jurisdiction, which reflects its organisational and functional ability to ensure the implementation of its tasks, functions, and powers.**

Based on the scheme of measuring the level of institutional capacity proposed by the UN Development Program, the key components of the theoretical model of the institutional capacity of the Constitutional Court are efficiency, stability, adaptability. The methodological way of theoretical development of the problem and formation of the doctrinal model of strengthening the institutional capacity of the Constitutional Court is the structural-functional approach. Organisational and functional aspects of this approach are complementary (cumulative): organisational reflects the conditionally static form of the institutional characteristics of the Court; functional reflects the dynamic side (activity).

The structural-functional approach is based on the analysis of the Court through the prism of its general features as a body of state power and special characteristics as a body of constitutional jurisdiction with assigned tasks, functions, powers, formation, staffing, organisational structure, administrative procedures, constitutional proceedings, that is, as a state institution. This approach allows identifying the following key areas of research on strengthening the institutional capacity of the Constitutional Court at the present stage:

1) The state of legal support of the organisation and activity of the Constitutional Court and ways of its improvement;

2) the mechanism for selecting candidates for the positions of judges of the Constitutional Court;

3) the effectiveness of the structure of the Constitutional Court and the implementation of its functions;

4) efficiency of execution of acts of the Constitutional Court;

5) the mechanism of interaction between the Court and civil society.

The state of the institutional capacity of the Constitutional Court plays an important role in the development of the statehood and legal system of Ukraine. M. Savchyn puts the ability of the Constitutional Court to make decisions based on constitutional values and principles as the first parameter of the institutional capacity of the state [15]. Therefore, since the Constitutional Court is the last legal "bastion" in the mechanism of national remedies, in the context of the implementation of the constitutional duty of the state (Article 3 of the Constitution of Ukraine), the higher the level of institutional capacity of the Court, the better

the stance of the protection of rights and freedoms of human and citizen and other subjects of civil society, the higher the degree of respect for the Constitution and constitutional values, as well as the degree of institutional trust in the Court, stronger its authority and stronger the state itself.

2.4. The role of the institutional capacity of the Constitutional Court of Ukraine for national development

The appropriate level of institutional capacity of constitutional courts is especially important in unstable and

contradictory sociopolitical conditions, conflicts, crises, and other turning points for the state. The Court of constitutional jurisdiction in its activities, notes V. Kovalchuk, constantly balances between law and policy, which significantly distinguishes it from the courts of general jurisdiction. Being, essentially, a non-political institution, by virtue of its powers, the constitutional court is forced to make decisions that have essential political significance. This is especially relating to the constitutional justice in developed democracies, where courts base their decisions not only on positive constitutional norms but also on unwritten constitutional norms and principles, and also carry out "creative", namely expanded interpretation of the constitution, which may arouse "suspicion" regarding their impartiality and political neutrality [17].

As explained by Nathan J. Brown, Julian G. Waller, in cases of constitutional vacuum, including when the political system operates outside the constitutional field, constitutional courts seem to cease to play their primary role (explain the content and spirit of the constitution). However, as per the fact that courts play a role in resolving fundamental issues, they and their judges can go beyond a strictly formalised decision framework. In such cases, constitutional courts often serve as the ultimate symbols of the permanence and legitimacy of the state, which is above the vicissitudes of politics [18]. Therefore, in the context of democratic transit, notes S. Gardbaum (University of California), constitutional courts need a careful balance between constitutional scrutiny and political provocations. Constitutional courts may entrust this balance to the law, taking a wise and cautious political decision [19].

In this context, the **state of the institutional capacity of the Constitutional Court largely depends on the state of its institutional independence**. In general, the independence of the judiciary from the direct political domination of another branch of government is a critical and traditional source of the judiciary [20]. The institutional independence of the judiciary is a complex and multifaceted phenomenon, as it should be seen as preventing any undue outside influence on the judiciary, its full autonomy from other branches of government, which means non-interference in the judiciary, and presupposes judicial independence in all its aspects, manifestations, guar-

antees of independence and inviolability of judges in full. Such independence is universal in the constitutional and legal dimension, given its importance as an essential requirement of the principle of separation of powers, the rule of law, and the right to judicial protection [21–23].

As convincing analysis of recent trends in the practice of the Constitutional Court to protect judicial independence, there is not only a violation of the individual guarantees of judicial independence but also an intervention in the institutional independence of the judiciary in Ukraine as an independent arbitrator from among the other branches of government through the introduction of aggregate legislative changes in the national judicial system, which encroached on its constitutionally defined structure and key guarantees of the independence of judges (the principle of immutability of judges, their proper material maintenance, ensuring the independence of judicial self-government) [24–26]. This indicates the presence of signs of crisis in the relationship between the legislative and judicial branches of government, which undermines public confidence in the latter, contradicts the constitutional principles of separation of powers, the rule of law, eliminates the right to judicial protection, and weakens the constitutional order in general.

It is important to note that in the context of modern judicial reform in Ukraine, the strengthening of the institutional capacity of the Constitutional Court should be carried out considering the current demands of society for the integrity of government. The Constitution of Ukraine [27] and the Law of Ukraine "On the Constitutional Court of Ukraine" [28] stipulate that judges of the Constitutional Court must have high moral qualities and be lawyers with a recognised level of competence. It is clear that every candidate for the position of a judge of the Constitutional Court deserves such characteristics due to his/her efforts and achievements in the scientific and/or practical field. At the same time, for the objectivity of the selection, it would be expedient to focus on a scientifically sound list of moral qualities and, perhaps, business abilities required to hold the position of a judge of the Constitutional Court, the methodology of their evaluation, using the Standards of Professional Ethics to be established by the Court. These legislative requirements should be supported by the principle of the integrity of judges of the Court.

CONCLUSIONS

External threats and internal challenges are a powerful stimulus to strengthen the potential of the Ukrainian state and its key institutions. One of the most important factors in establishing a developed civil society in Ukraine according to the best European standards is the stable and effective operation of the Constitutional Court of Ukraine. The establishment of the Constitutional Court in Ukraine was the most significant step towards the development of our state as a legal state and of Ukrainian society as a civil soci-

ety. The Constitutional Court of Ukraine ensures the rule of law, the rule of the Constitution and is the only body of the state that by exercising its functions and powers provides legal protection of constitutional values and ideals of civil society: man, his life and health, honor, dignity, inviolability, security, its decent living conditions, freedom, equality, justice, the sovereign will of the people.

The multidimensionality of the phenomenon of constitutional jurisdiction and, accordingly, the multifaceted nature of its research in the field of domestic science is demonstrated by the scientific works of theorists of common law doctrine, constitutionalists, and other scientific specialties. In the field of legal science in times of independence of Ukraine, a huge amount of scientific work on development issues of constitutional jurisdiction was held. At the same time, in the context of world trends in global development and national conditions for the formation of the rule of law and civil society, increasing the institutional capacity of the Constitutional Court of Ukraine is a significant scientific and practical problem. It is comprehensive and requires an interdisciplinary approach.

The institutional capacity of the Constitutional Court is a parameter of the institutional capacity of the state itself and, at the same time, is a factor in the formation of institutional trust. It is largely through the "channel" of constitutional jurisdiction that the Constitution of Ukraine exerts a reciprocal influence on society, strengthening its position in relations with the state. Hence, against the background of general trends in modern jurisprudence and its branches, improving the institution of constitutional jurisdiction in Ukraine means not so much and not primarily point changes in the mechanism of its functioning, but a systematic update of this mechanism by strengthening the institutional capacity of the Constitutional Court.

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FOREIGN EXPERIENCE IN CONSTITUTIONAL AND LEGAL REGULATION OF RESTRICTIONS ON HUMAN RIGHTS IN CONDITIONS OF EMERGENCY AND MARTIAL LAW

Abstract. *The study investigates the foreign experience of constitutional and legal regulation of restrictions on human rights in conditions of emergency and martial law in Macedonia, Armenia, Belarus, Moldova, Georgia, Latvia, Lithuania, Albania, Azerbaijan, which is relevant in modern conditions, based on the presence of local military conflicts, emergencies, or the possibility of their existence in many countries of the world. The purpose of this study was to analyse the text and content of the constitutions of foreign countries to clarify and explain the grounds for restricting human and civil rights and freedoms in conditions of emergency and martial law. To achieve this purpose, the study*

employed a system of methods of scientifc cognition, namely general scientifc (analysis, synthesis), particular (comparative, quantitative and qualitative analysis, approximation), as well as special legal (formal legal, comparative legal) methods. The practical value of the study lies in the identification of four prevailing trends in the constitutions of foreign states to the procedure for determining the scope of restrictions on human rights under special regimes: 1) consolidation of an exhaustive list of rights and freedoms in the constitutions, which cannot be restricted during the period of emergency and martial law; 2) consolidation of an exhaustive list of rights and freedoms in the constitution, which can be restricted to protect human rights, the democratic structure of the state, public safety, the well-being of the population and morals; 3) combining the first two options for consolidating restrictions in the text of the constitutions; 4) consolidation of the possibility of limiting the rights and freedoms of the individual in the texts of constitutions by state authorities under special legal regimes in the interests of national security without specifying partiular rights and freedoms that may (or may not) be restricted

Keywords: *emergency, legal regime, restrictions on human rights, national security, public order, democratic system*

INTRODUCTION

The practice of applying special legal regimes demonstrates that the legislation of most foreign countries considers such regimes as legal institutions governing the state of emergency of the exercise of state power in various situations when the normal functioning of society and the state becomes impossible. Therewith, the introduction of such regimes is inevitably associated with restrictions on human and civil rights and freedoms, which sometimes have an imperative nature with the use of coercion. At the same time, in the modern conditions of the development of civilisation, the introduction of the principle of humanism in all spheres of social existence, restrictions on human and civil rights and freedoms should be reasonable and proportional, restrictions related to the conduct of special legal regimes should not be excessive and imposed in violation of the procedural order. The above requires the development of proper criteria for restrictions on human and civil rights and freedoms under special regimes. Considering the foregoing, for a correct understanding of the grounds, essence, and limits of restrictions on human and civil rights and freedoms under special legal regimes, it is important to investigate the provisions of international law and foreign practice of applying a state of emergency and martial law.

Since special legal regimes serve as the legal basisfor restricting human and civil rights and freedoms, the relevance of the study of the concept, types, and key features of special legal regimes is beyond doubt. Within each country of the modern age and in the international space, emergencies have repeatedly arisen (aggression, threat to the constitutional order of the state, life and health of people and citizens, natural and

anthropogenic emergencies, and other exceptional circumstances), when the normal functioning of society and the state had been complicated. In such circumstances, there is an increasing need for a clear, consistent legal regulation of the behaviour model aimed at overcoming and eliminating the negative consequences of emergencies.

The state has a relatively greater freedom of action when dealing with national security issues. However, any decision of a political or legal nature in a state governed by the rule of law where the rule of law applies is limited by the constitution of the country that establishes the scope of discretionary powers of each body. In Ukraine, the regulation of public relations arising in connection with emergencies has become particularly important after the emergence of a military conflict on the territory of Ukraine and the spread of the Severe Acute Respiratory Syndrome-2 virus (SARSCoV-2) [1, p. 176].

Restriction of human rights and freedoms is an extremely relevant, necessary, and important subject, which is conditioned just by a considerable number of scientific studies of scientists and teachers of higher educational institutions, special academic disciplines, but also by the practical aspect of the coexistence of members of society within the state and global space, when it is necessary to determine how to ensure order in society; which rights can be restricted and which cannot; what is the due procedure for such restriction; how to implement the institution of restriction of human and civil rights and freedoms and still comply with such legal principles as the balance of interests of the individual, society, state, rule of law, legality, proportionality, humanism, etc [2, p. 72].

Certain aspects of the constitutional regulation of human rights restrictions have become the subject of scientific consideration by P. Sabrin [3, p. 219], B. Vankovskaya [4, p. 108], L. Dantfort [5, p. 144], S. Ramet [6, p. 288], D. Harutiunian [7, p. 62], D. Valieiev [8, p. 311], A. Mkrtumian [9, p. 23], M. Bryusis [10, p. 150], M. Rokhava [11, p. 131], E. Chenovich [12, p. 1090], V. Napetvaridze, T. Tskhovrebadze [13, p. 311], D. Lukianov [14, 15], Yu. Barabash [16], Ye. Hetman [17]. The relevance of studying the issue of constitutional legal regulation of restrictions on rights in conditions of emergency and martial states is covered through an evaluation of the signifcance of the principle of legality for society, which ultimately lies in the embodiment of universal values (human dignity, humanism, freedom, justice, and equality) in real legal relations. The principle of legality imposes an obligation on state institutions and their ofcials to comply with the laws (in a broad sense) in the exercise of power.

It is well known that to decide on the legitimacy of the restriction of human rights, the European Court of Human Rights uses the test: whether the restriction of the right isstipulated by law; whether a certain restriction pursues a legitimate purpose; whether the restriction

was necessary in a democratic society; whether such a restriction is discriminatory [18, p. 467]. This approach emphasises that human rights are based on interests that are fairly balanced with the interests of society, which necessitates the state to limit the exercise of human rights. The frst issue – the foreseeability of the restriction of rights by law – become the subject matter of this study.

When restricting the exercise of human rights, state authorities themselves should be limited in their actions by the established provisions of law. Such rules of conduct of state authorities are consolidated in the texts of state constitutions because they act as an agreement between citizens of the country, society and the state to coordinate the interests (private and public) of the parties. Considering the above, it is the constitutional legal regulation of the restriction of human rights by state authorities that is important for preventing arbitrariness by ofcials in law enforcement in specifc life circumstances to coordinate the interests of a person and society.

The purpose of the study is to analyse the content of the constitutions of individual foreign countries to clarify and interpret the grounds for restricting human and civil rights in special conditions to ensure a balance between the protection of fundamental rights and national (state) security.

1. MATERIALS AND METHODS

To carry out the study, a system of methods of scientific cognition was applied, namely general scientifc (analysis, synthesis), particular methods of scientifc cognition used in the branches of many sciences (comparative analysis, quantitative and qualitative analysis, approximation), as well as special legal methods (formal legal, comparative legal). The authors of this study applied the general philosophical (universal) method of cognition at all stages of the cognitive process. The method of approximation, which lies in replacing some objects with others, in some sense close to the original, but simpler, allowed investigating the numerical characteristics and qualitative properties of the object, reducing the task to the study of simpler or more convenient objects (for example, those whose features are easily calculated or whose properties are already known). Used fguratively as a method of approximation, a sign of an approximate, non-exhaustive nature, the method allowed determining the signifcance and level of influence of peaceful assemblies of people on the development of a democratic regime in Belarus.

Using the analysis method, the inherent and individual features of the constitutional and legal regulation of human rights restrictions under emergency and martial law conditions in Macedonia, Armenia, Belarus, Moldova, Georgia, Latvia, Lithuania, Albania, and Azerbaijan were identifed and studied. Comparative analysis provided an opportunity to identify different approaches to the procedure for determining the scope of restrictions on human and civil rights and freedoms

under special regimes stipulatedin the constitutions of foreign states. Using the generalization method, four prevailing trends of restrictions on human and civil rights and freedoms under special regimes in modern countries were identifed.

The method of deduction made it possible, based on the doctrinal opinions of researchers, to draw a general conclusion on the inherent features of constitutional legal regulation of human rights restrictions in conditions of emergency and military conditions, the existing grounds for their classifcation. The inductive method of cognising the provisions of the Constitution of the Republic of Macedonia, the Constitution of the Republic of Armenia, the Constitution of the Republic of Belarus, the Constitution of the Republic of Moldova, the Constitution of the Republic of Latvia, the Constitution of the Republic of Lithuania, the Constitution of the Republic of Albania, the Constitution of the Republic of Azerbaijan provided an opportunity to obtain a general conclusion on the inherent features of the grounds for restrictinghuman rights under a state of emergency and martial law. The historical method of cognition contributed to the coverage of teleological prerequisites for the development of constitutional provisions of foreign countries regarding the restriction of human and civil rights, allowed achieving an in-depth understanding of their essence and substantiate new recommendations for improving the legal provisions.

The study also used special legal methods, namely formal legal and system-structural methods, which were used in the development and study of the terminology of this study, specifcally upon clarifying the content of the categories "martial law", "state of emergency", as well as to cover the features of the defnition of these legal categories in different modern countries.

The regulatory framework for this study includes the Constitutions of foreign countries that establish the legal grounds for the legal restriction of human rights, namely the Constitution of the Republic of Macedonia of November 17, 1991[1], the Constitution of the Republic of Armenia of November 27, 2005[2], the Constitution of the Republic of Belarus of March 15, 1994[3], the Constitution of the Republic of Moldova of July 29, 1994[4], the Constitution of Georgia of August 24, 1995[5], the Constitution of the Republic of Latvia[6], the Constitution of the Republic of Lithu-

[1] Constitution of the Republic of Macedonia. (1991, November). Retrieved from https://www.sobranie.mk/the-constitution-of-therepublic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx.

[2] Constitution of the Republic of Armenia. (2005, November). Retrieved from https://www.president.am/en/constitution-2005/.

[3] Constitution of the Republic of Belarus. (1994, March). Retrieved from http://by-law.narod.ru/index02.htm.

[4] Constitution of the Republic of Moldova. (1994, July). Retrieved from http://www.presedinte.md/titlul2#2.

[5] Constitution of Georgia. (1995, August). Retrieved from https://matsne.gov.ge/ru/document/view/30346?publication=36.

[6] Constitution of the Republic of Latvia. (1922, February). Retrieved from https://likumi.lv/doc.php?id=57980.

ania[1], the Constitution of the Republic of Albania[2], the Constitution of the Republic of Azerbaijan[3]. In addition, the paper used doctrinal sources that cover the content of constitutional legal regulation of human rights restrictions

2. RESULTS AND DISCUSSION

The legal regime is a meaningful legal phenomenon that connects an integral set of legal provisions. The analysis of the constitutions of foreign countries demonstrates that most of them consolidate the possibility of restricting human and civil rights and freedoms in conditions of emergency and martial law. Notably, the scope of such restrictions is almost the same for both the martial law regime and the state of emergency. Based on the results of a comparative analysis, the identifed various approaches to the procedure for determining the scope of restrictions on human and civil rights and freedoms under special regimes stipulated in the constitutions of foreign states, which include four prevailing trends:

2.1. Consolidation of an exhaustive list of rights and freedoms in the constitutions, which cannot be restricted (terminated) during a state of emergency and martial law.

Thus, Article 54 of the Constitution of the Republic of Macedonia of November 17, 1991[4] stipulates that the freedom and rights of a person and citizen may be restricted only in cases defned by the Constitution. The freedom and rights of a person and citizen may be restricted during a state of war or a state of emergency in accordance with the provisions of the Constitution. Restrictions on freedoms and rights may not result in discrimination based on gender, race, colour, language, religion, national, or social origin, property, or social status. Restrictions may not apply to the right to life, the prohibition of torture, inhuman and degrading treatment and punishment, the legal defnition of punishable crimes and sentences, or the freedom of personal opinion, conscience, thought, and religious beliefs.

The work on the text of the Constitution of Republic of Macedonia began before the collapse of socialist Yugoslavia in 1991 [3, p. 219]. The most important dispute in the drafting of the Constitution was related to the description of Macedonia as a "state of citizens" (all citizens enjoy equal rights) or as a "national state" (privileges are granted to Macedonians over other groups of nationalities living in the country) [4, p. 108]. The drafters of the Constitution applied a compro-

[1] Constitution of the Republic of Lithuania. (1992, October). Retrieved from https: https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.

[2] Constitution of the Republic of Albania. (1998, November). Retrieved from https: https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf.

[3] Constitution of the Republic of Azerbaijan. (1995, November). Retrieved from https: https://mincom.gov.az/ru/view/pages/13/.

[4] Constitution of the Republic of Macedonia. (2019, January). Retrieved from https://www.sobranie.mk/the-constitution-of-the-republic-ofmacedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspx.

mise formula, defning the country as national in the preamble and consolidating equal rights and obligations of all nationalities in the text. This regulation retains the name "Constitution of the Republic of Macedonia" despite the change in the country's name (originally – the Former Yugoslav Republic of Macedonia, then – North Macedonia). The changes are explainedby the political and legal conflict between Macedonia and Greece, where the latter "insists on its ownership of the copyright to the name "Macedonia" [5, p. 288]. The Former Yugoslav Republic of Macedonia was the ofcial name used since 1993 in the UN [6, p. 144]. In 2018, the governments of Greece and the Republic of Macedonia came to a consensus on the name of the country, as a result of which the Macedonian party changed its name to the Republic of North Macedonia.

Article 44 of the Constitution of the Republic of Armenia[1] establishes that some fundamental human and civil rights and freedoms – except for those referred to in Articles 15, 17–22, and 42 of the Constitution – may be temporarily restricted, as provided by law, during martial law or a state of emergency, within the scope of international obligations assumed to derogate from obligations in emergencies.

The Constitution of the Republic of Armenia was amended in 2005 [7, p. 61]. The changes were a prerequisite for the development of a new judicial system in the country. The effectiveness and efciency of judicial protection is a guarantee of the inviolability of human rights under special regimes. The judicial code, which summarises all approaches and principles of the judicial system and which is designed to ensure judicial and legal reforms, is a unique document that has no world analogues [8, p. 311]. The new judicial system of Armenia recognises case law, the same resolution of judicial disputes in cases with similar factual circumstances. The source of case law in Armenia considers the decisions of the European Court of Human Rights and the Court of Cassation of Armenia [9, p. 23].

According to Articles 23 and 63 of the Constitution of the Republic of Belarus[2], restriction of individual rights and freedoms is allowed only in cases stipulated by law, in the interests of national security, public order, protection of morals, public health, and the rights and freedoms of others. The exercise of the rights and freedoms of the individual stipulated in this Constitution may be suspended only under conditions of a state of emergency or martial law, in accordance with the procedure and limits defned by the Constitution and law. When implementing particular measures during a state of emergency, the rights

[1] Constitution of the Republic of Armenia. (2005, November). Retrieved from https://www.president.am/en/constitution-2005/.

[2] Constitution of the Republic of Belarus. (1994, March). Retrieved from http://by-law.narod.ru/index02.html.

stipulated in Article 24, Part 3, Article 25, Articles 26 and 31 of the Constitution may not be restricted.

The mechanism for implementing the institution of restriction of human rights in the interests of the state in the Republic of Belarus is becoming particularly important in 2020 in the presidential elections of the country for the 6th term of ofce. As noted by M. Briusys, O. Lukashenkohas been the country's president for 26 years. This means that he has been in power in the post-Soviet space longer than the current de facto ruling heads of state, except for Emomali Rahmon in Tajikistan. In international comparison, the regime in Belarus has outlived other regimes by 7–23 years, depending on which typology is used for comparison [10, p. 150].

Article 35 of the Constitution of the Republic of Belarus[1] guarantees freedom of assembly. However, according to M. Rokhav, this right is violated, which suggests that the Constitution is a formality. This feature is often found in authoritarian regimes, but it becomes particularly important for personalist regimes, where the ruler can break the rules according to their will [11, p. 131].

According to the European Union Human Rights Report[2], "the most commonly used tool of the regime'sbrule in Belarus is "soft" repression: these are restrictions that are designed to preemptively prevent the opposition from gaining influence on social processes in the country. The regime systematically restricts freedom of assembly, expression, and association". When determining the signifcance and level of influence of peaceful assemblies of people on the development of a democratic regime in the country, it is worth referring to the opinion of E. Chenovich, who justifed the interrelation between the democratic struggle for power and the active, voluntary participation of the country's population in elections using the example of the law of physics: momentum is equal to mass multiplied by speed ($p = mv$). It approximates the law of physics and assumes that the impulse of disagreement of citizens with the current political and legal regime is the product of the participation of citizens (mass) and the number of protest actions per week (speed) [12, p. 1090]. That is, systematic illegal and undemocratic restrictions on freedom of assembly and expression in a particular country ultimately determine the absence of any influence of the country's population on the political and legal authorities of the country.

Article 6 of the Law of the Republic of Belarus "On Mass Events in the Republic of Belarus" also draws attention to itself[3], imposing the obligation to pay for state functions to maintain law and

[1] *Ibidem*, 1994.

[2] Human rights in Belarus: The EU's role since 2016. (2018, June). Retrieved from www.europarl.europa.eu/RegData/etudes/STUD/2018/603870/EXPO_STU(2018)603870_EN.pdf.

[3] Law of the Republic of Belarus No. 114-3 "On Mass Events in the Republic of Belarus". (1997, December). Retrieved from https://kodeksy-by.com/zakon_rb_o_massovyh_meropriyatiyah.htm.

order during meetings carried out by law enforcement agencies of state authorities on civil society institutions. Thus, the decision to allow or prohibit holding a mass event of the head of the local executive and administrative body is made considering the payment for public order protection services provided by the internal affairs bodies, expenses related to medical care, cleaning the territory after holding a mass event on it.

Article 54 of the Constitution of the Republic of Moldova[1] establishes that laws prohibiting or diminishing human and civil rights and fundamental freedoms cannot be adopted in the Republic of Moldova. The exercise of rights and freedoms is not subject to any restrictions other than those stipulated by law, comply with generally recognised provisions of international law and are necessary in the interests of national security, territorial integrity, economic well-being of the country, public order, to prevent mass disorder and crime, to protect the rights, freedoms, and dignity of others, to prevent the disclosure of information obtained confdentially, or to maintain the authority and impartiality of justice. These provisions do not allow restrictions on the rights proclaimed in Articles 20–24 of the Constitution.

The issue of restricting human rights in the Republic of Moldova under special legal regimes is becoming relevant in the context of the existence of the self-proclaimed Pridnestrovian Moldavian Republic on the territory of the state, unrecognised by the international community. Thus, in the case of Ilašku and others v. Moldova and Russia[2], the applicants submitted that they had been convicted by the Pridnestrovian Court, which had not had the relevant powers to carry out proceedings under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[3], the proceedings had not been fair, resulting in deprivation of property, which was in breach of Article 1 of Protocol No. 1; their detention in Transnistria had not been lawful, which was in breach of Article 5 of the Convention and the conditions of their detention had been contrary to Articles 3 and 8 of the Convention; there had been a violation of Article 2 of the Convention due to his conviction to death. The applicants submitted that the Moldovan authorities were responsible under the Convention for the alleged violations of the rights vested in them because they had not taken any proper measures to put an end to them, the Russian Federation shared the responsibility as the territory of Transnistria had actually been and still is under Russian control due to the Russian troops and military equipment stationed there.

[1] Constitution of the Republic of Moldova. (1994, July). Retrieved from http://www.presedinte.md/titlul2#2.

[2] Case of Ilaşcu and others v. Moldova and Russia. (2004, July). Retrieved from https://hudoc.echr.coe.int/eng#{%22appno%22:[%2248787/99%22],%22itemid%22:[%22001–61886%22]}.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms. (1950, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_004#Text.

The European Court of Human Rights has noted that Member States must be held accountable for any violations of the rights and freedoms protected by the convention committed against persons under their "jurisdiction". The extension of jurisdiction is a necessary condition for the state to be held accountable for actions or inaction that cause violations of human and civil rights and freedoms. The concept of jurisdiction is interpreted in the sense of a term used in public international law[1]. From the standpoint of public international law, the phrase "within their jurisdiction" should be interpreted as the territorial jurisdiction of a state, which implies the jurisdiction of a state throughout its territory. The said presumption may contain an exception under special circumstances, in particular when a state is deprived of the right to exercise its powers in part of its territory. This may be the result of military occupation by the armed forces of another state effectively controlling the territory concerned, acts of war or insurrection, or acts of a foreign state supporting the establishment of a separatist state on the territory of the state concerned.

The European Court of Human Rights emphasizes the superiority of the territorial principle of jurisdiction in the application of the Convention for the Protection of Human Rights and Fundamental Freedoms[2], however, when solving particular cases, it is not necessarily limited to the national territory of states, since in exceptional circumstances the actions of states committed outside their territory or giving rise to consequences there, may indicate that they exercise their jurisdiction under Article 1 of the Convention.

According to the principles of international law, the responsibility of a state can be provided for if, because of military actions (legal or illegal), it exercises in practice effective control over a territory found outside its national territory. The obligation to ensure human and civil rights and freedoms within the specifed territory comes from the fact of such control, regardless of whether it is carried out directly through its armed forces or through a subordinate local administration.

2.2. Consolidation of an exhaustive list of rights and freedoms in the constitution, which may be restricted during a state of emergency and martial law to protect human rights, the democratic structure of the state, public safety, the well-being of the population and morals. Thus, Part 4, Article 71 of the Constitution of Georgia[3] stipulates that during a state of emergency or martial law, the President of Georgia has the right to restrict by decree the rights listed in Articles 13, 14, 15, 17, 18, 19, 21, and 26 of the Constitution in the country or any part of it. During a state of emergency or martial law, the President of Georgia

[1] Case of Ilaşcu and others v. Moldova and Russia, op. cit.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, op. cit.

[3] Constitution of Georgia. (1995, August). Retrieved from https://matsne.gov.ge/ru/document/view/30346?publication=36.

has the right to suspend by decree the operation of Paragraphs 2–6, Article 13; Paragraph 2, Article 14; Paragraph 2, Article 15; Paragraphs 3, 5, and 6, Article 17; Paragraph 2, Article 18; and Paragraph 3, Article 19 of the Constitution in the country or any part of it. The President of Georgia immediately submits the decree provided for in this paragraph to Parliament for approval. The decree on restriction of the rights comes into force immediately after its publication, and the decree on suspension of the provision – immediately after its approval by the Parliament.

V. Napetvaridze and T. Tskhovrebadze, analysingthe process of adopting the Constitution of Georgia from the standpoint of discourse ethics, used the tool of the discourse quality index in accordance with the criteria developed by Jurgen Habermas [13, p. 311]. This methodology focuses on observing the behaviour of participants in the discourse, which allows measuring the quality of political debates. Within the framework of the study, the researchers investigated and analysed over 200 pages of verbatim records of the parliamentary debate on the adoption of the Constitution of Georgia in 1995.

The Constitution of Georgia of 1995 is the legal successor of the 1921 Constitution, which stipulated the mandatory referendum on constitutional issues. Due to the activities of self-proclaimed governments in the Tskhinvali region and Abkhazia, the Georgian government failed to hold a referendum. The topic of the referendum was the main cause of controversy during the debate in the Georgian parliament. One group of parliamentarians argued that the Constitution could not be adopted in violation of the 1921 Constitution. The second group argued for the necessity of adopting the Constitution by the Parliament, since the restoration of the country's independence encourages the adoption of the Fundamental Law of the state, which would guide the future development of the state. On August 24, 1995, the Parliament of Georgia adopted a new Constitution of Georgia.

G. Gabrichidze and his colleagues, analysing the so-called Foundations of the "constitutional" and "legal" system of individual unrecognised subjects on the territory mof Georgia and Ukraine, claim that the "constitutional" orders in these "republics" are described by indisputable similarities, and residents of these entities have the same problems regarding the protection of their fundamental rights and the application of international conventions to them [19, p. 93].

According to Article 116 of the Constitution of the Republic of Latvia[1], human rights established by Articles 96, 97, 98, 100, 102, 103, 106, and 108 of the Constitution, may be restricted in cases stipulated by law to protect the rights of others, democratic state structure, public security, prosperity, and virtues. The expression of religious beliefs may

[1] Constitution of the Republic of Latvia. (1922, February). Retrieved from https://likumi.lv/doc.php?id=57980.

also be restricted based on the conditions set out in this Article. In Latvia, national security issues are governed by the Law "On National Security"[1], which defnes the national security system and its tasks. The specifed law defnes the competence of the Parliament (Seimas), the Cabinet of Ministers and the President of the state, individual ministries, and self-government bodies regarding discrediting actions to maintain law and order. The Constitution of the Republic of Latvia does not state exresis verbis that the legitimate purpose of restricting fundamental human and civil rights is to ensure national or state security. But if one looks at the practice of the Constitutional Court of the Republic of Latvia, they can see that the court has identifed the protection of state security as a legitimate purpose of restricting rights, along with protecting the democratic structure of the state.

As noted by the head of the Constitutional Court of the Republic of Latvia A. Lavinis, if there is a legitimate purpose of restricting fundamental rights, then the Constitutional Court must perform its special task of weighing, on the one hand, a specifc restricted right, and on the other hand, national security [20]. Thus, in case No. 2004-14-01 of December 6, 2004[2], the Constitutional Court of the Republic of Latvia noted that to use public safety as a lawful purpose of legal regulation, the legislator had to objectively justify the existing or potential link between the adoption of an act and the elimination or reduction of a security threat.nTaking this position, the court ruled out the possibility of the legislator to "hide" behind unfounded references to national security.

In this case, the Constitutional Court of the Republic of Latvia, recognising the restriction as disproportionate, and the refuted provision as unconstitutional, pointed out to the legislator that the reference to the interests of national security was unfounded. The case was related to the institution of migration, which is currently of great interest in European countries due to the desire of citizens of less developed countries to obtain permanent residence in legal, democratic, and social states with an elevated level of economic development. The legal provision contested before the Constitutional Court was part of the Law "On Immigration"[3] and provided that the decision of the Minister of Foreign Affairs and the Minister of the Internal Affairs to include a person in the list of persons for whom entry to the Republic of Latvia is prohibited was not amenable to appeal. Thus, the legislator restricted the human right to a fair trial, pointing out that the purpose of the provision is to protect

[1] Law of Latvia "On National Security". (2002, May). Retrieved from https://likumi.lv/ta/en/en/id/14011-national-security-law.

[2] Judgment of the Constitutional Court of the Republic of Latvia "On the Compliance of Section 61, Paragraph Six of the Law "On Immigration" with Article 92 of the Constitution of the Republic of Latvia". (2004, December). Retrieved from https://likumi.lv/ta/id/97554.

[3] Law of Latvia "On Immigration". (2003, July). Retrieved from https://likumi.lv/ta/en/en/id/68522.

state and national security, as well as to create quick and effective means for situations where state and public security is at risk. Furthermore, as the legislator noted, this is necessary not only to protect state and public security, but also to prevent the disclosure of information with restricted access[1].

Referring to the practice of the European Court of Human Rights, the Constitutional Court of the Republic of Latvia confrmed that it was within the competence of the state to determine the procedure for controlling the entry and residence of foreigners, and especially to regulate the expulsion of foreigners found guilty of a criminal offence.

This refers to the case of C. v. Belgium No. 35/1995/541/627, of May 26, 1996[2]. The Constitutional Court, assessing within the framework of the case the balancing exercise between the interests of protecting national security and the impact on the applicant's right of access to a court, not only determined the limits of the legislator's discretion, but also made several important fndings:

− frstly, the court pointed out that a democratic society had the right to national security;

− secondly, internal security services should be empowered to fulfl their legitimate purpose of protecting national security, but they should not be given an uncontrolled opportunity to violate fundamental rights and freedoms. Therewith, the court recognised the need for procedural restrictions on human rights to prevent the leakage of information that harms national security and noted the breadth of the scope of discretionary powers of the executive branch in matters of national security;

− thirdly, the court recognised that the limits of the exercise of the right to a fair trial can be narrowed in cases related to national security. However, the complete exclusion of remedies cannot be justifed, and the authorities cannot be exempted from effective control by the judiciary when they claim that a case involves national security and terrorism.

Under Article 145 of the Constitution of the Republic of Lithuania[3], when martial law or a state of emergency is imposed, the rights and freedoms specifed in Articles 22, 24, 25, 32, 35, and 36 of the Constitution may be temporarily restricted. According to Article 25 of the Constitution of the Republic of Lithuania, everyone has the right to have their beliefs and express them freely. No one should be hindered from fnding, receiving, or distributing information and ideas. Freedom of expression, as well as the right to receive and impart information, may not be restricted except by law, when it is necessary to protect a person's health, honour, or dignity, private life or

[1] Judgment of the Constitutional Court of the Republic of Latvia "On the Compliance of Section 61, Paragraph Six of the Law "On Immigration" with Article 92 of the Constitution of the Republic of Latvia", op. cit.

[2] Judgment of European Court of Human Rights in the case "C. v. Belgium No. 35/1995/541/627". (1996, May). Retrieved from https://www.refworld.org/cases,ECHR,3f3266b04.html.

[3] Constitution of the Republic of Lithuania. (1992, October). Retrieved from https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.

morals, or for protecting the constitutional order. Freedom of expression of belief and the right to impart information are incompatible with criminal acts – incitement to national, racial, religious, or social hatred, incitement to violence or discrimination, and slander and misinformation.

The interpretation of the content of the specifed Article is provided in the decision of the Constitutional Court of the Republic of Lithuania of 16 May 2019 "On the Compliance of the Decision of the Seimas of the Republic of Lithuania of January 12, 2018 on the Establishment of a Special Investigative Commission of the Seimas of the Republic of Lithuania and the Obligation to Conduct a Parliamentary Investigation of the Lithuanian National Radio and Television and Its Financial and Economic Activitieswith the Constitution of the Republic of Lithuania"[1]. Notably, the Constitutional Court of the Republic of Lithuania exercised a considerable influence on the development of a democratic state governed by the rule of law, the formation of legal practice and legal doctrine of the country [21, p. 234].

The Constitutional Court of the Republic of Lithuania stressed that the provisions of Article 25 of the Constitution represent the constitutional basis of freedom of information, which is inseparable from the constitutional freedom of belief and expression and is a condition of the latter. Consequently, the right of a person to have their beliefs and express them freely (freedom of belief and expression) and the freedom to look for, receive, and disseminate information and ideas (freedom of information) are directly related.

Interpreting the content of freedom of information as the innate freedom of the individual, the Constitutional Court held that this freedom was one of the foundations of an open, just, and harmonious civil society and a democratic state, and an important prerequisite for the exercise of human rights and freedoms stipulated in the Constitution, since a person could fully exercise most of their constitutional rights and freedoms only if they could freely seek, receive, or transmit information, which, in particular, is realised through freedom of the media[2]. In this context, Lithuania is a pluralistic democracy, and freedom of the media is one of its foundations. The content of media freedom is based on the constitutional principle of diversity of sources of public information[3].

[1] Decision of the Constitutional Court of the Republic of Lithuania. (2019, May). Retrieved from https://www.lrkt.lt/en/court-acts/ search/ 170/ta1942/content.

[2] Ruling "On the Compliance of Article 8 and Paragraph 3, Article 14 of the Republic of Lithuania's Law on the Provision of Information to the Public with the Constitution of the Republic of Lithuania". (2002, October). Retrieved from https://www.lrkt.lt/en/court-acts/ search/ 170/ta1212/content.

[3] Resolution "On the compliance of Paragraph 5, Article 5 (wording of June 29, 2000), Paragraphs 1, 3, and 4 of Article 6 (wording of June 29, 2000), Paragraph 1, Article 10 (wording of June 29, 2000), Paragraphs 1 and 2, Article 15 (wording of June 29, 2000) of the Law of the Republic of Lithuania on National Radio and Television of Lithuania and Paragraph 4, Article 31 (wording of August 29, 2000) of the Law of the Republic of Lithuania on the Provision of Information to the Public Under the Constitution

The public's interest in proper information presupposes the corresponding constitutional obligations of the state. The state (its institutions and officials) bears not only a duty of negative content not to obstruct the free flow of information and ideas, but also a duty of positive content to take all necessary measures so that, frstly, other persons do not obstruct such activities, secondly, the media engage in their mission in accordance with the fundamental values of a democratic society in a state governed by the rule of law. Proceeding from this, the state should have proper mechanisms for monitoring the activities of media because the latter have a great influence on society, which can threaten national security, public order, and the legitimate interests of society. Consequently, the freedom of the media is not absolute, there is a possibility of their control as far as other constitutional obligations allow, such freedom does not negate parliamentary control over the media.

2.3. Ccombination of the frst two options for consolidating restrictions in the text of the Constitution.

Under Article 175 of the Constitution of the Republic of Albania[1], during a state of war or emergency, the rights and freedoms stipulated in Articles 15; 18; 19; 20; 21; 24; 25; 29; 30; 31; 32; 34; 39, Paragraph 1; 41, Paragraphs 1, 2, 3 and 5; 42; 43; 48; 54; 55 cannot be limited. In case of a natural disaster, the rights and freedoms stipulated in Articles 37; 38; 41, Paragraphs 4; 49; 51 may be restricted. Acts declaring a state of war, emergency, or natural disaster should indicate the rights and freedoms that are restricted.

Albania recognised COVID-19 as an emergency and applied the rebus sic stantibus principle [22, p. 53], which indicates the impossibility of performing international contractual obligations due to substantial changes and leads to the suspension of the international human rights treaty. This principle allows the treaty to become unusable due to fundamental changes in circumstances. In the international public domain, this principle is an exemption clause from the general rule pacta sunt servanda (promises must be fulflled).

The suspension of international treaties is stipulated by the law of the Republic of Albania on international agreements, which states that a country can temporarily suspend the implementation of relevant international agreements in relations with other subjects of international law but must always do so in accordance with the provisions of international law. Therewith, international, governmental, and interdepartmental agreements differ. Agreements are signed on behalf of Albania by the President of the Republic, or any person authorised by him/her, intergovern-

Republic of Lithuania". (2006, December). Retrieved from https://www.lrkt.lt/en/court-acts/search/170/ta1325/content.

[1] Constitution of the Republic of Albania. (1998, November). Retrieved from https://www.parlament.al/Files/sKuvendi/kushtetuta.pdf.

mental agreements are signed by the Prime Minister, and interdepartmental agreements are signed by the head of the corresponding institution. International treaties are suspended in the same form and by the same person, who, depending on the type of agreement and its nature, has the authority to sign.

The internal procedure involves putting forward a proposal by the competent ministry to suspend an international agreement, which is accompanied by a draft law or decision on suspension and an explanatory report explaining the reasons for the suspension. The consent of the Ministry of Foreign Affairs and the Ministry of Justice is obtained separately. Agreements dealing with European Union issues require the consent of the Ministry of European Integration.

Notably, Albania used the right to suspend international treaties for the second time after 1997, when there were riots and armed uprisings and the overthrow of the state regime in the country.

2.4. Consolidation of the possibility of state authorities to restrict individual rights and freedoms in the texts of constitutions under special legal regimes in the interests of national security, without specifying particularrights and freedoms that may (or may not) be restricted. Consolidation of the list of rights that may or may not be restricted is usually established by special provisions of sublegislative acts of state authorities. Notably, consolidation of the list of human and civil rights and freedoms in the texts of solely sub-legislative acts provides an opportunity for abuse of the right by state authorities, which in practice can lead to violations of human and civil rights and freedoms.

Thus, Part 3, Article 71 of the Constitution of the Republic of Azerbaijan[1] establishes that when declaring war, a state of war and a state of emergency, as well as mobilisation, the exercise of human and civil rights and freedoms may be partially and temporarily restricted, considering the international obligations of the Republic of Azerbaijan. The rights and freedoms whose exercise is restricted are notifed to the population in advance.

In the Judgment of the European Court of Human Rights in the case of Chiragov and others v. Armenia of June 16, 2015[2], the issue of human rights was raised in Nagorno-Karabakh, which today is de jure a recognized part of Azerbaijan, but before such recognition was actually controlled by Armenia and was called the "Nagorno-Karabakh Republic" [23, p. 3840]. In this decision, the court referred to the provisions on the laws and customs of warfare on land, the so-called Hague Regulations (The Hague, October 18, 1907)[3] and noted

[1] Constitution of the Republic of Azerbaijan. (1995, November). Retrieved from https://mincom.gov.az/ru/view/pages/13/.

[2] European Court of Human Rights (ECHR). Case of Chiragov and Others v. Armenia. (2015, June). Retrieved from http://www.refworld. org/cases,ECHR,5582d29d4.html.

[3] Regulations on the Laws and Customs of War on Land. (1907, October). Retrieved from https://zakon.rada.gov.ua/laws/ show/995_222#Text.

that the territory is considered occupied when it is actually transferred to the power of the enemy army. Accordingly, occupation, in the interpretation of The Hague Regulations of 1907, exists when a state exercises effective power over the territory or part of the territory of a hostile state. The term "de facto power" is considered synonymous with the term "effective control"[1]. Military occupation is referred to, in particular, when foreign troops are present on the territory or part of the territory, which capable of exercising effective control without the consent of a sovereign state. Accordingly, the European Court of Human Rights recognised the authority to ensure human rights by the Armenian side in the territory of the "Nagorno-Karabakh Republic", applying the principle of hybrid control and found that the Republic of Armenia, due to its military presence and provision of military equipment, took part in the conflict in Nagorno-Karabakh. It is this military support that has been and remains the decisive factor for conquering and maintaining permanent control over the territory. Furthermore, the budget of the "Nagorno-Karabakh Republic" was formed at the expense of sources of the Republic of Armenia, that is, there is a monetary impact involved. Consequently, the European Court of Human Rights recognised Armenia's obligation to ensure respect for human rights in this territory.

[1] European Court of Human Rights (ECHR). Case of Chiragov and Others v. Armenia, op. cit.

CONCLUSIONS

National security issues are governed at the constitutional level, the Fundamental Law of each state defnes the national security system and its tasks, the competence of the Parliament, the President of the state, the executive body, individual ministries, and self-government bodies. As the analysis of political and legal relations in different countries of the world has demonstrated, the regulation of the rights and obligations of subjects of law becomes particularly important after the emergence of a military conflict on the territory of a particular state. In this regard, the process of implementing human and civil rights requires more imperative methods of regulation, justifably takes the form of an emergency procedure for regulating public relations, sometimes relying on means of coercion.

Therewith, legal provisions and actions of executive state and local self-government bodies cannot avoid control by the judiciary if such a provision or action encroaches on the legitimate interests of a person. The judiciary in general and its constituent parts in particular must guarantee control over the other two branches of government. The Constitutional Court of countries, assessing the compliance of laws with the Constitution, implements the principle of the supremacy of the Constitution, thereby ensuring constitutionaljustice. Courts are competent to verify the lawfulness and constitutionality of decisions taken by other branches of government

in cases where such decisions are related to national security.

National security and human rights come into conflict when restrictions on fundamental rights are imposed in the interests of public safety. The task of state and local government bodies in such cases is to ensure a balance between the protection of fundamental rights, on the one hand, and national (state) security, on the other hand. Fundamental rights can only be restricted if there is a legitimate purpose for such restriction. Several articles of the Convention for the Protection of Human Rights and Fundamental Freedoms refer to national security as a legitimate purpose for which it is permissible to restrict certain rights. Only the protection of constitutional values can be the legitimate purpose of restricting fundamental rights. The rights of persons stipulated in the Constitution may be subject to restrictions in the circumstances provided for by law, in order to, frstly, protect the rights of others, secondly, protect the democratic structure of the state, and thirdly, protect public safety, welfare, and morality.

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UKRAINIAN MODEL OF LUSTRATION: LEGAL SPECIFICITIES AND SOCIAL CONSEQUENCES

Abstract. *The purpose of this article is a systematic analysis of the legal specificities and social consequences of the Ukrainian model of lustration. Based on the formal-legal method and the method of legal interpretation, the authors study more than 20 international and national "lustration" acts that regulate various aspects of government cleansing. Relying on the results of the legal analysis, the authors develop their periodisation of the stages of government cleansing of legal regulation in Ukraine. The obtained results allow considering the beginning of lustration in Ukraine not as traditionally defined legal prohibitions on holding public service by certain categories of civil servants; but restoration of parliamentary-presidential republic model in Ukraine, power deconcentration, and decentralisation. Using the method of legal modeling, the authors substantiate the feasibility of providing the entire theoretical approach to lustration in a narrow and broad sense. This actualises the study of lustration as a legal phenomenon not only from the standpoint of personal renewal of power, but as a legislative strengthening of democratic principles of public service. The authors emphasise the need to modernise international*

regulations establishing lustration standards. Based on the sociological research secondary data analysis, the paper identifies such negative social consequences of lustration in the Ukrainian society as the stigmatisation of "lustrated" civil servants, public service deprofessionalisation, and weakening of social cohesion in Ukraine. This work is of practical value for countries in democratic transit, which have the opportunity to ensure a dialectical balance between respect for human rights and the protection of democracy, relying on the peculiarities of the Ukrainian experience.

Keywords: *government cleansing; lustration legislation; power usurpation; public service; stigmatisation; social cohesion*

INTRODUCTION

The Ukrainian model of lustration differs significantly from lustration practices of Central and Eastern European countries in time-lapse, socio-political conditions of origins, and chosen lustration criteria. Lustration legislation in Germany, the Czech Republic, Poland, Bulgaria, Hungary was introduced in the 1990s to overcome the negative effects of the communist political system on the way to the establishment of young democracies and had a role of "transitional justice" institution. Both Polish laws of 1997 [1] and 2006 [2] were aimed at restoring the truth and historical justice as a basis to build a new democratic state [3]. Somewhat later, lustration started in Serbia (2003), Macedonia (2008), and Georgia (2004) [4]. In Ukraine, however, this mean of government cleansing was implemented on the 24th year of independence of a young democratic state which had already had a democratic constitution and established democratic values.

The Ukrainian researchers traditionally link the beginning of lustration in Ukraine with the adoption of two lustration laws – "On the Restoration of Trust in the Judiciary in Ukraine" No. 1188-VII from April 8, 2014, and "On Government Cleansing" No. 1682-VII from September 16, 2014 [5; 6]. These laws have appeared to be the state response to the request of civil society after the events of the Revolution of Dignity in 2013–2014.

In contrast to the other European countries which have applied lustration legislation to overcome the negative effects of the communist regime, the Ukrainian model of lustration provides government cleansing on three criteria simultaneously. In particular, it implies restricted access to the public service for: 1) involvement in power usurpation at times of President V. Yanukovych ("lustration for V. Yanukovych regime" – the authors' nomination); 2) holding office on leading positions in the Communist Party system or holding office in the Communist Party as full-time employees or undercover KGB agents ("lustration for the communist past"); 3) misstatement on property availability or inconsistency of property value indicated in declarations with the income received legally during this period ("lustration for corruption").

The purpose of government cleansing (lustration) is declared as "non-admission to the management of state affairs for people who carried out measures by their decisions, actions, or omissions aimed at power usurpation by President V. Yanukovych, undermining the national security and defense of Ukraine or violation of human rights and freedoms" (Paragraph 2 Art.1, Law of Ukraine "On Government Cleansing" [7]).

The experience of some European countries shows that lustration is a non-linear and dynamic process that may occur in several waves, clearing its direction and scope. Such an example is Polish and Romanian experiences – they renewed the existing lustration programs in the mid-2000s. Analysing them, Cynthia M. Horne sums up that the policy of late lustration was aimed at embracing "positions of public trust" and was used as a mean of promoting democratic changes by eradicating corruption, mistrust, and inequality in society [8]. She emphasises that new lustration laws in these countries have been restructured and merged with other reform programs, including anti-corruption programs [8]. In contrast, the European countries followed the path of renewing lustration legislation due to fulfillment of its primary goals while the significant difference of the Ukrainian law "On Government Cleansing" [7] is the absence of possibility for such transition and simultaneously involvement of lustration criteria with different legal nature. These criteria have formed three types of lustrations – "lustration for the regime of V. Yanukovych", "lustration for the communist past" and "lustration for corruption". In fact, lustration criteria formed by the Law of Ukraine "On Government Cleansing" [7] testify hybrid nature of the Ukrainian lustration model due to the combination of heterogeneous legal relations.

Evaluation of the Ukrainian lustration process inefficiency is a common position among national scientists. Having reflected lustration "failure" in the national legal practice, Yu. Zadorojniy explains it both by objective (conflict of lustration legislation norms and constitutional norms, a low level of lustration legislative technique) and subjective (lustration delaying, actual lack of political will for conducting lustration, corruption, corporate unity of state power representatives, etc.) factors [5]. V. Kravchuk emphasises the inefficiency of civil society institutions being integrated into the lustration process in Ukraine [9].

The recent decision of the European Court of Human Rights in the case Polyakh and Others v. Ukraine [10] is a no less meaningful event that provides legal law assessment and significantly determines the future of lustration in Ukraine. According to the document, the Court found the violation of Paragraph 1 Art. 6 and Art. 8 of the European Convention on Human Rights [11], underlining that the Ukrainian authorities did not provide convincing grounds for justification of the lustration of people

who had simply held certain Communist Party positions until 1991. The Court acknowledged the disproportionate nature of the lustration measure, emphasising that interference with any applicants was not necessary for the democratic society, and ordered the respondent State (Ukraine) to compensate the applicants' non-pecuniary damage. Considering that the decision of the European Court of Human Rights is a source of law in Ukraine, the analysed document questioned one of the lustration criteria – person's "communist past" (holding leadership positions in the CPSU, working full-time or being an undercover agent in the KGB of the USSR).

The above testifies the necessity to analyse legal specificities and social consequences of the Ukrainian model of lustration that forms the *aim of this paper*.

1. LITERATURE REVIEW

The existed lustration studies are not based on the single fundamental theory of lustration as a legal phenomenon. Studying foreign and domestic researches of lustration allows to defining some theoretical approaches to its analysis:

1) lustration consideration in dialectical relationships with human rights [12];

2) lustration study within the concept of transitional justice and transitological paradigm [13–15];

3) determination of lustration essential features through legislation analysis (degree of lustration measures rigidity, legal shortcomings, etc.). To specify the analysis of each of these approaches, we turn to the context of defining the Ukrainian model of lustration.

Lustration review in dialectical relationships with human rights highlights the necessity to consider legal safeguards and protect against possible power abuses. Bearing in mind the experience of Central and Eastern European countries, the lustration process has a dialectical nature: acting as an institution of "transitional justice" aimed at overcoming negative consequences of the communist political system and protection of democratic norms and values [14], lustration might become a tool of political struggle and possibility of power abuse, it leads to real threats to democratic transformations and reconstruction of the totalitarian regime [15]. This dialectic is represented by the approach of the European Court of Human Rights in cases involving lustration. The need to strike a balance between the concept of "democracy capable of defending itself" and the principle of respect for human rights and freedoms guaranteed by the European Convention on Human Rights [11] is stressed. The former provides the principle of political loyalty for civil servants ("a democratic state has the right to demand from civil servants loyalty to constitutional principles on which it is based" [16]).

The review of comments to the Law of Ukraine "On Government Cleansing" in the final opinion of the European Commission for Democracy through Law [17] it is stated that Ukraine has failed to provide legal safeguards for

human rights effectively in the main lustration law. In the final opinion, Venice Commission emphasised violation of the principles of individual responsibility and presumption of innocence; personal application of the law is too wide; absence of a specially created independent commission to administer lustration process; violation of the requirements of the 1996 Lustration Guidelines [18] for 5-year removal from office; law inconsistency with traditional approaches to lustration and legal relations mixed of different legal nature (in particular, regarding the anti-corruption component and lustration of judges), etc. These comments have not been "addressed" at the national level by making appropriate legislative changes. The Ukrainian researchers – [5; 6; 9] – agree that the further application of the current version of the Law of Ukraine "On Government Cleansing" under Venice Commission recognition of its non-compliance with international standards will mean significant violation of the constitutional rights and freedoms of the Ukrainian citizens. Moreover, it will require state reimbursement of court costs and wages during the forced absence of illegally fired [6].

Within the concept of transitional justice, lustration is shown as a personnel policy for key individuals of the "ancient regime". While in the transitological paradigm, it is defined as a tool and part of the democratisation process. The common is to determine the purpose of lustration – protection of the newly established democracy from the negative impact of the past [13]. The Law "On Government Cleansing" [7] might be considered from the standpoint of transitional justice concept while the "ancient regime" concept refers to the times of power usurpation by President V. Yanukovych that is captured in this legislative act. At the same time, this law simultaneously involves three lustration criteria: "lustration for the Yanukovych regime", "lustration for the communist past" and "lustration for corruption". The transitological paradigm is heuristic at explaining the strategic goal of the law aimed at strengthening democracy. However, means chosen by the legislator to ensure this goal are quite debatable.

In the theoretical studying of lustration measures, content researchers usually distinguish two models of lustration – "rigid" and "soft". The "rigid" model of lustration is based on the traditional approach to lustration providing removal of individuals from politics or legal punishment for past actions during the previous regime [13]. Actually, this model is laid down in Art. 1 of the Law "On Government Cleansing", which defines lustration as "established by law or court decision prohibition for certain individuals to hold definite positions (being on service) (except elective positions) in public authorities and local governments" [7].

The degree of lustration measures "rigidity" provides a misconception about its direct impact on democratisation results. Comparing Spain's and Portugal's democratic transitions after the fall of au-

thoritarian regimes, Omar Encarnación concluded that democracy nature and transition effectiveness are influenced not by the level of repressions but by the country's political development at the stage of late authoritarianism [19]. In Portugal, for example, a policy of cleansing aimed at liberating the state and society from the authoritarian past has nearly thwarted a democratic transition which has become a real "witch hunt". In Spain, as O. Encarnación highlights, abandonment of the past based on compromise and consensus, the politics of oblivion and the movement further turned into the basis of democratic consolidation [19]. It is worth considering that among the Ukrainian scholars there is no unity of positions about a successful and adequate choice of the Ukrainian model of lustration. M. Kutepov and S. Levitsky consider the Polish ("soft") model of lustration laws to be more acceptable for Ukraine, opposing the implemented "rigid" model [20].

The key focus of legal lustration research in Ukraine is aimed at analysing compliance of the Law of Ukraine "On Government Cleansing" with lustration international legal standards [7]. However, such a strategy in the legal field is, in the authors' opinion, limited, as it ignores other legal acts forming an array of lustration legislation. It affects the fact that in most scientific papers on lustration studying the latter is considered in the sense enshrined in the Law of Ukraine "On Government Cleansing" as "established by this Law or court decision prohibition for certain individuals to hold definite positions on public service (except elective positions) in public authorities and local governments" [7]. This legislative definition enshrines a narrow understanding of lustration which by essence and content does not cover all the legislation adopted for its implementation, according to which the cleansing of power in Ukraine was conducted.

It is proposed to consider lustration in a broad sense, based on the purpose of its application, defined in Art. 1 of the Law as "prevention of person's participation in the public affairs management carrying out activities aimed at power usurpation of President of Ukraine V. Yanukovych" [7]. This goal is realised not only by the Law "On Government Cleansing", but also by numerous legislative acts, which are traditionally not considered as "lustration". To show up lustration in a broad sense, let us turn to the analysis of the legal acts contributed to power usurpation by President of Ukraine V. Yanukovych as a key legal basis for the adoption of lustration legislation.

2. MATERIALS AND METHODS

To carry out the study, a system of scientific methods was used. Among general methods that were applied are the following: analysis, synthesis, typologisation, and periodization. Among special legal methods that were implemented are a formal-legal method and legal interpretation referring to laws studying, decisions of the Constitutional Court of Ukraine, Presidential decrees, and other

legislative acts regarding lustration regulation that in some cases were not defined as "lustration" acts. The stated methods were used both for the complex studying of the lustration phenomenon and defining stages of government cleansing of legal regulation in Ukraine. Methods of legal comparative studies and modeling also were underpinned in the paper by the development of the authors' proposals to define lustration narrow and broad understanding and highlighting legal specificities of the Ukrainian model of governmental cleansing.

The research's empirical basis consisted of the following legal acts: laws of Ukraine "On Government Cleansing" No. 1682-VII September 16, 2014 [7], "On the Restoration of Trust in the Judiciary in Ukraine" No. 1188-VII April 8, 2014 [21], "On the Cabinet of Ministers of Ukraine" No. 2591-VI October 7, 2010 [22], "On Central Executive Bodies" No. 3166-VI March 17, 2011 [23], "On Act Restoration of Certain Provisions of the Constitution of Ukraine" No. 742-VII February 21, 2014 [24]; the Presidential Decree "On measures to Ensure the Enforcement of Executive Power by Local State Administrations on the Relevant Territory" No. 307/2013 May 24, 2013 [25]; the Decision of the Constitutional Court of Ukraine No. 20-RP/2010 in case No. 1–45/2010 September 30, 2010 [26]; the Cabinet of Ministers Resolution "About Adoption of the Procedure for Powers Transfer to Local State Administrations of the Highest Level Executive Bodies and their Return" No. 740 October 09, 2013 [27]; Order of the Cabinet of Ministers "Issue of concluding the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part" No. 905-r November 21, 2013 [28]; Amendments to the Law of Ukraine "On the Regulation of the Verkhovna Rada" March 27, 2014 [29]; the Final Opinion on The Law "On Government Cleansing" of Ukraine, adopted by Venice Commission at its 103rd Plenary Session (Venice, 19–20 June 2015) [17]; Decision of the European Court of Human Rights in the Case Polyakh and Others v. Ukraine (Application No. 58812/15 and 4 other applications) 24.02.2020 [10].

Additionally analysed were the Verkhovna Rada Resolution "On Response to Violations of Judges' Oath by Judges of the Constitutional Court of Ukraine" No. 775-VII February 27, 2014 [30]; Regulation of the Uniform Register of Person Subject to Lustration approved by the order of the Ministry of Justice of Ukraine No. 1704/5 October 16, 2014 [31]; Regulation of the Lustration Community Council in the Ministry of Justice of Ukraine approved by the Order of the Ministry of Justice of Ukraine No. 1884/5 November 04, 2014 [32] to define stages of government cleansing of legal regulation in Ukraine.

The secondary analysis of the sociological research results and the sociological modeling method were used

to identify the social consequences of lustration for Ukrainian society.

3. RESULTS AND DISCUSSION

The main reason for the events defined in Ukraine as Revolution of Dignity 2013–2014 has become factual power usurpation made by President of Ukraine V. F. Yanukovych and his entourage during 2010–2013. As a matter of law, this was achieved by gradual power concentration, strengthening the presidential vertical and weakening the governmental role in state administration; the President's intervention in the judiciary and legislative power branches; transformation of the regional government system with shifting priorities between the executive power and local self-government in the direction of executive power strengthening.

In this regard, the Decision of the Constitutional Court of Ukraine No. 20-RP/2010 in case No. 1–45/2010 [22] is denotative. It has declared the Law of Ukraine "On Amendments to the Constitution of Ukraine" (Law on Political Reform) No. 2222-IV [33] unconstitutional and reactionary [34]. This model empowered the President to nominate the Prime Minister and exert leverage on the formation of the Cabinet of Ministers. It restored the Presidential right to regulate legal relations by own decrees without regulating laws; appoint heads of other central executive bodies as well as heads of local state administrations; terminate their powers; create and liquidate ministries and other central executive bodies. The Parliament was relieved of its obligation to form a coalition and nominate the Head of Government. These changes marked the transformation of Ukraine from the parliamentary-presidential republic to the presidential-parliamentary one.

The Law of Ukraine "On the Cabinet of Ministers of Ukraine" No. 2591-VI [22] became the next step towards strengthening the presidential power vertical. According to the latter, the Cabinet of Ministers of Ukraine (hereinafter – CMU) as the highest executive body was appointed responsible to President of Ukraine. The President got the decisive authority to form the Government, while the CMU's program of actions had to be based on the President's election program. Such changes contributed to the transformation of the Cabinet of Ministers into a dependent body. The President himself actually acquired the status of executive power branch head of the state.

To confirm the concentration of presidential power, it is worth mentioning the Law of Ukraine "On Central Executive Bodies" No. 3166-VI [23]. According to this legal act, ministries, and other central executive bodies except for the Constitution of Ukraine [34] and current legislation had to be guided by the acts and instructions of the President. This law provided by ministries to ensure the formation and implementation of state policy in one or more areas determined by the President has established the President's authority to approve pro-

visions of ministries. It has deepened his powers to establish, reorganise and liquidate ministries and other central executive bodies.

Adoption of the Presidential Decree "On measures to Ensure the Enforcement of Executive Power by Local State Administrations on the Relevant Territory" No. 307/2013 [25] is considered an important step to strengthen the presidential power vertical. It provided the heads of local state administrations (hereinafter – LSA) power to approve the appointment and dismissal of territorial executive power bodies leaders and the heads of enterprises, institutions, and organisations belonging to the ministries' sphere of management and other central executive bodies. This decree obliged the heads of central executive bodies to determine priorities of territorial bodies by the prior agreement with heads of the LSA to ensure implementation of their orders by relevant territorial bodies.

Implementing the aforementioned Presidential Decree, the Cabinet of Ministers of Ukraine by Resolution No. 740 [27] the Procedure of power transfer of higher-level executive authorities to the LSA and their return was approved. According to it, the right to initiate the power transfer to ministries and other central executive bodies, local state administrations of the highest level (regional relatively district (rayon)) was granted to regional state administrations and Kyiv and Sevastopol city administrations with the further decision on transfer or return of CMU powers. In fact, these state administrations were equated with ministries and other central executive bodies in such a way.

This transformation of the constitutional order towards strengthening the presidential power vertical was "ensured" by the support of the parliamentary majority of the pro-presidential political force – the Party of Regions deputy's fraction. Realising its competence to enact laws, the Parliament thus led to and promoted power usurpation of President V. Yanukovych. The coordinated and purposeful activity of the President, the Parliament, and the Government was carried out "undercover" in an attempt to substantiate conceptually the amendment of the Constitution of Ukraine [34] to implement democracy principles developed by the Constitutional Assembly. However, the changes achieved by the scientists of the Constitutional Assembly have not been implemented in the current legislation of Ukraine.

Meanwhile, the above analysed legal acts determined the maximum power concentration of the President of Ukraine. The reaction of civil society to numerous cases of power usurpation turned growing dissatisfaction of the pro-presidential team politics and the denial of trust to this political force. Thus, according to the annual monitoring of the National Science Academy of Ukraine Institute of Sociology, the number of Ukrainians who do not trust the President increased

from 31% in 2012 to 39% in 2013; the courts – from 32% to 45% consequently; the Verkhovna Rada – from 36% to 44%; the Government – from 34% to 42%. Since 1994 (the year of the beginning of the annual monitoring), this was the highest level of distrust to all the above state institutions [35].

In autumn 2013, the reason for the civil protest was the adoption of the order "Issue of concluding the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part" No. 905-r [28] by the M. Azarov's Government. According to this legal act preparation for conclusion initiated on 12.03.2012 by the parties, the Association Agreement between Ukraine and the EU was suspended. As the order states, several measures were envisaged to restore trade and economic relations with the Russian Federation in favor of Ukraine's national security. Furthermore, Russia's involvement in Ukraine's negotiations with the EU in the form of a tripartite commission was included. This Government decision was accepted extremely critically in Ukraine, as it testified to the change of the state's foreign policy course from the European integration to rapprochement to the Russian Federation. On November 24, 2013, peaceful protests against the Government's policy to refuse European integration began in Kyiv; on November 30, 2013, Special Forces of the Ministry of Internal Affairs of Ukraine violently dispersed the participants of peaceful rallies. Such power actions led to resistance increasing, prolonging the political crisis and, unfortunately, human casualties. This caused the protesters' demand for the removal of the president and his entourage from power.

After V. Yanukovych's escape at the end of February 2014 power reformatting began in Ukraine: a new majority was formed in the Parliament; a new speaker, Oleksandr Turchynov, was elected to serve as a current head of the state. On February 21, 2014, full re-election of the Government took place. During February-April 2014 the heads of LSAs and territorial branches of central executive bodies were dismissed while opposition politicians and public figures were appointed to these positions. Extraordinary presidential elections were scheduled on May 25, 2014; parliamentary elections – on October 31, 2014.

The new power formed from opposition to V. Yanukovych's part of politicum received civil society's credibility: they had to satisfy its request not only for personal renewal but also for changing the model of public administration. It involved issues of parliamentary-presidential republic restoration, the establishment of the constitutional system based on the rule of law, overcoming consequences of president V. Yanukovych's state management by power deconcentration, decentralisation, and

cleansing of all branches. Moreover, it led to defining the appropriate areas of legislative activity. ***Therefore, it might be useful to deal with lustration in Ukraine in a broad sense, as a state-building process of changing the public administration model, accompanied by the formation of personnel capable to ensure its implementation and functioning on a democratic basis.***

For further comprehensive research of the Ukrainian model of lustration, it is essential to analyse the key legislative acts that led to the restoration of the parliamentary-presidential republic, power deconcentration, decentralisation, and cleansing of all branches (i.e., the legislation we offer to define as lustration legislation). It corresponds to the concept "lustration" in the proposed broad sense. Following this approach, lustration legislation means not only traditionally stated laws "On Government Cleansing" and "On the Restoration of Trust in the Judiciary in Ukraine", but also other legislative acts aimed at overcoming consequences of V. Yanukovych's power usurpation.

Adoption time of lustration legislative acts, analysis of their intention and content allows us to define three stages of government cleansing of legal regulation in Ukraine (see table 1). In the framework of this paper, the authors will analyse in detail the lustration legislation features of the first stage of government cleansing of legal regulation in Ukraine:

Table 1. Stages of government cleansing of legal regulation in Ukraine

Name of stage	Period	Aim	Core legislative acts
The first stage of government cleansing (broad sense of lustration)	21.02.2014–08.04.2014	Overcoming consequences of V. Yanukovych's power usurpation at the level of changing the public administration model	Law of Ukraine "On Act Restoration of Certain Provisions of the Constitution of Ukraine" No. 742-VII [24]; New version of the Law of Ukraine "On the Cabinet of Ministers of Ukraine" No. 794-VII [36]; Amendments to the Law of Ukraine "On the Regulation of the Verkhovna Rada" **[29]**; Law of Ukraine "On Recognition as Having Lost Force of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Their Bringing into Compliance with the Constitution of Ukraine" No. 763-VII **[37]**; Resolution of the Verkhovna Rada of Ukraine "On Response to Violations of the Judge's Oath by Judges of the Constitutional Court of Ukraine" No. 775-VII [30].

Name of stage	Period	Aim	Core legislative acts
The second stage of government cleansing (narrow sense of lustration)	08.04.2014–16.10.2014	Increasing the judiciary power and trust of citizens to it; restoring the rule of law and justice	Law of Ukraine "On the Restoration of Trust in the Judiciary in Ukraine" No. 1188-VII [21].
The third stage of government cleansing (narrow sense of lustration)	16.10.2014-up to present	Non-admission to management of state affairs for people carrying out measures by their decisions, actions or omissions aimed at power usurpation by President V. Yanukovych	Law of Ukraine "On Government Cleansing" [7]; Regulation of the Uniform Register of Persons Subject to Lustration, approved by the order of the Ministry of Justice of Ukraine No. 1704/5 [31]; Regulation of the Lustration Community Council in the Ministry of Justice of Ukraine, approved by the Order of the Ministry of Justice of Ukraine No. 1884/5 [32].

Source: *made up by authors.*

The first stage is related to power usurpation by President V. Yanukovych, consequences overcoming on the level of changing the public administration model. The key legislative act of this stage is the Law of Ukraine "On Act Restoration of Certain Provisions of the Constitution of Ukraine" No. 742-VII [24].

This Law restored the constitutional status of the Verkhovna Rada of Ukraine (hereinafter – the VRU) as a body of parliamentary control of the state and regulated its functioning. The activity of the Parliament became open and public which was ensured by the adoption of amendments to the Law of Ukraine "On the Regulation of the Verkhovna Rada" [29]. Amending Art. 83 of the Constitution of Ukraine [34], the coalition status of parliamentary fractions was restored. Henceforth, the coalition had to submit proposals to the President of Ukraine on the candidacy of the Prime Minister and candidates to the CMU. The law updated the provisions of Art. 85 on the appointment of the Prime Minister, the Minister of Defense, the Minister for Foreign Affairs, the appointment of other members of the Cabinet of Ministers, their dismissal, resolution of the Prime Minister's resignation issue, appointment and dismissal of members of the Cabinet of Ministers due to proposal of the President of Ukraine and the Head of the Security Service.

The Law [24] restored the provisions of Art. 90 of the Constitution [34] by limiting the President's right to termi-

nate powers of the Verkhovna Rada. The strengthening of parliamentarism was guaranteed by changes to Art. 94 established its immediate official publication in case the President does not sign the law adopted by the Verkhovna Rada by at least two-thirds of its constitutional composition during reconsideration.

The role of the Cabinet of Ministers in the executive system has been strengthened. According to Art. 113 of the Constitution [34], the Government became accountable to the President of Ukraine and the Verkhovna Rada. It was to be guided in its activity, considering parliamentary resolutions. Art. 113 was also brought in line with Art. 85 and 106 of the Constitution [34] on the appointment of the Prime Minister by the Verkhovna Rada on the proposal of the President of Ukraine on the proposal of a coalition of parliamentary fractions. Art. 115 built on the constitutional responsibility of the Government by its resignation due to the adoption of a resolution of no confidence in the Cabinet of Ministers by the Verkhovna Rada. The law restored resignation provisions before the Verkhovna Rada was newly elected, while the President of Ukraine did not, as in the case of 2010–2013.

Art. 116 of the Constitution of Ukraine [34] amended by Law No. 742-VII [24] gave the Cabinet of Ministers constitutional authority to form, reorganise and liquidate ministries and other central executive bodies, as well as to appoint and dismiss heads of central executive bodies upon the Prime Minister's request which are not part of the CMU. As for the mentioned constitutional changes, the Verkhovna Rada adopted the Law of Ukraine "On the Cabinet of Ministers of Ukraine" from February 27, 2014 [36] in the new wording.

These changes contributed to the redistribution of constitutional powers in favor of the Parliament and Government to achieve a power balance between the executive, legislative branches, and the President of Ukraine. The analysed law which became one of the defining acts of lustration legislation restored the model of the parliamentary-presidential republic in Ukraine, overcoming the consequences of power usurpation by the previous president. Such constitutional changes have formed institutional protection to ensure the "government cleansing" further by minimising the risks of re-usurpation. At the same time, these changes have not provided the lustration safeguards against the activity of People's Deputies (the parliamentary activity of people's deputies during V. Yanukovych's presidency contributed to power usurpation in the state). Such a proposal does not contradict Lustration Guidelines requirements regarding lustration non-proliferation on the elective positions – it should provide the establishment of legal mechanisms that would minimise risks of constitutional changes recurrence towards power usurpation by any of its branches.

Researchers of the Sociology of Law note that draft laws should go through sociological expertise. It determines

"draft law compliance with social needs and legal awareness conditions, meaning assessment of the possibility of its adequate perception and implementation" [38, p. 136].

The statutory prohibitions on holding public office positions have led to different social consequences of lustration legislation implementation for the society and separate socio-professional groups. From the standpoint of E. Goffman's concept of stigma [39], this law establishes a stigma relating to a certain socio-professional group – civil servants – by ascriptive principle. On the one hand, this stigma is socially "invisible", but it is "set up" into the actor's life experience and actualised during appealing to his biographical project – during employment, public and political activities, etc. "Life experience" space formed by certain categories of civil servants holding senior positions during the regime of President V. Yanukovych is becoming a criterion of their social discrimination on professional, moral, and value grounds. It is facilitated by the presumption of guilt and absence of individualisation of punishment in lustration legislation.

In addition, the lustration procedure enshrined in the lustration legislation is the basis for constant reproduction of prior social distrust to the professional community – civil servants. Such stigmatisation at the group level forms additional social divisions, intensifying social disintegration. The authors find consistent conclusions in the works of the American researcher Cynthia N. Horne, who sums up that lustration procedures may increase trust in targeted social institutions, but have a negative impact on interpersonal trust in transitional societies [14]. Such state of affairs is a risky zone for the social cohesion in decentralised Ukraine, as far as interpersonal trust [40] and the absence of intergroup cleavages [41] are recognised as the most important components of social cohesion [42]. In this regard, actors of stigma reproduction are the media, through which political opponents use "lustration discrediting" against people with "political past" ensuring fixation and reproduction of civil servants of V. Yanukovych's regime social stigma. In turn, it provides a space for additional opportunities for the political advancement of new political elites, competition elimination between "predecessors" and "new faces" in the political field and civil service. Thus, the Law of Ukraine "On Government Cleansing" established a new criterion of social inequality providing a downward direction of professional mobility to a certain socio-professional group and at the same time creating conditions for socio-professional advancement and growth of all 'illustrated' (not lustrated) [7].

Such stigmatisation at the value level has formed and adapted the Ukrainians' perception to an obvious idea that the civil service or policy experience are signs of officials' corruption, perceived as prior and a factor of professional dis-

credit. In contrast, the absence of civil service experience and participation in politics has become one of the most powerful grounds for sociopolitical advancement and led to the emergence of the phenomenon of "new faces" as was evidenced by the results of both Ukrainian presidential and parliamentary elections in 2019. Thus, many representatives of different professions have entered the Verhovna Rada [43].

The adoption of lustration legislation and further civil service reform in Ukraine has significantly changed the socio-professional landscape of the civil service institute. Lustration principles of multiplicity and widespread law individual application have led to excessive coverage of public positions that fall under lustration prohibitions. On the one hand, the implementation of lustration bans has led to the dismissal of thousands of civil servants at all levels of public administration. On the other hand, the new version of the Law of Ukraine "On Civil Service" from 2015 [44] significantly simplified requirements for people applying for admission to the civil service. Weakening of educational and professional requirements both contributed to deprofessionalisation of civil service institutions, filled by representatives of other professional activity branches and young people without experience in public office. It has become another practical consequence of lustration stigma and the manifestation of demand for "new faces" in Ukrainian politics.

CONCLUSIONS

Legal analysis of the Ukrainian model of lustration has allowed us to look at the lustration phenomenon in a broad and narrow sense. The basis to distinguish a broad lustration understanding is the analysis of the purpose of the Law of Ukraine "On Government Cleansing" that defines power usurpation by President V. Yanukovych as a key legal problem. Legal analysis has shown that the beginning of lustration in Ukraine and lustration legislation adoption as a legal basis for overcoming consequences of power usurpation by President V. Yanukovych should not be associated with the establishment of legal prohibitions on holding public office, but with the restoration of the parliamentary-presidential republic model, implementation of power deconcentration and decentralisation. In these terms, the "lustration legislation" is not only traditionally defined Laws of Ukraine "On Government Cleansing" and "On the Restoration of Trust in the Judiciary in Ukraine" but also aimed at overcoming the power usurpation made by the former president systematically.

On the one hand, the goal of government cleansing in a broad sense was achieved by establishing a balance between various branches of power and Ukraine's return to the parliamentary-presidential republic model reflected in the Law of Ukraine "On Act Restoration of Certain Provisions of the Constitution of Ukraine". On the other hand, a narrow interpretation of the lustration purpose as non-admission to the management

of state affairs was implemented by the Laws of Ukraine "On Government Cleansing" and "On the Restoration of Trust in the Judiciary in Ukraine" only partially. This outcome is explained by the fact that the system of bans on holding public office has been implemented and continues to act in Ukraine. Still, it did not affect a key social entity that contributed directly to power usurpation by President V. Yanukovych (People's Deputies). For this reason, we consider it appropriate to raise the issue of revising the Lustration Guidelines at the level of international law aimed at updating the lustration challenges of transitional democracies accordingly.

Our study has shown the existence of three stages of government cleansing of legal regulation in Ukraine; distinguished dependence on time of lustration legislation acts adoption, their direction, content, and decisions taken to implement it. We link the first stage with legislative acts array adopted at the end of February 2014 and aimed at overcoming the consequences of power usurpation by President V. Yanukovych on the level of changing the public administration model. The second stage covers legal acts on "judicial lustration" aimed at increasing the authority of the judiciary of Ukraine and restoring public confidence in the judicial branch of power that took place in spring 2014. The third legislative stage of government cleansing in Ukraine deals with the Law of Ukraine "On Government Cleansing" and other acts adopted for its implementation. The third stage that began on October 16, 2014, continues up until now due to the ongoing updating of procedural acts and the prospect of basic lustration law changing in the near future.

Analysis of provisions of the Law of Ukraine "On Government Cleansing" and Venice Commission remarks from the standpoint of Sociology of Law has shown social discrimination phenomenon of civil servants of certain categories holding senior positions during V. Yanukovych's presidency on professional, moral, and value grounds. The acting of the law has led to further deprofessionalisation of the civil service in Ukraine and risks of social cohesion weakening.

The Ukrainian experience will be beneficial for all countries during government changes to their protection from the prospect of applying legal prohibitions named lustration, but, in fact, more inclined to political revenge instruments.

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IMPLEMENTATION PRACTICE OF ELECTRONIC ADMINISTRATIVE SERVICES IN UKRAINE

Abstract. *One of the factors for the development of civil society in Ukraine is an effective, well-functioning institution for providing administrative electronic services. Despite the intensity and wide scope of research covering various aspects of providing electronic administrative services to the population, many issues in this area remain quite debatable, as well as understudied, which conditioned the relevance of the study. The study is aimed at studying the organizational and procedural aspects of providing electronic administrative services in Ukraine. Authors of this study clarifed the signifcance of some fundamental concepts of this issue. The author's approach to defning the concept of electronic administrative services was formulated based on a personal interpretation of this concept from the standpoint of general theoretical analysis. Administrative mechanisms for imple-*

menting electronic public services were analysed. The study investigated the features of classifcation of electronic administrative services by types of electronic representation, by feld of activity, by form of ownership, by consumers, by place of receipt from the standpoint of the client and from the standpoint of involvement in the electronic service. This study is the frst to analyse the regulatory framework of Ukraine on the provision of electronic administrative services in stages and chronologically. Authors studied and compared the features of the procedure for rendering electronic administrative services using the Unifed State Portal of Administrative Services, the iGov portal of state electronic services and the Ukrainian online service of public services – Diia. The study covered the procedure for the operation of administrative service centres in Ukraine. It was concluded that the frst step of Ukraine towards creating its information society through the introduction of e-governance should be the establishment of a market for administrative and information electronic services

Keywords: *electronic management, information and communication technologies, electronic services, Unifed State Portal of Administrative Services, Internet*

INTRODUCTION

The study of the problems of administrative and legal support of access to administrative services within e-governance in Ukraine becomes particularly important in the context of modern European integration processes and the development of the concept of e-governance in Ukraine, the reform of public administration, as well as the development of information technologies. The primary basis of electronic administrative services is e-governance – a fundamentally new way of exercising state power towards developing democracy using a wide range of advanced and innovative electronic information and communication technologies that ensure the provision of qualitatively new and diverse public services in real time for all categories of persons, both internationally and nationally and regionally [1, p.100].

The modern state does not manage society but provides it with services. Citizens are not petitioners in relations with public authorities, but consumers of public services [2, p. 150]. The methodological basis for the development of the infrastructure of interaction between the authorities and citizens is the concept of state service to the citizen – the service concept of public administration as a modern understanding of the social purpose of the state, where the priority task of democratic governance is to serve civil society, and the main form of activity of government institutions is the provision of public services [3, p. 524].

The relevance of the introduction of electronic services in Ukraine is explained by the priority of developing the information society and the service state, focused on considering the interests and needs of citizens, improving their quality of life. Defning a new mission and developing a strategy for the activities of public authorities leads to the development of new management functions and

ways to render administrative services. The latter forces adjusting administrative processes and regulations, seeking new mechanisms and technologies to render administrative services [2, p. 189]. The introduction of electronic administrative services in Ukraine provides essential advantages for state and local government bodies and consumers of public services, namely: simplifes the processes of developing state information systems and managing state information; provides better compatibility and interaction with other institutions; facilitates the ability to navigate for the consumers and perform online navigation in a set of various public services [4, p. 473].

Notably, the introduction of electronic administrative regulations is an innovative approach to analysing the organisational and functional structure of public authorities and developing new models for describing their operation. As a result, the study of the problems of electronic administrative services within the framework of e-governance in Ukraine is important for the development of Ukrainian science and technology and substantial modernisation of the administrative and legal bases for regulating information relations, in particular, regarding the development and implementation of the national policy for the development of the information society, informatisation and e-governance, which allows implementing a considerable number of tasks of further socio-economic and political development of Ukraine and harmonious entry into the world information society [5, p. 301]. Furthermore, in contrast to the subject of information society development, which has already become conventional, the subject of legal and administrative and organisational support for the provision of public electronic services remains practically understudied in Ukraine [6, p. 1059].

The study of the practice of implementing electronic administrative services in Ukraine and summarising the existing array of developments on this issue is challenging, which explains the lack of research on this subject. Some aspects of this issue have been addressed to a certain extent by such foreign and Ukrainian scientists as A. Al-Refaie [7], M. Csótó [8], M. Kaluti [9], A. Klich [10], V. Margariti [5], S.A. Marzooqi [11], C. Misuraca [6], E.A. Nuaimi [11], H.M. Park [12], N.A. Qirim [11], A. Ramadna [7], J. Rocha [13], D. Špaček [8], N. Urs [8], V.M. Babaiev [14], O.M. Bukhanevych [15], S.Ya. Danylevych [16], O.P. Dzoban [17], P.S. Klimushyn [18], N. Kozachenko [19], I.S. Kuspliak [20], O.V. Litvinov [21], A.A. Mirzoian [22], L.P. Trebyk [23].

The purpose of this study lies in studying the practice of implementing electronic administrative services in Ukraine based on summarising the available array of developments of well-known Ukrainian and foreign researchers and scientists, as well as in providing the author's concept and conclusions regarding electronic administrative services.

1. MATERIALS AND METHODS

To achieve the formulated goals and objectives, the research used general scientifc and special legal methods and means of scientifc cognition. This allowed carefully analysing all questions concerning the specifc features of implementing electronic administrative services in Ukraine. Thus, the historical method allowed establishing that Ukraine adopted the idea of electronic administrative services from the experience of Western countries, where the doctrine of "new public management" and the orientation of the state/authorities towards the citizen as a client has been flourishing since the 1980s. In 1998, the idea of administrative (managerial) services was frst recorded in the Concept of Administrative Reform in Ukraine.

The dialectical method allowed investigating and gaining new knowledge about the content and ideas of electronic administrative services, which constitute one of the e-government structural elements and represent a certain method of fnding new approaches to analysing the structure of state processes and seeking new models for describingstate activities, which, in turn, make it more convenient, faster, and more efcient. The comparative legal method was used for research and comparison of the regulatory framework, portals and government organisations that have the purpose of implementation and development of electronic administrative services in Ukraine. A vast array was explored: regulatory framework of electronic administrative services starting from the moment of its consolidation by Ukraine as an independent state and fnishing with modern realities; portals of electronic administrative services both at the national and regional levels; state organisations, whose purpose is to provide a considerable number of different electronic administrative services.

The synthesis method helped gain new knowledge that the provision of electronic administrative services in Ukraine is the main prerogative of the union of the government and the Ukrainian people and one of the main priorities for the development of e-governance in Ukraine and the world, and the availability of such services is one of the criteria for a full and prominent level of development of Ukraine. Furthermore, this method helped establish that there are many state organisations in Ukraine that successfully render a considerable number of different electronic administrative services, namely electronic administrative services of the State Service for Geodesy, Cartography, and Cadastre of Ukraine; electronic administrative services of the State Architectural and Construction Inspectorate of Ukraine; electronic administrative services of the Ministry of Ecology and Natural Resources of Ukraine; electronic administrative services of the Ministry of Economic Development and Trade of Ukraine; electronic administrative services of the Ministry of Justice of Ukraine; electron-

ic services of the State Fiscal Service of Ukraine; electronic services of the Pension Fund of Ukraine.

The method of analysis helped establish that the main document governing the activities concerning the provision of administrative services in Ukraine is the Law of Ukraine "On Administrative Services", which defnes the legal framework for the implementation of the rights, freedoms, and legitimate interests of individuals and legal entities in the feld of administrative services. Moreover, using the analysis method, the authors identifed three portals of electronic administrative services in Ukraine, namely the Unifed State Portal of Administrative Services (https://my.gov.ua/), Portal of State Electronic Services – iGov (https://igov.org.ua/) and the Ukrainian online public services portal – Diia (https://diia.gov.ua/), where the frst one is an ofcial source of information on the provision of administrative services in Ukraine, the second is the undisputed leader in the number of services ordered and received, and the third is a promising portal that will become a universal point of access for citizens and businesses to all electronic public services according to uniform standards.

The method of extrapolation helped establish that the system of electronic administrative services in Ukraine will not be able to function effectively without a reliable and accessible information infrastructure, ensuring effective administration of the system of electronic administrative services, the availability of professional personnel and motivated heads of public administration bodies, eliminating unnecessary bureaucratic obstacles, and the development of useful and high-quality administrative services. Using the method of interpretation, it became possible to give the author's innovative and legal defnition of the concept of electronic administrative services, based on their understanding of this term, from the standpoint of theoretical and legal analysis and modern challenges to the development of society.

The system method allowed establishing that the frst step of Ukraine towards creating its information society through the introduction of e-governance should be the establishment of a market for administrative and information electronic services. It should become the engine that would enable the development of a new paradigm of public administration in developing e-governance, which aims to improve the well-being of the population, increase the competitiveness of Ukrainian enterprises and the state in general, and ensure new priorities for the development of Ukraine. The generalisation method revealed the key objectives in the provision of electronic administrative services in Ukraine, which will positively impact the development of the social state with influential civil society institutions, especially those issues where methods and forms of interaction of public administration bodies with citizens and business entities are of great importance.

2. RESULTS AND DISCUSSION

2.1. The concept of electronic public service and mechanisms for its implementation

The legal literature contains different opinions on the term "service". Some scientists believe that a service is an activity aimed at obtaining an intangible result [22, p.136]. That is why it is possible to distinguish certain features inherent in the institution of administrative services: provided at the request of an individual or legal entity; concern the rights and/or obligations of such a person, that is, an administrative service is rendered to ensure the acquisition, change, or termination of the rights and/or obligations of persons; rendered by administrative bodies (primarily executive authorities, local self-government, other state bodies) compulsorily through the exercise of power because the administrative body has a "monopoly" on the provision of a particular administrative service [19, p. 197–198].

Thus, a public service comprises one or more processes that can be performed in various state structures that are endowed with a certain responsibility and have the ability to perform a certain expert analysis. In further decomposition, the process (regulation) can be divided into sub-processes (steps) and operations. Multiple institutions can take part in the same process. The activities of any organisation, including the state one, comprise three levels of processes: 1) primary activity (implementation of the functions of the institution prescribed in the corresponding statutory documents); 2) secondary activity (aimed at improving the main function: information systems and organisation technologies); 3) activity aimed at improving the function (development of the strategy and architecture of information technologies of the organisation) [17, p. 152].

Determination of a modern political mission statement and objectives of a new quality, as well as design of a strategy for government bodies, lead to the development of new management functions and new ways of rendering public services. They aim to adjust administrative services and search for latest information technologies for providing public services. [9, p. 1059]. Most importantly, political goals are formulated at the state level, considering national interests and opportunities for their implementation on the part of the authorities. Then tasks are defned that require the provision of certain services to citizens, businesses, and other government organisations and institutions based on administrative services. And only in the end is the attention drawn to technologies that ensure the implementation of administrative services [10, p. 9]. The introduction of administrative services in electronic form is one of the main ideas of e-governance. In general, electronic services are understood as distinct types of tangible and intangible services rendered in electronic form using information and communication technologies, including the Internet [14, p. 96]. L. B. Trebyk noted that electronic administrative services are

administrative services implemented using e-governance technologies, when the subject of the request ordered and received an administrative service from the subject of provision as a result of the exercise of their authority in electronic form [23, p. 9].

Proceeding from this, it is still necessary to interpret it in a slightly different form: an electronic administrative service is any state information service of a public administrative nature, implemented through the use of information and communication technologies and the Internet, rendered to the subject of appeal by state and local government bodies in electronic form, and has the goal of improving the quality and the process of their provision. [1, p. 99]. It is the provision of electronic administrative services that is the main prerequisite for bringing power closer to the average citizen, meeting their needs and one of the main priorities for the development of e-governance in the world, while the availability of electronic administrative services in a modern state constitutes one of the criteria for its full and high development level.

The mechanisms for providing administrative services in electronic form are different. Thus, P. S. Klimushyn identifed the following mechanisms for implementing electronic public services: administrative, institutional, identifcation, intra-government, single access points, integration, unifed architecture of integrated applications. The author understands the administrative mechanisms of implementing electronic public services as their grouping in the corresponding life episodes and business situations [18, p. 4–7].

Of particular interest is the position of I. S. Kuspliak, who suggested dividing electronic administrative services by types of electronic representation, by scope of activity, by form of ownership, by consumers, by place of receipt from the client's standpoint and from the standpoint of involvement in the electronic service:

1. By types of electronic representation: informing; one-way interaction; two-way interaction; conducting transactions.

2. By the scope of activity: information services; consulting services; services for the preparation of political decisions or laws; services for interaction between institutions and organisations; services for providing aid and support; services for public procurement operations; services for the implementation of supervision and control functions by state departments.

3. By form of ownership: services rendered by the central executive bodies and their enterprises; by local state authorities; by local self-government bodies; and by business organisations.

4. By consumers, the services differ for public authorities, citizens, and business organisations as follows: B2B (Business-to-Business) primarily provides various ways of electronic interaction between business organisations; B2C (Business-to-Citizens) is described

by the fact that the service consumer is a private person who, for example, purchases goods and services via the Internet; G2B (Government-to-Business) – public procurement operations; G2C (Government-to-Citizens) – various types of electronic administrative services to the population; G2G (Government-to-Government) – data exchange through electronic exchangers between government actors. This includes internal and interagency exchanges at the national level, as well as exchanges between national, regional, and local levels; C2C (Citizens-to-Citizens) – electronic auctions, bulletin boards, etc.

5. By the place of receipt from the client's standpoint: the frst stage – conversion of a public service into electronic form allows considering services from various positions for the client. The second stage – creation of institutions that work on the principle of a "single-window concept", but without the Internet. The third stage – publication of information and interactive forms for receiving the service on the portal of a public authority, the ability to download and send these forms.

6. From the standpoint of involvement in the electronic service: fully automated and partially automated; fully automated; partially automated [20, p. 120–126].

2.2. Ukrainian experience in the development of electronic administrative services

As for the development of criteria for the quality of administrative services in electronic form, there may be criteria that are defned in the concept of development of the system of providing administrative services by authorities, "which should serve as a model for administrative services in electronic form". Such criteria are as follows: effectiveness; timeliness; accessibility; convenience; openness; professionalism, etc. [24, p.18].

One of the primary areas of activity on public services in developed countries has been the introduction of information technologies for the provision of services. This applies both to the digitalisation of individual services and to the creation of web portals dedicated to public services [25, p. 11]. The legal foundation for the development of a system of administrative services using the capabilities of special electronic data processing technologies has been laid a long time ago. Thus, for citizens to exercise their constitutional rights to free access to information on the activities of state authorities, as well as to ensure the transparency and openness of their activities, the Procedure for Publishing Information on the Activities of Executive Authorities on the Internet was adopted, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 3[1] and subsequently by the Law of Ukraine No. 2939-VI "On Access to Public Information" of January 13, 2011[2].

[1] Resolution of the Cabinet of Ministers of Ukraine No. 3 "On the Procedure for Publishing Information on the Activities of Executive Authorities on the Internet". (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/3–2002-%D0%BF#Text.

[2] Law of Ukraine No. 2939-VI "On Access to Public Information". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/ show/2709–15#Text.

In 2004, a Draft National Target Programme for Reforming Public Administration and Public Service for 2011–2015 was developed within the framework of international technical assistance, posted on the website of the Centre for Adaptation of Public Service to the European Union Standards (the Centre was established and operates under the Main Department of Public Service of Ukraine, in accordance with the Resolution of the Cabinet of Ministers of Ukraine No. 485 of April 14, 2004), and containing measures for the transition of public authorities to paperless (electronic) document management tools and building a system for rendering electronic administrative services[1].

As early as in 2010, the Order of the Cabinet of Ministers of Ukraine approved the Concept of E-government Development in Ukraine, according to which, the purpose of introducing e-governance is to create qualitatively new forms of organising the activities of state authorities and local self-government bodies, their interaction with citizens and business entities by providing access to state information resources, the ability to receive electronic administrative services, apply to state authorities and local self-government bodies using the Internet[2].

The main document governing the activities concerning the provision of administrative services in Ukraine is the Law of Ukraine "On Administrative Services"[3], which defnes the legal framework for the implementation of the rights, freedoms, and legitimate interests of individuals and legal entities in the feld of administrative services. According to Article 1 of this Law, an administrative service (which can be rendered in electronic form) should be understood as the result of the exercise of power by the subject of rendering administrative services at the request of an individual or legal entity, aimed at acquiring, changing, or terminating the rights and/or obligations of such a person in accordance with the law[4].

In this regard, the Order of the Cabinet of Ministers of Ukraine No. 386-p of May 15, 2013, which approved Information Society Development Strategy in Ukraine[5], describes the provision of electronic administrative services. Thus, it is planned to ensure the efciency and

[1] Resolution of the Cabinet of Ministers of Ukraine No. 485 "On Establishment of the Centre of Assistance to Institutional Development of Civil Service". (2004, April). Retrieved from https://zakon.rada.gov.ua/laws/show/485–2004-%D0%BF#Text.

[2] Order of the Cabinet of Ministers of Ukraine No. 649-p "On Approval of the Concept of E-governance Development in Ukraine". (2017, September). Retrieved from http://zakon2.rada.gov.ua/laws/show/2250–2010-%D1%80/ed20110926.

[3] Law of Ukraine No. 5203-VI "On Administrative Services". (2012, September). Retrieved from https://zakon.rada.gov.ua/laws/show/2709–15#Text.

[4] *Ibidem*, 2012.

[5] Order of the Cabinet of Ministers of Ukraine No. 386-p "On Approval of the Information Society Development Strategy in Ukraine". (2013, May). Retrieved from https://zakon.rada.gov.ua/laws/show/386–2013-%D1%80#Text.

quality of administrative services to the population and businesses rendered using information and communication technologies; the creation of a system of electronic interaction of state bodies; the creation of a unifed state portal of administrative services to ensure the provision of administrative services by executive authorities, other state bodies, local self-government bodies to citizens and organisations[1].

The entry into force of the Law of Ukraine "On Administrative Services"[2], laid the foundations and defned the rules for the operation of the administrative services sector, the development of administrative service centres and the All-Ukrainian portal of administrative services. The Law of Ukraine "On Administrative Services"[3], identifed ways to develop the system of administrative services. This Law virtually created the basis for the development of rendering electronic administrative services. To implement this Law, state authorities started developing a legislative framework for rendering electronic administrative services. Thus, many regulations governing the maintenance of the Register of Administrative Services were adopted[4].

2.3. Ukrainian portals of electronic administrative services

In accordance with Article 17 of the Law of Ukraine "On Administrative Services", the provision of electronic administrative services and access of subjects to information on administrative services using the Internet are ensured through the Unifed State Portal of Administrative Services[5]. Effectively, the portal started working in March 2016. This portal has become an ofcial source of information on the provision of electronic administrative services in Ukraine. The information is placed on the portal by the Ministry of Economic Development and Trade of Ukraine based on information received from the subjects of rendering administrative services and/or ofcials of state bodies, local self-government bodies who have been granted the corresponding access rights to the Unifed State Portal of Administrative Services[6]. In particular, Resolution of the Cabinet of Ministers of Ukraine No. 13 of January 3, 2013, established a mechanism for maintaining the Unifed State Portal of Administrative Services, which is conducted to ensure access of subjects to information on administrative services using the Internet and constitutes

[1] *Ibidem*, 2013.

[2] Law of Ukraine No. 5203-VI "On Administrative Services", op. cit.

[3] *Ibidem*, 2012.

[4] Resolution of the Cabinet of Ministers of Ukraine No. 1274 "On the Register of Administrative Services". (2011, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1274–2011-%D0%BF#Text.

[5] Law of Ukraine No. 5203-VI "On Administrative Services", op. cit.

[6] Order of the Cabinet of Ministers of Ukraine No. 718-p "On Approval of the Action Plan for the Creation of the Unifed State Portal of Administrative Services". (2013, September). Retrieved from http://zakon3.rada.gov.ua/laws/show/718–2013-%D1%80.

the ofcial source of information on the provision of administrative services[1].

The Unifed State Portal of Administrative Services provides as follows: access to information on administrative services provided rendered to subjects of appeal; access to information on centres and subjects of rendering administrative services; search by keywords in the felds of the description of administrative services; classifcation and search for services by life situations and categories; download of electronic application forms and other documents by subjects of appeal that must be flled out and submitted for receiving administrative services; submission of an online application for public services; payment of the established fee for the public services to be rendered, using electronic payment systems; tracking the stages of completion for documents on the provision of public services; tracking statistics of visits; data protection (including personal data of subjects of appeal) from unauthorised access, destruction, alteration, and blocking by implementing organisational and technical measures, means, and methods of technical protection of information; delineation and control of access to information that is on the portal, according to the powers of users; registration of events that occur on the portal and relate to its security; presentation of the structure of information resources and user-friendly Ukrainian-language interfaces.

In more detail, the specifc features of operation of the Unifed State Portal of Administrative Services are regulated by the Procedure for Maintaining the Unifed State Portal of Administrative Services No. 13 of January 3, 2013[2]. In 2015–2016, the Unifed State Portal of Administrative Services was modernised: its interface became more convenient to use (information on administrative services is systematised by topic), user authorisation using an electronic digital signature was introduced, as well as the provision of certain services of central executive authorities through the Portal [26]. Currently, the portal holds all the information necessary to receive a particular service. Effectively, the portal resembles an electronic information bureau, where for each particular service the information is collected regarding the list of documents, the place where one can receive this service, and the forms of documents approved by law. Therefore, the creation of a Unifed Portal of Administrative Services should be generally considered as a call sign of the frst step towards the development of a full-fledged system for rendering electronic administrative services. Notably, along with the Unifed State Portal of Administrative Services, there is the Portal of State Electronic

[1] Resolution of the Cabinet of Ministers of Ukraine No. 13 "On Approval of the Procedure for Maintaining the Unifed State Portal of Administrative Services". (2013, January). Retrieved from http://zakon3.rada.gov.ua/laws/show/13–2013-%D0%BF.

[2] Resolution of the Cabinet of Ministers of Ukraine No. 13 "On Approval of the Procedure for Maintaining the Unifed State Portal of Administrative Services". (2013, January). Retrieved from http://zakon3.rada.gov.ua/laws/show/13–2013-%D0%BF.

Services – iGov, which was created in June 2015 by a team of volunteers with the support of the E-Government Agency together with the Ministry of Economy and the Presidential Administration. The main purpose of creating this Portal was to obtain certificates and documents in electronic form or pre-order them without having to wait in line [11, p. 9].

The State Electronic Portal iGov can render three types of services, namely: 1. Fully electronic service, i.e., the process of ordering and receiving a service makes provision for the exclusion of a citizen's contact with a state body; 2. Reduced visits to government agencies. Documents are submitted to the state body in electronic form, but to receive a decision, a citizen must come to the state body for a document; 3. Electronic queue, i.e., some services cannot be fully implemented electronically. This applies, for example, to the service of obtaining a passport or driving licence. Such services make provision for the personal submission of documents and the physical presence of a citizen in a state body. However, in practice, such services force citizens to spend a lot of time in a live queue, which is why an electronic queue was created [12, p. 2477]. In this regard, A. M. Bukhanevych noted that "in general, the idea of creating a portal iGov.org.ua deserves attention, but such a portal should be a Unifed State Portal of Administrative Services, which should ensure the provision of electronic administrative services. There are legal grounds for this, which follow from the Law of Ukraine "On Administrative Services" [15, p. 59].

The advantage of using iGov is that many volunteer programmers are involved, who are engaged in spot development of the Portal in their spare time, which saves an extremely large amount of money, since this category of employees is the most paid in any IT project. Taking the cost of services as a basis, one can calculate the costs of developing one service on both portals. In this case, the portal of public services iGov is cheaper, although this is not the fnal cost, and it cannot be taken as the main one. However, even if the cost of one service is within 20%, the picture will not change because by its nature the Portal is built on volunteering, hence will be less costly.

Furthermore, the iGov Public Services Portal has an indisputable drawback in its activities, which is the lack of legislative approval for working with this portal, since volunteers agree to launch services in their regions. The distribution of these services is uneven, and there is also huge resistance from local authorities, who are often not interested in implementing electronic services. A common feature of these portals is that they are both designed to simplify communication between citizens and civil servants, making the process of ordering services simple and accessible to all citizens of Ukraine, so one should factor in the quantity of services ordered and received by citizens through these portals.

An equally important indicator is the number of services that were rendered through the portal. It is particularly noticeable that the iGov Public Services Portal is the undisputed leader in this category. Despite the number of services ordered and received in general, the portal increases the number of customers using the services by an average of 10–15% every month. This means that citizens' trust in the portal is quite high. In addition, apart from the number of services rendered, the quality of these services is equally important according to the users' opinion. On the iGov Public Services Portal, citizens can rate the service rendered from 1 to 5, as well as leave a review on these services. As for the Unifed State Portal of Administrative Services, it is completely impossible to evaluate the quality of services rendered or leave a review, and there is also no counter for the number of services rendered [16, p. 67].

At the same time, on September 27, 2019, the Ministry of Digital Transformation of Ukraine, together with Fedoriv and Spiilka design büro, presented the digital state brand "Diia", where the Minister of Digital Transformation Mikhail Fedorov announced the launch of a website and applications for receiving public services online and stated that the frst services would be available by the end of 2019, and that by 2022, 100% of public services can be received online. Diia ("Дія" – abbreviation for "Держава і я" – "State and I") is a Ukrainian application for public services developed by the Ministry of Digital Transformation of Ukraine. This is a mobile application with digital documents and a portal with public services. One of the frst services in the app was an E-driving licence and a certifcate for registration (logbook) of the vehicle. Diia is the start of building a state in a smartphone. It is what Ukrainians dreamed of – that the state should be efcient, almost invisible, not create problems, but on the contrary be a convenient service. Ukrainians will no longer need to spend time and nerves in endless queues of administrative institutions [27].

As of 2021, the portal renders two types of services: for citizens and for businesses. Citizens are provided with the following services: digital passport; certifcates and extracts; environment; security, law and order; family; pensions, benefts, and aid; transport; land, construction, real estate; licences and permits; entrepreneurship. Thus, for example, on April 15, 2020, the Cabinet of Ministers of Ukraine adopted a resolution "On the Implementation of the Pilot Project Regarding the Use of Electronic Display of Information Contained in the Passport of a Citizen of Ukraine in the Form of a Card, and Electronic Display of Information Contained in the Passport of a Citizen of Ukraine for Travel Abroad". Electronic versions of the ID card and passport are already accessible in the mobile application "Diia"[1].

[1] Resolution of the Cabinet of Ministers of Ukraine No. 278 "On the Implementation of the Pilot Project Regarding the Use of Electronic

A digital passport is more reliable than a paper one and no less reliable than a plastic one. Using an electronic passport, one can travel by plane or train within the country, receive postal services, and conduct banking operations. One can also use their passport in the Diia mobile app to confrm their age when buying cigarettes or alcoholic beverages in the store. One can receive medical services, hotel services, or present them to law enforcement agencies. Using a digital passport, one can also use the library, get communication services, enter administrative buildings, and receive public services in the Centres for Administrative Services, on the Diia portal, or to receive funds upon returning goods. The passport data of every citizen who has installed the Diia mobile application is securely protected. The mobile application does not collect or store them, but only displays the information that is available in the registers. All digital documents in the Diia mobile application are valid only on the territory of Ukraine. A foreign passport provides the same rights and opportunities as a national one. If a citizen does not have a driving licence or ID card, they can verify their identity using a foreign passport, which is available in "Diia" [28].

Display of Information Contained in the Passport of a Citizen of Ukraine in the Form of a Card, and Electronic Display of Information Contained in the Passport of a Citizen of Ukraine for Travel Abroad". (2020, April). Retrieved from https://zakon.rada.gov.ua/ laws/show/278–2020-%D0%BF#Text.

Businesses are provided with the following services: land, construction, real estate; licences and permits; transport; medicine and pharmaceuticals; extracts and references; business creation [29]. Based on the analysis of these three portals, the state is faced with a choice: 1) to develop the Unifed State Portal of Administrative Services; 2) to adopt a volunteer iGov Public Services Portal and continue developing it; 3) to create a promising portal that citizens and businesses would use as a universal point of access to all electronic public services according to uniform standards, where everything is fast, express, and clear, where one can receive the service on demand, and, subsequently, where all departments would be united into a single convenient and effective online system.

2.4. State organisations that provide various electronic administrative services

At present, there are already many state organisations in Ukraine that successfully provide a considerable number of various electronic administrative services. Thus, for example:

1) electronic administrative services of the State Service for Geodesy, Cartography and Cadastre of Ukraine, which provide such services as ordering an extract from the State Land Cadastre on a land plot; ordering an extract on the standard monetary valuation of land; obtaining information about the owners and users of land plots [30, p. 3];

2) electronic administrative services of the State Architectural and Construc-

tion Inspectorate of Ukraine: registration of a notice on the start of preparatory work; registration of declarations on the start of preparatory work; registration of a notice on the start of construction work; registration of declarations on the start of construction work; registration of declarations on the object readiness for operation (pilot implementation in the Volynska Oblast) [13];

3) electronic administrative services of the Ministry of Ecology and Natural Resources of Ukraine. In July 2015, the frst electronic service in the environmental sphere "Waste Declaration" was presented (menr.in.ua). When rendering this public service, an automated declaration form is provided to minimise errors in the process of flling it out. The system contains an integrated online calculator for waste indicators of a business entity. The business entity receives information on the progress of consideration of the declaration and its registration by e-mail [31];

4) electronic administrative services of the Ministry of Economic Development and Trade of Ukraine. In Q4 2015, the Ministry of Economic Development and Trade of Ukraine launched the Unifed State Portal of Administrative Services for test operation (poslugy.gov.ua), which hosted the frst 15 electronic administrative services rendered by this Ministry [7, p. 39];

5) electronic administrative services of the Ministry of Justice of Ukraine. Currently, the number of electronic services rendered by the Ministry of Justice of Ukraine is the largest compared to other ministries and central executive authorities. Through the Electronic Services Cabinet of the Ministry of Justice of Ukraine (kap.minjust.gov.ua) visitors are offered: obtaining documents online from State Registers of the Ministry of Justice of Ukraine; electronic registration actions in State Registers of Ukraine; search for information in State Registers of Ukraine; use of electronic reporting systems for persons engaged in specialised professional activities; participation in electronic auctions of seized property, etc. [32];

6) electronic services of the State Fiscal Service of Ukraine. The State Fiscal Service of Ukraine is one of the frst bodies in Ukraine to develop electronic services and services for taxpayers. The web portal of the State Fiscal Service of Ukraine (sfs.gov.ua) hosts many electronic services. The most popular services include Public Information and Reference Resource, Electronic Taxpayer Cabinet, Learn More about Your Business Partner, Verifcation of the Single Taxpayer Certifcate, Electronic Accounting, Register of Policyholders, Cancelled Registration of VAT Payers, Pulse, Online Declaration, Customs statistics, Accredited Key Certifcation Centre, Electronic Customs, Mass Registration Addresses [33, p. 231];

7) electronic services of the Pension Fund of Ukraine. Electronic services that a user can get on the web portal of the Pension Fund of Ukraine (portal.pfu.gov.ua) after registration are

as follows: receiving information from personalised accounting (for working citizens); receiving pension information (for pensioners); forming requests for preliminary preparation of documents; the possibility of fling complaints; making an appointment with the Fund's specialists; receiving information about the status of payments of payers from the Pension Fund of Ukraine (for legal entities and individuals-entrepreneurs) [8, p. 43–47].

At the regional level, local self-government bodies and local executive authorities develop separate electronic portals for rendering administrative services. For instance, the Regional Virtual Ofce of Electronic Administrative Services of the Dnipropetrovska Oblast; certain electronic administrative services are rendered on the website of the Centre for Administrative Services of the city of IvanoFrankivsk, etc.

As for the availability of professional personnel, the introduction and implementation of electronic administrative services is impossible without the availability of a suitable number of trained and qualifed specialists in the feld of e-governance, which, for its part, is a component of public administration. Training of such persons should be aimed at reorienting the activities of government bodies, at performing the main function in the form of rendering administrative services, namely electronic administrative services, requires a thorough analysis of their powers, improving the function and tasks that make provision for direct communication with potential consumers of services. Furthermore, for civil servants who are actively involved in the provision of services, it is necessary that the centres for retraining and advanced training of employees of state authorities, local self-government bodies, state-owned enterprises, institutions, and organisations design continuous professional development concerning the e-governance issues, namely electronic administrative services.

It is important for the state to monitor training and achieve an understanding of duties in the process of rendering electronic administrative services by a civil servant and a local government ofcial. That is why the Kherson National Technical University has developed a standard for training specialists in the speciality "Electronic governance" of the educational qualifcation level "Master" and licensed the training of 25 people in full-time education. According to the authors, the training of such specialists will contribute to the development of a unifed information space of Ukraine, as well as improve relations in e-governance between the state, businesses, and citizens, and facilitate socio-economic, political, and cultural development of Ukraine.

A major step towards the development of electronic services was the adoption of the Concept of Development of System of Electronic Services in Ukraine in 2016[1], which defnes the principal ar-

[1] Order of the Cabinet of Ministers of Ukraine No. 649-p "On Approval of the Concept of Development of System of Electronic Ser-

eas, mechanisms, and stages of development of an effective system for rendering administrative and other public services in electronic form in Ukraine. During 2016–2019, the Concept supported optimising the procedures for rendering administrative services, as well as implementing pilot projects to introduce the provision of priority services in electronic form[1]. The authors of this study fully agree that the development of the system of rendering administrative services through information and communication technologies directly depends on the development of the system of rendering administrative services in the country. At the same time, both digitalization and automation of unifed and standardised administrative services can increase the efciency of government bodies' activities in rendering administrative services to citizens [21].

CONCLUSIONS

The authors found that the best ways to stimulate the completion of the key objectives of electronic administrative services in Ukraine are as follows: development of a stepby-step strategy of public authorities on the introduction of electronic services with monitoring of effectiveness and demand by citizens; improvement of the quality of administrative services and their accessibility for citizens and organisations and development of a system for evaluating the quality of electronic administrative services; orientation of public authorities to the interests of applicants; improvement of the quality and efciency of administrative processes by focusing on the fnal result; increase in the transparency of public authorities through the introduction of open electronic administrative services; creation of national industry information systems, as well as improvement of administrative processes in public authorities with the use of information and telecommunications technologies; determination of the rights, obligations, and responsibilities of the parties and ofcials involved in the provision of electronic administrative services; reduction of opportunities for administrative discretion of decision-makers; parallel existence of the centres of administrative services and unifed licensing centres with a clear delineation of the scope of their activities, as basic elements of infrastructure of administrative services, which shall perform the confrmation function for documents received by the citizens from the state registers and databases; development of regional centres for the provision of electronic administrative services to extend service infrastructure of interaction between the subjects of the services; reduction of costs in the interaction of citizens and organisations with public authorities through the introduction of e-government; public monitoring of public authorities' performance of their assigned functions.

vices in Ukraine". (2017, September). Retrieved from http://zakon3.rada.gov.ua/laws/show/718–2013-%D1%80.

[1] *Ibidem*, 2017.

It was established that there are many legislative and regulatory documents in Ukraine that provide an opportunity to implement various electronic administrative

services, for example:

− the Concept of Administrative Reform in Ukraine;

− the Law of Ukraine "On Administrative Services";

− the Law of Ukraine "On Access to Public Information";

− the Resolution of the Cabinet of Ministers of Ukraine "On the Procedure for Publishing Information on the Activities of Executive Authorities on the Internet";

− the Resolution of the Cabinet of Ministers of Ukraine "On Establishment of the Centre of Assistance to Institutional Development of Civil Service";

− the Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Maintaining the Unifed State Portal of Administrative Services";

− the Resolution of the Cabinet of Ministers of Ukraine "On the Implementation of the Pilot Project Regarding the Use of Electronic Display of Information Contained in the Passport of a Citizen of Ukraine in the Form of a Card, and Electronic Display of Information Contained in the Passport of a Citizen of Ukraine for Travel Abroad";

− the Order of the Cabinet of Ministers of Ukraine "On Approval of the Concept of E-governance Development in Ukraine";

− the Order of the Cabinet of Ministers of Ukraine "On Approval of the Concept of Development of System of Electronic Services in Ukraine".

The modern development of the information society determines the widespread use of information and communication technologies in the public administration system, in particular the introduction of e-governance in the feld of public administration in Ukraine, within which various governance services are provided. Proper and effective administrative and legal support of access to management services and e-governance in Ukraine is an urgent need in the context of the development of Ukraine as a democratic and legal state, as well as the evolution of civil society, since electronic administrative services, as a modernised process of public administration and the degree of implementation of its tasks, necessitate the activation of research on the legal settlement of this issue.

Thus, a well-built system of electronic administrative services in Ukraine will have a positive impact on the development of the social state with influential civil society institutions, especially on those issues where methods and forms of interaction of public administration bodies with citizens and business entities are of immense importance.

RECOMMENDATIONS

The value of the subject matter is shown in the fact that one of the most critical issues of modern society is the devel-

opment and improvement of the level of participation of citizens through information and communication technologies in state affairs of Ukraine. Electronic administrative services, as a modernised public administration process and the degree of implementation of its tasks, necessitate the activation of research on the legal settlement of this issue.

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MUNICIPAL POLICY AS A PRIORITY AREA OF LEGAL POLICY IN THE CONTEXT OF REFORMING THE TERRITORIAL ORGANISATION OF POWER AND EUROPEAN INTEGRATION OF UKRAINE

Abstract. *The present study investigates the problems of development and implementation of municipal policy in Ukraine. It was found that the essence of municipal policy of Ukraine, given the ongoing decentralisation reform, is that it is a relatively stable, organi-*

sed, purposeful activity of public authorities and local governments, which aims to build a capable local government, adequate to the needs and interests of territorial communities. The study describes the elemental composition of municipal policy. The authors of this study established that its elemental composition includes: the concept of system-structural and organisational-functional organisation and activities of local authorities at different levels of administrative-territorial organisation; a coordinated system of regulations that govern the organisation and activity of local bodies of state executive power and local self-government, establish the scope and limits of their competence, determine the features of interaction and the procedure for resolving disputes between them; regulatory basis of resource provision of local self-government; legislative definition of a body or official in the structure of state executive bodies, which represents the interests of the state in the corresponding territory, has the right to exercise control powers, and constitutes a link between the territorial community, local governments and the system of state executive bodies; formally defined decision-making algorithm on issues relating to local self-government; system of monitoring the national municipal policy. The authors also identified the main blocks of issues under study, which require further use of a comprehensive scientific approach to their legislative solution

Keywords*: municipal government, local self-government, decentralisation, municipal policy*

INTRODUCTION

The leading world trends in modern democracies are the recognition, consolidation, and implementation of the principles of regionalisation and decentralisation, subsidiarity and local self-government, both within internal and external policy and within the constitutional regulation of legal phenomena, institutions, and mechanisms. International recognition of local self-government as the basis of any democratic system has significantly expanded the boundaries of municipalisation of the constitutional life of democratic countries [1].

Ukraine, which has nationally recognised the need to accelerate the reform of local self-government and territorial organisation of power, is not far behind global trends. The transformation processes transpiring in the present-day Ukraine are much more complex than some set of actions aimed at changing the form of government, establishing ties in the system of public authorities, local self-government, forming new political and legal institutions, etc. Instead, the establishment of democracy in Ukraine is a universal process that affects both the state and public authorities, as well as the territorial community and local governments. Most importantly, this refers to the development of capable self-government at the basic, district, and regional levels with the establishment of councils, optimisation of administrative-territorial organisation and the existing model of territorial organisation of power, introduction of effective mechanisms of local democracy. Furthermore,

the successful implementation of local government reform will contribute to the effective implementation of Ukraine's policy of European integration, the development of cooperation with European institutions, in particular, the Council of Europe and the European Union.

Issues relating to the development and implementation of municipal policy in Ukraine remain unexplored to this day. Therewith, the problems of legal policy development have repeatedly become the centre of scientific discussions [2]. Thus, such researchers as O. Yu. Bytiak, M. I. Panov, O. V. Petryshyn, A. O. Selivanov, O. V. Skrypniuk, V. Ya. Tatsii and others investigated the problems of development and implementation of the national policy. The studies concerning certain aspects of municipal policy include the articles by O. O. Akhmerov, M. O. Baimuratov, O. V. Batanov, P. M. Liubchenko, R. V, Khvan and some others.

Thus, among complex scientific studies in this subject area the authors of the present paper highlight the dissertation by B. V. Popovych on the topic: "Conceptual Principles of National Municipal Policy in Ukraine in the Context of European Integration", which singles out and investigates the theoretical and methodological principles of national municipal policy, institutional mechanism and policy cycle of its development and implementation, ways of developing the European-standard national municipal policy in Ukraine. At the same time, researchers have substantiated the legitimacy of identifying the institutional content of national municipal policy with public administration activities, which are carried out to create institutional conditions for the effective performance of local government functions. The study demonstrates that the content of national municipal policy is implemented at two levels of state regulation of local self-government – legislative and administrative. The role of public administration standards as elements of the methodology of the European national municipal policy, its conceptual legal bases and key factors of their implementation in Ukraine are highlighted. The study demonstrates that they are based on the principles, regulations and standards of local self-government, which are harmoniously combined in the concept of "good self-government" [3].

However, despite the strengthening of local self-government and local democracy in the world, the development of a global trend towards its effective development, both at the doctrinal and constitutional levels, the search for the best model of its organisation and activities, including the correlation with the system of state authorities is ongoing. The importance of local self-government for building a constitutional order based on the rule of law, democracy, and recognition of human rights necessitates a response on the part of the state by developing and implementing an appropriate legal policy as a system of principles, areas, and means of targeted legal influence on the course and aims of coresponding social processes and devel-

opment of appropriate social institutions and norms. The relevance and urgency of solving the above issues is confirmed, inter alia, by the growing scientific interest in the development and reform of public administration in general, including increasing attention of both theorists and practitioners to revise and amend the current legislation aimed at the establishment of an open, transparent, efficient, and effective system of public authorities and local selfgovernment in Ukraine, establishment of various capable public services in terms of both competence, financial support, and professionalism, and solving everyday and development problems of territorial communities and regions [4]. Rethinking the essence and significance of local self-government towards the realisation of the impossibility of existence, normal functioning and development of a modern democratic state without capable and active local self-government leads not only to the development national municipal policy, but also to the possibility of transition to municipal policyas a system of strategic management of self-government activities [5]. Therefore, the purpose of this study is to identify and analyse the political and legal foundations for the development of capable local government in Ukraine in terms of ongoing reform of local government and territorial organisation of power.

1. MATERIALS AND METHODS

The methodological framework of this study includes both general and special methods. A dialectical approachwas used to clarify the essence and content of public authorities in the field of municipal policy as a phenomenon of reality in its dynamics, constant development and interrelation with other political and legal phenomena, namely with the reform of local self-government and territorial organisation of power, public administration reform, European integration of Ukraine, including public relations at the level closest to the citizens – at the level of local self-government (regions, individual communities), including the provision of sustainable socio-economic local development, development of affluent communities, etc.

The study employed the method of system analysis to investigate various levels, manifestations, actors in the development and implementation of municipal policy. The system-structural and functional methods were used to single out and examine the elements of national municipal policy, namely: the concept of systemstructural and organisational-functional organisation and activity of local government at different levels of administrative-territorial structure; system of regulations, which govern the issues of organisation and activity of local bodies of state executive power and local self-government; regulatory framework of resource provision of local self-government; a body or official in the structure of bodies of state executive power, which represents the interests of the state in the relevant territory, has the right to exercise control powers in this

area; formally defined decision-making algorithm on issues relating to local self-government; system of monitoring the national municipal policy.

Functional-instrumental method allowed identifying the main aspects and patterns of various methods of state regulation of local government and determine their impact on the further development of local government, its institutions and mechanisms for exercising municipal power. In particular, the study establishes that the national municipal policy as a set of measures aimed at legalisation and statutory regulation of public relations in the organisation and exercise of municipal power, is described by a constant search within the framework of conceptually different systems of local government, inhibiting its development through imperfection, inconsistencies, gaps in legal regulation.

The formal legal method enabled a consistent analysis of the content of legal norms and features of regulatory support for the establishment, development and reform of local self-government. The provisions of numerous acts of different legal force are subject to analysis, since the adoption of the Concept of Reforming Local Self-Government and Territorial Organisation of Power in Ukraine, approved by the Cabinet of Ministers of Ukraine on April 1, 2014, which defined the main areas and logic of reform. In particular, the present study established that since the adoption of the Concept, the regulatory framework for the reform has been developed and adopted, and numerous laws have been adopted that lay the foundation for the development of capable local self-government and community cooperation. Therewith, numerous acts have remained drafts to this day. Thus, regulatory resolution is pending for important problems of the existence and functioning of an effective and efficient system of local self-government in Ukraine (problems of state supervision and/or control; statutory regulation of the organisation and conduct of local referendums, including their procedural requirements and rules of rule-making of territorial communities, bodies and officials of local self-government; introduction of an effective system of monitoring the implementation of not only regional but also local municipal policy, etc.). The logical-semantic method provided an opportunity to formulate recommendations on areas that require further scientific substantiation and legislative support, including comprehensive and systematic measures to develop a capable local government. The forecasting method helped outline the prospects for the development of municipal policy, in particular, as a system of strategic management of self-government, including the development of strategies, development programmes, and the implementation of best modern European and world practices of providing quality and affordable public services with simultaneous adaptation to the concepts of good governance, e-governance, including the use and coordination with the principles, individual mechanisms and means of "new public management", etc.

2. RESULTS AND DISCUSSION

Strengthening local self-government and local democracy has become one of the trends in state and social development on a global scale. The importance of local self-government for building a constitutional order based on the rule of law, democracy, and recognition of human rights necessitates a response on the part of the state by developing and implementing an appropriate legal policy as a system of principles, areas, and means of targeted legal influence on the course and aims of coresponding social processes and development of appropriate social institutions and norms.

Municipal policy is a kind of legal policy on the subject of legal regulation; it is a scientifically substantiated system of goals, priorities, areas, tasks and concrete measures for creation of an effective mechanism of municipal legal regulation, for development and modernisation of local self-government in the country. The implementation of such a policy must be rational and consistent, comply with the principles of the constitutional order and the international obligations of the state, be focused on the priority of human rightsand ensure the capacity of territorial communities. In a democratic, legal statehood, municipal policy is the main tool for influencing the system of public relations in the field of local self-government and is dialectically combined with other forms and types of national policy [6]. It includes the coordinated activities of public authorities, local governments, their officials and officials, civil society institutions, territorial groups and individuals, which is carried out with a common purpose and in the manner prescribed by applicable law, and orients society to optimise municipal legal regulation. Municipal policy is designed to organise the process of municipal construction, because it cannot happen spontaneously, and in the municipal legal sphere requires its own strategy and tactics, internal logic and systematic action [7].

The specificity of municipal policy is that it is, on the one hand, the closest to the place of residence of citizens, and hence to their daily needs and interests, and on the other hand – it has a complex nature, because such are the issues of local importance. Municipal policy should develop legal algorithms to address the problems faced by communities and their elected authorities, ways to resolve conflicts and overcome crises, propose mechanisms that could work proactively, and thus related to scientific forecasting and planning at the local level. Modern Ukraine clearly lacks consistency, moderation and soundness in the development of municipal policy, as well as political will in its implementation, as evidenced by the constitutional reform of decentralisation, which was announced in 2014, but still not implemented, having managed to substantially change during this time not only its content, but also strategic guidelines.

Referring to Ukrainian scientific sources, which to a certain extent investigate the municipal policy, the authors

of the present study agree that municipal policy is a legal policy pursued jointly by public authorities, local governments, civil society institutions involving members of local communities to development of local self-government [8]. The state is the leading subject of municipal policy development in Ukraine. It would seem that this is quite understandable given the sovereignty of state power, but not in the case of local self-government, the "top-down" construction of which contradicts the very nature of self-government, where the subject and object of power coincide in the face of the territorial community. Local self-government in Ukraine was initiated by state enforcement, as a result of which the local population was simply confronted with the fact that it currently has a different status, and the "power landscape" has changed radically. Therewith, the decrepit nature of local self-government persists throughout the years of Ukraine's independence, the most striking evidence of which is that all reforms in the municipal sphere are carried out at the initiative of the state and within the state vision of social development. As a result, contrary to the declared independence and autonomy from the state, local self-government remains the object of reform and even experimentation, being unable to oppose the will of the sovereign state power. Territorial communities and their authorities in the process of reforming their own existence are given, at best, an advisory role, while the centre of decision-making is concentrated in the capital, represented by the highest political bodies of the state. As a result, two parallel realities are formed: the abstract-idealised system of local self-government, which is seen in central government projects and reflected in strategies, concepts and laws, and a realitic system of local self-government, which is observed daily and which members of territorial communities face daily when solving their current issues.

In the process of voluntary and compulsory unification of territorial communities, the socio-territorial basis of local self-government was effectively destroyed, which conventionally was territorial communities as natural communities united by common interests and needs arising from living together within a single settlement. Newly created (united) territorial communities are artificial formations; members of such communities have no common ground. As a result, local self-government is transformed into a purely territorial administration and thus finally nationalised. Accordingly, initiative, democracy, reliance on the masses, publicity and local uniqueness of local self-government are lost, and thus all the creative potential embedded in the model outlined in the 1995 European Charter of Local Self-Government is levelled [9].

The starting points of the national municipal policy are the concepts of reform, strategies, plans for the development of local self-government, etc. Such documents underlie further transforma-

tion of the system of national legislation in the field of local self-government. The revision of the provisions of Ukrainian legislation on a new conceptual basis, in turn, is aimed at ensuring the purposefulness and systematisation of the state's transformations in the municipal sphere. Thus, the essence of municipal policy of Ukraine, given the decentralisation reform, is that it is a relatively stable, organised, purposeful activity of public authorities and local governments, which aims to build a capable local government, adequate to the needs and interests of territorial communities.

National municipal policy, its elemental composition (subjects, objects, purpose and means of activity, mechanisms of realisation, and also results of this activity and their estimation), depend on the following factors and conditions: 1) political value of a social problem (concept, strategy, recommendation, etc.); 2) the presence or possibility of developing a political administrative programme (legislation); 3) political-administrativestructure (vertical and horizontal connections of state authorities and local self-government), which makes provision for the definition of key actors (stakeholders), including institutional norms that affect their activities (specialised, sectoral laws); 4) the presence of an action plan, programme or their development (plans for the implementation of steps and stages, state target programmes, etc.); 5) acts of implementation (orders, instructions, methods, administrative documents of local nature), which are provided by the current legislation and correspond to the political administrative programme; 6) policy impact assessment (statistics and monitoring, administrative and financial audit, etc.) [10].

Therefore, the elemental composition of municipal policy is as follows:

1. Existence of the developed concept of system-structural and organisational-functional organization and activity of local government (local bodies of state executive power and local self-government bodies) at different levels of administrative-territorial structure, including basic, intermediate, and regional levels.

2. An agreed system of regulations that govern the organisation and activity of local bodies of state executive power and local self-government, establish the scope and limits of their competence, including determine the features of interaction and the procedure for resolving disputes between them.

3. Regulatory framework of resource provision of local self-government (most importantly, financial and budgetary).

4. The definition of a body or official in the structure of state executive bodies, which represents the interests of the state in the relevant territory, has the right to exercise control powers and is a link between the territorial community, local governments and the system of state executive bodies.

5. Formally defined algorithm for decision-making on issues relating to local self-government (in particular, involves

the participation of representatives of associations of local governments, including local needs and interests).

6. The system of monitoring the national municipal policy.

Taking the elemental composition as a basis, it is possible to investigate the ongoing changes by analysing the theoretical and conceptual and regulatory support of the reform.

1. The processes of regionalisation, decentralisation of public power, the development of a system of capable local self-government based on the principle of subsidiarity and universality are inherent in modern states with a liberal-democratic political regime. Decentralisation is usually understood as the reform of the system of public power in the state in the following main areas: 1) territorial reform (involves the reorganization of territorial organisation, usually through the consolidation (agglomeration) of administrative-territorial units (voluntary, forced or mixed) 2) institutional reorganisation (redistribution of powers and relevant financial and other resources); 3) procedural reorganisation (reform of the system of public services (including administrative services), introduction of e-government, due (good) governance at different levels and in different subsystems of public authority, best world practices of organisation and activity, etc.) [11]. Reforms in these areas were comprehensively and meaningfully carried out in countries such as Poland, Latvia, Lithuania, the Czech Republic, Slovakia, Estonia, Italy, Portugal, Denmark, Finland, and others [12; 13]. In many other countries of the world, these areas of reform are at an early stage (awareness of the need, search for a model, development of a concept, planning and forecasting, etc.).

The main issues to be addressed by the decentralisation reform, including in Ukraine, are as follows: 1) significant deterioration in the quality and accessibility of public services due to the resource failure of the vast majority of local governments; 2) catastrophic deterioration of heat, sewage, water supply networks, housing in general, including the risk of anthropogenic disasters in conditions of serious lack of material, financial, and other resources; 3) difficult demographic situation in most territorial communities; 4) inconsistency, and often separation of local policy on socio-economic development with the interests of territorial communities; 5) lack of unified state regulation of forms of local democracy of participation, inability and lack of initiative of members of territorial communities to take solidarity actions aimed at protecting their rights and interests; 6) reducing the level of professionalism of local government officials, including due to the weak competitiveness of local governments in the labour market, reducing the prestige of positions, which leads to low quality of vital decisions for the community; 7) corporatisation of the system of local self-government bodies, high degree of secrecy and non-transparency of their activity, increase of corruption, which

can lead to decrease in efficiency of use of own and involved material and financial resources, decrease of investment attractiveness of territories, increase of social tension; 8) politicisation of the decision-making process in this area of legal regulation, when representatives of the dominant party in Parliament pursue national interests without focusing on the affairs of territorial communities, while opposition parties, on the contrary, often sabotage the implementation of national policy, ignoring the interests of communities; 9) excessive centralization of powers of executive bodies and financial and material resources, even considering changes in the budget and tax spheres; 10) increasing social tensions due to failure to ensure the ubiquity of local self-government, etc. [14]. Thus, the areas and logic of the reform were defined by the Concept of reforming local self-government and territorial organisation of power in Ukraine, approved by the Cabinet of Ministers of Ukraine on April 1, 2014. [15]. The reform is based on the following starting points: transfer of powers from the centre to the periphery; the relevant delegated powers must be provided with sufficient financial resources; determination of forms and limits of control over the activity of local self-government bodies.

2. Since the adoption of the Concept, the regulatory framework for the reform has been developed and adopted, and numerous laws have been adopted that lay the foundation for the development of capable local self-government and community cooperation. Furthermore, in 2015, the Law of Ukraine "On the Principles of National Regional Policy" was adopted [16], which defines the basic socio-economic, legal and other principles of national regional policy as a component of internal policy of Ukraine, including defines the purpose, principles, levels, objects and subjects of national regional policy, their powers in this area, financial support measures, including monitoring their implementation.

Substantial changes were also introduced to the Tax and Budget Codes of Ukraine (in terms of fiscal decentralisation – changes in the structure of the budget system with corresponding changes in the powers of local governments, etc.). In particular, in pursuance of the Decree of the President of Ukraine "On Urgent Measures to Ensure Economic Growth, Stimulate Regional Development and Prevent Corruption", the State Strategy for Regional Development for 2021–2027 was developed [17] This document provides not only objective changes, but also changes in approaches to regional development, subjective changes (until 2020, the relevant policies were developed and implemented the by central government; starting from 2021, it is expected that the development and implementation of this policy will be performed at all levels: central, regional, local, including with the involvement of non-governmental organisations), substantial changes in the funding of relevant regional development programs, including monitoring of relevant mea-

sures by the Government of Ukraine and, finally, all these efforts to strategically plan development and efficient management of resources, etc.

At the same time, the reorganisation of the administrative-territorial system was initiated. On the one hand, this process should have been facilitated by the adoption of the Laws of Ukraine "On Cooperation of Territorial Communities" [18], "On Voluntary Association of Territorial Communities" [19] of 2014 and 2015, respectively. These regulations laid the foundations for future territorial reorganisation, namely by defining the legal framework for cooperation of territorial communities, principles, forms, subjects and areas, mechanisms of such cooperation, its promotion, financing and control, and settlement of relations arising in the process of voluntary association of territorial communities of villages, settlements, cities, including voluntary accession to the united territorial communities, purpose, subjects of initiation, including decisionmakers, funding issues, etc.

Therewith, the draft law, which should determine the principles of development of administrativeterritorial organisation, conditions, and procedure for creating administrative-territorial units, their reorganisation, status of settlements, procedure for naming and renaming settlements and administrativeterritorial units was not adopted by the Verkhovna Rada of Ukraine. The current situation, especially considering that the reform of local self-government and territorial organisation of power in Ukraine, administrative-territorial structure and national regional policy take place simultaneously, has an adverse impact on the ongoing process of territorial reorganisation, transfer of functions and powers, relevant resources, etc. Furthermore, the above issues, which were caused by a consistent and ill-considered policy in the field of territorial reorganisation, resulted in problems of establishment and organisation of new local governments, starting with the appointment and holding of elections to district councils of large communities and ending with financial and property and competence issues (unwillingness to take property on balance; unwillingness to take responsibility; problems of determining administrative centres and their proximity, accessibility, etc.).

At the same time, the Verkhovna Rada of Ukraine adopted some legislative acts on zoning, including amendments to the election legislation. In particular, according to the Resolution of the Verkhovna Rada of Ukraine "On the Formation and Liquidation of Districts" [20], a consolidation occured and 136 districts were created instead of 490. Furthermore, considering the introduction of new types of electoral systems for local council elections by the Electoral Code, and considering the need to hold not only regular but also the first local elections in a pandemic, the Law of Ukraine "On Amendments to Certain Laws of Ukraine Concerning the Improvement of Electoral Legislation" [21] eliminated gaps and

inconsistencies, adjusted deadlines, simplified and unified election procedures to ensure compliance with international standards for elections and to ensure the sustainability of democratic principles and procedures in Ukraine.

The above issues are complex and reflect the inconsistency and unsystematic nature of actions in the development of the national system of legislation in the field of local self-government. Thus, the nationalmunicipal policy as a set of measures aimed at legalisation and statutory regulation of public relations in the organisation and exercise of municipal power, is described by a constant search within the framework of conceptually different systems of local government, inhibiting its development through imperfection, inconsistencies, gaps in legal regulation.

3. It is clear that the territorial reorganisation, including the transfer of power (legal responsibilities of bodies and/or officials), and hence the responsibility involves the provision of appropriate material and financial resources. This provision is reflected both in the Concept of Reforming Local Self-Government and Territorial Organisation of Power in Ukraine and in the State Strategy for Regional Development for 2021–2027. Furthermore, substantial changes have been introduced to the current legislation of Ukraine.

Thus, the Law of Ukraine "On Amendments to the Budget Code of Ukraine Concerning the Reform of Intergovernmental Relations" [22] makes provision for increasing budgetary and financial independence of local budgets, stimulating communities to unite and forming capable territorial communities through the mechanism of transition of budgets of united communities to direct interbudgetary relations with the state budget, expanding the existing revenue base of local budgets, decentralisation of expenditure powers in sociocultural areas and a clear division of competences, formed on the principle of subsidiarity, the introduction of new types of transfers, the establishment of a new system of equalisation of national taxes, simplification of local guarantees and borrowing from international financial institutions, etc. Legislative changes also gave local governments the right to approve local budgets regardless of the date of adoption of the Law on the State Budget.

Accordingly, the Law of Ukraine "On Amendments to the Tax Code of Ukraine and Certain Legislative Acts of Ukraine Concerning Tax Reform" [23], albeit not directly related to the reform of local self-government, makes provision for substantial changes in the tax system that affect all actors. In particular, the united territorial communities received powers and resources at the level of cities of regional significance, while revenues from such taxes and fees as property tax, single tax, including the fee for parking spaces, tourist tax remained on the ground. Moreover, with the entry into force of the Law of Ukraine "On Amendments to the Tax Code of Ukraine to

Improve Tax Administration, Eliminate Technical and Logical Inconsistencies in Tax Legislation" [24], local governments shall not oblige to make annual decisions on the establishment of local taxes and/or fees. Local governments may not decide to impose local taxes and fees in the current year. In this case, subject to the adopted changes: 1) the single tax and property tax will handle the application of rates that were in effect until December 31 of the year preceding the budget period in which it is planned to apply such local taxes and/or fees; 2) property tax, fee for parking spaces for vehicles, tourist tax and land tax for forest lands (if established) – at the rates specified in the current decisions. In case of local self-government decisions, the provisions of which stipulate amendments to existing decisions only in part of the change of year or its exclusion in the title of the decision (indefinite decision), such decisions will not have the features of a regulation, and their adoption will not require procedures established by the Law of Ukraine "On the Principles of National Regulatory Policy in the Economic Activity Sector".

The Law of Ukraine "On Amendments to the Budget Code of Ukraine to Bring the Legislative Provisions in Line with the Completion of the Administrative-Territorial Reform" [25] continued the initiated transformations, making provision for the creation of an adequate resource base for the exercise of local government powers on a new territorial basis, in particular by dividing revenues and expenditures between budgets of districts and territorial communities, establishing the composition of revenues and expenditures of new communities (formed by the Cabinet of Ministers of Ukraine) in the amounts assigned to the budgets of cities of regional significance and united territorial communities, as well as establishing equal conditions for territorial communities (rural, settlement, urban) in budget support. The main sources of revenue of district budgets are revenues from the management of communal property (rent, income tax of communal enterprises, part of net profit) and administrative fees. The legislatively determined powers of district councils may be exercised within the limits of revenues to district budgets, including by attracting funds from village, town, and city budgets for joint social, infrastructural, economic, and other projects on a contractual basis. Therewith, due to a certain inconsistency of the transformation process (territorial and institutional reorganisation without prior proper regulatory framework: adoption of laws of Ukraine, including amendments to the Constitution of Ukraine, etc.), some terminological issues remain unresolved, such as clear definition and unambiguous understanding of the following terms: "local government budget", "territorial community budget", including the issue of some restriction of revenues to district budgets and their exclusion from the system of horizontal equalisation in favour of communities of villages, towns, and cities.

Both cumbersome and progressive are the competence and resource changes provided by the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Optimisation of the Network and Functioning of Centres for Provision of Administrative Services and Improvement of Access toAdministrative Services Provided in Electronic Form" [26]. Thus, on the one hand, it is assumed that the changes can improve and enhance the quality of administrative services provided to individuals and legal entities, including ensure budget revenues. On the other hand, such institutional and functional changes in practice are manifested in such problems as: the presence of the building or the need for its construction and/or equipment/re-equipment; staff training and encouragement; connection to registers; ensuring the availability of services by creating remote jobs and/or by concluding agreements on cooperation of territorial communities in common interests, etc.

4. The issues of transformation of local state administrations and/or introduction of the institution of prefect as a representative of the President of Ukraine in connection with structural and competence changes envisaged for the system of central executive bodies by the Public Administration Reform Strategy for 2016–2020 remain relevant and no less complicated, including in connection with the structural and competency changes provided for the system of local self-government by the Concept of Reforming Local Self-Government and Territorial Organisation of Power in Ukraine of 2014. Therewith, from a conceptual standpoint, the issue of transformation of local state administrations as state executive bodies on the ground and their interaction with local governments remains understudied, and the organisation and activities of these bodies still correspond to the outdated notion which is formed under the influence of the idea of centralised public administration with elements of excessive "guardianship" over local self-government [27]. Furthermore, the legislation does not contain a definition of the concept of administrative supervision and/or control over the activities of local governments and a clear mechanism for their implementation, which raises the issue of amending the Constitution of Ukraine [28], the Law of Ukraine "On Local State Administrations" [29] and/or the adoption of a separate regulation in this area.

According to Part 4, Article 143 of the Constitution of Ukraine, local governments on the exercise of powers of executive authorities are controlled by the latter. The Law of Ukraine "On Local Self-Government in Ukraine" [30] addresses these issues in several articles: 1) Article 20 stipulates that such control may be exercised only on the basis, within the powers, and in the manner prescribed by the Constitution and laws of Ukraine, and shall not lead to interference of public authorities or their officials in the exercise of local authorities' powers; 2) Part 10, Article 59 states

that "acts of bodies and officials of local self-government on the grounds of their inconsistency with the Constitution or laws of Ukraine are recognised as illegal in court. "In this case, Part 2, Article 71 of the Law emphasises that executive bodies and their officials have no right to interfere in the lawful activities of bodies and officials of local self-government, including to resolve issues referred by the Constitution and laws to the powers of the latter, except in cases delegated by councils and in other cases stipulated by law. This provision is detailed in Part 2, Article 76, which stipulates that bodies and officials of local self-government on the exercise of their delegated powers of executive bodies are under the control of the relevant executive bodies. Furthermore, the principles of relations of local state administrations with local governments, which also apply to the implementation of administrative supervision and control are defined in Article 35 of the Law of Ukraine "On Local State Administrations" (interaction; assistance; restriction of supervision and control by law; considering the proposals of local governments and officials; prior notification of local governments in case of important issues at the local level, central authorities, etc.).

In this case, Paragraph 1, Article 8 of the European Charter of Local Self-Government stipulates that any administrative supervision and/or control (currently, should consider not only the specifics of the translation, but also the specifics of the concept of the origin of local self-government, system and model of local self-government in each country, including in different regions (constituent parts) within one state) by local authorities may be carried out only in accordance with the procedures and in cases provided by the constitution or law. The purpose of administrative supervision and/or control can only be to ensure compliance with the law and constitutional principles (Paragraph 2, Article 8). However, instances may exercise administrative supervision over the timeliness of the tasks assigned to local governments. This provision establishes a standard for combining oversight of legality with control over expediency (administrative oversight of the municipal authority's powers is exercised solely over legality; for delegates, control over legality and expediency is permissible if the latter meets the requirements of legal certainty and is not opposed to legality). Therewith, the lack of special procedures, the general nature of the competence of local state administrations, the excessive amount of delegated powers, their functional intertwining with their own powers allow controlling the activities of local governments in violation of legal certainty and legality. Furthermore, Part 3, Article 8 of the Charter amphasises the principle of proportionality of the measures of the controlling body to the importance of the interests it intends to protect. Instead, the principle of proportionality manifests itself differently depending on the subject of supervision or control and regarding which powers of

local selfgovernment bodies (own or delegated) such supervision and/or control is exercised. According to this principle, the supervising/controlling body in the exercise of its powers must act in such a way as to have theleast possible effect on local autonomy, while achieving the desired result. Furthermore, Recommendations of the Congress of Local and Regional Authorities of the Council of Europe No. R (98) 12 "On supervision of local authorities" [31] contain guidelines that determine the scope of administrative supervision.

The authors of the present study believe that despite the imperfection of the doctrinal base and the presence of numerous gaps in the field of administrative supervision and/or control in the municipal law sphere, the state administrative supervision and/or control can be distinguished 1) in the exercise of local government powers; 2) in the sphere of exercising the delegated powers of local self-government bodies. Therewith, the current legislation does not contain a single and clear procedure for state control and/or supervision.

In turn, the principles of the mechanism of state control and supervision over the observance of the Constitution and laws of Ukraine by local governments are defined in the Draft Law of Ukraine "On Amendments to the Constitution of Ukraine (on decentralisation of power)" and in the Draft Law of Ukraine "On Amendments to the Law of Ukraine "On Local State Administrations" and Some Other Legislative Acts of Ukraine on Reforming the Territorial Organisation of Executive Power in Ukraine" (No. 4298 of October 30, 2020) [32], which, according to the explanatory note, makes provision for the creation of a system of local state administrations of the prefectural type. Therewith, it is assumed that local state administrations continue to implement district and regional budgets, including some powers of local self-government by delegation, etc. Therefore, this does not refer to the fact that the system of local state administrations will be structurally and functionally built and will act as "prefecture-type" bodies (although this term is not explained in the draft), but that apart from the usual set of tasks and powers, the latter acquire additional legal responsibilities for "ensuring the rule of law in the exercise of local self-government". In particular, a new chapter "Ensuring the rule of law in the exercise of local self-government" (Chapter 6, Section II) is proposed, which defines the general principles and principles of ensuring the rule of law in the exercise of local self-government; the system of bodies (central, regional and district level) that ensure the rule of law, their functions and powers; certain measures to ensure legality (including appeals against decisions of local governments, proposals, appeals to relevant bodies, consultations, etc.).

A detailed study of certain provisions of this project suggests that the power to "ensure the rule of law in the implementation of local self-government" in combination with the implementation in

practice of the role of their own executive bodies of district and regional councils can lead to redundancy and even direct interference in local government, which contradicts the very essence of the ongoing reform. After all, given the main goals of the reform of local self-government and territorial organisation of power in Ukraine, the creation of capable local self-government, primarily at the basic, subregional and regional levels is possible only if decisions can be made and implemented independently (including the implementation monitoring) within one subsystem of public authority (given the nature of local government). Instead, the Draft Law factually refers to the transformation of local state administrations into public authorities, which simultaneously "replace" their own executive bodies of local self-government at the subregional and regional levels and ensure: implementation of the Constitution of Ukraine, laws of Ukraine, acts of the President of Ukraine, Cabinet of Ministers and other executive bodies; law and order; observance of the rights and freedoms of citizens; implementation of state and regional programmes of socio-economic and cultural development, other programmes, reporting on their implementation; interaction with local self-government bodies and territorial bodies of central executive bodies. The implementation of such a project will not lead to the liquidation of local state administrations, as envisaged by the 2014 Concept and the draft constitutional reform on decentralisation in 2015, but to their further strengthening and even transformation into full-fledged, dominant bodies in the territory.

5. One of the determining factors in the establishment of capable local self-government is the optimisation of the decision-making process relating to local self-government. Most importantly, this refers to the coordinated and mutually coordinated activity of various public authorities, including their interaction both among themselves and with citizens. After all, over the past few years, relations between the government and citizens have deteriorated, in particular due to too high a degree of "secrecy" or "estrangement of the ruling elite" from the average citizen, and lack of real opportunity to influence decision-making, both state and local levels. In this context, the development of an active society that is ready to defend its interests and take part in rule-making, both at the national and local levels, is vital. Establishing interaction between the rulemaker and the public is one of a set of steps that can bring Ukraine closer to European standards of democracy. The primary need in such a situation is the revision of the current legislation on appeals (petitions) of citizens, public discussions and consultations, including the development of legal foundations for the introduction of new practices of public opinion.

Furthermore, to ensure a full opportunity for citizens to take part in the management of both state and local affairs, it is necessary to create an appropriate legal framework for not only national

but also localreferendums, the organisation and conduct of which is currently not governed by Ukrainian legislation. This, in turn, implies: a) the need for a clear definition of the subject of the referendum; b) bringing the regulation of the procedure for preparing and holding referendums in line with the provisions of the election legislation; c) introduction of mechanisms that would prevent the use of the institution of referendums to achieve the political goals of a government; d) creation of legal foundations for conducting local public polls, separating their subject from the subject of relevant referendums, simultaneously consolidating the non-imperative nature of decisions made through public polls and the obligation to consider their results by corresponding public authorities. Important, but understudied and insufficiently regulated is the issue of involving specialists, experts in the decision-making process on local self-government issues, both in the development and during the examination and discussion of draft decisions, including in the ongoing decentralisation reform, which should become an effective basis for ensuring the broad rights of citizens in modern conditions, including direct involvement in addressing pressing issues of community development, regions, state.

Therefore, the implementation of concerted and coordinated actions of both public authorities and local governments, including members of the public to improve the legal regulation of rule-making activities in Ukraine in general, including the process of developing local regulations of local government in particular, further harmonisation of Ukrainian legislation and European Union, which is manifested in the convergence of the national legal system and its subsystems with the legal system of the European Union and the requirements of international law and standards, including training of qualified personnel, in our opinion, are determinants of successful development of Ukraine [33]. This may include, inter alia, the following measures: determining the types and legal force of regulations (including regulations of local self-government), establishing the procedure for their preparation, adoption, entry into force, rules of interpretation, accounting and systematisation; training of specialists in this field; improving mechanisms for involving citizens in decision-making, including by reviewing current legislation on the organisation and conduct of referendums, access to public information, consideration of citizens' appeals, organisation of public control, public examination of draft decisions, etc.; termination of the practice of adopting acts, the successful implementation of which is not ensured by the relevant financial and other conditions, revision of available regulations on their security.

6. Finally, a unified approach to the design and development of municipal policy of Ukraine, its definition and conceptualisation will help define a common strategy and tactics of legal development of society, improving the mechanism of

legal regulation, ensuring human and civil rights and freedoms. The combination of efforts of leading theorists and practitioners around the scientific substantiation of the development of capable local self-government can have a positive impact on improving the system of local self-government and the development of individual territorial communities, and hence the state in general.

In this context, it is important to monitor the implementation of municipal policy. When considering this issue, it is vital to understand the very concept of legal monitoring, the list of officials/bodies, organisations, and persons authorised to implement it, including the mechanism for ensuring its implementation. However, these issues are not described by the unity of scientific approaches to their understanding, as well as the legal regulation of subject-object composition, powers (rights and responsibilities), and other elements.

In particular, the Law of Ukraine "On the Principles of National Regional Policy" stipulates that monitoring of the implementation of national regional policy is carried out by establishing appropriate indicators, the list of which is determined by the Methodology for Monitoring the Implementation of National Regional Policy approved by the Cabinet of Ministers of Ukraine [34]. Thus, in accordance with the provisions of the Law, the effectiveness of the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv, and Sevastopol city state administrations is monitored and evaluated to supervise the implementation of national regional policy, identify regional development issues and their causes, and improve managerial decisions of executive bodies in the field of regional development. The implementation of the national regional policy is monitored by determining the list of indicators, tracking their dynamics, preparation and publication of the results of such monitoring and includes: monitoring the implementation of indicators of the objectives of the documents that determine the national regional policy; monitoring of socio-economic development of the Autonomous Republic of Crimea, oblasts, cities of Kyiv and Sevastopol.

For example, ministries, other central executive bodies, the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv, and Sevastopol city state administrations submit an analytical note to the Ministry of Regional Development on socio-economic development of regions and urgent problems together with proposals for their solution in accordance with the form established by the Ministry of Regional Development. In particular, the Methodology includes the following indicators (subject to quarterly evaluation): economic efficiency; investment development and external economic cooperation; financial self-sufficiency; labour market efficiency; infrastructure development; renewable energy, and energy efficiency. Evaluation of the results lies in a certain comparison of the obtained data according to the corresponding formula.

Therewith, the essence and meaning of the term "monitoring", and specifically "monitoring the implementation of municipal policy", does not fit exclusively within the economic indicators (certain statistics), and is much more extensive. As an element of the legal system of society, legal monitoring is one of the tools to ensure the effectiveness of regulations and the practice of their application, which allows determining the current state of legislation (its quality), assess the effectiveness of legal regulation, identify reasons that hinder or prevent the achievement of the legal goals set. It is quite logical that the purpose of legal monitoring is to ensure the effective operation of the entire process of effective regulation of public relations. Therefore, the object of legal monitoring is public relations, which are covered by the scope of law and require appropriate legal regulation, and the subject – the relevant regulations and public relations, which are under the regulatory influence of such norms. In this regard, the main tasks of legal monitoring include identifying shortcomings in legal regulation and determining the effectiveness of legal norms for the systematisation and improvement of legislation; identifying trends and needs in the legal regulation of a certain scope of public relations; establishing the possibility and necessity of perception of foreign experience in the development of democratic legal institutions. These activities should be performed within the constitutional powers of public authorities and local governments, public organisations [35]. The essence of this activity is to collect and summarise information on the state of legislation, practice of its application, and its purpose – to identify their compliance with the projected result of legal regulation, including the expectations of participants (officials, civil society institutions, citizens). Monitoring should be performed at different levels and stages and in accordance with the tasks. The current legislation is yet to introduce a comprehensive approach to understanding the essence of this activity, especially in the context of monitoring the implementation of municipal policy. On the contrary, it is described by disorganisation, fragmentation, unprofessionalism, misunderstanding of the significance of its results for the further socio-economic development of the state and local self-government, etc.

Given these problems, which are addressed by a set of measures to decentralise reform, given the substantial ideological, cultural changes, including the complexity of modern socio-economic transformations, today one of the important tasks of the state as a whole is to ensure the development of capable local government, stimulating local innovative development, transition from the national municipal policy to the development of municipal policy as a system of strategic management of self-governing activities. After all, the modern socio-economic development of regions, individual territories and communities must be ensured based on the

implementation of effective mechanisms of municipal policy. The mechanism of state regulation of regional development should be determined at both regional and local levels and based on the use of local resources, economic restructuring, environmental, demographic, social and numerous other problems, and municipal – considering the interests of the state and prioritising local interests.

The authors of the present paper believe that ensuring high results and dynamic, balanced regional and local development is possible only through close cooperation of all levels of government and administration. Therewith, today, as never before, there is a detachment of different levels of government, an inability to accept and listen to each other's problems and suggestions, etc.

In turn, the main activities of local authorities (currently local state administrations and local governments) in the regulation of socio-economic development at the regional and local levels include: 1) involvement in the development and further implementation of not only national, but also regional and local development strategies and programmes; 2) assistance and support of economic entities of the relevant territory, region in matters of organisational and methodological support, logistical and advisory assistance (new approaches and mechanisms are gradually being introduced); 3) assistance in the acquisition of new technologies and implementation of local innovative projects of enterprises (mainly on the initiative of business entities themselves, with the involvement of local governments); 4) promoting the development of infrastructure (currently with great difficulty given the ongoing reform process, including medical, educational, and other reforms); 6) stimulating the manufacture of new products (given the substantial slowdown in global economic development, including through the threatening scale of the pandemic and other threats); 7) improvement of resource provision by financing from local budgets and attraction of investment resources, etc. (only in some communities, subject to cooperation between local governments and businesses of interest) [36].

The ongoing process of reforming local self-government and territorial organisation of power in Ukraine, including the processes of improving all levels of the executive branch due to the spread of decentralisation and reorganisation of public administration considerably complicate the development of municipal policy as a system of strategic self-government.

CONCLUSIONS

Based on the above, the authors of this study outline the following main blocks of issues that require the use of a comprehensive scientific approach to their legislative solution:

1. Completion of the ongoing reform of territorial organisation of government and local self-government requires the development of appropriate municipal policy as a system of goals, priorities,

areas, tasks and concrete measures for creation of an effective mechanism of municipal legal regulation, for development and modernisation of local self-government in the country. Both the development and implementation of this policy should involve not only public authorities, but also local governments, interested civil society institutions and local communities.

2. A local regulatory framework for the establishment and development of affluent communities should be created (at the level of Strategies, Action Plans for the implementation of the latter, etc.).

3. It is necessary to ensure a clear division of powers between local state administrations and local selfgovernment bodies, including the redistribution of powers in the system of local self-government bodies, considering the principle of subsidiarity.

4. Training and advisory centres of local self-government bodies should be established to improve the skills of deputies of local councils, officials, and officers of local self-government bodies on the abovementioned development issues at the local level.

5. It is necessary to redistribute funds in favour of local budgets and finance local projects within the objectives of the ongoing reform.

6. The goals, objectives, and ways of reform stated in the Concept of Local Self-Government Reform should be reflected and stipulated in other strategies, plans, and programmes of goals, in particular regulations issued by the state. One of the means of forming a consistent and coordinated national municipal policy should be the deepening and detailing of legal regulation in the municipal sphere through the development and adoption of the Municipal Code and others.

7. The implementation and protection of municipal rights and freedoms of members of territorial communities requires regulatory support, including through the development and adoption of the Law "On Local Referendum", and improving the legal regulation of other forms of local participatory democracy.

The basis for such transformations should be the reform of decentralisation of public power, which makes provision for the redistribution of powers and functions between different branches and levels, including subsystems of public power, in particular, considering the foreign practices of decentralised European countries. After all, the said practices demonstrate that the introduction of decentralisation reform has resulted not only in a substantial reduction in the effects of crises, solving many socio-economic problems, but also in the implementation of strategic objectives of national development of both leading and modern European countries.

Therefore, the highlighted issues require a comprehensive approach and concerted action of the main actors – the state, local government, the private sector, including specialists in the field of local selfgovernment. The legislative implementation of the best mod-

ern European and world practices of providing quality and affordable public services while adapting to the concepts of good governance, e-governance, including the use and compliance with the principles, mechanisms and means of new public management will increase trust in public authorities and local self-government, ensure social harmony, increase economic benefits, etc. The authors of this study argue that changes in the system of government and the territory will open wide opportunities to meet the vital needs and interests of citizens, ensure a high level of quality and structure of consumption of material, social, cultural goods, because they correspond to human nature and purpose and create optimal conditions for its self-fulfilment. Furthermore, a comprehensive approach is required in the implementation of strategies, concepts and plans for the digitalisation of state and public life.

Thus, a certain result of the ongoing decentralisation reform should be an awareness not only of the nature of local government as a special form of public authority, but, above all, awareness of the indisputable fact that local governments, considering the legislative and practical implementation of the principles of subsidiarity and decentralisation, underlying their organisation and activities should become those entities that will be in organisationally, legally and financially capable of ensuring local socio-economic development.

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AREAS OF REFORMING THE STATUTORY REGULATION OF ACADEMIC INTEGRITY IN UKRAINE

Abstract. *Academic integrity is the most important requirement for scientific research. However, the legal regulation of relations ensuring the academic integrity in scientific and educational activities is fragmented and does not contain effective mechanisms for influencing the violator of academic integrity. This necessitates a doctrinal study of the category "academic plagiarism" and the development of areas for reforming the current legislation in this field. Therefore, the purpose of this study is to analyse the statutory regulation of academic integrity as a phenomenon, the concept of academic plagiarism, its differences from plagiarism in the context of copyright compliance, to identify the scope of subjects responsible for establishing the facts of violations of academic integrity and their powers in the field of responding to corresponding violations, procedures for bringing to justice in case of violation of academic integrity. The present study, based both*

on general (historical, comparative, logical, and system) and special (structural-functional, formal legal, sociological, statistical, etc.) methods analyses the prospects of statutory regulation of the relatively new concept in Ukraine, which is academic plagiarism, including the legislative norms concerning the establishment of the concept of academic integrity, types of violations of academic integrity, procedures for considering issues of possible violations of academic integrity, types of responsibility for violations of academic integrity and bodies that have the right to apply them, verifies their compliance with international standards. The paper analyses the practice of the National Agency for Quality Assurance of Higher Education of Ukraine both on the consideration of complaints about violations of academic integrity, and within the framework of accreditation of educational programmes. Attention is drawn to the contradictions of current legal provisions in the legislation of Ukraine in the field of academic integrity. Proposals to the current legislation are formulated to optimise the legal regulation of the issue of compliance with academic integrity. The authors express their opinion on the necessity of accumulating legal regulation of academic integrity within the framework of a single law "On Academic Integrity" to define higher education institutions and scientific institutions as the main subject of ensuring compliance with the principles of academic integrity, and the National Agency for Quality Assurance of Higher Education – mainly by the appellate instance regarding decisions of higher education institutions on violations of academic integrity; adjusting the list of violations of academic integrity and specifying the procedure for their establishment and stimulating higher education institutions to real and not formal compliance with the principles of academic integrity

Keywords: *academic integrity, violation of academic integrity, academic plagiarism, plagiarism, liability for academic dishonesty*

INTRODUCTION

Nowadays, compliance with the principles of academic integrity is considered as one of the most important requirements for the content of scientific research. Cases of violations of the principles of academic integrity are vividly discussed in the scientific and educational environment, and most frequently – in social networks. But in the professional discussion of these problems, it is noted that the regulatory framework governing the rights and obligations, procedures and powers of all subjects participating in legal relations to establish the presence or absence of violations of academic integrity, within a particular case, is rather imperfect. Most importantly, attention is drawn to the fragmented legal regulation of relations ensuring academic integrity in scientific and educational activities, the "dispersion" of relevant legal provisions for various regulations, the presence of numerous gaps, the lack of effective mechanisms for influencing violators of academic integrity. An illustrative example is the question of a subject authorised to establish the presence or absence of a violation of academic integrity. Thus, if this refers to the educational process participants, the legislation provides appropriate op-

portunities for educational institutions, in particular, to create bodies to consider issues of compliance with academic integrity, establish appropriate procedures and penalties for such violations. But there are almost no examples of practical implementation of these opportunities. Only a few educational institutions have created full-fledged systems for ensuring academic integrity, capable of effectively responding to its violations, which would be confirmed by the practice of their work.

Until the adoption of the current Law of Ukraine "On Higher Education" [1], these functions were assigned to the Ministry of Education and Science of Ukraine, and nowadays these powers should be transferred to the National Agency for Quality Assurance of Higher Education. At the same time, the final transfer of powers has not yet taken place, as a result of which the Ministry of Education and Science of Ukraine is no longer considering the issue of establishing the facts of violation of academic integrity (in the form of academic plagiarism in scientific papers, as a result of which a scientific degree was awarded), and the National Agency for Quality Assurance of Higher Education was forced to suspend consideration of these issues, since numerous unresolved issues (mainly of procedural nature) led to an active appeal in court to almost every decision that was made by the Agency in connection with the revealed facts of violation of academic integrity. It should also be considered that the judicial practice in this category of cases is inconsistent and ambiguous. These objectively existing factors create a rather tense situation in the scientific and educational environment – information about the facts of academic plagiarism is actively distributed in social networks, tables comparing fragments of various papers are placed, etc. The public develops a perception of impunity for such obvious violations. A particularly acute reaction is observed in cases where the facts of academic dishonesty are revealed in the scientific papers of officials and other public figures. Thus, when it comes to the need to respond to possible violations of academic integrity in the results of scientific studies, the legislation of Ukraine impresses with its legal surrealism. It identifies subjects who are required to respond to violations of academic integrity, but each of them lacks the completeness of legal structures for the exercise of their powers.

Thus, there is a rather contradictory situation: the legislation defines subjects that are required to respond to the facts of violation of academic integrity, but in practice there are no proper legal structures and mechanisms that would provide these subjects with the opportunity to effectively exercise their powers. The mandatory procedures that must be followed when reviewing information about possible violations of academic integrity are determined, but the procedures themselves are not approved. Strict types of liability for violations of academic integrity are established,

but there is almost no practice of their application. Such a situation implicitly indicates the necessity of amending the Ukrainian legislation on compliance with the principles of academic integrity and responsibility for its violation. In the process of solving this important issue, it is advisable to consider the practices of foreign countries and independent specialised organisations.

Thus, the International Centre for Academic Integrity (ICAI) uses a positive approach in determining academic integrity and relies on values that must be respected: honesty, trust, justice, respect, responsibility, and courage [2]. Notably, this is a fairly common approach that does not establish liability for violations, but invites the public to join the recognised values. This factors in the historically formed university autonomy, which lies, inter alia, in the right of educational institutions to independently resolve all issues relating to the violation of academic integrity by educational applicants or teachers, including the possibility of bringing to all types of academic responsibility. Along with the definition of the very concept of academic integrity, foreign researchers pay great attention to certain types of violations of academic integrity, as well as mechanisms for their detection and proof, for example, various forms of plagiarism [3; 4].

Of interest are also the results of a comparative legal analysis of the statutory regulation of academic integrity in general, or the causes of violation of academic integrity, types of misdemeanors in this area in different countries [5, p. 84–96]. At the same time, along with differences in the regulation of such phenomena, absolutely similar problems can also be noted in the educational institutions and scientific institutions in other countries. Violation of academic integrity in the form of academic plagiarism or in other forms is a serious issue for many educational institutions, scientific institutions, and publishing houses because they can lead or actually lead to the fact that students, due to committed violations, have the opportunity to get credits without achieving educational goals; researchers, using academic plagiarism, can increase the number of their publications and the citation index and get research funding, not having proper qualifications in reality [6, p. 13; 7]. It is noted that violations of academic integrity have a devastating impact not only on education andscience, but also on economic, social, and political processes in general [8]. Attention is also drawn to the most pressing challenges in the field of academic integrity – the transition to distance learning in the context of a pandemic [9] or the importance of web citation [10, p. 1046; 11]. In Ukraine, in most cases, the problem of academic integrity is analysed in the context of the organisation of the educational process and the quality of higher education [12]. Conventionally, the problem of compliance with the principles of academic integrity is considered in the context of intellectual property, copyright or related

rights [13; 14]. There are also quite in-depth scientific studies of the concept and types of plagiarism [15] (which does not always coincide with the specifics of academic plagiarism), elements of academic integrity [16] and ways to combat academic plagiarism [17]. At the same time, sufficient attention is not paid to the specifics and significant shortcomings of the legal regulation of liability for violations of academic integrity. Therefore, the purpose of this study is to analyse the statutory regulation of academic integrity as a phenomenon, the concept of academic plagiarism, its differences from plagiarism in the context of copyright compliance, to identify the scope of subjects responsible for establishing the facts of violations of academic integrity and their powers in the field of responding to corresponding violations, procedures for bringing to justice in case of violation of academic integrity.

1. MATERIALS AND METHODS

The methodological basis of the present study includes a set of general scientific and special methods and techniques of scientific research. All methods were applied in an interconnected way, which ultimately contributed to ensuring the comprehensiveness, completeness, and objectivity of scientific research, correctness and consistency of conclusions. The methodological framework of the study includes universal methods of dialectics used at all stages of covering the essence of academic integrity, the history of its development in European countries, and the prospects for reform in Ukraine. In the course of the study, its authors employed general scientific methods as historical, comparative, logical, and systematic methods. Historical allowed studying the features of statutory regulation of the state's attitude towards such a phenomenon as academic integrity in its various manifestations, the gradual identification of two main aspects of academic integrity: ethical and legal, the development of rules for observing academic integrity, determining responsibility for its violation and mandatory elements of the decision-making procedure. Using the comparative method, the study compares the provisions of the current legislation of Ukraine, European countries, and international norms, considers the legal regulation of academic integrity and its reform in foreign countries. The system method helped justify the independence of the principles of academic integrity, made it possible to conceptually form and substantiate the theoretical foundations and develop a terminology necessary for studying the problems of regulating academic integrity.

Special methods were also applied at certain stages of the study, namely the structural-functional method, which mares provision for the consideration of any phenomenon as systemic with a mandatory analysis of the functions of interacting elements, was used to determine the mandatory components of academic integrity, the list of principles of academic integrity, the mandatory components of the procedure for

considering the presence or absence of a violation of academic responsibility. The formal legal method was also used to analyse the legal norms of corresponding regulations that define the concept of academic integrity, provide a list of its principles, determine the types of violations of academic integrity and types of punishments for violations of academic integrity, a list of subjects competent to decide on the presence or absence of violations of academic integrity and the measure of punishment in case of confirmation of violations, the rights and obligations of all participants in the process of considering violations of academic integrity. The methods of sociological, statistical, and generalisation were also used to analyse the standpoints of students, teachers, and representatives of the administration of higher educational institutions regarding the effectiveness of legislation in the field of compliance with the principles of academic integrity during training and scientific activities, real opportunities to protect their violated rights. The specifics of the area and subject of this study also necessitated the use of the methods of induction and deduction analysis, synthesis, comparison, analogy, which became vital tools for selecting factual material.

The regulatory framework of this study includes the standards and recommendations for quality assurance in the European Higher Education Space (ESG 2015), international legal acts ratified by the Verkhovna Rada of Ukraine, laws and other regulations of Ukraine in the field of education and science, the legislation of foreign countries that have joined the European higher education space and have success in observing the principles of academic integrity. The main stages of the study of the state of compliance with the principles of academic integrity in Ukraine and the areas of reforming the statutory regulation of this phenomenon included: 1) the hypothesis that regardless of the level of development, the size of the territory and other indicators, the education and science system of most states of the world have approximately the same new challenges in the field of compliance with academic integrity, which creates prerequisites for consolidatingefforts to overcome them; 2) the analysis of the state of legal regulation in Ukraine of academic integrity as a mandatory space of educational and scientific activity, the history of the development of the domestic regulatory framework in the corresponding area, the shortcomings of current legislation; 3) the study of doctrinal approaches and practices of foreign countries on the scope of legal regulation of academic integrity issues; 4) formulation of the conclusion that the current legislation of Ukraine does not meet all the requirements for regulating legal relations in the field of academic integrity, changing individual parts of a considerable number of laws will not be the solution to the problem, so the most effective solution to the problem is the adoption of a separate Law of Ukraine “On Academic Integrity”.

2. RESULTS AND DISCUSSION

At present, the issue of developing the foundations of academic integrity is becoming increasingly pressing in the scientific and educational space of Ukraine. At the same time, the importance of academic integrity has not always been the case, and the recognition of this phenomenon as a problem at the legislative level has occurred relatively recently. Within the framework of the historical analysis of the development of academic integrity and its impact on the quality of higher education, it can be noted that the legislator first normalized academic integrity as a phenomenon at the legislative level only in 2017. The Law of Ukraine "On Education" of September 5, 2017 [18] defines academic integrity as a set of ethical principles and rules defined by the laws of Ukraine, which should guide participants in the educational process during training, teaching, and conducting scientific (creative) activities to ensure confidence in the results of training and/or scientific (creative) achievements (Part 1, Article 42). Therewith, this does not mean that until 2017, Ukrainian educational institutions were not supervised and were not obliged to adhere to the corresponding ethical principles or legislatively defined rules in the field of training, teaching, scientific activities to ensure confidence in their results. However, all this had a different form of implementation and was not perceived within the framework of a single phenomenon, which is academic integrity. In particular, Article 52 of the Law of Ukraine "On Education" of 1991 [19] obliged all participants of the educational process (pupils, students, cadets, trainees, interns, clinical residents, postgraduates, doctoral students) to comply with legislation, moral and ethical standards. It was noted that persons with high moral qualities can engage in teaching activities (Part 1, Article 54). The duty of pedagogical and scientific-pedagogical workers was to establish respect for the principles of universal morality by setting and personal example: truth, justice, loyalty, patriotism, humanism, kindness, restraint, hard work, moderation, and other virtues; to observe pedagogical ethics, morals, and respect the dignity of a child, pupil, or student (Article 56). Even the responsibility of a higher educational institution in making decisions on the development of academic freedoms, the organisation of scientific research, the educational process, etc. was recognised (within the framework of defining the concept of autonomy of a higher educational institution – Article 46).

However, this law had not yet defined measures of liability for violation of these duties. In fact, the relevant norms were declarative in nature. This was explained by the fact that higher education institutions, applicants for higher education and research and teaching staff were still at the stage of awareness of the category of integrity, ethical and moral principles, which were not always perceived as priority or mandatory. The Law of Ukraine "On Higher Education" of 2002 [1] factually duplicated the provisions of the Law of Ukraine "On Education" of

1991 concerning the duties of teachers and research and teaching staff (Article 51). And the duties of persons studying in higher educational institutions included the necessity of compliance with legislation, moral and ethical norms was not mentioned at all (Article 55). Under such conditions, liability for violation of ethical and moral principles was not stipulated. At the same time, it is impossible to describe the higher education in Ukraine before 2017 as such that was completely unaware of and not characterised by the ethical rules of educational and scientific activities. The legislation of independent Ukraine initially established the requirement to refer to the sources used in scientific papers and the responsibility for "identifying text borrowings without reference to the source in a dissertation, the author of which has already been issued a Doctor or Candidate of Sciences Diploma" in the form of "making a decision to deprive them of their scientific degree" (Paragraph 14 of the procedure for awarding scientific degrees of 2013 [20]; Item 16 of the Order of awarding of scientific degrees and assignment of a scientific rank of the senior researcher [21]; Paragraphs 16, 46 of the Order of awarding of scientific degrees and assignment of scientific ranks of 1997 [22]; Clause 4, Article 2, Articles 18, 56 of the rocedure for awarding scientific degrees and conferring academic titles of Ukraine in 1992 [23], etc). In fact, these requirements correspond to the modern definition of "academic plagiarism" and are a type of violation of "academic integrity" in the context of current legislation.

In addition, one should not forget about the requirements of the civil legislation of Ukraine, which have always considered plagiarism as a violation of copyright and established responsibility for such violations, allowing the possibility of extending these rules to scientific and creative activities. However, the evolution ofscientific and educational processes has led to the realisation that the available volume of statutory regulation is clearly insufficient to ensure the proper development of higher education and scientific activities in Ukraine, and the lack of official recognition of academic integrity as a prerequisite for the quality of higher education and scientific activities significantly distorts their purpose in society and in general leads to the loss of advanced positions in this issue on the world stage. Based on the importance of this problem, the Law of Ukraine "On Higher Education" of 2014 [24] introduced the concept of academic plagiarism and a clear and strict responsibility of all subjects involved in its admission was established, while the Law of Ukraine "On Education" of 2017 not only defined the concept of academic integrity, but also made provision for manifestations of its violation, the obligation to comply with the principles of academic integrity for all participants in educational activities and responsibility for its violation. This position of the legislator should be recognised as quite reasonable. The scientific and

educational community, the society in general, should be aware that violation of the rules and principles of academic integrity makes it impossible to obtain a high-quality education, regardless of the institution of higher education or scientific institution where the training takes place. Such violations really call into question the results of training and complicate the self-fulfilment of a young specialist with a higher education diploma obtained in an institution where the principles of academic integrity do not apply. That is why an active policy of all participants in the educational process and scientific activities in the field of familiarisation and promotion of the rules of academic integrity is critical. High hopes for the mass dissemination of knowledge and practices of academic integrity in the field of higher education and scientific activities were associated with the creation of the National Agency for Quality Assurance of Higher Education in Ukraine (hereinafter referred to as "the National Agency"). This body was empowered to directly or indirectly take part in shaping practices of respect for academic integrity and responsibility for its violations at all levels:

a) the National Agency is directly obliged by the current Law of Ukraine "On Higher Education" to respond to violations of academic integrity in the form of academic plagiarism, forgery, falsification in the qualification work of an applicant for the degree of Doctor of Philosophy (Clause 6, Article 6; Clause 9, Article 19). This primarily concerns the responsibility of research and teaching staff;

b) regarding the development of principles and practices of academic integrity at the level of higher educational institutions, including applicants for education – the activities of the National Agency are indirect and these factors are verified in the process of accreditation of curricula.

Thus, when accrediting each curriculum, the National Agency tries to establish whether the higher education institution has defined a clear and understandable policy, standards and procedures for observing academic integrity, which all participants in the educational process must consistently adhere to upon implementing the curriculum. A higher education institution should promote academic integrity (primarily through the implementation of this policy in the internal culture of educational quality) and use appropriate technological solutions as tools to counteract violations of academic integrity. Furthermore, the institution of higher education should ensure compliance with academic integrity in the professional activities of scientific supervisors and postgraduates (adjuncts), in particular, take measures to exclude scientific leadership by persons who have committed violations of academic integrity. Notably, in the process of implementing each accreditation, experts of the National Agency are required to hold meetings with students and find out their assessment of both the institution's activities in the

field of ensuring academic integrity and in ensuring the quality of education in general. Furthermore, participants in the accreditation process or any other person have the right to apply for protection of their rights to the Ethics Committee of the National Agency. In the process of training experts of the National Agency who carry out accreditation of curricula, special skills and abilities are developed to comply with the procedures and procedure for verifying information on compliance with academic integrity standards within a particular institution of higher education (scientific institution). Thus, to confirm the information received from a higher education institution (scientific institution) that ensuring academic integrity is part of their internal system of ensuring the quality of education, experts should state the presence of at least such elements:

1) the policies, standards, and procedures for observing academic integrity must be pre-defined, clear, and understandable, and take the form of a code of honour or other document in accordance with the decision of the higher education institution. Procedures should include both mechanisms for monitoring compliance with academic integrity (verifying written papers to identify text and other borrowings without correct references, peer review of scientific texts before publication, an anonymous survey of higher education applicants about the presence/absence of violations of academic integrity, etc.), and effective, clear, and transparent procedures for responding to such violations and bringing to academic responsibility;

2) institutional ensuring of compliance with academic integrity implies the presence of a separate structural unit (official) that handles issues of academic integrity, or a clear distribution of relevant functions and powersamong the existing structural divisions (officials) of the higher education institution;

3) availability of appropriate information and technological means used by the institution of higher education to prevent and counteract manifestations of violations of academic integrity;

4) measures to promote academic integrity among applicants for higher education may include, in particular, the introduction of individual educational components dedicated to academic integrity and academic writing skills into the educational programme, the implementation of individual short-term training modules on this topic, etc.;

5) declaring and maintaining a zero-tolerance policy towards any manifestations of violations of academic integrity, which is embodied in the institutional culture and supported by appropriate procedures and institutional practices [25].

The analysis of the practicec of the National Agency and the activities of higher education institutions and scientific institutions in the field of compliance of participants in the educational and scientific space with the principles of academic integrity suggests rather disappointing conclusions. Firstly, the contradictions between the provisions

of the Laws of Ukraine "On Education" and "On Higher Education", as well as the practical absence of relevant sub-legislative acts in the field of ensuring the implementation of the requirements of the relevant laws, practically level the results of the work of the National Agency and stop the work of the Ministry of Education and Science of Ukraine regarding compliance with the principles of academic integrity. This is manifested in the fact that the Ministry of Education and Science of Ukraine no longer has the authority, and the National Agency does not yet have the proper legal tools to effectively respond to complaints (appeals, reports) about violations of academic integrity. Basically, this refers to reports about the presence of academic plagiarism in dissertations that have already passed the stage of defence in specialised academic councils. Sometimes this refers to other forms of violations of academic integrity (falsification or forgery in combination with academic plagiarism), again, in already defended dissertation research. It is not uncommon for attention to be drawn to procedural violations in the process of defending dissertations (non-compliance with the requirements for posting texts themselves, reviews of official opponents on the websites of relevant institutions of higher education (scientific institutions), requirements for the procedure for entering the defence, refusal of specialised academic councils to respond to such violations, etc.) in combination with violations in the design of dissertations. Complaints are received that accuse the admission of academic plagiarism in scientific articles that were considered during the defence of scientific achievements or were published after the defence of dissertation research and obtaining an academic degree. There are also accusations of a different nature: bribery (within the meaning of the Law of Ukraine "On Education"), biased assessment, etc.

The Law of Ukraine "on Higher Education" stipulated legal grounds for such appeals. In particular, it is noted that the National Agency forms an Ethics Committee to consider issues of academic plagiarism (performing other powers assigned to it by the National Agency), an appeal committee to consider appeals, applications, and complaints about the activities and decisions of specialised academic councils (Paragraph 9, Article 19). To approve the decisions recommended by these committees, the National Agency is authorized by the Law to monitor the activities of specialised academic councils (Paragraph 9, Part 1, Article 18), cancel the decision of the specialised academic council to award an academic degree in case of detection of academic plagiarism (Paragraph 6, Article 6), etc. Under such conditions, it is quite understandable that participants in educational or scientific activities who have witnessed violations of academic integrity or who have become aware of them, having familiarised themselves with the content of the Law of Ukraine "On Higher Education" and having a desire to contact the appropriate and com-

petent authority to eliminate the identified violations and bring the perpetrators to academic responsibility, approach the National Agency, especially in conditions when the Ministry of Education and Science of Ukraine, in case of receiving appeals on such issues, is forced to answer that the competent authority in matters of academic plagiarism is the National Agency. However, there is no effective procedure for exercising these powers, which must be approved by the Cabinet of Ministers of Ukraine.

For the Ethics Committee of the National Agency to fully consider numerous complaints about academic plagiarism received by the National Agency, the procedure for cancelling the decision of the dissertation council to award an academic degree must be approved. For the full-fledged work of the appeals committee of the National Agency, a new procedure for awarding academic degrees and the procedure for accreditation of specialised academic councils should be developed and approved. To eliminate contradictions between the Laws of Ukraine "On Higher Education" and "On Education" on academic integrity issues, it is necessary to amend the Law of Ukraine "On Education". The delay in the adoption of these sub-legislative acts leads not only to the fact that the decisions of the Ethics Committee of the National Agency (solely on formal grounds), without any assessment of their content component, are challenged in court, but also to the fact that almost all cases of violation of academic integrity remain without a proper reaction from the state and undermineconfidence in the level of Ukrainian scientific studies. This causes fair criticism amongst the scientific and educational community. These circumstances should not serve as grounds for the refusal of the National Agency to perform its tasks in the field of ensuring the quality of higher education and compliance with high principles of academic integrity. The search for all possible solutions must continue. Thus, the law not only empowers each educational institution, but also obliges them to approve the internal procedure for identifying and establishing violations of academic integrity, internal provisions on types of academic responsibility and apply these documents in practice.

Therefore, the National Agency should cooperate with higher education institutions, apply to them with a proposal to verify particular information about violations of academic integrity. In turn, higher education institutions should inform the National Agency about the results of such inspections, and the latter should consider the information provided when accrediting educational programmes. This solution requires more time, since several subjects are involved: higher education institutions and the National Agency. But the expansion of the subject composition also includes a positive aspect: not only the National Agency, but also higher education institutions take part in this work. Each educational institution or scientific institution should be involved

in this process and be responsible for the results of educational activities [26, p. 39; 27, p. 13] and scientific research as an essential component of ensuring the quality of education. It should be borne in mind that the place of education is crucial for the development of a culture of integrity and shapes the future behaviour of a graduate as a person and specialist [28, p. 134].

Secondly, the results of accreditation of curricula by the National Agency indicate, unfortunately, that higher education institutions (scientific institutions) mainly formally approach the problem of compliance with academic integrity. Most higher education institutions and scientific institutions have approved internal rules of academic integrity, procedures for considering relevant issues, and established ethics commissions or other bodies. However, there is virtually no practice of establishing the facts of violation of academic integrity and bringing the perpetrators to academic responsibility. The overhwelming majority of institutions claim that applicants for education, postgraduates, research and teaching staff, and representatives of the administration are informed about the rules of academic integrity, adhere to them in good faith and do not allow violations. In the meantime, the National Agency receives numerous complaints about blatant violations of academic integrity. This situation indicates that there are all signs of tolerance for violations of academic integrity in higher education institutions. Furthermore, it is not uncommon for a National Agency to establish violations of academic integrity on the part of particular researchers within the framework of its activities and transfer such information to higher educational institutions for an appropriate response, but the latter refused to recognise the existence of such violations and bring their research and teaching staff to academic responsibility. They even officially appealed to the National Agency and other bodies with a proposal not to look for violations of academic integrity in the results of scientific activities of their representatives. The analysis of these problems confirms the need to develop and adopt a unified legislative act that would function as a "special law" and define the main requirements and procedures for compliance with the rules of academic integrity, procedures for establishing its violation and bringing to justice. The authors of this paper believe that the Draft Law of Ukraine "On Academic Integrity" should perform the following tasks:

– accumulate legal regulation of all aspects of academic integrity within the framework of a single law;

– identify institutions of higher education (scientific institutions) as the main subject of ensuring compliance with the principles of academic integrity, providing them with additional opportunities to respond to its violation;

– define the National Agency for Quality Assurance of Higher Education as primarily an appealate instance for

decisions of higher education institutions on violations of academic integrity;

– identify the types of violations of academic integrity and specify the procedures for their establishment;

– encourage institutions of higher education and scientific institutions to actually, rather than formally, comply with the principles of academic integrity through the introduction of liability for failure to identify violations of academic integrity and counteract these violations.

CONCLUSIONS

As a final conclusion, it can be noted that today in Ukraine an active scientific and educational environment perceives the importance of developing a culture of compliance with the principles of academic integrity in educational processes and scientific activities in the same way as in other developed countries of the world. Despite territorial, social, economic, or any other differences, the main difficulties faced by representatives of the state, higher education institutions, and scientific institutions in combatting violations of academic integrity are almost the same in most countries. This can become an essential argument for combining the efforts of representatives of different countries, namely in the European educational and scientific space, to jointly develop an action plan for the development of systematic measures to combat any manifestations of academic integrity. Furthermore, there are insufficient real mechanisms for detecting and countering violations of academic integrity in the Ukrainian legal space.

Well-known international principles of academic integrity in the field of higher education and scientific activities are recognised, but mostly not observed. In most cases, this is not connected with conscious, systematic activities that are incompatible with the concept of academic integrity, but most frequently indicates a desire to prevent the disclosure and dissemination of information about violations detected and resolve conflicts "peacefully". Under such conditions, it is vital and necessary to activate the national policy aimed at stimulating transparency of processes in the field of compliance with academic integrity and responding to its violations, and developing a culture of compliance with academic integrity. An effective scenario for solving a considerable part of the problems of compliance with academic integrity can be the adoption of the Law of Ukraine "On Academic Integrity", which would ensure not only recognition of the importance of this phenomenon for the future of Ukrainian higher education and its presentation in the European Space, but also clearly define that not only the National Agency, the Ministry of Education and Science of Ukraine, or other state body, but also all higher education institutions and scientific institutions are responsible for the quality of higher education and research results, and, accordingly, for compliance with the principles of academic integrity.

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PROTECTION OF LABOUR RIGHTS BY TRADE UNIONS IN SEPARATE POST-SOVIET COUNTRIES

Abstract. *Trade unions play an increasingly more critical role in protection of the employees of every state. This article aims to outline the problems with regard to the legal regulation of labour rights protection by trade unions in post-Soviet countries. The research is based on a system of various general philosophical methods (dialectical method), general scientifc methods, such as methods of synthesis and analysis, induction and deduction, and special legal methods, including comparative legal method and the method of modelling. The choice of the mentioned methods was determined by the purpose of this study. The legal rules on protection of labour rights by trade unions in post-Soviet countries are set up by a number of international conventions, Constitutions of such countries (as this is a special constitutional right, being under a special protection of the state) and their national legislative acts. Some of the post-Soviet states are now members of the EU (Lithuania, Latvia, Estonia) and are subject to regional EU regulations. Every post-Soviet State has its own jurisprudence, legal practice and traditions of labour rights' protection and hence has its own national eculiarities with regard to this protection, the*

representation of employees and the architecture of labour legislation. The analysis conducted by the authors shows that the national legislators were not fully following the international standards established by the International Labour Organization and did not fully secure the freedom of association. All the mentioned countries were recommended either to change some pieces of legislation or to supervise the existing draft of laws to make them meet the rules set in a number of international conventions. The authors have also stated that trade unions in post-Soviet countries are not always effective

Keywords*: trade unions, right to protection by trade unions, post-Soviet countries, labour rights, the Committee on Freedom of Association*

INTRODUCTION

It seems impossible to deny that, due to the globalization of economic life, protection of labour rights by trade union is becoming more and more signifcant for employees of every state. History has shown cases where big employers were trying to minimize social expenses whilst limiting or infringing the labour rights of their employees. The trade unions' protective activities include resisting such limitations, and establishing preventive defence and protection of employees' labour rights along with their legitimate labour interests. This serves to protect the balance of rights between the employer and the employee. The efciency of this protective mechanism is reflected by the trade unions' establishment and functioning.

Trade unions form an important element in the structure of any modern civil society, they tend to be "par excellence form or workers' organisation" [1]. A right to form trade union is now understood as one of the main components of the international human rights system [2]. A progressive civil society should pursue the freedom of association of people, who are connected by common professional, social, economic interests that were developed while they fulflled their labour activity (e.g., powerful trade unions were created in France, Germany, United Kingdom, Ukraine, Poland). As V. Lambropoulos notes, "the legislative history reveals how the concept of freedom of association was reframed over the last century" [3], itis necessary to add that trade unions can be very effective even in times of economic and political crisis [4], they can narrow or broaden their agenda to respond to challenges (e.g., a migration challenge) [5], they can even influence a climate-change policies [6]. A trade union may become the main actor of the workplace democracy [7], no surprise the workers can even use hybrid forms of organising [8].

The trade unions' activities are an illustration of each society's social and economic life. The analysis of special literature shows that while perceiving the nature-labour relationship different models can be formed: "the container model, nature as a mediator of survival, and the naturelabour alliance" [9]. The

sphere of protection of labour rights by trade unions in post-Soviet countries has its own peculiarities. Common problems and tendencies can be outlined in the Republics of Kazakhstan, Uzbekistan, Tadzhikistan, Moldova, Belarus, Ukraine, Lithuania, Latvia, Estonia and other post-Soviet countries.

This article aims to outline the problems with regard to the legal regulation of labour rights protection by trade unions in post-Soviet countries, based on international, regional legislation, Constitutions as well as on jurisprudence.

1. LITERATURE REVIEW

The protection of labour rights by trade unions was studied by a number of Soviet and modern authors, such as: N. Aleksandrov, V. Chibisov, M. Chos, V. Dogadov, G. Goncharova, N. Iefremova, M. Inshyn, Ie. Ivanov, N. Lyutov, B. Nurasheva, V. Prokopenko, O. Protsevskyi, Yu. Schotova, I. Snigiriova, F. Tsesarskyi, V. Tsvyh, S. Vavzhenchuk and others.

The protection of labour rights by trade unions was also studied in a number of dissertation theses, defended during Soviet and post-Soviet times. In 1975 Valeriy Chibisov devoted his dissertation to the protective function of Soviet trade unions [10]. In 1988 Irina Snigiriova defended her dissertation thesis called "Trade Unions as Subjects of Soviet Labour Law" [11]. Mykhail Zelenov defended his thesis "Legal Problems of Participation of Trade Unions in Solving Collective Labour Disputes" in 1999 [12]. In 2004, the problem of protection of social-labour rights of employees in a market-driven economy by trade unions was analysed by Veniamin Nikiforov [13]. This very year Feliks Tsesarskyi devoted his dissertation thesis to the protective function of the trade unions and its peculiarity [14]. In 2013, Yulia Schotova studied the realisation of trade unions' function on the level of individual and collective legal relations in her dissertation for Dr. Habil, named "Legal Mechanism of Realisation of Trade Unions' Function as Subjects of Labour Law" [15]. In 2015 Bibigiul Nurasheva devoted a separate chapter in her dissertation to trade unions as the main element of protection of labour rights, in which she outlined perspectives on the development of a mechanismfor legal protection of labour rights by the trade unions in Republic of Kazakhstan [16].

A signifcant number of studies devoted to the legal status of trade unions was written during Soviet times: Vasiliy Dogadov (studied legal status of trade unions in the Soviet Union and was the frst to mention Trade Union Law) [17], Volodymyr Prokopenko (researched the peculiarities of subjects in relations between the trade unions and administration of the company) [18], Ievgeniy Ivanov analysed trade unions in the socialist system [19]. In postSoviet times, problems concerning the protection of labour rights by trade unions continued to be a popular feld of research: Volodymyr Tsvyh examined trade unions in civil society [20] and Nikita Lyutov researched the peculiarities of protection

of rights by trade unions in the United Kingdom [21]. Some separate questions of trade union activity were raised by the authors in a manual "Theoretical foundation of Labour Law of Ukraine" [22]. Serhii Vavzhenchuk, in his monograph called "Protection and Defence of Labour Rights of Employees" [23], considered the mechanism of protection labour rights by the trade unions.

Scientifc articles were also devoted to the problems concerning the legal regulation of trade unions' activity. During the Soviet period, the following scholars were dedicating their papers to the protection of rights by trade unions and their activities: Nikolai Aleksandrov described the notion of protection of employees' rights in his article [24]; Nadezhda Iefremova studied the role of trade unions in the period of communism building [25]; and Boris Shelomov devoted his research to the representation of trade unions [26]. During the post-Soviet period the authors also chose the protective function of trade unions as the object for scientifc research. Anatoliy Appakov studied the problems concerning the protective function of trade unions [27]. Galina Goncharova described trade unions and labour relations through the application of Ukrainian legislation [28]. Mykola Chos analysed the Law of Ukraine, regulating the activity of trade unions [29]. Olga Zadorozhna considered the issue on the development of collective contract relations though the activity of trade unions [30]. Bahodyr Ergashev researched the problems that trade unions in Central Asia and the Caucasus encountered [31]. Oleksandr Protsevskyi studied the consent of the trade union to the termination of contract [32]. Zinaida Bilous has highlighted the role of trade unions in the sphere of control upon meeting the rules of the labour legislation [33]. Pavlo Lukianchuk has studies the role of trade union's control in developed countries of the world [34].

2. MATERIALS AND METHODS

The article is based on international universal and regional European legal instruments, such as: Right to Organise and Collective Bargaining Convention[1], Workers' Representatives Convention[2], Freedom of Association and Protection of the Right to Organise Convention[3], International Covenant on Economic, Social and Cultural Rights[4], International Covenant on Civil and Political Rights[5],

[1] Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=N ORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243.

[2] Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C135

[3] Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/ dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087.

[4] International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from https://www.ohchr.org/en/ professionalinterest/pages/cescr.aspx.

[5] International Covenant on Civil and Political Rights. (1966, December). Retrieved from

Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community[1], EU Directives No. 94/95/EC (no longer in force)[2], 97/74/EC (no longer in force)[3], 2006/109/EC (no longer in force)[4] and 2009/38/EC[5], Constitutions of the post-Soviet Countries, the case law of the Committee on Freedom of Association and a number of scientifc works.

The research is grounded on a system of various general philosophical methods (dialectical method), general scientifc methods, such as methods of synthesis and analysis, induction and deduction, and special legal methods, including comparative legal method and the method of modelling. The choice of the mentioned methods was determined by the aims of this research. The dialectical method gave the possibility to review the interrelation between the international and regional European legal instruments regulating protection of labour rights by the trade unions and national legal framework of post-Soviet Countries and helped to identify that in general the national legislation of post-Soviet Countries does not always provide for direct implementation the international standards.

Such general methods as induction and deduction, were used to evaluate the exercising of the right to protection by trade unions in post-Soviet Countries and formulate the conclusion that the efciency of the traditional model of labour rights' protection by labour unions is still insuffcient in post-Soviet countries. The methods of synthesis and analysis were used to assess the existing Constitutional norms in the post-Soviet countries on trade unions and formulation and formulate the conclusion that in most post-Soviet Countries the right to establish and join a trade union is either directly or indirectly foreseen intheir Constitutions and also that the mentioned right is a peculiar right: a so-called constitutional labour right. The constitutional labour rights of employees are natural human rights, envisaged in the Constitution as opportunities for the person to apply his/her capability to certain labour, which is

https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[1] Directive No. 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. (2002, March). Retrieved from https://eur-lex.europa.eu/legalcontent/en/TXT/?uri=CELEX:32002L0014.

[2] EU Directive No. 94/95/EC. (1995, October). Retrieved from https://www.epchungary.hu/.

[3] Council Directive No. 97/74/EC. (1997, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ TXT/?uri=celex%3A31997L0074.

[4] Council Directive No. 2006/109/EC. (2006, November). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ ALL/?uri=CELEX%3A32006L0109.

[5] Directive No. 2009/38/EC of the European Parliament and of the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (2009, May). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038.

a minimal necessity for decent living, development and the securement of quality of life, all of which are realized within the labour legal relations.

Comparative legal method was used when accessing the international legal instruments, regulating the freedom of association and the trade unions' legal status and when examining the case law of the Committee on Freedom of Association, being an international body authorised to decide cases in violation of freedom of association, brought by the trade unions against the member states. The empirical base of the relevant case-law is broad, as the Committee on Freedom of Association has already examined more than 3 300 cases, including the cases brought against some post-Soviet countries. The method of modelling was used while formulating conclusion that the traditional models of labour rights' protection by labour unions needs revision and renovation of the legal framework.

3. RESULTS AND DISCUSSION

3.1. The Constitutions of post-Soviet Countries and Protection by Trade Unions

In most post-Soviet countries, the right to establish and join a trade union is either directly or indirectly foreseen in their Constitutions. This is a special constitutional right, being under a special protection of the state, just as much as other human rights (including such basic rights as the right to life, reproduction rights, rights to healthcare etc.).

In the *Constitution of the Republic of Kazakhstan* this right is not directly mentioned. Rather, the right to establish and enter a union is envisaged, as follows from the analysis, Article 32 of the Constitution of the Republic of Kazakhstan. In accordance with Part 1, Article 23 of theConstitution of the Republic of Kazakhstan, citizens of the Republic of Kazakhstan have freedom of association[1]. Such a broad defnition allows the citizens to form and enter any types of associations, including the trade unions. The text of *Constitution of the Republic* of *Latvia* also does not provide a direct indication to trade unions and the right to form and enter them, however as derived from Article 102 of the Constitution of the Republic of Latvia, everyone has the right to enter companies, political parties and other non-governmental organisations[2]. Trade unions are one of the types of non-governmental organisations and, therefore, this article entails the right to establish and enter trade unions. A very similar approach was used by the lawmaker of the Republic of Estonia. Pursuant to Article 48 of the *Constitution of the Republic of Estonia*, everyone has the right to join non-commercial associations and unions[3]. Therefore, unlike

[1] Constitution of the Republic of Kazakhstan. (1995, August). Retrieved from https://www.akorda.kz/ru/ofcial_documents/ constitution.

[2] Constitution of the Republic of Latvia. (1922, February). Retrieved from https://likumi.lv/ta/en/en/id/57980.

[3] Constitution of the Republic of Estonia. (1922, June). Retrieved from https://www.

the Constitution of the Republic of Kazakhstan, under the Constitutions of the Republic of Latvia and the Republic of Estonia, the mentioned right is vested not only in the citizens of the relevant state, meaning that under the Constitutions of the Republic of Latvia and the Republic of Estonia, the right to enter trade unions is granted not only to citizens of these states, but also to the foreign citizens and stateless persons. This shows that the focus, Article 48 of the Constitution of the Republic of Estonia and Article 102 of the Constitution of the Republic of Latvia are much wider than the range of Part 1, Article 23 of the Constitution of the Republic of Kazakhstan. Moreover, the Constitution of the Republic of Estonia provides for the principle of voluntariness of employees in the trade unions. The mentioned principle is directly listed in Article 29 of the Constitution of the Republic of Estonia, due to which the participation of the employee and employer in the associations and unions is voluntary[1].

A number of constitutions of post-Soviet countries directly list the right to enter trade unions. The mentioned right is a peculiar right: a so-called constitutional labour right. The constitutional labour rights of employees are natural human rights, envisaged in the Constitution as opportunities for the person to apply his/her capability to certain labour, which is a minimal necessity for decent living, development and the securement of quality of life, all of which are realised within the labour legal relations [22]. In particular, Article 36 of the *Constitution of Ukraine* precludes that Ukrainian citizens are entitled to freedom of association in political parties and non-governmental organisations for realisation and protection of one's rights and freedoms and serving political, economic, social, cultural and other interests, excluding the limitations foreseen by the law in the interests of national security and public order, health care of the population or protection of rights and freedoms of other people[2]. Part 3, Article 36 of the Constitution of Ukraine stipulates that citizens have the right to participate in trade unions with the aim to protect one's labour and social economic rights and interests. The Constitution of the Republic of Uzbekistan directly stipulates the right to enter trade unions. Pursuant to Article 23 of the *Constitution of the Republic of Uzbekistan*, the citizens of Uzbekistan are entitled to join trade unions, political parties and other non-commercial organisations, taking part in public events[3]. Moreover, the mentioned right is recognized as a political right, because the lawmaker included it in Chapter 8 of the Constitution of the Republic of Uzbekistan, titled "Political rights". The right to freely create trade unions is

concourt.am/armenian/legal_resources/world_constitutions/constit/estonia/estoni-r.htm.

[1] *Ibidem*, 1922.

[2] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.

[3] Freedom of Association and Protection of the Right to Organise Convention No. 87, op. cit.

foreseen in the *Constitution of the Republic of Moldova*, in accordance with Part 1, Article 42, in which it is listed that anyone is entitled to create trade unions and join them for the protection of one's interests[1]. *The Constitution of the Republic of Lithuania* also stipulates the right to free creation and activity of trade unions. Therefore, according to Article 50 of the Constitution of the Republic of Lithuania, trade unions are established and function independently. Apart from that, the Lithuanian lawmaker also listed the aim of trade unions' establishment, namely: protection of professional interests and social-economic rights and interests of the employees[2]. Article 41 of *the Constitution of the Republic of Belarus* also stipulates the right to enter trade unions. However, the mentioned right is defned by the Belarus lawmaker as one of the competences of the right to protection of economic and social interests, despite the fact that the right to protect one's economic and social interests and the right to enter unions have a different legal nature. The mentioned thesis is derived from the analysis, Article 41 of the Constitution of the Republic of Belarus, in accordance with which the citizens have the right to protect their economic and social interests, including the right to enter trade unions[3]. If we have a look at *the Constitution of the Republic of Poland*, we may fnd not only the principle of voluntariness of entering trade unions, but also a duty of the Republic of Poland to guarantee the realisation of this principle, as foreseen by Article 59 of the Constitution of the Republic of Poland, pursuant to which the freedom of association in trade unions, socioоccupational organisations of farmers, and employers' organisations shall be ensured[4].

3.2. Protection by Trade Unions as Defned by the International Legal Framework

The right to protection by trade unions is prescribed by a number of international acts. The international standards of the relevant right are set forth by the *Freedom of Association and Protection of the Right to Organise Convention (No. 87)* (hereinafter – Convention No. 87). As envisaged by the Article 2 of the Convention No. 87, workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation[5]. Article 2 of the Convention No. 87 is formulated very broad-

[1] Constitution of the Republic of Moldova. (1994, August). Retrieved from http://www.presedinte.md/rus/constitution.

[2] Constitution of the Republic of Lithuania. (1992, October). Retrieved from https://www.lrs.lt/home/Konstitucija/Konstitucija_RU.htm.

[3] Constitution of the Republic of Belarus. (1994, March). Retrieved from http://pravo.by/pravovaya-informatsiya/normativnyedokumenty/konstitutsiya-respubliki-belarus/.

[4] Constitution of the Republic of Poland. (1997, April). Retrieved from https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

[5] Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo. org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

ly, focusing on recognition of human social and labour rights and freedoms. Part 3, Article 36 of the Constitution of Ukraine[1], Article 23 of the Constitution of the Republic of Uzbekistan[2], Article 41 of the Constitution of the Republic of Belarus[3], Article 2 of the Convention No. 87 do not mention citizenship as necessary pre-condition of establishing or joining trade unions, unlike Part 1, Article 23 of the Constitution of the Republic of Kazakhstan. Therefore, in accordance with Article 3 of Convention No. 87, no person is restricted in his/her right to establish trade unions and enter them. It is important that the mentioned right is not just granted to people, but is also recognised by the Convention.

Bearing in mind the aforesaid, it is worth noting that Convention No. 87 establishes the rules on balance of norms of national legislation in the sphere of freedom of association and guarantees protection of labour rights by trade unions with the rules specifed in Convention No. 87.

In accordance with Article 8 of Convention No. 87, in exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised groups, will respect the law of the land. The law of the land will not be such as to impair, nor will it be so applied as to impair, the guarantees provided for in this Convention[4]. Thus, the guarantees and rights recognised by Convention No. 87 have priority over the national legislation and the national law-maker cannot limit the international guarantees in the pieces of national legislation.

Also, it is noteworthy to mention that, due to the imperative rule, Article 4 of the Convention No. 87, workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authorit[5]. The norms of Convention No. 87 contain the guarantee of non-interference of the state, under the jurisdiction of which the trade union was established, into the activity of such trade union (Article 3)[6]. Convention No. 87 also envisages the right of workers' and employers' organisations to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. Thus, trade unions have the rights to organize their activity based on their action plans, forming additional guarantees to realisation of protection of employees' rights by trade unions.

Another fundamental international instrument, establishing standards for activity of trade unions, is the *Right to*

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text.

[2] Constitution of the Republic of Uzbekistan. (1992, December). Retrieved from https://lex.uz/acts/35869.

[3] Constitution of the Republic of Belarus. (1994, March). Retrieved from http://pravo.by/pravovaya-informatsiya/normativnyedokumenty/konstitutsiya-respubliki-belarus/.

[4] Freedom of Association and Protection of the Right to Organise Convention No. 87, op. cit.

[5] *Ibidem*, 1948.

[6] *Ibidem*, 1948.

Organise and Collective Bargaining Convention (No. 98) (hereinafter – Convention No. 98)[1]. Convention No. 98 lays down the principle of non-interference in the activities of trade unions either "by each other or each other's agents or members in their establishment, functioning or administration" and provides a defnition of the act of interference, being the act which is "designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by fnancial or other means, with the object of placing such organisations under the control of employers or employers' organisations" (Article 2 of Convention No. 98). Moreover, in order to ensure the freedom of association, machinery appropriate to national conditions shall be established (Article 3 of the Convention No. 98)[2]. Some additional guarantees, protecting activity of trade unions, are laid down by the *Workers' Representatives Convention (No. 135)*[3] (hereinafter – Convention No. 135). In accordance with the Articles 1,3 of the Convention No. 135, trade union's representatives, namely representatives designated or elected by trade unions or by members of such unions, shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements[4].

Analysing the normative fundamentals of the trade union's protection and the guarantees of its realisation, it is necessary to mention the *International Covenant on Economic, Social and Cultural Rights (hereinafter – the Covenant)*[5]. As established in Part 1, Article 8 of the Covenant, the State Parties to the present Covenant undertake to ensure: (a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (b) the right of trade unions to establish national federa-

[1] Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C098,%2FDocument.

[2] *Ibidem*, 1949.

[3] Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO: 12100:P12100_INSTRUMENT_ID:312280.

[4] Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:1 2100:P12100_INSTRUMENT_ID:312280.

[5] International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from https://www.ohchr.org/EN/ ProfessionalInterest/Pages/CESCR.aspx.

tions or confederations and the right of the latter to form or join international trade-union organisations; (c) the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country[1].

Having analysed these rules provided by the Covenant, one can come to conclusion that the norms of Part 1, Article 8 of the Covenant complement the provisions of Convention No. 87. The norm of Part 1, point a), Article 8 of the Covenant further develops the contents, Article 2 of the Convention No. 87 regarding the right to establish trade unions and freely join them. Part 1, point b), Article 8 of the Covenant correlates to Article 5 of the Convention No. 87, as the latter provides that workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to afliate with international organisations of workers and employers[2]. Part 1, point c), Article 8 of the Covenant meets the norms, Article 3 and Article 4 of the Convention No. 87 with regard to the unrestricted functioning of trade unions. The *International Covenant on Civil and Political Rights*[3] also lays down the basics of protection of labour rights by trade union. Because of Part 1, Article 22 of the International Covenant on Civil and Political Rights, everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of one's own interests[4]. It is very positive that two capabilities that form the right to freedom of association are outlined in this article. The frst capability is the right to form trade unions. Its recognition as the separate element shows a very special attitude from the side of international law-makers. The second capability will be the right to join trade unions with the defned aim – protection of interests.

As commanded by Part 2, Article 2 of the International Covenant on Civil and Political Rights, no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others[5]. This rule contains limitations on everyone's right to freedom of association. Such limitations are appropriate

[1] *Ibidem*, 1966.

[2] Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/ dyn/ normlex/en/f?p=NORMLEXPUB:12100:0:: NO::P12100_INSTRUMENT_ID:312232.

[3] International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://www.ohchr.org/en/professionalinterest/ pages/ccpr.aspx.

[4] *Ibidem*, 1966.

[5] *Ibidem*, 1966.

when prescribed by law and should meet special requirements, i.e., to be necessary: 1) in a democratic society; 2) in the interests of national security; 3) in the interests of public safety; 4) in the interests of public order; 5) in the interests of the protection of public health; 6) in the interests of morals; 7) in the interests of protection of the rights and freedoms of others.

Special attention should be paid to criterion No. 6 (in the interests of morals) and criterion No. 7 (in the interests of protection of the rights and freedoms of others). The term "moral' has 12 meanings as defned by the Oxford English dictionary [32], with the frst meaning being as follows: of or pertaining to character or disposition, considered as good or bad, virtuous or vicious; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings; ethical (e.g., Aristotle distinguished the moral from intellectual virtue) [32]. Thus, the term "moral" is not a legal term, because it is based on moral norms but not on legal rules, and should therefore not be regulated by legal acts. It must also be mentioned that morality is subjective and not legal category, meaning it has very broad frames of understanding within society. Thus, there is no established rule for a qualifcation that should regulate the limitation of right to freedom of association as such a criterion as morality cannot serve as grounds for limitation or termination of the human right to association.

Regarding criteria No. 7 (in the interests of protection of the rights and freedoms of others), it should be noted that the conflict between the right of one person and the interest of the other person is a questionable one: on the one hand we have the freedom of association and on the other hand – the protection of the rights and freedoms of others. Moreover, under such a formula it may occur that the right to freedom of association contradicts the interest of the employer to minimize the importance and capability of trade union, limit its independence etc. In the light of this argument, it seems impossible to talk about a grounded and possible conflict between the right of one person and the interest of another one.

Apart from the mentioned exceptions, Article 22 of the International Covenant on Civil and Political Rights[1] correlates with Article 4 of the Convention No. 87[2] and is specifed in Part 1, point c), Article 8 of the Covenant.

3.3. Evaluation of Exercising the Right to Protection by Trade Unions in post-Soviet Countries

It is not a secret that not all trade unions in post-Soviet countries are fully working towards the aim of protecting the

[1] International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[2] Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

labour rights and interests of the employees, despite the existence of legally established guarantees. This is causing tension in society and is leading to a number of employee strikes, who are attempting to protect those labour rights.

A lot of trade unions created in post-Soviet countries have the distinctive features of hostage institutions, as they are either dependent from the employer or have lost their independence under pressure of the employer. In this context it is very interesting to read the outcome of the research on exercise of labour rights, conducted by the Solidarity Centre in cooperation with the Uzbek-German Forum for human rights. In accordance *to the report of the Solidarity Centre "There is No Work We Haven't Done", published in 2019*, trade unions in Uzbekistan are weak and dependent from the state or employer and are incapable to represent the interests of the employees and protect them from forced labour. The employees who were interviewed acknowledge that their trade unions were ineffective and sometimes even helped to organize and manage forced labour [33]. The conclusions of the Report of the Solidarity Centre contain a number of interesting observations. First of all, it is mentioned that the central government "has recently taken a stand against the forced labour of public-sector employees that has begun to influence regional and local ofcials, including some to stop using forced labour or take steps to try to hide it" [33]. Secondly, the dependence of the trade unions is underlined. The report stresses that the trade unions "are weak and subordinate to influence from both government and management… This undermines the perceived effectiveness of union-led mechanisms for grievance and remedy" [33].

The fnal report of *international research project "Trade unions in post-socialist society: overcoming the state-socialist legacy"* mentions that in the Republic of Belarus, the federation of trade unions was built into the state system of power and was turned from a non-governmental organisation into the "Labour Ministry with Employees". The organisation is now called "Federation of Trade Unions of Belarus" and this very fact is extremely demonstrative: under the legislation of Belarus, the ofcial name of the state can only be used in the titles of the state structures. Therefore, the "Federation of Trade Unions of Belarus" became a state instrument by its title and by its substance [34].

In the Republic of Moldova, the establishment of the trade unions' protection of labour rights is considered to be a geopolitical process. In legal literature it is mentioned that forcing the establishment of "alternative" trade unions in October-December 2000, completed by the Establishing Conference of the Confederation of Free Trade Unions of the Republic of Moldova "Solidarite", was a part of a unifed geopolitical process in the country. Therefore, stating that this process is a renaissance of the communist trade unions is justifed as a consequence of close cooperation of

the mentioned trade unions with the state governing party [35].

One of the problems of development of trade unions' activity in Estonia, Poland, Lithuania is that the employees are not very active in the trade unions' movement with regard to the protection of labour rights. In the *report, published in the framework of the project "Europe 2020 and the Baltic Region", titled "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain"*, it is underlined that very limited participation in the trade unions (5% in Estonia, 12% in Poland, 15% in Lithuania) directly affects the restricted possibilities of influencing the employer and the decisions taken by the employer [36]. In the meantime, the legal model of the protective function of the trade union is recognised by a number of scholars as an effective one, because it allows for the development of a mechanism of protection of labour rights and balances the interests of the employers and the employees. E.g., the experts from Poland, Lithuania, Latvia, Estonia and Great Britain have outlined trade unions as the most effective model of support and representation of the employees in their reports, elaborated in 2016 [36].

In EU countries, *under Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002*[1], work councils had to be set up. By their nature, they are new forms of alternative representation in labour law. However, setting up such work councils on the level of EU Directive 2002/14/EC appeared to be not very effective from the point of view of protection of the employees' labour rights. I.e., in *the Report "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain"*, it is underlined that such councils haven't been used in Estonia, except by international corporations, and in Latvia there are no such councils at all. In Lithuania they are called councils and are functioning only within the enterprises where trade unions have been established [36].

European Work Councils (EWC) is an alternative form of employees' representation in the countries of the EU, foreseen by the *EU Directives No. 94/95/EC (no longer in force)*[2], *97/74/EC (no longer in force)*[3], *2006/109/EC (no lon-*

[1] Directive 2002/14/EC of the European Parliament and the Council establishing a general framework for informing and consulting employees in the European Community. (2002, March). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ ALL/?uri=CELEX%3A32002L0014.

[2] Council Directive 1994/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1994, September). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31994L0045.

[3] Council Directive 1997/74/EC extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1997, December). Retrieved from https://www.legislation.gov.uk/ eudr/1997/74/contents/adopted.

ger in force)[1] *and 2009/38/EC*[2]. The preventive protection of labour rights is realised by EWC by conducting representational, consultative and informative functions. EWC is an intermediate between the representatives of the employees and the employer in questions concerning organisational and management changes in the enterprise, and in the establishment, change and closure of the subdivisions of the enterprise. A number of functions which are conducted by the EWC are overlapping with the functions of the trade unions (representational, informative, consultative). Additionally, representatives of the trade unions are usually the frst to enter the EWC created within the enterprise, due to their knowledge on representation and protection of labour rights. This situation has causeddifferences in the application of the EWC mechanism in different states, notwithstanding the stimulation of application of EWC by the EU through its directives etc. In a number of states, EWCs are integrated only partly in transnational corporations (Latvia, Lithuania). The Report "Employee participation in Poland, Lithuania, Latvia, Estonia and Great Britain" stresses that, in Latvia, EWCs are not widespread and there is little knowledge on its functioning and advantages [36]. EWCs are also not widely used in Estonia, because the national legislation on EWC has not been adopted and the EU Directives are not a legal basis for their functioning [36].

The International Labour Organisation established the *Committee on Freedom of Association* (hereinafter – CFA), which is an international body authorised to decide cases in violation of freedom of association, brought by the trade unions against the member states. The CFA has already examined more than 3 300 cases, including the cases brought against some post-Soviet countries. E.g., during the last 10 years, CFA has heard:

• 4 *cases against Poland* and issued recommendations for the Polish government concerning the collective bargaining procedure and safeguarding the right to protests[3]; to review the situation of the trade unions activists that were allegedly fred due to their organisation of industrial action[4] and even to

[1] Council Directive 1997/74/EC extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (1997, December). Retrieved from https://www.legislation.gov.uk/eudr/1997/74/contents/adopted.

[2] Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. (2009, May). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0038.

[3] Case No. 3111 (Poland): Defnitive report of the Committee on Freedom of Association No. 378. (2016, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3282128.

[4] Case No. 2972 (Poland): Report in which the Committee on Freedom of Association re-

amend the Act on Trade Unions so as to ensure that home-based workers can establish and join organisations of their own choosing[1];

• 3 *cases against Ukraine*, with the following recommendations for the Ukrainian government: to ensure independent inquiries in the cases on interference in trade union's affairs[2]; to amend the Civil Code of Ukraine to fully guarantee the right of workers to establish their organisations without previous authorisation[3];

• 1 *case against Kazakhstan*, where the FCA requested entering amendments into the Law on Trade Unions so as to ensure the right of workers to freely decide whether they wish to associate with or become members of a higher-level trade union structure and to lower thresholds requirements to establish higher-level organisations[4];

• 2 *cases against Lithuania* and asked the government to inform the CFA on developments relating to the draft law on police activities insofar as it has an impact on organisations and bargaining rights[5]; to review the relevant provisions governing collective bargaining[6].

This analysis shows that the national legislators were not fully following the international standards established by the International Labour Organization and did not fully secure the freedom of association. All the mentioned countries were recommended either to change some pieces of legislation or to supervise the existing draft of laws to make them meet the rules set in a number of international conventions

quests to be kept informed on development No. 368. (2013, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128190.

[1] Case No. 2888 (Poland): Defnitive report of the Committee on Freedom of Association No. 363. (2012, March). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057194.

[2] Case No. 2890 (Ukraine): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 367. (2013, March). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112068.

[3] Case No. 2843 (Ukraine): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 362 (2011, November). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2912587.

[4] Case No. 3283 (Kazakhstan): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 386 (2018, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3950243.

[5] Case No. 3073 (Lithuania): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 374. (2015, March). Retrieved from http://ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237748

[6] Case No. 2907 (Lithuania): Report in which the Committee on Freedom of Association requests to be kept informed on development No. 367 (2013, March). Retrieved from http://ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112089.

CONCLUSIONS

Trade unions form an important element in every civil society, because one of their main functions is the protection of labour rights with the aim to establish a fair balance between employers and employees. A number of legal guarantees to ensure a smooth fulfilment of the protective function of the trade unions is foreseen by international legal instruments: Freedom of Association and Protection of the Right to Organise Convention (No. 87)[1], Right to Organise and Collective Bargaining Convention (No. 98) (hereinafter – Convention No. 98)[2], Workers' Representatives Convention (No. 135)[3], International Covenant on Economic, Social and Cultural Rights[4] and the International Covenant on Civil and Political Rights[5]. The international standards, set forth by these conventions, are not always directly implemented in the legislation of post-Soviet Countries, despite the fact that trade unions' activities are directly or indirectly mentioned in the Constitutions of the mentioned countries.

Some of the post-Soviet states are now members of the EU (Lithuania, Latvia, Estonia) and are subject to regional EU regulations. The EU legislator provides special additional representational instruments of the rights of employees, which duplicate the functions of trade unions – such as European work councils. However, these instruments are only used in big transnational corporations and aren't popular in Lithuania, Latvia, and Estonia.

Every post-Soviet State has its own jurisprudence, legal practice and traditions of labour rights' protection and hence has its own national peculiarities with regard to this protection, the representation of employees and the architecture of labour legislation. All of this should be taken into account when implementing or unifying international or European labour legislation. When studying the cases heard by the Committee on Freedom of Association, established by the International Labour Organization, one notices that in post-Soviet countries there had been a number of norms, provided by national laws, which were not meeting the international standards. Moreover, as the international independent reports show, trade unions in post-Soviet countries are not always effective, despite the fact that national

[1] Freedom of Association and Protection of the Right to Organise Convention No. 87. (1948, June). Retrieved from https://www.ilo.org/ dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232.

[2] Right to Organise and Collective Bargaining Convention No. 98. (1949, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C098,%2FDocument.

[3] Workers' Representatives Convention No. 135. (1971, June). Retrieved from https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:312280.

[4] International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

[5] International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

legislation duly meets the standard of international practices. Notwithstanding mistakes of certain trade unions, the effciency and popularity of the traditional model of labour rights' protection by labour unions is still insufcient in post-Soviet countries. These models need revision and renovation of the legal framework, which will allow the rebooting of the protective mechanism of the trade unions, aligned with the modern needs of post-Soviet societies.

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INTERNATIONAL STANDARD OF ACCESS TO JUSTICE AND SUBJECT OF CIVIL PROCEDURAL LAW

Abstract. *The current state of development of national systems of civil justice is described by the growing influence of the ideas of accessibility and efficiency of justice in civil cases and requires the harmonization of national systems with international standards of fair trial. This necessitates a rethinking of some classical provisions of the doctrine of civil procedural law to comply with modern realities. The aim of the article is to study the evolution and approaches to the modern interpretation of the international standard of access to justice in civil cases, as well as its impact on the doctrine of the subject of civil procedural law at the doctrinal level. The article is based on dialectical, histo rical-legal, system-structural, logical-legal, comparative-legal research methods, as well as methods of analysis and synthesis, autonomous and evolutionary interpretation of the European Convention on Human Rights (ECHR). The authors advocate a broad approach to the concept of access to justice, including access to justice, access to effective remedies and access to alternative dispute resolution. Through the prism of the international standard of access to justice, the ideas of procedural centralism, based on the idea of judicial protection as the main and most effective form of protection of violated rights, and procedural pluralism, based on the provision of multiple forms of protection, the effectiveness of which is determined by the circumstances of a particular dispute. The authors substantiate the conclusion about the expediency of the perception of the idea of procedural pluralism at the level of the national legal order. A parallel is drawn between the ideas of procedural centralism and pluralism that have developed in foreign literature, and the*

narrow and broad concept of the subject of civil procedural law, formed in the domestic doctrine. Taking into account the autonomous interpretation of the concept of "court", enshrined in paragraph 1 of Art. 6 of the ECHR, as well as the increasing popularization of alternative dispute resolution, provide arguments in support of a broad concept of the subject of civil procedural law, including civil litigation and alternative dispute resolution, in particular, arbitration, international commercial arbitration, mediation, etc.

Keywords: *access to justice, access to court, right to a fair trial, procedural pluralism, alternative dispute resolution*

INTRODUCTION

Access to justice has become a cornerstone in the doctrine of civil procedural law in recent decades. In essence, it has become existential in the development of the theory of civil procedural law and in the reform of civil justice in European countries, because the real access to justice for persons whose rights are unrecognised, challenged or violated is now recognised as one element of the rule of law in a democratic society. International standards of access to justice have become guidelines for the reforms of domestic civil procedural legislation in recent years. The founders of the movement for access to justice in Europe are well-known proceduralists M. Capelletti and B. Garth [1], who laid the methodological basis for understanding this concept. Scientists proposed the so-called instrumental approach to the problems of studying the access to justice in a comparative perspective, which was based not only on identifying the so-called "waves" of access to justice as the main directions of development of this theory, but also investigated effective mechanisms that could be used to overcome certain negative phenomena in the field of civil procedure. The founders of the movement themselves noted that the idea of access to justice is a response to liberalism, which, admiring the declarative slogans of the proclamation of human rights, did not pay due attention to the mechanisms for their implementation. But the movement for access to justice was designed to overcome the formalistic understanding of law in its exclusively normative aspect as a "system of norms" created by the state, replacing it with the so-called "contextual" concept of law, which shifted the emphasis to ensuring the implementation of certain rights, overcoming obstacles to such implementation [2, p. 282–283].

As a doctrinal concept proposed in the late 1970s, access to justice eventually became the main leitmotif of civil justice reforms in foreign countries. However, such popularity of this concept has not added unity to the understanding of its content, which is still debated, which has long gone beyond the purely legal issues and doctrine of civil procedural law, also covering economic, sociological, psychological and other dimensions.

The modern understanding of access to justice as a certain international standard in the field of administration of justice in civil cases allows addressing the broader issue of access to justice as a problem that should be considered at the supranational level. At the same time, international acts do not define the concept of access to justice, which often leads to its identification within the convention system with access to a court as a guarantee of the right to a fair trial (paragraph 1 of Article 6 of the European Convention on Human Rights (ECHR) [3]) and the right to an effective remedy (Article 13 of the ECHR), and within the European Union (EU) protection system – with the right to an effective remedy and to a fair trial (Article 47 of the EU Charter of fundamental rights [4]). In addition, access to justice is increasingly not limited to judicial protection, but also includes access to alternative dispute resolution (ADR), including arbitration, international commercial arbitration, mediation, conciliation, collaborative proceedings, etc. These circumstances indicate the lack of unity of approaches to determining the structural characteristics of the international standard of access to justice at the supranational level.

The study of certain aspects of access to justice was paid attention to in the pages of scientific literature on civil procedural law. Most often in this context, the issues of substantive characteristics of the concept of access to justice were studied [5; 6], ensuring access to justice for certain groups of persons or in certain categories of disputes [7; 8], as well as the implementation of certain elements of access to justice (free legal aid, court costs, rational jurisdiction, judicial immunity, efficiency of court proceedings, the availability of class actions, simplified procedures, execution of court decisions, etc.) [9–11]. At the same time, insufficient attention has been paid to the institutional characterization of the international standard of access to justice in the literature. In view of the above, the issue of studying the institutional dimension of the international standard of access to justice in civil cases and its impact on the classical provisions of domestic procedural doctrine, in particular in terms of rethinking views on the subject of civil procedural law. For a long time, the doctrine was dominated by a narrow approach to defining the subject of civil procedural law, which meant social relations that arise during the conducting the trial in civil cases. At the same time, the broader approach, which also included non-judicial forms of protection in the field of civil procedural law, in particular, alternative dispute resolution, was less popular. Therefore, there is an urgent need to rethink approaches to defining the subject of civil procedural law, considering international standards of justice and access to justice in civil cases, as well as the increasingly popular concept of procedural pluralism, which involves recognizing the multiplicity and effectiveness of various forms of protection of violated and disputed rights and interests of individuals. Therefore, the purpose of

this article is to investigate the evolution and approaches to the modern interpretation of the international standard of access to justice in civil cases, as well as to trace its impact on the doctrine of the subject of civil procedural law at the doctrinal level.

1. MATERIALS AND METHODS

The research methodology is determined by the peculiarities of its purpose and subject area of civil procedural law. The article uses general philosophical, general scientific and special research methods. The dialectical method forms the methodological basis of the study and is used to clarify the nature and content of the concept of access to justice, its conceptual foundations, intersystem relations and the relationship between international legal and domestic regulation of access to justice as a standard of civil proceedings in the aspect of implementing the requirements of the ECHR and the current civil procedural legislation. The historical-legal method is used in the study of the evolution of understanding the concept of access to justice as an international standard of civil justice and enshrining its elements in regulatory sources at the national and supranational levels. The method of analysis and synthesis allowed the authors to analyse and systematise the main approaches proposed in foreign and domestic scientific literature and international documents to define the concept of access to justice in civil cases. Using this method through the prism of the international standard of access to justice, the ideas of procedural centralism, based on the idea of judicial protection as the main and most effective form of protection of violated rights, and procedural pluralism, based on the provision of multiple forms of protection, the effectiveness of which circumstances of a particular dispute. The authors draw a parallel between the ideas of procedural centralism and pluralism, which have developed in foreign literature, and the narrow and broad concept of the subject of civil procedural law, formed in the domestic science of civil procedural law.

The system-structural method allowed providing a structural description of the access to justice in civil proceedings, highlighting such elements as access to court, access to effective remedies and access to alternative dispute resolution. This method also allowed analysing the content of these components of access to justice. The logical-legal method revealed the inconsistency of the interpretation of the current legislation of Ukraine with international standards of access to justice, in particular, regarding a narrower understanding of the concept of justice within domestic constitutional provisions compared to foreign doctrine and international documents. The comparative law method was used in the analysis of the regulation of certain elements of access to justice within the two regional systems of protection of rights, in particular, within the framework of the conventional protection of the ECHR and the system of protection of rights within the EU. This method was also

used to project the doctrinal provisions that have developed within the European movement for access to justice and the American theory of procedural pluralism, in the field of domestic science of civil procedural law.

The use of an autonomous and evolutionary method of interpretation of the concept of "court", enshrined in paragraph 1 of Article 6 of the ECHR, in the practice of the ECHR allowed substantiating the need to extend guarantees of the right to a fair trial to quasi-judicial methods of alternative dispute resolution, in particular, arbitrations, international commercial arbitrations, labour dispute commissions, etc. This made it possible to further argue the expediency of recognising a broad concept of understanding the subject of civil procedural law. The theoretical basis of the study were the works of leading domestic and foreign scholars in the field of the civil procedural law and theory of law, dealing with international standards of access to justice, the concept of procedural pluralism and the doctrine of the subject of civil procedural law. The legal basis of the study is international documents in the field of human rights protection at the regional level, in particular, the ECHR and the EU Charter of Fundamental Rights, as well as current provisions of domestic constitutional, civil procedural and civil law on access to justice in civil cases. The empirical basis of the study is based on the case law of the European Court of Human Rights on the interpretation and application of the right to a fair trial in civil cases, analytical intelligence of the European Commission on the Efficiency of Justice (CEPEJ).

2. RESULTS AND DISCUSSION

2.1. Access to justice as an element of the fundamental principle of the rule of law

Despite the fact that the principle of the rule of law is a fundamental principle of law, today its content in the literature is still hotly debated. In general, it is a dichotomy between formal (thin) and substantive (thick) conceptions of the rule of law. Formal conceptions make formal demands on the field of legal regulation, requiring that legal prescriptions be adopted in accordance with the procedure established by law, be of a general nature, be non-retrospective, clear, consistent, etc. But substantive conceptions, taking into account formal requirements, also relate to the content of legislative prescriptions, including the content of the rule of law, the guarantee of human rights and freedoms, the need to comply with general principles of law, ensuring material justice by courts when considering cases, etc. [12, p. 91–113; 13; 14]. At the same time, despite differing approaches to the rule of law, there is currently some consensus within the European region on the minimum requirements of this principle, as reflected in the Report on the Rule of Law of the European Commission for Democracy through Law (Venice Commission), where key elements the principle of the rule of law recognises: 1) legality, including a transparent, accountable and demo-

cratic process for enacting law; 2) legal certainty; 3) prohibition of arbitrariness; 4) access to justice before independent and impartial courts, including judicial review of administrative acts; 5) respect for human rights; 6) non-discrimination and equality before the law [15].

Evidently, ensuring an accessible, fair and independent system of administration of justice is given one of the central places in the context of the requirements of the rule of law, which allows individual authors to contemplate the need to distinguish, along with the formal and substantive requirements of the rule of law, also a third group of requirements – procedural. Thus, J. Waldron notes that: "the procedural understanding of the rule of law requires not only that officials apply the rules as they are set out; it requires application of the rules with all the care and attention to fairness that is signalled by ideals such as "natural justice" and "due process" [16, p. 7–8]. Thus, one of the key requirements of the rule of law is to ensure access to justice. However, it is worth noting that there is currently no consensus on the concept of access to justice, which is increasingly no longer associated with access exclusively to state courts. T. Bingham believes that one of the elements of the rule of law should be considered the existence of a dispute resolution system in civil cases, which allows considering a dispute without excessive costs and delays [17, p. 85]. Therewith, the author notes that this does not exclusively refer to judicial guarantees of fair proceedings, but also to alternative ways of resolving disputes, which are better to call "appropriate" (additional) ways of resolving disputes, because they allow choosing the most optimal way to resolve a dispute, considering the specifics of the latter. Such methods are considered by the author to be consultation, mediation, arbitration, but the court is considered by him as the last way to apply when the previous ones do not give the desired result [17, p. 85–86]. Such a broad approach to defining the concept of access to justice in the context of the implementation of the rule of law in a democratic society necessitates the study of the international standard of access to justice in civil cases.

2.2. International standard of access to justice in civil cases: origins and evolution of understanding

The concept of access to justice is associated with the international movement for access to justice, the founders of which were Italian scholars M. Cappelletti and B. Garth, who edited the study "Access to justice: the worldwide movement to make rights effective: a general report" in the late 1970s [1]. This study addressed such alarming tendencies in the field of civil justice that were characteristic of most European legal systems at the time, such as excessive length of court proceedings, excessive court costs and the general inefficiency of court proceedings. As a result, scholars have identified the so-called three waves of access to justice, aimed at overcoming the relevant negative trends: the first –

aimed at ensuring the efficiency of court costs and the introduction of free legal aid mechanisms for vulnerable groups; the second was aimed at protecting group and collective interests; the third was aimed at the general simplification of civil proceedings and the unloading of the judicial system through the introduction of alternative dispute resolution [1].

Later the issue of access to justice in foreign countries has gone far beyond the reform of the judiciary, covering a wider range of issues. Thus, the famous Canadian scientist R. MacDonald, using the metaphor with waves of access to justice, highlights among the latter: 1) "access to lawyers and courts", which provides for the provision of free legal assistance for vulnerable segments of the population; 2) "institutional restructuring", aimed at changes in the administration of courts and the reform of civil proceedings (the introduction of simplified proceedings and the institution of class actions, the creation of commissions for the protection of human rights and other out-of-court bodies for unloading courts); 3) "demystification of law", aimed at popularising ADR, increasing legal awareness of the population and legal education; 4) "preventive law", which was aimed at ensuring the existence of effective preventive means of dispute resolution by ensuring access to all institutions where laws are created, increasing legal awareness of the population; 5) "proactive access to justice", which provides for ensuring equal opportunities for individuals to receive legal education, hold positions in public authorities, restore confidence in state bodies, etc. [18, p. 20–23]. As can be seen, the proposed interpretation of the concept of access to justice differs significantly from its original understanding and goes beyond civil justice, affecting a wider range of issues of legal practice and legal culture.

Returning to the problems of implementing the accessibility of justice in civil proceedings, it should be emphasised that the approach proposed by M. Cappelletti and B. Garth not only had a great influence on changing the scientific aspects of research in the field of civil procedure, but also became the leading leitmotif for reforming the civil procedural legislation of foreign countries. Thus, improving access to justice was the motto of the famous reform of civil justice in England, carried out by Lord Wolf. The latter noted, in particular, that to ensure the access to justice, the civil procedural system must: a) be just in the results it delivers; b) be fair in the way it treats litigants; c) offer appropriate procedures at a reasonable cost; d) deal with cases with reasonable speed; e) be understandable to those who use it; f) be responsive to the needs of those who use it; g) provide as much certainty as the nature of the particular case allows; h) be effective, inter alia, adequately resourced and organised [19, p. 4, 7]. The issue of access to justice was also addressed by the European Commission on the Efficiency of Justice (CEPEJ), which prepares a report every two years

on the efficiency and accessibility of justice in European countries. According to the CEPEJ approach, access to justice includes all legal and organizational factors that affect the availability and effectiveness of judicial institutions, which allows obtaining the maximum number of decisions at reasonable taxpayer costs, while maintaining the quality of such decisions [20, p. 13]. Consequently, the key element of access to justice is recognised as access to the court, which depends on such indicators as the number of courts and their geographical proximity to court users, the use of electronic court proceedings, information awareness of persons applying to the court regarding their case and civil proceedings, the right to free legal assistance, the availability of simplified procedures, the possibility of applying for mediation [20, p. 31, 152; 21, p. 71, 196, 206, 223–224].

A separate aspect of the issue of access to justice is the relationship between the concepts of "access to justice" and "access to justice", which becomes especially relevant in the context of convention provisions. Interesting in this context is the view of N.Y. Sakara, according to which the concept of "access to justice" should be understood in two meanings: a) as the right of access to justice, arising from paragraph 1 of Article 6 of the ECHR and is one of the guarantees of the right to a fair trial; b) as an international standard of access to justice for fair and effective judicial protection, covering the requirements that must meet not only civil proceedings, but also the entire judicial sphere [9, p. 80]. At the same time, the author identifies two groups of elements of the international standard of access to justice: 1) those that guarantee the unhindered exercise of the right of access to the court of each person ("rational" jurisdiction of the court, the right of public interest, due process, reasonable time of a trial); 2) those that remove obstacles that arise when applying to the court of a particular person ("the right of poverty", procedural mechanisms for providing legal assistance) [9, p. 91].

At the same time, it is easy to notice that the author refers to the elements of access to justice quite diverse institutions, in particular, some elements of the right to access to court, institutions considered in the context of the movement for access to justice, some elements of the right to a fair trial. This approach leads to a certain identification of access to justice and the right to a fair trial. Undoubtedly, the modern interpretation of the concept of access to justice cannot be imagined without the approaches laid down by the ECHR when interpreting the right of access to a court in the context of paragraph 1 of article 6 of the ECHR, in particular, this refers to developing an approach to assessing the legitimacy of restrictions on the right of access to court, taking into account the principle of proportionality, highlighting obstacles to access to court (jurisdictional, economic, formal, etc.) and effective mechanisms for overcoming them. At the same time, in our opinion, the problem of access to justice today should be considered in

a broader plane of the entire procedural scope of guarantees provided within the framework of the convention system, and not just the guarantees of judicial protection provided for in paragraph 1 of Article 6 of the ECHR.

Interesting in this context is the broader approach to determining the structure of access to justice presented in the study of the EU Fundamental Rights Agency (FRA), which proceeds from the fact that the international standard of access to justice obliges states to guarantee everyone not only the right to access the court, but in some cases access to ADR. The accessibility of justice in this study correlates not only with Article 6 (1) of the ECHR, but also with Article 13 of the ECHR, which establishes the right to effective remedies, as well as Article 47 of the EU Charter of Fundamental Rights, which establishes the right to an effective remedy and to a fair trial [22, p. 16]. Apart from the classical judicial protection, this study also draws attention to the so-called "other paths to justice", that is, this refers to other non-judicial administrative bodies that can ensure the consideration of the case and settlement of the dispute, for example, national institutions for the protection of human rights, data protection agencies, ombudsman institutions, specialised tribunals, etc. [22, p. 48]. Such bodies, according to the FRA, can provide faster remedies and collective redress, and can therefore be considered to ensure access to justice, provided that they do not deprive a person of the right of access to a court and their decisions can be objects of judicial review. In addition, the availability of justice can also be provided by ADR, which are an alternative to obtaining justice by "formal judicial routes" [22, p. 48]. The modern broad approach to the accessibility of justice must take into account not only the right of access to a court in the context of paragraph 1 of Article 6 of the ECHR, but also the right of access to effective remedies provided for in Article 13 of the ECHR, according to which everyone whose rights and freedoms recognised in the ECHR have been violated has the right to an effective remedy before a national authority, even if such a violation has been committed by persons exercising their official powers. As can be seen, paragraph 1 of Article 6 of the ECHR establishes special guarantees of judicial protection and is a special norm, but Article 13 of the ECHR provides for broader guarantees, extending to the non-judicial sphere. The application of paragraph 1 of Article 6 of the ECHR excludes the need to apply Article 13 of the ECHR, except for some exceptions, for example, in cases where there are effective remedies for violating the right to a reasonable time of trial and enforcement of a court decision (*Kudla v. Poland*).

In its practice, the ECHR has developed certain established approaches to the interpretation of the right to an effective remedy. Thus, the ECHR proceeds from the fact that such a tool should allow the competent domestic authorities to consider the relevant complaint about

the violation of convention rights and provide appropriate compensation (*Halford v. the United Kingdom*). At the same time, several means of protection can also provide effective protection, having a cumulative effect (*Silver and Others v. United Kingdom*). The criteria for the effectiveness of a remedy are reduced to the following provisions: a) a remedy must be effective both in theory and in practice (*Rotaru v. Romania*); b) an effective remedy is considered to be one that can prevent, stop, or allow appropriate redress for a violation that has already occurred (*Ramirez Sanchez v. France*); c) a remedy must be adequate and accessible (*Paulino Tomás v. Portugal*); d) the introduction of a certain type of remedy is not required, but the nature of the right that a person requests to be protected affects the type of remedy that the state must provide in each case (*Budayeva and Others v. Russia*); e) the institution that guarantees the use of a certain remedy does not necessarily have to be judicial (*Kudla v. Poland*); f) the effectiveness of the remedy does not depend on the satisfaction of the claims of the person using the said remedy (*Costello-Roberts v. The United Kingdom*). The ECHR may also establish additional specific requirements for the remedies of certain convention rights, an example of which is the above-mentioned remedies for the right to a reasonable time of trial and execution of a court decision, because the inability to protect this right at the level of the national legal order, in fact, leads to its illusory nature and indicates the lack of access to justice for persons whose rights have been violated.

In view of the above, in our opinion, the content of access to justice should also include the right to effective remedies. At the same time, the inclusion in the content of this concept of all elements of the right to a fair trial in accordance with paragraph 1 of Article 6 of the ECHR is inappropriate and leads to the actual identification of the right to a fair trial with the access to justice, which eliminates the importance of these categories as self-sufficient. Consequently, the element of the international standard of access to justice is precisely the right to access to a court as an element of the right to a fair trial, and not all the guarantees of paragraph 1 of Article 6 of the ECHR. Thus, the concept of access to justice includes: a) the right of access to court; b) the right to an effective remedy; c) the right of access to the ADR. In our study, we will focus on the study of the right of access to court and the right of access to ADR, because the issue of the right to effective remedies is not covered by the subject of civil procedural law, but concerns extrajudicial administrative remedies, with their defining characteristics be able to judicially review their decisions.

2.3. Access to justice, procedural pluralism and the subject of civil procedural law

The proposed broad understanding of the concept of access to justice allows reaching a broader issue of methodological

principles and the modern paradigm of civil procedural law. In the legal literature attention was drawn to the difference in the perception of dispute resolution procedures from the standpoint the ideas of legal centralism and legal pluralism [23], which were the basis of two modern theories of the legal process – procedural centralism and procedural pluralism [24, p. 147]. Proponents of procedural centralism consider judicial protection to be the only and main way to resolve disputes, and the courts are the centre of the world of dispute resolution [25, p. 199], unified bodies that administer justice, and monopoly conductors of law and values in society [24, p. 148]. Under this approach, the access to justice is reduced to ensuring unimpeded access to state courts of the classical type. Instead, procedural pluralism is based on the recognition of the legitimacy of the diversity of dispute resolution procedures, in which judicial protection is seen as only one of the possibilities along with other ways of resolving disputes. It is based on the recognition of a wide range of values [24, p. 149] and the idea that non-judicial methods of dispute resolution sometimes allow achieving better results than classical legal proceedings, due to their flexibility and ability to adapt to the specifics of a particular dispute [24, p. 149]. Therefore, ADR is not interpreted as an alternative to judicial protection, but rather "appropriate" ways of resolving disputes. Currently, the theory of procedural pluralism has become one of the main trends not only in the field of ADR, but also in the doctrine of civil procedural law [24; 26–28].

A broad approach to defining the concept of access to justice, which is actually based on the idea of procedural pluralism, actualises the discussion on the subject of civil procedural law, which is recognised as a classic in domestic legal doctrine. In the last few decades, civil procedural law has been considered as an independent branch of law, the subject of which is the social relations that arise during conducting a trial in civil cases. This approach, admittedly, is extremely important, because part 1 of Article 55 of the Constitution of Ukraine [29] establishes the right to judicial protection, which at the international level is called the "right to a fair trial" or "right to a trial". The right to judicial protection belongs to the basic constitutional rights of a person and citizen, has a general character, cannot be restricted and is implemented in accordance with the principle of the rule of law in appropriate judicial procedures of justice that guarantee the right to a fair trial [30, p. 410]. The idea of the subject of civil procedural law as a system of relations in the field of administration of justice in civil cases in domestic science has become traditional and almost universally accepted. This indicates that nowadays the doctrine of civil procedural law is dominated by the idea of civil litigation as a form of administration of justice in civil cases and the identity of the concepts of civil litigation and civil procedure, which echoes the idea of procedural central-

ism proposed in foreign literature. In the scientific literature it is customary to distinguish between a broad and a narrow concept of understanding the subject of civil procedural law. A narrow concept is reduced to the identification of civil procedure with civil litigation as an activity for the administration of justice in civil cases [31, p. 7; 32, p. 74], and broad-related to its extended interpretation, according to which this concept covers not only civil litigation, but also related areas of judicial activity, in particular, enforcement proceedings, ADR, etc. [33; 34, p. 106; 35, p. 96].

A broad concept of understanding the subject of civil procedural law in Soviet literature was proposed by N. B. Zaider back in the 1960s. It was based on the view that the subject of civil procedural law, in addition to legal relations arising from the consideration of cases by courts in civil litigation, should also include legal relations formed during the consideration of civil cases and other bodies of civil jurisdiction, because civil procedural law provides for a plurality of procedural forms of protection of civil rights (arbitration, friendly courts, notary, etc.) [33, p. 81]. This concept was supported at that time by some other scientists [36, p. 55–56; 37, p. 4–8], but did not become widespread during the Soviet period. The phenomenon of differentiation of civil jurisdiction still exists today, despite the fundamentally new principles of organization and functioning of the judiciary, enshrined in the Constitution of Ukraine and current legislation. Yes, the Civil Code of Ukraine [38] (hereinafter – the Civil Code) provides that each a person has the right to apply to the court for protection of civil rights and interests (Article 16 of the Civil Code). Such protection may also be carried out in an administrative manner (Article 17 of the Civil Code) or by a notary by making a writ of execution on a debt document in the cases and in the manner prescribed by law (Article 18 of the Civil Code). Some labour disputes are considered by commissions on labour disputes, except for disputes that are subject to consideration directly in district, district in the city or city courts (Article 232 of the Labour Code of Ukraine [39]). Individuals also have the right to refer a case to arbitration courts (Laws of Ukraine "On Arbitration Courts" [40] and "On International Commercial Arbitration" [41]) or try to resolve the dispute through mediation, which has recently become increasingly popular as a consensual method of ADR, although it is not enshrined in law. Finally, the protection of civil rights and interests can be carried out as self-defense, the methods of which can be chosen by a person or established by contract or acts of civil law (parts 1, 2 of Article 19 of the Civil Code).

Forms of protection are a category of civil procedural law used to denote jurisdictional procedures for civil cases, and therefore the content of the legislative definition of forms of protection of subjective rights and interests is to ensure the implementation of these rights through appropriate enforcement

mechanisms, i.e. through appropriate legal procedures. S. Kurylov proposed typological characteristics of forms of protection of civil rights, based on the existence of objective reasons for this in terms of advantages (simplicity, accessibility, etc.) of one form or another and the effectiveness of law enforcement [42]. Depending on the nature of the jurisdiction's relationship with the parties to the dispute, the author singled out such forms of protection of civil rights and legitimate interests as: 1) resolving the case by a jurisdictional act of one of the parties to the dispute: 2) resolving the case by a jurisdictional act of an organ which is not a party of the dispute, but is connected with one or both parties of the dispute by certain legal or organizational ties; 3) resolution of the case by a body that is not a party of the dispute and is not related to them by legal or organizational relations, except of procedural nature [42, p. 162, 170–171]. These scientific observations and generalizations in one way or another really reflect a certain legislative practice. At the same time, modern procedural law, based on the priority of judicial protection, also provide opportunities for the protection of civil rights in other procedural forms, in particular, through ADR methods. At the same time, their use has a dispositive character, does not exclude the possibility of judicial protection and is generally assessed as a positive moment and a factor in the unloading of courts.

The existence of various forms of protection of civil rights is a positive fact in the context of the implementation of the international standard of access to justice. At the same time, in its practice, the ECHR has repeatedly emphasised the need for an autonomous interpretation of the concept of "court" in paragraph 1 of Article 6 of the ECHR, which should not be understood exclusively as a state court, but should be considered in its essential meaning (*Regent Company v. Ukraine*). This approach entails the need to comply with the standards of fair trial not only by courts but also by other bodies of civil jurisdiction, which, in the opinion of the ECHR, meet the characteristics of "court", which are: a) the presence of full jurisdiction to clearly established procedures; b) the existence of the power to make binding judgments, which may not be set aside other than by a court of higher instance; c) incoherence of the court with the conclusions of other bodies used in the case; d) the existence of guarantees of independence and impartiality of the relevant body [35, p. 122–123]. Thus, the ECHR assumes that the term "court" should be interpreted broadly, sometimes including quasi-judicial and non-judicial bodies, in particular, disciplinary commissions of doctors and lawyers, administrative bodies that authorised land sales, the High Council of Justice, the parliamentary committee etc. (*Ringeisen v. Austria;m Sramek v. Austria; Oleksandr Volkov v. Ukraine*). In addition, the ECHR extended, with some limitations, the guarantees of paragraph 1 of Article 6 of the ECHR for arbitration (*Regent Company v. Ukraine; Court v.*

The Czech Republic), which in the sense of the above provisions are considered "courts", despite the fact that by their nature they are a method of ADR. This clearly indicates the existence of common fundamental approaches to court proceedings and through quasi-judicial ADR methods, although with some peculiarities regarding the latter, which should be considered in the context of general standards of the right to a fair trial.

So, the problem of forms of protection, although genetically and institutionally determined by the status of judiciary and the fundamental value of justice, reflects the real state of the procedural sphere of legal regulation (the sphere of civil jurisdiction in general) as a system of civil courts, other bodies that protect civil rights, and the system of relevant civil procedures. This conclusion is of conceptual significance for the theory of civil procedural law from the standpoint the ontological essence of the interaction of the principle of the fundamental principle of the rule of law, the constitutional right to judicial protection and the convention right to a fair trial, which in the practice of the ECHR applies to procedures during which civil rights and obligations are determined. In this respect, it is extremely important that the constitutional right to a judicial protection and the convention right to a fair trial, which has a broader subject of legal regulation, are, so to speak, hybridised. The phenomenon of such hybridization determines the fact not only of the real interaction of the right to a court at the national and international levels, but also the fact of ontological unity of legal relations arising in connection with the trial to determine civil rights and obligations [34, p. 105].

At the same time, this theoretical approach should not be taken as undermining the basic constitutional values of justice, in particular, recognising that justice in Ukraine is administered exclusively by courts and delegating court functions, as well as assigning these functions to other bodies or officials is impossible (Article 124 of the Constitution of Ukraine). At the constitutional level, the indisputable values of justice are fixed as a form of exercising the judiciary, which must be separated from the legislative and executive, and have specific, unique functions. Interpretation of Art. 124 of the Constitution of Ukraine is found in the practice of the Constitutional Court of Ukraine. Thus, considering the case on the constitutional petition of 51 People's Deputies of Ukraine regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of para. 7, 11 st. 2, art. 3, item 9 of Art. 4 and Section VIII "Arbitration Self-Government" of the Law "On Arbitration Courts" (case on the tasks of the arbitration court) [43], The Constitutional Court of Ukraine noted that justice is an independent branch of state activity, which courts carry out by considering and resolving in court in a special, established by law, procedural form of civil, criminal and other cases. Instead, arbitration of disputes between the parties in the field of civil and com-

mercial relations is defined as a type of non-state jurisdictional activity, which arbitration courts carry out based on the laws of Ukraine by applying, in particular, arbitration methods. The exercise by arbitration courts of the function of protection provided for in paragraph 7 of Article 2, Article 3 of the law of Ukraine "on arbitration courts" is not the exercise of justice, but the resolving the disputes between the parties in civil and economic legal relations within the limits of the right defined in Part 5 of Article 55 of the Constitution of Ukraine. It is noted that arbitration is not justice, and the decisions of arbitration courts are only acts of non-state jurisdictional institutions to resolve disputes between the parties in the field of civil and economic relations. Arbitration courts make decisions only on their own behalf, and these decisions themselves, adopted within the current legislation, are binding only on the parties to the dispute. Ensuring the enforcement of decisions of arbitration courts is beyond the scope of arbitration and is the task of the competent courts and the state executive service.

Thus, we can conclude that despite the fact that in accordance with domestic law courts are recognised as the core of the system of civil jurisdiction, the existence of various procedural forms of protection of civil rights does not deny the exclusivity and unity of the judiciary, which together mean formal and effective constitution state of a single and equal court for all. This approach makes it obvious that the concepts of civil litigation and civil procedure do not coincide, as the latter covers not only civil litigation, but also other jurisdictional procedures for consideration and resolution of civil cases [34, p. 106]. The broad concept of understanding the subject of civil procedural law, proposed at one time by N. B. Zaider, has not received wide support in scientific circles, but now it seems extremely relevant, given the recent reforms of civil procedural legislation in Ukraine and foreign countries, the evolution of civil procedure and the further differentiation of various forms of legal proceedings. This approach allows identifying the most common patterns of formation of the procedural sphere and the functioning of the system of civil jurisdiction to optimise procedural law in general.

The expediency of a broad approach to defining the subject of civil procedural law should also be considered in view of the need to build a new value paradigm of civil procedure in the context of the fundamental principle of the rule of law, which focuses on respect for human rights and freedoms. Civil litigation and ADR are related to a single subject matter, which is a dispute over civil rights and obligations. European doctrine of civil procedure recognizes the fact that justice should not necessarily be carried out exclusively in courts, because alternative methods of dispute resolution, for example, mediation, are sometimes more appropriate procedures for resolving a particular dispute, because they allow achieving better results than classical

legal proceedings in terms of the possibility of developing solutions that satisfy both parties, eliminating the dispute between them. Thus, the Supreme Court of Canada, in interpreting the principle of proportionality, noted that "a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial. This requires a shift in culture […]. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure" (Hryniak v. Mauldin, SCC 7, [2014] 1 S.C. R. 87). It is in this sense that both the judiciary and the ADR ensure access to justice in civil matters in a democratic society governed by the rule of law. Separately in this context, attention should also be paid to the hybridization of civil proceedings, which is associated with the blurring of the boundaries between "formal" and "informal", "public" and "private" justice [24, p. 335]. A clear example of such hybridization is the integration of mediation into litigation, which results in, on the one hand, a certain degree of formalization and the introduction of some element of publicity, and on the other – strengthening the consensual principle in civil proceedings. Successes in expanding the scope of ADR methods have given grounds to talk even about the "privatization" of the field of civil litigation [2, p. 294]. In fact, this indicates the gradual blurring of the boundaries between public and private justice in the modern world, based on the idea of procedural pluralism and recognition of the polymorphic structure of dispute resolution, which should be explored in all its diversity, not separately.

CONCLUSIONS

Analysis of modern approaches to defining the concept of access to justice leads to the urgent need to rethink some classic postulates of the theory of civil procedural law, due to Ukraine's desire to integrate into the European legal space and recognition of the rule of law as a fundamental principle of law in a democratic society. Despite the lack of established views in foreign and domestic literature on the interpretation of the concept of access to justice in civil cases, we can trace certain patterns in this area. The study concludes that a broad approach to the interpretation of the international standard of access to justice in civil cases is appropriate, according to which its elements such as access to justice, access to effective remedies and access to ADR can be distinguished. This approach is based on the idea of procedural pluralism, which is based on the provision of coexistence of multiple forms of protection of violated rights of persons, the effectiveness of which is determined based on the specifics of a particular dispute. Under this approach, the court is recognised as only one of the possible appropriate ways of resolving disputes, along with other ways of resolving disputes.

Nowadays, we can say that the idea of procedural centralism corresponds to

the domestic narrow concept of the subject of civil procedural law, and the idea of procedural pluralism – with a broad concept of the subject of civil procedural law. Considering the autonomous interpretation of the term "court" in the practice of the ECHR regarding the interpretation of paragraph 1 of Article 6 of the ECHR, as well as the growing popularity of alternative dispute resolution, it is now advisable to adopt a broad approach to defining the subject of civil procedural law, which should cover both the classical form of judicial protection (civil litigation) and various ADR methods, in particular arbitration, international commercial arbitration, mediation, conciliation, etc. In view of the above, the concepts of civil litigation and civil process do not coincide and are not identical. Civil procedure are a more general concept that encompasses both civil litigation and other jurisdictional procedures for the consideration and resolution of civil cases to protect the subjective rights and interests of disputant.

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LIABILITY FOR DAMAGE CAUSED USING ARTIFICIAL INTELLIGENCE TECHNOLOGIES

Abstract. *Artifcial intelligence technologies, which have recently been rapidly developing, along with indisputable advantages, also create many dangers, the implementation of which causes harm. Compensation for such damage raises questions regarding the subjects, the act in itself which caused the damage, the causality, etc. The situation is also complicated by the imperfection of statutory regulation of relations on the use of artifcial intelligence technologies and the insufciency or ambiguity of judicial practice on compensation for damage caused using digital technologies. Therefore, the purpose of this publication is to outline approaches to applying legal liability for damage caused using artificial intelligence technologies. Based on a systematic analysis using dialectical, synergetic, comparative, logical-dogmatic, and other methods, the study analysed the state of legal regulation of liability for damage caused using artifcial intelligence technologies and discusses approaches to the application of legal liability for damage caused using*

these technologies. In particular, it was concluded that despite several resolutions adopted by the European Parliament, relations with the use of artifcial intelligence technologies and the application of legal liability for damage caused by artifcial intelligence have not received a fnal statutory regulation. The regulatory framework is merely under development and rules of conductin the feld of digital technologies are still being created. States, including Ukraine, are faced with the task of bringing legislation in the feld of the use of artifcial intelligence technologies in line with international regulations to protect human and civil rights and freedoms and ensure proper guarantees for the use of such technologies. One of the priority areas of harmonisation of legislation is to address the issue of legal liability regimes for damage caused using artificial intelligence technologies. Such regimes today are strict liability and liability based on the principle of guilt. However, theability of a particular regime to perform the functions of deterring and compensating for damage caused using artificial intelligence technologies encourages scientifc discussion

Keywords*: obligations, tort, electronic identity, civil law, IT technology, compensation for damages*

INTRODUCTION

At present, the problem of liability for damage caused using artifcial intelligence technologies is actively discussedamong scientists. Quite polar opinions are expressed, and various arguments are given favouring a certain approach. In general, the issue of liability for damage caused by artifcial intelligence is placed in the context of the essence of artifcial intelligence and determining its place in the structure of legal relations. Thus, there are three main approaches to determining the legal status of artifcial intelligence: 1) its perception exclusively as an object of civil relations, which should be subject to the legal regime of things; 2) its perception exclusively as a subject of civilrelations, a carrier of subjective rights and obligations, capable of acting independently and realising and evaluating the signifcance of their actions and the actions of other persons; 3) differentiated determination of the place of robots in the structure of civil relations, where they can be both subjects and objects of civil relations [1]. At the same time, it is suggested that non-autonomous or partially autonomous robots should be considered as tools used by subjects of legal relations – the manufacturer, owner, software developer, user, state authority, military chief, etc. Accordingly, legal liability for causing losses or other negative consequences should be assigned proportionally to the developers of robots, their owners and users. However, the issue of legal liability of autonomous robots is undetermined, that is, they virtually cannot be held accountable for themselves and for actions or inaction by which they damage third parties [2, p. 160]. There is also a position that the person responsible for the damage caused by artifcial intelligence

(hereinafter referred to as "AI") should be identifed based on who caused the action or inaction of AI, which ultimately caused damage, and the level of autonomy of AI [3, p. 194–195].

Therefore, the solution of the issue of liability for damage caused using AI technologies is impossible without establishing the essence of AI because, as O. V. Kokhanovska notes: "the explanation of the phenomenon of virtuality is important from the standpoint of fnding the correct legal approaches to solving issues of guilt and legal liability, protection of rights when it comes to damage caused by a person – a living being and an automaton created by it, a robot or artifcial intelligence" [4, p. 147]. However, science has not yet developed a unifed approach to understanding the essence of AI. It can only be stated that AI is perceived at least in the following meanings: 1) "weak artifcial intelligence" – AI focused on solving one or more tasks that a person performs or can perform; 2) "strong artifcial intelligence" – AI focused on solving all tasks that a person performs or can perform; 3) "artifcial superintelligence" – AI that is much smarter than the best human intelligence in almost every feld, including scientifc creativity, general wisdom and social skills, which can have consciousness and subjective experiences [5]. And the role that AI plays is blurring borders, democratising experience, automating work, and distributing resources [6].

In April 2018, within the framework of the EU strategy for AI development, a group of high-level experts designed seven key requirements for AI: 1) mediation and supervision of human activities: AI systems should ensure a fair society, supporting freedom of human rights and fundamental rights, and not reduce or restrict the human right to make decisions; 2) reliability and security: algorithms should be stable, reliable, and sufcient to eliminate errors or inconsistencies during all phases of the life cycle of AI systems; 3) confdentiality and data management: citizens should have full control over their data, while data relating to them should not be used to damage or discriminate against them; 4) transparency: AI systems should be traceable; 5) diversity, non-discrimination, and fairness: AI systems should consider the full range of human abilities, skills, and requirements and ensure accessibility; 6) social and environmental well-being: AI systems should be used to enhance positive social change and increase environmental responsibility; 7) accountability: mechanisms should be put in place to ensure responsibility for AI systems and their results[1].

Given the ambiguity of the interpretation of the essence of AI, and as a result, the lack of a unifed concept of liability for damage caused using AI technologies, there is a need to discuss the issue of legal liability for causing damage to AI. Therefore, the purpose of this pub-

[1] Artifcial intelligence: Commission takes forward its work on ethics guidelines. (2019, April). Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1893.

lication is to outline approaches to applying legal liability for damagecaused using artifcial intelligence technologies.

1. MATERIALS AND METHODS

The understanding and application of law should be basedon a socially determined approach to perform the social functions assigned to it. The improvement of the law should ideally be subject to a common sense of justice and based on a combination of different interests, both private and the entire society. The system of modern Ukrainian law to a considerable extent uses the methodology of Soviet law, which is objectively not designed to serve the state and liberal law. Consequently, the departure from positivism, dogmatism, and ideologisation creates the need, on the one hand, to critically approach the previously used methods of cognition and transformation of reality, and on the other hand, to develop innovative approaches to the application of the principles of building and organising theoretical and practical activities.

The principles, techniques, means, and methods of research are determined by the essence of the phenomena and processes under study. The study of artifcial intelligence and relations on the use of digital technologies shouldconsider the comparative novelty of such an object of research activity, and therefore use both long-known and widely used techniques, and new methodological tools that are not familiar to legal science. Therefore, when studying legal liability for damage caused using artifcial intelligence technologies, it was advisable to use such general techniques as dialectical, Aristotelian, synergetic, comparative, as well as the logical-dogmatic method of interpreting law as a special method of scientifc cognition, including the method of hermeneutics.

The dialectical method of research, which allows analysing various social phenomena in their development, was used to study the contradictions of approaches to the application of a particular regime of legal liability for damage caused using artifcial intelligence technologies and to establish causality between the understanding of the essence of artifcial intelligence and legal liability regimes. Synergetics, considering development as self-development of complex systems, proves that each such system has not a single line of development, but many such lines. Therefore, the use of the synergistic method allowed considering not a single line of development of responsibility relations, but also toconduct research factoring in their multidimensional nature.

Using the Aristotelian method, judgements regarding the application of legal liability for damage caused using artifcial intelligence technologies were justifed by provisions based on proven theories. And the use of the comparative method allowed analysing and identifying the contradictions of the proposed approaches to compensation for damage caused using artifcial intelligence technologies. The comparative method

also allowed studying the state of legal regulation of liability for damage caused using artifcial intelligence technologies and concluding on the insufciency of such statutory regulation and a need for updating national legislation considering current global trends in this area.

The logical-dogmatic method of scientifc research helped identify obvious attributes (aspects, characteristics) of legal phenomena without delving into internal essential connections. It was aimed at cognising the dogma of law, which solves the problems of systematisation, interpretation, and application of law, as well as the development of law. However, the change of the worldview, legal understanding and, as a result, of the methodological approaches to the study of legal phenomena, as well as an increase in the fluidity of the dogma of law, require complementing the dogmatic method with the method of hermeneutics, which involves expansion of the researcher's intelligence, feelings, and intuition on the subject of cognition. The main idea of hermeneutics is that the essence of any socio-legal phenomenon can be understood only in the context of the historicity of its existence. Given the above, the use of the logical-dogmatic method along with the method of hermeneutics allowed considering the regimes of legal liability for damage caused using artifcial intelligence technologies through the lens of their perception by interstate institutions and researchers. In particular, using such techniques, an attempt was made to interpret the regimes of legal liability through the analysis given in the European Parliament resolution of 16 February 2017 with recommendations to the Commission on CivilLaw Rules on Robotics, European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artifcial intelligence[1] and scientifc literature on conditions of legal liability.

The main stages of the study of legal liability for damage caused using artifcial intelligence technologies were as follows: 1) the hypothesis that compensation for damage caused using artifcial intelligence technologies should be based on the conventional principles of legal liability – strict liability and liability on the principle of guilt, considering the specifc feld of activity – digital technologies; 2) analysis of the state of legal regulation of relations on the use of artifcial intelligence technologies and liability for damage caused using such technologies; 3) study of doctrinal approaches to the application of legal liability regimes for damage caused using artifcial intelligence technologies and the effectiveness of their performance regarding the functions of deterrence and compensation of such damage; 4) formulation of the conclusion that liability for damage caused using artifcial

[1] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

intelligence technologies depends on the level of risks of artifcial intelligence systems.

2. RESULTS AND DISCUSSION

2.1. Legal regulation of liability for damage caused using artifcial intelligence technologies

On October 20, 2020, the European Parliament approved the resolution with recommendations to the Commission on a civil liability regime for artifcial intelligence (2020/2014(INL))[1]. The introduction of this resolution states that *in order to efciently exploit the advantages and prevent potential misuses of AI-systems and to avoid regulatory fragmentation in the Union, uniform, principlebased and future-proof legislation across the Union for all AI-systems is crucial. Technology development must not undermine the protection of users from damage that can be caused by devices and systems using AI. The question of liability in cases of harm or damage caused by an AI-system is one of the key aspects to address within this framework.*

Prior to the approval of the said 2020 resolution, the regulation of liability for damage caused by AI was partially implemented by the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL))[2]. In fact, in a 2017 Resolution, the European Parliament, given that the more autonomous robots, the less they can be considered simple tools in the hands of other entities (such as the manufacturer, operator, owner, user, etc.), questioned the sufciency of conventional liability rules to ensure clarity of the legal liability of various entities regarding liability for actions and inaction of robots, when the cause cannot be traced to a particular human actor and the unresolved question remains whether it was possible to avoid actions or inaction of robots that caused damage. It was suggested that the autonomy of robots raised questions concerning their nature in the light of existing legal categories, or whether a new category should be created with its specifc features and consequences. Therewith, it was noted that under the current legal framework, robots by themselves cannot be held liable for actions or inaction that cause damage to third parties; at the same time, the existing liability rules cover cases where the cause of the robot's action or inaction can be traced back to a particular human agent, such as the manufacturer, operator, owner, or user, and whether this agent could have foreseen and avoided harmful behaviour of the robot. Furthermore, manufacturers, operators, owners, or users may be strictly responsible for the robot's actions or inaction. If a robot or AI can make autonomous decisions, conventional rules will not be sufcient

[1] *Ibidem*, 2020.

[2] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). (2017, February). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html?redirect.

to impose legal liability for damage caused by the robot, since they do not allow identifying the party responsible for providing compensation and require the party to compensate for the damage it has caused. In addition, in this resolution, the European Parliament stated a need to design new, effective, and modern rules that should correspond to technological developments and innovations that have recently emerged and are used on the market both in the feld of contractual and non-contractual liability, since conventional rules of contractual liability are not applicable, and Directive 85/374/EEC[1], which covers non-contractual liability, can only cover damage caused by manufacturing defects of the robot, provided that the injured person can prove the actual damage, product defect and causality between the damage and the defect, so the rules of strict liability or no-fault liability may be insufcient. In paragraph 59 of Resolution 2017, the European Parliament called on the Commission, when conducting an impact assessment of its future legislative tool, to study and analyse the creation of a specifc legal status for robots in the long term, so that at least the most complex autonomous robots can be established as having the status of electronic persons responsible for compensation for damage they may cause, and possibly the application of electronic identity to cases where robots make independent decisions or otherwise interact with third parties independently.

In 2020, *Policy Department C, at the request of the European Parliament's Committee on Legal Affairs*, conducted a study that resulted in recommendations regarding AI civil liability. The study notes that to date, the only possible fundamental and universal reasoning for artifcial intelligence systems is that there is no philosophical, technological, or legal grounds to consider them anything other than artefacts generated by human intelligence, and hence products. From an ontological standpoint, all advanced technologies are not subjects, but only objects, and there is no reason to grant them rights and bring them to legal responsibility. Even considering the existing liability standards, it is always theoretically possible to identify a person who can be found responsible for losses caused by using the device. But from a functional standpoint, one can defne some conditions under which it is advisable to assign a fctitious form of legal personality to a certain class of applications, as is currently the case with corporations. However, if the concept of electronic personality should be understood as a way to recognise the possibility for a machine to get rights or be burdened with responsibilities, in the light of its internal features – intelligence, the ability to learn and modify

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. (1985, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31985L0374.

itself, autonomy, unpredictability of its result – which cause it to differ from other objects, such a proposal should be ignored and objected to [7, p. 9, 38].

In fact, this approach was developed in the abovementioned 2020 resolution[1], which noted no need for a complete review of well-functioning liability regimes, but rather for specifc and coordinated adjustments to liability regimes to avoid a situation where persons who suffer damage or whose property is damaged fnd themselves without compensation. For 30 years, *Product Liability Directive*[2] has proved to be an effective means of obtaining compensation for damage caused by a defective product, but it needs to be revised to adapt it to the digital world and the challenges facing new digital technologies, thus ensuring a prominent level of effective consumer protection, as well as legal certainty for consumers and businesses, while avoiding high costs and risks. However, Product Liability Directive should be updated in parallel with the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety[3].

The current civil legislation of Ukraine contains no special provisions that would regulate the issues of liability for damage caused using AI technologies. However, given the rapid development of digital technologies, the urgent need to protect human and civil rights and freedoms, democratic values, as well as provide proper guarantees during the use of such technologies, relations on the use of AI are gradually gaining legal regulation. Thus, on December 2, 2020, the Cabinet of Ministers of Ukraine approved the Concept of Development of Artifcial Intelligence in Ukraine[4], where one of the principles of development and use of artificial intelligence technologies, adherence to which fully complies with the principles of the Organisation for Economic Cooperation and Development on artifcial intelligence issues, defnes the principle of assigning responsibility for their proper functioning to organisations and persons who develop, implement, or use artifcial intelligence systems in accordance with these principles. And bringing the legislation in the feld of artifcial intelligence technologies in line with international regulations is one of the priority areas for implementation of the Concept.

As part of the recodifcation of civil legislation of Ukraine by the Working

[1] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

[2] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, op. cit.

[3] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. (2001, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0095.

[4] Order of the Cabinet of Ministers of Ukraine No. 1556-p "On Approval of the Concept of Development of Artifcial Intelligence in Ukraine". (2020, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1556–2020-%D1%80#Text.

Group as one of the areas of updating the statutory array of the Civil Code of Ukraine[1] (hereinafter referred to as "the CCU") it is proposed to develop the provision on the "digital rights" of a person as a type of personal non-property rights that create the possibility of realising interests in the feld of digitalisation; more clearly regulate the features of the implementation and protection of personal non-property rights, which are endowed with persons who have special legal statuses (legal modes), in particular, a digital (electronic) person; supplement the current CCU, among other things, with provisions on 1) compensation for damage caused by malicious software; 2) compensation for damage caused by robotics and artifcial intelligence [8, p. 18, 51].

Thus, the statutory regulation of relations on the use of artifcial intelligence technologies in general and the application of legal liability for damage caused by artificial intelligence in particular is at the stage of development. Several resolutions adopted by the European Parliament established the principles of legal liability and laid down conceptual provisions for compensation for damage caused by artifcial intelligence. At the same time, it is the right of any country to supplement the current national legislation in the feld of application of artifcial intelligence technologies. Such an update of legislation should consider current global trends, including regarding the liability for damage caused by AI, and at the same time allow covering future technological developments, including developments based on free and open-source software, since, as noted in the 2020 resolution[2], any future-oriented civil liability legal framework should inspire confdence in the safety, reliability, and consistency of products and services, including digital technologies, to strike a balance between effective and fair protection of potential victims of damage, while providing sufcient free opportunities for businesses, especially for small and medium-sized ones, to develop new technologies, goods, or services. This would help build trust and create stability for investment because, ultimately, the goal of any liability system should be to provide legal confdence for all parties, whether it is the manufacturer, operator, victim, or any other third party. Therefore, the authors of this study tried to outline approaches to the application of legal liability for damage caused using artifcial intelligence.

2.2. Legal liability for damage caused using artificial intelligence technologies

Liability plays an important dual role in everyday life because on the one hand, it guarantees that a person who has suffered damage or danger of causing it has

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15.

[2] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artifcial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

the right to claim and receive compensation from the party regarding which it is proved that it is liable for such damage or loss, and, on the other hand, it creates economic incentives for individuals and legal entities to prevent damage or losses, or bear the risk of having to pay compensation[1].

At present, there is a rather ambiguous situation with compensation for damage caused using AI technologies. Scientifc publications offer various approaches to bringing to legal responsibility for such damage – from applying the rules of compensation for damage caused by a source of increased danger to assigning responsibility to the AI itself – an electronic person. This diversity of opinions is explained by the comparative novelty of relations on the use of AI, and, as a result, the lack of statutory regulation of these relations and the lack of well-established judicial practice in dispute resolution. Consequently, legal liability for damage caused using AI technologies is on the agenda of the entire legal community. As Virginia Dignum pointed out, tools are needed to integrate moral, social, and legal values with technological development in AI. Responsibility is fundamental to the understanding and research of AI, in particular, in the context of subject composition, for example, who is to blame if a self-driving car harms a pedestrian: a hardware designer; a software developer that allows the car to decide on the path; the power that lets the car on the road; the owner who can personalise the decision-making system in the car according to his or her preferences; the car itself because its behaviour is based on its self-training, or perhaps all these subjects together [9]. According to Mohammad Bashayreh, the basis of the new liability regime should be the distribution of risk as proportionate responsibility, when participants in relations on the use of AI technologies agree to bear the risk of unpredictable AI behaviour [10]. After all, the behaviour of AI systems depends, among other things, on the following factors: 1) data from third-party developers (if any) to train it, some of which may be open to algorithmic choices made by researchers and developers; 2) how users can provide data to the system during its use; 3) how algorithms (some of which may be probabilistic in nature and therefore difcult to evaluate and fully control) are designed to adapt or possibly ignore some input data; 4) how people can make decisions by receiving instructions from AI, in particular behavioural effects, as people become overconfdent or change their attitude towards risk when using AI for decision-making [11].

Along with questions on whether AI or an autonomous system will be brought to legal responsibility, whether the person who bears such a legal obligation should

be responsible for negligent or criminal actions of AI (the programmer of the algorithm or its inventor/owner), the question of the possibility of AI to fle a claim is also raised [12].

[1] *Ibidem*, 2020.

According to Jean-Sebastien Boghetti, different liability regimes may apply depending on the circumstances and legal systems. The author makes a general distinction between sector-specifc modes and non-specifc sector modes. Thus, when AI is used in an area of activity covered by such a specifc regime, a sector-specifc liability regime is applied, for example, a special (strict) liability regime in case of damage caused by a road accident. Non-specifc sector regimes are quite different in this respect. Each country has its rules, but there are two types of regimes that can be found in most (Western) legal systems and the application of which can at least be provided for in case AI causes damage: liability for goods and liability for guilt [13, p. 95]. This refers to strict liability (damage is compensated regardless of guilt) and liability based on the principle of guilt. Next, the authors analysed these liability regimes.

According to the rules of strict liability, a party who causes damage to another compensates for it, regardless of who is at fault. In general, there are doubts in science regarding the capability of strict liability to create effective incentives for subjects to avoid causing damage. Tort law has two main statutory goals: compensation to victims of a tort and deterrence of future tort behaviour [14, p. 443]. Giuseppe Dari-Mathiacci and Francesco Parisi noted that strict liability, as well as lack of liability, cannot provide an effective outcome in terms of stimulating risk reduction. This is explained by the fact that in the system of strict liability, the causer of damage must bear both the costs of preventive measures and the expected amount of damage, and therefore minimise the amount of these costs. This ensures an effective level of precautionary measures, but only for the damage causer. There are no incentives for the victim to prevent damage since they always receive compensation. In the absence of liability, the situation becomes the opposite. The rules of liability, depending on the fault, determine the level of due diligence and verify whether the relevant party has accepted this level of discretion or not. Accordingly, both parties to the legal relations are motivated to take all measures necessary to prevent the damage caused or, if it is impossible to avoid it, reduce the amount of damage caused [15]. According to Emiliano Marchisio, the idea that civil liability should have a deterrent function implies that the obligation to compensate for damages is imposed on the person whom legal systems defne as the addressee of such deterrence. This paradigm has remained virtually unchanged over time and has developed two main strategies for distributing liability for damages: liability for guilt and strict liability. The concept of guilt has in some cases been conceptually replaced by the concept of strict liability simply to increase deterrence, even in cases where guilt could not be assessed positively in court, to encourage producers and other professionals to increase investment in

security. This approach is supported by scientists, and even complex studies at the supranational level have considered and continue to consider the deterrent function together with the compensation function as the central function of civil liability [16].

Holding liable for damage caused using AI technologies under the rules of compensation for damage caused by a source of increased danger, albeit logical, has its drawbacks. In the previous publication [3], covering legal issues and risks of using AI technologies, it has already been noted that when it comes to compensation for damage caused by a source of increased danger, such damage occurs in the case of using a certain vehicle, mechanism, equipment, which, although they can get out of human control, however, cannot make autonomous decisions. A distinctive feature of AI is its ability to make decisions unassisted. Therefore, this refers not only to the lack of submission to a person's control, but also to the unpredictability of its actions and causing damage. Accordingly, since such harm is unpredictable, its infliction is not covered by the concept of activities that create an increased danger to the environment, in the interpretation *of Principles of European Tort Law* [3, p. 194–195]. The norms of strict liability oblige an individual or legal entity that uses AI, or on whose behalf AI acts, to bear responsibility for damage inflicted, regardless of whether such behaviour was planned or envisaged [17, p. 385].

In the 2020 Resolution[1], the European Parliament noted that, proceeding from the legal challenges that AI systems pose to existing current civil liability regimes, it appears reasonable to establish a general strict liability regime for autonomous high-risk AI systems. Responsibility should be assigned to the operator, regardless of where the operation takes place and whether it is performed physically or virtually. This approach is based on risk assessment, which can cover several levels of risk, and should be based on clear criteria and a suitable defnition of high risk and provide legal certainty. At the same time, an AI system poses a substantialrisk when its autonomous operation implies a considerable potential for causing damage to one or more individuals randomly and exceeds reasonable expectations. When determining whether an AI system is high-risk, it is also necessary to consider the sector where signifcant risks can be expected, and the nature of the measures taken. The signifcance of the risk potentially depends on the interaction between the severity of the possible damage, the probability of causing damage or losses, and how the AI system is used. All highrisk AI systems should be exhaustively listed in the Annex to the proposed Regula-

[1] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artifcial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

tion[1], which should be reviewed at least once every six months. If all activities, devices, or processes controlled by AI systems that cause damage or create danger are not listed in the Annex to the proposed regulation, compensation for damage should be made in accordance with the rules of liability for guilt. The injured person can at least beneft from the presumption of guilt on the part of the operator, who should be able to justify themselves by proving that they have performed their duty of due care. If several operators cause damage, they must be jointly and severally liable, but each operator will have the right to recover part of the compensation from other operators, proportionately to their liability, provided that the injured person has been provided with full compensation.

Thus, the Resolution 2020[2] established two modes of liability for damage caused by AI: 1) strict liability for damage caused by high-risk AI systems; 2) liability on the principle of guilt if the damage caused by AI is not classified as high-risk AI systems. Procedural issues of prosecution, as well as issues of the amount of penalties and limitation periods for such types of claims, fall within the competence of Member States pursuant to the Resolution 2020.

According to H. Zech, when the risk cannot yet be determined based on the state of technological knowledge, strict liability can serve as a useful tool for controlling technological risk in the face of uncertainty. This liability regime can also be used as a risk-sharing tool, especially in combination with mandatory liability insurance (third-party insurance). However, like any liability rule, it applies only when it is possible to prove an individual causality [18]. However, as Emiliano Marchisio notes, in the feld of AI, the interrelation between cause and effect regarding the causality of damage can be non-linear. Therefore, applying the conventional civil liability paradigm to AI may not considerably improve security and may instead identify negative external effects. This is explained by the fact that compensation for damage to consumers and other end users of AI devices requires, according to the conventional paradigm, that the obligation to pay compensation is imposed on manufacturers and programmers. However, manufacturers and programmers will not be able to forecast the unpredictable "behaviour" of AI algorithms, which will be affected by countless variables provided by databases, Big Data collection, and end users themselves, which are completely beyond the reach and control of anyone. The scientist believes that strict

[1] Annex to the Resolution: Detailed Recommendations for Drawing Up a European Parliament and Council Regulation on Liability for the Operation of Artifcial Intelligence-Systems. (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

[2] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artifcial intelligence (2020/2014(INL)). (2020, October). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html.

liability should not be applied if an algorithm programmed in accordance with standards sometimes makes mistakes and leads to negative consequences, despite the absence of shortcomings in development or implementation. In these cases, manufacturers and programmers of AI algorithms and devices should be exempt from civil liability for damages. In other words, in all cases where there is no evidence of negligence, carelessness, or ineptitude, and the robot (both in its physical components and in aspects of artifcial intelligence) adhered to the production and programming of scientifcally proven standards, programmers and manufacturers of AI algorithms and devices should not be held responsible for damages [16]. In this regard, Gyandeep Chaudhary added that the key question regarding AI is whether AI systems offer any solution in a particular scenario, like most expert systems, or whether AI itself makes decisions and acts accordingly, such as an autonomous car. The frst case concerns at least one external agent, thereby complicating the proof of causality, while in the latter case, due to the lack of participation of an external agent, suck proof is relatively easy [19, p. 157]. However, the specifc feature of AI is that AI systems are specially programmed to interact and change AI based on the wishes of consumers. Therefore, at the time of purchase, the AI programme has only the potential to develop into a dangerous or harmful product responding to the consumer's use in and of itself [20, p. 1213].

As for liability for damage caused by a defective product, established by the *Product Liability Directive*, pursuant to Article 1 of this Directive, the manufacturer shall be liable for damage caused by a defect in its product[1]. "Manufacturer" in the Directive means the manufacturer of the fnished product, the manufacturer of any raw material or manufacturer of a component, and any person who, by putting their name, trademark, or other distinctive feature on the product, represents themselves as its manufacturer. Also, a "manufacturer" is any person who imports goods into the community for sale, hiring, leasing, or any form of distribution during their activities, and therefore shall be responsible as a manufacturer. Thus, the "manufacturer" of AI in the sense of the *Product Liability Directive* will be a manufacturer of the fnished product – software, or a design engineer, if the defect is conditioned by the design of this product. In this case, according to Susana Navas, the designer could be personally responsible for the damage caused as the "manufacturer of the component" of the robot [21, p. 81].

In accordance with the position of the European Parliament[2], liability for

[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. (1985, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31985L0374.

[2] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artifcial intelligence (2020/2014(INL)), op. cit.

damage caused using AI technologies should generally be borne by the AI system operator. This is explained by the fact that the operator controls the risk associated with the AI system, similar to the owner of the car. Due to the complexity and interconnectedness of the AI system, the operator will in many cases be the frst perceptible person for the victim. The term "operator" covers both an external network operator and an internal network operator if the latter is not covered by the *Product Liability Directive*[1]. An external network operator is an individual or legal entity that exercises certain control over the risk associated with the operation and functioning of the AI system and benefts from its operation. An internal network operator is an individual or legal entity who constantly determines the features of the technology, provides data and the main support service of the internal network, and therefore also exercises some control over the risk associated with the operation and functioning of the AI system. Exercising control means any action of the operator that affects the operation of the AI system, and therefore the extent to which it exposes third parties to its potential risks. Such operator actions can affect the operation of the AI system from start to fnish, determining inputs, outputs, or results, and whether particular functions or processes in the AI system can change. If there is more than one operator, all operators shall be jointly and severally liable, having the right to proportionate appeal against each other. The proportions of liability should be determined by the appropriate degree of control that operators had over the risk associated with the operation and functioning of the AI system.

However, proceeding from the basic principle of the *Product Liability Directive* that the manufacturer is liable for losses caused by a defect in the goods that they have put into turnover, the responsibility of the manufacturer is essentially a strict liability, since imposing on the manufacturer the obligation to compensate for damage caused by a defect in the goods does not require proof of their guilt. Therefore, by and large, this still refers to two modes of liability for damage caused using AI technologies – strict liability and liability on the principle of guilt. Consequently, radically innovative approaches to compensation for damage caused using AI technologies have not yet been observed. At the statutory level, the idea of an "electronic person" as a participant in legal relations and a subject of legal liability was not supported. Legal liability for damage caused by artifcial intelligence is based on conventional principles: strict liability and the principle of guilt.

CONCLUSIONS

The rapid development of digital technologies creates new opportunities, but also creates new challenges. Protecting human and civil rights and freedoms, democratic values, and ensuring proper guarantees during the use of such tech-

[1] *Ibidem*, 2020.

nologies is becoming a priority task of the state. The implementation of this task requires well-thought-out law-making activities and coordination of national legislation with international legislation. Currently, the issue of legal liability for damage caused using artifcial intelligence technologies is debatable. The idea of providing artifcial intelligence with legal personality and, as a result, recognising it as a liable party, which is quite actively discussed in the scientifc literature, has not been consolidated in regulatory documents. Numerous resolutions, adopted by the European Parliament, consolidate the conventional principles of legal liability and compensation for damage caused using AI technologies: 1) strict liability; 2) liability based on the principle of guilt. The differentiation of such modes is based on the risk assessment of AI systems, and the operator of such systems is determined as the party liable. Therefore, compensation for damage caused using high-risk AI technologies is the operator's obligation, regardless of where the operation takes place and whether it occurs physically or virtually, and whether the operator is guilty of causing the damage. If the damage is caused by devices or processes controlled by AI systems that are not classifed as high-risk AI systems, compensation for such damage should be performed per the rules of liability for guilt. In this case, the operator's proof that it has taken all reasonable means to avoid damage will release it from liability for damage caused using AI technologies. At the same time, for subsequent research, it would be interesting to study the issue of liability insurance for damage caused using artifcial intelligence technologies, from the standpoint of preventing and/or compensating for such damage.

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FEATURES OF LEGAL REGULATION OF THE LEGAL CAPACITY OF MINORS AND PROBLEMS OF THEIR EMANCIPATION

Abstract. *This study investigated and established the specifc features of the legal capacity of minors, as well as cases of granting them full civil legal capacity. The purpose of this study was to cover certain features of the implementation and protection of subjective civil rights of minors within their legal capacity, their emancipation and to develop specifc proposals for improving the private law regulation of these relations. The study analysed the provisions of the current Ukrainian legislation on the legal regulation of relations on determining the scope of civil legal capacity of minors, as well as the legislative experience of foreign countries, in particular, France, Germany, Great Britain, the United States, etc. The authors of this study concluded that Ukrainian legislation is heterogeneous in nature, as well as that there are different legislative approaches to determining the age of majority of an individual, and to the scope of powers granted to minors. The study examined the foreign experience of legislative provision of minors with the opportunity to dispose of their property in case of their death, as well as the approach of the Ukrainian legislator in terms of governing these legal relations. Based on the analysis of Article 1234 of the Civil Code of Ukraine (hereinafter referred to as "the CCU"), the authors identifed specifc features of the right to make a will in terms of determining its subjects and concluded on the absence of legislative prohibition of making a will by a minor who has acquired full civil legal capacity in accordance with the procedure established by law. The position of scientists on the need for statutory consolidation of the ability of minors to make a will was supported, but with certain reservations conditioned*

by the provisions of the current civil legislation; the authors developed specifc proposals for amendments to the CCU. It was concluded that a minor receives the status of a fully capable person in two ways – by granting and acquiring. At the same time, the granting of full civil legal capacity is interpreted as the adoption of an appropriate decision by the competent authority (in this case, the guardianship and custodianship authority or the court) provided the availability of grounds stipulated by law. Therewith, the acquisition of full civil legal capacity in the context of Part 2, Article 34 of the CCU is perceived as the result of independent performance of a legal action by a minor (in this case, marriage), which is stipulated by law and entails legal consequences in the form of obtaining full civil legal capacity without additional authorisation from other persons or the state

Keywords: *individual, legal personality, legal capacity, subjective civil law, restriction of civil rights, emancipation*

INTRODUCTION

The civil status of minors constitutes an extremely complex, multidimensional, and dynamic phenomenon, the specifc features of which are determined by numerous factors, namely the aspects of social and economic policy of the state. This, for its part, objectively necessitates the identifcation, pinpointing, and investigation of the fundamental components of the civil status of minors and the problems of their emancipation. However, modern civilistics has not yet developed a unifed scientifc approach to the main categories that describe this status. Over the past few decades, the study of the specifc features of the legal personality of minors and its main elements has become of unprecedented importance, given the consolidation at the highest international level – in the Universal Declaration of Human Rights of 1948[1] and the International Covenant on Civil and Political Rights of 1966[2] – the provision that "everyone, wherever they are, have the right to recognition of their legal personality". Furthermore, this provision once again demonstrates the manifestation of the principle of anthropocentrism as fundamental for building a social and legal state.

The current stage of development of the doctrine of legal personality in general and the legal capacity of minors in particular is described by dynamism and the emergence of innovative approaches to understanding legal personality. New scientifc challenges require the scientifc community and the legislator to accumulate efforts to timely respond to the emergence of new phenomena and ensure adequate legal regulation of the legal capacity of minors and the problems of their emancipation. In addition, nowadays, one can confdently say that the

[1] Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015#Text.

[2] International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043/ed19661216#Text.

category of legal personality of minors in the legal doctrine consistently acquires features inherent in an interbranch legal institution, going beyond the subject of civil law.

The purpose of this study was to cover certain features of the implementation and protection of subjective civil rights of minors within their legal capacity, their emancipation and to develop specifc proposals for improving the private law regulation of these relations.

1. MATERIALS AND METHODS

The scientifc and theoretical framework for the study of legal regulation of relations in the feld of legal capacity of minors and the problems of their emancipation included the papers of famous theorists and civilistic scientists of the pre-revolutionary, Soviet, and modern periods, who considered the basic principles of legal personality of individuals: M. M. Agarkov [1], S. S. Alekseev [2], V. I. Borysova [3], S. M. Bratus [4], M. V. Vitruk [5], V. P. Hrybanov [6], O. V. Dzera [7], A. S. Dovhert [8], I. V. Zhylinkova [9], Yu. O. Zaika [10], O. S. Ioffe [11], O. O. Kot [12], O. D. Krupchan [13], N. S. Kuznetsova [14], V. V. Luts [13], O. O. Kovalenko [15], R. A. Maidanyk [16], Z. V. Romovska [17], M. M. Sibilova [18], R. O. Stefanchuk [19], Ye. O. Sukhanov [20], Ya. M. Shevchenko [21], G. F. Shershenevych [22], S. I. Shymon [23], V. L. Yarotskyi [24] and others. On their basis, using philosophical, general scientifc, and special scientifc methods of cognition, the features of legal regulation of the legal capacity of minors and the problems of their emancipation were established.

The main empirical material used in the preparation of the study included the legal provisions that defne the concept, content, and correlation of elements of civil legal personality of minors in civil law of Ukraine, features of its implementation, relevant theoretical provisions and conceptual approaches to understanding legal personality of minors, legislation of Ukraine, other countries and international agreements, as well as law enforcement and judicial practice in cases related to the exercise of legal personality of minors for further scientifc development of vectors of legal science in the feld of regulation of relations concerning emancipation, as well as the legal consequences that the minors' behaviour may lead to. The research methods were chosen in accordance with the purpose and objectives of the study, taking into account its object and subject. The methodology of this study includes information regarding the philosophical aspects, methodological and legal foundations of scientifc cognition, the study of the structure and main stages of a scientifc article, etc. The methodological framework of the study included philosophical, general scientifc, and special scientifc methods of cognition. In particular, *dialectical method* was used to investigate the terms "individual", "legal personality", "legal personality", "legal capacity", and estab-

lish their specifc features. Furthermore, the use of the dialectical method allowed outlining objective prerequisites for the development of an effective mechanism for legal regulation of relations arising in the exercise of legal personality. *Aristotelian method* was used to formulate the concepts of legal personality of minors and the category of emancipation.

The use of the *synergistic method* made it possible to study and determine the nature of legal personality or minors in the totality of its main features and elements and establish connections between the elements of its structure. Use of general scientifc methods, such as *analysis and synthesis*, allowed investigating the components of the legal personality of minors and the effectiveness of legal regulation of relations arising upon its exercise. *The comparative legal method* made it possible to identify and determine ways to implement the positive foreign experience in law-making, legal doctrine, and judicial practice in the feld of legal regulation of relations on the exercise of the legal personality of minors in the Ukrainian legal system. This method also helped clarify conceptual approaches to understanding the concept of legal personality, theories of static and dynamic legal capacity.

Use of *judicial practice* helped establish an understanding of the essence of the legal personality of minors from the standpoint of judicial practice. *The method of legal modelling* was used to formulate relevant proposals and recommendations for improving the current legislation of Ukraine and the practice of its application.

2. RESULTS AND DISCUSSION

When studying the specifc features of the legal capacity of minors, it is necessary to refer to the provisions of the current legislation governing relations in this area. Thus, according to Article 32 of the CCU[1], an individual between the ages of fourteen and eighteen is recognised as a minor. Analysing the provisions of this Article, one can conclude that the legislator has considerably expanded the scope of legal capacity of minors in comparison with the legal capacity of children. Thus, Part 1, Article 32 of the CCU indicates that, apart from transactions provided for in Article 31 of the CCU (i.e., making small household transactions and exercising personal non-property rights to the results of intellectual and creative activities), a minor has the right to:

1) independently manage their earnings, scholarship, or other income;

2) independently exercise the rights to the results of intellectual and creative activities protected by law;

3) be a participant (founder) of legal entities, if this is not prohibited by law or the constituent documents of the legal entity;

4) independently conclude a bank deposit agreement (account) and dispose of the deposit made by them in their name (funds on the account).

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15/ed20030116#Text.

At the same time, an exhaustive list of powers of minors aged 14 to 18 years indicates that the legislator states their inability to independently exercise other rights and perform obligations stipulated by civil legislation in comparison with adults. Moreover, Part 2, Article 32 of the CCU states that a minor makes other transactions with the consent of parents (adoptive parents) or guardians. This, in turn, as fairly noted by S. V. Reznichenko, is the reverse side of the legal status that reflects the aspect of interference in the fulfilment of their capabilities by parents (adoptive parents), guardians, or guardianship and custodianship authority. In this case, the legislation makes provision for a legal lever that can influence the course of civil relations, the subject of which is a minor, in particular, to restrict their rights. Proceeding from these factors, such a person is legally dependent and relatively non-independent [25, p. 14].

In this regard, it would be advisable to give examples of foreign experience in the legal consolidation of the scope of civil legal capacity of minors. Interesting, in particular, is the experience of France. Thus, according to Article 389 of the Civil Code of France, a person under the age of 18 is considered legally incompetent[1]. Their property is managed by their legal representatives, that is, their parents, and in case of their death, custodians. Parents are jointly and severally liable for damage caused by their minor children. They also enter into agreements on behalf of a minor until they reach the age of majority. However, in cases defned by law, a minor can independently enter into transactions with the consent of their parents or guardians. According to the provisions of French civil law, uponreaching the age of 16, a minor can only enter into a certain number of transactions without the consent of their parents (guardians). Such transactions include the conclusion of an employment agreement, the right to dispose of personalearnings and deposit in the bank, the right to make a willfor half of the property bequeathed to minors, and other transactions that, according to Article 1305 of the Civil Code of France, are not unproftable for a minor and do not violate their rights [26, p. 82].

In Germany, a person becomes fully capable from the age of 18. A child under the age of 7 is completely incapable. A person between the ages of 7 and 18 has limited legal capacity and, as a general rule, concludes transactions with the consent of legal representatives. However, a minor has the right to conclude some transactions independently. Apart from the possibility of entering into transactions that give legal benefts, minors can enter into transactions within the limits of funds received from a legal representative or other person (with the consent of their parents); transactions concluded as a result of the operation of an enterprise for which the legal representative's consent was obtained;

[1] Civil Code of France. (1804, March). Retrieved from https://www.napoleon-series.org/research/government/c_code.html.

transactions aimed at implementing and terminating an employment agreement. Tort – the ability to bear responsibility for the damage caused – is defned as a separate legal category in Germany. Thus, according to Paragraph 828 of the Civil Code of Germany[1], a person under the age of 7 is not responsible for damage caused to another person. A person between the ages of 7 and 10 is not responsible for damage caused to another person as a result of an accident involving a car or railway, except if he or she intentionally caused an injury. And according to Part 3 of the same Paragraph, a person under the age of 18 is not responsible for damage caused to another person, if, upon causing damage, they did not have the understanding necessary to realise their responsibility [27; 28].

In the United States and England, there is no concept of legal capacity in its classical understanding. In these countries, only the term "legal status" is used, which, according to judicial practice, is divided into passive and active legal status, although English civil doctrine does not clearly distinguish between these concepts. In the literal sense, active legal status is the ability to perform certain actions, which in Ukraine and in most European countries is called legal capacity [28]. As for the legal consolidation of the powers of minors, in England, until the age of 18, a person is considered a minor, their legal capacity is limited regardless of age. A minor can only conclude certain transactions, such as the purchase of necessary things and services; the possibility of entering into a personal employment agreement, etc. A special feature of the civil law of England is the presence of the so-called "unconditionally invalid transactions", that is, transactions to which a minor is not entitled. Such transactions include a money loan agreement, trade transactions, recognition of the balance of a counter-current account [29].

In the United States, the legal capacity of a minor is regulated similarly to English law. A person becomes fully capable from the moment of their majority, which in different states occurs between the ages of 18 and 21. If a person has not reached the age of majority, they are considered to have limited legal capacity. A feature of American judicial practice is the tendency to expand the legal capacity of minors by recognising the validity of a larger scope of transactions that minors can conclude and perform [30, p. 83].

The analysis of foreign experience in the legal consolidation of the scope of civil legal capacity of minors indicates its heterogeneous nature and the existence of various legislative approaches, frstly, to the establishment of the age from which an individual is considered an adult; secondly, to the actual application of the terms "legal status" and "legal capacity" in law-making; thirdly, to the scopeof powers that minor individuals are endowed with. At the same time, there is no doubt that each of these ap-

[1] Civil Code of Germany. (2013, October). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/.

proaches is based on the corresponding legal traditions that form the foundation of a particular legal system.

The experience of France in securing the right to make a will for property for minors deserves special attention and consideration of this right through the lens of Ukrainian civil legislation and doctrinal approaches to the expediency of consolidating it. Most importantly, the authors of this study note that pursuant to Article 1234 of the CCU[1], only an individual with full civil legal capacity has the right to a will. The analysis of this Article enables the identifcation of specifc features of the right to make a will in terms of determining its subjects. Thus, the right to make a will belongs exclusively to individuals; the right to make a will is conditioned by the acquisition of full civil legal capacity by an individual; the right to make a will does not stipulate that an individual reaches the age of majority. This suggests the possibility of a will made by a minor who has acquired full civil legal capacity in accordance with the procedure established by law. At the same time, the theoretical provisions of civilistics generally lack consensus regarding the possibility for minors to dispose of wages or scholarships by making a will [31, p. 38]. According to V. I. Serebrovskyi, minors cannot bequeath property because they have the right to independently use their earnings "for consumption", and the will does not have such a purpose [32, p. 99].

I. V. Zhylinkova's position is quite opposite – she believes that since the relevant article of the CCU givesminors the right to dispose of their earnings, scholarships, and other income, the transfer of such property by will is another way to dispose of it. Otherwise, there is a conflict: on the one hand, a minor has the right to dispose of theirearnings, scholarship, and other income, and on the other hand, they do not have the opportunity to dispose of these funds by making a will [33, p. 23].

It is difcult to disagree with this position because according to Article 1233 of the CCU, a will is a personal order of an individual in case of their death. It is the private, personal nature of this document that indicates that there is no need for its approval by other persons. Furthermore, the legislative ban on making a will through a representative, which is stipulated by Article 1234 of the CCU, indicates the inadmissibility of any influence on the will of the testator, and only the personal will of the latter must be considered when making a will. The literature also expresses the opinion that the right to make a will, along with fully capable persons, should be granted to persons with incomplete civil legal capacity because the right to bequeath is a component of the term "disposal", and therefore, relating to specifc property, minors should have a testamentary legal capacity [34, p. 10]. The legislative experience of foreign countries in

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15/ed20030116#Text.

securing the right to make a will for minors is quite different. Thus, according to the requirements of the legislation of the countries of the continental and Anglo-American legal systems, as a general rule, a will can also be made only by adults and fully capable persons, but there are exceptions to this rule. According to the Civil Code of Germany[1] a will can be made by a person who has reached the age of 16. A will made by a person who, due to mental illness, is incapable of understanding and evaluating the meaning of the instructions contained in it is considered invalid. Minors (from 16 to 18 years of age) can make a will only in the form of an oral application or transfer a written application to a notary.

According to the provisions of the Civil Code of France[2], a will is any document, the content of which expressly indicates the will of a person to engage in a testamentary disposition. A person who has reached the age of majority or an emancipated minor who has reached the age of 16 has the right to make a will. Non-emancipated minors who have reached the age of 16 can make a will for ½ part of the property that is theirs by right of ownership, and which they could dispose of if they were of legal age [35, p. 87].

According to English law, the ability to make a will arises only upon reaching the age of majority, namely from the age of 18. An exception is made for sailors during the voyage and military personnel who can make a will from the age of 14 [36, p. 230].

Under US legislation, the right to make a will arises at the age of 16. Some states, such as Georgia, have set an earlier age for achieving the ability to make a will – 14 years. Laws and judicial practice require that the testator be "competent", that is, understand what their actions, and determine wills made by incapable, mentally ill persons to be invalid, as well as those concluded with the use of violence, threats, deception, mistakes, etc. [36, p. 87; 37].

Based on the analysis of the above, one can state a global trend of moving away from the implicit condition that an individual has the right to make a will by acquiring full civil legal capacity or reaching the age of majority. On the contrary, the legislation of foreign states establishes a considerable number of exceptions for granting testability to persons who are not of legal age, as well as do not have full civil legal capacity. According to the authors, such an approach to solving the issue of the possibility of minors to be testators of their property is quite reasonable and adequate to modern social realities. Moreover, it does not contradict the current Ukrainian legislation in any way because, as already noted, minors aged 14 to 18 years have the right to independently dispose of the funds that they have acquired through their work, and, consequently, to deter-

[1] Civil Code of Germany. (2013, October). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/.

[2] Civil Code of France. (1804, March). Retrieved from https://www.napoleon-series.org/research/government/c_code.html.

mine their future legal fate in case of their death.

Considering the above, the authors deem it appropriate to support the position on the need for regulatory consolidation of the ability of minors to make a will, but with certain reservations, which are stipulated by the provisions of the current civil legislation. Thus, if according to Part 1, Article 32 of the CCU[1] minors have the right to independently, at their own discretion, dispose of their earnings, scholarship, or other income, then in accordance with Part 2 of this Article, a minor must make a transaction relating to vehicles or immovable property with the written notarised consent of the parents (adoptive parents) or the guardian and the permission of the guardianship and custodianship authority. Part 3, Article 32 of the CCU is based on the same principle, which indicates that a minor can dispose of funds deposited in whole or in part by other persons in a fnancial institution in their name with the consent of the guardianship and custodianship authority and parents (adoptive parents) or a guardian. Consequently, the existing legislative restrictions on the minors' disposal of certain categories of property belonging to them make it impossible for potential minor testators to freely include it in a will without the corresponding approval of their parents (guardians) and the guardianship and custodianship authority. With this in mind, to provide minor individuals with the opportunity to fully dispose of their property in accordance with the current legislation and at the same time to protect the property rights and interests of minors, the authors of this study propose to amend Parts 1–2 of Article 32 of the CCU, wording them as follows:

"Article 32. Incomplete civil legal capacity of an individual between the ages of fourteen and eighteen

1. Apart from transactions stipulated by Article 31 of this Code, an individual between the ages of fourteen and eighteen (a minor) has the right to:

1) independently manage their earnings, scholarship, or other income, ***including by making a will***;

2. A minor makes other transactions with the consent of their parents (adoptive parents) or guardians. For a minor to make a transaction relating to vehicles or immovable property, ***including wills****, there must be written notarised consent of the parents (adoptive parents) or the guardian and permission of the guardianship and custodianship authority".*

Furthermore, Article 1234 of the CCU should be supplemented with Part 2 and be worded as follows:

"A minor individual with incomplete civil legal capacity has the right to a will relating to the property belonging to them by right of ownership, considering the requirements of Parts 1–2 of Article 32 of this Code regarding the need to obtain the consent of parents (adoptive parents) or a guardian and the permission of the guardianship and cus-

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15/ed20030116#Text.

todianship authority for minor to make a transaction relating to certain types of property".

In the context of studying the specifc features of civil legal capacity of minors, the issue of granting them full civil legal capacity in accordance with the procedure established by law is critical. This institution is widely known to all legal systems of the world under such a term as emancipation. In general, there is an opinion in society that a person acquires full civil legal capacity only after reaching the age of 18. However, in this regard, the position of I. F. Shershenevych is correct, that it is quite possible that a person will reach maturity before the legal term, and then it would be difcult for them to be under excessive guardianship; it is possible, on the contrary, that a person will remain mentally challenged even after reaching the age of majority, and then it would be dangerous to leave them without a mentor [38, p. 69].

As N. Ya. Dyachkova fairly noted, the basis for the emergence of emancipation in Ukraine was the need for legal regulation of existing relations due to the new economic structure of Ukraine and the rapid development of entrepreneurship, and the biosocial nature of human – the rapid acceleration of adolescents, etc. The forced unemployment of millions of adults has prompted their children to seek a certain source of income. The payment of extracurricular education, the unavailability of free higher education for many also contributes to the early growth of adolescents who seek to acquire economic freedom by their own work [39, p. 298]. Thus, the need to legislate the legal possibility of teenagers "reaching the age of majority ahead of schedule" is quite natural and objectively predetermined.

In general, emancipation emerged more than two thousand years ago in the Roman Empire and became one of those legal phenomena that are successfully used in the world to this day. Its primary importance, as a ritual for freeing persons from parental care, in the modern world has found its purpose in the procedure for granting full civil legal capacity to minors [40, p. 57].

"The Romans", as Dionysius explained to Greek readers, "have nothing of their own as long as their parents are alive, but both money and slaves, everything they have belongs to their parents" [41]. Parental authority was unlimited and ceased only with the death of the father, the death of the subject, or the receipt of certain honorary titles by the subject. However, the power of the home-owner as a unilateral right could be terminated artifcially – the father had the right to release his son from his power at his own discretion. This procedure was called emancipation and originated as the antipode of the ritual of mancipation (mancipatio), through which Roman citizens concluded transactions with things and persons. That is, in case of the implementation of mancipatio relating to a person, they fell under the power of the home-owner, but if emancipatio was applied to a person, they were released

from parental authority. Thus, emancipation (emancipatio) is a procedure for the release of a subordinate son by the will of pater familias (home-owner) [40, p. 58].

Notably, emancipation did not cease to exist with the fall of the Roman Empire, and, according to I. V. Zhylinkova has retained its primary importance in foreign law and is interpreted as the release of a person from guardianship and custodianship by parents or other authorised persons and the acquisition of the ability to acquire rights and obligations by their actions, that is, the acquisition of full civil legal capacity by a person [27]. Thus, for example, Article 477 of the Civil Code of France[1] establishes the possibility of withdrawal from parental care if the person reaches the age of 16. The legal status of an emancipated person in this country is close to the legal status of an adult, but at the same time it has a number of restrictions. In particular, an emancipated minor cannot engage in business activities [37].

Considering the experience of Spain, according to Article 323 of the Spanish Civil Code[2], an emancipated person cannot borrow money, alienate their real estate or objects of special value without the permission of their parents (guardians) [37]. In the United States, only some states regulate the emancipation. According to Paragraphs 62, 64 of the Civil Code of the State of California[3] a person aged 14 to 18 years is considered emancipated if he or she marries, enrols military service, or by a court decision [40, p. 58].

According to the provisions of the legislation of the Czech Republic, a minor can be declared fully capable by a court decision if he or she has reached the age of 15, their ability to earn a living independently and solve their issues is confrmed, as well as with the consent of the legal representative of the minor (Part 1, Para. 37 of the Civil Code of the Czech Republic)[4].

At the same time, emancipation does not fnd its legislative consolidation in all countries of the world. Thus, in Germany, after reducing the age of majority to 18 years, emancipation lost its signifcance and the corresponding paragraphs of the Civil Code were removed [42]. Furthermore, the emancipation procedure is also absent in such countries as Denmark, the Netherlands, England. [43, p. 861].

The analysis of the regulatory consolidation of theemancipation procedure in the legislation of foreign states indicates a variation in approaches to the possibility of minors to acquire full civil legal capacity, which is quite natural given

[1] Civil Code of France. (1804, March). Retrieved from https://www.napoleon-series.org/research/government/c_code.html.

[2] Civil Code of Spain. (1889, July). Retrieved from https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5a8ad42e4.

[3] Civil Code of the State of California. (1872). Retrieved from https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=CIV.

[4] Civil Code of the Czech Republic (2012, February). Retrieved from http://anesro.com/downl/zakon/89-2012_Sb.pdf.

the specifc features of the legal customs of a particular state, which in turn are caused by the features of historical and social development.

At the same time, the legislation of Ukraine, as well as, for the most part, in European countries, also establishes emancipation as an institution. However, Z. V. Romovska made a reservation that "granting minors full civil legal capacity is both good and bad because, on the one hand, it eliminates obstacles to full social activity; on the other hand, because the minor becomes an independent subject of risk and responsibility, losing the possibility of partially transferring them to parents, guardians". In this regard, according to Romovska, the provision of full civil legal capacity should be approached carefully and mindfully [17, p. 254].

Evidently, guided by the need for special protection of the interests of minors, the Ukrainian legislation approached the issue of regulating the procedure for emancipation cautiously, providing an exclusive procedure for obtaining full civil legal capacity by minors in the CCU provisions. Thus, according to the provisions of Article 35 of the CCU, full civil legal capacity can be granted to an individual who has reached the age of sixteen and works under an employment agreement, as well as to a minor who is recorded by the mother or father of the child. Full civil legal capacity is granted by a decision of the guardianship and custodianship authority at the request of the interested person with the written consent of the parents (adoptive parents) or the guardian, and in the absence of such consent, full civil legal capacity may be granted by a court decision. Full civil legal capacity may be granted to an individual who has reached the age of sixteen and wishes to engage in entrepreneurial activity. With the written consent of the parents (adoptive parents), guardian or guardianship authority, such a person may be registered as an entrepreneur. In this case, an individual acquires full civil legal capacity from the moment of state registration as an entrepreneur. Full civil legal capacity granted to an individual applies to all civil rights and obligations. In case of termination of the employment agreement or termination of business activities by an individual, the full civil legal capacity granted to him/her remains.

Furthermore, the full civil legal capacity of an individual before reaching the age of majority is also mentioned in Part 2, Article 34 of the CCU, according to which in case of marriage registration of an individual who has not reached the age of majority, he or she acquires full civil legal capacity from the moment of marriage registration. Thus, the analysis of these legislative provisions suggests that a minor receives the status of a fully capable person in two ways – by granting and acquiring. At the same time, the granting of full civil legal capacity is interpreted as the adoption of an appropriate decision by the competent authority (in this case, the guardianship and custodianship authority or the court) provided

the availability of grounds stipulated by law. For its part, the acquisition of full civil legal capacity in the context of Part 2, Article 34 of the CCU is perceived as the result of independent performance of a legal action by a minor (in this case, marriage), which is stipulated by law and entails legal consequences in the form of obtaining full civil legal capacity without additional authorisation from other persons or the state.

Therefore, mandatory prerequisites for granting minors full civil legal capacity are as follows:

1) reaching the age of 16 and working under an employment agreement;

2) reaching the age of 16 and wanting to engage in entrepreneurial activity;

3) recording of a minor by the father or mother of a child, regardless of the age of the minor. At the same time, for persons engaged in labour activity or recorded by the father/mother of the child, the provision of full civil legal capacity is subject to the written consent of legal representatives. In the absence of such consent, full civil legal capacity may be granted by a court decision. At the same time, it appears rather strange and incomprehensible that a minor is not assigned the opportunity to obtain full civil legal capacity if there is a desire to engage in entrepreneurial activity in the absence of written consent of parents (adoptive parents), a trustee or a guardianship and custodianship authority in court.

This situation is also reflected in the procedural legislation. Specifc features of court proceedings on cases of granting a minor full civil capacity are contained in Article 301 of the Civil Procedural Code of Ukraine, according to which the statement of a minor, who has reached sixteen years of age, requesting to grant them full civil capacity in cases established by the CCU, in the absence of the consent of parents (adoptive) or guardian is submitted to the court of residence. Therewith, according to the provisions of Article 302 of the Civil Procedural Code of Ukraine, the application for granting a minor full civil legal capacity must contain data that the minor works under an employment agreement or is the mother or father of the child in accordance with the civil status certifcate[1].

Analysis of the grounds defned in Article 35 of the CCU for granting a minor full civil legal capacity suggests that different grounds for acquiring full civil legal capacity by minors are conditioned by different goals of the legislation. Thus, it is quite true that the emancipation of minors engaged in labour or entrepreneurial activity is carried out for stimulating, encouraging them to be involved in civil (entrepreneurial) turnover without waiting for the coming of age [44, p. 48]. Emancipation of minors based on their recording by their mother or father of the child is carried out not for stimulating them to give birth to children by minors, but for fully performing parental duties and the possibility of protecting the rights and freedoms of their children

[1] Civil Procedural Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15#Text.

(since in case of failure to provide minor parents with full legal capacity, both they and their young new-born children will actually have incomplete and partial legal capacity, which will not allow them to become full members of society) [45, p. 115]. Thus, it can be confdently stated that each of the legally defned grounds for granting a person full civil legal capacity is a weighty argument in favour of the need to ensure the possibility of a minor to become a full-fledged subject of civil legal relations and, accordingly, a carrier of the entire range of rights and obligations stipulated by civil legislation. Considering the above, the possibility of minors to obtain full civil legal capacity in court in the absence of the consent of legal representatives constitutes an additional legislative guarantee aimed at protecting the interests of minors and preventing abuse of legal rights by their rights and obligations relating to children (minors).

According to the authors of this study, entrepreneurship in its essence and meaning is as similar as possible to working under an employment agreement, and in some cases, the risks of entrepreneurial activity are much higher than self-employment. Regarding the dynamic growth of the role of entrepreneurship for young people, the literature contains fair points that today, when information technology is developing rapidly, numerous new human activities have emerged, including professions that are opened before reaching the age of majority. The "sale" of intellectual abilities and their results by minors is now fairly commonplace. Moreover, self-fulfilment in these types of activities is possible not only through the conclusion of employment agreements, but also through self-organisation of individual work, that is, through the implementation of entrepreneurship or the conclusion of separate civil agreements. One should not forget that young men and women are currently active not only in the feld of information technologies or the creation of objects of intellectual property rights, but also in the "conventional" branches of entrepreneurship: retail trade, service provision, etc. [15, p. 36]. Considering the above, it is necessary to introduceappropriate amendments to the Civil Code of Ukraine and the Civil Procedural Code of Ukraine regarding ensuring the possibility of minors to obtain full civil legal capacity by a court decision in the absence of the consent of legal representatives. In particular, the authors of this study propose to word Paragraph 2, Part 3, Article 35 of the CCU as follows:

"With the written consent of the parents (adoptive parents), guardian or guardianship authority, such a person may be registered as an entrepreneur. In this case, an individual acquires full civil legal capacity from the moment of state registration as an entrepreneur. In the absence of such consent, full civil legal capacity may be granted by a court decision".

Furthermore, the authors also consider it appropriate to support the pro-

posal of M. V. Mishchenko regarding the presentation of Article 302 of the Civil Procedural Code of Ukraine in the following wording:

"Article 302.

Content of the statement.

1. The statement for granting a minor full civil legal capacity must contain information that the minor works under an employment agreement, or is the mother or father of the child in accordance with the civil status certifcate, or has other grounds for acquiring full civil legal capacity stipulated by the legislation of Ukraine" [45, p. 116].

Summarising this stage of research, the analysis of the current legislation aimed at the legal regulation of relations in the feld of determining the legal capacity of minors, as well as theoretical developments on this subject, indicates the existence of a considerable number of problematic issues that necessitate an in-depth study and solution. Considering the above, as well as factoring in the constant dynamic development of public relations, the features of the legal capacity of minors should become the subject of periodic scientifc study of a legal, socioeconomic, and psychological nature, and the results of these studies should be updated and correspond to the current level of society development. This, for its part, will ensure timely and adequate changes in legislative provisions in this area to maximise the protection of the rights and interests of minors.

CONCLUSIONS

The analysis of foreign experience in the legal consolidation of the scope of civil legal capacity of minors indicates its heterogeneous nature and the existence of various legislative approaches, frstly, to the establishment of the age from which an individual is considered an adult; secondly, to the actual application of the terms "legal status" and "legal capacity" in law-making; thirdly, to the scope of powers that minor individuals are endowed with. At the same time, there is no doubt that each of these approaches is based on the corresponding legal traditions that form the foundation of a particular legal system.

Having analysed the scope of legal capacity of children under the age of 14 under the civil legislation of Ukraine, one can come to the conclusion that in general, the provisions that currently govern these issues can create sufcient legal conditions for the exercise and protection of subjective civil rights of minors. It can be stated that there is currently a situation of expanding cases of independent participation of minors in civil relations, which actually goes beyond the limits of partial legal capacity granted to them by law. Therewith, to expand the opportunities of this category in modern civil legal relations, as well as to solve some problematic and controversial issues, the requirements of the legislation regarding the establishment of a minimum age for acquiring partial legal capacity, expanding the scope of legal capacity of minors,

as well as providing them with the opportunity to independently apply for free legal aid to protect their subjective rights and interests, including civil ones, need to be improved.

The authors deem it appropriate to support the position on the need for regulatory consolidation of the ability of minors to make a will, but with certain reservations, which are stipulated by the provisions of the current civil legislation. Thus, if pursuant to Part 1, Article 32 of the CCU minors have the right to independently, at their own discretion, dispose of their earnings, scholarship, or other income, then in accordance with Part 2 of this Article, a minor must make a transaction relating to vehicles or immovable property with the written notarised consent of the parents (adoptive parents) or the guardian and the permission of the guardianship and custodianship authority. Part 3, Article 32 of the CCU is based on the same principle, which indicates that a minor can dispose of funds deposited in whole or in part by other persons in a fnancial institution in their name with the consent of the guardianship and custodianship authority and parents (adoptive parents) or a guardian. Consequently, the existing legislative restrictions on the minors' disposal of certain categories of property belonging to them make it impossible for potential minor testators to freely include it in a will without the corresponding approval of their parents (guardians) and the guardianship and custodianship authority.

RECOMMENDATIONS

Considering the global trend of moving away from the implicit condition that an individual has the right to make a will by acquiring full civil legal capacity or reaching the age of majority, it is appropriate to pay attention to the legislation of foreign countries, which establishes a considerable number of exceptions for granting testaments to persons who are not of legal age, as well as do not have full civil legal capacity. According to the authors, such an approach to solving the issue of the possibility of minors to be testators of their property is quite reasonable and adequate to modern social realities. Moreover, it does not contradict the current Ukrainian legislation in any way because, as already noted, minors aged 14 to 18 years have the right to independently dispose of the funds that they have acquired through their work, and, consequently, to determine their future legal fate in case of their death.

Each of the legally defned grounds for granting a person full civil legal capacity is a weighty argument in favour of the need to ensure the possibility of a minor to become a full-fledged subject of civil legal relations and, accordingly, a carrier of the entire range of rights and obligations stipulated by civil legislation. Considering the above, it is recommended to pay attention to the minors' possibility of obtaining full civil legal capacity in court in the absence of the consent of legal representatives, which has to be an additional legislative guar-

antee aimed at protecting the interests of minors and preventing abuse of legal rights by their rights and obligations relating to children (minors).

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STANDARD OF PROOF IN COMMON LAW: MATHEMATICAL EXPLICATION AND PROBATIVE VALUE OF STATISTICAL DATA

Abstract. *As a result of recent amendments to the procedural legislation of Ukraine, one may observe a tendency in judicial practice to differentiate the standards of proof depending on the type of litigation. Thus, in commercial litigation the so-called standard of "probability of evidence" applies, while in criminal proceedings – "beyond a reasonable doubt" standard applies. The purpose of this study was to fnd the rational justifcation for the differentiation of the standards of proof applied in civil (commercial) and criminal cases and to explain how the same fact is considered proven for thepurposes of civil lawsuit and not proven for the purposes of criminal charge. The study is based on the methodology of Bayesian decision theory. The paper demonstrated how the principles of Bayesian decision theory can be applied to judicial fact-fnding. According to Bayesian theory, the standard of proof applied depends on the ratio of the false positive error disutility to false negative error disutility. Since both types of error have the same disutility in a civil litigation, the threshold value of conviction is 50+ percent. In a criminal case, on the other hand, the disutility of false positive error considerably exceeds the disutility of the false negative one, and therefore the threshold value of conviction shall be much higher, amounting to 90 percent. Bayesian decision theory is premised on probabilistic assessments. And since the concept of probability has many meanings, the results of the application of Bayesian theory to judicial fact-fnding can be interpreted in a variety of*

ways. When dealing with statistical evidence, it is crucial to distinguish between subjective and objective probability. Statistics indicate objective probability, while the standard of proof refers to subjective probability. Yet, in some cases, especially when statistical data is the only available evidence, the subjective probability may be roughly equivalent to the objective probability. In such cases, statistics cannot be ignored

Keywords: *standard of proof; Bayesian decision theory; beyond reasonable doubt; balance of probabilities; naked statistics*

INTRODUCTION

To prove a statement in court means to persuade the court or the jury (together referred to as "the fact-fnder") that the statement is true. But persuasion is a gradable concept, which means that the fact-fnder may be more or less persuaded. Therefore, it is crucial to specify what degree of persuasion is sufcient for the fact-fnder to hold that a statement is true, and the judgment can be based on it. In other words, if we express persuasion in percentage terms (supposing that one may be 100 per cent persuaded or 90 per cent persuaded etc.) then what is the threshold value necessary to adjudicate a case? Is 100 per cent persuasion the only acceptable threshold to serve justice? Is it ever achievable?

In civil law countries, these issues are not paid sufcient attention [1, p. 253–255, 258; 2, p. 1593]. Ukraine is no exception. Until recently, the very concept of the standard of proof was unknown to Ukrainian jurisprudence. As Justice of the Supreme Court Konstantin Pilkov notes, the courts started to apply it not earlier than 2018–2019 [3]. In accordance with the tradition of civil law countries, the procedural legislation of Ukraine stipulates that a judge shall assess evidence according to his/her inner conviction[1]. This provision is supplemented by the rule that no evidence has a pre-established probative value for the court[2]. Along with this, among the criteria for evaluating evidence, procedural codes mention sufciency and reli-

[1] Civil Procedural Code of Ukraine, Paragraph 1, Article 89. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15/ed20040318#Text; Criminal Procedural Code of Ukraine, Paragraph 1, Article 94. (2010, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17/ed20100418#Text; Commercial Procedural Code of Ukraine, Paragraph 2, Article 79. (2003, January). Retrieved fromhttps://zakon.rada.gov.ua/laws/show/436–15/ed20030116#Text; Administrative Procedural Code of Ukraine, Paragraph 2, Article 76. (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2747–15#Text.

[2] Civil Procedural Code of Ukraine, Paragraph 2, Article 89. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15/ed20040318#Text; Criminal Procedural Code of Ukraine, Paragraph 2, Article 94. (2010, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17/ed20100418#Text; Commercial Procedural Code of Ukraine, Paragraph 2, Article 86. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15/ed20030116#Text; Administrative Procedural Code of Ukraine, Paragraph 2, Article 90. (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2747–15#Text.

ability[1]. However, the above provisions of the law do not allow understanding when a judge can "diagnose" themselves as having necessary inner conviction, which would allow him to recognize the evidence as sufcient and reliable.

Furthermore, until recently, it was tacitly accepted that the standard of proof in civil and criminal cases is the same. However, under the influence of the case law of the European Court of Human Rights and as a result of changes in the procedural law[2], there is now a tendency to distinguish between the standard of proof in criminal proceedings (where "beyond reasonable doubt" standard applies) and the standard in commercial proceedings (where the so-called standard of "probability of evidence" applies). Notably, amendments pertaining to the standard of proof were introduced into the Commercial Procedural Code[3], while the Civil Procedural Code remains unchanged in this regard[4].

The tendency to differentiate the standards of proof is new for Ukrainian courts and therefore for doctrinal justifcation. Academicians can help clarify the reasons for the existence of distinct standards of proof for different types of proceedings. Second, comparative law studies can predict vexed questions Ukrainian courts will have to cope with in the future. In this vein, it is helpful to resort to the doctrine of common law, where the tradition of distinguishing between the standards of proof has been the subject of thorough scholarly analysis. In common law countries, there are two different standards of proof – one for criminal cases and one for civil cases. The former is known as 'beyond reasonable doubt' standard (BRD), the latter is known as 'balance of probabilities' (in the United Kingdom) or 'preponderance of the evidence' (in the United States) (BoP) [4, p. 280; 5, p. 80; 6, p. 1–2].

In criminal cases, the threshold value of persuasion is much higher than in civil cases. Under the BRD-standard, the fact-fnder has to be almost certain that the statement is true. In numbers BRD-standard amounts to 90 per cent conviction [7, p. 1; 8, p. 561]. On the contrary, in civil cases a much lower degree of conviction is sufcient: the fact-fnder has merely to fnd the trueness of the statement more probable than its falseness. In numbers, it amounts to 50+ percent conviction [9, p. 168; 10, p.1076–1077; 11, p. 384–386]. It means that one and the same fact may be considered proven for the purposes of civil litigation, but at the same time unproven for the purposes

[1] Civil Procedural Code of Ukraine, Articles 78, 79. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15/ed20040318#Text; Administrative Procedural Code of Ukraine, Articles 75, 76. (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2747–15#Text.

[2] Commercial Procedural Code of Ukraine, Article 79. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15/ed20030116#Text.

[3] *Ibidem*, 2003.

[4] Civil Procedural Code of Ukraine, Articles 77–80. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15/ed20040318#Text.

of criminal charge. A bright example is the famous O. J. Simpson case [12].

The standard of proof issue was addressed by many writers, which include J. Chalmers [13], E. K. Cheng [14], K. M. Clermont [1; 15–18], C. Engel [19], J. Kaplan [20], D. H. Kaye [7; 21; 22], J. Leubsdorf [2], B. Luppi, F. Parisi, D. Pi [23], M. Schweizer [6], G. Tuzet [24], R. W. Wright [5] and other.

1. MATERIALS AND METHODS

The methodology employed was determined by the purpose of this study, which is to fnd a rational explanation of why the standard of proof in civil and criminal proceedings should be different, and, accordingly, how the same fact can be considered proven in a civil case and unproven – in a criminal case. The methodological framework of the study is Bayesian decision theory. This theory is based on Bayes' theorem and offers an algorithm to make a rational decision under uncertainty, when the real state of affairs is unknown and only the probability values are available. According to this theory, a rational decision is one that will result in the maximum value of the expected utility under the given conditions. Therefore, it calls for determining theexpected utility value of each of the possible decisions and considering the probability that such a decision can appear to be wrong.

Through the use of mathematical modelling, the principles of Bayesian decision theory are applied to judicial fact-fnding process in civil and criminal proceedings. The publications of D. Kaye and J. Kaplan constitute the theoretical basis of this exercise. The utility maximisation function is replaced by the equivalent disutility minimisation function, and it is assumed that a correct decision on the issue of fact does not have any disutility. The article mentions the methodology of behaviourism in the context of the discussion of whether the actor's perceptions should be considered when determining the utility value brought by a particular decision.

Since Bayesian decision theory is premised on probabilistic judgments, it is necessary to explain what is meant by probability in the context of the judicial fact-fnding. According to D. Kaye probability has at least seven different meanings (mathematical probability, informal probability, classical probability, frequentist probability, logical probability, personal probability and propensity theory) [22, p. 164–166]. That is why the second part of the article addressed the problem where different interpretations of probability are most evident. It is the problem of using statistical data as evidence in court proceedings, or the so-called "naked statistics" problem. This problem most often manifests in tort cases, where the plaintiff claims that the damage to his or her health was caused by a toxic substance (for example, asbestos-containing dust). In this part of the study, the methods of statistical analysis were used. Furthermore, the authors employed the epidemiological concept of relative risk. In particular, it is explained

how the concept of relative risk in epidemiology is related to the standard of proof and the problem of establishing causation in some personal injury cases.

Particular attention was paid to the analysis of the hypothetical Blue Taxi case, which is widely discussed in the literature. In this context, the methodology of law and economics was also used with reference to one of its founders – R. Posner. The empirical framework of this study included the case law of American courts in cases where they had to decide on the probative value of statistics. Those are, in particular, the case of Herskovits v. Group Health Cooperative of Puget Sound [25] and Sargent v. Massachusetts Accident Co. [26].

Although the article does not directly compare the doctrine of common law with the law of Ukraine, it nevertheless has a comparative context, as the authors sought to emphasise the universalism of the idea of rational decision-making and its applicability regardless of whether the jurisdiction belongs to common law or to civil law family. After the amendments to the Commercial Procedural Code of Ukraine and the introduction of the standard of "probability of evidence" in Ukrainian law, courts gradually begin to differentiate the standards of proof depending on the type of proceedings. This study offers a take at the achievements of the doctrine of common law to develop a more profound understanding of this differentiation, which will allow judges to approach the problem of proof more carefully and consistently, avoiding hasty manoeuvres on a new path.

2. RESULTS AND DISCUSSIONS

2.1. Bayesian decision theory as a rationalisation of the two standards of proof

Bayesian decision theory offers an algorithm of how to make a rational decision under uncertainty [8, p. 558–559]. Thus, the frst step in its application is to acknowledge that the court and the jury operate under uncertainty. In this context, it is determined that a fact-fnder cannot gain absolute knowledge of the facts under investigation [4, p. 275, 282; 9, p. 167; 19, p. 436], and therefore has to decide proceeding from incomplete knowledge, relying only on the greater or lesser probability of the relative facts *(The unattainable nature of absolute truth (absolute certainty) is emphasised even in the description of the criminal standard of proof).*

A rational decision is one that results in the maximum possible value of utility under the set conditions (utility maximisation) or, what is the same, minimum possible value of disutility under the set conditions (disutility minimisation) [1, p. 252–253; 6, p. 8; 7, p. 1–2; 21, p. 55; 20]. The fact-fnding process can be analysed in terms of either function, but the analysis through the prism of disutility minimisation is somewhat more convenient and therefore prevail in the literature.

Regarding a particular fact, the fact-fnder can make only one of two decisions: either that this fact really took

place (true) or that it did not really take place (false). Both the frst and the second decision can be either correct or incorrect. Thus, there are four possible scenarios: the fact-fnder concludes that the fact took place, and it really did (a1); the fact-fnder concludes that the fact took place, although it really did not (a0); the fact-fnder concludes that the fact did not take place, and it really did not (n1); the fact-fnder concludes that the fact did not take place, although it really did (n0) (Table 1). Scenarios a0 and n0 are called false positive and false negative errors, respectively, (or "alpha error" and "beta error" [19, c. 444–445]).

Of the two alternative decisions, it is rational to choose the one which results in less disutility. Assuming that the correct decisions do not result in any disutility, then it is rational to opt for positive decision whenever the disutility of false positive error (La0) is less than the disutility of false negative error (Ln0).

Table 1. *Fact-fnder's fndings*

	The fact took place	**The fact did not take place**
Found that the fact took place	a1	a0
Found that the fact did not take place	n0	n1

However, operating under uncertainty, one cannot calculate the real disutility; only the expected disutility value can be known [7, p. 10]. The latter is defned as the real disutility of the incorrect decision (L_{a0} or L_{n0}) multiplied by the probability factor that the decision will appear to be incorrect. If the probability that the fact really took place is p, and the probability that the fact did not really take place is 1 – p, then the expected disutility of a false positive decision is $L_{a0} \times (1 - p)$, and the expected disutility of the false negative decision is $L_{n0} \times p$.

Therefore, it is rational to

opt for decision a whenever $L_{a0} \times (1 - p) < L_{n0} \times p$; and

opt for decision n whenever $L_{a0} \times (1 - p) \geq L_{n0} \times p$.

Next, if one takes an equilibrium point when the expected disutilities of false positive and false negative errors are equal, that is, $L_{a0} \times (1 - p) = L_{n0} \times p$, then, having solved the obtained equation, one can fnd the threshold value p*, i.e., fact's probability value, below which it is rational to act as if the fact did not take place, and above which – it is rational to act as if the fact did take place. This threshold value p* is calculated as follows:

$$p^* = \frac{L_{a0}}{L_{a0} + L_{n0}} \qquad (1)$$

In Figure 1 (after [7, p. 12–14]) the descending line from the vertex L_{a0} denotes the expected disutility of the false positive error: it decreases with the increase in probability that the fact really took place (p). Instead, the ascending

line to the vertex L_{n0} denotes the expected disutility of the false negative error: contrariwise, it increases with the decrease in the probability that the fact really took place *(However, it is more precise to represent the expected disutility function via the normal distribution curve (Gaussian distribution), the vertex of which corresponds to p = 0 (for the expected disutility of a false positive error) or p = 1 (for the expected disutility of the false negative error))*. Sought-for threshold value p* is the probability value at the point of intersection of these two lines.

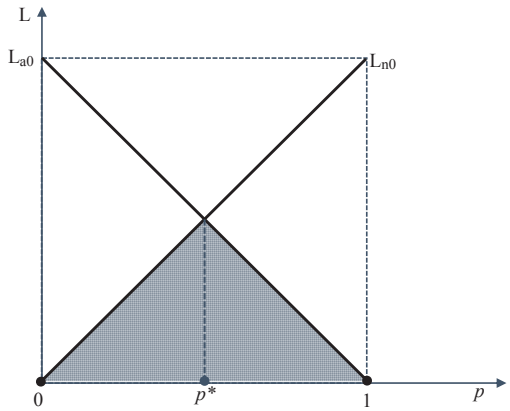

***Figure 1**. Threshold value of probability (p*) where disutility of false positive error (L_{a0}) equals disutility of false negative error (L_{n0})*

If up to this point one opts for the negative decision, and after it – for the positive decision, one gets the minimum amount of expected disutility possible resulting from one's decisions (Figure 1 demonstrates this amount as the shaded triangle). In this way, the goal of minimising disutility is achieved, and thus the decision-making strategy can be considered as rationally justifed, despite the incompleteness of knowledge available. Next, the point p* can move along the p-axis closer to the right (p = 1), or closer to the left (p = 0). It depends on how the vertices L_{a0} and Ln0 relate to each other. If they are equal (as in Figure 1), then the point p* will lie exactly in the middle, i.e., at the value of 0.5 (or 50%) because in this case:

$$p^* = \frac{L_{a0}}{L_{a0}+L_{n0}} = \frac{1}{1+1} = \frac{1}{2} \quad (2)$$

But if L_{a0} is greater than L_{n0}, then the value of p* will move closer to the right edge (as shown in Figure 2). So, for example, if $L_{a0} = 8\ L_{n0}$, then we obtain:

$$p^* = \frac{L_{a0}}{L_{a0}+L_{n0}} = \frac{8}{8+1} = \frac{8}{9} \approx 0.9 \quad (3)$$

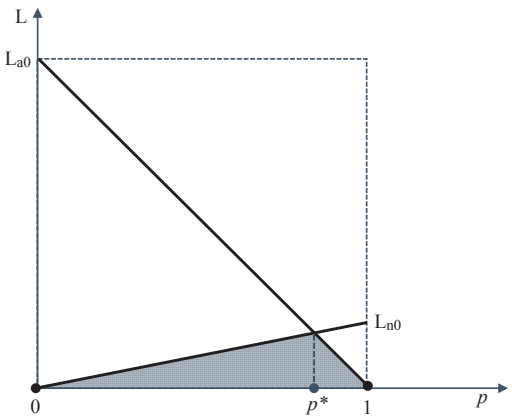

***Figure 2**. Threshold value of probability (p*) where disutility of false positive error (L_{a0}) exceeds disutility of false negative error (L_{n0})*

Thus, the greater the disutility of the false positive error, compared to the

disutility of the false negative error, the closer to the right edge moves the threshold value p* (and vice versa). That is, the greater the disutility from the false positive error than the disutility of the false negative error, the more confdent one must be to opt for the positive decision. Therefore, if the disutility of the false positive error is eight times greater than the disutility of the false negative error, then taking a positive decision is rational only if the decision-maker is more than 90% sure that the fact on which the decision is based did really take place. On the other hand, if the disutility of the false positive error is equal to the disutility of the false negative error, it is enough to be just more than 50% sure that the fact on which the decision is based did really take place.

The above sets the scene for the justifcation of why the standards of proof should be different in civil and criminal cases. In a civil case, money or some other pecuniary interest is usually at stake. Upholding a claim is the positive decision and rejecting a claim – is the negative decision. Accordingly, the false positive error is when the court upholds a claim that under the complete knowledge would have been rejected. The false negative error is when the court rejects the claim, that under the complete knowledge would have been upheld.

Assuming the price of the claim is 10,000 USD, the false positive error results in defendant's losing 10,000 USD he/she should not lose; the false negative error results in plaintiff's not obtaining 10,000 USD he/she should obtain. It is generally accepted that the disutility in both cases is the same, since every dollar erroneously not received by the plaintiff has the same value as a dollar erroneously overpaid by the defendant [1, p. 252; 2, p. 1580–1581; 4, p. 280; 6, p. 3; 8, p. 559; 9, p. 171; 18, p. 469–470]. That is, $L_{a0} = L_{n0}$, which means that, according to the Bayesian formula, the probability threshold p* is equal to 0.5, and this is precisely the threshold value set by the "balance of probability" (or "preponderance of evidence") standard [8, p. 560].

In contrast to civil cases, in criminal cases the situation is fundamentally different: under a liberal regime *(The Bayesian formula for decision-making alone does not determine the standard of proof since the respective values of the variables need to be substituted into the formula. Estimation of these values is a political decision, and it depends on the political regime. Under an authoritarian regime, the punishment of an innocent may be considered less harmful than when a guilty one goes unpunished)*, convicting an innocent person (false positive error) is considered much worse than acquitting the guilty one (false negative error) [1, p. 268; 6, p. 3; 8, p. 560]. By some estimates, ten times worse [8, p. 562]. That is, $L_{a0} = 10 \times L_{n0}$. Substituting these values into the formula yields the following:

$$p^* = \frac{L_{a0}}{L_{a0}+L_{n0}} = \frac{10}{10+1} = \frac{10}{11} \approx 0.9 \qquad (4)$$

It means that to convict a person of committing a criminal offence, the fact-fnder needs to be more than 90% sure that the accused did really commit it. And this is precisely the threshold required by the 'beyond a reasonable doubt' standard. The approach prevailing in common law, therefore, is based on three basic tenets. First, the court and the jury have to decide under uncertainty, i.e., in a situation where the absolute truth about the facts of the case is not achievable. Second, under uncertainty, the best thing to do is to make a rational decision based on the available knowledge, i.e., a decision that minimises the total amount of expected disutility. Third, in civil cases the disutility of the error favouring the plaintiff equals the disutility of the error favouring the defendant; instead, in criminal cases, a mistake favouring the prosecution is much worse than a mistake favouring the defence.

The first tenet seems to be commonly accepted. As for the other two, there is some criticism. Thus, R. Allen insists that the goal should be to minimise the real disutility instead than expected disutility [27, p. 47; 28, p. 641; 29, p. 346]. But, as D. Kaye points out, minimising the real disutility calls for the data that is not usually available in the real world [7, p. 27]. Secondly, the more cases are considered, the more the real disutility approaches the expected disutility value [7, p. 30] (as with a coin toss: out of ten attempts, the number of heads may be other than fve, but out of a thousand attempts, the number of eagles will be close to fve hundred [21, p. 57]). Thus, eventually, the strategy of minimising the expected disutility leads to minimising real disutility as well.

As for the third tenet, there are two limbs of criticism. The frst is based on behaviourism: there is empirical evidence showing that gaining something is perceived emotionally less intensively than losing the same [6, p. 10; 30, p. 279]. Gaining a thousand dollars brings less satisfaction than losing a thousand dollars brings frustration. From this point of view, the erroneous recovery of a thousand dollars from the defendant is emotionally experienced by the latter not in the same way as the plaintiff experiences an erroneous rejection of their claim for the same amount. However, it is debatable whether such emotional experiences should be considered when determining the rational approach to decision-making.

The second limb essentially lies in stressing that all civil or criminal cases are not the same and, thus, applying the same standard to all civil or criminal cases is effectively a "one-size-fts-all" approach [4, p. 285–286]. Indeed, if the subject of the dispute is money, then there really is a symmetry [4, p. 280]: the erroneous recovery of the money is as harmful to the defendant as its erroneous non-recovery – to the plaintiff. But in contrast, there are many civil cases in which entirely different, non-pecuniary interests are at stake: for example, cases involving deprivation of parental rights, protection of honour,

dignity or business reputation, restriction of legal capacity etc. In such cases, there is no symmetry – the ratio of the two errors' disutility is other than 1:1. The same is true for the criminal cases: unlike cases involving imprisonment, there are cases of petty criminal offences where pecuniary punishment is at stake. Thus, according to K. Kotsoglou, the common view of the standards of proof is generally incoherent, since if one acknowledges that the standard of proof is dependent on what is at stake in the trial, one should infer that the standard has to be determined for each case individually (depending on what is at stake in this particular case) rather than be fxed for all civil or all criminal cases altogether [4, p. 286].

To some extent, the third, "higher" civil standard of proof ("clear and convincing evidence") may serve as a response to this objection. In this context, it is noteworthy that the Supreme Court of New Jersey in the case of *In re Polk License Revocation* [31] pointed out that "the clear and convincing standard has been found to be required as a matter of due process when the threatened loss resulting from civil proceedings is comparable to the consequences of a criminal proceeding in the sense that it takes away liberty or permanently deprives individuals of interests that are clearly fundamental or signifcant to personal welfare". The main argument against the 'floating' standard of proof is, however, that it would be practically difcult to implement it [19, p. 447].

Probative value of the statistical data. For proper understanding of the standard of proof concept, it is necessary to address the issue of so-called "naked statistics". The crux of the issue is to fnd out what probative value (if any) statistical data has. The issue has provoked heated debate in the academic literature and legal science. Suppose that in some city there are only two taxi services – Blue Taxi and Yellow Taxi, and the former has a fleet of vehicles three times larger than the latter. Thus, of all the taxis on the city roads, 75% are blue and 25% are yellow. Suppose further that a pedestrian was knocked down by a taxi, but he cannot recall its colour. Is it sound to hold a Blue Taxi liable for the damage proceeding solely from the fact that statistically the probability of the car being blue is greater (0.75)? It would be a hasty conclusion, even though at frst glance it may seem that the threshold set by the civil standard of proof has been surmounted (0.75>0.5).

In *Herskovits v. Group Health Cooperative of Puget Sound* [25] Justice Brachtenbach (dissenting) stated: "This fact has relevancy; it is admissible. But is it sufcient to prove the blue cab company more probably than not committed the act? No. If this were not the case, the blue cab company could be held liable for every unidentifed cab accident that occurred. Thus, statistics alone should not be sufcient to prove proximate cause. What is necessary, at the minimum, is some evidence connecting the statistics to the facts of the case. Referring back to the

cab example, testimony that a blue cab was seen in the vicinity of the accident before or after it occurred or evidence of a recently acquired, unaccounted for, dent in a blue cab could combine with the statistical evidence to lead a jury to believe it was more probable than not that this plaintiff was hit by a blue cab".

The Blue Taxi case shows that there are really two different types of probability: objective and subjective. Subjective probability describes the level of confdence that some statement is true, or, in other words, the readiness to act like it were true. It is the level of our belief [4, p. 283]. Subjective probability is backward-looking: one decides whether one believes in the facts that have taken place in the past, regarding which one does not have complete information. In contrast, objective probability is a numerically calculated concept in probability theory that describes properties of the objective world [4, p. 283]. For example, the fact that a considerable number of coin tosses show heads half of the times – it is an objective probability that describes the laws of the real world. Objective probability is forward-looking: it allows calculating the odds or chances that something will happen in the future (for example, it is the chances that one is dealing with while betting on sports).

Confusion of objective and subjective probability leads to fallacious perception of what standard of proof means [5, p. 91–95; 11, p. 379; 32]. Standard of proof sets the threshold value of subjective probability, i.e., the level of confdence the fact-fnder should have to conclude that the statement is true; meanwhile 0.75 in Blue Taxi case is a value of objective probability, which indicates the odds or chances to be hit by a blue car. But when a person has already been hit, there are no odds or chances any more, it was either a blue car or not. From this point on, it becomes merely a matter of one's knowledge: one does not know which of two alternatives happened, and therefore one believes more or less in one of the versions.

In *Sargent v. Massachusetts Accident Co*. [26] J. Lummus stated: "It has been held not enough that mathematically the chances somewhat favour a proposition to be proved; for example, the fact that coloured automobiles made in the current year outnumber black ones would not warrant a fnding that an unidentifed automobile of the current year is coloured and not black, nor would the fact that only a minority of men die of cancer warrant a fnding that a particular man did not die of cancer. … a proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that real belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may linger there".

Thus, statistical probability and subjective probability are two indicators on two different scales. In the case of the Blue Taxi, the statistical data were not sufcient to form the necessary level of belief in the mind of the fact-fnder

that the victim was hit by a blue car. However, it would be wrong to claim based on Blue Taxi case that statistical probability has no probative value at all and hence it can never be used to prove causation in a particular case. Richard Posner suggests digging deeper into the reasons why exactly the statistical data in Blue Taxi case seem unconvincing [33, p. 39–42]. According to Posner, the main reason is the overall implausibility of the situation where there is absolutely no other evidence that could help identify the car apart from the naked statistics [33, p. 40].

The fact that the plaintiff failed to provide any other evidence (apart from the ratio of the number of cars belonging to two services) provokes two assumptions: either the plaintiff knows that he was hit by a yellow car, but for some reason he wants to avoid suing the Yellow Taxi (maybe, it is insolvent or has ceased to exist), or the plaintiff poorly prepared his case and did not bother to fnd other evidence [33, p. 40–41]. If the frst assumption is correct, admittedly, the claim is not subject to satisfaction. And the very possibility of such an assumption renders the subjective probability lower than the objective probability. If the second assumption is correct, then the hint of guilt for the plaintiff disinclines to believe in the veracity of his allegations. From law and economics perspective, "[a] court should not expend any of its scarce resources of time and effort on a case until the plaintiff has conducted a sufcient search to indicate that an expenditure of public resources is reasonably likely to yield a signifcant social beneft" [33, p. 41].

Instead, assuming that both parties have conducted a thorough investigation and did everything in their power, but nevertheless failed to fnd other evidence – in this case, a decision based on objective probability no longer seems an ill-founded [33, p. 41]. Thus, the vital question is whether evidence other than statistical data could have been obtained, and if not, was it due to the plaintiff's fault? If no evidence other than statistical data is available, and the plaintiff is not to blame for it, the ponderance of statistics increases signifcantly and the subjective probability may approach the value of the objective probability indicated by the statistics [34; 35].

The need for admissibility of statistical evidence is particularly acute in cases of so-called toxic torts [11], where often the epidemiological data is the only evidence available that can prove a causal link between a toxic substance and a disease. In such cases, it is proffered to employ doubling the risk principle to assess causal nexus. This principle is based on the epidemiological concept of relative risk (*RR*) [36, p. 195–209; 37, p. 305–307]. Relative risk is the ratio of the incidence of a disease in a group exposed to a toxic substance to the incidence of a disease in a control group that has not been exposed to the substance [32, p. 129]. Therefore,

$$RR = \frac{Risk\ in\ exposed\ group}{Risk\ in\ unexposed\ \ group} \qquad (5)$$

For example, if among the population not exposed to substance X the incidence of lung cancer is 1.5%, whilst among the population exposed it is 3%, then

$$RR = \frac{3}{1.5} = 2 \qquad (6)$$

This means that the exposure to substance X doubles the risk of lung cancer. If *RR* = 1, it means that there is no correlation between the substance and the disease. Under doubling the risk doctrine, the causal nexus between exposure to substance and the disease shall be considered proven whenever *RR*>2. Suppose that, in the above example, the incidence of the disease among the population exposed to substance X is 3.5% (instead of three). Thus, *RR* = 2.3. This means that for every 1,000 people exposed to substance X, 35 people contract the disease. However, 15 of them would have contracted the disease even if they had not been exposed to the substance, while 20 would not have contracted the disease but for the exposure. Therefore, statistically, the probability that a random person suffering from the disease has contracted it because of the exposure is 20/35 = 0.57. Such a statistical probability will always be greater than 0.5, provided that *RR*>2. And since often in such cases objective (statistical) probability is the only knowledge available to humankind (since medical science cannot describe the aetiology of the disease in each particular case), there is no choice but to rely on this objective probability.

Against the application of doubling the risk doctrine, the following argument is submitted. Indeed, whenever *RR*>2 among the exposed who contracted the disease, there are two categories of people: frst is the people who contracted the disease as a result of exposure; second is the people whose disease was caused by some other factors. And it is correct that *RR*>2 indicates that the frst category is more numerous than the second. But it does not indicate to which of the two categories a particular plaintiff belongs [5, p. 92; 11, p. 383].

It is all about the distinction between general and individual causation [5, p. 92; 32, p. 125]. General causation answers whether some substance X is theoretically capable of causing the disease Y. Individual causation answers whether in this particular case the disease Y was caused by the substance X? [36, p. 127]. In substantiating the tort claim, the plaintiff must persuade the fact-fnder that the answers to both questions are in the afrmative. The opponents of the use of statistical evidence insist that epidemiological data can only be helpful regarding the frst question, and cannot clarify anything regarding the second, since epidemiology deals with populations, and not with a single case [5, p. 91–96; 11, p. 379–380, 390].

It is true that epidemiology does not solve the issue of individual causation. However, it does not follow that the plaintiffs should be denied compensation. Because, if in the given example with 35 diseased per thousand the courts deny all the claims on the ground that epidemiology does not prove individual

causation, at the end of the day, the majority of court judgments (20) will turn out to be fallacious (since of all 35 people whose claims were rejected, 20 really deserved compensation); on the contrary, if the courts satisfy all the claims, recognising doubling the risk doctrine, then in a long run the number of fallacious decisions will amount to 15 and this number will be always less than the number of correct ones provided that *RR*>2.

CONCLUSIONS

From the perspective of civil law countries, it may sound discordant that one and the same fact may be considered proven in the civil case and not proven in the criminal case. However, there is nothing irrational in it. As a starting point, one has to acknowledge that the fact-fnder acts under uncertainty and conviction is a gradable concept. Once these premises are accepted, the question is how to determine the threshold value of conviction that would sufce for the specifc purposes of civil litigation or criminal charge. The rational answer to this question can be found through the use of Bayesian decision theory. This theory offers an algorithm of rational decision-making under uncertainty. The decision is considered rational if it yields the maximum possible utility value (or, which is the same, – the minimum possible disutility value). According to Bayesian decision theory, the standard of proof applicable in the proceedings depends on the ratio of false positive error disutility to false negative error disutility. Since in a civil case two types of error have equal disutility, the threshold value of conviction is 50+ percent. Instead, in a criminal case, false positive error disutility signifcantly exceeds false negative error disutility and therefore the threshold value of conviction is much higher – 90 percent. Bayesian decision theory is based on probabilistic judgments. And since the concept of probability has many distinct meanings, the results of the application of Bayesian theory to judicial fact-fnding can be interpreted in several ways. A bright illustration of this conflict of interpretations is the problem revolving around the probative value of statistical data.

However, it does not mean that statistics and subjective probability are out of contact with each other. In some cases, statistics (including epidemiological data) may be the only available evidence of a causal nexus between wrongdoing and harm. If the absence of any other evidence cannot be blamed on the plaintiff (or even more – can be blamed on the defendant), then the statistics may well determine the degree of subjective probability. In other words, the value of subjective probability (belief) can approach the value of the objective probability indicated by statistics. In such cases, statistics cannot be ignored.

RECOMMENDATIONS

This study may be of use for judges, lawyers, law professors, law students and everyone interested in evidence law in general and in the issue of the standard of proof in particular.

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CONTRACTUAL GROUNDS FOR THE EMERGENCE OF HOUSING OWNERSHIP

Abstract. *The study provides the theoretical analysis of such secondary grounds for the emergence of housing ownership as civil law contracts. It is established that a civil law contract constitutes the most common basis, which delineates the general will of the contracting parties in a single expression of will, aimed at the transfer of housing ownership. There is a good reason that the contract constitutes a legal fact, a form of legal relations, a document that consolidates the rights and obligations of the parties, and the regulator of the relationship of transfer of housing. The study analysed and proposed to supplement the current system of civil law contracts as grounds for the housing ownership by such contractual forms as a pledge agreement (mortgage), donation agreement, a hire-purchase agreement, inheritance agreement, and marital agreement. In addition, the study established the differences between the housing barter contract and the housing exchange contract. The authors emphasised the imperfections of the current legislation in this regard and concluded that these contractual structures have different legal nature, because the barter agreement serves as the basis for the housing ownership, and the exchange agreement serves only as the basis for the right of use. Distinguishing the gift agreement as the basis for the ownership of housing and wills, it was concluded that the gift agreement may be concluded in the event of the donor's death in the future, as the law does not make provision for such a prohibition. That is, the contracting parties may stipulate in the housing gift agreement that the housing passes to the donee from the moment of death of the donor. Special attention is paid to the features of the gift agreement as the basis for the housing ownership, which is reflected in the right of the donor to determine the purpose of use of housing, which is transferred to the ownership of the person under*

the contract. The purpose stated in the gift agreement must correspond to the purpose of the housing. The study considered the specifc features of inheritance and marriage contracts as grounds for the emergence of ownership of housing. Civil law contracts are proposed as a basis for the emergence of housing ownership to be classifed as housing purchase and sale contracts; housing barter agreements; perpetual maintenance agreements; housing rental agreements; housing gift agreements; housing mortgage agreements; housing donation agreements; hire-purchase agreements; inheritance agreements; marital agreements; construction agreements; agreements on joint activities

Keywords: *property rights, exchange, perpetual maintenance, inheritance contract, purchase and sale*

INTRODUCTION

During the entire development of property relations, special attention has been paid to the institution of property rights. Researchers pay no less attention to issues related to housing as an object of property rights and the subject of relevant civil law transactions. Thus, in accordance with Part 1 of Article 328 of the Civil Code of Ukraine the right of ownership is acquired on grounds not prohibited by law, in particular from transactions, the most common types of which are civil law contracts, which, serving as secondary grounds for ownership, are not limited to influencing the dynamics of civil relations, but also determine the content specifc rights and obligations of the parties to the contractual obligation. That is, the derivative grounds for acquiring the right of housing ownership are those where a person's ownership is based on the right of the previous owner [1]. Accordingly, the civil law contract is the most common ground, which delineates the general will of the contracting parties in a single expression of will, aimed at the transfer of housing ownership. There is a good reason that the contract constitutes a legal fact, a form of legal relations, a document that consolidates the rights and obligations of the parties, and the regulator of the relationship of transfer of housing. Therefore, when analysing the most common civil law contracts as grounds for the housing ownership should take into account the time of acquisition of ownership, as the owner must have a clear idea of how long they can treat such housing as their property.

This issue also intersects with the scientifc discussion on the criteria for classifying civil law contracts as grounds for the housing ownership. Thus, Ye. O. Michurin proposes to classify the contracts based on which a person may have the right to own housing, according to the types of contracts on the transfer of ownership, which are listed in the Civil Code of Ukraine1. In particular, according to the scientist, such contracts include a housing purchase and sale agreement, a housing barter agreement, a perpetual maintenance agreement, a housing rent agreement, and

a housing gift agreement [2]. The proposed classifcation needs to be supplemented by such contractual forms as a pledge agreement (mortgage), a donation agreement, a hire-purchase agreement, an inheritance agreement, as well as a marriage contract, taking into account the specifcs of these agreements, which will be covered below.

At the same time, one can draw attention to the insufcient coverage of the outlined issues in the modern Ukrainian legal literature [3–12]. Notably, the modern legal doctrine lacks comprehensive research that would address the subject of contractual grounds for the emergence of housing ownership. This results in the incoherent approaches, enshrined in the codifed regulations of Ukraine concerning the governing of the legal relations under study, the need to identify possible conflicts and develop scientifcally sound proposals for their elimination. This emphasised the relevance of these issues and led to the choice of research subject.

Accordingly, the purpose of this study is to analyse the existing classifcations of civil law contracts and develop a holistic system of civil law contracts as a basis for the housing ownership.

1. MATERIALS AND METHODS

The issue of isolating civil law contracts as a basis for the emergence of housing ownership is understudied in the legal literature. Classifcations of civil law contracts under which the transfer of housing ownership takes place is covered in the works of such scholars as Ye. O. Michurin [13], M. K. Haliantych [14], L. M. Nykolaichuk [15] and others. At the scientifc level, some issues of recognition of the right of housing ownership under purchase and sale agreements, perpetual maintenance agreements, gift agreements, etc. were considered, indicating that the legislator does not single out and systematise housing contracts separately. Thus, at the doctrinal level it is proposed to divide the contracts of sale of housing (depending on the subject matter of the contract and the method of its acquisition) into: an apartment, house, estate, part of a house purchase and sale agreement; a house purchase and sale agreement on the terms of perpetual maintenance; a purchase and sale agreement for a residential building owned by a minor; agreement on purchase and sale of a share of a residential building; agreements on purchase of residential premises in apartment buildings; real estate purchase transactions, the subject of which is not only a residential property, part of a house or a house, but also a corresponding land plot with outbuildings. The methods of purchase include purchase of housing at auction; by buyout; on the stock exchange [14].

Particular attention should be paid to the classifcation of agreements that mediate the transfer of housing ownership as an object of ownership, to: 1) housing purchase and sale agreements; 2) housing barter agreements; 3) perpetual maintenance agreements; 4) housing rental agreements; 5) housing gift agreements [2]. However, considering the need to

update the grounds for the housing ownership, the above classifcations need to be revised and supplemented. The methodology of the relevant study is determined by its purpose and is to determine the features of the contractual grounds for the emergence of housing ownership; to identify gaps and inconsistencies in the legislation of Ukraine and the judicial practice, which arise during the application of the relevant grounds, and to make proposals for the elimination of such gaps and inconsistencies. The Civil Code of Ukraine[1], the Housing Code of the Ukrainian SSR[2], the Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances"[3], the Resolution of the Cabinet of Ministers of Ukraine "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances'[4], etc.

In this study, general scientifc and special legal methods of scientifc cognition were applied. The main method of research is a systematic method, which allowed to determine the system of civil law contracts, which are aimed at acquiring housing ownership. The dialectical method of cognition allowed to consider the trends in the development of civil law agreements as the basis for the emergence of housing ownership. The logical-semantic method allowed to analyse individual civil law contracts and determine their place in the system of grounds for the housing ownership. The dogmatic legal method allowed to analyse the provisions of the current legislation, to identify gaps in it, to formulate proposals for its improvement. The presented scientifc ideas of the authors in the modern development of civil relations include target, methodological, substantive, organisational, legal and effective components.

2. RESULTS AND DISCUSSION

The most common contract, given pride of place to by the legislator among other types of contracts, is the purchase and sale agreement. In the context of the subject of this study, it will be considered as a housing purchase and sale agreement, which is classifed in the doctrine according to the criteria of the subject of the contract and the method of its purchase as follows: agreements on purchase and sale of an apartment, house, estate, part of a house, etc. Furthermore, the emergence of housing ownership based on a purchase and sale agreement may occur by purchasing an apartment or residential property from a housing construction cooperative, a member of which may

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

[2] Housing Code of the Ukrainian SSR No. 5464-X. (1983, June). Retrieved from https://zakon.rada.gov.ua/laws/show/5464–10#Text.

[3] 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.

[4] Resolution of the Cabinet of Ministers of Ukraine No. 1127 "On the Procedure for State Registration of Real Rights to Immovable Property and Their Encumbrances". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1127–2015-%D0%BF#Text.

be an individual. Ownership of a residential building created by a housing cooperative, according to Article 384 of the Civil Code of Ukraine[1], arises in the cooperative. Individuals as its members, in order to acquire ownership of the apartment, must purchase it from a cooperative. Hence, it is concluded that the emergence of housing ownership in a person as a member of a cooperative occurs based on a civil contract; therefore, such acquisition constitutes a secondary ground for the emergence of ownership.

At the same time, it is not necessary to single out the purchase of an apartment from a housing construction cooperative as an independent basis for the emergence of housing ownership, because there a corresponding right occurs under a purchase and sale agreement. Although the authors of this study cannot disagree that the purchase and sale agreement has its certain features in this case. In particular, housing is purchased from a legal entity and a person can acquire ownership only of an apartment and not of a residential building. The current version of Part 3 of Article 384 of the Civil Code of Ukraine[2] allows to reach such conclusion. Thus, the housing purchase and sale agreement should be described as a contract aimed at the transfer of housing ownership on a paid basis. Therewith, one should support the opinion expressed in the legal literature that the risk of accidental destruction of housing passes to the purchaser simultaneously with the emergence of this purchaser's property rights, even if the contract stipulates otherwise [14]. This approach is conditioned by the fact that the seller, who is no longer the owner of the housing, is not responsible for the fate of the latter. Otherwise, it should be recognised that in the event of the loss of housing (loss of the contractual subject matter), the housing purchase and sale agreement would not be performed by the seller, which, in turn, would entail appropriate legal consequences. But de facto the seller would have performed the terms and conditions under the contract, and the destruction of the housing would be a coincidence, i.e., it would not be the seller's fault. Less common than the housing purchase and sale agreement, but no less applicable in practice, is the housing barter agreement. According to Article 715 of the Civil Code of Ukraine[3] under a barter agreement, each party undertakes to transfer ownership of one product to the other party in exchange for another product. Each contracting party in the barter is the seller of the housing that it transfers and the buyer of the housing which it receives in return. The contract may determine a supplemental payment for higher-value housing, which is exchanged for lower-value housing.

Thus, the housing barter agreement as a ground for the housing ownership is endowed with the same features as the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

[2] *Ibidem*, 2003.

[3] *Ibidem*, 2003.

housing purchase and sale agreement. That is, it is a paid, bilateral, consensual contract for the transfer of property (because it is concluded from the moment the parties agree on all its essential terms, and not from the moment of transfer of housing).

By concluding this contract, the parties have the opportunity to acquire housing ownership without attracting significant funds. In particular, a person does not have to enter into loan or credit agreements or mortgage his or her housing to improve his or her living conditions. It is sufcient for such person to exchange his or her housing or other property for the housing of a person who is the other party to the housing barter agreement. An individual may also agree to purchase housing in lieu of the services or work provided. Ownership of the exchanged housing passes to the parties at the same time after the performance of the obligations to transfer the housing by both parties, unless otherwise provided by agreement or law. Accordingly, the state registration of the parties' ownership to the exchanged housing takes place after each of the parties has completed the registration procedures. In the legal literature, some scholars make a distinction between a housing barter agreement and a housing exchange agreement. Thus, A.A. Titov noted that the barter agreement differs from the exchange agreement in that the parties to such a transaction (barter) can only be the owners of residential premises, and the subject is the housing owned by these parties [16]. Ye. O. Michurin argued that the difference between the barter and exchange contracts is that in the frst case the contract consolidates the transfer of ownership, and in the second case there is a transfer of the right of use between the tenants of housing [2]. The same opinion is expressed by M. K. Haliantych, believing that the barter and exchange contracts differ in such features as subject, parties, procedure, legal grounds, and mechanism [14]. Given the above positions and considering the imperfections of current legislation in this regard, it should be recognised that the exchange of housing and the housing barter agreement are not terminological inconsistencies, and the specifed contractual structures have different legal nature, because the barter agreement serves gives grounds to the emergence of housing ownership, while the housing exchange agreement merely gives grounds for the emergence of the right of use.

Another fairly common contractual for that serves as grounds for the emergence of housing ownership is a gift agreement. Under this agreement, the donor transfers or undertakes to transfer housing in the future to the donee free of charge. Thus Part 2 of Article 717 of the Civil Code of Ukraine[1] clarifes that the donee cannot be obliged to perform any action of a property or non-property nature in favour of the donor. Otherwise, according to Article 235 of

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

the Civil Code of Ukraine, the housing gift agreement may be rendered null and void as a fctitious transaction and the parties will be subject to the provisions of civil legislation, which govern the contractual legal relations that the parties actually committed. In particular, this refers to the legal provisions on the above-analysed contractual forms of purchase and sale or barter of housing. At the same time, the legal literature states the thesis that the obligation of the donee to perform certain actions in favour of a third party, stipulated in Article 725 of the Civil Code of Ukraine, actually eliminates the free-of-charge basis of such agreement [17]. Therewith, the obligation of the donee to take certain actions in favour of a third party does not lead to the recognition of the housing gift agreement as payable, as payment of the contract is associated with the performance of a counter-obligation.

Accordingly, the donor does not receive any counter-grant under this agreement, which describes it as a free-of-charge transaction. A gift is a transaction that is based on mutual consent, not just on the will of the donor. This distinguishes the gift agreement from, for example, a will, which does not require the consent of the heir, since, according to the will, the rights and obligations of the deceased pass at the time of his or her death, and the housing gift agreement cannot be concluded in the event of the death of the donor in the future.

Agreeing that the main difference between a gift agreement and a will is that the gift agreement constitutes a bilateral transaction, and the will is unilateral. It cannot be categorically stated that the gift agreement cannot be concluded in case of future death of the donor, as the law does not make provision for such a prohibition. In addition, according to Part 2 of Article 719 of the Civil Code of Ukraine, the housing gift agreement is concluded in writing and is subject to notarisation; therefore, for state registration of ownership of donated housing (the moment of emergence of this right under the housing gift agreement), it is sufcient to submit the notarised housing gift agreement to the state registrar (Article 20 of the Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances"[1]), which, as noted above, is consensual. That is, the contracting parties may stipulate in the housing gift agreement that the housing passes to the donee from the moment of death of the donor. Considering the requirements of Articles 334 and 722 of the Civil Code of Ukraine[2], one can conclude that the housing ownership of the donee on the grounds of the gift agreement arises from the moment of state registration of such ownership. Thus, according to Part 1 of Article 722 of the Civil Code of Ukraine, the right of hous-

[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.

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

ing ownership arises from the moment of its adoption. In this case, according to Part 4 of this study, the acceptance of documents certifying housing ownership, other documents certifying the identity of the subject of the contract, or symbols of the thing (keys, models, etc.) constitutes the acceptance of a gift. However, considering the provision stipulated in Part 4 of Article 334 of the Civil Code of Ukraine, the housing ownership arises from the date of state registration of such ownership in accordance with the law.

Therefore, the recognition of the state registration of housing ownership as the only and indisputable legal fact cannot be questioned by the contracting parties under the housing gift agreement, as moments of acceptance of the gift and the emergence of ownership of it, stipulated in Part 4 of Article 722 of the Civil Code of Ukraine[1] relate to movables (e.g., vehicles or animals), and not housing or other real estate. The same opinion is expressed in the scientifc literature, where the transfer of keys to an apartment or house or documents to them is considered a symbolic act [15]. An interesting and understudied type of housing gift agreement, according to Articles 729 and 730 of the Civil Code of Ukraine, is a donation agreement. Thus, based on the content of Article 729 of the Civil Code of Ukraine, a donation is a gift for the donor and the donee to achieve a certain predetermined goal. The donation agreement is concluded from the moment of acceptance of the object of donation. The donation agreement is subject to the provisions on the gift agreement unless otherwise provided by law.

According to Article 730 of the Civil Code of Ukraine, the donor has the right to control the use of housing as an object of donation in accordance with the purpose established by the agreement. If the intended use of the housing (for example, as a church for monks, doctors, etc.) is impossible, its use for another purpose is possible only with the consent of the donor, and in case of death or liquidation of the legal entity – by court decision. The donor or his of her successors have the right to demand termination of the donation agreement in the event that the housing is used for other purposes not stipulated by the agreement.

S. D. Rusu fairly pointed out that the specifc feature of this agreement is that in order for the parties to achieve a certain predetermined goal, the agreement is considered to be concluded from the moment of acceptance of the donation [18]. In addition, the very agreement on the purpose of housing, which is transferred into the ownership of a person under a donation agreement, distinguishes this agreement from the gift agreement, for which the stipulation of the purpose of housing will contradict the essence of this agreement. In this case, the purpose of the use of housing may be, for example, to enable certain persons to live in it, to impose on a person the obligation to use housing as a shelter for certain

[1] *Ibidem*, 2003.

categories of persons or to provide permission to conduct excursions or exhibitions, etc. However, the purpose specifed in the donation agreement must be consistent with the purpose of housing. That is, the arrangement of trade platforms, a medical institution, etc. will contradict the provisions of Chapter 28 of the Civil Code of Ukraine. In conclusion, the housing donation agreement should be described as a real, free-of-charge, bilaterally binding agreement. The next type of agreements on the transfer of property ownership, based on which a person may have acquire the housing ownership, is a perpetual maintenance agreement, under which the alienator transfers ownership of the house, apartment or part thereof, in exchange for which the purchaser undertakes to provide the alienator with perpetual maintenance and (or) care.

There is a well-established position among civilists that such agreement is: a) unilateral, as only the purchaser of property becomes obliged under the agreement, while the alienator has no obligations [17]; b) paid, because the purchaser undertakes to carry out the alienator's property maintenance instead of receiving the property. The alienator, in turn, after the transfer of ownership of the thing, may require the purchaser to provide him of her with endowment. In this case, in contrast to the purchase and sale agreement, the perpetual maintenance agreement refers not to the price as an essential condition of the contract, but only to the monetary value of property and services [19]; c) aleatory (risk-related), because at the time of its conclusion it is impossible to determine what will be higher – the cost of housing or the fnal cost of the provided endowment [13]; d) consensual, because the ownership of a movable thing arises in the purchaser from the moment of notarisation of the agreement, while the ownership of immovable property arises from the moment of its state registration. The perpetual maintenance agreement should be described as a bilaterally binding transaction, as the alienator is obliged to transfer ownership of the house, apartment or part thereof, etc. in return for care or maintenance to be provided to the alienator by the acquirer. Moreover, this obligation is maintained in the event of termination of the perpetual maintenance agreement, provided that it is not the result of improper performance of obligations by the acquirer, or in the event of its termination due to the death of the acquirer (before the alienator dies).

In this regard, R.A. Maidanyk expressed an opinion that the specifcs and the legal nature of the relations of perpetual maintenance are conditioned by the presence of a special, fduciary trust in this agreement. By its legal nature, perpetual maintenance is a kind of fduciary legal relationship [20]. It seems appropriate to agree with such considerations of the scientist, because the alienator, as a rule, chooses the person or persons who will care for him of her not at random, but from the circle of people close or well-known to him or her, who must

justify the alienator's trust by providing the necessary security – perpetual maintenance or care.

In addition, the doctrine draws attention to the fact that the alienator is not sufciently protected from committing an intentional crime against him or her. Because of this, there are proposals to improve the current civil legislation by making provision for a rule according to which, if the purchaser commits an intentional crime against the alienator, he or she loses the right to acquire ownership of the alienator's property (housing), and the perpetual maintenance agreement is rendered null and void [17].

In this regard, the arguments of V. P. Maslov are interesting for doctrinal analysis. He believes that the law should stipulate that the property should not be transferred into the full ownership of the person providing the maintenance, but should rather be in the joint ownership of the contracting parties [21], as this would reduce the risk of a perpetual maintenance agreement and strengthen protection of the rights of both parties. In view of the above, the authors of this study propose to amend Part 1 of Article 744 of the Civil Code of Ukraine[1] with the following wording: *"Under the perpetual maintenance agreement, one party (alienator) transfers to the other party (purchaser) a house, apartment or part thereof, other real estate or movable property of signifcant value on the right of joint ownership, with the condition of emergence of private ownership with the acquirer after the death of the alienator, in exchange for which the acquirer undertakes to provide the alienator with perpetual maintenance and (or) care".*

Due to the fact that the perpetual maintenance agreement is aimed at the transfer of housing ownership, the law establishes certain requirements for such property: frstly, the housing must belong to the alienator on an ownership basis, which must be confrmed by corresponding title documents, and, secondly, this housing should not be encumbered by arrest, bail, or any other rights of third parties. At the same time, the legislator reiterates that ownership is binding. Therefore, the purchaser as the owner of such real estate assumes all encumbrances and risks associated with it, including payment of all taxes and fees associated with the maintenance of housing, and bears the risk of accidental death or damage. Relatively new and not widespread in practice is the following ground for the emergence of housing ownership – a rent agreement under which the recipient of the rent transfers the housing ownership to the payer of the rent, and the payer of the rent, in return, undertakes to periodically pay the rent to the recipient thereof in the form of a certain amount of money or in another form. This formulation of the features of the rental agreement, as well as the rules for the transfer of property for rent stipulated in Article 734 of the Civil Code of Ukraine[2] bring it closer

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

[2] Civil Code of Ukraine. (2003, January).

to the agreements of purchase and sale, gift, loan, and perpetual maintenance.

However, as rightly noted in the legal literature, the differences between the rent agreement and the purchase and sale agreement are seen in the fact that, unlike the latter, the rental agreement is described by some uncertainty regarding the equivalence of considerations, because according to Part 2 of Article 731 of the Civil Code of Ukraine, the rent agreement may establish an obligation to pay rent both for a certain period and indefnitely, and in the latter case there is always a risk for each party that it will be greater than the consideration received in return. In addition, rent relations are described by the duration of existence and periodicity of payments – rent is never onetime [22]. M. K. Haliantych considers the rent agreement and perpetual maintenance agreement as varieties of the same contract, observing the common features of these contracts. Both under a perpetual maintenance agreement and under a rent agreement, one party transfers housing to the other. However, unlike a rent agreement, a list of property that can be transferred into the ownership of the purchaser is defned under the perpetual maintenance agreement. Under both a perpetual maintenance agreement and a rent agreement, the purchaser of the property undertakes to provide the alienator with certain compensation in the form of rent or provision of maintenance or care [14].

The above position does not withstand criticism, proceeding from the placement of these contractual structures in separate chapters of the Civil Code of Ukraine, given their completely different purpose and features of legal regulation: under the perpetual maintenance agreement – housing needs are satisfed by performing social functions of care and maintenance in respect of persons who need it; under a rent agreement – the satisfaction of housing needs by making periodic payments in the form of a certain amount of money or in another form that may signifcantly exceed the value of the housing thus alienated. In this regard, the position of M. I. Baru on the difference between a perpetual maintenance contract and a rent agreement is reasonable, which lies in the purpose of each of the agreements; for the former, it is the acquisition of property, and for the latter, it is the fnancial assistance to the party by its counterparty [23]. Moreover, the scientist went even further, emphasising the expediency of classifying the rental agreement as a contract for the provision of services as opposed to the transfer of property [23].

This statement is not appropriate, given the nature of the rental agreement as a contract of transfer of ownership, as its main purpose is the possibility of participants in civil relations to acquire property (housing) ownership rather than enriching the counterparty. Rent payments constitute a kind of payment by the rent payer for the opportunity to acquire the housing ownership, and not

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a loan or credit. There is no unity among scientists regarding the moment when the rent agreement should be considered concluded. According to some researchers, the rent agreement is consensual [24], according to others – real [25], and yet others believe that it is either consensual (in the case of alienation of real estate) or real (in the case of alienation of movables) [26]. The authors of this study believe that it is expedient to described the rent agreement as a consensual agreement, because, as follows from the analysis of Chapter 56 of the Civil Code of Ukraine[1], the law connects the rights and obligations of the parties to the rent agreement with the transfer of rent to the payer. In particular, as stated in Article 731 of the Civil Code of Ukraine, the rent payer undertakes to pay rent payments in exchange for the property (housing) transferred by the rent recipient. That is, the corresponding obligation of the person as a rent payer arises from the moment of registration of ownership of the relevant housing as the subject of the contract. The legislator connects the risk of accidental destruction or damage to housing with the moment of the transfer of rented housing. In addition, the contract for the transfer of rented housing is subject to notarisation. A rent agreement may stipulate that the rent receiver transfers the housing to the person for a fee or free of charge. If the rent agreement stipulates that the rent receiver transfers the housing ownership for a fee, the general provisions on purchase and sale agreement shall apply to the relations between the parties regarding the transfer of the housing, and if the property is transferred free of charge, the general provisions on the gift agreement should apply to the extent it is not inconsistent with the rent agreement.

In conclusion, the rent agreement, under which a person acquires the housing ownership, is described as a contract of transfer of housing ownership, consensual, paid, or free-of-charge (depending on its terms and conditions) and bilateral (the recipient of rent is obliged to transfer the housing ownership) contract as the grounds for the emergence of the housing ownership with the acquirer. Another ground for the emergence and termination of housing ownership is a mortgage agreement, under which the parties can resolve the issue of foreclosure on the subject of the mortgage by out-of-court settlement based on the agreement. In this case, the law allows the conclusion of such an agreement at any time before the entry into force of the court decision on recovery. Accordingly, the mortgage agreement plays a dual role. On the one hand, it is one of the derivative grounds for the emergence of housing ownership, and on the other hand, it can perform an ancillary function – to ensure the performance of the principal obligation. In particular, a person who does not have sufcient funds may enter into, for example, a mortgage agreement with a bank to ensure the implementation of the housing purchase and sale agreement (thus being able to pay the cost of hous-

[1] *Ibidem*, 2003.

ing), which will be the subject of the mortgage. In this situation, the mortgage agreement will not serve as the basis for the housing ownership. However, when a person acts as a mortgagee (pledgee), he or she can acquire ownership of the mortgaged housing by applying for foreclosure on the housing of the mortgagor (pledgor) or a third party who failed to perform its principal obligation (debtors). Despite the above, in connection with the changes introduced in the Civil Code of Ukraine on June 29, 2010, individuals were enabled to acquire housing ownership based on a hire-purchase agreement. The procedure for exercising this right is governed by Article 810 of the Civil Code of Ukraine[1] and the Resolution of the Cabinet of Ministers of Ukraine No. 274 "On approval of the Procedure for housing hire-purchase" of March 25, 2009[2]. These changes were introduced in the Civil Code of Ukraine with the adoption of the Law of Ukraine "On Prevention of the Impact of the Global Financial Crisis on the Development of the Construction Industry and Housing Construction"[3]. However, as fairly noted in the legal literature, it is unclear how the purpose of this law (which is to stabilise construction, increase the solvency of the population, ensure the implementation of housing rights of citizens in need of state support, stimulate construction and related industries in the global fnancial crisis) correlates with the settlement of the legal relations of lease of already built property [27].

Notably, this method of acquiring ownership can be distinguished as one that is inherent specifcally in housing matters. Thus, in accordance with Part 1 of Article 810 of the Civil Code of Ukraine[4] hire-purchase constitutes a special type of rent (lease) of housing, which may provide for the assignment of the lessor's right to claim the debt to another person – the benefciary. Under the hire-purchase agreement, one party, the enterprise-lessor, transfers housing to the other party, an individual (lessee), for a fee for a long period (up to 30 years), after which or preterm, subject to full payment of rent, housing passes into the lessee's ownership. The hire-purchase agreement is a document certifying the transfer of ownership of real estate from the lessor to the lessee with deferred circumstances specifed by law. In this case, the lessor acquires ownership of the housing previously selected by the lessee for the purpose of further transfer of such long-term hire-purchase housing to such a person and disposes of such housing until its full repurchase. The lessor disposes of the housing until the lessee

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

[2] Resolution of the Cabinet of Ministers of Ukraine No. 274 "On approval of the Procedure for housing hire-purchase". (2009, March). Retrieved from https://zakon.rada.gov.ua/laws/show/274–2009-%D0%BF#Text.

[3] Law of Ukraine No. 800-VI "On Prevention of the Impact of the Global Financial Crisis on the Development of the Construction Industry and Housing Construction". (2008, December). Retrieved from https://zakon.rada.gov.ua/laws/show/800–17#Text.

[4] Civil Code of Ukraine, op. cit.

pays the rent in full. At the same time, the lessee is empowered to own and use the rented housing, and after paying the rent in full, the latter acquires ownership of such housing. The object of rent may be an apartment or part thereof, a residential building or part thereof, which are intended and suitable for permanent residence in them.

The hire-purchase agreement must specify the persons who will reside together with the lessee. These persons acquire equal rights and obligations with the lessee regarding the use of housing. The lessee is liable to the lessor for breach of contract by persons residing with the lessee.

The hire-purchase agreement is concluded in writing and is subject to mandatory notarisation. Remuneration (income) of the lessor is defned as the interest rate on payments for the purchase of housing, the amount of which is stipulated in the lease agreement. Payment of rent in full is certifed by an act that forms an integral part of the contract. With the consent of the lessor, a person may enter into a sublease agreement with other persons who do not acquire an independent right to use housing. The right of housing ownership under a lease agreement with redemption arises, as well as housing acquired under other agreements, from the moment of state registration of this right. Thus, the analysis of the specifed legal provisions suggests that the hire-purchase agreement as the grounds for the emergence of the housing ownership has the following attributes: 1) it is paid; 2) it is consensual; 3) it is bilateral; 4) it is aleatory (risk-related), because neither side, given the constant changes in socio-economic relations, is unsure of its benefts; 5) it is terminal, because the agreement is terminated with the expiration of the term established therein; 6) it belongs to mixed contracts, as it combines the features of the housing rent (lease) agreement and the housing purchase and sale agreement. Based on the above, it can be concluded that the hire-purchase agreement constitutes a separate type of contract, and serves as the grounds for the emergence of housing ownership.

The least common in the system of contracts, on the grounds of which the housing ownership may arise, is an inheritance agreement. The legislator allocated only 7 articles for the inheritance agreement and representatives of the civil law science developed several doctrinal provisions regarding it, from denying the agreement as such that restricts civil capacity and constitutes an attempt to deprive individual heirs of the right to a mandatory inheritance [28] to its approval as such that does not deprive the person of civil capacity, because the right to a mandatory share cannot arise until the death of the testator. Until then, there can be only hope of obtaining this share, which may disappear due to the conclusion of not only an inheritance agreement, but also the agreements on gift, purchase and sale, or perpetual maintenance [29]. Notably, the inheritance agreement, indeed, does not allow

the alienator to dispose (sell, gift, etc.) of the property that is its subject. However, it does not deprive a person of civil capacity, as the alienator expresses one's will to enter into such an agreement, and instead receives the right to demand the implementation of one's orders, which, admittedly, should not contradict the current legislation and moral principles of society.

The parties to the inheritance agreement are the alienator and the acquirer. The alienator can be one or more individuals – spouses, one of the spouses, or another person. The legislator's use of the phrasing "or another person" in Part 1 of Article 1303 of the Civil Code of Ukraine[1] suggests that it refers to any person (both an individual and a legal entity) as a participant in civil relations. However, a detailed analysis of the provisions of Chapter 90 of the Civil Code of Ukraine clarifes that the moment of emergence of ownership of the acquirer is closely related to the moment of death of the alienator. That is, in this case, not all participants in civil relations under Article 2 of the Civil Code of Ukraine are implied, but specifcally an individual endowed with full legal capacity [30]. The purchasers under the inheritance agreement may be individuals or legal entities. When concluding an inheritance agreement, the acquirer, if he or she is an heir by will or by law, does not lose the right to inherit in the share of property that was not specifed in the inheritance agreement. The subject of the inheritance agreement is both the acquisition of ownership of the alienator's property and the actions (performance of works, rendering of services, etc.) of the acquirer. Personal non-property rights (for example, the alienator may not restrict the purchaser in choosing a place of residence, in choosing a spouse, etc.), property rights to another's property (emphyteusis, superfcies, easements), etc. may not be the subject of this agreement.

Therefore, the acquirer undertakes to comply with the alienator's order and, in the event of the alienator's death, acquires ownership of such housing. That is, the inheritance agreement performs a dual function of the regulator of relations on the transfer of ownership and the commission of actions, because the inheritance agreement constitutes the transfer of ownership to the acquirer, and although these actions are no longer performed by the alienator, but by other persons after the alienator's death, the acquirer becomes the owner of the property alienated in his of her favour. Thus, the alienator has the right to appoint a person who will supervise the performance of the inheritance agreement after the alienator's death. The inheritance agreement may be terminated by the court at the request of the person monitoring the performance of the alienator's will after the latter's death, in case of frustration on the acquirer's part or at the request of the acquirer in case of impossibility to perform the alienator's

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

orders. The notary, who has certifed such an agreement, imposes a ban on alienation of such housing, which achieves protection of the rights and interests of the purchaser. That is, the notarial form of the contract has a substantial legal signifcance, because the notary, unless otherwise provided by the agreement, acts as a guarantor of the obligations of the acquirer, which he or she must perform after the death of the alienator. That is, the notarial form of the hereditary contract allows to document the manifestation of the will of the parties most adequately and thus provide evidence of the true direction of their intentions.

In view of the above, the question of the place of the inheritance contract in the system of civil law contracts remains debatable to this day. Thus, Yu. O. Zaika substantiates the expediency of its "transfer" to Book Five of the Civil Code of Ukraine[1] and placement next to perpetual maintenance agreement and rent agreement as an independent contractual form [31]. V. V. Vasylchenko, on the contrary, defends the position on the validity of the consolidation of this institution in the system of inheritance law [32]. According to S. V. Mazurenko, the inheritance agreement does not belong to any of the groups of agreements proposed in the literature, but is in essence an "atypical agreement" of civil law. Therewith, the scientist concludes that in these relations two agreements are merged: 1) an agreement on the performance of actions by the acquirer, which gives rise to the relevant obligations, the content of which is the actions of the acquirer; 2) agreement on the transfer of ownership of the property of the alienator after his or her death [33]. Since the inheritance contract is a special type of binding legal relationship, the essence of which, although closely intertwined with the inheritance relations, cannot be considered as one of the possible types of inheritance. Accordingly, since the provisions of the Civil Code of Ukraine governing relations under the inheritance agreement are already placed in Book Six, and the moment of ownership of the alienator's property is associated with his or her death, there is no need to "transfer" the inheritance agreement to the Book Five of the Civil Code of Ukraine, as this is unlikely to affect the effectiveness of legal regulation.

The issues of possibility/impossibility of concluding this agreement through a representative also deserve special attention. In particular, R. A. Maidanyk, V. V. Vasylchenko believe that the inheritance agreement can be concluded only personally by an individual with full civil capacity [34; 35]. According to other scholars, on the contrary, it is allowed to conclude this agreement through a representative, because "according to the contractual nature of transactions, the conclusion of an inheritance contract is possible through a representative, at least the Civil Code of Ukraine does not prohibit it" [36]. The conclusion of an inheritance agreement, under which the housing is transferred into the ownership,

[1] *Ibidem*, 2003.

cannot be carried out through a representative, because the alienator does not care who will be the purchaser of his or her housing. Only the alienator alone can ensure it most completely. Even if it is impossible to search for a purchaser unassisted, one should not involve a representative, although the law does not explicitly prohibit it. To confrm this, it is advisable to cite the position of O. V. Onishchenko, who believes that "it can be assumed that the inheritance agreement may be concluded in the interests of a minor, juvenile, incapacitated and incapable person, subject to the rules of the Civil Code of Ukraine on transactions with persons without full capacity", and suggests "to solve this issue at the legislative level by, for example, indicating that the alienator can be an individual regardless of age and state of health (following the model of a perpetual maintenance agreement)" [37].

In view of the ongoing discussion on the recognition of a succession agreement as a unilateral or bilateral agreement, the inheritance agreement is bilateral, as the rights and obligations under it arise for both the alienator and the acquirer. In particular, the acquirer, apart from the rights (ownership of the alienator's property, the right to demand termination of the contract in case of impossibility to execute the alienator's orders), also has obligations (to execute the alienator's orders and perform certain property or non-property actions). The alienator, in addition to his rights (to make certain orders, require the acquirer to perform certain conditions of the contract actions of property or non-property nature), also have responsibilities (the obligation not to alienate property defned by the inheritance agreement, the obligation to ensure the safety of this property and proper treatment). The bilateral nature of this agreement is also evidenced by the prohibition on the alienation of housing, including by will, which constitutes the subject of an inheritance agreement. In addition, the bilateral binding nature of this agreement is evidenced by the content of Article 1308 of the Civil Code of Ukraine[1] , under which the inheritance agreement may be terminated by the court at the request of the alienator in the event of non-performance of his or her orders by the purchaser or at the request of the acquirer in case of impossibility to perform the alienator's orders. Notably, in both cases the termination of the inheritance agreement is possible only in court. It is the court that must establish the fact of violation of the inheritance contract or the impossibility of its execution. Thus, due to the bilateral feature, the inheritance agreement cannot be terminated or changed unilaterally during the life of the alienator, as is the case with a will [30]. As for the payment-related feature of the inheritance contract, almost all scholars refer to this agreement as paid agreement, as the purchaser receives the property specifed in the agreement (in this case – housing),

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

and the alienator receives results of certain actions of property or non-property nature on the part of the acquirer. It is no coincidence that this feature allows to distinguish the inheritance agreement from the will and the perpetual maintenance agreement.

The purchaser's housing ownership on the grounds of the inheritance agreement emerges from the moment of the state registration of such ownership. This conclusion follows from the analysis of Articles 334, 1302, 1307 of the Civil Code of Ukraine. In particular, according to Article 1302 of the Civil Code of Ukraine, the purchaser under the inheritance agreement acquires the ownership of housing of the alienator in case of his or her (alienator's) death. However, given the fact that housing is real estate, the ownership of which is subject to state registration in accordance with the procedure prescribed by law, the ownership, according to Part 4 of Article 334 of the Civil Code of Ukraine, arises from the moment of such registration. In addition, Article 1307 of the Civil Code of Ukraine prohibits the alienation of property (housing), which is the subject of the inheritance agreement, until the death of the alienator. That is, the possibility of housing ownership under the inheritance agreement earlier than from the moment of death of the alienator is excluded. Therefore, considering the need for state registration of ownership of housing as a real estate, the right of ownership of the purchaser arises from the moment of state registration of the right, and not from the moment of death of the alienator. Thus, the above suggests that the inheritance agreement, under which a person may have ownership of housing, is a contract of transfer of ownership of property, paid, bilateral (bilaterally binding), fduciary (based on trust between the parties), aleatory (the purchaser cannot be sure that the actions of property or non-property nature committed by them will be equivalent to the value of the received housing), and is of a personal nature.

Features of conclusion of the hereditary agreement by spouses should also be considered within the framework of this study. Thus, an inheritance agreement can be concluded by one or both spouses. In this case, the subject of the inheritance agreement may be housing jointly owned by the spouses, as well as housing that is the personal private property of either of them. As for the conclusion of an inheritance agreement by the spouses, the subject of which is housing as an object of joint ownership, one should be bear in mind that when making any transaction concerning the joint property of the spouses which requires notarisation, the consent of the other spouse must be established. If the contract was concluded without the consent of the other spouse, it may lead to a challenge to its validity. However, the inheritance contract may be certifed without the consent of the other spouse, if the title document indicates that the housing specifed in it was acquired prior to the registration of marriage, or during the marital rela-

tionship, but on terms determined by the agreement concluded between the spouses, or by inheritance, as well as in cases where the one of the spouses does not reside at the property and his or her place of residence is unknown. A copy of the court decision, which has entered into force, must be submitted to confrm this circumstance.

If the spouse as an alienator does not agree with the inclusion of jointly acquired property in the inheritance agreement or the spouses do not agree on this property, one of the spouses may establish its share in the joint property in court and then enter into a separate inheritance agreement. The inheritance agreement can also establish that in case of death of one of the spouses the inheritance passes to the other, and in case of death of the other spouse his or her property only then passes to the purchaser under the agreement. In the presence of a marital agreement, which defnes the rights and obligations of the spouses to housing purchased both before marriage and during the latter, received as a gift or inherited by one of the spouses, upon certifying the inheritance agreement, the notary must be guided by the terms and conditions specifed in the marital agreement. If the alienator violated the terms and conditions of the previously concluded marital agreement upon concluding the inheritance agreement, then this serves as the basis for rendering such agreement null and void.

In terms of the legal nature of the marital agreement as separate grounds for the emergence of housing ownership, it is appropriate to note the lack of a unifed opinion in the doctrine of private law. The most common opinion is that the marital agreement, despite several specifc features, belongs to the civil law contracts and is subject to general rules for transactions [38–40]. A detailed analysis of this contractual form, the conditions of its validity, the grounds for its invalidation, and the procedure for its conclusion and performance suggests that the general civil law constructions of contract law are used in this case. Therefore, it is necessary to agree with the opinion of those scholars who refer the marital agreement to civil law contracts. In general, the marital agreement is the most complex and can contain a variety of terms and conditions relating to the property of the spouses or the provision of maintenance to one of them; unlike all other agreements, marital agreement can be concluded in respect of the future property of the spouses; the subjects of the marital agreement may be not only the spouses, but also the persons who have applied for registration of marriage. In addition, a marriage contract can serve as grounds for joint ownership of the spouses if it stipulates that the spouses become co-owners of housing, which prior to the marriage and marital agreement was in ownership of one of the spouses. Moreover, the joint housing ownership of the spouses acquired based on the marital agreement emerges from the moment of state registration of such ownership.

There is good reason that Article 94 of the Family Code of Ukraine[1] stipulates the requirement that the marital agreement is to be concluded in writing and notarised. Notably, there is still a "cautious" attitude of the notarial community towards the marital agreement. As a result, there are cases of extortion to certify the relevant legal relations of other agreements (on the alienation of the share of one of the spouses in the joint ownership in favour of the other spouse without the allocation of this share, on the procedure for using property, on the allocation of a share of immovable property of one of the spouses from all property assets, on provision of maintenance, etc.), which forces persons wishing to enter into a marital agreement to bear considerable costs upon its execution. To prevent such abuse, the Law of Ukraine "On Notaries"[2] obliges a notary to assist citizens in exercising their rights and protecting their legitimate interests. In particular, when certifying a marital agreement, the notary is obliged to explain to the parties the content and meaning of the marital agreement, the consequences of including certain terms and conditions therein, as well as to verify compliance with the law and the actual intentions of the parties.

Thus, among the grounds for the housing ownership, the marital agreement has a special place because: 1) it has the most complex nature and may contain various conditions relating to the property of the spouses or the provision of maintenance to one of them; 2) it may be concluded in respect of the future property of the spouses.

CONCLUSIONS

Summarising the analysis of the contractual grounds for the emergence of housing ownership, it is appropriate to emphasise the feasibility of expanding the classifcation of contracts as grounds for the emergence of housing ownership, which is established in the doctrine of housing law, by supplementing the classifcation with such contractual forms as mortgage agreement, donation agreement, hire-purchase agreement, inheritance agreement, lease agreement, as well as a marital agreement. Thus, it is appropriate to supplement the system of agreements that mediate the transfer of ownership of housing as an object of ownership as follows: 1) housing purchase and sale agreements; 2) housing barter agreements; 3) perpetual maintenance agreements; 4) housing rent agreements; 5) housing gift agreements; 6) housing mortgage agreements; 7) housing donation agreements; 8) hire-purchase agreements; 9) hereditary agreements; 10) marital agreements; 11) construction agreements; 12) agreements on joint activities.

It is established that the exchange of housing and the housing barter agreement are not terminological inaccura-

[1] Family Code of Ukraine. (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text.

[2] Law of Ukraine No. 3425-XII "On Notaries". (1993, September). Retrieved from https://zakon.rada.gov.ua/laws/show/3425–12#Text.

cies; these contractual forms have different legal nature, because the barter agreement serves as grounds for housing ownership, and the housing exchange agreement serves merely as grounds of the right of use.

It is substantiated that the inheritance contract performs a double function, governing both the relations on the transfer of housing into ownership and the performance of actions, since under the inheritance agreement, the property is transferred to the acquirer in his or her ownership, and although these actions are no longer carried out by the alienator, but by other persons after the death of the alienator, the acquirer becomes the owner of the property alienated in his or her favour.

Thus, the issue of identifying new contractual grounds for the disappearance of housing ownership in general and the study of individual contractual grounds in particular is relevant and such that requires further substantial research.

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NEW APPROACHES TO LEGAL REGULATION AND ORGANISATION OF LABOUR IN UKRAINE

Abstract. *It is noted that the issues of introducing new approaches to the organisation of labour of employees are acute on the agenda today. The conventional approach, when the vast majority of employees in Ukraine worked at workplaces within enterprises, institutions, organisations, taking into account the quarantine restrictions introduced in 2020, ceased to correspond to the modern realities. Modernity requires the development of the telework. The paper provides a scientifc study of the actual problem both for the science of labour law and for rule-making activities regarding the current state and trends in the legal regulation of remote work in Ukraine. The relevance of the study is conditioned by the importance of remote work for the sustainable development of the national economy and the state, as well as ensuring the interests of employees and employers in modern conditions. The purpose of the study is to provide scientifcally sound conclusions and suggestions for improving the legal regulation of remote work in Ukraine. Using general scientifc and special methods of scientifc cognition, the study considers the essence of remote and home work; the provisions of the Labour Code of Ukraine are compared with the provisions of the Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts On Improving the Legal Regulation of Remote Work" dated September 04, 2020 and the Draft Labour Code of Ukraine. A general conclusion is made regarding the need to develop and adopt a modern comprehensive regulation in the feld of labour – the Labour Code of Ukraine, which makes provision for a separate structural division (for example, a book) covering the specifc features of regulating labour relations of certain categories of employees, within which a chapter should be placed with the title: "Features of*

Regulating Labour Relations of Employees Engaged in Remote Work". The articles of such a chapter should make provision for the defnition of remote work, the specifcs of concluding, changing, and terminating an employment contract on remote work, the features of working hours and rest times of employees engaged in remote work, the features of labour protection of employees engaged in remote work, guarantees of labour rights of employees engaged in remote work

Keywords*: remote work, employee, employer, homeworker, telework*

INTRODUCTION

The events of 2020, primarily related to the coronavirus disease (COVID-19) pandemic, have sharply put on the agenda the issue of introducing new approaches to the organisation of labour. The conventional approach, when the vast majority of employees in Ukraine worked at workplaces within enterprises, institutions, organisations, taking into account the introduced quarantine restrictions, ceased to correspond to the modern realities. To ensure the functioning of enterprises, institutions, and organisations, their management began to make decisions on transferring employees' work activities to a remote format. This immediately raised the issue of legal regulation of remote work. Notably, until 2020, the main comprehensive regulation in the feld of labour – the Labour Code of Ukraine – did not regulate the relevant relations and did not even use the term "remote work". The opportunity to telework was provided only by the provision on remote work, which was stipulated in Part 8 Article 179 of the Labour Code of Ukraine, and then not to all employees, but only to the mother, the father, grandmother, grandfather, and other relatives who actually take care of the child, during their stay on parental leave. In addition, a Soviet Regulation On the Working Conditions of Homeworkers, approved by the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Centre of Labour No. 275/17–99 of September 29, 1981[1] is still in force in Ukraine, which provided an opportunity to apply home work mainly for persons who, for subjective and objective reasons, required such work (women who have children under the age of 15; disabled people and pensioners; persons who have reached retirement age, but do not receive a pension; persons with reduced working capacity, who are recommended to work in accordance with the established procedure; persons who take care of disabled or long-term ill family members in need of care for health reasons; persons engaged in work with a seasonal nature of production (in the off-season period); persons studying in full-time educational institutions;

[1] Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

persons who, for objective reasons, cannot be employed directly at work in the given area).

In March 2020, the Verkhovna Rada of Ukraine introduced provisions on remote work by the Laws of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" of March 17, 2020[1] and No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)" of March 30, 2020[2]. In particular, such provisions were introduced by the latest law in Article 60 of the Labour Code of Ukraine[3]. The national legislator has defned remote (home) work as a form of labour organisation, when work is performed by an employee at his or her place of residence or in another place of their choice, including with the help of information and communication technologies, but outside the employer's premises. It was stipulated that for the duration of the threat of the spread of an epidemic, pandemic, and/or for the duration of a threat of military, anthropogenic, natural or other origin, the condition for remote (home) work may be established in the order (instruction) of the employer without the mandatory conclusion in writing of an employment contract for remote (home) work[4].

In November 2020, the Verkhovna Rada of Ukraine adopted as a basis the Draft Law No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work" of September 4, 2020[5] (hereinafter referred to as "the Draft Law No. 4051"), which amends the Labour Code of Ukraine[6] and the Law of Ukraine "On Labour Protection"[7]. The Draft Law No. 4051[8] proposes to change

[1] Law of Ukraine No. 530-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/530–20#Text.

[2] Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/540–20#Text.

[3] Labour Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322–08#Text.

[4] Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)", op. cit.

[5] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

[6] Labour Code of Ukraine, op. cit.

[7] Law of Ukraine No. 2694-XII "On Labour Protection". (1992, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2694-12#Text.

[8] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work", op. cit.

the terminological construction "remote (home) work", which is currently stipulated in the Labour Code of Ukraine, to the terminological construction "remote or home work" and introduce other provisions aimed at the legal regulation of these types of work.

In general, Draft Law No. 4051 introduces amendments to the provisions that were included in the Labour Code of Ukraine in March 2020. This in itself indicates a general trend of the present – the rush to adopt changes to national legislation and the lack of a proper scientifc approach in preparing the relevant changes. In addition, the provisions proposed by the Draft Law No. 4051 change the working conditions of certain categories of employees, which means that such innovations require in-depth modern scientifc research. Problems of remote and home work were ivnestigated in the studies of such scientists as S.V. Vyshnovetska [1], A.S. Diligul [2], A.M. Lushnikov [3], O.S. Pochanska [4], B.A. Rymar [5], K.L. Tomashevskii [6], O.M. Yaroshenko [7], and others. Therewith, there are no up-to-date studies of the provisions of the latest draft amendments to the Labour Code of Ukraine regarding the use of remote and home work.

The purpose of the study is to provide scientifcally sound conclusions and suggestions for improving the legal regulation of remote work in Ukraine. The objectives of the study are to consider the categories "remote work", "home work", "telework"; to provide the author's definition of the term "remote work"; to investigate the regulatory material governing remote work in Ukraine.

1. MATERIALS AND METHODS

The study is based on the research of scientifc achievements of foreign and Ukrainian scientists and the results of study on the provisions of international acts and national legislation on remote and home work. The study analysed the works of representatives of the science of labour law, which highlighted the place and essence of remote and home work. The study investigated the provisions of the Home Work Convention of the International Labor Organization (No. 177) of June 20, 1996[1] the Labour Code of Ukraine[2] the Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)" of March 30, 2020[3], the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Commit-

[1] Home Work Convention of the International Labor Organization (No. 177). (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_327#Text.

[2] Labour Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322–08#Text.

[3] Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guarantees in Connection with the Spread of Coronavirus Disease (COVID-19)". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/540–20#Text.

tee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981[1], as well as a number of draft laws: Draft Labour Code of Ukraine No. 1658 of December 27, 2014[2], Draft Labour Code of Ukraine No. 1658, prepared for the second reading on July 24, 2017[3], Draft Labour Code of Ukraine No. 2410 of November 08, 2019[4] and the Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts to Improve the Legal Regulation of Remote Work" of September 04, 2020[5].

To achieve the purpose of the study, the appropriate research algorithm was chosen, which is inherent in the set of collected materials, conditions and form of work. The methodological framework of the study included the general scientifc, as well as special scientifc methods, the application of which is conditioned by the purpose of the study and the need to use theoretical achievements of the science of labour law in national legislation. The study employed the dialectical method, the Aristotelian method, the comparative legal method, and the method of system analysis. In their interaction, all the above methods made it possible to carry out a full-fledged completed legal research, each of them was used at a certain stage of research; therefore, the methodology of the study is balanced, thorough, and comprehensive.

The dialectical method is chosen as the basis of the research methodology as an objectively necessary logic of the cognition process, which allows considering the phenomenon under study in its development and interrelation due to the material conditions of social life. This method helped to cover the essence of remote and home work in the study. The dialectical method allowed to considering the legal regulation of remote and home work in Ukraine in the specifc historical conditions of modern Ukraine and determine the expediency of the legislative provisions proposed in 2020 aimed at regulating these types of work. The Aristotelian method provided an opportunity to investigate the current state of legal regulation of remote and home work in Ukraine. Using the techniques of the Aristotelian method, the shortcomings of the provisions of both

[1] Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

[2] Draft Labour Code of Ukraine No. 1658. (2014, December). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.

[3] Draft Labor Code of Ukraine No. 1658, prepared for the second reading. (2017, July). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=53221&pf35401=431270.

[4] Draft Labour Code of Ukraine No. 2410. (2019, November). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67331.

[5] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

the current regulations and the Draft Law No. 4051 registered in the Verkhovna Rada of Ukraine on the legal regulation of remote and home work were identifed and proposals were made to eliminate them. The comparative legal method was used during the consideration and comparison of the provisions of the Draft Law No. 4051 regulating remote and home work, as well as when comparing the provisions of the Home Work Convention of the International Labor Organization, the Labour Code of Ukraine, and the Draft Labour Code of Ukraine. The use of the comparative legal method made it possible to determine the place of remote work in the structure of a complex regulation in the feld of labour and to understand its essence in more detail.

The method of system analysis was used in the study of scientifc approaches to the place of remote work in the system of modern organisation of labour. System analysis convincingly proves the need to develop remote work in modern conditions, which has proven itself positively in recent years in the world, taking into account the development of telecommunications systems, new technologies for the output of products, the provision of electronic services, as well as proceeding from modern world challenges (pandemics, anthropogenic disasters, military operations, etc.).

2. RESULTS AND DISCUSSION

The current development of the world economy, modern international social and labour standards and new challenges currently facing humanity require constant improvement of national legislation. Ukraine, as a part of the international community, does not stand aside from these processes, and therefore must reform its own legislation. The need for qualitative changes in national legislation both in the labour and social spheres, in particular in the medical spheres, has been repeatedly addressed in the studies of Ukrainian legal scientists in the feld of labour [8–16]. Taking into account the COVID-19 coronavirus pandemic, the national legislator urgently introduced changes to the relevant regulations, in particular to the Labour Code of Ukraine regarding the introduction of remote work. Over time, a need arose to change the introduced standards. The Draft Law No. 4051, designed to amend certain articles of the Labour Code of Ukraine and supplement it with Articles 60–1 and 60–2.

In particular, it is proposed to make "cosmetic" changes to Paragraph 6–1 of Part 1 Article 24 of the Labour Code of Ukraine, which was included in this article in March 2020. This paragraph includes the conclusion of an employment contract for remote (home) work in the list of cases when compliance with the written form of concluding an employment contract is mandatory. The authors of the study believe that all employment contracts should be concluded in writing from the moment of publishing Part 3 Article 24 of the Labour Code of Ukraine in 2014 in the following wording: "an employee may not be allowed to work

without entering into an employment contract issued by an order or instruction of the owner or an authorised body, and notifying the central executive authority on ensuring the development and implementation of the national policy on the administration of a unifed contribution to mandatory state social insurance on hiring an employee in accordance with the procedure established by the Cabinet of Ministers of Ukraine"[1]. In this regard, the introduction of the above-mentioned amendments to Part 1 Article 24 of the Labour Code of Ukraine is superfluous. Part 1 Article 24 of the Labour Code of Ukraine should be worded as follows: "an employment contract shall be concluded in writing." The amendments made by the Draft Law No. 4051 to Article 29 of the Labour Code of Ukraine are not entirely correct. Firstly, such changes remove persons who have entered into an employment contract for remote work from the scope of Part 1 Article 29 of the Code, which makes provision for the employer's obligation to perform certain introductory actions in relation to the employee, in particular, to explain to the employee his or her rights and obligations and inform them against receipt about working conditions. Secondly, Article 29 of the Labour Code of Ukraine is supplemented by Part 2, which makes provision that upon entering into an employment contract for remote work, the employer must ensure compliance with Paragraph 2 of Part 1 of this article (familiarise the employee with the internal labour regulations and the collective agreement), as well as familiarise the employee with the requirements for labour protection upon working with equipment and means recommended or provided by the employer. Thus, according to the logic of the authors of the Draft Law No. 4051, employees who will work remotely do not need to know their rights, obligations, and working conditions, but at the same time they should know the internal labour regulations. The latter comes into conflict with the provision of Part 4 Article 60–2 of the Labour Code of Ukraine proposed by the authors of the Draft Law No. 4051 as follows: "when working remotely, employees allocate working hours at their discretion, they are not subject to internal labour regulations, unless otherwise provided in the employment contract"[2].

Notably, in the Labour Code of Ukraine, the provisions defning the features of remote and home work are currently stipulated in Article 60 "Flexible working hours". As mentioned above, the relevant provisions were introduced in Article 60 of the Labour Code of

[1] Law of Ukraine No. 77-VIII "On Amendments to Certain Legislative Acts of Ukraine Concerning the Reform of Compulsory State Social Insurance and Legalisation of the Remuneration Fund". (2014, December). Retrieved from https://zakon.rada.gov.ua/laws/show/77–19#n615.

[2] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

Ukraine in March 2020. Thus, the national legislator, having presented this Article in a new wording, in turn failed to reflect its content in its title, which, frst and foremost, complicated the search for relevant statutory material. The authors of this study believe that the title of the article would be more correct to state as follows: "Flexible working hours and remote (home) work". Separately, it should be noted that prior to the abovementioned amendments, Article 60 of the Labour Code of Ukraine was called "Division of the working day into parts" and regulated the corresponding working hours. As noted in the legal literature, the division of working hours into parts is a mode of working hours where the working day can be divided into parts within the limits defned by law. In particular, the working day with the division of shifts into two parts is established for drivers and conductors of buses, trolleybuses, trams operating on urban regular passenger lines [17]. The regime with the division of the working day into parts is applied at work with special conditions and the nature of work in accordance with the procedure and cases stipulated by legislation. The working day under this regime can be divided into parts, provided that the total duration of work does not exceed the established working day (Article 60 of the Labour Code of Ukraine). Such regime is usually introduced in industries where the amount of work is unevenly distributed throughout the day (for example, public transport drivers). The division of the working day into parts, frst and foremost, implies the possibility of establishing a break in work for more than two hours, which the labour legislation provides for recreation and nutrition purposes [18]. Consequently, the national legislator, having provided for the regulation of such a working time regime as flexible working hours in Article 60 of the Labour Code of Ukraine, abolished the rather popular working time regime – the division of the working day into parts.

Today, the national legislator does not separate the provisions regulating remote and home work in Article 60 of the Labour Code of Ukraine, using the terminological construction "remote (home) work". The Draft Law No. 4051 proposes to supplement the Labour Code of Ukraine with two articles: Article 60–1 "Home work" and Article 60–2 "Remote work", as well as to amend Article 60 "Flexible working hours", removing the provisions on remote and home work from it. This means that the authors of Draft Law No. 4051 are trying to introduce a different approach to the categories of remote and home work as independent ones. The latter is also evidenced by the use of differing defnitions of the terms "home work" and "remote work". Thus, the Draft Law No. 4051 stipulates the following provision of Part 1 of Article 60–1 of the Labour Code of Ukraine: "home work" is a form of labour organisation when paid work is performed by an employee at his or her place of residence or in other premises previously chosen by them,

which are described by the presence of a designated zone, technical means (main production and non-production funds, tools, devices, inventory) or their totality, necessary for the production of products, provision of services, performance of works or functions stipulated in the constituent documents, but outside the production or working premises of the owner of the enterprise, institution, organisation, or authorised body. According to Part 1 of Article 60–2 of the Labour Code of Ukraine, remote work is a form of organising labour relations between an employee and an employer and/or performing work, when work is performed by an employee outside the employer's premises in any place of their choice and using information and communication technologies[1].

Comparing the above defnitions, one should note such a common feature as the performance of work by an employee outside the employer's premises. In case of home work, it is only specifed that such work is usually performed by the employee at his or her place of residence or in other pre-selected premises that are appropriately equipped and adapted to work. The authors of the Draft Law No. 4051 use different terminology in these defnitions for no particular reason. Firstly, the Labour Code of Ukraine currently uses the term "owner or authorised body", the Draft Law No. 4051 proposes to use the term "employer" in Part 1 Article 60–2 of the Code, and "owner of an enterprise, institution, organisation, or authorised body" in Part 1 Article 60–1 of the Code. The authors of this study believe that if the Labour Code of Ukraine uses the term "owner or authorised body", then this term should be contained in the provisions that are proposed to be included in it. Secondly, home work is defned as a form of labour organisation, and remote work is defned as a form of organising labour relations. As is known, the terms "labour" and "labour relations" are independent and mean different phenomena. Given the relationship between remote and home work, which follows from the above concepts, it appears appropriate in this case to apply a unifed terminology, or to justify why such a difference is proposed. Thirdly, the phrase "paid work" is used for home work, and "work" is used for remote work. This also points to the need to apply a unifed terminology, since both types of work are paid.

There is a certain question regarding the placement of provisions on remote and home work in the Labour Code of Ukraine in the structural part covering such working conditions as working hours (Article 60 "Flexible working hours" of Chapter IV "Working hours"[2]). The Draft Law No. 4051 retains the specifed placement – Article 60–1

[1] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838.

[2] Labour Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322–08#Text.

"Home work" and Article 60–2 "Remote work" are placed in Chapter IV "Working hours"[1]. Notably, a similar situation is observed in the draft versions of the Labour Code of Ukraine, which in recent years have been registered with the Verkhovna Rada of Ukraine. Thus, in Draft No. 1658 of December 27, 2014 places Article 43 "Condition for home work" in Chapter 1 "Labour relations and employment contract" of the Book Two "Emergence and termination of Labour Relations. Employment contract"; the relevant provisions are also contained in Article 137 "Employees who independently plan their working hours" of Paragraph 2 "Working hours" of Chapter 2 "Working hours" of the Book Three "Labour conditions"[2]. In Draft No. 1658, prepared for the second reading on July 24, 2017, the relevant provisions are contained in Article 32 "Content of the employment contract" and Article 42 "Condition for working at home" of Chapter 1 "Labour relations and employment contrac" of the Book Two "Emergence and termination of labour relations. Employment contract"; the relevant provisions are also contained in Article 149 "Employees who independently plan their working hours" of Paragraph 2 "Working hours" of Chapter 2 "Working hours" of the Book Three "Labour conditions"[3]. In Draft No. 2410 of November 08, 2019, the relevant provisions are contained in Article 32 "Content of the employment contract" and Article 42 "Remote (home) work" of Chapter 1 "Labour relations and employment contract" of Book Two "Emergence and termination of labour relations. Employment contract"; the relevant provisions are also contained in Article 149 "Employees who independently plan their working hours" of Paragraph 2 "Working hours" of Chapter 2 "Working hours" of the Book Three "Labour conditions"[4].

The legal literature on labour law contains a somewhat different understanding of the place and essence of remote and home work. Thus, the vast majority of labour scientists do not refer remote and home work to working hours [17–23]. O. M. Yaroshenko and N. B. Bolotina distinguish the employment contract for home work as one of the types of employment contracts [21; 22]. The latter position is facilitated by the provisions of the esolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the

[1] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work", op. cit.

[2] Draft Labour Code of Ukraine No. 1658. (2014, December). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221.

[3] Draft Labor Code of Ukraine No. 1658, prepared for the second reading. (2017, July). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=53221&pf35401=431270.

[4] Draft Labour Code of Ukraine No. 2410. (2019, November). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67331.

Regulations on Working Conditions of Homeworkers" of September 29, 1981, according to which homeworkers are considered persons who have entered into an employment contract with an enterprise to perform work at home by personal labour from materials and using tools and means of labour allocated by the enterprise, or purchased at the expense of this enterprise[1]. Home Work Convention of the International Labor Organization (No. 177) of 20 June 1996[2] lists homeworkers as a separate category of employees. Thus, under Article 1 of Convention No. 177, the term "home work" means work that a person called a homeworker performs at his or her place of residence or in other premises of their choice, but not in the employer's production premises; for remuneration; for the purpose of producing goods or services, as directed by the employer, regardless of who provides the equipment, materials, or other resources used, unless that person has such a degree of autonomy and economic independence at his or her disposal as is necessary to be considered an independent employee under national legislation or court decisions. Persons with the status of employees do not become homeworkers within the meaning of this convention because of the very fact that they perform work from time to time as employees at home, and not at their usual workplace[3].

In labour law, working hours are understood as: the procedure for distributing working hours within a certain calendar period (day, week, etc.) in order to ensure the proper labour process and rest of employees [18]; distribution of working hours within a day or other calendar period [19]; distribution of working hours within a day or other calendar period, the beginning and end of daily work (shift), the beginning and end of a break for rest and food [23]. Taking into account the essence of the category "working hours" and the content of the provisions of the Howe Work Convention of the International Labor Organization No. 177 of June 20, 1996[4] and the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981[5], remote and home work cannot be consid-

[1] Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

[2] Home Work Convention of the International Labor Organization (No. 177). (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_327#Text.

[3] *Ibidem*, 1996.

[4] Home Work Convention of the International Labor Organization (No. 177). (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/993_327#Text.

[5] Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers". (1981, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v0275400-81#Text.

ered working hours. Employees engaged in remote and home-based work should be considered specifc categories of employees whose labour relations have certain features and require appropriate legal regulation.

The authors of the Draft Law No. 4051 propose to consolidate such difference between home and remote work as the freedom to change the workplace in Parts 3 and 4 of Article 60–1 and Part 3 Article 60–2 of the Labour Code of Ukraine. Thus, when performing home work, the employee's workplace is fxed and cannot be changed at the employee's initiative without the consent of the employer. If it is impossible to perform work at a fxed workplace for reasons beyond the employee's control, the employee has the right to change the workplace. When performing remote work, the employee independently chooses their designated workplace[1]. One should note the dubious expediency of introducing this condition for home work, which is not stipulated by Home Work Convention of the International Labor Organization No. 177 of June 20, 1996, as well as the difculty for the employer to monitor its compliance.

The Draft Law No. 4051 proposes to consolidate the differences in establishing labour regulations for remote and home work in Part 5 Article 60–1 and Part 4 Article 60–2 of the Labour Code of Ukraine. Thus, when working at home, employees are subject to the general working hours of the enterprise, institution and organisation, unless otherwise stipulated in the employment contract. When working remotely, employees allocate working hours at their personal discretion, and they are not subject to internal labour regulations, unless otherwise stipulated in the employment contract[2]. The authors of this study consider the provision on extending the general mode of operation of the enterprise to homeworkers doubtful: frstly, home work requires more freedom due to the specifcs of the place of performance; secondly, compliance with this provision would be difcult to control; and thirdly, such a provision is not contained either in the Home Work Convention of the International Labor Organization No. 177 of June 20, 1996, or the provision on working conditions of homeworkers, approved by the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981, fourthly, Article 60 of the Labor Code of Ukraine currently stipulates that both remote and home work employees allocate working hours at their discretion, and they are not subject to internal labour regulations.

It is proposed to supplement Part 6 Article 60–1 of the Labour Code of Ukraine with a provision that the perfor-

[1] Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts Concerning the Improvement of the Legal Regulation of Remote Work". (2020, September). Retrieved from https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69838

[2] *Ibidem*, 2020.

mance of home does not entail changes in rationing, remuneration, and does not affect the scope of labour rights of employees[1].

The authors of this study believe that the corresponding provision should be stipulated in Article 60–2 of the Labour Code of Ukraine regarding remote work. An analysis of Parts 7 and 8 of Article 60–2 of the Labour Code of Ukraine proposed by Draft Law No. 4051 indicates that certain provisions are established for remote work, which are not stipulated for home work in Article 60–1 of the Labour Code of Ukraine. This is the stay of an employee who performs remote work via information and telecommunications with the employer, and the latter's obligation to provide the employee with means of work related to information and communication technologies that they use. In turn, Parts 7, 9, 11 and 12 of Article 60–1 of the Labour Code of Ukraine stipulate such provisions regarding home work, which are not included in Article 60–2 of the Labour Code of Ukraine. It is the duty of the employer: 1) to provide the employee with the means of production, materials, and tools necessary for performing home work; 2) to keep records of employees who carry out home work; 3) to allow home work only for those persons who have the necessary housing and living conditions, as well as practical skills or can be trained in these skills to perform certain work; 4) to examine the housing and living conditions of home workers with the participation of a trade union body, and in appropriate cases – with the participation of representatives of sanitary and fre supervision.

The above, along with the defnitions of "remote work" and "home work", indicates that the authors of the Draft Law No. 4051 interpret remote work mainly as a mental activity related to the provision of information services, the creation of software products, the collection and generalisation of information, etc., which is performed mainly with the help of computer equipment, telecommunications systems, and transmitted to the employer by information and telecommunications means. In their understanding, home work is manifested in the manufacture of products, provision of services, performance of work using a variety of equipment, tools, devices, etc.

In the scientifc literature, it is noted that from the beginning, home work as a form of employment was focused mainly on pensioners, housewives, disabled people, and people engaged in folk crafts [24]. This is also confrmed by the content of the provisions of the regulation on working conditions for homeworkers, approved by Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworkers" of September 29, 1981. As B.A. Rymar notes, the regulation on working conditions of homeworkers of 1981 regulates the work

[1] *Ibidem*, 2020.

of so-called conventional homeworkers – persons of low qualifcations who perform mainly simple, manual work at home [25].

Over time, the development of technology gave an impetus to the modifcation of conventional ways of organising labour, as well as differentiated the categories of employees whose work was carried out outside the employer's premises. New opportunities provided by telecommunications technologies in the organisation of the labour process introduced a new term into practice – "telework". In 1990, the International Labor Organization

proposed a defnition of telework based on two features: the existence of a distance from the conventional workplace and the use of communication technologies [26]. Teleworking is a form of labour where: a) work is performed from a place remote from the central ofce or production areas, thus separating the employee from personal contacts with colleagues; b) new technologies make this separation possible with the help of appropriate communications [27].

In 2002, at the level of the European Union, Social Partners concluded a framework agreement on teleworking between the European Commission and European associations of trade unions and employers, which established working conditions and guarantees of the rights of employees engaged in teleworking [28]. The legislation of developed countries of the world currently promotes the introduction of teleworking. Thus, in a number of US states, there is a law "On Clean Air", which provides signifcant tax benefts to enterprises that use teleworking, since their employees do not pollute the environment by coming to the ofce by car. In recent years, many large and medium-sized frms have displayed a tendency to decentralise management, when the frm is divided into several functionally independent divisions with their individual budgets, and a number of employees are transferred to work outside the main ofce. Such units can often use virtual or home ofces. Especially characteristic is the growth of such ofces for the United States, which has about half of all computing power on the planet. The rapid development and cheapness of telecommunications services, the availability of ofce equipment turn the housing of TV workers into a powerful and modern ofce. Many managers also periodically switch to teleworking mode and, for example, remotely manage their business during business trips or vacations [29].

Conventional home work on the manufacture of products, provision of services and performance of work by an employee at home on the appropriate equipment, with the help of tools, devices, etc. remains to this day and co-exists along with teleworking. In this regard, such home work and telework should be considered as varieties of remote work.

Thus, it is advisable to understand the remote work as the paid performance of labour duties by an employee as stipulated by law, including acts of social

dialogue, local acts and an employment contract, outside the employer's premises in any place at the employee's choice, which does not entail any restrictions on the scope of his or her labour rights. It is precisely this approach to understanding remote work that should be provided for in a comprehensive regulation in the feld of labour.

CONCLUSIONS

The constant introduction of amendments and additions to the Labour Code of Ukraine, which is still taking place today, is not productive, since neither its structure nor the content of its provisions correspond to the modern development of knowledge in the feld of labour law, does not make provision for a number of important international and European norms in the feld of labour, and does not make provision for high-quality regulation of labour and related relations. At present, there is a need to develop and adopt a modern comprehensive regulation in the feld of labour – the Labour Code of Ukraine, which should preserve time-tested guarantees of labour rights of employees, introduce provisions that meet modern requirements of international and European acts in the feld of Labour and the development of the science of labour law.

In the Labour Code of Ukraine, it is advisable to make provision for a separate structural division (for example, a book) devoted to the specifc features of regulating labour relations of certain categories of employees. Within the framework of such a subsection, it is necessary to make provision for a chapter entitled "Features of regulating labour relations of employees engaged in remote work", and consolidate in its articles the defnition of remote work, the features of concluding, amending, and terminating an employment contract on remote work, the features of working hours and rest times of employees engaged in remote work, the features of labour protection of employees engaged in remote work, guarantees of labour rights of employees engaged in remote work. These articles should also make provision for the specifc features of home work and telework.

Remote work is the paid performance of labour duties by an employee as stipulated by law, including acts of social dialogue, local acts and an employment contract, outside the employer's premises in any place at the employee's choice, which does not entail any restrictions on the scope of his or her labour rights.

RECOMMENDATIONS

The study provides a thorough analysis of the terminology of remote work, provides the author's defnition of "remote work", a research as conducted concerning the relevant provisions of the Home Work Convention of the International Labor Organization No. 177 of June 20, 1996, the Labour Code of Ukraine, the Law of Ukraine No. 540-IX "On Amendments to Certain Legislative Acts of Ukraine Aimed at Providing Additional Social and Economic Guar-

antees in Connection with the Spread of Coronavirus Disease (COVID-19)" of March 30, 2020, the Resolution of the State Committee of Labour of the USSR and the Secretariat of the All-Union Central Committee No. 275/17–99 "On Approval of the Regulations on Working Conditions of Homeworker" of September 29, 1981, a number of drafts of the Labour Code of Ukraine and the Draft Law of Ukraine No. 4051 "On Amendments to Certain Legislative Acts to Improve the Legal Regulation of Remote Work" of September 04, 2020, provided scientifcally based conclusions and proposals for improving the legal regulation of remote work in Ukraine.

The provisions of the study are useful for: the science of labour law in further scientifc developments of the problems of labour organisation; legislative activities in the development of the Labour Code of Ukraine; the educational process in the training of doctors of philosophy and doctors of sciences.

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PROSPECTS FOR RECODIFICATION OF PRIVATE INTERNATIONAL LAW IN UKRAINE: DO CONFLICT-OF-LAWS RULES REQUIRE A NEW HAVEN?

Abstract. *The purpose of the study was to investigate the areas of modernisation of legislation governing private relations of a cross-border nature, proposed by the authors of the draft concept of updating (recodifcation) of the Civil Code of Ukraine (the CCU), and generalise foreign and international legal experience in developing acts of codifcation of private international law. The authors of the study considered private international law as a most dynamically developing branch due to the constant expansion of cross-border relations and requirements for constant updating and adaptation to the requirements of international civil turnover. The paper analysed the general factors and prerequisites for the recodifcation of private international law, comprehensively examined the expediency of abandoning autonomous codifcation and transferring conflict-of-law rules to the CCU. The study focused on current European experience and assessment of the impact of EU regulations on the national codifcations of private international law of member states and third countries. To assess the idea of restoring the status of the CCU*

as a core act governing all public relations with private law content, the authors of the study addressed the negative consequences of interbranch codifcation of private international law in a number of post-Soviet countries. The paper proved that European states are dominated by the tendency to adopt consolidated acts of codifcation in this area and recognise the priority of unifed international legal acts governing certain types of cross-border private relations. Based on the analysis, it is justifed to conclude that the world has currently accumulated considerable experience in law-making in the area of private international law and the most effective is a comprehensive autonomous codifcation of conflict-of-laws rules, which is based on the priority of unifed international acts and the widespread use of direct references to international agreements. While agreeing in general with the proposed changes regarding the content update of conflict-of-laws regulation, the authors emphasised the need to improve and develop conceptual approaches

Keywords*: codifcation, autonomous codifcation, intersectoral codifcation, conflict-of-laws regulation, choice of law*

INTRODUCTION

In 2004, on the pages of "Legal Practice", arguing the need for early approval of the draft Law of Ukraine "On Private International Law"[1], prof. V. I. Kysil wrote: "Analysis of the history of lawmaking in the feld of private international law indicates that the gradual separation of legislation on private international law from acts of civil and family legislation is inevitable. This process is logical, consistent, has a convincing justifcation and is welcomed by legal practice. Special laws on private international law have a clear structure and allow applying a comprehensive approach to regulating the most complex problems of the branch of law, which is often regarded as "higher mathematics of legal science". The application of such laws is more convenient and efcient" [1]. The idea of autonomous codifcation of private international law was justifed in the doctoral dissertation of Prof. V. I. Kysil and the studies of his students [2; 3], and in 2005 it was implemented by the parliament, which approved the Law of Ukraine "On Private International Law" (hereinafter referred to as "the Law on PIL")[2]. For sixteen years, Ukrainian and foreign scientists and practitioners emphasised the advantages of autonomous codifcation of PIL in their studies, calling it a "need of the hour" and the embodiment of "best European practices". However, the draft concept of updating the Civil Code of Ukraine (hereinafter referred to as "the Concept") proposed last year radically changed the positions of certain scientifc circles, and today the existence of the Law of Ukraine "On Private International Law" is already

[1] Law of Ukraine No. 2709-IV "On Private International Law". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2709–15#Text.

[2] Law of Ukraine No. 2709-IV "On Private International Law". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2709–15#Text.

considered as a "legislative tragedy", a "blow of anti-market forces", which slows down law-making, complicates law enforcement and negatively affects legal education [4]. In one of the last issues of the above-mentioned publication, Prof. A. S. Dovhert noted: "particularly serious consequences (signifcant losses in law-making, law enforcement, training of lawyers, etc.) occurred as a result of two treacherous blows: the adoption of the Economic Code of Ukraine, which is antagonistic to private law[1] and separation of two books from the codifcation ("Family Law" and "Private International Law")" [5]. Thus, according to the authors of the Concept, autonomous codifcation in the feld of private international law in its "destructive impact" on the system of legal regulation of private relations is equal to the adoption of the Economic Code of Ukraine[2].

The content of the Concept and the categorical nature of many of its provisions have caused a wave of discussions in the academic environment, and experienced lawyers and young scientists are joining them with renewed vigour and new arguments. It is difcult to overestimate the importance of scientifc events that are currently being discussed because modern lawyers have much wider access to the European and world scientifc space, research information platforms and leading legal publications, which enables a more indepth study of doctrinal approaches and practical experience in codifying private law in different states.

The problem of codifcation of PIL has been discussed in doctrine since the second half of the 19th century. Until recently, it was widely believed that the PIL is not ready for codifcation at all due to its "youth", excessive complexity and casuistry, and in some European countries this concept still prevails (France, Norway, Sweden, etc.). However, since the second half of the last century, doctrinal approaches have changed dramatically and codifcation processes have become extremely active because the existence of an effective act of codifcation of the PIL is one of the mandatory conditions for the development of foreign economic turnover, which is crucial for the economy of any country. Today, there are more than 90 national codifcations of PIL in the world.

Thus, the current challenges and level of discussion have become an extremely favourable moment for studying the phenomenon of national codifcation of private international law in Ukraine. Especially important, in the authors' opinion, is the analysis of the arguments of supporters of both interbranch and autonomous codifcation because referring to the same circumstances (economic globalisation, liberalisation of market relations, comprehensive internationalisation), appealing to the studies of the same acknowledged specialists (S. C. Symeonides [6], R. Cabrillac [7],

[1] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436–15#Text.

[2] *Ibidem, 2003.*

J. Basedow [8], etc.), referring to the analytical reports of international institutions, the authors draw diametrically opposite conclusions regarding the optimal form of consolidating the PIL provisions.

The purpose of the study is an analysis of the proposed areas of modernising legislation governing private relations of a cross-border nature, generalisation of foreign and international legal experience in the development of acts of codifcation of private international law and an attempt to formulate the author's vision of the prospects for the recodifcation of private international law in Ukraine.

1. LITERATURE REVIEW

The theoretical framework of this study included the articles of Ukrainian and foreign scientists in the feld of private international law, in particular, the studies by V. I. Kysil [1; 2], A. S. Dovhert [5; 9], V. Ya. Kalakura [3], which cover the problems of PIL codifcation in Ukraine. To investigate the experience of foreign codifcations, the Encyclopaedia of Private International Law was used as one of the main sources [10], which was published in 2016 under the editorship of the director of the Max Plank Institute for Private International Law and Comparative Law, professor J. Basedow and today is the most authoritative and comprehensive reference source in this subject area.

The study of the works of S. C. Symeonides [6], R. Cabrillac [7], and Cs. Varga [11] was of great importance for clarifying the opinions of world-famous researchers on the modern processes of PIL codifcation. The fundamental works of these scientists provide an in-depth understanding of the institution of codifcation as such, allow determining its essence and signifcance from legal, technical, historical, sociological, and other standpoints. The book "Codifcation of private international law around the world: an international comparative analysis" by S. C. Symeonides contains a global study of codifcations of private international law for 50 years (1962-2012) [6]. During this period, more codifcations in the feld of PIL were adopted than in all previous years, and horizontal comparison and analysis of these codifcations provides answers to the fundamental philosophical and methodological dilemmas of PIL.

The authors of this study also investigated the articles of young scientists, their new views on the theory of codifcation, on the prospects for the development of legislation in the feld of PIL in the global digital economy. In particular, the results of the dissertation work of Professor E. A. Hetman "Codifcation of the Legislation of Ukraine: General Characteristics, Features and Types" and other developments of this scientist were used [12; 13]. The studies of Estonian legal scientists Prof. Tanel Kerikmäe[14], Karin Sein [15], Maarja Torga [16], Lithuanian scientist Prof. Valentinas Mikelėnas [17] and others also became important literary sources. The experience of codifying PIL in the Baltic States is important for Ukraine,

frst and foremost because this process in began simultaneously in these countries and the initial conditions were quite similar. Of particular importance for comparative analysis is the fact that, despite similar doctrinal approaches, conflict-of-laws rules were included in civil codes in Lithuania and Latvia, and the Estonian legislator carried out autonomous codifcation by adopting the Law of Estonia "On Private International Law"[1]. To summarise the Baltic experience, the study investigated the monograph "Law of the Baltic States" under the general editorship of Prof. Tanel Kerikmäe, one of the sections of which contains a deep comparative analysis of the private law of three states [14]. Studies of Prof. K. Sein and M. Torga, doctor of law, covering the development of the Estonian PIL and its relationship with EU regulations [15] were also used to get acquainted with certain aspects of the national codifcation process in this area.

The studies of Russian scientists Prof. N. I. Marysheva [18], prof. I. B. Hetman-Pavlova [19], researcher Ye. O. Krutiy [20] were also of great importance for the coverage of the subject under study, as well as the opinions of the famous Kazakh civilian Prof. M. K. Suleimenova [21]. The analysis of the studies of these authors clearly illustrates the change in doctrinal approaches to the codifcation of PIL in the post-Soviet space under the influence of European and global trends, at least in the feld of theoretical research

2. MATERIALS AND METHODS

The methodological framework of the study included a set of general and special methods of scientifc cognition, namely such methods of empirical research as comparison, methods of analysis and synthesis, induction and deduction, methods of formal legal, comparative, and historical analysis. At all stages of the study, the general philosophical (universal) method of cognition and the hermeneutical method were used to interpret theoretical concepts of private international law and the provisions of current legislation.

Considering the scientifc task set, the main research method was the critical legal method. According to one of the most influential contemporary philosophers of science, K. Popper [22, p. 29–30], any solutions proposed in social research should be subjected to critical analysis, and solutions that are not available for criticism should be excluded as unscientifc. The essence of the critical analysis was to verify the relevance of legal information and the completeness of the sources used, as well as to evaluate the proposed scientifc solution. The paper also widely used the method of comparative law, which allowed identifying the most important features of the problem under study: factors and prerequisites for the codifcation of PIL, approaches to the classifcation of national codifcations of PIL from the

[1] Law of the Republic of Estonia "On Private International Law". (2002, July). Retrieved from https://www.riigiteataja.ee/akt/13242136.

standpoint of consolidating provisions, structural aspects of modern codifcations of PIL, etc. The comparison covered acts of national codifcations of PIL and international unifed legal provisions. Diachronic comparison allowed tracing the development of national codifcations of different countries according to the principle of time sequence, which made it possible to determine the vector of development of PIL codifcations as a legal phenomenon and outline future trends. Synchronous comparison was applied to simultaneously existing codifcation phenomena.

The method of historical analysis allowed studying the stages of development and adoption of private international law codifcation acts in Ukraine and other states. The dialectical method provided an opportunity to analyse the PIL codifcation in its development, to identify trends in improving the legislation of EU Member States and third states in the context of harmonisation and European integration. The formal legal method was used to analyse the legal provisions governing certain types of cross-border legal relations and the practice of their application.

Using the method of deduction based on the doctrinal opinions of scientists, a conclusion was made about the general prerequisites for systematisation and codifcation of legislation in the feld of PIL. The study also identifed the specifc features of the main types of codifcation used in the implementation of modern approaches, and evaluated their effectiveness. The inductive method helped conclude that the intersectoral approach to PIL codifcation reduces the effectiveness of regulatory influence, complicates the processes of updating and adapting to EU legislation. The Aristotelian method was used to analyse the content of the current legislation of Ukraine and other states in the feld of private international law, identify problems of legislative technique used in certain regulations.

The results obtained thanks to special scientifc research methods were corrected considering the data of related legal sciences (history and theory of law, civil studies, comparative law), which helped identify the historical and meaningful context of ideas about the forms and methods of systematisation of conflict-of-laws rules of modern lawyers and scientists of past centuries.

The theoretical framework of the study comprised scientifc articles and monographic studies of leading domestic and foreign experts in the feld of law theory, civil studies, private and public international law. In addition, the paper used specialised doctrinal studies covering the entire range of issues of systematisation and codifcation of PIL. The study analysed the concept of updating the Civil Code of Ukraine [4], prepared by the members of the working group formed by the Resolution of the Cabinet of Ministers of Ukraine, under the scientifc supervision of Professor A. S. Dovhert and Prof. N. S. Kuznetsova[1]. The regulatory

[1] Resolution of the Cabinet of Ministers of Ukraine No. 6501 "On the Establishment of

framework of the study comprises modern national acts of codifcation of the PIL, foreign family, commercial, civil, and civil procedural legislation, international universal and regional agreements, EU regulations and directives. The study also investigated such regulations as the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I")[1], Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[2]; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I")[3], etc.

3. RESULTS AND DISCUSSION

3.1. Refusal of autonomous codifcation of PIL as a component of the system update of private law in Ukraine

The idea of abandoning the comprehensive autonomous codifcation of private international law in Ukraine was proposed by the authors of the Concept as one of the factors of the "general process of reviving private law in Ukraine", which should be implemented in the updated CCU[4], which will become a "supermarket of legal opportunities for every citizen of Ukraine" [23]. The particular relevance of recodifcation with a change in the structure and a considerable expansion of the scope of regulation of the Civil Code of Ukraine[5] is explained by pan-European trends, namely, the invention of "globally applicable legal provisions (solutions)" by scientists of the EU countries for many areas of private law relations, and the modernisation of "old" civil law codifcations, considering European and universal international documents.

Systematic updating of legislation, admittedly, plays a critical role in the development of legal systems, at the same time, codifcation (recodifcation) is the most radical means that provides an orderly statutory regulation of certain legal relations, so this type of law-making requires a particularly careful and respon-

a Working Group on Recoding (Updating) of the Civil Legislation of Ukraine". (2019, July). Retrieved from https://zakon.rada.gov.ua/laws/show/650–2019-y%D0%BF#Text.

[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (2000, December). Retrieved from eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN.

[2] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. (2003, November). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003R2201.

[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF.

[4] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/main/435–15#Text.

[5] *Ibidem, 2003.*

sible attitude. In the theory of law, there have been many attempts to classify the types of systemic updates of legislation, but, as noted by the outstanding Hungarian legal scientist C. Varga, each such project is born in a unique socio-historical environment, so attempts to deduce rigid schemes and regularities of the development of these processes do not make sense [11, p. 328].

The current socio-historical and political situation in Ukraine is, in fact, unique, and it determines the main actors of changes, goals, and volumes of modernisation of legislation. Further transformation of society, the impact of new technologies on all spheres of life, admittedly, require a corresponding update of the legal regulation of private relations, which participants in national and international legal events have been discussing in recent years, primarily emphasising the urgent need to introduce changes and amendments to the current CCU[1]. Well-known Ukrainian civilists, namely prof. O. E. Kharytonov and prof. A. S. Dovhert believe that the current civil legislation is outdated and needs a complete reinterpretation and adaptation to the European concept and new political values, as well as elimination of substantial gaps and shortcomings [9; 24]. Other scientists, in particular, prof. I. V. Spasibo-Fateeva, on the contrary, believe that the CCU of 2003 is based on a well-thought-out and consistently implemented scientifc concept, "the application of provisions of the Civil Code did not reveal any obvious and gross shortcomings for 15 years. Therefore, it cannot be said that the reason for the modernisation of the Civil Code is its shortcomings, which must be eliminated" [25]. Despite some differences in opinions, almost all representatives of civilistic schools as well as foreign researchers [26] are united in the fact that the main reason for the crisis of regulation of civil law relations is the Economic Code of Ukraine, which creates other legal mechanisms compared to those proposed in the CCU, and "its existence does not allow reforming what modern society urgently demands" [27, p. 101]. Thus, the main efforts to date are aimed at "reforming the Civil Code in such a way that nobody could fnd what has left of the Economic Code" [25].

The proposed concept generally meets the goals outlined above, defning the abolition of the Economic Code of Ukraine[2] as the primary task, it makes provision for clarifying the areas of application of civil legislation, in particular, the inclusion of "additional areas of social reality – entrepreneurship, corporate, or information spheres, etc." It is also proposed to expand the list of objects of civil rights. The concept contains detailed analytical materials and important suggestions for structural and meaningful changes to each book of the current Civil Code. Therewith, the ar-

[1] *Ibidem, 2003.*

[2] Economic Code of Ukraine. (2003, January). Retrieved from: https://zakon.rada.gov.ua/laws/show/436–15#Text.

gument for the abolition of the Family Code of Ukraine[1] and the Law on PIL[2] and the transfer of their provisions to the updated Civil Code is concise, and about ten pages of the Concept are devoted to both issues taken together. The least attention is paid to family law, Section 7 states that "the inclusion of family law in the updated Civil Code of Ukraine is considered by the Working Group as an important step towards the harmonisation of Ukrainian doctrine and *jus commune* legislation, but the main areas of the recodifcation are not elaborated, with a mere reference that they will be presented after discussing the concept at the stage of its completion [4, p. 59].

The issues of PIL recodifcation are considered somewhat more broadly. The section "Main areas of updating (recodifcation)" provides a critical analysis of the content of the current Law on PIL[3], stating that the national conflict-of-laws theory and rule-making practice do not fully comply with the legislative achievements of European countries and suggesting updating the content of the Law on PIL[4] in fve identifed areas: strengthening the private law foundations of conflict-of-laws rules; providing conflictof-laws rules with greater flexibility while maintaining their certainty; "materialising" the choice of law; clarifying a one-vector approach to solving a conflict-of-laws issue; reformatting the text of the Law on PIL in the fnal book of the modifed CCU. The appendices separately consider the factors and prerequisites for updating the CCU, the main results of the PIL codifcation in 2005, provide a brief analysis of the practice of applying the PIL provisions by the courts of Ukraine, address individual unifcation acts, legislation of the EU and foreign states, the fundamental ideas of which should be considered during recodifcation, and outline the expected results of modernisation.

Thus, the analysis of the text of the concept allows conditionally distinguishing three types of provisions concerning the PIL recodifcation: determination of general factors and prerequisites for its implementation; proposals for meaningful updating and improvement of individual PIL provisions; justifcation of the expediency of transferring conflict-of-law rules to the CCU[5]. Therefore, the authors of this study attempted to consistently analyse the prerequisites and expediency of recodifcation using critical legal, comparative legal, dogmatic, and other methods of legal research and determine the degree of their validity, compliance with historical principles and modern needs of society, verify the pres-

[1] Family Code of Ukraine. (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2947–14#Text.

[2] Law of Ukraine No. 2709-IV "On Private International Law". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2709–15#Text.

[3] *Ibidem, 2005.*

[4] *Ibidem, 2005.*

[5] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/main/435–15#Text.

ence of contradictions, compliance with fundamental principles, etc.

3.2. Analysis of the prerequisites for the PIL recodifcation and the feasibility of transferring conflict-of-laws rules to the CCU

The concept names fve factors that led to the start of work on the recodifcation of private law, two of which are related to internal processes: the development of market legislation and increasing the potential of Ukrainian private law science. These processes are ongoing and, according to the authors of this study, cannot be considered as decisive factors of influence. Other factors are external in nature and are related to the legislative experience of both individual European countries and trends at the pan-European level, namely the availability of model provisions of international acts, the experience of recodifcation of civil codes of France[1] and Germany[2], a legislative example of new EU members.

The subject of analysis in the future will be precisely external factors in terms of their impact on conflict-of-laws regulation. However, according to the authors of the Concept, there is another factor at play that should encourage the PIL recodifcation, which is "the restoration of the national legal tradition regarding the placement of conflict-of-laws rules, since earlier the Civil Code of 1963 contained a similar part, although under a different name – "the application of foreign law and international treaties, the legal status and capacity of foreign citizens" [4, p. 126].

Admittedly, the Civil Code of the Ukrainian SSR[3] (Articles 565–572) and Fundamentals of Civil Legislation of the USSR and Its Republics[4] (Articles 156–170) contained about a dozen conflict-of-laws rules focused on regulating a very narrow scope of issues because the emergence of a "foreign element" in private relations was a rare phenomenon behind the "Iron Curtain" of a totalitarian state. However, even in those days there were ties with individual countries, and after the end of the Cold War, with a gradual change in foreign policy, the exchange in the private sphere intensifed, which required expanding the scope of conflict-of-laws regulation. As early as in the 1970s, a recognised specialist of that time, the author of a fundamental course on private international law, Prof. L. A. Lunts proposed to develop and adopt a special law on PIL, and in 1990 his students O. M. Sadikov, N. I. Martsheva and A. L. Makovskyi developed a Draft Law of the USSR "On Private International Law and International Civil Procedure"[5].

[1] Civil Code of France. (2020). Retrieved from https://hindravi.fles.wordpress.com/2019/12/french-civil-code.pdf.

[2] Civil Code of Germany. (2002). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

[3] Civil Code of the Ukrainian SSR. (1963, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2709–15#Text.

[4] Fundamentals of Civil Legislation of the USSR and Its Republics. (1991, May). Retrieved from https://zakon.rada.gov.ua/laws/show/v2211400-91#Text.

[5] Draft Law of the USSR "On Private Inter-

The developers of this project are convinced that it did not become law due to departmental competition and administrative influence. Later, an abridged version of the text of the draft law was included in the Civil Code of the Russian Federation[1]. However, to this day, Professor N. I. Marysheva and other well-known experts in the PIL defend the expediency of autonomous codifcation proposed by L. A. Lunts, believing that only in this way "the shortcomings of branch codifcation" can be successfully overcome. "The adoption of the federal law on private international law and international civil procedure would allow, frstly, most fully and consistently defning and distinguishing between general and special institutions in this area and, secondly, achieving goals that can be defned as 1) restoring gaps, 2) eliminating duplication, 3) eliminating contradictions. But most importantly, the introduction of this law would provide a rare opportunity to unite (or rather, reunite) related institutions of private international law, scattered across "branch compartments", and would be one of the serious steps towards the development of truly private law" [18, p. 62].

Consequently, the reference to the regulatory framework and doctrine of the Soviet period, according to the authors of this study, is insufciently justifed. It is improbable that the approaches of that time can be considered the origins of the national legal tradition, given that the most authoritative scientists, whose professional development took place in the pre-Soviet period, even then saw the advantages of a comprehensive autonomous codifcation of private international law.

Next, the authors analysed the external factors and prerequisites for the PIL codifcation. The Concept names new pan-European trends as *the frst factor*. Admittedly, the reform of European private law is of great importance for Ukraine, given the European integration aspirations and the need to perform programme tasks to adapt national legislation to EU legislation. The European Union has been active in the feld of PIL and international civil procedure for more than two decades, and today a supranational codifcation has been created, comprising EU directives and regulations in this area.

Association Agreement between Ukraine and the EU of June 27, 2014[2] (hereinafter referred to as "the AA") makes provision for the rapprochement of the private legislation of Ukraine to *acquis communautaire* in the feld of corporate regulation, intellectual property, contractual relations, etc., but it does not contain special rules relating to the

national Law and International Civil Procedure". (1970, March). Retrieved from https://zakon.ru/Tools/DownloadFileRecord/24255.

[1] Civil Code of the Russian Federation. (1994, November). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_5142/.

[2] Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011#Text.

private international law issues. Only Article 24 of the AA[1], which covers legal cooperation, notes that the parties intend to develop further judicial cooperation in civil cases based on relevant multilateral legal documents, in particular the conventions of the Hague Conference on Private International Law in the areas of international legal cooperation[2], litigation, and child protection.

According to Prof. J. Basedow, such "blind spots" of the AA[3] regarding the PIL are understandable when it comes to mutual recognition of court decisions within the EU, established by the Brussels I Regulation[4] but the harmonisation of conflict-of-laws regulation, for example, relating to non-contractual obligations, established by other acquis documents, "does not affect the sovereignty of associated states, such as Ukraine", and can contribute to the development of a good-neighbourly policy [8, p.16]. Comments by Prof. J. Basedow, according to the authors of this study, are quite reasonable. Unfortunately, the National Programme of Adaptation of Ukrainian Legislation to EU Legislation[5], approved on May 18, 2004, does not make provision for particular measures for rapprochement of national conflict-of-laws regulation and does not contain a list of corresponding regulations of the EU and Ukraine.

It appears that upon developing the conceptual framework for modernising the provisions of the PIL, most of all, it is necessary to conduct an in-depth analysis of the EU regulatory framework and determine the list of acquis acts of priority importance, as well as the scope and limits of adaptation of legislation in this area. At present, the Concept briefly mentions only the EU regulations "Rome I"[6] and "Rome II"[7] as such that should improve the institution of autonomy of the will in Ukraine [4, p. 61].

Notably, such research and identifcation of priorities are quite a difcult and

[1] *Ibidem, 2014.*

[2] Conventions, protocols, and principles. Hague Conference on Private International Law. (n.d.). Retrieved from https://www.hcch.net/en/instruments/conventions.

[3] Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011#Text.

[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1. (2012, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215

[5] Law of Ukraine No. 1629-IV "On the National Program for Adaptation of the Legislation of Ukraine to the Legislation of the European Union". (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1629–15#n16.

[6] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF.

[7] 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). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&from=en.

time-consuming task. As Prof. T. K. Grazianonotes, "over the past two decades, the number of EU regulations in the feld of private international law has grown at breakneck speed, on the one hand, this has eliminated many gaps, but, on the other hand, it is becoming increasingly difcult to determine the scope of EU regulations. Moreover, the same legal terms have different meanings in different regulations, there are complex issues concerning the interaction of procedural provisions and provisions regarding the choice of proper law. That is, the system of private international law of the EU is becoming increasingly difcult to apply and risks losing its consistency" [28, p. 585].

The need to systematise EU conflict-of-laws legislation is currently being discussed by the European academic community and EU advisory bodies. As one of the options for solving the issue, the possibility of adopting the European Code of Private International Law is considered, the draft of which is being developed by experts of the Directorate General of Internal Policy of the EU [29, p. 75]. In the authors' opinion, this experience is worthy of attention and should also be considered when determining ways to update the PIL of Ukraine. The EU's legislative activity in the feld of private international law has considerably affected the internal codifcations of Member States, but it is impossible to completely replace national legislation at this stage of integration. Therefore, the study of options for modernising conflict-of-laws regulation at the national level is important for the further development of the Ukrainian PIL doctrine and legislative activities.

The second external factor to which the Concept attaches special importance are the civil codes of France[1] and Germany[2] – "bastions" of civil law in continental Europe, the reform of which over the past decade affects the legislative processes of neighbouring states. It is impossible to disagree with this statement, but it is worth noting that in the feld of conflict-of-laws regulation, the approaches used in both countries are based on ideas that clearly do not coincide with the proposals of the authors of the Concept.

Germany is one of the countries that have an autonomous national PIL codifcation. In 1986, the Law "On New Regulation of Private International Law"[3] introduced Chapter Two of the Introductory Law to the Civil Code of Germany, entitled "Private International Law". However, as Prof. Jan von Hein notes, due to the constant expansion of EU conflict-of-laws legislation, the scope

[1] Civil Code of France. (2020). Retrieved from https://hindravi.fles.wordpress.com/2019/12/french-civil-code.pdf.

[2] Civil Code of Germany. (2002). Retrieved from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf.

[3] The Law of Germany on Private International Law. (1986, July). Retrieved from https://www.bgbl.de/xaver/bgbl/start.xav?start=//*%5B@attr_id=%27bgbl186s1142.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl186s1142.pdf%27%5D__1622817586757.

of application of national provisions is becoming narrower, with courts applying internal conflict-of-laws rules only in the absence of corresponding European regulation or an international treaty [30].

France belongs to a number of states where private international law is not codifed. Prof. Gilles Cuniberti, highlighting French legislation in the Encyclopaedia of Private International Law, notes as follows: "ironically, the birthplace of the Civil Code has never had a comprehensive regulation of private international law… except for three articles of the Civil Code of the Napoleonic era: Article 3 (on the applicable law) and Articles 14–15 (on the choice of jurisdiction)" [31, p. 2079]. Today, conflict-of-laws rules on the applicable law are contained in certain national laws governing family and property relations, numerous universal and bilateral agreements on private international law, as well as EU regulations. Conventionally, the practice of higher courts is of great importance for governing relations with a foreign element. French legal doctrine proceeds from the fact that the casuistry of legal matter necessitates the construction of decisions in accordance with each particular case, which judicial practice succeeds in much better than codes. Prof. Pierre Mayor, in particular, argues that "the extremely complex nature of the problems being solved requires compliance with the concept of legal provisions that are created based on consideration of particular situations. If we do not have such a beacon, then the human mind, whatever the inherent power of abstraction, risks falling into error" [32]. The French approach is not unique in Europe, the PIL is not codifed in the Scandinavian countries (Denmark, Norway, Sweden, Finland, Iceland), as well as in Ireland and Cyprus.

Eleven European countries, fve of which are former republics of the USSR (Russia, Belarus, Armenia, Latvia, Lithuania, Moldova), have carried out interbranch PIL codifcation and placed the main array of conflict-of-laws rules in one of the last sections (books) of the civil codes, and individual institutions in family, commercial, and other codifed acts. However, the absolute majority (twenty-fve countries) have special laws on the PIL, or the PIL codes (Belgium, Bulgaria, Turkey), which also include the rules of international civil procedure, that is, these countries have performed a comprehensive autonomous codifcation of PIL.

Consequently, the complexity of conflict-of-laws rules in the vast majority of legal systems does not prevent the PIL codifcation – on the contrary, codifcation in theory and practice is considered a means of overcoming excessive complexity and casuistry. As noted by R. Cabrillac, the code does not necessarily have to simplify, it can consolidate complex realities, "nothing prevents formulating decisions found by judicial practice in one or two abstract provisions" [7, p. 392]. Signifcant, from this point of view, is the PIL codifcation in the UK. Neither the complexity of Eng-

lish law nor its casuistry prevented the adoption of the PIL law in 1995[1], where a small scope of relations in this area has been settled, but with a trace of desire for broader codifcation. Notably, in most countries of the Anglo-Saxon legal system, unofcial PIL codifcations are popular, such as the work Dicey, Morris & Collins *on the Conflict of Laws* [33], where the relevant precedents are systematised. In the United States, the frst (1934) [34] and second (1971) sets of rules on conflict of laws are widely known [35] (*Restatements of the Conflict of Laws*), the latter is a 30-volume publication, where precedents are systematised and set out in the form of articles of the law. In 2014, the American Institute of Law commenced the development of the third Restatement, which should radically reconsider the American tradition of conflict-oflaw regulation [36].

Thus, according to the authors of this study, there is no reason to assert that interbranch codifcation, that is, the placement of an array of conflict-of-laws rules in civil codes, is confrmed by the current legislative practice of European countries. On the contrary, the vast majority of countries in the continental legal system implemented autonomous codifcation of the PIL at the beginning of the third millennium, a trend that remains dominant and is gaining popularity even in common law states.

The third external factor considered by the authors of the Concept as decisive for applying an interbranch approach to the recodifcation of PIL in Ukraine is the experience of new EU Member States. However, the analysis demonstrates that only three countries that are considered as new EU members use a cross-branch approach, namely Romania, Latvia, and Lithuania. Other countries, including Bulgaria, Estonia, Poland, Slovenia, Slovakia, Hungary, Croatia, Czech Republic, etc., have separate laws or codes of the PIL.

The authors of this study are particularly interested in the experience of the Baltic States, which from the middle of the 19th century and prior to the Soviet occupation had a unifed Baltic Civil Code [37], also had almost similar legislation in the Soviet period, but after the restoration of independence chose entirely different approaches to the PIL codifcation. The least developed is conflict-of-laws regulation in Latvia, where certain provisions of the PIL are placed in the Introductory Law to the Civil Code, which was in force since 1937 and was updated in 1992 in an almost unchanged wording[2]. Seventeen articles of this regulation (Articles 7–24) contain strict conflict-of-laws rules that have a structure inherent in codifcations of the middle of the 20th century, while Article 25 establishes the priority of international treaties in gov-

[1] Private International Law (Miscellaneous Provisions) Act. (1995, November). Retrieved from https://www.legislation.gov.uk/ukpga/1995/42.

[2] Civil Law of Republic of Latvia. (1937, January). Retrieved from http://www.vvc.gov.lv/export/sites/default/LV/publikacijas/civillikums.pdf.

erning cross-border private relations: "the rules of this law apply to the extent that otherwise is not established by international treaties and conventions in which Latvia takes part".

In the Civil Code of Lithuania[1] of 2000, a separate chapter covers the issues of the PIL, where fve articles contain general rules of conflict-of-laws: application of foreign law, restrictions on the application of foreign law, determination of the content of foreign law, international treaties and reverse references, and forty-seven articles govern individual institutions of the general part of the PIL. The Civil Code of Lithuania also recognises the priority of international treaties, but reservations are made regarding their direct application and compliance with a unifed approach to the interpretation of terms. The Lithuanian model is more advanced than the Latvian one, but it considerably differs from the latest codifcations of Western European states. Scientists from Latvia and Lithuania and representatives of the judiciary, upon discussing ways to improve conflict-of-laws legislation, more frequently suggest referring to the experience of autonomous codifcations of EU Member States. Thus, professor of Vilnius University *Valentinas Mikelėnas* considers that the absence of a single law on private international law and the dispersion of conflict-of-laws rules between different codes "is the weakest link in the reform of private international law" in Lithuania. The scientist hopes that this is only the frst stage, the next step of the reform will no longer be a "leap into darkness" for Lithuanian judges and scientists [17, p. 181].

Unlike Lithuania and Latvia, Estonia has had a separate Law "On Private International Law" in force since 2002[2], which was developed by German, Swiss, and Austrian lawyers, since Estonia traditionally belongs to the German legal family [15]. The law was drafted according to the Swiss model and included both the rules of the PIL and the rules of international civil procedure, but only conflict-of-laws regulation was ultimately introduced. The scientifc literature notes the modernity and thoughtfulness of the principles for determining the competent legal order proposed by the Estonian legislation, the presence of blanket rules containing references to EU legislation and The Hague Conventions on private international law. The indisputable advantages also include detailed conflict-of-laws regulation of ownership relations for such objects as vehicles and securities, devoting articles to certain types of obligations (consumer agreements, assignment of claims, insurance agreements, etc.). Therewith, the regulation of certain PIL issues is contained in other regulations: in the Laws

[1] Civil Code of the Republic of Lithuania. (2000, July). Retrieved from https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=14f2280hqa&documentId=TAIS.400592&category=TAD.

[2] The Law of Estonia on Private International Law. (2002, March). Retrieved from https://www.riigiteataja.ee/akt/13242136.

"On Succession"[1] of 2009, "On Investment Funds"[2] of 2004 and in Chapter 62 "Proceedings on Cases on Recognition of the Execution of Acts of Foreign Judicial and Other Bodies" of the Civil Procedural Code[3] of 2005.

Assessing the prospects for the development and improvement of the regulation of cross-border relations in the legislation of the Baltic States, most legal experts note the need for more complete implementation of the fundamental provisions of EU acts regarding the PIL and the most developed European codifcations [14, p. 147].

Prof. I. V. Hetman-Pavlova connects the specifc features of the PIL codifcation in the former Soviet countries with the "Soviet tradition of interbranch codifcation of the PIL" [19, p. 56], which is deeply rooted in the minds of lawyers. That is why even the latest autonomous codifcations of Estonia and Azerbaijan do not include the rules of international civil procedure, despite the global trend that has dominated since the beginning of the 1980s. Comparable to Latvia and Lithuania, a larger or smaller set of conflict-of-laws rules is contained in the civil codes of Moldova[4], Kazakhstan[5], Belarus[6], Armenia[7] and some other post-Soviet countries. As the well-known Kazakh scientist Prof. M. K. Suleimenov fairly pointed out upon answering a question regarding the prospects for the development of the PIL of Kazakhstan, "we abandoned the Soviet greatcoat but still remain in it. Therefore, we still use the Russian model in our activities. We shall see what the future brings" [38].

Thus, according to the authors, the modern form of codifcation of PIL in Ukraine, carried out considering the best practices of European codifcations, demonstrates a departure from Soviet traditions. In one of the latest dissertation studies covering modern codifcations of private international law, three types of modern codifcations of PIL are identifed in terms of the form of consolidating rules, namely, interbranch, autonomous, and complex, and it is proved that since the mid-1980s, the world has been dominated by the trend of complex autonomous codifcations. The overwhelming majority of experts in the PIL make the following arguments favouring autonomous codifcation:

– the separation of the PIL rules from the provisions of civil and economic legislation is necessary due to

[1] The Law of Estonia on Succession. (2008, January). Retrieved from https://www.riigiteataja.ee/akt/104012021036.

[2] Investment Funds Act of Estonia. (2016, December). Retrieved from https://www.riigiteataja.ee/akt/131122016003.

[3] Code of Civil Procedure of Estonia. (2005, April). Retrieved from https://www.riigiteataja.ee/akt/109042021017.

[4] Civil Code of the Republic of Moldova. (2002, June). Retrieved from https://cis-legislation.com/document.fwx?rgn=3244.

[5] Civil Code of the Republic of Kazakhstan. (1994, December). Retrieved from https://cis-legislation.com/document.fwx?rgn=3634.

[6] Civil Code of the Republic of Belarus. (1998, December). Retrieved from http://law.by/document/?guid=3871&p0=Hk9800218e.

[7] Civil Code of the Republic of Armenia. (1998, May). Retrieved from http://www.translation-centre.am/pdf/Translat/HH_Codes/CIVIL_CODE_en.pdf.

the special subject of regulation, which emphasises its independence as a defnite branch of law;

– the presentation of the general PIL institutions in one specialised act allows them to subordinate all types of private legal relations with a foreign element, which contributes to a clearer and more detailed systematisation of legislation;

– combining the PIL rules in one act ensures their greater accessibility to all stakeholders, hence their effectiveness;

– integrated autonomous codifcation of the PIL avoids duplication of the same provisions, eliminates gaps and discrepancies between different conflict-of-laws rules;

– the adoption of a codifed act on the PIL enables the reduction of the legislative array in general, contributing to the "legislation clearing";

– there are no "mutual references" in full-scale codifcation, as well as fewer grounds for applying the analogy of law;

– the clear structure of special laws on the PIL enables the implementation of a comprehensive approach to regulating the most complex branch of law (which is called "higher mathematics of legal science") and consistent distinction between its general and special institutions [20, p. 55–56].

As noted above, there is also a clear trend at this stage to incorporate the rules of international civil procedure into codifed acts of the PIL. Examples include the Hungarian PIL Law (2017)[1], Section IX of which covers the international civil procedure (Articles 66–126); the Law of Slovakia "On Private International Law and Rules of Procedure" (as amended in 2008)[2] contains Part 2 "International Civil Procedure" (Articles 37–68); the Law of Czech Republic on PIL (as amended in 2015)[3] governs not only the general provisions of international civil procedure, but also cross-border bankruptcy procedures (Articles 102–123).

The Concept states that "the emergence of individual laws on the PIL in some countries is explained by tradition (Albania, Poland, Turkey, Czech Republic, Hungary, the countries of the former Yugoslavia, Japan) or the lack of civil codes or the initiated processes of their modernisation" [4, p. 68]. The authors of this study believe that this provision is subject to additional study because Poland, Hungary, the Czech Republic, Slovakia, Estonia, and even Turkey have national civil codes, and the legislation on PIL has been updating for the last 3–5 years. Thus, the authors also believe that the experience of the new EU members and the conducted theoretical research convincingly indicate that the integrated autonomous codifcation of the PIL

[1] The Law of Hungary XXVIII "On Private International Law". (2017, April). Retrieved from https://magyarkozlony.hu/dokumentumok/016703e04c2a3e6791025f6066da98b69fca22d8/megtekintes.

[2] The Law of the Republic of Slovakia No. 97 "On Private International Law and Rules of Procedure". (1993, December). Retrieved from http://jafbase.fr/docUE/Slovaquie/LoiDIP.pdf.

[3] Law of Czech Republic No. 91/2012 Sb. "On the Regulation of Private International Law". (2012, January). Retrieved from http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf.

is currently the most popular, relevant, and widespread form of systematisation of the PIL rules and international civil procedure.

Concluding a fundamental study on the codifcation of private international law, professor S. Symeonides wrote: "this book was written in 2013, which coincidentally matches with the 700th anniversary of Bartolus de Saxoferrato (1613-1357), the founder of modern private international law. Over the course of seven centuries, the world has become closer and more complex, and the art of codifying law has become a science… today private international law is not only *alive and well*, although less idealistic, but it is also more viable, refned, flexible, and pluralistic" [6, p. 425]. The development of the PIL as an independent branch of law, legislation, science, and academic discipline has taken place, and it deserves a modern autonomous codifcation.

CONCLUSIONS

Unlike many former Soviet bloc republics, after lengthy discussions in independent Ukraine, the idea of autonomous codifcation was implemented, the PIL law was a big step in the development of private law, meeting the requirements of an open society and embodying the best achievements of academic science of that period. The existence of a separate law emphasised the independence of the branch of private international law, which does not require "shelter" on the periphery of branch codifcations, which was emphasised in the comments and reviews of the vast majority of scientists and practitioners.

The analysis of current scientifc studies and legislation of individual European countries and the EU demonstrates that the idea of abandoning the autonomous codifcation of PIL proposed by the authors of the Concept is insufciently justifed and requires further investigation. Firstly, there is a controversial claim regarding the violation of national legal traditions of the Soviet period, the minimum number of conflict-of-laws rules in the civil legislation of that time, which were almost not applied in judicial practice, hardly give grounds to speak about the existence of tradition. Ukraine created conflict-of-laws regulation starting "from scratch", based on the best European practices of the beginning of the third millennium. Secondly, the emphasis on the dominance of interbranch codifcation in the EU is confrmed neither by the modernisation results of the "bastions" of civil legislation, the codes of France and Germany, nor by the current legislative practice of the new EU members. On the contrary, the vast majority of countries in the continental legal system implemented autonomous codifcation of the PIL at the beginning of the third millennium, a trend that remains dominant and is gaining popularity even in common law states. The development of EU lawmaking in the feld of PIL has put on the agenda the need to systematise numerous regulations, and the possibility of adopting a European Code of Private

International Law is being considered as one of the options.

It is also worth considering the fact that the development processes of information and communication technologies, which have been ongoing for more than thirty years, have developed a new space of social interaction, which does not have territorial and temporary barriers. The role of law in the new so-called networked society is undergoing considerable changes, and the PIL is at their forefront, as it governs cross-border private law relations, which are currently distinguished by a certain anti-hierarchy and decentralisation. In such circumstances, the modernisation of conflict-of-laws legislation, the conceptual revision of individual institutions and the introduction of new ones are much more effective within the framework of a special law. Thus, the provisions of the Concept of updating the Civil Code of Ukraine regarding the PIL require further professional discussion and an in-depth analysis of the prospects for the proposed recodifcation.

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UPDATING THE CIVIL CODE OF UKRAINE AS A GUARANTEE OF EFFECTIVE INTERACTION BETWEEN THE STATE AND SOCIETY

Abstract. *The study analyses the current provisions of the Civil Code of Ukraine and judicial practice, examines international acts of civil legislation. Considering the need to update civil legislation to the legislation of the European Union countries, as well as gradually approaching the recommendations of the European Union in the property sphere, it is concluded that Article 1 of the Civil Code of Ukraine should be modernised by moving the phrase "civil relations" to the end of this sentence, since civil relations are such relations that meet all the criteria defned in Part 1 of this article, that is, relations based on legal equality, free expression of will and property independence of their participants. Based on the analysis of the provisions of the Civil Code of Ukraine, it is proposed to replace such a feature as "property autonomy", which should be inherent in all civil relations, with a more accurate phrase – "property insulation". It is considered that the Civil Code of Ukraine should be designed both for relations in which their participants set the goal of making a proft, and for relations in which participants do not pursue such a goal. The study proves the need to restore the status of the Civil Code of Ukraine as a core act for all public relations with private law content. To implement the idea of the Civil Code of Ukraine as a core act for private law, attention is drawn to the need to review the mechanism for ensuring the status of the Civil Code of Ukraine as the main act*

of civil legislation of Ukraine. After all, the mechanism laid down in Part 2 Article 4 of the Civil Code of Ukraine turned out to be ineffective: the text of the Civil Code of Ukraine was amended by any laws without taking into account the specifc features of the mechanism of civil law regulation of such relations. It is considered that at the stage of updating the civil legislation, it is necessary to return to consolidating the list of legal forms for creation of legal entities in the Civil Code of Ukraine and thus harmonise Ukrainian legislation with European approaches to regulating the institution of a legal entity, as well as a number of contracts that were forcibly excluded from the Civil Code of Ukraine in 2003 to develop and fll in the text of the Civil Code of Ukraine

Keywords*: updating of civil legislation, interaction between the state and society, private law, protection of rights, balance of interests*

INTRODUCTION

The social purpose and social value of law lies in the fact that it is designed to govern relations in society between individuals and certain social groups. Evidently, the role and signifcance of the adoption and implementation of the Civil Code of Ukraine[1] in 2003 should not be underestimated. This Code replaced the outdated Civil Code of the Ukrainian SSR of 1963[2], designed to be applied to social relations that existed under radically different socioeconomic conditions, a different political formation. The Civil Code of Ukraine was originally designed to regulate economic relations in the conditions of economic relations built on a free market as opposed to a planned economy.

The Civil Code of Ukraine, in contrast to the Civil Code of the Ukrainian SSR, became the code of private law, which focused its regulatory influence on a human, a private person, with his or her interests, aspirations, desires. In a functioning civil society, the Civil Code of Ukraine has taken a leading place as the most important legal act that ensures and guarantees the full existence of a private person in the Ukrainian state. For undemocratic political regimes, criminal legislation always remains the core, which defnes the limits of permissible freedom (unfreedom), the existence and free use of human rights and freedoms; for such a state, there are no insurmountable boundaries in the sphere of a person's private existence, just as there is nothing private in the life of an individual for which any aspirations are not recognised outside the interests of the state and such a totalitarian society.

As history demonstrates, only in an open society dominated by liberal values can human thought develop freely, with conditions appropriate for fruitful creativity and the birth of innovation. It was open societies that demonstrated their advantages over closed non-free

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435–15#Text.

[2] Civil Code of the Ukrainian SSR. (1963, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1540–06#Text.

societies, which in the long run have always lost out to democratic political regimes. Accordingly, the main task of the Civil Code is to create conditions for the development of a private person, his or her creativity, and the flourishing of their abilities and talents.

The Civil Code of Ukraine, adopted on January 16, 2003 (hereinafter referred to as "the CC of Ukraine"), has become a decisive step that determined the line of development of the entire legal system of Ukraine towards civilised development [1]. The CC of Ukraine has radically changed the paradigm of legal regulation of civil relations. If, prior to its entry into force, the main (if not the only) model of legal regulation of such relations was their external regulation by the state with the admission of only dosed so-called "autonomous" regulation carried out by participants in such relations, then with the entry into force of the CC of Ukraine, the emphasis was placed differently. The interpretation of the Part 2 Article 6 of the CC of Ukraine suggests that the rules of this Code contain precisely dispositive provisions, if the opposite does not follow from the content of the act of civil legislation, as well as if the imperative nature of a certain provision follows from its content or from the essence of relations between the parties [2]. Attracting contractual means to regulate civil relations opened up wide opportunities for improving civil law and general boost in the efciency of the mechanism of legal regulation of civil relations, increased the role of the contract in civil law in the status of a regulator of civil relations, expanded the freedom of contract, included initiative as a driving force for the development of an open society [3].

17 years of functioning and application of the frst and main act of codifcation of Ukrainian civil legislation clearly demonstrated the progressiveness of the CC of Ukraine; on the other hand, the experience of its application allowed identifying certain shortcomings, weaknesses, and gaps in the introduced mechanism of legal regulation of these relations. The global fnancial crisis that has engulfed Ukraine, the permanent economic crisis in the state, excessive regulation of certain public relations, numerous examples of maintaining in the legislation the possibility of unjustifed state interference in private relations set the Ukrainian legislator an urgent task of preparing and conducting another systematic change in civil legislation, the state of which indicates that currently it fails to meet the modern realities and needs [4]. Ukraine also needs to join the processes of unifcation of private law that have been going on across the European continent for more than 20 years and have already ended with the creation of numerous new model laws in the feld of private law that meet the requirements for the development of modern economies.

In Ukrainian legal science, such a process of updating the Civil Code of Ukraine has already received an apt name – recodifcation of civil legislation, which makes provision for its moderni-

sation, harmonisation with European achievements in the science of private law, so that its condition meets the requirements and needs of today. The updated code should become an engine for the development of Ukraine. It is worth considering that for almost two decades since its adoption, numerous amendments and modifcations have been made to the Code, which quite often did not take into account either the content or spirit of this act, or the principles of its construction, which was repeatedly proved both in purely scientifc and in research to practice studies [5].

It is precisely the lawmakers' awareness of the need for a comprehensive doctrinal approach to amending the Civil Code of Ukraine that should be welcomed instead of making "patchwork" changes, since a long-awaited discussion has commenced at the ofcial level, resulting in the creation of a draft concept for updating the Civil Code of Ukraine at the frst stage [6].

The purpose of this study is to analyse individual changes in civil legislation in the development of the provisions proposed by the authors of this draft Concept.

1. MATERIALS AND METHODS

The methodology of the study is determined by its purpose, which is to analyse the structural parts, namely sections, articles, paragraphs, clauses of the Civil Code of Ukraine for the subject of legal regulation of civil relations, their emergence, change, and termination, ordering, in accordance with the ideal model that the subject of legal regulation consolidates in the contract or in acts of civil legislation. The statutory legal basis for this study included codifed regulations governing public relations, namely the CC of Ukraine; the Law of Ukraine "On Mortgage"; the Law of Ukraine "On the Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of Bodies Engaged in Intelligence Activities, Pre-Trial Investigation Bodies, Prosecutor's Ofce and Court", etc.

Comparative legal, philosophical, dialectical, general scientifc, special scientifc, and Aristotelian research methods were used in this study. The Aristotelian method, namely analysis, synthesis, abstraction, generalisation, analogy, induction and deduction, was used to study certain provisions of the CC of Ukraine, as well as provisions of international acts of civil legislation. The leading tool of the Aristotelian method is the analysis of the current civil legislation, which was used to predict the effectiveness of interaction between the state and civil society. In particular, this refers to the fact that the extension of the rules on liability for non-performance of a monetary obligation to any type of delay of the debtor was a reaction of society, the economy and the legal community to the crisis of total non-payments on obligations and the lack of an effective mechanism for executing court decisions. It is noted that the rule of Article 625 of the CC of Ukraine is currently applied as a provision on the astreinte. Similarly, abuse of

the right to claim and other procedural rights was investigated.

The dialectical method was used for the purpose of analytical research of doctrinal approaches to the defnition of the term "civil relations", as well as to cover the main properties of the above term. With the help of abstraction, the updating of civil legislation as a prerequisite for ensuring effective interaction between the state and civil society was investigated in terms of applicability and legitimisation in a particular regulation. The method of abstraction made it possible to formulate the conclusions of this scientifc research, and the method of deduction and induction – to carry out an appropriate search for initial ideas (proposals for statutory changes and corresponding doctrinal provisions). Induction and deduction were used to fnd the necessary material for generalising and abstracting the statutory approach to updating (recodifying) the civil legislation.

The legal technical and dogmatic methods were used to study and interpret the provisions of the current CC of Ukraine, as well as to implement its systematisation upon updating its provisions. The comparative law method was used to compare the principles, defnitions and standard rules of European private law (DCFR) and the CC of Ukraine. The historical method facilitated the study of the term "civil relations" in retrospect and establish the purpose of civil legislation. Axiological and institutional approaches made it possible to consider such basic categories of civil law as property independence, good faith, abuse of law, etc. in combination and unity, which serve as the basis for building civil legal relations. The use of Aristotelian, system-structural methods allowed concluding that Ukraine should strive to overcome the total legal nihilism that has reigned in all spheres of social existence in Ukraine. The method of system analysis provided a generalisation of accumulated theoretical knowledge on updating civil legislation. To generalise and develop a holistic understanding of updating the civil legislation of Ukraine, the study used a systematic approach, interpretation and construction of a theoretical model of the provisions of the Civil Code of Ukraine. A systematic approach made it possible to outline the problematic aspects of law enforcement and offer the author's vision regarding their solution.

All scientifc research methods were used in interrelation and interdependence, which contributed to ensuring the comprehensiveness, objectivity, and completeness of the study. The chosen aspect made it possible to lay the foundation for further lines of scientifc development of theoretical ideas on updating (recodifcation) the civil legislation of Ukraine.

2. RESULTS AND DISCUSSION

Admittedly, since the declaration of its independence, Ukraine has been creating the legislation of an independent country, which has chosen the irrevers-

ible path of building a democratic state governed by the rule of law; there is not only a search for effective mechanisms for the legal regulation of certain social relations, but also a search for the ideal model according to which the legislator wants to regulate these relations. General comments on the process of updating the Civil Code of Ukraine. The study identifed the general shortcomings of the current state of civil legislation.

2.1. Analysis of general shortcomings and lines for improving the civil legislation of Ukraine

Insufciently detailed legal regulation of certain public relations may not always indicate a shortcoming of a legislative act. If the mechanism of legal regulation of these relations works effectively, then there is no need for their more detailed regulation. If the content of a legal provision is understood unambiguously by bona fde participants in civil relations, there is also no need to supplement its content. However, if the provision allows for an ambiguous interpretation (with a conscientious attitude towards determining its actual content), to abuse of the rights and opportunities that it provides, which has found manifestation in ambiguous or inconsistent judicial practice, there is an urgent need to eliminate the incompleteness of such a legal provision. The imperfection of the introduced mechanism of legal regulation of certain public relations indicates that the rule of law is incapable of leading public relations to the ideal state that the legislator had in mind during its introduction and to which its repeated and uniform application should have led [7]. The legislator must justify the need to introduce each new provision with arguments on the need to achieve those goals that do not contradict the considerations of the free functioning of civil transactions, for example, considerations of ensuring the interests of the weaker party, or the need to ensure stability in a particular area of economic relations.

Thus, the experience of the fnancial crisis of 2008–2009 necessitated the introduction of a legislative restriction on the possibility of obtaining loans in foreign currency by individuals-residents of Ukraine; in addition, credit institutions have been additionally obliged to give preliminary clarifcation of the conditions for providing credit funds, the interests of the weaker party in credit relations – the borrower – were also considred to a certain extent, etc. The above has forced to limit the possibility for credit institutions to introduce unfair, sometimes enslaving conditions for consumers in loan agreements, which indicate a considerable imbalance in the rights and obligations of its parties. The public movement, directed against the imposition of all currency risks in connection with the devaluation of the national currency of Ukraine to foreign currencies exclusively on consumers of banking services – individuals, also forced the legislator to seek ways to change the existing mechanism of legal regulation in order to factor in the interests of this

part of society – as a weak party in the described relations [8].

Therewith, one should take note here: the right of the legislator to regulate certain public, private law relations in their content is not arbitrary, but must be conditioned by a certain urgent public need pending to be satisfed. The introduction of legislative regulation of certain private relations is always an intervention of the state in these relations, it is a manifestation of state coercion. In itself, the introduction of regulation of public relations cannot be the purpose of such actions on the part of the state: the task of legislative regulation of private relations is to establish acceptable and understandable boundaries, within which free initiative should have a certain freedom for its implementation.

Only when the model of real social relations that develop in the practice of applying certain legislative prescriptions does not correspond to the ideas of justice and the public good, and there is a certain social or economic tension in society, there is an urgent need for state intervention in such relations in order to change them in accordance with the desired ideal model of the existence of such relations. For example, the use of cars in Ukraine that are not cleared in accordance with the established procedure, imported into the country in circumvention of the introduced customs rules, leads to many unsolvable problems related to determining the person responsible for the negative consequences of operating such a car, etc.

The law should be designed to be applied repeatedly over a long period of time, and should be sufciently abstract in its content to be effective even in case of subsequent changes in the sphere of regulated economic relations. The law should be stable and designed for the sustainable development of society and the economy; it should be predictable for the market, making provision for the evolutionary, not revolutionary development of the country. The law should prevent attempts to use it in bad faith, making it impossible to abuse the stipulated rights, as well as prevent actions committed solely for the purpose of inflicting harm on another person. Therefore, the civil law should also perform a certain predictive function: not only to eliminate existing legislative shortcomings, but also to strive to prevent the occurrence of such shortcomings in the introduced mechanism of legal regulation of civil relations in the foreseeable future. This obliges the legislator to identify and take into account trends in the development of the economy, society, and the state, directing them towards a certain desired model of a just state where civil society develops freely.

Therewith, the authors of this study are convinced that not all the provisions of the CC of Ukraine require mandatory changes. Thus, it is proposed to be extremely careful about the changes to Section I “Main Provisions” of Book 1 of the CC of Ukraine. In particular, in Article 1 of the CC of Ukraine, the phrase “civil relations” should be moved to the

end of this sentence, since civil relations are those relations that meet all the criteria defned in Part 1 of said article. Such public relations should be based on legal equality, free expression of will and property independence of their participants. Otherwise, there is a deceptive interpretation of the content of this defnition, that any personal non-property and property relations are civil. In reality, this is not the case. It is proposed to replace such a feature as "property autonomy", which should be inherent in all civil relations, with a more accurate phrase – "property insulation". Quite often, in business structures, one private legal entity is not property-independent from another person. Thus, according to its statutory documents, a person may bear subsidiary liability for another person, or otherwise be involved in the relationship of liability for its debts. That is, the sign of property independence is not inherent in all participants in civil relations; therefore, the phrase "property independence" as a sign of all civil relations is not sufciently correct.

However, the sign of each participant in civil relations is exclusively the property insulation of one person from another, since the appurtenance of certain rights and property to a certain person can always be objectively determined with varying accuracy. All participants in civil relations are exercise property insulation from each other, even in the case when one person is the owner of certain property, and the other is merely its user.

Evidently, over all the years of operation of the Civil Code of Ukraine, the Ukrainian legislator has created a considerable array of legislative acts in the feld of regulating civil relations. Such rules turned out to be included in numerous legislative acts with their unique structure, logic, and terminology, which sometimes differ quite substantially from the ideas and solutions embodied in the CC of Ukraine. It is necessary to restore the status of the Civil Code of Ukraine as a core act for all public relations with private law content. The CC of Ukraine is the basis for the construction and functioning of private law as a system of legislation. The consistency of provisions and rules determines their interaction and correlation in terms of strength and scope of application. The authors of this study consider it appropriate to supplement the content of the CC of Ukraine with the general provisions of special laws on land lease, consumer rights protection, from the content of the provisions of the Housing Code of the Ukrainian SSR1 – provisions on the housing rental agreement, from other special laws – rules on consumer lending, acquisition of rights to objects of unfnished construction, including housing constructions, etc.; admittedly, this should apply to rules of a private law nature.

To implement the idea of the Civil Code of Ukraine as a core act for private law, it is necessary to review the mechanism for ensuring the status of the Civil Code of Ukraine as the main act of civil legislation of Ukraine. Evident-

ly, the mechanism laid down in Part 2 Article 4 of the Civil Code of Ukraine turned out to be ineffective: the text of the Civil Code of Ukraine was amended by any laws without taking into account the specifc features of the mechanism of civil law regulation of such relations. It may be necessary to implement the idea of dividing laws into ordinary and constitutional ones, in order to refer codes as the main acts of various branches of legislation to constitutional laws. However, without appropriate amendments to the Constitution, such an idea is impossible to implement.

An obvious disadvantage of the current civil legislation is the lack of general provisions prohibiting discrimination. In developed democracies, special attention is paid to the implementation of the prohibition of discrimination in all its manifestations at the legislative level. The practice of the ECHR proves that both Ukrainian legislation and the practice of its application do not meet the criteria for prohibiting discrimination. However, the issue of banning all forms of discrimination remains outside the scope of the CC of Ukraine. Evidently, following the Constitution, the CC of Ukraine, as a code of civil society, should defne the general principles of anti-discriminatory legislation. Respect for the individual and his or her personality should be based on the equality of all persons before the law and in rights, in the state, and in society.

The current CC of Ukraine does not take into account the specifc features of the status of a consumer and an entrepreneur (merchant, i.e., a professional participant in relations), etc. The CC of Ukraine should be designed both for relations in which their participants set the goal of making a proft, and for relations in which participants do not pursue such a goal. Given that the current model of building Ukrainian legislation is not described by the idea of dualism of private law, the Civil Code of Ukraine should certainly contain the provisions of trade law, which are placed in the Trade Code in countries where the concept of dualism of private law is realised (Germany, France, etc.). Dualism of private law is not a modern trend in constructing a system of civil legislation; thus, relatively modern codifcations of civil legislation – the civil codes of the Netherlands, the province of Quebec, the Czech Republic, the updated civil code of the Republic of Moldova and others have incorporated special provisions of trade law [9]. The modern example of non-state systematisation of civil law – DCFR 0 does not make provision for the implementation of the dualism of private law [10]. Accordingly, the special status of a merchant (entrepreneur) and a consumer should be clearly indicated in the general provisions of the CC of Ukraine.

The basis of modern legal systems of European countries is Roman private law [11], since all of them have undergone its reception to a certain degree. Roman law underlies modern law, it is a part of the current legal doctrine and legal culture,

and the education of a future lawyer is impossible without mastering the legal heritage of Ancient Rome. This means that one should not worry about and deny the use of Latin both in the legislation and in the practice of its use, just as Latin is acceptable in medicine. The use of Latin in the text of the law is capable of eliminating ambiguities in wording, as well as double interpretation. A classic example: the title of Chapter 32 "The Right to Use the Property of Another" used in the Civil Code of Ukraine misleads the law enforcement ofcer, giving the impression that the rules contained in this subsection are subject to application to all cases of the right to use the property of another (for example, on lease rights), which is erroneous. Only a systematic and doctrinal interpretation of the content of the legal provisions of this chapter gives grounds for concluding that they are designed exclusively for application to easement relations. Accordingly, changing the title of this chapter to "Servitudes" (easements) would make it easier to understand its text, eliminate ambiguities, and eliminate double interpretation.

Therefore, to ensure that the text of the law is concise and corresponds to European terminological traditions, a wider use of Latin legal vocabulary is proposed, such as: gestor – principal, servitude (easement) – servitor (easement holder), superfciality – superfciary, emphyteusis – emphyteuta, etc. Unjustifed in general for civil law is the application of such a feature as "economic", applied to any civil law defnitions and legal categories. This feature does not carry any semantic load in private law and is superfluous. In particular, it is also unjustifed to refer to a company, which is usually understood as an organisation created for the commercial purpose of making a proft, and only a simple company, as an exception to the above rule, does not make provision for the creation of a legal entity as a legal form.

2.2. Amendments to the Civil Code of Ukraine caused by the abolition of the Economic Code of Ukraine

As indicated in the draft Concept, a systematic update of the Book One, as well as the CC of Ukraine in general, is possible only if the Economic Code of Ukraine is cancelled. The latter does not correspond to the parameters of acts regulating business relations, which by their nature are primarily private law [5]. Therefore, it is quite reasonable to introduce amendments to the CC of Ukraine, which are conditioned by the abolition of the Economic Code of Ukraine (hereinafter referred to as "the EC of Ukraine"). As for fundamental changes, these are changes in three areas of legal regulation: legal entities, ownership of property by public legal entities and institutions, as well as certain types of contracts. Legal entities are subjects of relations, so the construction "legal entity" meaks provision for the insulation of property, which can occur together with or without the association of persons (Article 81 of the CC of Ukraine).

Initially, at the stage of preparing the draft, the CC of Ukraine did not make provision for the possibility of the existence of other legal forms, with the exception of those established in the CC of Ukraine. However, to achieve the so-called "legislative compromise", the list of legal forms of legal entities in Article 83 of the Civil Code of Ukraine was defned as open. Therefore, at the stage of updating civil legislation, it is quite logical to return to consolidating the list of legal forms of legal entities in the Civil Code of Ukraine and thus harmonise Ukrainian legislation with European approaches to regulating the institution of a legal entity. Given the rather large number of legal entities that currently operate in legal forms not stipulated by the CC of Ukraine – this refers to enterprises as subjects of law (state and municipal enterprises, so-called "collective property enterprises", private enterprises, enterprises with foreign investments, etc.) and their associations (corporations, consortia, concerns, etc.) – it is advisable to establish a certain transition period to bring the legal forms of legal entities into compliance with the requirements of the CC of Ukraine.

Property transferred to public legal entities and institutions. The EC of Ukraine regulates property relations in a form that was inherent in the administrative-command economy, when property was transferred to a legal entity not in ownership, but in titles that were its peculiar analogue, but with appropriate restrictions. The subject of law, to whom the property was granted on the right of economic management or on the right of operational management, was deprived of the right to freely dispose of it or respond to such property under its obligations. In accordance with the international obligations assumed by Ukraine, national legal regulation should comply with the established international approaches not only to the legal forms of legal entities, but also to property relations. Therefore, the authors of this study believe that it is advisable to extend general approaches to the use of other people's property to the use of property by public legal entities and institutions – frst of all, this refers to renting and managing property. The Institute of property management should perform the functions of ensuring the transfer of property by the owner (in particular, the state or the relevant municipality) to legal entities under public law and institutions in order to perform their respective functions [12].

A completely logical solution is to return a number of contracts that were forcibly excluded from the CC of Ukraine in 2003 to the feld of civil law regulation in order to form and fll in the text of the EC of Ukraine. This refers, frst of all, to supply contracts, barter, leases, certain provisions on mediation, transportation, contract agreements, contracts in the feld of banking, etc. [13].

2.3. Proposals for Section I "Main Provisions" of the draft concept for updating civil legislation

Supporting the ideas laid down in the draft Concept of updating the Civil Code

of Ukraine, it is advisable to develop individual proposals at the stage of preparing the draft law in a particular way. Thus, for the development of paragraph 1.4. of the draft Concept, it should be noted that the urgent abolition of the EC of Ukraine necessitates the exclusion of provisions on the subsidiary application of the EC of Ukraine to the regulation of any relations in the feld of economic management from Article 9 of the CC of Ukraine. Thus, all relations that were previously covered by an unknown "sphere of management" are included in the sphere of regulation of the CC of Ukraine. Such relations should be governed by the CC of Ukraine as provisions of direct action, and not subsidiarily, taking into account some of their features. Certain features of legal regulation should be provided for relations involving merchants (entrepreneurs), that is, individuals whose main purpose of activity is to make a proft, both among themselves and with consumers.

It is also necessary to agree with the idea of improving the provisions on compensation for non-pecuniary damage (to 1.7. of the Concept). In this study, it is proposed to limit the scope of possible application of such a method of protection as compensation for non-pecuniary damage, making this remedy not common to all civil relations, but special. During its functioning in the Ukrainian legal system, this institution has acquired an interbranch character, its legal nature and scope of its application have turned out to be completely unclear and contradictory at the current stage of legal development. According to the Law of Ukraine "On the Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of Bodies Engaged in Intelligence Activities, Pre-Trial Investigation Bodies, Prosecutor's Ofce and Court"[1] – moral damage is actually similar to the tax liability of the state, which depends on the period of stay of an individual under investigation and court; to determine its minimum size, it is not actually necessary to fnd out the nature and degree of moral suffering of a person, etc. In labour relations – causing non-pecuniary damage to an employee in case of violation of his or her labour rights is virtually presumed. In contractual civil relations, the use of such a method of protection as universal is quite common, which is also unjustifed. The current version of Part 1 Article 23 of the Civil Code of Ukraine stipulates that a person has the right to compensation for moral damage caused as a result of violation of any of his or her rights.

Supporting the idea of objectifying the general principles of its compensation [14], it is necessary to limit the scope of application of compensation for non-pecuniary damage and when preparing relevant amendments to the

[1] Law of Ukraine 266/94-VR "On the Procedure for Compensation of Damage Caused to a Citizen by Illegal Actions of Bodies Engaged in Intelligence Activities, Pre-Trial Investigation Bodies, Prosecutor's Ofce and Court". (1994, December). Retrieved from https://zakon.rada.gov.ua/laws/show/266/94-%D0%B2%D1%80#Text.

CC of Ukraine, it is proposed to stipulate that the right to its compensation would arise only in case of a violation of not any civil rights of a person, but only non-property rights of an individual. Accordingly, in case of violation of any other civil rights, as a general rule, the right to compensation for non-pecuniary damage will not arise. An exception should be made for relations involving consumers, in labour relations for the affected employee, in tort relations – in case of harm to the health of the injured person and in case of his or her death (with the mandatory defnition of an exclusive list of persons who have the right to apply for its compensation) [15]. Compensation in cash for non-property damage should not replace the obligation to fully compensate for property damage, supplement it with the hidden purpose of compensation for those losses that are difcult to prove, etc.

Developing the idea of the concept of the need to take into account the changes that have occurred in the procedural legislation regarding the right of the court to determine, at the request of the plaintiff, a method of protection that is effective, but not stipulated either by law or contract, the authors of this study consider it appropriate to introduce a new procedure for protecting the jurisdictional nature of civil rights in the legislation. Thus, foreclosure on the subject of a mortgage based on a mortgage clause does not occur in accordance with a court or a notarised procedure, providing protection of the rights and interests of the mortgagee. Chapter 3 of the Book One of the CC of Ukraine stipulates that civil rights and interests shall be subject to protection in one of the following protection procedures: judicial, notarial, administrative, and in selfdefence [16].

The Registrar of Real Rights does not act as a body of state or local self-government (that is, as a subject of power), but as a result of the registration action, a certain right is actually recognised, in particular, for the mortgagee on the subject of mortgage. That is, the method of protection stipulated in Article 16 of the CC of Ukraine is applied in accordance with the procedure established by a mortgage agreement with a mortgage reservation, or an agreement on foreclosure on the mortgage subject in accordance with the Law of Ukraine "On Mortgage"[1]. The general provisions on the application of such an unnamed procedure for the protection of civil rights and interests should also be reflected in the relevant chapter of the CC of Ukraine [17].

CONCLUSIONS

Determining the urgent directions for improving civil legislation, its updating should provide the most unambiguous answers to existing requests from law enforcement practice, which are absent from the current legislation and which the relevant judicial practice is forced to seek. Thus, the issue of fair regulation of relations in case of a refusal of a contract

[1] Law of Ukraine "On Mortgages". (2003, June). Retrieved from https://zakon.rada.gov.ua/laws/show/898–15#Text.

participant to perform its obligations in the currency stipulated by the parties in the text of the agreement remains quite relevant. The next pressing issue is the following: the extension of the rules on liability for non-performance of a monetary obligation to any type of delay of the debtor was a reaction of society, the economy and the legal community to the crisis of total non-payments on obligations and the lack of an effective mechanism for executing court decisions. In fact, the rule of Article 625 of the CC of Ukraine is currently applied as a provision on the astreinte. Obviously, the court does not have the right to refuse to grant judicial protection when human rights fairly require it. However, with such a spreading interpretation, the court eliminates the existing gap in the current legislation, which the legislator is incapable of flling with legislative regulation in a timely manner.

Evasion from performing credit obligations has become a massive reaction of individuals to the lack of an effective and transparent mechanism for bankruptcy of an individual. As a protection against usury on the part of individual credit institutions, borrowers, for their part, resort to abuse of their rights, including abuse of the right to claim, and other procedural rights. Ukraine should strive to overcome the total legal nihilism that has reigned in all spheres of social life in Ukraine.

Therefore, it should be recognised that it is high time to eliminate these contradictory and often mutually exclusive approaches, to fnd a new balance of interests of all interested parties to ensure the prosperity of Ukraine and its citizens.

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SALARY OPTIMISATION IN UKRAINE IN THE CONTEXT OF THE ECONOMY EUROPEANISATION

Abstract. *In the context of active legislative prospects of the labour legislation of Ukraine in the aspect of their European integration, there are issues of developing and implementing effective remuneration systems and optimising them, which should be aimed at solving the problems of developing the Ukrainian economy, ensuring a combination of economic and social interests and goals of individual employees and managers of enterprises. This requires the application of new approaches to the organisation of wages, considering the specifics of enterprises and the experience of domestic and foreign companies, as well as scientists in the field of wages. The establishment of effective mechanisms in the remuneration system, which should ensure social and economic justice in labour relations, plays a significant role in resolving the relevant issues. This is primarily*

the observance, protection and restoration of the subjective rights of employees to pay in case of violation. If most of the outlined general social and economic problems cannot be solved by one means or another, it is not only possible but also necessary to formulate priority purely legal tasks related to the optimisation of legal regulation of wages. The article reflects: 1) the international legal basis for the establishment of an appropriate level of wages, 2) foreign experience in the establishment of optimised wages and 3) scientific and applied approaches to optimising wages in the Ukrainian economy under the influence of European integration processes. During the writing of this article, for a comprehensive disclosure of the issues, to achieve an objective scientific result and formulate appropriate conclusions, the authors used general and special methods of cognition (dialectical, functional, Aristotelian, comparative legal, hermeneutic, method of comparison). The article concludes that the existence of many intra-industry tariff grids in Ukraine in practice only complicates law enforcement. If there really was a Unified Tariff Grid, which would consider all professions, their features and the specifics of working conditions, there would be no need for each sector of the economy to develop its own tariff grid. Currently, there is a situation when within the UTS itself there is a significant number of other internal tariff grids in various areas and industries. The UTS should be developed based on the Dictionary of Occupational Titles, as it is the unified act that contains a list of professions that exist in the economic life of Ukraine. Therefore, each of these professions must be assigned its own tariff coefficient and the corresponding category. Wage growth should depend on the employee's qualifications, level of education, and productivity

Keywords: *wages, tariff system, wages, retribution, labour relations, Europeanisation*

INTRODUCTION

In the context of European integration transformations in Ukraine, labour remains the main source of income for the population, and therefore the issues of wages are important for the paradigm of post-industrial development of all economic systems. Unfortunately, the state currently has a policy of low wages, which has an adverse impact on productivity growth. As a result, wages almost do not fulfill their key function – the reproduction of the energy expended by human resources and the motivation of workers to work productively. The low level of wages compared to the cost of the consumer budget required for the normal reproduction of the worker's labour force is a limiting factor in increasing the purchasing power of the population, and hence the progressive growth of the economy. In this regard, without correcting the institutional environment – formal and informal norms, public ideas about the normal level of market price for labour – stable labour relations between the employee and the employer are impossible, and hence the achievement of high socio-economic results of state development, which, in turn, significantly slows down the process of interest of European partners in the Ukrainian economic space.

The effective operation of modern enterprises is largely determined by the performance of their employees and an effective system of remuneration, which must meet the strategic goals of these enterprises, create a reliable assessment of the contribution of individual employees and units in achieving high results, create conditions for staff tasks, to form loyalty and to be perceived by all employees as fair. Thus, as of today, in terms of active legislative prospects of labour legislation of Ukraine in terms of their European integration, the issues of development and implementation of effective remuneration systems and their optimisation are ripe, which should be aimed at solving problems of domestic economy, ensuring a combination of economic and social interests and goals of individual employees and managers. This requires the application of new approaches to the organisation of wages, considering the specifics of enterprises and the experience of domestic and foreign companies, as well as scientists in the field of wages.

The scientific and theoretical basis of this study were the works of such Ukrainian and Belarusian researchers in the branch of labour law as Yu. M. Burniahina [1], N. M. Vapniarchuk [2], O. Ye. Lutsenko [3; 4], O. V. Moskalenko [5; 6], K. L. Tomashevskyi [7], O. M. Yaroshenko [8–10] and others. Ukrainian and Belarusian scholars have revealed only some aspects of wages, but no attention has been paid to reformatting the wage system. To deeply understand the possible ways to modernise the wage system in Ukraine under the influence of European transformations, the authors in writing this article turned to the scientific work of foreign scientists – M. Camarero, G. D'adamo, C. Tamarit, G. Bosch, K. Goraus-Tan´ska, P. Lewandowski, J. Gautié.

Ukraine has practically created a legal framework for regulating wages in accordance with international labour standards. At the same time, the mechanisms of its state and collective bargaining regulation do not yet work in full. In addition, their functioning is negatively affected by the imperfection of the reform of the monetary and tax system, a clear lag in the establishment of new economic entities, in the creation of a full-fledged system of social partnership etc.

At present, one can observe a fairly broad liberalisation of labour relations, including the issue of establishing a system and the amount of wages. The development of the Ukrainian economy is directly related to the level of wages received by workers and which it affects. The more a person earns, the more needs of different personal nature he can meet. In this regard, there is a need not only for centralised regulation of wages, but also to establish differentiated approaches to determining the latter for certain categories of workers or for all employees of the enterprise, institution or organisation. This creates the need for a doctrinal justification of the strategy of reforming wages in labour relations, in the economic system and society in general.

The establishment of effective mechanisms in the remuneration system, which should ensure social and economic justice in labour relations, plays a significant role in resolving the relevant issues. This is primarily the observance, protection and restoration of the subjective rights of employees to pay in case of violation. If most of the outlined general social and economic problems cannot be solved by one means or another, it is not only possible but also necessary to formulate priority purely legal tasks related to the optimisation of legal regulation of wages.

1. MATERIALS AND METHODS

The impetus for writing this article was a substantial deterioration in the level of wages in Ukraine in recent years. Moreover, during the pandemic the situation became extremely complicated. This is confirmed by a sociological survey conducted by the Razumkov Centre's sociological service from May 21 to 26, 2021, which showed that over the past year, 54% of the economically active population's wages have not changed, 37% have decreased, and only 3% – increased. The reduction of wages is more often indicated by employees of the private sector than the public (respectively 40% and 26%), noting that it has not changed – respectively 52% and 67%, and that it has increased – respectively 3% and 4% [11].

Thus, the authors of the article aimed to explore the international legal basis for the establishment of an appropriate level of wages, to study foreign experience in the establishment of optimised wages and to develop scientific and applied approaches to optimising wages in the Ukrainian economy under the influence of European integration processes. To do this, the authors used a number of scientific papers by both Ukrainian and foreign scientists, international instruments and best practices of economically developed countries in matters of wages.

During the writing of this article, for a comprehensive disclosure of the issues, to achieve an objective scientific result and to formulate appropriate conclusions, the authors used general and special methods of cognition. The scientific research is based on the dialectical method, which contributed to the comprehensive study of wage optimisation processes in the context of European integration changes in labour legislation in their relationship and interdependence, which revealed the current state of the subject. The functional method was useful in clarifying intra-system, inter-system and external system connections in the construction of the wage system. The Aristotelian method was chosen in the process of critical analysis of the legislation in matters related to the legal regulation of wage formation, which helped to develop proposals for improving labour legislation. The method of comparative studies is used to analyse foreign experience in the legal regulation of remuneration systems.

First of all, the authors used the method of comparative law and herme-

neutics to understand the content of wages in international instruments and foreign experience. In particular, the content of the Concept of development of legal bases and mechanisms of functioning of the welfare state in the Commonwealth and the essence of the category "wages", which in world practice is consistent with the key principle of labour relations – remuneration. This means that all employees are entitled to a fair remuneration that will ensure their adequate standard of living. Apart from the obligation of the employer to pay for the results of the employee's work, there are also other obligations of material content. They relate to costs that are mainly aimed at the protection of labour and health of the employee or to ensure a minimum standard of living, including downtime, i.e., suspension of work caused by lack of organisational or technical conditions necessary to perform the latter, inevitable force or other circumstances (force majeure, etc.).

During the establishment of scientific and applied approaches to the optimisation of wages in the Ukrainian economy under the influence of European integration processes, the authors used the laws of dialectics, applied Aristotelian and functional methods of scientific research. Based on these methods, the authors were able to identify effective approaches to improving the legal regulation of wages in Ukrainian enterprises. Furthermore, the authors concluded that the system of calculating super-tariff elements of salaries of state employees (allowances, surcharges, and bonuses of a stimulating and compensating nature) requires further improvement towards developing progressive motivational systems with particular understandable indicators and methods, their calculation and accrual, which will not depend on the changing mood of the management of the enterprise, institution, or organisation.

2. RESULTS AND DISCUSSION

2.1. International legal basis for the establishment of an appropriate level of remuneration

The key principle of the social state, around which the entire system of social and economic rights is built, is the provision formulated in Part 1, Article 25 of the Universal Declaration of Human Rights [12]: "Everyone shall have the right to such a standard of living, including food, clothing, housing, medical care and necessary social services, as is necessary to maintain the health and well-being of themselves and their family, and the right to security in the event of unemployment, illness, disability, widowhood, old age or other loss of livelihood due to circumstances beyond their control". This principle is developed in Part 1 of Article 11 of the International Covenant on Economic, Social, and Cultural Rights [13], ratified by the decree of the Presidium of the Supreme Soviet of the Ukrainian SSR on October 19, 1973 [14]: member states hereunder not only recognise the right of everyone to an adequate standard of living for them and their family (including adequate food,

clothing, and housing) and to a steady improvement in living conditions, but also undertake to take appropriate measures to ensure the exercise of this right, while recognising the importance of international cooperation based on free consent. These provisions were further developed in the European Social Charter (revised) (1996) [15], ratified by the Law of Ukraine of September 14, 2006 [16], according to which the Member States of the Council of Europe agreed to ensure the social rights mentioned in these documents to improve the standard of living and social well-being of their population.

The welfare state is characterised by a constant dialogue with man in the fields of politics, economics and culture. The basis of material security of each citizen is the innovative development of information technology, which arose as a result of scientific and technological progress and serve as a means of further development of the latter. Innovative development enriches the consciousness of the population, its social and political interests, requirements, which contributes to changing the functioning of state institutions in various fields.

However, it is not necessary to idealise the welfare state, but we must first consider that the implementation of the above is associated with certain negative aspects, namely: a) the possibility of replacing temporary measures of radical solutions to certain social problems; b) in an attempt by the State only to mitigate the social consequences of its own failed or unpopular reforms; c) with excessive public spending on the social sphere, which can lead to crises in the economy; d) with the presence of possible excessive social claims of the population, which may weaken the implementation of the principle of citizens' own responsibility; e) with the acquisition by the self-proclaimed state of new social, sophisticated, perfect forms of control over society, which strengthens the role of state power in people's lives; e) with the economic dependence of the citizen on the state, which paralyses and disorganises the social process [17].

The concept of formation of legal bases and mechanisms of functioning of the welfare state in the Commonwealth, adopted by the Interparliamentary Assembly of the CIS member states on May 31, 2007, interprets the welfare state as legal and democratic, which proclaims man the highest value and creates conditions and self-realisation of creative (labour) potential as a person [18]. This international legal document calls the criteria for assessing the degree of sociality of a democratic state governed by the rule of law:

– observance of human rights and freedoms;

– conducting an active and strong social policy;

– ensuring decent living standards for most citizens;

– targeted support for the most vulnerable segments and groups of the population, reduction and further eradication of poverty;

– guarantees of creation of favourable conditions for real involvement of citizens in development and social examination of decisions at all levels of the power and management;

– observance of the rights and guarantees that recognise and develop the system of social partnership as the main mechanism for achieving public consent and balance of interests of the employee and the employer in the regulatory role of the state;

– guarantees under which any business entity or owner must bear specific social responsibility;

– social justice and social solidarity of society, ensured through the development of shareholder ownership of employees, as well as through tax redistribution of income from rich to poor and a greater workload of the most able-bodied members of society to help the less able;

– gender equality of men and women;

– involvement of all citizens in the management of state and public affairs, employees – in the management of production, the development of social partnership;

– observance of rights and guarantees aimed at strengthening the family, the spiritual, cultural and moral development of citizens, especially young people, their careful attitude to the heritage and succession of generations, the preservation of the identity of national and historical traditions [19].

According to Article 1 of the ILO Protection of Wages Convention No. 95 [20], ratified by Ukraine on August 4, 1961 [21], the term "wages", whatever the name and method of calculating the latter, means any remuneration, earnings, established by agreement or national law, which may be calculated in money which the employer must pay to the worker for work already performed or to be performed, or the same for services that have already been provided or should be provided. This definition corresponds to the definition of "salary", provided in Part 1, Article 94 of the Labour Code of Ukraine [22] and in Part 1, Article 1 of the Law of Ukraine "On Remuneration of Labour"[23]: it is a remuneration, calculated, as a rule, in monetary terms, which the owner or his authorised body (employer) pays to the employee for the work performed by him. The Constitutional Court of Ukraine has concluded that the terms "wages" and "remuneration", which are governed by the laws governing employment, are equivalent in terms of the parties who are in employment, the rights and obligations to pay, the conditions of their implementation and the consequences to be incurred in the event of failure to fulfill these obligations.

The content of the category "wages" is consistent with one of the principles of labour relations, such as remuneration, which is reflected in Paragraph 4, Part 1 of the European Social Charter (revised) of May 3, 1996 [24], ratified by the Law of Ukraine No. 137-V of September 14, 2006 [16], according to which all employees are entitled to a fair

remuneration that will ensure their adequate standard of living. Apart from the obligation of the employer to pay for the results of the employee's work, there are also other obligations of material content. They relate to costs that are mainly aimed at the protection of labour and health of the worker (employee) or to ensure a minimum standard of living, including in the event of downtime, i.e., suspension of work caused by lack of organisational or technical conditions necessary to perform the latter, by inevitable force or other circumstances (force majeure, etc.). These obligations comply with the minimum state guarantees established in Article 12 of the Law of Ukraine "On Remuneration of Labour" [23], in particular, regarding the payment of downtime, which took place through no fault of the employee.

2.2. Scientific and applied approaches to the optimisation of wages in the Ukrainian economy under the influence of European integration processes

In today's European integration environment, when developing a strategy and policy of remuneration in enterprises should consider 3 main criteria, which (a) must be internally fair (employees must be paid in proportion to the relative value of their work), (b) competitive (employee wages must correspond to the market price of the position), and (c) create personal interest in employees. The fourth goal, which in practice often remains hidden from line managers, is to facilitate wage management. However, at the same time the implementation of the first 2 criteria is often impossible, as a result of which the organisation has to sacrifice something for the sake of another; achieving the third goal means a high degree of individualisation, which complicates the implementation of the fourth goal [25].

In modern conditions, the system of remuneration at industrial enterprises of Ukraine is of great socioeconomic importance. To ensure its flexibility, it is advisable to apply an appropriate approach, which is to develop a strategy for forming such a system, i.e., the direction of certain actions aimed at achieving the goals of the latter to provide staff, its preservation and motivation to work in accordance with strategic objectives and resources. The correct choice of strategy for the establishment of the remuneration system is the basis of its effective functioning [26].

Effective approaches to improving the legal regulation of wages at Ukrainian enterprises can now be seen:

1) coordination of the process of establishment of the remuneration fund with the general goals of enterprise development, its corporate and personnel strategies. This approach, in particular, provides for the establishment of a balanced system of indicators as well as the introduction of a rating system of jobs based on their value to the company [27];

2) optimisation of the structure of the wage fund. As you know, the payroll is structurally composed of such components as (a) the basic salary (remunera-

tion for the work of the employee, calculated in accordance with certain labour standards), (b) additional wages (remuneration for work in excess of certain norms, for special working conditions or achievements in employment), (c) other incentive and compensation payments. The shares of each of these elements in the general fund of remuneration vary depending on the industry and the specifics of a particular enterprise. However, according to O. S. Litvinova and O. O. Sukach, in general, the Ukrainian economy contains a violation of the rational structure of this fund, which leads to a decrease in the labour interest and motivation of employees. Based on the study of foreign experience, scientists consider the share of basic wages optimal at the level of 80–85%, which will provide a stimulating value [28];

3) the use of flexible forms of remuneration and their differentiation depending on the category of personnel of the enterprise. These forms will contribute to a differentiated approach to the establishment of wages of employees in accordance with the level of their labour efforts, characteristics, qualifications, as well as individual labour results, which will ensure the implementation of the incentive function of wages. At the same time, it is advisable to establish different forms and systems of remuneration for different categories of staff, considering the specific features of their work [29]. In the scientific economic literature, it is argued that the strengthening of income differentiation of the population in Ukraine is primarily associated with different opportunities for assigning income from labour, property, capital, and entrepreneurial activities, which are distributed among the owners of production in the form of wages, rent, interest, and profit. Ukraine has not created conditions for equal access of broad sections of the working population to these factors, which prevents the real opportunity for every citizen to fully realise their economic and social functions [30].

4) ensuring clarity, clarity and transparency of payroll mechanisms. Establishing clearly defined and transparent criteria for calculating wages can solve 2 problems at once. On the one hand, the presence of determined and consolidated criteria in the Regulation on Remuneration of Labour will contribute to the unification of the current approaches to calculating wages, reduce the labour intensity of the relevant process, and on the other hand, employees, clearly understanding the process of forming their earnings, will be focused on achieving the appropriate criteria, which will stimulate the growth of productivity and quality of their labour. We can talk about the dual role of the state in the legal regulation of labour relations on wages. First, the state actually undertakes to establish state guarantees for the rights of workers and employers, to control and supervise their implementation, to ensure the right of everyone to protection of his rights and freedoms, including in court. Secondly, in modern conditions the state in the person of certain state bodies actually

acts as a participant of social partnership. The result of its implementation of the functions of a participant in such a partnership is the adoption of collective decisions agreed by the social partners. Thus, the state acts in 2 interrelated guises – as a legislator and as a participant in social partnership. Given this, its role in streamlining labour relations, including wages, is unique and has no analogues in any field of law [31];

5) introduction of an effective mechanism for assessing the characteristics of employees and their labour contribution. The use of the incentive function of wages is not only to ensure the growth of productivity of the latter, but also in their motivation to improve their skills. That is why a periodic staff appraisal system, the results of which will affect the level of remuneration, will encourage workers to support and improve their skills to increase potential earnings. The authors of the present study believe that when performing a comprehensive assessment, it is advisable to factor in the indicators of labour performance, behaviour (compliance with discipline and corporate culture, relationships with colleagues, subordinates, and managers, etc.), as well as the qualification achievements of the employee (category, qualification level, higher education, mastery of a foreign language, etc.). It is clear that an adequate system of such assessment to ensure its objectivity involves the definition of relevant criteria for each category of workers.

The importance of the mechanism of formation of the wage fund in terms of efficiency of any enterprise is quite difficult to overestimate, so the development of effective measures to improve it is an important lever to ensure the stability and competitiveness of the business entity. A comprehensive approach to the implementation of the proposed measures will increase the efficiency of both the establishment of the payroll and the activities of the organisation as a whole [32].

Currently in Ukraine there are 2 parallel systems of remuneration of public sector employees: one is based on the actions of the Unified Tariff Grid; the second is regulated by regulations that can be attributed to special legislation governing the remuneration of certain categories of workers, namely: civil servants, judges, law enforcement officers, prosecutors, etc.

None of the current systems of remuneration of public sector employees is effective, and therefore there is an objective need to improve the system of their wages. The main task of the state in this direction is to steadily increase the salaries of state employees, considering inflation, as well as the adoption of such regulations, which should contain effective measures to improve the financial situation of these workers. The income policy of the latter should be aimed at reviving key industries for development (science, education, state-building, health care, industry, high technology, etc.), i.e., those that today, during the 3rd industrial revolution, have become a reliable foundation of economic growth worldwide.

Let us further define other tasks that are no less important for the state.

The authors of this study believe that special attention should be paid to the problem of establishing the optimal range of the tariff grid. After all, for the construction of the system of remuneration of state employees, depending on their qualifications, the range of the tariff grid is extremely important. This is explained by the fact that the division of the levels of tariff coefficients, and hence the rates of workers of intermediate levels of qualification, depends on the accepted range. The question of the UTS range is closely related to 2 factors – the difference in the complexity of work (the degree that objectively determines this range) and the size of the rate of the first category: the higher this size (other things being equal), the more reasons to narrow this range. The principle of grid compression is positive in terms of mitigating contradictions in the remuneration of state employees in the event of a financial deficit. Due to the re-tariffing of employees by category and the introduction of over-tariff surcharges in the structure of the latter, an increase in the minimum wage is achieved, and on this basis – the rates of wages by category.

This is how the advantages are created for raising the wage rates of the main contingent of public sector workers, i.e., for those who will be charged at medium and higher levels. Unjustified convergence in the salaries of persons who perform simple and complex work, which arose as a result of a long-term policy of raising the minimum wage, is automatically eliminated. The system of calculating super-tariff elements of salaries of state employees (allowances, surcharges, and bonuses of a stimulating and compensating nature) requires further improvement towards developing progressive motivational systems with particular understandable indicators and methods, their calculation and accrual, which will not depend on the changing mood of the management of the enterprise, institution, or organisation.

The authors of this study believe that the current Unified Tariff System should be radically changed, as it lacks the appropriate logic and consistency. And the worst thing is that it is not aimed at ensuring fair remuneration of workers for the performance of a particular job. First, the very structure of the Scheme of tariff categories of positions is unclear, as it is based on certain areas of the economy, within which the ranges of categories for UTS (in particular, education, science, health, social protection, theaters, concert organisations), followed by specific enterprises, institutions and organisations, namely: the National Television Company of Ukraine, the National Radio Company of Ukraine, the Parliamentary TV Channel Rada, the State Television and Radio Company World Service Ukrainian Television and Radio Broadcasting, the National Agency for Quality Assurance in Higher Education, Educational Ombudsman and the Education Ombudsman Service, State Institutions "All-Ukrainian Youth Center"

and "Ukrainian Institute for Educational Development", UTS.

This approach is unclear, because if we take as a basis the direction of economic activity, the development of the UTS should be guided by the Classification of Economic Activities. If you develop for each individual enterprise, institution or organisation separately UTS, it should be done at the local level. However, from our point of view, the UTS should be developed exclusively at the state level, and at the local level an approach should be developed to adjust the salaries of employees, considering labour intensity, special ranks, awards, achievements and other characteristics that may serve good reasons for accrual and payment of allowances and surcharges.

Second, the qualifications assigned to many professions are illogical and unfounded. For example, according to the current UTS, the head of the office and the head of the farm have 5–8 grades, while the head (director) of an out-of-school educational institution has 12–16 grades, although according to the Dictionary of Occupational Titles these positions belong to one group. So why is there such a striking difference in the range of qualifying ranks? Here is another example: in the Scheme of tariff categories of jobs (professions) common to all budgetary institutions, establishments and organisations, it is very difficult to understand the logic of assigning categories. In particular, those employees who perform simple unskilled work are assigned the 1st or 2nd tariff category. At the same time, employees who perform skilled (complex) work are assigned the 2nd-5th tariff category. So how can the 2nd category be intermediate? After all, different in complexity work logically cannot have the same category. The same applies to low-skilled and highly skilled workers, because there is an intermediate 3rd category. The whole UTS is completely imbued with such controversial and illogical ordering.

We propose to develop the UTS based on the Dictionary of Occupational Titles, as it is the unified act that contains a list of occupations that exist in the economic life of Ukraine. Therefore, each of these professions must be assigned its own tariff coefficient and the corresponding category.

Currently, according to the current ETS, the calculation of salaries (tariff rates, wage rates) is based on the size of the salary (tariff rate) of the employee of the 1st tariff category, set at the subsistence level (i.e., 2102 UAH) for able-bodied persons on January 1, 2020. Thus, if calculated in this way, only workers whose professions correspond to the 13th category (out of 25) have a minimum wage. This category has a tariff coefficient of 2.27, respectively, the official salary (tariff rate) is 4772 UAH, while the minimum wage on January 1, 2020 is 4723 UAH. In other words, until the 12th category, all employees do not receive even the minimum wage for their salaries (tariff rates). The Cabinet of Ministers of Ukraine has imposed on

employers the obligation, so to speak, to keep all these salaries up to the level of the minimum wage. But if the size of the 1st tariff category had been calculated and established at the legislative level economically, such a situation, admittedly, would not have arisen. Moreover, this is the state of affairs that provokes employers to commit a number of violations: the issuance of salaries in "envelopes", tax evasion, non-registration of employees under an employment contract, and others. The analysis of the provisions of the UTS showed that the 12th category contrains many managers, professional doctors and representatives of other professions, who do not receive even the minimum wage (salary rate), and employers have to correct this situation at their own expense.

2.3. Foreign approaches to the formation of optimised wages

Countries with a long history and a developed market economy have extensive experience in operating a variety of pay systems. They have distinctive features, in particular: a) there is a joint and several salary in Sweden; b) in Japan – payment for seniority; c) in Germany, stimulating productivity growth; d) in the USA – payment for qualification; e) in the United Kingdom, payment under individual contracts; (e) in France – individualisation of wages; g) in Italy, the payment of individual and collective allowances to the sectoral tariff rate and the increase in the cost of living. At the same time, there is a general focus of wage systems on improving production efficiency. However, in all cases, labour standards are set directly at enterprises. The latter receive practical assistance in this regard from non-profit and private counselling centers and associations, which are professionally engaged in labour rationing issues and provide appropriate software using modern computer technology. In a number of foreign countries, labour law establishes: a) rules for the payment of holidays and vacations, downtime, marriage and other guarantees and compensatory payments; b) the procedure and frequency of salary payments, ways to protect workers' earnings from excessive deductions; c) indexation of wages, etc. Many of their enterprises (organisations) use hourly wages to improve the quality of products, rather than its volume [33].

Over the past 15 years, real wage trends across the Eurozone countries have been very diverse, reflecting differences in aggregate unit labour costs [34, p. 25]. The mechanism of state regulation of wages in the EU is based on the ratio of such components as: (a) the minimum wage, the limits of its growth during inflation, (b) tax policy (government regulation), (c) the general procedure for income indexation, (d) forms and systems of remuneration (in particular, collective bargaining at the sectoral level), (e) the rates of tariff rates, salaries, surcharges and allowances (collective agreements), (e) the average wage (labour market) [35]. Of the 28 European Union member states,

22 had minimum wages established at the national level, for example, in Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. We focus on this group of countries in our paper. The other EU countries had minimum wages established at the sector (Austria, Denmark, Finland, Italy) or occupation (Cyprus) level, usually as a result of collective bargaining [36, p. 297].

In France and the Netherlands, collective agreements fix minimum wage levels at the industry level, which are then usually extended by the government to uncovered workers throughout the industry. These agreements not only set a minimum pay floor but also establish a complete pay scale with different rates for different types of jobs and employee characteristics (mainly skills and seniority) and, in many cases, additional industry specific premiums and bonuses as well as some fringe benefits. In Germany, in a small number of industries such as construction, cleaning and postal services, the government declares the minimum wage set in the industry collective agreement as binding within the industry but generally does not extend other terms of the agreement. In Denmark, the social partners agree on a national minimum wage floor, which is enforced by unions and employers. Finally, the United Kingdom, the United States, France, and the Netherlands have a legislated national minimum wage rates (NMW in the following), often called "statutory" or "legal" minimum wages.12 In France and the Netherlands, if the minimum pay rate set by the industry collective agreement is lower than the NMW, the latter must apply [37].

Three characteristics of a NMW play key roles in shaping the wage distribution: its coverage, its level, and its implementation. One may define the legal (or "formal") "inclusiveness" of a NMW by the extent of its legal coverage. This coverage does not differ much across the four countries in this study with a NMW, since almost all industries and firms are covered. But there are also some special rates for young workers that constitute legal "exit options" (i.e. legal ways to avoid and/or circumvent stricter regulations). In the Netherlands, these youth rates are very low and, in that sense, the NMW in that country is less "inclusive" than it is in France, the UK and the US [38, p. 313–317].

As we can see, the countries of the European Union have abandoned administrative and centralised planning mechanisms and methods of wage setting, which has opened a wide way for social dialogue. Wage issues in them are usually resolved through collective bargaining or individually at the enterprise level. At the enterprises of the EU countries today we observe a tendency to individual wage setting, which is reduced to the following, such as: a) determination of a certain amount of the minimum annual salary for each employee, considering all remuneration; b) unequal wage increases within the proposed increase in its total fund; c) refusal to index wages due to

rising prices; d) considering the merits of employees and not their seniority in determining personal allowances; e) regulation of the procedure for considering these merits.

The experience of Japan in economic stimulation of labour, investigated by V. V. Baranov, deserves special attention. One of the factors of successful development of the Japanese economy is an effective system of such incentives. It integrates properly thought-out and consistently used forms and methods of increasing the labour activity of staff (especially in large enterprises), which by their nature are divided into 2 closely related groups of economic and psychological incentives. In the framework of this scientific work we will consider in more detail the group of economic incentives. As you know, the main economic incentive to increase the labour activity of workers is wages. Apart from the basic salary, employees receive cash bonuses twice a year (summer and winter), the amount of which depends on the company's performance. An effective incentive to increase such activity of employees is to provide them with material assistance in the form of various one-time payments – for housing, some utilities, food, clothing, transport, cultural and medical expenses. These payments are one-time and are provided only in exceptional cases as a kind of charitable assistance.

Along with the in-house system of severance pay in this country, there are a number of national types of social insurance, which must cover all enterprises, even with the number of staff of 5 people. This is a comprehensive national social insurance system, which includes both social insurance and pensions. Unlike in-house severance pay systems, all types of insurance are paid. Insurance funds are formed at the expense of mandatory monthly contributions of the directly insured, as well as enterprises and the state [39, p. 141–144].

The pay system in Japan is based on lifelong employment, rotation, reputation and training of the employee in the workplace. It is these factors that directly affect the formation of the Japanese wage system, making it a powerful factor in the country's economic growth. This system of remuneration in the country began to develop companies selling Japanese electrical goods. Its specific feature was the distribution of the basic and additional part of the salary, which was in the proportion of 80% + 20%, and the increase in remuneration for qualifications and work results was carried out only under the condition of on-the-job training. These and other concepts of remuneration have served as a prototype for the incentive models used in Japanese enterprises today. The formation of total earnings in Japan can be influenced by 6 main factors: a) age, experience, education (this is the type of wages that exist in metallurgy); b) position, profession, responsibilities; c) working conditions; d) results of work; e) assistance for family, housing, transport; f) regional aid

(considering the specifics of the region where the enterprise is located).

Currently, 85% of businesses in Japan pay family benefits. In the banking sector, the level of assistance is the highest – 37 thousand yen per dependent. Transport benefits are paid by 90% of enterprises (travel to and from work by bus, train, etc.). At the same time, employers in Japan adhere to the regime of wage savings. If, for example, they believe that the work is not so far from the place of residence, transport assistance is not paid. Once a year (April 1), the wages of workers in all Japanese companies traditionally increase. This is at the request of trade unions and by mutual agreement with employers in accordance with the principles of social partnership of tripartism.

With all the variety of Japanese models of remuneration, it is possible, from the point of view of some scholars, to identify 5 main common features [40, p. 179–197].

1. The first is the dependence of remuneration on the length of service and age of the employee – a system of payment for years of service. This system is an effective method of control, in which pay and promotion are proportional to the age of the employee and the number of years of continuous service. The expectation of promotion, which in the future depends on seniority, helps to consolidate the employee in the company and expand the use of the labour market within the organisation. The category "lifelong employment" does not mean the conclusion of an agreement on lifelong employment. In reality, there are no enterprises where remuneration is determined only by age and number of years of continuous service, as remuneration is only partly determined by age and number of years of continuous service, and partly by a person's ability to perform official duties. However, it should be borne in mind that in favor of the promotion of a person in proportion to age and number of years of continuous service is also evidenced by the fact that his qualifications increase in proportion to age and number of years of the latter.

Assessment of the employee's ability to perform their duties is carried out not only by the complexity of the work performed by him and the degree of its performance, but also by hidden abilities, considering the disclosure of which in another assessment creates a strong incentive for their development. Assessment of a person's ability to perform to perform the duties assigned to him – the prerogative of the management of the enterprise. The system of payment for years of service itself stimulates competition between employees.

The system in question is characterised by 3 important elements in determining the amount of wages: (a) concern for the cost of living, (b) encouraging him to increase productivity and (c) stimulating the development of their own abilities. There are very few piece-rate workers in Japanese enterprises; there is no such method of inducing work as a threat of dismissal by the boss. As you can see, it

is believed that employees of Japanese companies have a strong incentive to work, because the existing system of remuneration for years of service actively encourages them to professional growth, and the assessment of their ability to perform their duties is carried out by management.

The effectiveness of the system of payment for years of service also lies in the fact that it significantly contributes to the creation of an environment of cooperation and mutual assistance, as well as that it establishes a direct link between labour and wages and forms a flexible attitude of workers to relocation. Thus, the dependence of wages in this country on age and length of service should not be taken literally. The Japanese constantly emphasise that this is just an outer shell, which is deceptive. In reality, the salary increases not for the length of service and age of the person, but for his work skills and professionalism, which, admittedly, increase with increasing length of service. If such growth does not affect the increase in productivity and skills of the employee, the amount of remuneration in this case (which is extremely rare) does not increase.

2. The second feature of the Japanese system of remuneration of workers is the dependence of the latter on the so-called peaks of life. This clearly indicates the real concern of the state for a particular person. The employee feels and knows that in difficult life situations he is not alone, that the company will help him financially. Living in such conditions is much calmer and more reliable, and therefore the appropriate attitude of the employee to the enterprise is formed and his self-sacrifice is formed. Thus, the Japanese economy can be described as socially oriented.

3. Apart from seniority and qualifications, an increasing influence on the growth (or decrease) of wages has an indicator of the actual labour contribution of the employee, i.e., an indicator of the actual results of their work. This is the third feature of the wage system in Japan. The mechanism of this relationship at different enterprises of the state is different. For example, there are certain gradations in groups of workers – for "white" and "blue collar". In other words, under equal conditions (experience, education, position, etc.) employees who are in the same group, depending on the actual results of work are attributed to different grades for pay. As of today, in Japan, wages are more than 60% of total wages, and this trend is growing.

There is a certain variant of interrelation of payment of work of workers with actual results of their work. According to the results of the latter and, accordingly, the level of payment, all employees are divided into 5 ranks. Notably, this classification is mobile. Each employee of the company is faced with the task set by him and his immediate supervisor. After 6 months, based on the results of her work, the employee independently assesses to which salary rank he belongs. If he completed the task by 120% – to a special rank (highest) – "5",

if 100% – "4", 80% – "3"; 60% – "2" and 40% – "1". If the estimates of the employee and his manager coincide, this rank is assigned to the person for the next 6 months. If the assessments are different, an interview is conducted, the parties present their arguments for their assessment and find a common solution.

4. Dependence of managers' salaries on the results of the enterprise is the fourth feature of the Japanese remuneration system. All workplaces use a system of so-called floating salaries. For example, the basic rates of the plant director, shop managers, other managers vary depending on the dynamics of the cost of production, the volume and range of production and other indicators for which a manager is responsible. By the way, the head of the shop has a salary of 700 thousand yen. If his shop has reduced the cost of production by 10%, the salary will automatically increase by the same 10%, etc. These conditions are determined by the provisions on remuneration at a particular enterprise. By the way, the President of the Japan Center for Productivity of Socio-Economic Development, who previously headed a large oil company, gave the following example. Once the company was in crisis, and he was forced to convene all managers to discuss with them the size of the reduction of their salaries and bonuses (these measures in Japan are a priority and mandatory for every company). As a result, the head of the company reduced his salary by 20%, senior managers – by 15%, middle – by 5–10%. And this was done voluntarily, based on a survey of each leader. At the same time, earnings for all workers were increased by 30%. Due to this adjustment of the salaries of managers and employees in one or two months, this company was rehabilitated, and no staff reductions were made. In Japanese companies, they prefer to transfer problems better to managers than to workers.

5. The fifth feature of the wage system in Japan is the presence of one of the world's lowest wage differentials (it is lower only in Sweden – 1:3). This means that the lowest-skilled worker receives only three times less than the highest-skilled worker. In this country, a locksmith, salesman, engineer, doctor receive 4–5 times less than the president of the company, as an example, in the company "Nissan", where the CEO receives 5 times more than an employee of the lowest qualification [40, p. 182].

So, is it good or bad? Is it possible to use this experience in Ukraine? From our point of view, this is one of the 5 named features of incentives for Japanese workers, namely low differentiation in wages, is unacceptable for Ukraine. So far, this feature (which is this paradox) is inherent in the economy of highly developed countries. If you use this ratio (1:3), Ukrainian companies will have significant problems with highly qualified workers, engineers, directors. As for the 10% of the richest Japanese, their income is only 2.8 times higher than the income of 10% of the poorest [40, p. 197].

CONCLUSIONS

The existence of many intra-industry tariff grids in Ukraine in practice only complicates law enforcement. If there really was a Unified Tariff Grid, which would consider all professions, their features and the specifics of working conditions, there would be no need for each sector of the economy to develop its own tariff grid. Currently, there is a situation when within the UTS itself there is a significant number of other internal tariff grids in various areas and industries. The UTS should be developed based on the Dictionary of Occupational Titles, as it is the unified act that contains a list of professions that exist in the economic life of Ukraine. Therefore, each of these professions must be assigned its own tariff coefficient and the corresponding category.

In Ukraine, the tariff rate is the main initial normative value that determines the amount of wages. Tariff rates set the amount of wages for workers who perform various jobs per unit time. The formation of the tariff grid (salary scheme) is carried out based on the tariff rate of the worker of the 1st category and interqualification (inter-job) ratios of the sizes of tariff rates (official salaries). To differentiate wages according to working conditions, increased tariff rates of the 1st and subsequent categories are set, as well as lists of occupations of employees whose work is paid at higher tariff rates are considered.

Using tariff grids and tariff-qualification categories, the size of tariff rates of specific employees is determined considering their qualifications and the complexity of their work. The higher the level of qualification of the worker, the higher the tariff rate based on which his salary is calculated. Therewith, the number of digits of the tariff grid is not regulated by the state (except for budgetary institutions) and for different organisations and different sectors of the economy it may be different. Tariff rates in many sectors of the economy are differentiated depending on the intensity of the labour process. The tariff rate of an employee of the 1st tariff category may not be less than the minimum official salary (tariff rate), which is equal to the subsistence level for able-bodied persons. Wage growth should depend on the employee's qualifications, level of education, and productivity.

RECOMMENDATIONS

The scientific value of this article is that the authors, based on the understanding of international, foreign experience in the formation of an effective wage system, for the first time identified applied problems of the wage system in Ukraine and revised the approach to its formation. Thus, the authors insist that the tariff rate of the worker of the 1st tariff category cannot be less than the minimum wage. The minimum salary must also be not less than the minimum wage. This, according to the authors of the article, will overcome the burden on employers to pay supplements to the minimum wage. And as for employees,

this approach will be more balanced and fairer.

Inter-job ratios of tariff rates should be based on the unit for which the indicator is taken, not lower than the minimum wage. It is proposed to install them at the state level, based on a factor of 0.02. This will allow implementing a fair and balanced approach to the establishment of salaries, as each tariff category itself has a differentiation depending on the complexity and prestige of the profession.

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ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

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ECONOMIC SOVEREIGNTY AND ECONOMIC SECURITY OF UKRAINE (INTERRELATION AND MUTUAL UNDERSTANDING) IN THE CONTEXT OF THEIR DOCTRINAL AND LEGAL SUPPORT

Abstract. *The purpose of this article is to address current issues of doctrinal and legal security of economic security of the state with the actualisation of issues concerning the relationship between the concepts of "economic security" and "economic sovereignty" in their relationship and mutual understanding. The authors pay attention to the analysis of existing in the national legal doctrines of individual countries scientific approaches to the definition of "economic sovereignty", clarify its main features, analyse the scientific approaches of domestic and foreign researchers to define the concept of "economic security" and on this basis own vision of the instrumental content of these definitions. It is argued that the concept of "economic sovereignty" is primary in relation to the concept of "economic security". The article examines the national systems (models) of economic security of the state, including, in particular, American, Japanese, Chinese, models of institutional entities (in particular, the EU), models typical of countries with economies in transition. The authors found that Ukraine is characterised by a system (model) of economic security of countries with economies in transition, which is fragmented and inconsistent in its construction, which ultimately affects the state of economic*

security of the state as a whole. It was found that the main goal of Ukraine at this stage of its development in the context of building a national model of economic security is to create an effective system of means to overcome or minimise existing or potential threats, especially in the context of globalisation of trade and economic relations. The paper emphasises the need to borrow positive foreign experience of legal support of relations for the creation and implementation of national systems of economic security of the state to gradually transform Ukraine into an important participant in the processes of international economic security

Keywords: *state sovereignty, economic sovereignty, economic security, national security systems, national interests*

INTRODUCTION

Today's economic security is a state of development of the economic system of the state, in which it must be maximally protected from existing external and internal threats and can develop without much deviation towards the deterioration of economic processes, even if they are actively influenced. Achieving the desired state of economic security, which would ensure the balanced development of the state economy is impossible without reference to the category of "economic sovereignty", as the content of this definition is specified through the definition of basic sovereign rights of the state, including the right to constitutional and/or legislative principles of national economic policy; the right to be an equal participant in international economic relations; the right to respect for national economic interests, etc. Fulfilment of the key task for any state – ensuring economic sovereignty – is impossible without recourse to the studied categories, as ensuring the balanced development of the state's economy involves the existence of a separate system of social relations in which the state is both regulator and participant and subject of control and monitoring the functioning of such a system. Furthermore, the complexity of building national economic systems in the context of ensuring economic sovereignty and economic security of the state as interrelated categories shows that the process of achieving them will be multifaceted and extremely differentiated, which ultimately is objectified in a certain model of relations. Analysis of the experience of doctrinal and legal support of economic security of developed countries also convincingly proves that this process is characterised by increasing tendencies to the constant expansion of the scope, range and scale of tasks [1].

It should be noted that the state economy is the environment of functioning of participants in economic relations of all forms of ownership without exception, and therefore in a democratic, legal state, the possibility of only imperative influence on economic processes is excluded, in connection with which the state's desire to achieve the common good, an indispensable element of which is unques-

tionably considered economic security as a certain state of the economy, and therefore economic stability in society, does not justify its unlimited interference in the activities of subjects participating in these relations. This, however, does not mean that the state should not create appropriate legal conditions for the effective functioning of business entities, for the development of all sectors and sectors of the national economy, for the development of economic subsystems of the regions (region) of the state, balanced development of the economic system of the state as a whole, so that the very model of their existence allows to achieve the desired state of ensuring economic sovereignty and economic security. In a state governed by the rule of law, relations between subjects in any potentially significant sphere of public life are subject to legal regulation. Therefore, the state has a monopoly on the establishment and protection of law and order, which is actually embodied in its regulatory influence. The main purpose of this legal order in the context of our research should be considered doctrinal and legal support of economic sovereignty and economic security of the state, which is objectified through the creation of a mechanism (system) of legal support of economic sovereignty and economic security. The formation and effective functioning of this mechanism in a democratic state is conditioned by the use of exclusively legal means, as the law itself is the primary basis for ensuring the necessary regulatory influence of any social relations, including relations to ensure economic sovereignty and economic security. According to V. V. Yakovenko and A. S. Peshkova, "the economic security of the state is ensured by a nationwide set of tools and measures aimed at the permanent development of the state and involve a large number of actors in this process. This testifies to the need for the existence of a system of legal support, because only the law is the only way to legitimise the models and forms of social relations" [2]. Some experts emphasise that ensuring the economic sovereignty and economic security of the state can and should take place exclusively within the framework of national legislation and only by means established and enshrined in law, in particular by means of state coercion. This opinion is held in particular by L. I. Abalkin [3], I. I. Bogdanov [4], V. K. Senchagov [5] and others. The positions of these scholars demonstrate the dependence of legal doctrine on national policy in the field of economic sovereignty and economic security. Today, the predestination of the legal doctrine by national interests, in particular in the field of ensuring economic sovereignty and economic security, can be traced to the example of "trade wars" unleashed by the United States with China, the Russian Federation, the European Union and a number of other countries [6] and which are implemented through trade sanctions and protectionist means provided for at the level of national legislation.

The relevance of the study at the present stage is also due to the fact that

the domestic legal doctrine has not yet formed the generally accepted concepts of "economic sovereignty" and "economic security", there is no unified methodological approach to elaborating the components of these definitions, not developed theoretical and methodological tools, the place of the categories "economic security" and "economic sovereignty" in the domestic legal science is not defined either.

The priority of this work is to address the actual problems of doctrinal and legal support of economic sovereignty and economic security of Ukraine with the updating of issues regarding the role of domestic law and legislation as a determining basis in ensuring economic sovereignty and economic security of the state, among which the most attention deserves: optimisation of national legal support of economic sovereignty and economic security and its unification with the legislation of individual states of the world, having a positive experience of building effective national systems of ensuring economic sovereignty and economic security; improvement of national policy in the field of legal support of economic sovereignty and economic security; clarification of Ukraine's place in the world system of ensuring international economic security.

The theoretical framework of this study included papers by researchers of such as V. M. Heiets, V. S. Zagashvili, V. A. Lipkan, H. A. Pasternak-Taranushenko, V. G. Pylypchuk, V. T. Shlemko, and others.

Certain aspects of ensuring the economic sovereignty and economic security of Ukraine were investigated in the studies of such foreign researchers as A. Anghie, C.-J. J. Chen, M. Kahler, as well as Ukrainian researchers: S. V. Mochernyi, M. M. Khapatniukovskyi, O. F. Skakun, and others. At the same time, in the domestic legal science the complex analysis of questions of doctrinal and legal maintenance of economic sovereignty and economic security of Ukraine in their interrelation and mutual understanding was not carried out.

1. MATERIALS AND METHODS

The methodological basis of this study includes the following general and special research methods: dialectical, comparative law, system-structural, hermeneutic, theoretical and prognostic, and others. The basis of the research methodology is the dialectical method as the main philosophical method that allows to consider and know the subject of research through the prism of its development, changes that occur with it, and the connections it has with other phenomena. The dialectical method of cognition accompanied the whole process of this scientific research and allowed to consider the issues of economic sovereignty and economic security of Ukraine in the context of their doctrinal and legal support. In particular, this method allowed to reveal in detail the essence of such complex phenomena as economic sovereignty and economic security. Furthermore, the dialectical method was

used to comprehensively study the principles of formation and functioning of the mechanism (system) of legal support of economic sovereignty and economic security of Ukraine, linking the categories of "economic sovereignty" and "economic security" with domestic legal doctrine, domestic legislation. As a result of resorting to this method, the issues of economic sovereignty and economic security of Ukraine in their relationship and mutual understanding were studied.

The comparative legal method helped to reveal the approaches inherent in the legal systems of individual foreign countries to the features and patterns of legal regulation of relations to ensure economic sovereignty and economic security of the state and identify opportunities to use their positive experience to improve domestic legislation in this area. This method is the main method in the system of methodology of comparative legal research and acts as a set of methods and techniques for identifying the origin, development, functioning of different legal systems based on a comparative study of general and specific patterns. This method is described by comparing legal concepts, phenomena, processes of the same order and determining the similarities and differences between them. This method was useful for the analysis of scientific views and experience of foreign countries within this issue. By addressing him, it was found that the analysis of foreign experience in regulating the principles of national economic security by individual states and institutional entities in general allows us to conclude on the permanence and priority of purely national interests. Even regardless of the involvement of countries in the system of international economic security, the focus is mainly on domestic problems and threats. And only the overdeveloped countries: the United States, Japan, and some EU countries – among the main tasks of ensuring economic sovereignty and economic security are considering the protection of their own foreign economic priorities.

The use of the hermeneutic method contributed to the interpretation and interpretation of regulations and scientific works of scientists, which formed the basis for the formulation of the terminology of this study. Thanks to the hermeneutical method, it became possible to collect and record material on the subject of this research, which allowed identifying its meaning, this method of research became exactly the tool with which it was possible to solve the issue of meaningful content of the concepts of "economic sovereignty" and "economic security" in their interrelation and mutual understanding. With the help of the system-structural method, the place of Ukraine in the architectonics of the system of ensuring international economic security was determined, namely, it is a state with a transition economy, the system of economic security of which is characterised by the fragmentation of the implemented national policy, aimed mainly at stabilising economic processes

after independence and a rather weak instrumental content of this system.

The theoretical and prognostic method was the basis for developing forecasts for further development of domestic legal doctrine in the field of economic sovereignty and economic security of Ukraine, which allowed formulating a number of criteria and goals for Ukraine's development as a participant in international economic security. Furthermore, the appeal to this method allows improving the quality of legislation in this area in the future, justifying the need to make changes and additions to them to build a logically structured mechanism (system) of legal support for economic sovereignty and economic security of the state to achieve significant results in protecting the domestic economy in the context of globalisation of trade and economic relations.

2. RESULTS AND DISCUSSION

The category of "economic sovereignty" in its content is an economic and legal category, the nature of which is covered by special legal methods of cognition and is the ability of the state to make decisions on economic development. This interpretation is general and to some extent even somewhat conditional. This is explained by the fact that the functioning of the modern state is due to trends in the globalised world economy, and in some cases also the national interests of economically more powerful countries and their integration associations. Therefore, the choice of national economic model at the present stage of human development is often due to some limited strategic opportunities for economic development of the country, and economic sovereignty is the ability of political power to choose one of the alternatives for further development.

The term "economic sovereignty", as well as similar categories ("financial", "fiscal", "customs", "technological" sovereignty, etc.) were actively used in economic and legal literature mainly in the era of decolonisation [7, p. 211–214] due to the need to ensure permanent sovereignty over natural resources as a condition that affects the state's economy beyond significant economic progress[1]

[1] In resolution 523 (VI) "Integrated economic development and commercial agreements" (1952) the General Assembly considered that "the underdeveloped countries have the right to determine freely the use of their natural resources and that they must utilise such resources to be in a better position to further the realisation of their plans of development in accordance with their national interests, and to further the expansion of the world economy"; "commercial agreements shall not contain economic or political conditions violating the sovereign rights of the underdeveloped countries, including the right to determine their own plans for economic development". Permanent Sovereignty as a Principle of international economic law was enshrined in resolution1803 of the UN General Assembly. This allowed its development to be more rapid than it would have been through more conventional methods of law-making, such as evolving State practice or diplomatic conferences [8, p. 3] common article 1 of both Covenants affirms, in paragraph 2, "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case

as well as in the late XX – early XXI centuries in the post-Soviet space[1] in particular, in Ukraine. In other states, primarily in Western countries, the category of "economic sovereignty" is usually not used (the exception is publications devoted to European integration, in particular on issues of limiting the economic sovereignty of member states in favor of the goals of political integration, as well as assessing the impact on the economic sovereignty of a state as a result of the activities of international financial organisations) [9–13]. Instead, in the research of foreign authors, the concept of "economic power" is widely used [14–17], "economic security" [18; 19], "economic interests", etc.

It can be argued that although "economic sovereignty" and its derivatives are actively used in the national legislation of the Russian Federation, the Republic of Belarus and some other countries, mostly postSoviet space, in the decisions of their constitutional courts, other official documents[2], in legal science, these concepts are just beginning to develop. It should be noted that the introduction into scientific circulation of the concept of "economic sovereignty" in some way gave impetus to the development of the doctrine of sovereign rights of the state, its content [20; 21]. In the process of scientific research, the basic sovereign rights of the state were determined, which specify the content of the category "economic sovereignty". Such rights of the state include: the sovereign right of the state to dispose of its own resources; the right to determine the principles of national economic policy at the constitutional and/or legislative level[3]; sovereign right both to join and leave the integration associations of economic orientation (for example, the EU) and international economic organisations (World Bank, International Monetary Fund, Organisation for Economic Cooperation and Development, IBRD, WTO); the right to be an equal participant in international economic relations; the right to respect for national economic interests; the right to take part in solving

may a people be deprived of its own means of subsistence".

[1] The appeal of politicians and scholars of this category is due in some way to ideological guidelines, as well as the fact that after the collapse of the Soviet Union in the transition from socialist to market economy, the national economy of the newly formed states was open, structurally primitive and highly dependent on foreign policy. In modern conditions, military force has ceased to be the main instrument of coercion in international relations, while economic power is becoming increasingly important. In this regard, the popularity of the concept of "economic sovereignty" in the Russian Federation and Belarus is due to the application to these states of economic sanctions by the United States and the European Union.

[2] The provisions of regulations and decisions of constitutional courts usually relate to mechanisms to ensure economic sovereignty, in particular, the restriction of foreign investment in strategic sectors of the national economy; introduction of covert mechanisms of protectionism; anti-offshore regulation, etc.

[3] This refers to the ability to independently determine and implement financial and trade policy, legislate the activities of foreign companies, foreign investment, the nationalisation of foreign property and more.

international economic problems, especially those that affect national interests.

Since the concept of "economic sovereignty" is cross-scientific, its features have both legal and economic origins. Among the main features should be noted: unity; inalienability; extraterritorial activity of resident economic entities; priority of national interests; indivisibility; availability of own currency; availability of own tax system. Unity as a sign of economic sovereignty of the state is the existence of a single sovereign power of the Ukrainian state, exercised by a system of bodies, including representative, throughout Ukraine. Ukraine's economic independence is manifested through the activities of relevant state institutions, bodies and organisations, in the general sense, aimed at ensuring the implementation of the strategy of its economic development. Strategy is an integral element of economic sovereignty, although not a feature of it, but performs an important function of ensuring stable and predictable development of the country's economy. These two categories (economic independence and economic development strategy) are the initial criteria for determining the effectiveness of the economic security system, which demonstrates the relationship between economic sovereignty and economic security.

The inalienability of the economic sovereignty of the state is manifested in its inseparable connection with the direct performance by public authorities of the functions of ensuring balanced economic development. No other body, institution or organisation, which does not have the appropriate mandate, can perform organisational and administrative functions in the field of management of the economic system of the state. However, it should be clearly understood that almost all economic entities and market agents have the potential to influence economic processes in the country to one degree or another, but their influence is manifested discreetly, within the dispositive models of economic behavior enshrined in law. Legitimate public authorities have much more power, and in particular, they determine the boundaries of all other participants in economic relations.

Extraterritorial activity of resident economic entities means their ability to conduct their activities outside the territory of the state in the process of achieving economic interests of both their own and national. The essence of this feature is that no matter what interests are pursued by resident businesses, one way or another they ensure the economic growth of the state as a whole, including by: generating profits and transferring part of them in the form of taxes to the budgets of different levels; ensuring employment; development of socio-economic infrastructure of the territory, etc. In addition, the active activities of resident economic entities, their development contribute to improving the efficiency of the system of economic security of the state.

The concept of extraterritoriality is closely related to the concept of priority

of national interests, because to ensure economic independence, the state must have the appropriate resources, mechanisms and tools to respond to situations of various kinds. The fact that the national legislation, within which economic relations take place, is completely focused on national interests, is quite logical, but, in addition, the same orientation should have business – "public contract". Today, such a concept is already spreading and taking the form of social responsibility, when business structures are delegated by the authorities' part of the powers to solve socio-economic problems of the territories where the production facilities of enterprises are located. At the international level, this feature is embodied in the vector of foreign economic and foreign policy development of the state. This, in fact, determines the position of the state in globalisation processes, its direction and the choice of the organisation of which it seeks to become a member.

Indivisibility of economic sovereignty means the ability of the state to ensure its fullness and, according to the law, only to delegate their sovereign rights to state-authorised bodies, international organisations etc. From the point of view of globalisation, the delegation of economic functions of the state to the level of, for example, international organisations is the most relevant and controversial issue. The fact is that such delegation can lead to a partial loss of self-identity of the state, the subordination of its interests to the interests of more developed economies and ultimately – to the weakening of economic security of the state. At the same time, full integration is impossible without such delegation. As for Ukraine in particular, joining various integration associations is objectively necessary for the further development of the state. At the constitutional level, the supremacy of the norms of international law over the norms of domestic law is recognised, however, in the case of ratification of the former. This situation leads to ambiguity in the processes of development and adoption of regulations, as in the first place is the criterion of their compliance with international agreements. This can be clearly demonstrated by the example of Ukraine's accession to the WTO and the desire for EU integration. In the first case, the process of so-called "harmonisation" of legislation lasted almost five years and continues today. Therewith, the position of Ukraine's economic security in relation to certain sectors of the economy was significantly worsened due to the adoption of a number of laws(primarily concerning the ratification of WTO agreements), which, on the one hand, weakened the position of the national commodity producer, but on the other, opened up new opportunities for Ukraine in international trade markets. Nominally, Ukraine has not lost its economic sovereignty or even weakened it, because the relevant decisions were made without pressure, independently, considering the results of market analysis and strategic prospects for development.

This statement fully applies to Ukraine's potential membership in other associations and unions, including the EU. As for joining the EU, Ukraine must radically reform the system of public administration decisions and independently transfer part of its powers in the economic sphere to the level of interstate superstructure in the form of EU institutions. The above clearly demonstrates that integration into world economic unions, alliances and other entities is possible only if the legislator maintains the ability to adequately respond to the economic challenges of the future. If such regulation does not take place, the country may find itself in the situation that took place in Ireland, Iceland and Cyprus in 2008–2010, when all the negative effects of the global financial and economic crisis from the European economy was transferred to the economy of these countries. That is why it is important to strike a balance between national interests and strategic decisions regarding the state's membership in such integration associations.

The presence of its own currency is traditionally seen not only as a sign but also a prerequisite for the state to ensure its own economic sovereignty. The importance of the national currency lies in the ability of the state through the central bank to independently control its circulation: increase or decrease in demand, which will directly affect the controllability of inflation. At the same time, the country can freely circulate world currencies, in particular the US dollar, euro, currency of other countries, but the state, in the case of its own currency, has the opportunity to regulate the conversion rate. Economic growth, industrial development, export activity of enterprises, as well as the monetary and financial stability of the state depend on this. In addition, the presence of its own currency significantly expands the stabilisation of the economic security of the state, but also makes it vulnerable due to the ability to accumulate currency by other actors in international economic relations, which thus gain additional leverage on the economic situation within the country. Therewith, trends in the development of the European integration process show that in the conditions of State membership in a supranational integration Association, the preservation of the national currency is the exception rather than the rule[1]. The creation of a single market, banking and monetary unions implies the abandonment of member states' own currency.

The last sign of our declared economic sovereignty is the existence of our own tax system. Taxes are a legal way to redistribute monetary and financial resources to maintain the apparatus of public economic management. The eco-

[1] Jean Monnet believed that Europe would be created by currency or would never be created. Today, the European Union uses the opportunities of the euro as a factor of financial and political pressure, internal consolidation, the creation of a favorable environment, cultural expansion abroad and – due to the above – the construction of a special European identity that revives forgotten imperial ambitions.

nomic essence of taxes can be expressed as follows: pre-established and fixed fee of taxpayers for the maintenance of a sustainable system of regulation of economic activity. The importance of taxes for the economic sovereignty of the state is due to the fact that in this way – by obtaining relatively independent sources of funding – ensures the inalienability, unity of power and priority of national interests. In the context of economic security, taxes are a potential resource that can ensure its full functioning, but first of all they are considered as the most important source of replenishment of the state budget, and therefore they are the object of national economic security. Even in the context of a state's membership in the European Union, tax policy as the last tool of national governments in the process of regulating their own economy remains important: tax policies of member states reflect the features of national socio-economic models, which are quite different, which complicates the process of their harmonisation within the EU.

The close relationship between the economic sovereignty of the state and its economic security is a priori and objective, but these categories should be clearly distinguished not only by content but also by origin. Economic sovereignty is paramount in terms of economic security. As the ability of state power, one of its characteristics, economic sovereignty further determines the emergence of economic security and the creation of a system of its provision. Therewith, it is not necessary that economic sovereignty will be fully realised, but it will not disappear, but will remain in the category of conditional categories, while the phenomenon of "economic security" is more categorical. It can be complete, powerful, comprehensive or partial, weak, and in some cases, it may not be at all, even when the country's authorities have the potential to secure their economic sovereignty.

Economic security, in contrast to economic sovereignty, is a certain state of the system, and therefore this category has a material nature, which determines its structural and logical scheme and features. Instead, economic sovereignty is a category that characterises state power, and therefore outside the system of power relations, its use is meaningless. The relationship of these categories, if viewed through the prism of state regulation, can be depicted as a material embodiment (security system) of the economic will of the state (sovereignty). In general, it should be noted that the economic sovereignty of the state is an extremely complex category and needs further research in the context of determining the mechanisms for its provision. As an objective characteristic of state power, economic sovereignty arises with the formation and legitimate registration of the state and its governing bodies, but for its full and real provision requires an appropriate economic system that is formed, managed and controlled by the state.

Scientific sources on the study of the categories of economic sovereignty and

economic security in their mutual understanding and interrelation suggest that most Ukrainian and foreign researchers, namely Z. S. Varnalii [22], A. A. Mazaraki, O. P. Korolchuk [23], V. K. Senchagov, B. V. Gubin [24], V. T. Shlemko, I. F. Binko [25], and others identify these concepts to a certain extent. Thus, for example: P. Yakovenko and A. A. Mazaraki [23] in their research come to the general conclusion that economic security objectifies the economic independence of the state. That is, the achievement of a certain state of development of economic processes, in which we can talk about the presence of all signs of economic security, according to researchers, makes the state completely independent in the international economic environment. In our opinion, this statement is quite debatable, because even with an extremely high level of economic security in the context of globalisation and integration processes, hardly any country in the world can be considered independent at least in foreign economic activity, as international markets do not depend on the level their economic sovereignty, instead, it is international economic processes that affect the state of development of the national model of economic relations.

In this context, it is expedient to cite the point of view that can be traced in the works of G. I. Bashtyanin, O. I. Kovtun and P. A. Kutsyk. Researchers are talking about the need to revise the content of the principle of sovereignty in the field of economic relations [26]. That is, in fact, they propose to level the very content of the economic sovereignty of the state in the context of globalisation[1], explaining this by the fact that it is mutually limited in different states by their agreement, which is achieved through the tools of established and created international organisations and international economic cooperation based on them. Such a position would be appropriate if the principle of sovereignty were subject to revision in both political and other spheres of public life. But at this stage of development of the world's states, we consider the pressure and possible adverse impact of globalisation processes on the state of economic security of the state only as a justification for the inability of a particular state to ensure the proper level of security.

A similar point of view is expressed by R. Keohane and J. Naem, who, analysing the nature of the development of national economies of countries in their transition period, as well as studying the phenomenon of transnationalisation of the world global economy and the formation of the so-called "transnational-

[1] It should be agreed that globalisation has undermined the established approach to understanding economic security, which was based on the economic vulnerability of the state by other states. Globalisation has led to a rethinking of economic security in the light of the risks posed by cross-border networks of non-state actors and the economic instability of the new global environment. However, national institutions remain key to ensuring economic security. Regional and global institutions can complement each other, as well as the actions of national governments in reducing new economic insecurity [19].

ism of world politics", make an attempt to scientifically prove the existence of a trend towards full liberalisation of global regulatory processes, when international organisations actually take over the functions of the state, and the latter delegate them to them [27; 28]. We believe that such tendencies actually exist, but to say that they are objective is premature. The fact is that the loss of economic sovereignty, as described by researchers, occurs through the voluntary transfer of some decision-making functions on the general outlines of the global market, rather than on decisions relating to the economic security of the state. In our opinion, the state is not deprived of opportunities and capabilities to ensure its own economic security, even with membership in international organisations, but on the contrary, we define such membership as additional opportunities to ensure sustainable development of the national economy and economic stability.

Therefore, from our point of view, S. I. Tkalenko's statement is more appropriate that "economic sovereignty and ensuring economic security for Ukraine is the basis for ensuring strategic development based on national ideas and interests". Ensuring economic security is a guarantee of state independence of Ukraine" [29]. This scientific position coincides with our idea that the sovereignty of the state can be fully revealed only when the state has created the right conditions for comprehensive security development.

In this context, the position of O. Skrypnyuk is also appropriate, which indicates that "state sovereignty can be properly ensured only through the further and irreversible establishment of Ukraine as a democratic, legal and social state, including in the sphere of Economic Policy" [30]. That is, the realisation of sovereignty, including economic, depends not only on independence in decision-making in the field of economic security, but also on the nature of measures of state and regulatory influence. A somewhat similar position is supported by I. F. Binko and V. T. Shlemko [25], who believe that the democratic nature of national economic policy is largely itself decisive for achieving the maximum level of economic independence.

M. M. Khapatniukovskyi notes that "economic sovereignty is the regulatory ability of the state to create conditions and mechanisms for the expanded reproduction of its national economic system based on a combination of endogenous and exogenous sources and development factors, while ensuring the preservation of control of the national state/community over the possession (use) of strategic resources and assets" [31]. In our opinion, such a vision is focused on the needs of economic sciences, but for legal science it reveals new planes of possibilities for studying the essence of the phenomenon of "economic sovereignty". According to M. M. Khapatnyukovsky, whom we support, economic security is comprehended by a certain set of means that the state is able to pro-

vide and implement only if it has reached the appropriate state of development of economic sovereignty. In other words, freedom of choice of mechanisms for the implementation of strategic directions of national economic policy is a necessary condition for the implementation of economic sovereignty.

Moreover, M. M. Khapatnyukovsky, investigating the directions of improving the regulatory capacity of Ukraine to ensure economic sovereignty, focuses on the need to consider the conditions of global imbalances. That is, economic sovereignty, according to the researcher, will be fully revealed only when the state will be able not only to create certain conditions for the development of the national economy and ensure proper economic security, but also to effectively counter external threats. In this approach, in our opinion, the relationship between the categories of "economic sovereignty" and "economic freedom" is extremely accurate, as both of these categories characterise the economic system of the state as an integral object of the global system of economic relations.

Some researchers, for example O. P. Gradov [32] or Ya. A. Zhalilo [33], use, but do not define the category of "economic sovereignty", interpreting it as a certain state of development of the economic system of the state, without linking the need for its implementation in the fundamental law of the state (usually the Constitution). It should be noted that their positions deserve support, because it is possible to objectify by enshrining at the level of law only those economic processes and forms of relations that have practical measurability or manifestation. Furthermore, the relations of economic sovereignty in the domestic legal doctrine of today also have even scientific uncertainty at the level of theoretical and methodological understanding of the tools that provide it.

V. V. Mikitas and S. V. Tyutyunnikova note that "despite the increasing influence of external determinants of globalisation processes on national socio-economic development, the need to preserve and use national identity, national subjectivity in the formation of economic policy of the state aimed at improving the competitiveness and quality of life of the population is being updated" [34]. We support this position of scholars, supplementing it only by the fact that the ability to preserve the economic sovereignty of the state will reveal and characterise the quality of economic policy pursued by the state and the level of competence of the political leadership of this state.

In turn, A. F. Skakun considers the economic sovereignty of the state as a component of state sovereignty, defining the former as a political and legal property expressed in the supremacy of the Economic will of the state on its own territory and independence in foreign economic relations [35]. However, as noted above, the maximum level of independence in the global economic environment is unlikely to be achieved, but the risks and economic challenges of

the global economy can and should be effectively addressed. That is why it is expedient, in our opinion, to supplement the proposed definition with such an element as self-sufficiency in decision-making on the choice of directions of economic development.

Separately, S. V. Mocherny addresses the problem of economic sovereignty in his works, who notes that a significant drawback of the existing definitions is abstraction from economic property relations, and therefore from the political and economic aspect of the problem. The researcher interprets economic sovereignty in the political-economic aspect as the property of the people for their own national wealth, based on which their authorised bodies independently regulate the economy and foreign economic activity, primarily in the interests of employees [36]. In our opinion, this position of the scientist needs to be detailed because, defining the bearer of economic sovereignty as the people, by analogy with public and political sovereignty, it is necessary to clarify that we are talking primarily about those who directly exercise their economic rights, i.e. participants relations in the field of management (Article 2 of the Civil Code of Ukraine). We believe that they should be considered the primary carriers of economic sovereignty of the state.

S. G. Vatamanyuk and S. M. Panchishin, studying the above category, come to the conclusion that the most important feature of the category "economic sovereignty" is not independent regulation by the economy, since this feature is secondary or derived from the presence of a sovereign state, nation or people ownership of all national wealth, natural resources, land, etc. Therewith, economic sovereignty is organically associated with such a feature of state sovereignty as the supremacy of the state in its own territory. Thus, economic sovereignty is defined as the ability of the state at the expense of representative bodies to implement the will of the majority in the context of managing the country's economy [37]. This position of researchers can be agreed, however, the term "will of the majority", in our opinion, should be replaced by the term "national interests" or "public interests". Furthermore, economic sovereignty is a manifestation of the ability of public authorities to regulate and organise economic processes in the state in a way that maximises the quality of economic security, and thus creates conditions for balanced development of the state economy and its self-strengthening.

As O. O. Ashurkov rightly notes in this regard, if earlier the sovereignty of any state, as well as the degree of its completeness, did not raise doubts, then in the conditions of current globalisation, the question of the possibility of state sovereignty of an individual country does not just arise, but already comes to the fore, because today's reality largely unfolds against such sovereignty, admittedly, in its essential, and not formal implementation: the presence of formal sovereignty does not guarantee the exis-

tence of real sovereignty at all [38]. The researcher uses the categories "economic security" and "economic sovereignty" not identically, but concludes that the first category is only an element of the second. The author notes that the main thing to ensure economic sovereignty is a consistent policy of self-strengthening, the use of all legal means that promote self-strengthening, starting with a clear enshrinement in the Constitution of the economic system and ensuring public order in the economy. Only a state that is strategically aimed at self-empowerment can successfully resist the negative external influences that always exist in the world economy. In other words, the researcher states that economic sovereignty is the ability of a state to withstand the external economic pressure of other states and global integration entities. Although this definition of economic sovereignty is debatable, it is this understanding of this category that is most appropriate in the context of our research.

Furthermore, in the context of ensuring national economic security as a component of ensuring the economic sovereignty of the state, it is important not only the theoretical and methodological justification of the instrumental content of these categories, but also the legal regulation of the relations under study, since the creation of appropriate transparent and effective tools for Legal Regulation, understandable to all participants in these relations, is the key to the effectiveness of the national policy implemented in this area. Therefore, it is relevant and important for Ukraine to analyse foreign experience in this aspect, but not only those states that have a strong system of protecting the national economy and promote aggressive foreign economic policy, but also those countries that have a lot in common with Ukraine in terms of their level and historical development.

As V. Y. Yedynak rightly notes in this regard, "the entire period of formation of the economic system of any country is accompanied by an increase in dependencies in the world economy, which were caused by the processes of internationalisation of production and globalisation, which causes the emergence of new threats to the functioning of the economy of such a country. In fact, the problem of ensuring the economic security of the country arises with the emergence of the state itself, its national interests and awareness of the latter" [39]. In our opinion, this means that each state, as a sovereign, as a bearer of economic power, forms, implements and ensures the functioning of its own system of economic security. This statement fully applies to Ukraine, which, given its own specifics of establishment and development, independently determines the architecture of its own model of economic security. Today in the world there are a large number of models of national economic security (according to the number of countries in the world), each of which has its own purpose, and is characterised by a different set of government mechanisms. At the same time,

there are states whose national models of economic security can serve as a guide for Ukraine to solve a purely applied task – to build its own effective, efficient system of economic security, considering the national specifics of the domestic economy. Such borrowing of certain elements of the national systems of economic security of those states that are successful in the economic sense, can not be considered as a component of partial loss of economic sovereignty, because, first, the state must always focus on national economic interests, and secondly, treatment to such a positive experience allows the state to quickly integrate into the general world economic space [40]. We believe that, given the current geopolitical and geoeconomic situation, the experience of building national systems of economic security of those states and institutional entities, which we will consider below, may be most useful for the state of Ukraine.

The American model is characterised by the main emphasis of national policy on ensuring a balanced system of tools and measures to counter internal and external threats. The security system of the domestic economic sector considers the main global threats and risks, the source of which are international economic processes. This model is the most utilitarian and is used by many developed countries.

When studying the US experience in building a system of economic security, we should pay attention to the following key aspects. First of all, the state is focused exclusively on the protection of national interests, i.e. public authorities work in such a way as to maximise the development of national producers, as well as provide maximum methodological, practical, stimulating support to businesses in their foreign economic activity. In this way, the United States carries out economic expansion through its enterprises and TNCs. "The main directions of the US national security policy are presented in the National Security Strategy in three main blocks: the formation of a secure international environment in America, ensuring an adequate response to threats and crises, proper preparedness of American society for unpredictable trends and future phenomena. Virtually every area involves measures to solve problems of economic security" [41]. It should also be noted that most of the mechanisms and tools of public administration actions aimed at ensuring economic security are provided in the United States by separate regulations.

Notably, the long process of finding effective ways to protect national economic interests has allowed creating an effective regulatory framework for economic security. US economic security is considered an integral and most important of the structural components of national security in the National Security Strategy and is implemented in the laws on certain aspects of its provision, in particular:

– General issues of economic security are concentrated in The Economic Security Act of 1996;

– improving the efficiency of national education and science is reflected in the law on education for economic security (The Education for Economic Security Act of 1999);

– issues of tax regulation, priorities of economic development, customs protectionism – in the law on economic security and reproduction (The Economic Security & Recovery Act of 2001);

– issues of the labour market, the fight against unemployment, economic protection of the population – in the Job Creation and Economic Security Act of 2002, etc. [42].

The Japanese model is the main regulatory emphasis is on ensuring the stability of social processes, the development of society and the nation. The economic system of the state is seen as a means of achieving social development goals and therefore requires balanced development and a certain level of isolation from global processes to prevent the export of economic crises and other negative manifestations of the global economic environment.

It should be emphasised that Japan is characterised by a certain isolation of its own society, traditions and its own economy from other economies in the world. Japan, on the other hand, is a clear example of successful globalisation, when Japanese corporations have introduced the practice of so-called "creeping globalisation", which means the penetration of TNCs into all sectors of the international economy without exception. Such secrecy, on the one hand, contributed to the resilience of the Japanese economy during many global financial and economic crises, and on the other – constantly supported the growth of competitive advantages of national corporations in the almost complete absence of non-resident competitors.

Japan's economic security system is based on the following principles:

– preservation and increase of economic potential and economic power of the country;

– maintaining the domestic market of a country with a high level of purchasing power;

– creating conditions for the gradual globalisation of Japanese corporations, which will ensure national interests. This goal is achieved through the country's inflows of surplus profits from Japanese corporations received in global markets or abroad.

The Chinese model is common only in countries that are trying to build a socialist society. The concept of economic security is well known, based on the ideas and provisions of the structural rigidity of the economic system, its manageability, a high level of protection from external challenges and threats. The main condition of economic security is considered resources, capacity, stability, manageability. In fact, China's economic security is a synthesis of Confucian philosophy, reform and openness, the right balance between reform, development and stability [41]. However, China's current national policy in the field of economic security is based on market principles and the

principles of free competition. However, this competition is carried out in a way that is not typical for most developed countries of the world, since the Chinese government largely acts as a guarantor for national producers, subsidises and subsidises a large number of sectors of the economy and directly enterprises, which creates additional advantages that are difficult for non – resident business entities to compete with.

Another feature of state regulation of economic security in China is the way to overcome the crisis. Unlike democracies, the Chinese government independently develops crisis management programs and scenarios that define the roles of even businesses, i.e. in China, the state independently manages the process of avoiding and minimising negative factors, rather than regulating it. This imperative way of ensuring economic security has its positive sides, but it is difficult to note its effectiveness in the future due to the spread of globalisation and the gradual intervention in Chinese markets of foreign TNCs. As a separate phenomenon in the context of the development of the notion of economic security, in our opinion, it is necessary to consider the provision of economic security in unions, associations of states, in particular in the EU.

The experience of EU countries shows that ensuring national economic security has the effect of securing a specific place in the global world that would correspond to its geostrategic significance and potential. In the EU, the concept of "economic security" depends on the position of this association in the world economic system. The EU dictates the importance of European integration to achieve a high level of competitiveness in the context of globalisation. According to the EU's strategic approaches to development, each EU member state has much less potential for economic resources than other developed countries, and the synergy effect of resource sharing increases the EU's ability to ensure a high level of economic security and competitiveness. Therewith, the ultimate goal of ensuring economic security in the EU is the formation of a fully integrated Europe with the same standard of living in all member states [43].

Examining the doctrines of most EU countries, it can be emphasised that the main task of security policy in national doctrines is to strengthen the European space of stability through the development of European integration and active EU neighbourhood policy with Eastern Europe, South Caucasus, Central Asia and the Mediterranean. Although here it is impossible not to agree with the opinion of A. Otsepek that each EU country applies its own concept of economic security, which has common provisions and goals with the EU concept [43].

For example, in Germany there is no separate law that would determine the principles of economic security. Ensuring economic security in practice is carried out through laws that regulate the

main areas of market activity and give the state significant competence in the field of control. The main interests of the state in the field of national security, including its economic component, are presented in the form of an official directive of the Ministry of Defense. The leading means of ensuring the safe development of the economy in Germany include actions to maintain the civilised nature of market relations, ensuring a level playing field, preventing monopolisation in certain industries and maintaining the stability of the European currency.

In France, conceptual approaches to the model of economic security define it as the prevention of economic threats through the formation of new schemes, adaptations of norms and structures of international security and the creation of a network of cooperation, in particular between public and private sectors and between states [44].

Conceptual approaches to economic security in Spain are considered in the context of addressing this issue in the context of economic security throughout the EU. But, as A. I. Prilepsky rightly notes, the country has a system of ensuring national interests in the economic sphere. The scientist emphasises that its basis is: adaptive legal framework; unambiguous delimitation of the competence of ministries, departments and organisations in the implementation of regulations relating to economic development; the presence at each level of development of a legally approved program of economic priorities, which in theory could make it impossible to distribute targeted privileges; availability of special state control services [44].

For Ukraine, given its real economic potential and place in the system of global economic relations, the experience of such countries as Belgium, the Netherlands, Denmark, Luxembourg is indicative. They are deprived of the opportunity to influence the trends of international economic processes, and therefore must shape domestic security policy in such a way as to be maximally prepared and adapted to external economic threats [45]. The essence of the policy of national economic security in these countries is to form a system of indicators to prevent negative phenomena for the national economy with the development of appropriate scenarios for overcoming or avoiding them.

The conceptual foundations of economic security in Poland, the Csech Republic, Slovakia, and the Baltic States are based on the convergence of national interests with European ones, as well as political, economic, and institutional transformation in accordance with Western European standards. As evidenced by the development of these countries, the study of their economies in scientific papers [46], in the early 1990s, these countries have chosen almost the same model of economic security, which consisted of:

– assessments of the regional geopolitical situation;

– determination of strategy and vector of development;

– formation and implementation of a model of behavior, in particular in the economic sphere, in accordance with the trends of regional and global evolutionary process;

– the ratio of basic quantitative and qualitative indicators of development with global and regional standards;

– adjusting the course of economic reforms.

It should be noted that the successful provision of national economic security by EU countries depends on the stability and strength of their national economies. It is absolutely obvious that only a strong economy allows effectively protecting national economic interests in the context of globalisation and economic crisis. In view of this, the state must not only develop a national concept of security, based on world experience, but above all to reform the domestic and foreign economic policy to protect all economic entities. The protection of economic entities is an element of economic security at the micro level, but the degree of protection of enterprises and organisations in the economic sphere depends on economic security at the meso and macro levels.

Special emphasis should be placed on the fact that economic security in the EU is subject to regulation. The supranational bodies and institutions of the EU independently develop recommendations to the EU member states on taking certain actions aimed at eliminating the shortcomings of economic development or counteracting economic crises.

Although such recommendations are not binding, their utilitarianism and effectiveness are obvious, and most countries use them as elements of a national system of economic security. This does not mean a loss of economic sovereignty, but it is extremely effective from cooperation within the EU, as models and mechanisms for overcoming economic crises and negative trends in economic development are equally effective for all EU member states.

Thus, the experience of EU countries shows that ensuring economic security has a decisive influence on securing for the state a clear place in the global world, which would correspond to its geostrategic significance and potential. That is why today the adaptation of the experience of EU countries in ensuring economic security should become one of the priorities of Ukraine's foreign policy not only in terms of achieving stability and efficiency of the national economy, but also in terms of long-term national development strategy [42].

The systems of economic security inherent in countries with economies in transition are characterised by the presence of unsystematic fragments of national policy aimed primarily at stabilising economic processes after the independence of the state, changes in the political regime, etc. In our opinion, such a model of economic security is inherent in modern Ukraine, which indicates, rather, the low efficiency of state decision-making in the context of building an effective and efficient system of economic security

and weak theoretical, methodological and regulatory support in this area.

CONCLUSIONS

Economic sovereignty is the ability of a state to make full use of a set of conditions and factors, measures and means (primarily legal) that ensure the independence of the national economy, its stability and stability, the ability to constantly renew and self-improvement for further economic development, despite or minimising negative external pressure of other participants in globalisation processes. The content of economic sovereignty is a sequence of policies of economic self-strengthening, the use of legal means and internal economic reserves and potential that contribute to the formation of an economically independent and self-sufficient state.

Economic security of the state is a certain state of the country's economy, which should ensure the ability to counter internal and external threats to the economic system of Ukraine, is the embodiment of the ability of the state to resist external economic pressure from other states, Interstate economic associations, TNCs, powerful market agents-non-residents and independently, independently implement their own economic policy, ensure the ability of national business entities to compete in foreign economic markets, maintain the balance of national economic interests, including legal means, this directly affects the state of economic sovereignty of the state.

The appeal to the national systems of economic sovereignty and economic security of individual countries of the world allowed determining the features of their functioning depending on the type of state economy and legal means to ensure the functioning of such systems, namely: American (characterised by the main emphasis of national policy on ensuring a balanced system and external threats); Japanese (emphasis is placed on ensuring the stability of social processes, the development of the nation); Chinese (corresponds to the socialist guidelines for the development of society); European (on the example of the EU), characterised by differences that are associated with the presence of different potentials of the economies of the EU, which leads to the existence of different approaches to the creation of national systems of economic security); States with economies in transition (including Ukraine) – is characterised by fragmentary national policy in the field of economic security of the state, rather weak theoretical and methodological and regulatory support in this area.

It should be important for Ukraine to understand that it is possible to achieve significant results in protecting the domestic economy only by creating an effective system of means to overcome or minimise existing or too potential threats, especially in the context of globalisation of trade and economic relations, when each state tries to export such threats from its own economic system to a weaker one. Instead, to strengthen its

position on the world market, Ukraine must gradually become an important participant in the processes of ensuring international economic security.

Given the above, we can say that today Ukraine must simultaneously counter external economic threats and try to most effectively and quickly realise its own foreign economic ambitions by creating an effective mechanism (system) of legal support for economic sovereignty and economic security.

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NATIONAL DEVELOPMENT STRATEGIES IN TERMS OF ENSURING ENVIRONMENTAL RIGHTS AND INTERESTS: COMPARATIVE APPROACH

Abstract. *The study is devoted to scientific and theoretical analysis of the principles of state activity in the development of national policy in the context of ensuring human's environmental rights and interests, the creation of effective legal mechanisms for their guarantee, exercise, and protection, solving systemic issues in this area. The purpose of the study is a comprehensive examination and analysis of legislation from the standpoint of greening national and foreign policy, national development strategies. The methodological basis of the study is a set of general philosophical, general scientific, special scientific, and legal methods. It is proposed to consider greening as a multifaceted phenomenon. In general, the state environmental policy is a component of state policy, which fixes its strategic goals and objectives, defined for the future, considering environmental factors. It is proved that at the legislative level there should be clear mechanisms for the legal support of integration of environmental policy into sectoral, national, and regional strategies, local action plans, and interaction with civil society institutions, the scientific community. It is argued that modern state environmental policy and further systematisation of environmental legislation should be based on the provisions of environmental law doctrine to consider modern approaches to environmental regulation, integration of environmental requirements and regulations to state planning, sectoral, regional, and local development. Based on conducted research and synthesis, proposals and recommendations for the development of a unified concept of legal policy, in particular, environmental*

legal policy as its component, also, for the improvement of national regulatory framework (namely by adopting the Concept of systematisation of environmental legislation and modernisation of the contemporary strategy of state environmental policy) are elaborated

Keywords: *state environmental policy, environmental law policy, climate rights, environmental law doctrine, greening sectoral and regional policies*

INTRODUCTION

The desire of the authorities to develop a clear and balanced state environmental policy, extrapolating its key goals to industry strategies (primarily for their greening), indicates that those in power are aware of the existence of a global environmental crisis, its possible dangerous consequences, which is very important in modern conditions. Currently, the preservation of the environment, the protection of citizens' environmental rights, ensuring environmental security, etc. are integral components of the national and foreign policy of Ukraine and all states of the world. Moreover, the essence, content, scope, and degree of guaranteeing the environmental rights of citizens are constantly at the centre of attention when determining the strategic vectors of state development. However, their understanding (vision of the depth and urgency of the solution) and consolidation at the legislative level, unfortunately, did not guarantee their security and safety. The above repeatedly confirms that the exercise and protection of citizens 'environmental rights were and remain relevant, especially in the context of establishing environmental law and order, greening national legislation, state policies and strategies for national development, developing citizens' environmental legal awareness, etc. Based on the above, the strategic vectors of national policy (not only environmental policy) should be adjusted to meet the challenges of modern time. Furthermore, it is necessary to dispose of long-term goals, optimise tasks, and clearly define the stages and measures of implementing the state environmental policy (including environmental law as its component), especially considering the consensus on updating the association agreement on systematisation of environmental legislation.

All the above becomes vital due to the fact that, firstly, there are considerable differences between the theory and practice of protecting environmental rights, secondly, these rights are formally recognised and enshrined in legislation, but in fact, they cannot be fully exercised and protected, and thirdly, there is a spread of environmental and legal nihilism. This is an additional confirmation of the existence of an imbalance, the lack of an effective legal mechanism and an appropriate system of measures to create conditions for the unhindered exercise or restoration of violated environmental rights and satisfaction of interests, their safety, protection, and

the development of environmental consciousness and culture.

In view of the above, it seems appropriate to provide general statistical data. Thus, as of 20.03.2020., the European Court of Human Rights (hereinafter referred to as the ECHR, the court) adopted 1.434 decisions stating that Ukraine violated the provisions of the convention for the protection of human rights and fundamental freedoms and its protocols [1]. Notably, in 2019, Ukraine was among the top 3 countries in terms of the number of appeals to the ECHR and the top 5 states in terms of the number of court decisions made on violations of at least one article of the European Convention for the protection of human rights and fundamental freedoms by the country during its entire existence. Admittedly, Ukraine's systematic failure to comply with court decisions causes serious concern [2].

No less considerable is the fact that according to the Rule of Law Index "The World Justice Project: Rule of Law Index 2020", Ukraine ranks 72nd (index 0.51) [3]. In Ukraine, according to the index data, the key problems of ensuring the rule of law are systemic corruption, unfair legal proceedings, and weak law enforcement. According to the Environmental Performance Index in 2020. Ukraine ranked 60th out of 180. Ukraine has the worst indicators in the field of quality of life, conservation of biodiversity and ecosystems [4]. This situation is unfavourable since every human and civil right is valuable only if it receives proper security and protection, which should become the leading concept of national policy and its legal component. Based on this, it becomes clear that there is an urgent need for its improvement, modernisation, especially in the field of management and environmental protection, nature management, adaptation to climate change, and transition to the principles of a "green economy".

Legal aspects of the development of state environmental policy in the field of ensuring the exercise and protection of environmental rights and interests are considered in the studies of Ukrainian specialists – representatives of environmental, land and agrarian law, theory of law, and other branches of knowledge, namely O. S. Hyliaka [5], N. I. Karpachova [6], E. M. Kopytsya [7; 8], T. V. Kurman [9], O. V. Petryshyn [10], Y. V. Shchokin [11], O. V. Donets [12] et al. Notably, the authors of this study also repeatedly addressed the outlined issue, suggested possible ways to solve it, and expressed their own thoughts on this issue. Despite the presence of a considerable number of studies, unfortunately, no compromise has been reached so far, there is no unity of views of researchers, as a result, the mechanism for protecting environmental rights and interests at the legislative level remains imperfect, which complicates law enforcement activities.

Without detracting from the importance and scientific value of the publications of the above-mentioned authors,

it is worth noting that in modern conditions, this problem requires further comprehensive study and cognition in the context of a systematic analysis of national sectoral and regional development strategies to improve the system of protecting environmental rights and interests, promoting their security. However, given the limited volume of the publication, it is worth focusing on the fundamental strategies of national policy, the features of greening sectoral strategies for the protection of environmental rights and interests, the subjects of which, along with the state, are public organisations (primarily environmental organisations), local self-government bodies, political parties, etc. (that is, there is a polysubjectivity).

1. MATERIALS AND METHODS

The methodological basis of the research consists of general scientific and special methods of cognition of legal phenomena: historical, dialectical, Aristotelian, system-structural, theoretical-predictive, historical-legal, comparative-legal, comparativist, formal-legal, interpretation of legal provisions etc.

Thus, the dialectical method allowed comprehensively considering and substantiating the natural process of greening national development strategies, creating environmental policy from the standpoint of ecological and legal doctrine and science, considering their dynamics, constant updating, and advancement, and other social factors. The historical method was useful in studying the genesis of state environmental policy strategies in the context of protecting environmental rights, in analysing problems, trends, and prospects for further systematisation of environmental legislation. The use of this method allowed proving that greening is considered, firstly, as a historically determined process, which facilitates achieving a safe state of the environment for human life and health, in particular, by introducing strategic narratives, secondly, as a component of the development of a modern legal space and law and order in the context of European integration.

The use of the system-structural method contributed to determining the place of environmental policy in the architectonics of the national policy system and the legal system; structural-functional – to studying the institutional foundations for ensuring national environmental policy, especially from the standpoint of protecting environmental and climate rights. The theoretical and predictive method allowed choosing ways and areas for further improvement of the provisions of the national ecological and legal policy and environmental legislation. The comparative legal and comparative methods considered the legal regulation of environmental relations inherent in the legal systems of individual foreign states and investigated the mechanism for protecting environmental and climate rights and interests in the context of state environmental policy. Upon the formal-legal method, the content of individual prescriptions of international documents,

the national environmental regulatory framework are covered, judicial practice is analysed, which allowed formulating the author's conclusions and proposals. Considering the fact that it is necessary to examine the established practice of EU countries and international environmental organisations, according to which every five to six years, based on the results of the analysis of the effectiveness of introduction, the strategic goals of environmental policies are reviewed (adjusted), the authors also applied certain methods of logic.

The features and chronology of the development of legislation, based on the prescriptions of which the foundations of the state's environmental policy are established in the context of ensuring environmental rights and interests, are clarified using the historical-legal method. Upon using the normative-analytical method, the interpretation of normative legal regulations and scientific views of specialists was conducted, which became the basis for the development of the conceptual and categorical research apparatus. The use of the Aristotelian (dogmatic) method contributed to the disclosure and improvement of many concepts, allowed defining such legal constructions as "state environmental policy", "greening of national development strategies", etc., identifying their inherent features, and provided a complete review of the theoretical and methodological foundations for the development of state environmental policy. The contextualisation allowed substantiating the position that the content and measures for greening national policy depend on historical, social, political, and ideological factors. The mental modelling was useful in designing and modernising legal provisions proposed for making changes to the current environmental legislation, statistical – in proving the negative impact of conflict, inconsistency of environmental legislation provisions on the mechanism of legal regulation of environmental relations in the field of national policy. These methods were used in a relationship, which ensured the completeness of the research and the validity of the formulated conclusions and proposals, allowed proving the need to develop a concept for systematisation of environmental legislation, without which it is impossible to clearly define the legal mechanisms for implementing state environmental policy, while all efforts will seem another attempt to branch out environmental legislation, which is already overloaded with legal regulations. Moreover, the issue of developing a unified concept of legal policy and its component of environmental and legal policy also remains urgent.

2. RESULTS AND DISCUSSION

It is well known that the purpose of any policy is to solve acute and urgent problems. Moreover, this is recognised as the most important and difficult matter in their development. Thus, regarding the development of sectoral development policies, specialists note that social needs are poorly structured, and they are also

"not clearly delineated: it is unknown where one problem begins and another ends. They partially overlap, intersect, and collide with each other" [13, p. 89]. As a result, this hinders horizontal coordination in determining the areas and vectors of the relevant policy.

Furthermore, despite the urgency of this problem, since Ukraine gained independence, unfortunately, it has not been possible to find optimal ways to overcome it, although certain positive steps have been taken in this area. Thus, at the legislative level, *four* special legal regulations (*two* of which, based on the name, are strategies, although in content it is advisable to discuss three strategies for the development of state environmental policy), which establish strategic goals and objectives, conceptual foundations of state environmental policy were adopted, namely: the resolution of the Verkhovna Rada of Ukraine "On the Main Directions of the State Policy of Ukraine in the Field of Environmental Protection, Use of Natural Resources and Ensuring Environmental Safety" (1998) [14] (*first*), laws of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2020" (2010) [15] (*second*), "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030" (2019) [16] (*third*), the decree of the Cabinet of Ministers of Ukraine "The Concept of the national ecological policy of Ukraine for the period till 2020", dated 17.10.2007, No. 880-R [17] (which chronologically preceded the law of Ukraine of 21.12.2010 No. 2818-VI) (*fourth*). Evidently, these documents mostly use the term "state environmental policy". Notably, the policy is not a source of law, but it has a legal form. Considering this, it is not necessary to identify such legal categories as "national policy" and "legal policy" in the field of ecology, since the former is not always legal, and the latter, in turn, necessarily has its own legal mechanisms for ensuring.

It is also impossible to ignore the fact that before the above-mentioned regulations in the development and implementation of state environmental policy, the regulatory framework was the law of Ukraine "On Environmental Protection", Section VII. "Environmental safety" of the Declaration on state sovereignty of Ukraine (1990), the resolution of the Supreme Soviet of the Ukrainian SSR "On Declaration of Independence of Ukraine" (1991) and, admittedly, the Constitution of Ukraine (1996), etc. Currently, the marker of changes in the vectors of state environmental policy strategies is precisely the goals and objectives of these regulations, among them: "raising the level of public environmental awareness" (Strategy 2020) and "developing environmental values and principles of sustainable consumption and production in society" (Strategy 2030). Such conclusion was drawn based on the comparative analysis of the provisions of two documents – the laws of Ukraine "On the basic principles (strategy) of the

state environmental policy of Ukraine for the period up to 2020" (2010) and "On the basic principles (strategy) of the state environmental policy of Ukraine for the period up to 2030" (2019). In fact, the latter (regarding its goal) is quite controversial, although attractive. It is advisable to recognise it as progressive, but one that requires considerable improvement. Given this, the issue of monitoring the effectiveness and ability to achieve the goals, compliance with their achievement for timely adjustment, is now becoming particularly relevant.

Thus, when developing national development strategies, it is necessary to first focus on finding new approaches and rethinking the place in them of vital high social values, such as state and territorial sovereignty, protection of human rights, and the Rule of Law [7, p. 169; 13; 18], which have been mentioned in the study. This is also of particular importance due to the fact that reducing environmental risks and minimising their impact on ecosystems, socio-economic development, and public health; the establishment of environmental values and principles of sustainable consumption in society in the new strategy are proclaimed the strategic principles of state environmental policy. Notably, the problematic aspects of implementing the ecosystem approach as an element of the right to a safe environment for life and health were studied by Y. P. Suietnov [19].

Regarding the issue of greening national sectoral development strategies and ensuring the protection of environmental rights and interests of subjects, it seems appropriate to recall that a large number of strategies, concepts, doctrines, etc. have been developed and adopted in Ukraine over the past decades. This is what gives grounds to discuss a frenzied legislative boom, given that the tendency to "fetishise" laws has fully manifested itself in this area, and legal mechanisms are being replaced by law to a large extent to achieve certain political, but actually groundless, socially unmotivated, and often even purely private goals. Nevertheless, the study and analysis of their content allow asserting that now greening is considered as a area of national policy, its fundamental principle, and a method.

Thus, the radical reform of the system of environmental management of protection and use of natural resources and complexes declared within the framework of greening will contribute to the achievement of the SDG (namely, goal 16 to ensure access to justice for all and build effective, accountable, and inclusive institutions), guarantee citizens the constitutional right to a safe environment for life and health, and implement European standards, including access to justice on environmental issues. In fact, all this is reflected in the decree of the president of Ukraine "On the Goals of Sustainable Development of Ukraine for the period up to 2030" [20] of 30.09.2019, No. 722/2019, in the National Economic Strategy for the period up to 2030 [2], which proclaimed the interaction of society on the principles

of environmental friendliness and gender equality for the dissemination and protection of generally recognised human values, and in the three-year strategy for the development of the justice system and constitutional court proceedings, approved by the decree of the president of Ukraine from 11.06.2021 No. 231/2021 [21], the purpose of which is to improve the activities of justice institutions, modernise the system for protecting the rights and interests of citizens, including environmental ones.

Furthermore, there are recently put into effect strategies (it refers to such as the development of the justice system and constitutional court, foreign policy activities, military security, in the field of human rights, national youth, national economic, digital transformation of the social sphere, national security of Ukraine, regional development, biological security and biological protection, the development of exports of agricultural products, food and processing industry, the development of innovation, assistance in attracting private investment in agriculture, irrigation and drainage in Ukraine for the period up to 2030, etc). In addition, many strategies and concepts of environmental orientation have been adopted (environmental safety and adaptation to climate change for the period up to 2030 (2021), implementation of national policy in the field of industrial pollution (2019), on combating land degradation and desertification (2014), implementation of national policy in the field of climate change for the period up to 2030 (2016), etc.), and the national target social programme "Drinking Water of Ukraine" for 2022–2026 (2021), national target technological space programme of Ukraine for 2021–2025 (2021), etc., which determine the vectors of the state's movement towards greening.

Continuing to consider the issue, the resolution of the Verkhovna Rada of Ukraine "On the Principles of State Policy of Ukraine in the Field of Human Rights" of 17.06.1999, No. 757-XIV [22], which, based on the provisions of the Constitution, the Universal Declaration of Human Rights (1948), the convention for the protection of human rights and fundamental freedoms (1950) and its protocols, ratified by Ukraine, for the first time enshrined the principles and main areas of national policy in the field of human rights. It is important that the resolution reflects that Ukraine seeks to ensure that human rights and freedoms, their guarantees determine the content and area of the state activity. Notably, in the National Strategy in the field of human rights, approved by the Decree of the President of Ukraine of 25.08.2015 № 501/2015 (Decree expired based on the Presidential Decree of 24.03.2021 № 119/2021), and in the Action Plan on the implementation of the National Strategy in the field of human rights for the period up to 2020 [23], approved by the order of the Cabinet of Ministers of Ukraine dated 23.11.2015 No. 1393-r. (which expired on December 31, 2020), environmental rights, unfortunately, have not been singled out as an indepen-

dent category (unlike the current Strategy). Currently, there is a new national strategy in the field of human rights [24], which was developed to solve and respond in a timely manner to systemic problems in this area in the context of modern challenges facing society [25], including, as noted earlier, the climate crisis, the impoverishment of biological diversity. Based on this, it seems quite logical and reasonable that the 15th strategic area of this strategy is to ensure environmental rights. In addition, the separation of this area indicates that the legislator considered the requirements of Articles 16 and 50 of the Constitution of Ukraine and articles 9 and 10 of the law of Ukraine "On Environmental Protection". Moreover, according to the strategy, the state plans to make every effort to solve (or rather eliminate) the following main problems: a) anthropogenic impact on the environment that threatens human health; b) low level of control over compliance with the legislation on environmental protection; c) ignorance of the population about environmental rights, mechanisms for their exercise and protection. Considering the globality and the importance of urgently correcting the situation, it is relevant to introduce a new environmental protection area of national policy, defining it at the national level as a priority in the field of guaranteeing and respecting human rights. However, the tasks that will contribute to the achievement of the purposes, unfortunately, require to be considerably improved, because they are written in a declarative, non-systematical manner and do not cover all existing levers of influence on the creation of an effective mechanism for the exercise, protection, legal protection of environmental rights, etc. Moreover, this also affects the expected results and key indicators.

Despite the existence of certain inconsistencies and shortcomings in fixing key goals and objectives, expected results and key indicators, their consolidation in the national human rights strategy should still be considered as a positive step in the development of the environmental rights system. In particular, from the standpoint of their official recognition (as an independent type/group) and their consideration as a strategic area of national policy, the desire to guarantee and hope for the possibility to protect them effectively. Otherwise, there is no point in waiting for the best because violations of environmental rights can cause consequences for the life and health of modern and future generations that are diverse in scale and prevalence, harm to the environment. An example of this is the Chernobyl disaster, which in the recent history of Ukraine for the first time raised the problem of environmental migration of affected citizens, due to which the development of a national mechanism for the legal regulation of internal forced environmental migration actually began.

It is worth giving another example. As is known, in the occupied territories of Crimea and eastern Ukraine there is a crisis environmental situation, since almost

all components of the natural resource potential of Ukraine have been damaged. Many national and international institutions and organisations recognise that the armed conflict, which is still ongoing, has caused an environmental catastrophe, which is manifested in aggravation of the water crisis, the destruction of unique natural landscapes, recreational potential, etc. Under the influence of these negative phenomena, previously unknown categories are developed, namely the rights of environmental and climate refugees. It is worth emphasising that forced migration of the population is now a common problem for many countries (although the reasons may vary). Notably, the term "environmental refugees" was introduced into public discourse back in 1985 by a UNEP employee, El Hinnaoui, who suggested that this term should be understood as persons who are forced to temporarily or permanently leave their place of residence due to considerable environmental violations (natural or human-caused) that endanger their existence and seriously affect their quality of life. Through the use of this term and its expansion, "climate refugees", "climate migrants", "temperature refugees", "environmental migrants" etc. have emerged, which, although used depending on the context, are inherently identical and characterise an important trend in the movement of the world's population at the beginning of the third millennium.

It is noteworthy that at least during the discussion of the draft Presidential Decree already mentioned above "On the national strategy in the field of human rights", the Directorate of strategic planning and European Integration of the Ministry of Justice of Ukraine held a meeting via videoconference on 19.05.2020, with the participation of representatives of the Ministry of Environmental Protection and Natural Resources of Ukraine, public and scientific environmental community to consider the issue of including environmental/climate rights of refugees in it. Special attention should also be paid to the fact that emphasis (considering new challenges) was placed on supplementing the area of "Ensuring the rights of refugees and persons in need of additional protection, including foreigners and stateless persons who are legally in Ukraine" with the rights of climate refugees, and the area "Protecting the rights of internally displaced persons" with the rights of internal climate refugees. Despite this, this issue is still open, because so far, the proposals submitted and discussed have not been legislatively consolidated in the current National Human Rights Strategy.

This suggests that climate rights should be considered as an institution (and not only in the context of the rights of migrants/refugees), which is at the stage of development. It is worth explaining the given position. First, the rights and regulatory framework for their provision are currently at the stage of development (it refers to the fact that legislation is being developed mainly in the field of adaptation to climate change and compliance with environmental safety

requirements, prevention of environmental risks), secondly, it (the institute) is in close connection with the institute of environmental rights, moreover, climate rights correlate with environmental rights, which constitute a comprehensive intersectoral institute of environmental law and legislation. Based on this, the climate rights of not only a person/citizen but also the people/humanity can be discussed, which means that it should also be considered as a complex intersectoral institute in the future. Furthermore, as already mentioned above, these rights, and most importantly, their provision, are very important for all of humanity, especially from the standpoint of responsibility to future generations. The above is quite consistent with the sustainable development goals and is one of the fundamental concepts of the present time.

For the completeness of consideration of the issue of environmental/climate refugees, it should be noted that it has repeatedly been the object of research and discussed at scientific and practical conferences. It is impossible to ignore the fact that when analysing factors that potentially affect the development of international migration processes, in legal science, along with the reference to military-political instability (which is indirectly covered), population poverty, an increase in the unemployment rate in the world, etc., environmental problems and climate disasters are highlighted [26, p. 183]. Moreover, climatic and environmental conditions, as a rule, are attributed to internal factors according to the model of attraction/repulsion factors (E. Li) [27]. Given this, ecological migration in modern conditions is separated by many researchers into an independent group. In addition, researchers also analysed the impact of global environmental problems and environmental risks on "sustainable economic development" [28; 29], the state of introduction of its model in accordance with the Kyoto Protocol, and the prospects for introducing the Paris Agreement, which replaced it. Moreover, some aspects of ecological migration are covered in studies, monographs, and dissertation research conducted recently by the following authors: K. V. Shymanska [26], N. P. Pavlov-Samoil [30], M. M. Sirant [31], V. I. Olefir [32] et al.

It is worth returning to the essence and interpretation of the "environmental migrant", mentioned above. Firstly, it was used by the International Organisation for Migration, which proposed the following definition: "environmental emigrants are persons who, due to sudden or gradual changes in the environment that negatively affect their living and health conditions, are forced to leave their homes or plan such actions and temporarily or permanently seek shelter within their country or abroad. All persons who migrate for environmental reasons are protected by international human rights law" [33]. In fact, this means that all national development strategies, namely economic, environmental, security, migration etc, environmental policy, modern national

policy in general, should be focused on the introduction of a system to protect the population from the potential consequences of environmental disasters to reduce the risks of factors that strengthen migration processes, etc.

Regarding this issue, it is crucial focus on the Inter-American Court of Human Rights, namely, complaints of individuals, groups of individuals, and organisations about violations of their rights guaranteed by the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights, and other Inter-American human rights treaties submitted to the Inter-American Commission on Human Rights. In addition, when creating an effective system for the protection of environmental and climate rights, an integral role was played by cases that were considered by the Commission in the context of the connection of human rights violations with climate change (the cases of Mayagna (Sumo) Awas Tingni v. Nicaragua [34], Athabasques v. Canada [35], Inuit v. The United States [36]).

There is also a practice of filing lawsuits in the EU countries. Thus, for many of them, a kind of signal should be the fact that Germany, France, Ukraine, and 29 other states will have to provide explanations to the European Court of Human Rights (ECHR) related to the claim of a group of young Portuguese people for climate protection. It refers to the fact that on 30.11.2020, the ECHR accepted the specified climate claim for consideration. Judges in Strasbourg will consider the complaint of six young Portuguese people aged 8 to 21 on a priority basis. As it became known, the lawsuit, among other things, refers to the emissions of greenhouse gases by the respondent states that affect global climate change. The plaintiffs claim that the devastating forest fires in Portugal in 2019 were partly caused by the insufficient implementation of the Paris climate agreement in Europe. According to the plaintiffs, the governments of the accused countries were inactive (that is, they did not take appropriate and necessary measures) in the fight against climate change, in particular, severe droughts, because of which the agriculture of this state faced the problem of water shortage [37]. Legal support for the plaintiffs was provided by the British non-governmental organisation Legal Action Network. The claim of the Dutch Foundation Urgenda [38], which forced the government to reduce the number of coal-fired power plants, should be recognised as most successful and considerable. Thus, based on the above, it seems necessary to emphasise that according to the Sabin Centre for Climate Change Law and Arnold & Porter Kaye Scholer LLP, 1,444 such cases were registered in accordance with the climate change legislation as of January 2020 [39].

It is worth focusing on one more positive point. Thus, the German Constitutional Court granted the claim of eco-activists (including Fridays for Future, founded by Greta Thunberg), which demanded that the government tighten

the requirements of the climate protection law adopted in 2019. As is known, on April 9, 2021, The German Constitutional Court ruled that the mentioned law is partially unconstitutional, in particular, it postpones the period of reduction of harmful emissions until 2030 without explanation and does not specify exactly how the state plans to achieve this. According to the court's decision, the German government was given time (more precisely, until the end of next year) to finalise the law and tighten its requirements [40]. Notably, the claim states that their " **fundamental right to a civilised future**" was violated due to the fact that the law provides for an insufficient number of measures to reduce greenhouse gas emissions and counteract climate change. Hopefully, similar actions and court decisions will appear in Ukraine, considering the fact that Articles 3, 16, and 50 of the Constitution are provisions of direct action.

This conclusion is made in view of the fact that today Ukraine has adopted many laws and strategies that provide for the implementation of projects to reduce carbon emissions, such as: Energy strategy for the period up to 2035, Strategy of the state environmental policy of Ukraine for the period up to 2030, Low-carbon development strategy, Action plan on energy efficiency and renewable energy sources, National plan to reduce emissions of pollutants from large combustion plants, Law on the basics of monitoring, reporting and verification of greenhouse gas emissions, etc. It is noteworthy that all these documents stipulate that Ukraine should start many important projects in the field of countering climate change. However, in practice, everything is not the same as on paper, the reason for which is the imperfection of tools for implementing strategies, and as a result, there is no real reduction in greenhouse gas emissions.

To summarise, certain steps have been taken in Ukraine to eliminate climate threats and ensure climate rights. Namely, on the one hand, the ratification by Ukraine of the Paris Agreement, the UN Framework Convention on Climate Change, the Association Agreement between, and the European Union, on the other hand, the European Atomic Energy Community and its member states, the adoption of the concept of implementing national policy in the field of climate change for the period up to 2030 [41], including the action plan for it (2017), the adoption of the long-awaited strategy for environmental security and climate adaptation (2021), etc., which lay the foundation for the development of a system for protecting climate rights, although mostly for the future. However, despite all these attempts to reintroduce an extensive regulatory framework, Ukraine continues to lose its position in the Climate Change Performance Index 2021 policy rating, currently being on the 20th place [42], and the reasons for this lie in the fact that, as already mentioned, at present, a comprehensive coordinated policy on adaptation to climate change in various sectors of the economy and

public life has not been developed, while industry strategies, policies, and plans are not coordinated with climate planning documents, there are no plans for adaptation to climate change.

CONCLUSIONS

In view of the above considerations, the following conclusions and generalisations about the development of state environmental policy through the prism of ensuring environmental rights and interests can be proposed.

First, the extrapolation of the fundamental goals of state environmental policy into national development strategies, sectoral policies (their greening) should be scientifically based and have a reasonable methodological basis.

Secondly, strategic planning of the state environmental policy should become balanced, methodologically reasoned, with an outline of problems (especially those that may arise in the future) and ways to solve them, a long-term vision; it should set tasks and evaluate obstacles that hinder the implementation of development strategies, include the desire to coordinate development vectors and make appropriate decisions, proper legal support. A special place should be given to monitoring the performance and evaluation of the results of the activities.

Third, there is a certain logic in the fact that in modern conditions in many strategies, concepts, and doctrines of the development of Ukraine, greening is considered as a multidimensional phenomenon, since it acts as: (1) the leading vector of national policy development strategies; (2) the fundamental principle and (3) the method of national policy; (4) a component of the development of a modern legal space in the context of European integration; (5) an element of modern law and order; (6) a component of modern legal awareness; (7) the constitutional obligation of the state; (8) a system of appropriate measures aimed at preserving and restoring the constancy of ecosystems, ensuring environmental safety requirements in the process of economic activity and production, security, and protection of environmental rights, interests, etc.; (9) a historically determined process, which allows achieving a safe state of the environment for human life and health, in particular, by introducing strategic narratives, namely, an ecosystem approach to all areas of socio-economic development of Ukraine and an environmentally balanced nature management, restoration and preservation of natural ecosystems, etc. Based on this, the object of further research, admittedly, should be the features of not only the greening of national policy but also the national legal system and legislation, legal relations.

Fourth, the disadvantage of strategies, principles, concepts, doctrines developed in Ukraine is the fact that they do not correlate with each other, do not have a clear definition of priority issues directly related to climate change, ensuring environmental safety of the population, protecting the environment, environmental rights and interests. In

general, the state environmental policy is a component of the national policy, which fixes its strategic goals and objectives (that is, their legislative consolidation), defined for the future, considering the constancy of ecosystems, biological and landscape diversity, the level of public health, anthropogenic impact on the environment, environmental risks, etc. through the development and use of certain mechanisms, a set of means and measures, including legal ones.

RECOMMENDATIONS

Based on the results of the study, it is necessary to consider the established practice of EU countries and international environmental organisations, according to which every five to six years, based on the results of the analysis of the effectiveness of introduction, the strategic goals of environmental policies are reviewed (adjusted). In this regard, it is appropriate to review the modern strategy of state environmental policy, which primarily concerns changing the name (from the standpoint of the semantic approach to "fundamentals" and "strategies"), lexical and etymological interpretation of the term "environmental policy", the definition of its content component and internal differentiation, a clear definition at the legislative level of the procedure for developing, updating state environmental policy, and especially the coordination of strategic development vectors and corresponding tasks. In addition, legal liability for its improper performance should be indicated.

Furthermore, at the legislative level there should be clear mechanisms for legal support for the integration of environmental policy into sectoral, national, and regional strategies, local action plans; interaction with civil society institutions, the scientific community should be real, and not exist (prescribed) on paper, the expert activity of lawyers should be considered, especially when developing strategic vectors of state environmental policy. It is also necessary to develop a concept of systematisation of environmental legislation, without which it is impossible to clearly outline the legal mechanisms for implementing state environmental policy, otherwise all efforts will seem like an attempt to branch out environmental legislation, which is already overloaded with legal regulations. Furthermore, the issue of developing a unified concept of legal policy also remains urgent.

It is also necessary to identify the form of systematisation of environmental legislation. Recently, many approaches to it have been proposed and scientifically substantiated, such as: adoption of the Ecological Code of Ukraine, Fundamentals of Environmental Legislation of Ukraine, Code of Environmental Laws, Code of Laws of Ukraine on Safe Environment, etc. Considering the above, it is advisable to combine the efforts of the environmental community to coordinate and choose the form of its implementation and determine the principles of

environmental and legal policy. Therewith, environmental rights, interests, and obligations should be considered as a system-developing factor, a value guide for the development of ecological and legal science, doctrine, policy, and legislation (especially during its systematisation).

When starting to codify environmental legislation, it is worth remembering that it is innovative, since it has not yet acquired a certainty and objective readiness in its content, although its implementation is already socially determined. The preparation of the codified act will be an attempt to solve a number of problems of legislative regulation of environmental relations, the rejection of fragmentary modernisation of environmental legislation and the transition to its systematic updating. The outlined points should become a strategic vector for modernising the tasks of modern environmental policy.

Therewith, an integrated approach to the development of state environmental policy should be maintained, based on systematic, continuous greening of national development strategies, integration of state environmental policy into others. However, it should be remembered that the main threat is the possibility of "blurring" it in the problems of other sectoral policies, therefore, the environmental component of national policy, development strategies should not remain only a declaration, a beautiful and bright slogan with a European connotation, but should perform its own functions, such as ideological, doctrinal, law-making, law-enforcing, right-exercising, etc., which is a crucial aspect. Environmental rights and interests should be ensured in the legal aspect and in the political, economic, social, and ideological aspects. Only under such conditions will their proper provision in national development strategies become an effective tool not only for their exercise but also for their protection. Thus, ensuring the security and protection of environmental rights of modern and future generations depends on how effective and balanced the modern state environmental policy will be and how perfect will the national legislation be.

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THE ORDER OF PROPERTY REALISATION IN BANKRUPTCY (INSOLVENCY) PROCEDURE UNDER THE LAW OF UKRAINE AND GERMANY

Abstract. *The article represents a comparative legal study of the specifics of the order of debtor's property realisation in the bankruptcy procedure under the law of Ukraine and Germany through the application of hermeneutic (used in accessing the essence of the legal framework and judicial practice); axiological (in determining the evaluative base) along with phenomenological (and the nature of the phenomena); systematic (modeling of the functioning systems) methodological toolkit. The authors emphasise the importance of legal provisions governing the sale of the debtor's property, due to the natural proximity of this stage of the competitive process to the financial component, which, in turn, is inevitably associated with various abuses. An electronic trading system had been recently introduced in Ukraine, on which therefore many hopes and expectations were relied upon. However, the electronic trading system did not cope with tasks set, and many new problems were added to the old ones. The article states that the existence of problematic issues in the procedure of bankrupt property realisation is confirmed, in particular, by the court practice. However, judicial practice in itself often becomes a source of problems. The article pays special attention to the German legislation, which uses a radically opposite model of property sale in insolvency proceedings. The authors justifiably propose to make certain changes to the Ukrainian legislation, by using the positive experience of Germany. As a result of a comparative legal analysis of the legislation of Ukraine and Germany, the authors provide ways of solving the raised issues in the article. The implementation of the recommendations submitted within this comparative-legal study should improve the quality of bankruptcy proceedings, reduce the number of abuses by insolvency trustees, as well as protect the rights and property interests of competitive creditors and creditors with the right of separate satisfaction*

Keywords: *bankruptcy procedure, competitive process, incapacity, creditors' committee, creditors with right of separate satisfaction, auction, insolvency trustee*

INTRODUCTION

On October 21, 2019, the Code of Ukraine on Bankruptcy Procedures of October 18, 2018 No. 2597-VIII [1] was enacted. The main purpose of adopting this Code was to optimise and update the procedures established by the Law of Ukraine "On Reestablishing Debtor Solvency or Declaring Bankruptcy" [2] (replaced by the top-mentioned document). Clause 4 of the Final and Transitional Provisions of the Code established that "…from the date of entry into force of this Code further proceedings on bankruptcy cases are carried out in accordance with the provisions of the new Code, regardless of the date of opening of bankruptcy proceedings, except for bankruptcy cases, which at the date of entry into force of this Code are at the stage of rehabilitation, proceedings on which are continued in accordance with the Law of Ukraine "On Reestablishing Debtor Solvency or Declaring Bankruptcy" [1].

The entry into force of this codified act and its further amendments have generated increased scientific interest towards the specifics of its practical application, especially in the context of the launched program of Big Privatisation (concerning large state-owned enterprises). In essence, the stage of the sale of the debtor's property is the culmination of the competitive process, as it becomes clear whether there will be enough assets in the liquidation mass to meet the property claims of creditors. It is the onset of the stage of the sale of the debtor's property that creditors have been waiting for so long, gradually going through numerous and long stages of the competitive process. A prominent German lawyer and researcher of the competitive process of the XIX century, Wilhelm Endemann, noted that the distribution of the debtor's property is possible only after the indisputability and type of creditors' claims are finally approved [3, p. 425; 4, p. 543].

After all, the provisions of bankruptcy (insolvency) normative acts in both Ukraine and Germany, which regulate the procedure for selling the debtor's property, certainly arouse great interest. The latter is explained by the importance of this stage of the competitive process, in which property assets are converted into monetary assets, which later will be distributed among creditors. However, it is at this stage of the sale of the debtor's property that several abuses occur in practice. The famous French civilian of the XIX century. Edmond Eugène Thaller noted that "the mercantilism of bankruptcy trustees has always been considered by the governments of the Anglo-Saxon nations as a plague of bankruptcy proceedings, as well as an obstacle to the success of all bankruptcy statutes" [5, p. 182]. Thus, we get an inseparable symbiosis, which becomes a kind of stumbling block in the field of the competition process.

A similar position in this regard is taken by the eminent jurist-scientist Gabriel Shershenevich, citing a brilliant comparison of the already mentioned Edmond Eugène Thaller: "As much as the amicable agreement represents a picture of peace, the distribution of property is similar to a war that devastates the country" [3, p. 428]. Indeed, sometimes the creditors together with the insolvency trustee, in the pursuit of the greatest possible satisfaction of their own monetary claims, ruthlessly devastate the entire property of the debtor. However, the conversion of the debtor's property assets into monetary equivalent is a necessary step because otherwise, the proportional satisfaction of creditors' claims in conditions of the absence of the debtor's assets will be almost impossible.

The theoretical basis of the article is the works of such prominent multinational scholars and lawyers as B. Polyakov [6], G. Shershenevich [3], V. Endemann [4], S. Greif [7], E. E. Taller [5], O. Titova [8], K. Kalachenkova [8], N. Haverkamp [9; 10], and other scientists. At the same time, in the context of the recent reformation of the bankruptcy procedure in Ukraine [11], a comparative legal analysis of the procedure and conditions of sale of the debtor's property under the law of Ukraine and Germany, highlighting problematic aspects of this stage of the bankruptcy process and finding their solutions are very actual.

Given the standardisation of economic activity within states to ensure the stability of the internal market of the European Union, foreign scholars have also developed various aspects related to certain phases of insolvency proceedings. Elements of their research published in highly reputable journals were also drawn into the study of German practices because of the standardised approaches to the above-mentioned problems (and their specific elements) [12–18].

The purpose of the study is to conduct a comprehensive comparative legal analysis of Ukrainian and German legislation in the field of regulating the realisation of debtor's property in bankruptcy (insolvency) proceedings, determining the powers of representative bodies of creditors and insolvency trustees at this stage, clarifying the legally established conditions of sale of debtor's property, and also finding the ways to improve the bankruptcy procedure in Ukraine with the possible usage of the German experience.

1. MATERIALS AND METHODS

By setting a wide range of relations that arise around the procedure of the realisation of debtor's property in the legal practice of Ukraine and Germany as the object of research, the subject of this article included its elements: bankruptcy procedure, the principle of competitiveness in the process, structural features and characteristics of creditors' committees, mechanics of auctions and guarantors of realisation. The defined object and subject of the study are substantiated not only by the existing problems in terms of their regulation in Ukraine but also by

the need for the cautious and incremental introduction of foreign legal models and mechanisms into the legislation and legal practice of our country. Moreover, the comparative-legal orientation of this research in itself already provides value for the domestic legal science because besides the main purpose of scientific search it also enhances the methodological and material framework for further branch and inter-branch investigations for Ukrainian lawyers-theorists and practitioners.

Within the general methodological framework of the given research inevitably was the use of all general methods of scientific cognition used in general science: observation (in conjunction with the other methods), comparison (of the significant common and different features in order to form regularities), abstraction (in the process of capturing phenomena and relations of interest to the researchers). Specifically, when researching the above elements, a variety of special scientific methods were applied: phenomenological (to reveal the nature of the elements), hermeneutic (to discover the essential nature of the texts when working with the legislative framework and judicial practice of Germany and Ukraine), axiological (focused on determining the evaluative base of the phenomena) and systematic (as the foundation) to construct a scientocentric model of interaction of the elements. Furthermore, the prognostic method provided an opportunity to form a series of perspectives and proposals for the reforming of the procedures under study in the national law of Ukraine.

The comparative legal approach and the use of the corresponding method became pivotal for the article. Currently, the interest in comparative law in Ukraine is on the rise. It is necessary to note that having a rather robust methodological basis for comparative studies in the Soviet Union, modern Ukrainian legal science uses a different toolkit. Distinctive features of Soviet comparative legal science were the use of Marxist-Leninist methodology, increased interest in general methodological issues, sharp ideological and political orientation of works of Soviet scientists, who critically evaluated the so-called bourgeois concepts of comparative law. In modern Ukraine, the development of contemporary comparative law has been greatly influenced by using of foreign law in the creation of new national laws and the benchmarking of different legal systems for a more in-depth study of the phenomenon of law. Considering European and Euro-Atlantic courses embodied in the Constitution of Ukraine, the improvement of legislation, and, accordingly, the introduction of fundamentally new practices and models is carried out considering the norms of foreign law.

The substantive basis of this paper constitutes classical European monographic studies, scientific articles with high credibility, codified legislation of Ukraine and Germany, as well as court practice materials.

2. RESULTS AND DISCUSSION

2.1. Domestic legislative innovations and court practice

Returning to the already mentioned statement of Edmond Eugène Thaller, the authors must state that, unfortunately, the "picture of peace" is not provided by the provisions of the Bankruptcy Procedure Code of Ukraine [1] (hereinafter – Bankruptcy Code), and therefore "devastating war" is an inevitable phenomenon, to which, actually, the section V of this codified act is devoted. However, in an incomprehensible way, Art. 63 with the name: "Sale of bankrupt property" appeared outside the mentioned section.

In part 1 of Art. 63 of the Bankruptcy Code stipulates that the liquidator sells the bankrupt's property at auction. However, this method of property realisation is not always mandatory, as the legislator provides some exceptions. Thus, the liquidator has the ability to sell perishable goods at a reasonable price, and he is empowered to sell inventories and low-value items, provided that their market value is not more than one minimum wage.

The authors fully support giving to the liquidator the opportunity to sell the property without an auction in cases of its low value, as the public sale may be impractical. O. Titova and K. Kalachenkova take a somewhat similar position, noting that "… it is not very effective to sell low-value items, that do not belong to the category of perishable items, at auction. A possible option, in this case, could be to set a price limit for the property realisation outside the auction" [8]. One should consider that the formulation provided in the mentioned provisions of the Bankruptcy Code is too vague, as there is a possibility of abuse of that rule of law by dividing the property into small parts in order not to exceed the statutory value. This situation is most typical of insolvency proceedings against individuals.

Moreover, we cannot ignore the evaluation concept of "reasonable price". Of course, providing the opportunity to quickly sell perishable goods is vital, however, at this stage, the situation with a "reasonable price" is reminiscent to us the ancient Rome, where, as noted by K. Malyshev, it was impossible to value property at market value, as there wasn't an established price for certain goods [19]. Of course, immediately selling perishable goods at their market value is an extremely difficult and almost impossible task, but the state of affairs described above needs to change. In particular, the authors propose to establish by law a special procedure for the realisation of perishable goods by the liquidator, as well as to clarify what price can be considered "reasonable".

The provisions of part 3 of Art. 63 of the Bankruptcy Code [1] are quite ambiguous since they prohibit the provision of agreements to provide the buyer of the bankrupt's property in installments or deferral of payments. In accordance with part 1 of Art. 85 of the Bankruptcy Code, the buyer is indeed obliged to pay the price of the purchased goods within

10 working days from the date of publication in the electronic trading system (hereinafter – ETS) of the results of the auctions. However, surprisingly, in part 3 of the mentioned article, the legislator provides for the buyer to defer payment of the price for the goods for 10 calendar days if he pays more than 50% within the prescribed period. Thus, despite the prohibition to provide for deferrals at the contractual level, which, of course, is done both to expedite the bankruptcy proceedings and to obtain funds as soon as possible, the legislator decides to provide deferrals on the legal level.

The introduction of the sale of the debtor's property through ETS is one of the most important innovations in the bankruptcy procedure. A. Pidhoretska notes in this regard: "Regulations on the sale of all debtor's property exclusively at electronic auction at the highest price is a novelty of the Code, which aims to create competitive and favorable conditions for organising and conducting auctions for the realisation of debtors' property in bankruptcy cases, promoting expansion circle of potential buyers, increasing the level of repayment of creditors' claims" [20].

Therefore, Art. 68 of the Bankruptcy Code [1] stipulates that "… the sale of the debtor's property at auction takes place in ETS". The procedure for the functioning of the ETS was approved by the Resolution of the Cabinet of Ministers No. 865 of October 2, 2019 [21] (hereinafter – the Procedure). Here it is necessary to note the position of B. Polyakov, who pointed out that the Bankruptcy Code provides a different name of the act, which should regulate the functioning of the ETS [22]. Indeed, in some strange way, instead of the title "Procedure for the functioning of the electronic trading system", we received the "Procedure for organising and conducting auctions for the sale of debtors' property in bankruptcy (insolvency) cases".

If at the legislative level there is confusion with the name of the normative act, then, most likely, its provisions will also be far from perfect. No wonder they say: "as you name a ship, so it will sail". This Procedure clearly demonstrates the effectiveness of mentioned principle, and therefore the authors propose to consider some problematic issues.

In the analysis of the Procedure, the provisions of its paragraph 73, which allow holding an auction with only one buyer, are quite incomprehensible. Therefore, in the case of a bid, only one bidder is presumed to have submitted the highest bid. We fully share the opinion of B. Polyakov, who noted: "In the auction must always be at least 2 participants, otherwise there will be no competitive principle inherent". Complementing the above-mentioned position, the authors note that in this case, between the concepts of "auction" and "sales contract" will be a sign of equality.

The completely opposite situation arises in the case of an auction for small-scale privatisation of state property. Clause 49 of the Procedure for Conduct-

ing Electronic Auctions for the Sale of Small-Scale Privatisation Objects and Determining Additional Terms of Sale, [23] stipulates that the system automatically detects an auction as "failed" if less than two applications for participation or two bids were received.

Thereby, the legislator differentiates depending on the auction customer. However, it is unclear why the protection of creditors' interests during bankruptcy proceedings is not as high-priority as the protection of state interests during small-scale privatisation. Moreover, it is common for privatisation to occur at a loss. In accordance with part 5 of Art. 12 of the Law of Ukraine "On Privatisation of State and Municipal Property" bankruptcy cases against debtors – state enterprises or business enterprises, more than 50% of the shares of which belong to the state, are not opened if such enterprises are privatised. Bankruptcy proceedings against such enterprises must be terminated, except for liquidation by the decision of the owner [24].

Therefore, the state has the opportunity to "pull" a certain category of debtors out from bankruptcy by "redirecting" them to privatisation and hold a real auction, rather than concluding a regular sales contract with any buyer without any competition. This state of affairs somewhat reminds us of the competitive process of Kievan Rus, where the Knyaz' (prince's) property interests were satisfied primarily. Similarly, the sale of certain state property can take place on the terms of a more secure auction.

Moreover, problems with the realisation of the debtor's property do not end. Let's pay attention to paragraphs 75, 76, 78 of the Procedure [21], which provide the legal consequences if holding the auction without determining the winner. Thus, when holding repeated and second repeated auctions, the initial price of the first auction will be reduced by 20%, as well as the initial price of the first repeated auction will be reduced by 25%. Furthermore, there is a possibility of holding the first repeated auction with a price reduction with the consent of the secured creditor or the creditors' committee. At the second repeated auction such consent is not required (p. 3 of Art. 80 of the Bankruptcy Code, paragraph 76 of the Procedure). The authors have to admit that the situation with the procedure in case if the second repeated auction would fail is not regulated by law. Moreover, the law does not exclude such a course of events. In particular, in p. 3 of Art. 81 of the Bankruptcy Code enshrines the right of the secured creditor to apply to the bankruptcy trustee regarding the purchase of collateral property within 20 days from the date of the end of the second repeated auction.

The authors are convinced that the above-described problem is unacceptable because at the legislative level there are provisions that allow holding an auction at incredibly low prices. The Northern Economic Court of Appeal rightly stated in the resolution in case No. 925/1500/17: "The repeated and second repeated auction are pro-

vided in the Law to prevent situations when the property cannot be sold due to its inflated initial value" [24]. However, unfortunately, the provisions on repeated auctions are currently used by arbitration trustees to achieve the exact opposite goal. The mentioned decision concerned the fact that the bankruptcy trustee tried to sell the debtor's property (right of claim) at the second repeated auction with the initial price of 600,000 UAH, with the number of reduction steps reaching 99 and the size of 1 step – 1%. All this provided that the right of claim is 719,968.00 UAH.

B. Polyakov noted that "… during the sale of property assets of the debtor creditors receive 50 times less than their book value" [6, p. 382], and, as further substantiated by this study, nothing has changed significantly in 10 years. Regarding this, the authors firmly believe that this situation requires some changes, the justification of which will be given below. For now, it is worth paying attention to the cases when the auction ended without determining the winner. According to paragraph 75 of the Procedure [21], such cases are the absence of participants of an auction, non-receipt of the price offer from any participant of the auction, non-performance by any of the participants of the auction at any step of auction. If the auction ends without determining the winner, it is considered "failed". In addition, the auction is recognised as "failed", in case of refusal or delay by the winner to make payment for the full amount for the goods (paragraph 90 of the Procedure), as well as in case of failure to sign a protocol or act of acquisition at the auction.

It should be noted that under certain conditions, the legislator provides some negative consequences for the auction participants or the winner of the auction if the auction is recognised as "failed". Thus, in p. 3 of Art. 84 of the Bankruptcy Code [1] stated that guarantee fees are not refundable in case if the auction is completed without determining the winner, as well as in case of non-payment or late payment by the winner of the auction of the appropriate amount for the property. This legal regulation can be explained by the fact that, first, the legislator encourages auction participants to submit price proposals because if none is received, all participants will lose their guarantee fee. Secondly, the legislator tries to prevent all kinds of illegal manipulations by auction participants, which are committed to purchasing property at the lowest possible price.

2.2. Procedural problems in the implementation of key innovative mechanisms

However, these measures are not enough because even if the guarantee fee is lost, the unscrupulous participant still gets the opportunity to buy property at a low price. To realise this possibility, it is necessary that the first and the repeated auctions would be recognised as not having taken place. And this can be achieved either by not submitting a price offer to any of the participants or, if one of the participants has submitted it, submitting

a higher price offer. In both cases, the unscrupulous bidder loses the guarantee fee but later comes the long-awaited auction with a much lower starting price, and the possibility of its reduction. To prevent such situations, the authors propose the following changes.

Firstly, in addition to depriving participants of the guarantee fee in the cases provided for in Art. 84 of the Bankruptcy Code [1], it is also necessary to limit their right to participate in subsequently repeated auctions. This can be justified by the fact that the participant is aware of the price of the property when making a guarantee fee, since this is a mandatory condition of sale (Article 75 of the Bankruptcy Code), and such information must be contained in the auction announcement (Article 77 of the Bankruptcy Code). If it is an auction with a price reduction, the bidder knows that the price is reduced by a maximum of 99 steps (the exception is only when the creditors' committee or secured creditor set a minimum price, but in this case, it is necessary to legally establish the obligation of the organiser to inform participants about the number of steps). Thus, the person who becomes a participant in the auction is aware of the initial price of the product, which is the minimum, and in the case of an auction with the price reduction – provides a potentially minimum price, and therefore agrees to the conditions. Therefore, the only reason for not receiving a price offer from any participant is to commit illegal acts in order to seize property at a meager price. Secondly, the authors consider it is necessary to increase the guarantee fee by auction participants to 50%.

The essence of the auction is that the winner pays the necessary funds for the debtor's property as soon as possible to let the debtor repay his debts. Therefore, it is illogical to leave the obligation to pay the full proper amount by the winner, as well as to prevent the auction from being declared "failed", in case of non-payment or incomplete payment by the winner. In this case, the payment of the proper amount by the winner possibly may be delayed, so, the bankruptcy procedure also will possibly be delayed. However, on the other hand, it is possible to ensure payment of at least a slightly larger part of the proper amount for the property by increasing the guarantee fee to 50%. At the same time, it will be at least unprofitable for the winner of the auction to refuse to fully pay the proper amount because a significant amount of money will be lost. Moreover, persons who do not intend or don't have the opportunity to purchase property at public auction will not participate in them. The authors also note that the guaranty fee does not provide any obligations for participants on purchasing the goods, and in case of their proper action, that fee is totally refundable.

Without any doubt, with such provided changes, the number of potential participants of auctions will decrease but will decrease only due to the refusal of unscrupulous participants, while those with bona fide will remain.

In addition to the above-mentioned, the situation with the recognition of a transaction, made at an auction, as invalid in case of violation of the established procedure for preparing or conducting an auction, which prevented or could prevent the sale of the property at the highest price, is quite problematic. Article 73 of the Bankruptcy Code is devoted to this situation.

In analysing the regulations of Art. 73 of Bankruptcy Code, B. Polyakov made some following important conclusions:

– to appeal the result of the auction, it is necessary to prove the fact of violation, the fact of obstruction or potential obstruction of the property realisation at the highest price, as well as the causal relationship between them;

– "… The drafters of the code did not consider that any agreement must meet the requirements of the law. Therefore, the agreement concluded at the auction can be appealed not only on special grounds, which are provided for in Art. 73, and in Art. 42 of the Bankruptcy Code (as a loss-making agreement for creditors), as well as on the general grounds, which are provided in the Civil Code" [22].

The identical position can be seen in the Resolution of the Supreme Court in the Judicial Chamber for bankruptcy proceedings of the Economic Court of Cassation of October 2, 2019, in case No 5006/5/396/2012, where it was stated that "… the legal nature of the property sale by auction gives grounds for recognising (if there are any grounds) the results of such auctions invalid under the rules of invalidation of transactions, and under the civil law regulations" [26].

It is also worth paying attention to the fact that under the p. 4 of Art. 656 of the Civil Code of Ukraine [27] to the contract of sale, which is concluded at auction, the general provisions of the contract of sale are applicable unless otherwise provided by law governing the procedure for concluding these contracts or does not follow from their essence. Consequently, the provisions of Art. 203 and 215 of the Civil Code of Ukraine are applicable. Therefore, it would seem, that a transaction entered into at an auction, which was held in violation of applicable law, should be declared invalid without the need to prove the fact of obstruction or potential obstruction to the sale of the property at the highest price and causal relationship between them. A somewhat similar position can be found in the Resolution of the Supreme Court of Ukraine of June 29, 2016, in the case No 6-370цс16, where it is stated that "… the legal nature of the sale of property by a public auction provides grounds, which are based on the norms of civil legislation (Articles 203, 215 of the Civil Code of Ukraine) on the invalidity of the transaction as not meeting the requirements of the law, in case of non-compliance with the procedure, bidding procedure provided by the Provisional Regulations on the procedure of public sale of seized property, approved by the order of the Ministry

of Justice of Ukraine No 68/5 of October 27, 1999…" [28].

However, the authors draw attention to the fact that since p. 4 of Art. 656 of the Civil Code of Ukraine [27] provides a certain exception and the provisions of Art. 73 of the Bankruptcy Code just fall under it, in which case it is necessary to apply a special rule of the Bankruptcy Code instead of the general rule of the Civil Code. Given the above-mentioned, it can be concluded that it is not necessary to recognise the transaction concluded at the auction as invalid in case of violation of the auction procedure if such violation did not affect the sale price. Moreover, confirmation of this position is found in Art. 74 of the Bankruptcy Code, which indicates the legal consequences in case of violation of the conditions of the auction, which prevented the person to participate in a public sale of the property. The authors note that among the specified legal consequences, the possibility of recognition of the transaction as invalid in this norm isn't provided. Probably, in this case, the legislator aimed to ensure the receipt of the funds in the maximum possible amount through the sale of the debtor's property, but at the same time in compliance with the condition of ephemeral bankruptcy proceedings.

However, despite all this, it must be stated that the fact that currently the provisions of the Bankruptcy Code do not sufficiently protect the inviolability of the agreement concluded at the auction. After all, as already noted, now there is an opportunity to recognise the transaction, made at auction, invalid also on the general basis which are provided in the Civil Code of Ukraine. Therefore, the authors consider it appropriate to introduce an additional article to the Bankruptcy Code, which would indicate an exhaustive list of subjects of appeal and the conditions under which the transaction made at auction for the sale of the debtor's property in bankruptcy proceedings may be declared invalid.

In addition, in this new article, it would be appropriate to provide a limited, non-renewable period for appeals by auction participants and participants in the bankruptcy procedure on the result of public auction. An example from the case law can serve as an illustration of the real need to introduce such novelty. As can be seen from the resolution of the Economic Court of Cassation in the Supreme Court of March 5, 2020, in case No 14/325"б", in 2013 an auction was held for the sale of the debtor's property, in its result, there also was a payment of the proper funds by the buyer and the conclusion of a contract of sale between the buyer and arbitration trustee. In 2014, the buyer alienated the property he had purchased at auction. In 2018, the arbitration trustee was replaced by a new one, who, in turn, 5 months later decided to apply to the court to declare the results of the auction as invalid [29].

The first thing that comes to mind is the general limitation period of actions, which is established by Art. 257 of the Civil Code of Ukraine and is three

years. Indeed, three years have passed, and it appears that no delays in the bankruptcy proceedings are planned. Of course, this statement is correct, but as it is already known, the case reached the court of cassation, and only in March 2020, namely almost 7 years after the auction, should reach its logical end. However, it didn't. In the mentioned resolution the court concluded that the buyer's application for the limitation period was not sealed with an electronic digital signature, as a result of which the case was sent for a new trial to the first instance [29].

This approach cannot be considered successful, as 7 years have passed since the auction, and the issue of declaring its result invalid has not been resolved because the court of cassation "decided to put a comma instead of a dot". And most importantly: what exactly was the reason for sending the case for a retrial? Formality in the absence of an electronic digital signature in the application, the applicant of which does not challenge its validity. Maybe next time the court will remand the case for a retrial due to the absence of a punctuation mark or a spelling mistake in the application? However, the strangest thing in this situation is that the bankruptcy procedure was paralysed for such a long time due to only one proceeding.

To prevent such situations, the authors propose to set at the legislative level a monthly non-renewable period for appealing the results of the auction, given that:

– firstly, according to the Bankruptcy Code, the liquidation procedure itself should last no more than 12 months. Based on this, the one-month deadline for appeal is not so short. Moreover, in this case, there can be no question of the application of the general limitation period of three years;

– secondly, in the described dispute there is a limited subject composition. As the court noted in the above-mentioned resolution, "… the parties to the dispute over the recognition of the auction and its results as invalid are the seller, the winner of the auction and the organiser of this auction" [29]. Thus, it can be noted that, given the limited subject composition, the one-month time limit for appeal is sufficient. Furthermore, do not forget about such a possible course of events as the further alienation of the property by the winner of the auction. In the mentioned case, the bona fide purchaser was lucky that the winner of the auction announced the expiration of the limitation period, but what would have happened if he had not done so? Or, for example, let's simulate a situation where the property has been sold several times… Then what method of legal protection should the current owner of the property use, and how to further establish the whole "chain" of owners? Moreover, if the winner of the auction was liquidated, the bankruptcy trustee will be able to file a lawsuit in court without any restrictions on the limitation period. Do not forget that the application on the expiration of the limitation period is a right and not an

obligation of the party. Considering the following circumstances, it can be said that the court of cassation has unreliably established the subjective composition of the parties to the dispute on the invalidation of the auction and its results. In the authors' opinion, in this case, the court must have also indicated the current owner of the property if the limitation period could be applied to such a dispute.

Therefore, the authors consider the establishment of a one-month non-renewable period for appealing the result of the auction in the bankruptcy procedure to be justified and necessary. The problematic issues related to the legal regulation of the sale of property in bankruptcy proceedings do not end there. Let's take a look at the situation with the realisation of the debtor's collateral property. Thus, from the system analysis of p. 6, 9 of Art. 41, p. 6 of Art. 64, p. 3–7 of Art. 75 and Art. 81 of the Bankruptcy Code, we can conclude that the sale of the collateral property is carried out by the bankruptcy trustee, and such property needs to be included in the liquidation estate. However, the creditor, whose claims were secured, will receive separate satisfaction at the expense of the realised collateral. In the second paragraph of p. 2 of Art. 45 of the Bankruptcy Code [1] it is stated that: "If the value of the collateral is insufficient to cover the entire claim, the creditor should be considered as secured only in part of the value of the collateral. The rest of the claims are considered unsecured". It would seem that this legal norm is clearly formulated and totally understandable, however, the Judicial Chamber for Bankruptcy Cases of the Economic Court of Cassation of the Supreme Court will disagree with this statement, which in its resolution of February 4, 2021, in the case No. 904/1360/19 [30] comes to a rather unexpected decision. In paragraph 85 of this resolution, the court provides three approaches to understanding the number of claims of creditors with the right of separate satisfaction:

– "Approach I – the creditor's claims, unless otherwise stipulated in the contract, are recognised as secured only in the amount of the value of the collateral (mortgage), determined between the creditor and the debtor (property guarantor who is not a debtor in the principal obligation) in the pledge agreement (mortgage), which subsequently in practice results in cases of re-application of the creditor to the court with a statement of recognition of his claims secured in case of sale of the collateral (mortgage) at a price higher than that agreed in the pledge agreement…;

– Approach II – the creditor's claims, unless otherwise stipulated in the contract, are recognised as secured only in the amount of the collateral (mortgage) agreed between the creditor and the debtor (property guarantor who is not a debtor in the principal obligation) in the pledge agreement (mortgage), and in the other part, the claims are unsecured and are repaid in the order determined by the Bankruptcy Code. In this case, the creditor will be both secured and com-

petitive and will have not only the right to participate in the creditors‘ assembly with a casting vote but also to obtain satisfaction of other unsecured claims at the expense of other property of the debtor, which is not subject to security…;

– Approach III – the creditor‘s claims, unless otherwise provided by the contract, are recognised as secured in the amount of the total number of claims against the debtor (property guarantor who is not the debtor in the principal obligation)" [30].

In paragraphs 110 and 111 the court concludes that the first and second approaches are erroneous, moreover, in paragraph 112 stated that "… these approaches are inconsistent with the purpose and principles of the competitive process, which include, in particular, the prohibition of individual satisfaction of creditors' claims; satisfaction of creditors' claims in order of priority; satisfaction of requirements of each line after full satisfaction of requirements of creditors of the previous line; satisfaction of creditors' claims in case of insufficiency of the debtor's funds to satisfy creditors' claims of one line proportionally to the amounts of their claims. Observance of this order is aimed at preventing the overwhelming satisfaction of the claims of some creditors to the detriment of others" [30].

Based on the analysis of the above-provided paragraph of this resolution, it appears that the court erroneously applies to secured creditors the principles of the competitive process, which apply only to competitive creditors. Currently, the current provisions of the Bankruptcy Code do not provide any order of priority of secured creditors' satisfaction. In addition, a separate and extraordinary satisfaction of the claims of secured creditors is clearly spelled out in p. 6 of Art. 64 of the Bankruptcy Code, and therefore, for a secured creditor, the privileged position compared to competitive creditors is established by law.

On the other hand, if the collateral is not enough to fully satisfy the claims of the secured creditor, the latter will be able to finally satisfy them in the status of a competitive creditor in the established order of priority. This position, in particular, is confirmed by the scientific opinion of the members of the Scientific Advisory Board of the Supreme Council Doctor of Law Professor. O. Belyanevych and Ph.D. in Law V. Belyanevych, who noted in it: "If the debtor is a mortgagor, the claim for the value of the collateral (mortgage) is considered secured, the rest of the claim must be entered in the register of creditors' claims as unsecured" [30].

However, in the end, the court concludes that the creditor is considered secured by the entire claim, regardless of the assessment of the collateral. Given the fact that the collateral property is sold by the bankruptcy trustee, the secured creditors are currently in a rather difficult situation. Previously, such creditors were not particularly interested in the amount of money that will be received from the sale of collateral because the difference

with their claim will be included in the register of creditors' claims. At present, secured creditors have been deprived of such a prerogative.

If the amount of satisfaction of secured creditors' claims is directly proportional to the sale of the debtor's collateral property, would it not be appropriate for those creditors to sell this property on their own or to transfer it to their ownership immediately? Why then does the legislator provide for a special procedure for the sale of the property to a secured creditor? In the end, we have a question: if the collateral covers the entire monetary claim of the creditor, regardless of its value, then why do the parties provide for the value of the collateral (mortgaged property) in the contract? Overall, the conclusion is that the sale of the debtor's property under Ukrainian law is quite problematic, and ETS, which was designed to eliminate the problematic issues, instead creates new ones, which, of course, needs to be corrected.

2.3. Findings of a comparative review of German legislation on improving the situation in Ukraine

A completely different legal regulation of these issues can be seen in Germany. The authors propose to proceed to the analysis of German legislation. Thus, § 159 of Insolvenzordnung [31] (hereinafter – Statute) stipulates that the insolvency trustee must immediately liquidate the property constituting the bankruptcy estate after the report review meeting unless this is contrary to the decision of the creditors' assembly. We note that the German legislator does not stipulate the obligation of the insolvency trustee to sell the property from the bankruptcy estate through a public auction. It is also worth mentioning the position of D. Lasser, who noted that the insolvency trustee "has a choice between initiating an auction or selling property in a private way" [32]. Moreover, this lawyer argues that the sale of property through an auction is mostly inappropriate and unprofitable [32]. N. Haverkamp takes a similar position, noting that the auction for the sale of property "is a long-term bureaucratic process, which often results in a lower purchase price than when sold privately" [9].

§ 160 of the Statute is devoted to significant transactions, for which the insolvency trustee must obtain the consent of the creditors' committee, and in its absence, respectively – the assembly of creditors. Moreover, this rule provides for cases where the consent of the representative body of creditors is required, namely: 1) privately sale of the enterprise, plant, or part of real estate in, sale of the debtor's share in another enterprise if such shares are intended to create permanent ownership to the enterprise or obtaining the right to periodic profit; 2) if the transaction consists in concluding a loan agreement with a significant encumbrance for the insolvency property; 3) if the insolvency trustee intends to perform certain procedural actions relating to a lawsuit with a significant price (application, accession, refusal, or avoid-

ance of such actions). Also, quite interesting are the provisions of this norm on the quorum of creditors‘ assembly. Thus, it is not required for a decision at a creditors‘ assembly, and creditors must be notified of this in the invitation to such a meeting of creditors' assembly. Therefore, we conclude that the provisions of the Statute are mostly aimed at the ephemerality of the insolvency procedure, rather than compliance with certain legislative formalities. Indeed, if the creditor is interested in voting against the transaction, he must be present, otherwise, it is presumed that there are no objections.

Approaching the question of the ephemerality of the insolvency procedure and the focus on any profit-making, the authors cannot mention the provisions of § 164 of the Statute. This norm indicates the validity of the transactions of the insolvency trustee if they are committed in violation of §§ 160–163 of the Statute. Of course, something similar can be seen in the Bankruptcy Code, in particular in Art. 73, the analysis of which was carried out above. But this similarity is very tiny since § 160 is devoted to significant transactions, § 161 – a temporary prohibition of significant transactions, § 162 – the sale of the company to particularly interested persons, and § 163 – the alienation of the company at a reduced price. Thereby, these provisions of the Statute are aimed primarily at stimulating the ephemerality of the competition process, for which the German legislator is ready to make various sacrifices, even so-called "illegal law". After all, such provisions at least contradict the established practice of contractual relations, and at most – open the way to various kinds of abuse by the insolvency trustee. N. Haverkamp notes that the insolvency trustee often sells property at a below-market value because in this way he manages to reduce his time costs. However, in this case, he can be prosecuted [10].

The authors do not deny in any means the possibility of bringing the bankruptcy trustee to prosecution, but in authors' opinion, such a task is not easy, as it is necessary to prove in court the commission of illegal actions, the consequences of such actions, and the causation. In general, this state of affairs can be explained by the fact that, unlike Ukraine in Germany, the debtor is not released from its obligations if the size of the bankruptcy estate was not sufficient to cover all creditors' claims. Therefore, the question of the most efficient sale of the debtor's property should for the most part concern the debtor himself, when the creditors are concerned indirectly. In fact, it is precise because of this circumstance that issues related to the validity of the property sale agreement in Germany have a completely different substantive regulation, and for Ukraine, it is currently unattainable and, frankly, unlikely to be attractive.

As already was mentioned, § 161 of the Statute provides for the possibility of a temporary prohibition of the transaction. It stipulates the obligation of the

insolvency trustee to notify the debtor of the decisions of creditors' self-government bodies relating to transactions falling under § 160. If the participants in the creditors' assembly do not give their consent, the court may, at the request of the debtor or the qualified majority of creditors provided for in paragraph 3, part 1 of § 75, temporarily prohibit the insolvency trustee from making transactions and convene creditors' assembly to resolve the issue. After all, the provisions of this rule of law indicate that the procedure for a transaction by an insolvency trustee is much simpler than postponing its commission. Therefore, by its essence, this norm is mostly declarative and almost does not create obstacles.

§ 162 of the Statute is devoted to the sale of the enterprise to particularly interested persons. Thus, for this transaction is obligatory the consent of the assembly of creditors, if the buyer of the enterprise or a person who owns 1/5 of the capital of the enterprise, are:

1) an interested person within the meaning of § 138, including a person who is an enterprise and has a share in the buyer's capital or is dependent on the buyer or a third party acting at the expense of the buyer or at the expense of the enterprise dependent on the buyer;

2) a non-competitive creditor or a competitive creditor with claims of not lower rank, whose rights to separate satisfaction, according to the court, are at least 1/5 of the sum of all claims with separate satisfaction and the number of claims of competitive creditors with claims of not lower level.

§ 163 is devoted to the sale of the debtor's enterprise at a lower price. This regulation allows the debtor or a qualified majority of creditors (paragraph 3, part 1, § 75) to apply to the court to state that there is another buyer and sale to him would be more profitable. In this case, the court may require the trustee to obtain the consent of the creditors' assembly.

Section 3 of the Statute is devoted to the sale of the property to which there is a right to separate satisfaction. Thus, § 165 of the Statute provides for the right of the insolvency trustee to hold an auction for the sale of real estate, in respect of which there is a right to separate satisfaction. Indeed, § 166 of the Statute is devoted to the sale of movable property. Accordingly, the insolvency trustee has the right to such realisation, if the property is at his disposal. At once there is a question with a way of sale in such case, after all unlike realisation of real estate the German legislator does not make a specification here. Therefore, it is worth paying attention to the provisions of § 1235 of the German Civil Code [33]. This regulation stipulates that the collateral must be sold at a public auction.

The provision of p. 1 of § 1238 of the German Civil Code [33] attracts attention in terms of improving Ukrainian legislation since it stipulates that the sale of a mortgaged property can take place only if the buyer pays the full amount for the goods in cash, otherwise his rights

are lost. Of course, the Ukrainian legislation also states something similar, but we have already described that there is a statutory delay in the payment of the full proper amount for the purchased goods.

In addition, the Statute states that the insolvency trustee must provide information to the creditor regarding the property in case of its sale in accordance with § 166. The authors emphasise the provision of § 168, which states that before the sale, the insolvency trustee warns the creditor about the sale of a property. A creditor has the right within a week to determine another method of sale that would be more profitable for him. Thus, the authors conclude that the sale of a property is possible in any way in consultation with a non-competitive creditor.

It should be noted that in case of non-application of § 166 in accordance with the provisions of § 173, the non-competitive creditor has the right to independently sell the property belonging to him. However, Part 2 of this rule provides for the right of the court to set time limits for a non-competitive creditor and, in case of non-compliance, to oblige the insolvency trustee to sell the property.

The authors also agree with the position of S. Greif, who noted that: "A creditor who has the right to a separate satisfaction may declare that the object does not belong to the bankruptcy estate, and demand its return, referring to the right seen from the legislation provisions outside the Statute" [7]. Therefore, it can be assumed that despite the obligation imposed by the German legislature on the insolvency trustee to sell the property of creditors with the right to separate satisfaction, in the latter for the most part there is the possibility for those creditors to perform self-realisation.

Summarising all the above-mentioned, the authors conclude that in Germany, the insolvency trustee is endowed with greater discretion, which, in turn, leaves room for all sorts of abuses. In the authors' opinion, such an experience is inappropriate for Ukraine, as we currently tend for the legislator to try to restrict the bankruptcy trustee as much as possible in the freedom of choice. Moreover, despite such restrictions, abuses by bankruptcy trustees remain possible. Therefore, it is even scary to imagine the consequences of using similar procedures with the German competitive process.

On the other hand, the provisions of German law, which provide for a greater role of creditors' representative bodies in the sale of the debtor's property, are noteworthy because in this way the powers of the insolvency trustee are reduced. Therefore, in addition to the above-provided proposals, the authors consider it is necessary to make the following changes in domestic legislation.

Firstly, there is a need to move away from selling property at an auction. No, of course, such a type of sale must exist, but it cannot be non-alternative. Therefore, the authors propose to provide an opportunity for the secured creditor to

sell the mortgaged property of the debtor independently out of competition. Such innovation will be especially relevant given the existing case law. In turn, the creditors' committee or assembly must be authorised to sell the debtor's property privately. However, despite this, the authors believe that the bankruptcy trustee should continue to sell the property at public auction with the help of a modified ETS.

The authors would like to highlight that this approach is not a novelty, since it existed in the days of the Russian Empire, which, in particular, was noted by G. Shershenevich, who pointed out that the law gives to creditors' assembly the right to choose the method of property realisation [3, p. 428]. Secondly, it is necessary to remove from the Ukrainian legislation the provisions on the second repeated auction because its existence only contributes to the sale of property for a pittance. Instead of a second repeated auction, a meeting of the creditors' assembly or committee should be initiated, at which creditors should decide whether to sell the property privately or to hold the auction again. However, the price and conditions of such an auction should be determined by creditors themselves.

Legislative provisions on the functioning of the ETS also need to be improved. First of all, it is necessary to recognise the need for participation in the bidding of at least two buyers because with the participation of only one such bidding cannot be considered public. In addition, it is necessary to remove Part 3 of Art. 85 of the Bankruptcy Code. The authors are confident that with the introduction of these changes in the procedure of the realisation of bankrupt property, the bankruptcy procedure in Ukraine will become much more productive.

CONCLUSIONS

In this research, a theoretical and practical generalisation was made and the ways of solving the mentioned problems of legal regulation of the order were proposed, as well as the method of sale of the debtor's property in the bankruptcy (insolvency) procedure under the law of Ukraine and Germany. As a result of the study, the authors came to the following conclusions:

1. The provisions of the Bankruptcy Code regulating the sale of bankrupt property contain many problematic issues that complicate the work of law enforcement agencies, and therefore need an immediate resolution.

2. Notwithstanding the high hopes and expectations placed on the ETS, currently the electronic trading system does not cope with the set task.

3. Unlike Ukraine, in Germany the sale of the debtor's property at auction is considered an unprofitable and unjustifiably long procedure.

4. In Germany, the insolvency trustee privately sells the debtor's property, according to which the discretion of his powers is much wider than his prototype in Ukraine, and therefore, the German insolvency trustee has room for various abuses.

5. For Ukraine, Germany's experience in the sale of the debtor's property is not entirely relevant. At the same time, there is a possibility of its partial borrowing.

6. Ukraine should move away from the mandatory sale of bankrupt property at auction and authorise the representative bodies of creditors to sell property privately.

7. It is argued that due to the existing case law, secured creditors in Ukraine are currently in a rather difficult situation, and therefore it is necessary to authorise them at the legislative level to independently sell the mortgaged property of the debtor.

8. It is proposed to increase the guarantee fees of auction participants to 50%, as well as in case of their illegal behavior to apply restrictions to such participants in the right to further participation in the repeated auction.

9. Legislation on the application of the second repeated auction should be removed, as its existence only facilitates the sale of property for a pittance.

10. It is stated that bidding cannot be considered public if there is only one participant, and therefore it is necessary to recognise the mandatory participation of at least two buyers.

11. It is noted about the urgency of providing in the Bankruptcy Code an exhaustive list of conditions under which the transaction made at the auction for the sale of the debtor's property in bankruptcy proceedings may be declared invalid. Furthermore, it will also be appropriate to indicate the list of subjects of appeal and set a one-month non-renewable period for appealing its results in order to ensure the transiency of the bankruptcy procedure, compliance with the deadlines for liquidation, and protect the rights of future bona fide owners of the property, which was sold at auction.

12. It is argued that p. 3 of Art. 85 of the Bankruptcy Code on deferral of payment by the buyer of the due second part for the goods must be removed in connection with the existence of a legal prohibition in establishing deferrals at the contractual level (p. 3 of Article 63 of the Bankruptcy Code).

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LEGAL SUPPORT FOR THE ACTIVITIES OF AGRICULTURAL TRANSNATIONAL CORPORATIONS IN UKRAINE

Abstract. *Agricultural transnational corporations have always expressed interest in Ukraine as a state with a strong natural potential and good and reliable prospects for agribusiness. Under the influence of factors such as climate change, an unprecedented increase in the world's population and, as a result, a high demand for agricultural products, this interest will increase, and the role of agricultural transnational corporations will grow every year. Therefore, one of the most urgent research and practical problems that lawyers will have to solve is the defnition of the key term "agricultural transnational corporations" and the identifcation of their features. This will allow the Ukrainian legislator to regulate complex and multidimensional relations with their participation in the agricultural sector as accurately as possible and, in particular, govern relations concerning the activities of these subjects of agricultural business, and eliminate gaps in the current legal regulation. Considering this, the purpose of this study was to attempt establish-*

ing the essence of agricultural transnational corporations as a legal phenomenon based on an in-depth analysis and to defne this term, classify these corporations on certain grounds and establish the specifc features of their activities. The study was conducted considering the existing legal support of these participants in agribusiness relations. Research methods included a set of philosophical, general scientifc, and special legal methods. The synergetic research method was the fundamental method of understanding the legal support of agricultural transnational corporations. It was proved that an agricultural transnational corporation is a complex entity that engages in agricultural activities in two or more countries, is managed and controlled from a single centre and comprises a parent company, subsidiaries, branches, and departments. The study analysed positive and negative aspects of the activities of agricultural transnational corporations. It was established out that the following agricultural transnational corporations act in Ukraine: in the feld of crop production, animal husbandry, processing, servicing agricultural producers, and with mixed activities (simultaneously engaged in both crop production and animal husbandry). It was emphasised that the agricultural chain of a transnational corporation can cover different countries

Keywords*: agribusiness, agrarian, agricultural, production, chain, legal regulation*

INTRODUCTION

Since 2017, Ukraine has introduced international standards for investment and operation of transnational corporations. This was made possible by the signing of an agreement with the Organisation for Economic Cooperation and Development (OECD) on Ukraine's accession to the Declaration on International Investment and Transnational Corporations [1]. The application of international standards for the activities of transnational corporations means the introduction of a national regime for these large business entities, which are centres of influence on economic processes [2, p. 748]. This situation in the current conditions is important for the development of the modern agricultural sector of the Ukrainian economy, since it is agricultural transnational corporations that have a considerable influence on the development of national agribusiness. Among them, the most powerful are considered to be *Cargill* (crop and animal husbandry, food products), *McDonald's, Nestle, Kraft-Foods* (TM "Lux"), *Lactalis* (TM "President"), *Kernel* (TM "Shchedry Dar", "Stozhar"), *Pepsico, Danone* ("Danissimo", 'Actimel") [3]. The products of these companies are familiar to the Ukrainian consumer because their products and services are of high quality, and they are also well-advertised. This position in the market was achieved not only by the availability of fnancial, labour, modern material and technical, innovative resources, but also by their rational use and a high level of management. Notably, Ukrainian farmers, mainly due to a lack of funds, an unfavourable lending system and lack of state support, etc., cannot create the necessary infrastructure at the proper level. For example, the

state of material and technical support for agricultural producers is described by disappointing data: if 3,688 agricultural tractors were purchased in 2017, then in 2018–305 units, in 2019–209 units, that is, the trend of rapid decline in purchases of agricultural machinery is evident [4].

It is also important to pay address such a feature of the present as the predominance of private relations in agrarian relations, which considerably affect the completion of land and agrarian reforms. Thus, on March 31, 2020, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Turnover of Agricultural Lands" was adopted[1], which stipulates the introduction of the land market in Ukraine from July 1, 2021. The prospect of participation of transnational corporations in relations concerning the land market is explained by the fact that they can be registered as national subjects of Ukraine in the form of corresponding subsidiaries [5, p. 1]. This, admittedly, increases the interest of such corporations in investing in the agricultural market of Ukraine.

One cannot ignore an important fact – it is the agricultural market that is the most stable in the context of the COVID-19 pandemic, which considerably affected the state of global investment [6, p. 1]. Moreover, in the context of a general decline in investment and the spread of the pandemic, not only economic relations arise around transnational corporations, but also an opportunity to support and ensure human rights occurs, namely healthcare, access to essential products [7]. Considering the importance of agricultural transnational corporations for the development of Ukrainian agribusiness, the need for a separate study of the legal support of their activities is being updated.

At the level of scientifc research, the features of transnational corporations were analysed in the works of J. Kapler (described the effect of intensity and accumulation of resources in the structure of transnational corporations) [8], M. I. Romanova (justifed the position of multinationality of corporations) [9], O. Tahirli (indicated the implementation of corporate activities in individual states) [10], O. Cheku (identifed the history of the development of transnational corporations) [11], etc. Despite their contribution to the development of this subject, many problematic issues remain (namely the lack of a defnition of the key term "agricultural transnational corporations" in the legislation) that have yet to be solved by modern lawyers and legislators. Understanding the essence of the phenomenon under study in the legal aspect, studying the features and signifcance of the activities of such agribusiness entities for society will not only offer the legislator its scientifc defnition, but also contribute to a more balanced and high-quality

[1] Law of Ukraine No. 552-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning the Turnover of Agricultural Lands".(2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/552–20#Text.

legal regulation of relations in the agricultural sector with the participation of agricultural transnational corporations. Given the above, one cannot ignore the fact that along with the positive manifestations of their activities, there are also negative manifestations that cause reasonable concern in Ukrainian society. Thus, large agricultural businesses around the world are associated with the use of genetic engineering, which allows getting a quick guaranteed proft. Furthermore, transnational corporations can influence the political processes of countries that are in a state of reform and economic development. Strengthening the role of these actors in the life of any society should be treated critically, giving preference to public and national interests. There is an absolute need for their separate research in order to develop and improve legislation governing relations involving transnational corporations. This area is particularly relevant for Ukrainian legislation, since it does not contain special provisions that would govern the activities of these entities, in particular, in agricultural relations. The issue of the impact (both positive and negative) of transnational corporations on the development of the agricultural sector of the economy was ignored by lawyers, which led to the existence of gaps in the legal regulation of the activities of agricultural transnational corporations. Therefore, the subject of legal support for the activities of agricultural transnational corporations appeared relevant and required scientifc understanding and solution of pressing issues in law-making.

The purpose of this study was an identifcation of the specifc features of legal support for agricultural transnational corporations in Ukraine.

1. MATERIALS AND METHODS

The methodological framework of this study included a set of philosophical, general scientifc, and special legal methods of scientifc cognition, the use of which is explained by the specifc features of the subject matter. The dialectical method allowed identifying various trends that develop around the activities of transnational corporations in the feld of agribusiness, namely consideration of the opposites in their activities, which are explained by the focus of corporations on making a proft. The hermeneutical methodological approach was fundamental in the process of understanding the activities of agricultural transnational corporations and provided an opportunity to interpret the law. The axiological method allowed conducting research considering the values that exist and arise around the subject under study. It was this method that allowed justifying the position that the activities of agricultural transnational corporations have positive (use of innovations, creation of new jobs in rural areas) and negative aspects (their activities can considerably affect the deterioration of the environment, in particular, soil degradation can occur).

The synergetic research method was the fundamental method of studying the legal support of agricultural transnational corporations. It allowed considering a transnational corporation as a complex system of mutual relations, in particular, to identify integration between the participants of the corporation, that is, to emphasise that they are described by self-organisation. Furthermore, this approach allowed identifying the specifc features of the activities of agricultural transnational corporations that are constantly influenced by political, economic, and social systems. Concretisation of scientifc cognition of the legal support of the activities of agricultural transnational corporations occurred through the use of general scientifc methods, namely the method of analysis and synthesis, the historical method. The use of the analysis method allowed identifying the current scientifc opinions regarding the defnition of agricultural transnational corporations, at the applied level it provided an opportunity to establish the structural elements of this business entity (the existence of a parent company and subsidiaries, branches), the features of an agricultural transnational corporation, to identify their typical division.

The synthesis method allowed combining various types of activities that create a single agricultural chain, which can be covered by one agricultural transnational corporation. This method provided an opportunity to elaborate the defnition of an agricultural transnational corporation. The historical method was used to prove a retrospective of the emergence of these complex agribusiness entities at the global level. The identifcation of a retrospective of the activities of transnational corporations allowed asserting the growing role of agricultural transnational corporations in the system of agribusiness relations. The formal legal method allowed investigating agricultural transnational corporations within the framework of the dogma of law, that is, considering the express regulation of their activities, both at the level of international and national legislation. The use of the system-structural method allowed establishing the features of an agricultural transnational corporation, determining their division depending on the type of agricultural production. The comparative legal method allowed searching for the provisions of international and national law towards the task set, identifying the levels of legal regulation of the activities of these subjects. The structural logical method made it possible to identify mandatory structural elements of a transnational corporation. In particular, the parent company manages subsidiaries, taking natural and climatic conditions that directly affect the cultivation of agricultural products in a specifc country into account.

During the study of legal support for the activities of agricultural transnational corporations, a comprehensive (interbranch) research method was applied. This method allowed conducting research considering the knowledge of various sciences, combining the achieve-

ments of economic and legal science. Furthermore, agricultural transnational corporations have an influence on the development of the economic system, so to investigate the subject of this study, economic opinions regarding the activities of transnational corporations were used. The statistical method was used, in particular, to identify quantitative indicators of the acquisition of material and technical resources by agricultural enterprises of Ukraine for the production needs of agricultural producers in 2017, 2018, and 2019.

The study materials included indicators of the number of purchased agricultural machinery for production needs from 2017–2019 and the number of agricultural transnational corporations among other transnational corporations. The study used materials in the form of scientifc publications, background information, international and national legislation.

2. RESULTS AND DISCUSSION

2.1. Defnition of an agricultural transnational corporation as a subject of agribusiness legal relations

Initially complex business entities, whose activities covered several countries, appeared in the 16th-17th centuries as a result of the colonial development of the New World [11, p. 171]. Gradually, such entities started being regarded as independent participants in legal relations and came to the attention of lawyers as the subject of research, thanks to which the modern term "transnational company" subsequently emerged. In 1974, this term was consolidated in the texts of documents of the Group of Seventy-Seven (G-77), which operates within the UN. It was this organisation that advocated the terminological separation of its international corporations, calling them "transnational corporations" (MNCs), from the corporations of the largest industrially developed countries, which were called "transnational corporations" (TNCs) [9, p. 168]. Despite progress in attempts to defne the term "transnational corporation", a special, as it were, branch term "agricultural transnational corporation" was not introduced. However, this did not prevent the successful operation of such companies as *Cargill, Nestle, Monsanto, ConAgra and Archer Daniels Midland* which successfully dominate the world food system. They control extremely large shares of international markets for grain, fertilisers, pesticides, and seeds. They are involved in the food system – from the farm to the supermarket [12]. And this is understandable because frst the phenomenon itself arises, then "declares" itself and, subsequently, strengthens its position in society, which, for its part, noticing and recognising this phenomenon, gives it a name. Evidently, the role of agricultural transnational corporations will grow every year under the influence of objective factors, and the theoretical and practical need to determine agricultural TNCs based on the analysis of the features of a transnational corporation is also obvious, since the legislator has

not provided a separate defnition of this key concept.

The broadest defnition of TNCs is proposed in the Oxford Handbook as a company that is controlled from its own country (country of origin) and performs business operations in different countries [13]. At the level of Ukrainian legislation, the concept of TNCs is not identifed, but the authors of this study recall that the defnition of TNCs is stipulated in the Convention on Transnational Corporations[1] of the CIS dated 06.03.1998. Thus, Article 2 of the Convention establishes that TNCs should be interpreted as a legal entity (a set of legal entities), which owns, controls, or manages separate property in the territories of two or more countries; is created by legal entities of two or more countries; registered as a corporation in accordance with the legislation, in particular in the form of a fnancial and industrial group, company, concern, holding, joint venture, joint stock company with foreign participation, etc[2]. The above defnition is quite narrow in legal sources, a broader approach to understanding this subject is proposed.

O. Tahirli, along with international, multinational, and global companies, identifes transnational companies and defnes them as complex structures with a developed internal system that are managed from one central or regional ofce [11, p. 80]. That is, the scientist based the concept of TNCs on the presence of a central ofce and an extensive system of enterprises.

According to J. Kapler, TNCs form the dominant group of frms that apply a qualitatively different, more intensive competitive regime, indicators of proftability of TNCs are explained by (a) a higher level of new capital investments and the evident ability to focus these investments on particularly proftable sectors, (b) the degree of internationalisation of production assets and (c) the presence of intensive search for new production technologies, advertising [9, p. 54]. O. Cheku proved that TNCs are a hierarchical entity, the unity of which lies in the binding decisions of the control centre of this entity for all its structural divisions [12, p. 174]. E. M. Limonova pointed out that they constitute an association of enterprises that engage in commercial activities in two or more countries, which allows, due to cross-border mobility, to acquire economic and political power that exceeds the limits of power of any subject of the national economy, which is regulated at the state, interstate, supranational and public levels, and ensures its trans-level [14, p. 28]. Analysing the different opinions of researchers on TNCs, it is advisable to highlight their features and emphasise that TNCs appear as associations of enterprises that centralise and consolidate capital, extend their activities to two or more countries, should act considering their own and public interests, while the

[1] Convention on Transnational Corporations. (1998, March). Retrieved from https://zakon.rada.gov.ua/laws/show/997_193#Text.

[2] *Ibidem, 1998.*

latter are determined by the needs of the country where the activity is carried out.

Thus, the features of TNCs are as follows: 1) these are vertically integrated structures in the form of an association of enterprises; 2) an association of enterprises of different national origin; 3) the management structure makes provision for the existence of a parent company and subsidiaries, branches; 4) they are a subject of capital concentration; 5) the activities of TNCs are spread to several states; 6) can influence the economy and policy of an individual state; 7) structural parts of TNCs operate under different national jurisdictions; 8) they have a single strategic plan of action and development.

Based on these features, considering the particulars of agribusiness, the authors can offer the following defnition: an agricultural transnational corporation is a complex entity that engages in agricultural activities in two or more countries, is managed and controlled from a single centre and comprises a parent company, subsidiaries, branches, and departments. Attributes of an agricultural TNC are as follows: 1) it is an integrated structure in the form of a vertical or horizontal association of enterprises; 2) its activities cover the entire chain of agribusiness (agricultural innovation activities; activities for the production, storage and processing of agricultural products; agrologistics; provision of material and technical equipment (supply of agricultural machinery, agroservice maintenance, etc.); sales (marketing) of agricultural products), which is realised in different countries; 3) the management structure assumes the existence of the parent company and controlled entities; 4) it is a subject of concentration and integration of capital; 5) activities of a TNC are extended to several states; 6) it can influence the economy, politics, and ecology of an individual state; 7) planning of TNCs' activities factors in the natural and climatic conditions of production in different states.

2.2. Classifcation of agricultural transnational corporations

TNCs can be classifed according to various criteria. According to its legal form, TNCs in Ukraine can be created in the form of a concern, a consortium, a holding company, or a joint-stock company. Depending on the organisation of business activities, TNCs can have the following types: cartel (associations of institutions whose members agree among themselves on the volume of goods produced, the division of sales markets, requirements for the sale and hiring of labour, prices, and other payment terms); syndicate (participants of the organisation have a certain production independence, but, according to joint contracts, lose commercial independence); pools (monopoly organisations, for which revenue goes to the general reserves, that is, there is a corresponding division according to the results of the operation of a separate part of the market in a predetermined proportion); trust (structure of the organisation, within which members lose business independence);

concern (statutory association of enterprises); consortia (temporary contractual association of enterprises); transnational strategic alliances (TSA) (a specifc form of inter-corporate relations between two or more organisations) [15, p. 57].

Depending on the structure of the management organisation, TNCs can be divided into: "1) horizontally integrated TNCs – manage divisions located in different countries that produce the same or similar goods; 2) vertically integrated TNCs – manage divisions in a certain country that produce goods delivered to their divisions in other countries; 3) separate TNCs – manage divisions located in different countries that are not combined vertically or horizontally" [16, p. 77].

According to structural features, there are international (a national dominant company with foreign assets), multinational (an international corporation that unites national companies of several states on a production and scientifc and technical basis) and global corporations (a corporation that integrates economic activities carried out in different countries). To determine the legal forms, it is important to divide TNCs into holding (based on the shareholder form of control) and non-holding (relations in the association are based on the principles of special agreements) [17, p. 115–116]. It is advisable to add that TNCs can be divided according to the industry activities: machine-building companies, agribusiness, light industry, medicine, etc.

Notably, the capital of TNCs can combine state and private property because the growth of the economic power of TNCs contributes to the development of a cooperative option for interaction with states, international government organisations and subjects of public associations. As a result, a new structure for managing global economic processes will arise, which will be based on both mixed (with the participation of governmental and non-governmental actors in world politics) and private mechanisms that are created by TNCs independently or with the support of the international community [18, p. 42].

Proceeding from the above, it is possible to divide agricultural TNCs into types depending on the type of production of agricultural products: 1) TNCs that are mainly engaged in the production of agricultural products, their processing, sale; 2) TNCs with mixed activities (can be engaged, for example, in the production of agricultural products, and means of material and technical support for such activities).

2.3. Features of the activities of agricultural TNCs

The specifc features of the activities of agricultural TNCs are conditioned by the fact that their production is located in developing countries, while the source of capital origin is concentrated in developed countries. The availability of fnancial support opens the way for TNCs to innovate, which makes it possible to be constantly competitive

and have super-large profts. As a result, international corporations, as experts emphasise, continue their large-scale expansion not only in industry-specifc commodity markets, but also in the innovative sector of the economy, which produces high-tech products with a fairly high added value [9, p. 179]. They are subjects of capital concentration. At the same time, the concentration of capital occurs in the country of the parent company, while the effect from applying investment occurs in the country of production. Along with the positive aspects of implementing activities in TNCs, there are also some negative aspects – environmental pollution, intervention into political processes, etc. Thus, intensive TNC production directly affects the environment. Irrational and short-sighted farming substantially worsens the state of the environment, in particular, contributing to soil degradation, pollution of air and water bodies, violations in the use of agrochemicals lead to the extinction of bees and birds, and the transformation of forests into new agricultural land increases the area of deforestation and negatively affects biodiversity. Intensive farming, at the same time, depletes water resources (thereby increasing water scarcity) and causes soil erosion, leading to climate change. These environmental issues should also be considered upon determining the level of state support. Thus, farm production has less negative impact on the environment, and therefore the farming movement requires additional support and attention from both the state and society, while the activities of TNCs raise reasonable doubts and criticism. TNCs and international strategic alliances form global (cross-border and interstate) chains, which does not cause the dissolution of national states in them, which, as a rule, retain their integrity, although in a modifed form [19].

The specifc feature of TNCs' activities in the agricultural segment of the economy is also manifested in the fact that they currently give preference to crop production. Out of 25 TNCs in agriculture, only 4 companies fully or partially specialise in the production of livestock products. Thus, the American company "Tyson Foods Inc." Produces and sells chicken, beef, and pork in Brazil, India, China, England, Ireland, Japan, Mexico, Panama, Puerto Rico, Singapore, South Korea, Taiwan, and the United Arab Emirates. Another feature of agricultural TNCs is that all world-leading TNCs in the agricultural production actively use GMOs in their activities and develop ecological agricultural production (focusing on consumers) at the same time; herbicides, fungicides, insecticides, a system of protection of seed material (seeds), plant growth regulators, and various agrochemicals are widely used. TNC's innovative research also includes areas related to agribusiness, including medical research. For example, BASF conducted a study of the innovative area called Nutrigenomics in 2016, which investigates the effect of nutrition and nutrients on human genes [20, p. 18].

Notably, during the development of an agribusiness chain at the TNC level, the parent company can plan and implement its activities factoring in natural and climatic conditions that directly affect the cultivation of agricultural products in a particular country. It is known that agriculture depends on natural resources (availability of arable land, fertile soil), climatic conditions and availability of water resources. These conditions vary signifcantly around the world, which is why TNCs can take this into account and produce agricultural products in countries that are favourable for cultivation, and organise processing of these products elsewhere. Thus, TNCs have certain advantages among other agribusiness entities in terms of reducing risks from agricultural activities. Recently, researchers of agricultural TNCs have noticed that in economically underdeveloped countries, transnational corporations often change the scheme of land use for a long period, due to the cultivation of mainly industrial crops and expensive environmentally friendly food products for export to rich countries, thereby worsening the land. This was the case, for example, in Ethiopia, where in the Awash Valley cotton and coffee plantations were extended to traditional pasture zones of nomadic tribes, or in the Sahel region of West Africa, where transnational corporations proftably used thousands of hectares for agriculture, cotton cultivation, and cattle breeding at the expense of their grain production [21, p. 93]. Furthermore, agricultural TNCs are changing the food culture, in particular in TNCs, whose headquarters are always located in the United States and Europe, they are steadily replacing conventional food systems in the world [22]. It is also necessary to consider that agricultural TNCs can increase the shortage of agricultural products, which eventually leads to an increase in prices for these products on the internal market.

Thus, the specifc features of the activity of agricultural TNCs lie in the presence of certain positive and negative aspects. The frst aspects include the fact that TNCs allow the country to solve a number of problems: improving the efciency of national exports; intensifyingmutually benefcial cooperation with countries receiving investments; ensuring uninterrupted supply of raw materials, skilled labour and innovative technologies; effective use of competitive advantages by national corporations to achieve competitiveness at the international level; overcoming (by concluding special agreements with the government of the recipient country) barriers to entry of national TNCs into the host country market; establishing regional cooperation within the home country and stimulating further development of investment abroad [23, p. 118]. The negative aspects of TNCs' activities include the fact that these entities are associated with the tendency to create their individual autonomous economic system, which threatens to replace the interstate economic order or substantially modify it. TNCs may challenge the principles on

which the international economic order is currently based [24, p. 6].

2.4. Current issues of legal regulation of the activities of agricultural TNCs in Ukraine

Despite the global economic crisis associated with the pandemic, TNCs continue to express interest in the agricultural sector of the Ukrainian economy, which has recently signifcantly increased, which is obviously explained by the possibility of opening the agricultural land market. Despite the fact that foreign companies are deprived of the right to be participants in the land market, they can create national enterprises that will have the right and opportunity to purchase land that will actually become the capital of TNCs. This gives grounds to state the activation of the presence of TNCs in Ukrainian agribusiness. Therewith, national legislation does not systematically regulate the activities of TNCs. In this regard, the government of Ukraine does not have the opportunity to set certain restrictions and social obligations of TNCs. This constitutes a considerable gap in relations between TNCs, the government, and society. The specifc features of legal regulation of agricultural TNCs are also not considered. This situation may negatively affect the development of the national agricultural sector of the country, as TNCs influence the pricing of agricultural products, the distribution of domestic agricultural markets, and food security of the state. Considering the above, it is necessary to clearly set out legal provisions to optimally regulate complex and multidimensional legal relations involving agricultural TNCs.

In the Charter of Economic Rights and Duties of States[1] approved by the UN General Assembly resolution of 1974, it is established that every state has the right to regulate and control the activities of transnational corporations within its national jurisdiction and to take measures to ensure that such activities do not contradict its laws, provisions, and regulations and comply with its economic and social policies. Transnational corporations should not interfere in the internal affairs of the host state (Paragraph 2, Article 2 of the Charter)[2]. In its activities, TNCs should be guided by the provisions of the Declaration on International Investment and transnational Companies of June 21, 1976, which was supported by Ukraine, but has not yet been ratifed. According to this declaration, TNCs are obliged to comply with the provisions of national legislation; promote economic, social, and environmental progress to achieve sustainable development; refrain from seeking and receiving benefts that are not provided for in laws or other regulatory provisions related to human rights; encourage local capacity-building through close cooperation with the local community[3]. In accordance with the

[1] United Nations General Assembly Resolution 3281 (XXIX). Charter of Economic Rights and Duties of States. (1974, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_077?#Text.

[2] *Ibidem, 1974.*

[3] Declaration on International Investment

positions of the United Nations Conference on Trade and Development (UNCTAD), TNC (transnational corporation, transnational corporation, transnational company, transnational enterprise) is an enterprise that unites legal entities of any legal forms and types of activity in two or more countries and pursues a single policy and common strategy thanks to one or more decision-making centres [25, p. 36]. According to the UN Code of Conduct of TNCs, a transnational corporation is an enterprise described by the location of subsidiaries in two or more countries of the world, regardless of the feld of activity and legal form of the institution; it uses such a decision-making system that ensures the implementation of effective management strategies from several centres and contributes to a coordinated policy within the company's divisions [26, p. 95].

Analysis of the provisions of legal regulation of TNCs' activities reveals three levels of legal regulation of the activities of these agribusiness entities: domestic legislation, agreements between the two states, and international acts. For the legal regulation of TNCs, the most promising is the international legal unifcation of the provisions governing the creation and operation of TNCs. This means that the unifed provisions included in the relevant universal international treaties are implemented in the national legal systems of the participating countries [27, p. 430].

In Ukraine, the concept of TNCs is still not defned at the level of national legislation. Part 3, Article 120 of the Economic Code of Ukraine is applied to their activities, according to which a corporation is recognised as a contractual association created based on a combination of production, scientifc, and commercial interests of the combined enterprises, with their delegation of separate powers of centralised regulation of the activities of each of the participants to the corporation's management bodies[1].

CONCLUSIONS

In the overall structure of Ukrainian agribusiness, TNC activities form an important component that actively influences the development of the state's agro-industrial sector. TNCs as complex integrated subjects of agricultural activity in Ukraine are mainly created due to foreign direct investment, which, in turn, opens up access to new technologies of agricultural production. One of the important features and at the same time features that determine the essence of the activities of agricultural TNCs is that the production chain that unites the production of agricultural products with the participation of TNCs covers several states. That is what accounts for the specifc features of their activities in agribusiness. In particular, agricul-

and transnational Companies C(76)99/FINAL. (1976, June). Retrieved from https://investment.zoda.gov.ua/frontend/web/userfles/view/fles/deklaratsia_oesr.doc.

[1] Economic Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/main/436–15#n124.

tural products grown in Ukraine can be processed, packaged in another country, and offered for sale in several countries. Agricultural value chains can be long, and different actors – both national and foreign – are involved at each stage of the chain. Each participant performs certain functions (supply, transportation, processing, sales, and retail trade).

The conducted research allowed formulating the concept of a transnational corporation, its varieties. The activities of any transnational agricultural corporation can have both positive and negative effects. After all, due to globalisation processes, climate change, and the constant threat of food shortages in individual states, the activities of these corporations constitute a necessary element of the global economy. The study of the practice of TNC functioning indicated that there are three levels of legal regulation of TNC activities: internal legislation, treaties between two states, and international acts. The lack of legal regulation of the activities of agricultural TNCs at the level of Ukrainian legislation indicates obstacles to the development of Ukrainian agricultural producers, the presence of threats to environmental and food security for the country's population in general. Notably, this is a negative phenomenon that needs to be eliminated as soon as possible. When improving the legal regulation of TNCs' activities, it is necessary to consider the following details: 1) the public and private interests of both the state and TNCs; 2) the ability to have guarantees to reduce the negative impact of TNCs' activities on the environment; 3) the ability to oblige TNCs to bear social responsibility to the local population.

RECOMMENDATIONS

This study may be of interest to researchers of problems of economic and agricultural law, practising lawyers in the feld of agribusiness. The materials of this study can be used to prepare methodological recommendations, textbooks on agricultural law, and agribusiness law.

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RELIABILITY EVALUATION OF A FORENSIC EXPERT'S OPINION: WORLD PRACTICES AND UKRAINIAN REALITIES

Abstract. *Improving the activities of pre-trial investigation and judicial review largely depends on the increased use of special knowledge in forensic investigative practice and, above all, the involvement of an expert and their analysis. The relevance of the subject matter is explained by the need to introduce new forms and approaches to evaluating the reliability of expert opinions, in particular with the involvement of independent specialists of the corresponding speciality. The purpose of this study was to provide arguments regarding the expediency of attracting knowledgeable persons as reviewers to evaluate the objectivity and completeness of forensic analysis, the correctness of the methods and techniques applied by the expert, and the validity of the opinion. To achieve this purpose, the following general scientifc and special research methods were used:*

Aristotelian, comparative legal, functional, sociological, statistical, system and formal legal analysis, legal modelling, and forecasting. It was established that in the vast majority of countries of the world, except Ukraine, an independent, knowledgeable person with special knowledge in the corresponding feld is involved to help evaluate the reliability of an expert opinion. It was proved that contacting knowledgeable persons to evaluate the objectivity, validity, completeness of expert research helps establish the causality between the identifed features of the object of analysis and the fact that is subject to establishment, and also gives grounds for determining the afliation, admissibility, reliability, and sufciency of the expert opinion. At the same time, a specialist's review cannot serve as a source of evidence, but only has an auxiliary (advisory, technical) nature and can serve as a basis for appointing a second (additional) forensic analysis or a cross-examination of the expert and the reviewer. To exercise the rights of individuals to fair justice, it is proposed to introduce this procedure for evaluating the reliability of expert opinions in Ukraine, with the necessary changes in the current procedural legislation of Ukraine to provide an opportunity for participants in criminal proceedings and the victim to attract knowledgeable persons as reviewers of expert opinions

Keywords*: access to justice, validity of the expert opinion, objectivity of the expert opinion, knowledgeable persons, reviewing the expert opinion, appealing the expert opinion*

INTRODUCTION

Technological advance is changing the ways of illegal activities. Criminals actively use modern technological means and innovative technologies, leaving at the same time specifc traces, including digital ones. This complicates the work of an investigator or detective in gathering evidence and requires the use of special knowledge. As V. V. Vapniarchuk fairly notes, "the specifcity of the expert opinion in the system of other forms of existence of evidentiary information is that thanks to special knowledge of the expert and analyses conducted by them, it becomes possible to identify hidden information, inaccessible to immediate perception, establish circumstances substantial for criminal proceedings (for example, the sanity of a person, pertinence of an object to cold-arms or frearms, pertinence of a certain substance to a narcotic, etc.)" [1, p. 307]. The results of a survey of 125 investigators of the Ministry of Internal Affairs of Ukraine in the Poltavska, Sumska, and Kharkivska Oblasts indicated that 76.9% of them always involve an expert during the investigation of crimes. 16.2% of respondents reported that they had to appoint a forensic analysis twice (primary and repeated) to solve the same issues. In some cases (2.4%), the expert's opinions even refuted the investigative lead. 85% of respondents noted that the involvement of an expert has a positive effect on their activities and considerably accelerates the collection of evidence.

According to Part 2, Article 84 of the Criminal Procedural Code of Ukrai-

ne[1], expert opinions are procedural sources of evidence, which are evaluated according to their inner conviction by the investigator, detective, prosecutor, investigating judge and court. The criteria for evaluating an expert opinion are its relevance, admissibility, and reliability. The frst two criteria are usually clear to the evaluation subjects, while evaluating the reliability of an expert opinion in some cases causes certain difculties. On this occasion, M. H. Shcherbakovskyi claims that the investigator and the court are incapable of independently evaluating either the scientifc validity of the expert's conclusions, or the correct choice and application of analysis methods, or the compliance of the method with modern achievements of this branch of scientifc knowledge because for such an assessment they must have the same special knowledge as the expert [2, p. 369]. The same opinion is shared by Canadian [3; 4], Australian [5; 6] and Chinese researchers [7]. At the same time, some scientists even warn about the possible loss of opportunities for the investigator and the court in evaluation of scientifc validity of the expert opinion, the effectiveness of the research methods and techniques applied by the expert, objectivity of conclusions through the emergence of new types of forensic analysis and modern high-tech expert methods and techniques [8, p. 318]. Considering the above, O. S. Panievin and H. Ye. Sukhova especially emphasise the importance of evaluating the scientifc validity of the expert opinion and the compliance of the analysis with expert methods [9, p. 143].

Notably, the problems of evaluating an expert opinion have been investigated by researchers for more than a hundred years. In particular, as early as the beginning of the 20th century, L. Ye. Vladymyrov argued that since judges do not have special knowledge and cannot evaluate the expert opinion unassisted, the reliability and objectivity of the expert opinion should be presumed [10, p. 236], that is, considered true until it is refuted. Yu. K. Orlov noted that due to the lack of special knowledge in the subjects of evaluating the expert opinions, they cannot establish their reliability unassisted, fully trust the expert opinions and overestimate their evidentiary value [11, p.40]. For his part, V. B. Romaniuk warns that unreliable expert opinions can mislead the investigator (prosecutor, judge) and lead to errors in making procedural decisions [12, p. 161].

The problems of using special knowledge in criminal proceedings were addressed by such leading Ukrainian and foreign scholars as H. K. Avdieieva [13], O. I. Haliashina [8], V. A. Zhuravel [13], O. M. Zinin [8], Yu. K. Orlov [11], V. B. Romaniuk [12], O. R. Rossynska [8], V. Ya. Tatsiy [13], M. H. Shcherbakovskyi [2], and others. Despite a fairly wide scope of issues investigated in this area, some issues remain understudied.

[1] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text.

In particular, this concerns the evaluation of the reliability of the expert opinion, which includes an evaluation of its scientifc validity, the effectiveness of the analysis methods and techniques used by the expert, and the objectivity of the expert opinion formulated.

Considering the above, *the purpose of this study* was to investigate the possibility and procedure for evaluating the reliability of expert opinions in Ukraine, the USA, Germany, Italy, France, the Netherlands, Australia, China, the Russian Federation, and other countries, to carry out a comparative legal analysis of the statutory regulation of such activities in different countries, to determine the effectiveness of assessing the reliability of expert opinions as sources of evidence using special knowledge in various forms, to identify issues preventing a qualitative evaluation of the reliability of expert opinion by the prosecution and the court, as well as issues related to the implementation of the rights of the defence and the victim to appeal against the expert opinion, to develop proposals to improve the quality of evaluation of expert opinions based on the reliability criterion.

1. MATERIALS AND METHODS

To achieve the purposes of this study, the authors visited the ofcial website of the European Court of Human Rights (ECHR)[1] and selected 15 decisions of the European Court of Human Rights on applications of individuals who failed to challenge the opinions of ofcially appointed experts in national courts by providing alternative opinions of independent experts involved by them or reviewing the expert's opinions. Additionally, the legal positions of the US Supreme Court were investigated in 17 decisions[2], which contain recommendations on the procedure for evaluating evidence, including expert opinions. The analysis of the legal opinions of the ECHR and the US Supreme Court in these decisions helped formulate proposals for improving the quality of evaluation of expert opinions according to the reliability criterion. To identify the issues of evaluating the reliability of expert opinions in Ukraine, 45 sentences of criminal courts and 75 decisions and rulings of courts of civil and economic jurisdiction of Ukraine were analysed, in which the defence attempted to challenge the opinion of an ofcially appointed expert. To determine the role of forensic analysis in the investigation of crimes, 125 investigators of the Ministry of Internal Affairs of Ukraine were surveyed in the Poltavska, Sumska, and Kharkivska Oblasts. An anonymous survey of 220 potential participants in criminal proceedings (150 investigators, 15 employees of intelligence units, 16 prosecutors, 28 advocates, and 11 judges) was conducted to resolve issues regarding the ability to evaluate the

[1] European Court of Human Rights. (n.d.) Retrieved from https://www.echr.coe.int/Pages/home.aspx?p=home.

[2] Supreme Court of the United States. U. S. Reports. Retrieved from https://www.supremecourt.gov/opinions/USReports.aspx.

scientifc validity of the expert opinions unassisted.

To conduct a comparative legal analysis of the procedure for evaluating evidence in conditions of respect for human rights, the relevant legal provisions of numerous international, Ukrainian, and foreign regulations were studied and analysed, namely the Universal Declaration of Human Rights[1], Convention for the Protection of Human Rights and Fundamental Freedoms[2], International Covenant on Civil and Political Rights[3], Constitution Of Ukraine[4], Criminal Procedural[5] and Civil Procedural[6] Codes of Ukraine, the Law of Ukraine "On Forensic Examination"[7], Criminal Procedural Code of the Federal Republic of Germany[8], Criminal Procedural code of Italy[9], Criminal Procedural Codes of the Russian Federation[10], Turkmenistan[11], Republic of Azerbaijan[12], Republic of Armenia[13], US Federal Rules of Evidence[14], Decree of the President of Ukraine No. 837/2019 "On Urgent Measures to Implement Reforms and Strengthen the State" of November 8, 2019[15].

The study used methods of theoretical analysis and synthesis in the investigation of the content of legal provisions and concepts contained in international

[1] Universal Declaration of Human Rights. (1948, December). Retrieved from https://www.un.org/en/about-us/universal-declarationof-human-rights.

[2] The European Convention on Human Rights. (1950, November). Retrieved from https://www.coe.int/en/web/human-rightsconvention/the-convention-in-1950.

[3] International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[4] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

[5] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text.

[6] Civil Procedural Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618–15#Text.

[7] Law of Ukraine No. 4038-XII "On Forensic Examination". (1994, February). Retrieved from https://zakon.rada.gov.ua/laws/show/4038–12#Text.

[8] Criminal Procedural Code of Germany. (1987, April). Retrieved from https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.

[9] Criminal Procedural Code of Italy. (2011). Retrieved from https://www.legislationline.org/download/id/4357/fle/Italy_CPC_updated_till_2012_Part_1_it.pdf.

[10] Criminal Procedural Code of the Russian Federation. (2001). Retrieved from http://pravo.gov.ru/proxy/ips/?docbody=&nd=102073942.

[11] Criminal Procedural Code of Turkmenistan. (2009, April). Retrieved from https://online.zakon.kz/document/?doc_id=31344376.

[12] Criminal Procedural Code of the Republic of Azerbaijan. (2000, July). Retrieved from https://online.zakon.kz/document/?doc_id=30420280.

[13] Criminal Procedural Code of the Republic of Armenia. (1998, July). Retrieved from https://www.legislationline.org/download/id/4261/fle/Armenia_CPC_am2006_ru.pdf.

[14] Federal Rules of Evidence. (1975, January). Retrieved from https://www.uscourts.gov/sites/default/fles/federal_rules_of_evidence_-_dec_1_2019_0.pdf.

[15] Decree of the President of Ukraine No. 837/2019 "On Urgent Measures to Implement Reforms and Strengthen the State". (2019, November). Retrieved from https://www.president.gov.ua/documents/8372019–30389.

regulations, Criminal and Civil Procedural Codes of Ukraine, the Law of Ukraine "On Forensic Examination", in scientifc publications of foreign and Ukrainian researchers, in judgements, decisions, and rulings of courts, which contain the results of evaluating evidence, including expert opinions according to the reliability criterion. The method of systematic analysis was used to clarify the content of human rights to fair justice and the rights of the defence and the victim to appeal the expert opinion and determine ways to implement them in Ukraine

Formal legal analysis of the provisions of international and Ukrainian legislation on evaluating the reliability of an expert opinion allowed identifying the shortcomings and contradictions inherent in legal acts and formulate proposals for improving legal regulation, namely on the need for regulatory consolidation of the possibility of attracting knowledgeable persons to help evaluate the reliability of an expert opinion and its reasoned appeal. Using the comparative legal method, the experience of individual countries in evaluating the reliability of a forensic expert's opinion as a source of evidence was studied. The method of legal forecasting allowed identifying further likely areas for implementing the procedure for evaluating expert opinions in Ukrainian forensic investigative practice. In the process of solving the problems under study, other separate scientifc methods of cognition were also employed, namely Aristotelian (to typify expert errors and their consequences), functional (to establish the influence of unreliable expert conclusions on the procedure of gathering and evaluating evidence-based information), legal modelling (to clarify the state and prospects of implementing the procedure for evaluating expert opinions), sociological and statistical (to analyse the results of applying special knowledge in the work of an investigator, generalising expert errors), etc.

2. RESULTS AND DISCUSSION

Making any intellectual and volitional decision, including an expert opinion, has a certain logic and does not exclude the possibility of individual errors. As Jonathan Koehler correctly states, an expert opinion is the result of a person making a certain decision, which, like all other decisions, contains the inevitable potential for errors [14, p. 89]. That is why Anglo-American criminal proceedings pay considerable attention to evaluation of the scientifc validity of expert opinions because without such an assessment, courts sometimes made unjust decisions. In particular, in the United States, as part of the Innocence Project, which aims to analyse unjust judgements based on the genetic examination opinions, 375 people have been rehabilitated so far (among them, 21 people were sentenced to death, and 44 people have pleaded guilty to crimes that they did not commit). In 259 cases, experts made mistakes when identifying individuals based on DNA [15].

In the United States, according to Rule 702 of the Federal Rules of Evidence, the court, upon evaluating evidence, including expert opinions, involves persons (witnesses) who have special knowledge, skills, experience, and appropriate education to give evidence in the form of an opinion or other form[1]. At the same time, according to the Daubert standard, one of the methods for evaluating evidence-based information is its review [16]. According to the U.S. Supreme Court decision in the case of Kumho Tire Co. v Carmichael, "Daubert criteria" should be used upon evaluating the opinions and testimony of experts [17]. The means of evaluating the reliability of evidence-based information of all types in the United States are their peer review and analysis by representatives of the corresponding scientifc community [16, p. 39]. William King and Edward Maguire also argued that for a rational assessment of the evidentiary value of an expert opinion, an investigator needs to verify its reliability with the help of another expert [18, p. 159].

Interesting and exemplary were the studies of members of the American Psychological Association Margaret Bull Kovera and Bradley D. McAuliff, who conducted a survey of 554 judges and found that 17% of them always recognise the expert opinions as reliable, regardless of their completeness and correctness of justifcation. The decision of this part of the judges is not influenced even by negative scientifc publications about the unreasonableness of the expert opinions. 12% of judges indicated that they had to deal with unreliable expert opinions, but they found out about this after the procedural decision was made. Having received such results of the study, the scientists concluded that the judges are incapable of evaluating the reliability of the expert opinions unassisted and suggested that the advocates involve a specialist of the corresponding speciality to explain and verify the objectivity of the expert opinions. They also note that to recognise an expert opinion as evidence, Canadian judges can involve another expert to analyse and explain it, and advocates can involve knowledgeable persons to evaluate the reliability of opinions [3, p. 582–584].

The report of the group of advisers to the President of the United States on science and technology indicates the presence of numerous expert errors during the study of various objects. Most mistakes are made by experts in the process of comparative research of analysis objects, when the subjective factor plays the greatest role in the formulation of an expert opinion [19, p. 3–5]. According to the Federal Bureau of Investigation (USA), the results of microscopic expert examination of hair contain errors in at least 90% of cases [20]. Errors also occur during DNA analysis, when an expert accidentally mixes samples, uses "contaminated" laboratory utensils, or misinterprets the result of the study.

[1] Federal Rules of Evidence. (2021). Retrieved from https://www.rulesofevidence.org/table-of-contents/.

The statistical analysis conducted by scientists indicated that the frequency of such errors reaches 1 in 306 cases [19, p. 7–10]. An independent generalisation of criminal proceedings demonstrated that some procedural decisions were made based on erroneous expert opinions obtained using incorrectly selected analysis methods [19, p. 26].

Considering these and other negative examples, scientists and practitioners suggest various measures aimed at eliminating these shortcomings. Thus, scientists at the University of Denver (USA, Colorado) believe that independent review of expert opinions allows identifying substantial methodological shortcomings that misled judges [16, p. 95]. Based on the analysis of materials of the investigation of crimes and court sentences, scientists of the University of Melbourne note the presence of investigative and judicial errors in cases when investigators and judges, upon evaluating the expert opinions on the analysis of hair, lead bullets, hand marks, voice, bites, etc. objects, did not involve knowledgeable persons to analyse unreliable expert opinions, but recognised them as sources of evidence only because the experts had certifcates for conducting analysis [5, p. 984].

In the Netherlands, an investigating judge may, at the request of an accused person, invite knowledgeable persons to analyse the opinion of an ofcially engaged expert. M. Malsch and J. Frekelton note that the courts of the Netherlands, relying on the decision of the European Court of Human Rights, provide an opportunity for the accused to appeal the opinions of an ofcially appointed expert by hearing another expert proposed by the accused [21, p. 42].

In Germany, in accordance with Part 2, Article 245 of the Criminal Procedural Code of Germany, the court is obliged, at the request of the defendant or prosecutor, to attract a knowledgeable person to obtain new and analyse existing evidence, including the opinion of an ofcially involved expert[1]. The explanations of the Supreme Court of Germany state that during the evaluation of the expert opinion it is necessary to verify the content and logical validity of the opinions, the correctness of the methods used by the expert and the compliance of these features with expert methods published in the literature. The German Supreme Court strongly recommends that such an evaluation be carried out particularly carefully in criminal proceedings if the defence appeals against the opinion of an ofcially appointed expert through a review or the opinion of an independent expert, comparing all materials with each other [22].

The United Kingdom Forensic Regulator's newsletter emphasises the importance of expert witness assistance in evaluating expert opinions and states that such persons are obliged to assist judges and jurors in forming their independent opinions on the validity of

[1] Criminal Code of Germany. (1871, May). Retrieved from https://www.gesetze-im-internet.de/stgb/BJNR001270871.html/.

expert opinions [23, p. 7]. The UK's Forensic Regulator's Annual Report for 2020 points to the need for a more thorough examination of scientifc evidence (expert opinions) in order to adhere more strictly to quality standards and proposes to increase the requirements for the work of independent expert witnesses to help make such an assessment, to the quality standards of forensic examination [24, p. 12]. These proposals are included in the draft law on the activities of the Forensic Regulator and Biometric Strategy, which is under consideration in the parliament [25].

Shaofang Wang, a researcher in the Department of Forensic Science at Wuhan University (China), emphasises the importance of analysing the reliability of an expert opinion in order to avoid mistakes in the investigation of crimes. The author suggests that investigators, judges, prosecutors, advocates, victims, suspects, accused, and other participants in the proceedings, in order to analyse the expert opinions and explain them, involve special subjects – expert assistants and even presents a model of the procedural status of such persons (their rights and obligations, level of education and training). The author also proposed an algorithm for evaluating the reliability of an expert opinion [26].

In Australia, to recognise an expert opinion as a source of evidence upon its evaluation, courts establish whether the parties to the case had access to expert advice on this opinion (especially in criminal proceedings) [5]. According to Article 225 of the Criminal Procedural Code of Italy, each of the parties has the right to involve its "technical consultants" not only to conduct a forensic analysis, but also to review expert opinions[1].

Notably, an independent review of expert opinions is widespread in the judicial practice of the Russian Federation, where reviewers are private experts and employees of state forensic institutions, and reviews are used both in procedural form (receiving testimony from a specialist or inclusion of a review to the case as a specialist's judgement) and in non-procedural form (written consultations commissioned by the defence and the victim). At the same time, Russian researchers argue that to refute the position of the prosecution, the defence should involve independent specialists to analyse the scientifc validity of the expert opinion [27, p. 150; 28, p. 1665].

Thus, the analysis of the legislation and numerous studies of scientists from the USA, Canada, Great Britain, Germany, Italy, the Netherlands, Australia, China, the Russian Federation, and other countries demonstrated that in these countries, to help evaluate the reliability of the opinion of a forensic expert, the investigator and the court involve knowledgeable persons (mainly, they are called expert witnesses). The defence party engages an independent expert (techni-

[1] Criminal Procedural Code of Italy. (2011). Retrieved from https://www.legislationline.org/download/id/4357/fle/Italy_CPC_updated_till_2012_Part_1_it.pdf.

cal assistant) to conduct an alternative forensic analysis or review the opinion of an ofcially appointed expert. In some countries (USA, Germany, Italy), if the defence disagrees with the opinion of an ofcially appointed expert, the involvement of an independent expert to analyse the reliability of their opinion is mandatory. Moreover, in Germany, Australia, and other countries, an expert opinion is recognised by the court as a source of evidence only after it is convinced that the defence party has exercised the right to involve an independent expert or reviewer of an expert opinion.

These provisions are important for implementing the procedure for reviewing forensic expert opinions in the legal system of Ukraine, which is discussed in numerous publications and public discussions [13; 29–31]. Notably, nowadays, in accordance with Paragraph 2 of the Procedure for Reviewing the Opinions of Forensic Experts[1], the purpose of reviewing opinions is solely to improve the professional skills of experts, improve the quality and validity of their future opinions, and not to help evaluate the expert opinion. Review is not conducted to refute or confrm the opinions. At the same time, the opinion of a forensic expert can only be reviewed by a person who is an employee of a state forensic institution. Moreover, state forensic institutions are not required to report negative results of their review to the persons who commissioned the review. In other words, there is a possibility that the basis of judgements and court decisions may be erroneous expert opinions.

Such monopolisation of the practice of evaluating the results of forensic expert activity is erroneous and does not meet international and European standards. On the other hand, independent review of the expert opinion by a person who has special knowledge in the same area of expertise would make it possible to establish the facts of compliance of the expert research with special methods, verify the completeness of the analysis and the objectivity of the opinions, make sure that the results obtained are justifed, etc. Undoubtedly, a review of the expert opinion received by the defence party, the victim, a representative of a legal entity, etc. by directly contacting their chosen specialist who has scientifc or other special knowledge in the corresponding feld would contribute to establishing the objective truth in the case and would encourage forensic experts to conduct better expert analysis. Furthermore, the prohibition of independent review of the expert opinion may prevent the prosecutor, the head of the pre-trial investigation body, the investigator from fully and impartially investigating the circumstances of criminal proceedings, identifying both those circumstances that incriminate and those that justify the suspect, the accused, as well as circumstances that mitigate or aggravate

[1] Order of the Ministry of Justice of Ukraine No. 335/5 "On Approval of the Procedure for Reviewing the Opinions of Forensic Experts". (2020, February). Retrieved from https://zakon.rada.gov.ua/laws/show/z0131-20#Text.

their punishment, providing them with a proper legal evaluation and ensuring the adoption of legal and impartial procedural decisions (Part 2, Article 9 of the Criminal Procedural Code of Ukraine)[1].

This position is supported not only by legal scholars, but also by practitioners. Thus, a survey of 220 people (including 150 investigators, 16 prosecutors, 15 employees of intelligence nits, 11 judges, and 28 advocates) indicated that a total of 75% of respondents are incapable of evaluating the reliability of an expert opinion without the help of knowledgeable persons. This opinion was expressed by 65% of investigators, 64% of prosecutors, 87% of intelligence unit ofcers, 73% of judges, and 86% of advocates.The overwhelming majority of respondents (78%) consider it necessary to legislate the involvement of knowledgeable persons (independent experts, specialists, reviewers, professionals in a particular feld) to help evaluate the reliability of the expert opinion.

The courts of Ukraine, due to the complexity of evaluating an expert opinion without the help of knowledgeable persons, are forced to recognise the importance and legality of independent review of expert opinions. Thus, the Decision of the Supreme Court of Ukraine of 14.01.2021 in case No. 922/2216/18[2] noted that the courts' "failure to consider" the review as evidence violates the adversarial principle, and "the review is not inherently a repeated or additional analysis, as it does not evaluate evidence. The expert who provides the review evaluates, in particular, the methods and completeness of the analysis, the logic of the conclusion". In the verdict of the Svyatoshinskyi District Court of the city of Kyiv dated January 15, 2018 in case No. 759/846/17, it is indicated that according to the results of the analysis of an independent review of the expert opinion as written evidence, the court considered the expert opinion No. 64/9/2016 unfounded, biased, and inconsistent with the legislation of Ukraine[3].

Thus, in Ukraine, the judicial practice of using reviews of forensic experts' opinions is starting to develop. Moreover, this practice is quite consistent with the ECtHR decisions, which note that it can be difcult to challenge a forensic report without the help of another expert in the corresponding area of expertise, and in such cases, it would be useful to review the expert opinion [32]. In particular, the ECHR decision in the case of Borgers v. Belgium (Borgers v. Belgium) dated 30.10.1991 stated that the parties to the trial must be given the opportunity to get acquainted with all the evidence and comment on it, to involve an "independent representative of the

[1] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651–17#Text.

[2] Resolution of the Supreme Court of Ukraine No. 922/2216/18. (2021, January). Retrieved from https://reyestr.court.gov.ua/Review/94151198.

[3] Judgement of the Sviatoshynskyi District Court of Kyiv No. 759/846/17. (2018, January). Retrieved from https://reyestr.court.gov.ua/Review/71570540.

national legal system" to influence the court's decision"[1].

Therefore, to receive assistance in verifying the objectivity and reliability of the expert opinion, each party to the proceedings must have the legal right to contact the appropriate specialist. The specialist may present the results of the analysis of the expert opinion in the form of a written document – a review, consultation, analytical note, expert opinion, etc. Such a document is not a source of evidence, but if errors are found in the expert opinion that affected the wording of the conclusions, it should be considered by the investigator (court) and serve as a basis for appointing a second or additional forensic analysis. An additional forensic analysis may be assigned to verify or clarify disputed information that the reviewer drew attention to upon reviewing the expert opinion.

Legalisation of reviews of expert opinions will not only reduce the number of investigative (judicial) errors, but also prevent illegal actions of incompetent and dishonest reviewers to provide biased reviews by publishing information about them in the review text (last name, education, academic degree, academic title, length of service and place of work, etc.). It would also be appropriate to make provision for the possibility of cross-examination of the reviewer and the executor of the reviewed expert opinion.

The importance of introducing independent review of expert opinions is also confrmed by the fact that the President of Ukraine issued Decree No. 837/2019[2] in which, as urgent measures for the implementation of reforms, the development and submission to the Verkhovna Rada of Ukraine of a draft law on amendments to certain legislative acts of Ukraine on the introduction of peer review of a forensic expert opinion and the introduction of a mechanism for evaluating the quality of legal aid provided using *peer review*. In compliance with this Decree, it would be correct to supplement Part 1, Article 94 of the Criminal Procedural Code of Ukraine[3] with the following text: "To help evaluate the reliability of an expert opinion, it can be analysed (reviewed) by a person who has the appropriate higher education, scientifc degree, and practical work experience of at least 10 years in forensic examination. The results of such an analysis do not constitute a source of evidence, but are of an auxiliary (advisory) technical nature, cannot contain an evaluation of the evidence or instructions on procedural decision to be made, but if errors are found in the expert opinion that affected the wording of the conclusions, it should be considered by the investigator (investigating judge, court) and serve as a basis for ordering

[1] Decision of the European Court of Human Rights "Case of Borgers v. Belgium". Application No. 12005/86. (1991, October). Retrieved from http://hudoc.echr.coe.int/rus?i=001–57720.

[2] Decree of the President of Ukraine No. 837/2019 "On Urgent Measures to Implement Reforms and Strengthen the State". (2019, November). Retrieved from https://www.president.gov.ua/documents/8372019–30389.

[3] Criminal Procedural Code of Ukraine, op. cit.

a second (additional) expert examination or cross-examination of the expert and the reviewer".

Legalising reviews of expert opinions would also allow the defence to independently gather information and evaluate the reliability of the expert opinion as a source of evidence, which, for its part, would reduce the number of investigative (judicial) errors. The defence's lack of the right to appeal against expert opinions leads to appeals to the European Court of Human Rights, which in its decisions has repeatedly noted cases of violation of the principle of equality of arms, considering the difculties faced by clients upon trying to challenge the prosecution's expert opinions. In particular, in the ECHR decision in the case of Khodorkovsky and Lebedev v. Russia of 25.07.2013, applications Nos. 11082/06 and 13772/051, it is indicated that the court's rejection of reports of specialists made by examining the expert opinions (without examining the objects of forensic analysis), which constitute nothing more than reviews of the expert opinions, is a violation of Article 6 of the Convention (the right to a fair trial). The European Court also believes that to effectively challenge expert opinions, the defence party must be capable of providing alternative expert opinions, and the domestic court's refusal to review expert opinions in court violates the balance between the defence and prosecution parties in the matter of gathering and providing expert evidence and disregards the principle of equality of arms.

CONCLUSIONS

Based on a comparative legal analysis of the legislation of the countries of the Anglo-American legal system (USA, Canada, Great Britain, Australia), continental (Italy, Germany, Netherlands, Russian Federation, Ukraine), and Far Eastern system (China), which regulate the procedure for evaluating evidence, including expert opinions according to the reliability criterion, it was established that in all these countries, except Ukraine, an independent knowledgeable person is involved with special knowledge in the corresponding area of expertise. Such a person is obliged, orally or in writing, to provide the court, jury, parties to the proceedings and the victim (at their request) with their judgements on the essence of the facts established by the expert, the completeness of the analysis, the correctness of the methods and techniques used by the expert, and the validity of the conclusions. Contacting knowledgeable persons to evaluate the objectivity, validity, completeness of expert research helps establish the causality between the identifed features of the object of analysis and the fact that is subject to establishment, and also gives grounds for determining the afliation, admissibility, reliability, and sufciency of the expert opinion as a source of evidence. The involvement of knowledgeable persons to help evaluate the expert opinions is associated with the fact that scientists have proven the presence of errors in expert opinions, which served as the basis for making unfair

procedural decisions (even regarding death sentences). If the opinions of an ofcially appointed expert and an independent expert or reviewer differ, the court cross-examines them to form an unbiased objective opinion regarding the expert opinion. To exercise the rights of individuals to fair justice, it would be advisable to introduce such a procedure for evaluating the reliability of expert opinions in Ukraine.

Generalisation and analysis of the results of the survey conducted among investigators, judges, employees of operational units, prosecutors, and lawyers demonstrated that these persons are incapable of evaluating the reliability of the expert opinion without the help of knowledgeable persons with special knowledge in a particular area of expertise. The overwhelming majority of these individuals support the introduction of amendments to the procedural legislation of Ukraine regarding the possibility for participants in criminal proceedings and victims to attract knowledgeable persons to help evaluate the reliability of expert opinions.

To normalise the procedure for evaluating the reliability of expert conclusions by reviewing them by knowledgeable persons from the same feld of knowledge, it is considered appropriate to introduce the necessary changes to the procedural legislation of Ukraine. At the same time, such a review cannot serve as a source of evidence, but only has an auxiliary (advisory, technical) nature. The review cannot contain an evaluation of the evidence or a reviewer's judgement regarding the procedural decision to be made by the procedural person. If errors are found in the expert opinion that affected the wording of the conclusions, the review should be considered by the investigator (investigating judge, court) and serve as a basis for assigning a second (additional) expert examination or conducting a cross-examination of the expert and the reviewer.

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BIOMETRIC PERSONAL DATA AND THEIR USE IN THE INVESTIGATION OF CRIMINAL OFFENCES

Abstract. *The article is devoted to the analysis of biometric personal data, which is proposed to be considered as a source of information about a person and used during pre-trial investigation of criminal offences. The relevance of the research topic lies in the need to develop an optimal mechanism for using biometric personal data in the activities of pre-trial investigation bodies. The purpose of the research is to analyse the current international and national legislation on determining the place of biometric personal data in the criminal record system, implement their classification and provide recommendations for use by state bodies and individuals. To achieve this goal, the work used dialectical, historical-legal, formal-logical, dogmatic, structural-system and comparative-legal methods. It is proved that various types of biometric personal data accumulated in the criminal record system can be successfully used in the process of investigating criminal offences, and in some cases by individuals within the limits of their statutory powers. It was noted that along with the positive results of such activities, there are certain risks, namely, the presence of a threat of leakage and access to biometric data by unauthorized persons, as evidenced by the negative judicial practice of individual countries regarding*

unsatisfactory collection, processing, storage and use of biometric personal data. Taking into account the above, it is stated that the collection, processing and use of biometric personal data for the purpose of their use in the investigation of criminal offences must meet certain requirements, namely: the owner of the database of biometric personal data should only be the state represented by a special state body. Accordingly, the state should ensure the storage and protection of biometric personal data.

Keywords: *criminal proceedings, pre-trial investigation, fingerprints, human genetic characteristics, forensic records, forensic registration.*

INTRODUCTION

Respect for the rule of law and maintaining law and order in society remains one of the most important functions of a democratic state. The system of state bodies and private individuals take a wide variety of measures to prevent offences in various spheres of socio-economic and socio-political life, as well as to investigate criminal offences that have already been committed. The development of technical means and the spread of digitalisation logically leads to their use in law enforcement activities. The data about the person that is the basis for their identification – personal data – comes to the fore. However, such activities contain not only undoubted benefits, but also potential threats to human rights and freedoms. Therefore, it is necessary to develop a balanced mechanism for their use with maximum efficiency and minimisation of risks.

The relevance of the research topic is due to two aspects: first, active legislative activity in this direction in Ukraine and the world. In particular, over the past few years, amendments have been made to the Law of Ukraine "On the Unified State Demographic Register and Documents Certifying Citizenship of Ukraine, a Person's Identity or Special Status" [1] and the Law of Ukraine "On Personal Data Protection" [2]. In 2017, the Regulations on national system of biometric verification and identification of citizens of Ukraine, foreigners and stateless persons was adopted (approved by the resolution of the Cabinet of Ministers of Ukraine of 27.12.2017 No. 1073) [3], and in 2018 – Instructions on the procedure for recording biometric data (parameters) of foreigners and stateless persons by officials of the State Migration Service of Ukraine, its territorial bodies and territorial divisions (approved by the order of the Ministry of Internal Affairs of Ukraine of 23.11.2018 No. 944) [4]. At the end of 2020, draft law No. 4265 "On State Registration of Human Genomic Information" was submitted and considered [5].

In Europe, the GDPR came into effect on May 25, 2018 (*The General Data Protection Regulation*, 2016). The GDPR specifically identifies biometric data as a "sensitive" category of personal information, ensuring reliable protection. The GDPR defines biometric data quite broadly, including physical (physi-

cal or physiological characteristics of a person: face, fingerprints, iris scans, etc.) and behavioural characteristics of the person. An important advantage of the GDPR is that the data subject has the right to withdraw their consent to their storage and processing at any time. It is also worth noting that in April of this year, the European Parliament approved the creation of one of the world's largest biometric databases – *Common Identity Repository* (CIR), which will be designed to combine the records of more than 350 million people.

In the United States, the CCPA came into force on January 01, 2020 (*California Consumer Privacy Act*, 2018). It is impossible not to mention that the largest biometric database in the world is located in India (*Unique Identification Authority of India* – UIDAI), which includes more than 90% of the country's population, and biometrics are used everywhere.

Secondly, the relevance of the study is determined by a large number of offences in the field of collecting, storing and processing personal data. During 2017–2020 alone, more than 20 large-scale leaks of personal data of millions of people were recorded [6; 7]. At the same time, the owners of personal data databases were both public institutions and private companies. New, modern technologies that attackers use to their advantage also contribute to the activation of committing offences in this area. So, in 2016, *Vkansee* researchers unlocked an iPhone using fingerprints collected with *Play-Doh*. This indicates that even advanced biometric systems can still be vulnerable to forgery. Consequently, the challenge is to protect them from unauthorised use.

General theoretical issues of using personal data are considered by S. Dobrianskiy [8], M. Rizak [9], V. Shvydenko [10] and et al. Certain issues of using biometric personal data in the process of investigating criminal offences were covered by scientists V. Bondar [11], R. Melnyk [12], O. Petryshyn [13], V. Prykhodko [14], M. Shepitko [15; 16], V. Shepitko [17] and other scientists. However, there are no comprehensive studies on this issue in Ukrainian legal Science, which makes it difficult to develop a balanced mechanism for using biometric personal data, in particular in the process of investigating criminal offences, taking into account national and international legislation.

Consequently, the need to develop an optimal mechanism for using biometric personal data in the activities of pre-trial investigation bodies is an urgent need of modern forensic science. Considering the above, *the purpose of the article* is a development and provision of recommendations for the implementation of optimal mechanisms for collecting, processing, storing, and using biometric personal data. *Tasks of the author's team* are to analyse international legal acts and the current legislation of individual states on regulating the use of biometric personal data in conducting forensic records, classify personal data, develop,

and provide recommendations on the work of state bodies and individuals with biometric personal data.

1. MATERIALS AND METHODS

The work was based on the following materials: the Law of Ukraine "On Personal Data Protection", departmental regulatory documents: "Instruction on the operation of the fingerprint accounting of the expert service of the Ministry of Internal Affairs of Ukraine", "Instructions on the procedure for forming and using automated accounting of human genetic traits".

The methodological basis of the research was a system of techniques and methods of scientific knowledge, in particular, the dialectical method was included, which made it possible to comprehensively perceive and systematically study theoretical and regulatory provisions concerning the collection, storage and processing of personal data in the process of investigating criminal offences. The study also applied such general scientific methods as description, which made it possible to study and describe a person as a single biological and social dynamic system, biometric data as a set of data about a person collected on the basis of recording its characteristics, having sufficient stability and significantly different from similar parameters of other persons (biometric data, parameters – digitized signature of a person, digitized face image of a person, digitized fingerprints), the dogmatic method became the basis for the interpretation of concepts used in the field of psychology, linguistics and other branches of non-legal knowledge, finding out the content and meaning of the concepts and terms used, justification of the proposal to change and supplement them. The formal-logical method made it possible to define terminology related to the digitisation of all spheres of human life, the use of innovative digital technologies, and so on. A comparative legal method that has a number of advantages, namely comparison, classification in order to determine the legal categories that characterise personal data, which are diverse information in content and uniform in origin. The structural-system method is used to study the ways, forms, concentration and systematisation of information that accumulates in the criminal record system as a subsystem of means of forensic registration, which differs in accounting data, the system of recorded data and the procedure for collecting, registering, systematising, storing and searching such data. Also, algorithms for recognising a wide variety of biometric indicators of a person, which in the future can be introduced as interrelated fingerprint and portrait identification, identification features for which are taken into account in various automated identification systems.

Among the special methods used: the historical and legal method made it possible to study the formation and implementation of informatisation on the basis of the Ministry of Internal Affairs of Ukraine and central executive

authorities, the introduction of a unified information system, which over the past five years has been improved in order to ensure a high level of its reliability and trouble-free functioning. One of the most important areas of such activity was the development of automated public data banks based on the existing unified software and hardware complexes of the DIT divisions and the Expert Service of the Ministry of Internal Affairs of Ukraine. The integration of these information resources was supposed to create prospects for automating the information and search engine for identifying a person based on a face image. The formal legal method made it possible to study the norms of the law of Ukraine "On Personal Data Protection", other laws of Ukraine, departmental regulatory documents, namely "Instruction on the operation of the fingerprint accounting of the expert service of the Ministry of Internal Affairs of Ukraine", "Instructions on the procedure for forming and using automated accounting of human genetic traits". Sociological and statistical methods made it possible to elicit the views of academics, investigators and experts in the context of the study.

2. RESULTS AND DISCUSSION

Personal data is diverse information in content and uniform in origin. All of them describe the individual as a single biological and social dynamic system. One of the subspecies of personal data is biometric. They are widely used for identity verification (identification) in order to provide access rights to gadgets, office and industrial premises, vehicles and information with restricted access, for making payments, for crossing state borders and receiving financial services. Therefore, the collection, use and processing of biometric data has long been part of the daily life of society.

International law classifies biometric personal data as "sensitive", that is, such that improper use of which leads to a violation of human rights and freedoms. Article 6 of the Council of Europe Convention No. 108 stipulates that such information should not be processed automatically if the national legislation does not provide for sufficient guarantees for its protection. The Regulation of the Council of Europe clarifies that the mentioned Article 6 of the convention does not contain an exhaustive list of "sensitive" personal data in general and biometric personal data in particular [18, p. 28]. However, despite the significant history of the formation and development of the protection of human rights and freedoms, there is no reason to call the EU human rights protection system a fully formed system without the need for further improvements [8, p. 57].

National Ukrainian legislation defines biometric data as a set of data about a person collected on the basis of recording its characteristics, which have sufficient stability and significantly differ from similar parameters of other persons (biometric data, parameters – digitized signature of a person, digitized image of a person's face, digitized fin-

gerprints) [1]. Biometric data is characterised by biometric parameters, which are measurable physical characteristics or personality behavioural traits that are used to identify a person or verify the identification information provided about a person. In a narrow sense, biometric data includes a person's fingerprint, iris or retina, features of limbs, face, ear, tongue print, voice, location of veins, DNA, ECG, signature. In a broad sense, biometric data also includes human behaviour (in terms of features that can be distinguished): physical movements (the way of walking); the force/speed of pressing the screen, keyboard; the way an individual enters data (with their finger (which one), stylus), how the device is held (for example, the angle of inclination of the phone), etc. [9, p. 92]. The special status of biometric personal data is also determined by the inability to change them, unlike other personal data [19]. Yes, one can change their first and last name, passport details, residential address, and phone number. In some cases, even the date and place of birth and taxpayer identification number must be replaced. However, fingerprints, the location of veins, DNA, and voice cannot be changed. Therefore, it is biometric personal data that requires a special procedure for collecting, processing and storing it. Biometric personal data is a part of the persona, and it can be "read" and recorded, so there is no risk of forgetting or losing it. However, because they are unique, they cannot be replaced. Therefore, if biometric data has been compromised, it can lead to the destruction of an individual's social life.

Complete digitisation of all spheres of human life, the use of innovative digital technologies has a number of advantages: reducing costs, resources, time for information processing, fast analysis of large amounts of data, increasing labour productivity, more accurate forecasts in various spheres of life, etc. [20, p. 186]. The level of security of these biometric data is directly proportional to the level of security of their protection on the part of the database owner and manager. It is believed that the storage of biometric personal data by distributing it in different places, as well as a multilevel method of identity authentication to grant access rights, are necessary conditions for the security of such data.

Our belief in the need to strengthen the level of protection of biometric personal data is based on examples of numerous large-scale leaks of personal data around the world over the past few years.

In particular in supermarket chains *Morrisons* (£10,500 fine), *British Airways* (£183 million fine), data leak of 500 million *Marriott* users in November 2018, *Nova Poshta* (in the spring of 2018, screenshots of the customer passport data database were leaked, an unscheduled inspection found no evidence), *Uber* in December 2017 (the company paid a ransom of $ 100,000 for non-disclosure of data) [21]. In 2017, a personal data leak occurred in the largest bank in Ukraine, and in 2018 – in the world's most popular social network, the

most common taxi service and the largest delivery service in Ukraine [10].

In 2019, access to the Chinese Smart city database could be obtained *from* a web browser without a password. This database contained gigabytes of information, including facial recognition data from hundreds of people. The data was hosted on the cloud platform of the Chinese tech giant Alibaba [22]. The FBI has arrested 33-year-old programmer Paige Thompson. She is suspected of stealing the data of 106 million users of the American bank Capital One, mainly citizens of the United States and Canada [6].

Well-known companies from various sectors of the economy also become targets of hacker attacks with theft of personal data, such as *FacebookInc* (there are already many cases, in one of which the fine is $5 billion). It contained data from 133 million Facebook users from the United States, 18 million from the United Kingdom, and 50 million from Vietnam [7]. There were also leaks of personal data in *Toyota* and *Lexus* (hackers stole information about car owners in March 2019), *Suprema Biostar* (August 2019), *Mastercard* (August 2019), *Habr.com* (August 2019), *Yves Rocher* (September 2019), Darimax (Russian Federation, September 2019), *Novaestrat* (data leak on almost all residents of Ecuador, September 2019) and many others [21].

Therefore, the issue of storing and processing biometric personal data is particularly relevant.

In most cases, users of digital technology and the Internet protect personal information individually, using a variety of technologies [13, p. 19; 23]. However, the security of using biometric personal data in the process of investigating criminal offences should be ensured by the state, since such activities are one of the main tasks of the state. Judicial practice in cases of misuse of biometric personal data by private individuals confirms the need for the state to guarantee the security of storage and use of such data.

In 2019, the owner of a fitness club in Kazan (Russian Federation) challenged in court the decision of Roskomnadzor to impose a fine of 10,000 RUB for using the PACS system to identify visitors from a photo when passing through a turnstile without their written consent. The court did not satisfy the complaint, referring to the fact that the photo is biometric personal data, and their use requires the written consent of the owner [24].

Decision of the Supreme Court of Illinois (USA) of 25.01.2019 in the case of the corporation *Rosenbach v. Six Flags Entertainment Corporation* confirmed the need for written consent to the collection and processing of biometric personal data [21]. In this case the parents of a minor child filed a lawsuit against the amusement park *Six Flags Great America*. They claimed that their child's biometric data was collected without consent and violated BIPA (performing biometric scanning at the turnstile to prevent fraud and provide access in case of ticket loss). The Illinois Supreme

Court ruled that *Six Flags Entertainment Corporation* violated BIPA. The court's decision concluded that it is not necessary to prove the damage and it is enough that the collection was incorrect.

Biometric personal data is now widely used in the banking sector, in the field of providing financial services and making payments for services rendered. Thus, from 2015 to 2020, the Ladoshki project (Russian Federation) collected data on the structure of palm veins of tens of thousands of Russian children for use in the school food payment system [25]. Despite the 5-year period of the project's existence, there is still no consensus even among representatives of state bodies on the legality of all aspects of its activities.

There are the first attempts to use fingerprints to register an employee's working hours in private companies. Thus, they try to maintain work discipline, because the fingerprint is not a card, it is impossible to transfer it to another person to register.

Banks are increasingly investing in new technologies: machine learning; real-time fraud reporting; voice, face, and fingerprint recognition (biometric data), as well as so-called behavioural biometrics, which include customer interaction profiles with their devices and online banking tools. Since 2018, the Central Bank (Russian Federation) has started collecting biometric personal data to identify individuals when providing financial services. This data is entered in a single biometric system and collected by many banking institutions. Since 2019, PrivatBank (Ukraine) has launched FacePay24 payment technology [26]. To counteract this, cybercriminals have created a digital fingerprint market, and fraudsters have learned to record and reproduce customer voices using new technologies [27, p. 174].

Only a few states are gradually beginning to fill in large-scale regulatory gaps in regulating the use of biometric personal data by digital banks. It is very likely that in the near future, innovative technologies will radically change the structure of the economy, the labour market and the construction of society as a whole [28, p. 159]. Currently, the analysis of the current legislation of Ukraine suggests that the Ukrainian legislation protects the rights of Ukrainians much more closely than the CCPA, BIPA and GDPR, resulting in possible abuses. Violation of the Ukrainian national legislation on the rules for handling biometric personal data entails administrative and criminal liability. At the same time, an important achievement of the GDPR is the consolidation of the "right to erasure.". According to it, the subject of biometric personal data has the right to withdraw their consent at any time. The consequence of revoking such consent under national law may be the "archiving" of such data without the possibility of further use, or deletion from the database. In April 2020, the European Parliament approved the creation of one of the world's largest biometric databases. It will be called the *Common*

Identity Repository (CIR) and will contain records of more than 350 million people. The largest biometric database in the world is currently created in India (it includes data on more than 90% of the country's population, and biometrics are used everywhere) – UIDAI (*Unique Identification Authority of India*). Each person is assigned a unique personal number – AADHHAAR.

Biometric personal data is widely used in criminal proceedings. One of the most important and effective ways to achieve forensic tasks is forensic registration in general and maintaining forensic records in particular. Forensic registration (in the scientific literature, the term "criminal registration" is also often used) is a system of material objects (file cabinets, databases, collections and other information repositories) and a practical registration activity [12, p. 186]. It was the materialistic understanding of the world around us, the laws of dialectics and the theory of knowledge that became the basis for the development of the doctrine of forensic registration. Its development is closely connected with the teachings on the mechanism of trace formation and methods of committing criminal offences, on recording evidentiary information, and directly with the theory of forensic identification. Forensic registration also occupies a prominent place in the activities of Interpol. V. Shepitko emphasises the importance of creating and using judicial (international) records of Interpol as the most effective means of countering international crime [17, p. 184]. The doctrine of forensic registration is a scientific theoretical basis for a whole criminal record system, its development and designing of organisational forms and technical support. Biometric personal data is used to achieve the goals of forensic registration, namely:

1) accumulation of data that can be used to investigate and prevent criminal offences;

2) providing conditions for identifying objects whose attributes are accumulated in the credentials;

3) assistance in finding objects whose attributes are accumulated in their credentials;

4) providing reference and orientation information to operational-search and investigative units of law enforcement agencies and judicial bodies.

Accounting as a subsystem of forensic registration tools differs in record data, methods and forms of their concentration and systematisation. Accounting is both a system of recorded data and a procedure for collecting, registering, organising, storing and searching such data. According to incomplete information of R. Melnik, the modern system of forensic registration unites more than 30 types of objects of different origin and features [12, p. 185]. Forensic registration is conducted not only in Ukraine, but also in foreign countries. Thus, the model legislation establishing effective control over persons who have committed sexual offences is the legislation of the United Kingdom. The law on sexual

offences, adopted in 2003, provides that persons who have committed sexual crimes are registered in a special database [15, p. 6], which contains, among other things, biometric personal data.

Biometric personal data contained in forensic records is used in the investigation of all types of criminal offences. Thus, M. Shepitko notes that during the investigation of judicial errors, investigators should search for and seize case materials and documents relevant to the case, namely recordings of the court session, audio and video recordings of the court session, a document confirming payment of the court fee, etc. [16, p. 136]. It is impossible to identify individuals on video and audio recordings of court sessions without using biometric personal data, in particular voice, speech and facial images.

In 2016, the creation of a Unified Information System (hereinafter, UIS) of the Ministry of Internal Affairs began in the system of bodies subordinate to the MIA. During 2016–2020, implementing the concept of informatisation of the Ministry of Internal Affairs of Ukraine and central executive authorities, the implemented UIs was improved in order to ensure a high level of its reliability and trouble-free operation. One of the most important areas of such activity was the development of automated public data banks based on the existing unified software and hardware complexes of the DIT divisions and the Expert Service of the Ministry of Internal Affairs of Ukraine. The integration of these information resources was supposed to create prospects for automating the information and search engine for identifying a person based on a face image. Also, since 2016, the provisions of the Law of Ukraine "On the Unified State Demographic Register and Documents Certifying Citizenship of Ukraine, a Person's Identity or Special Status" have been implemented, in particular, the registration of a passport of a citizen of Ukraine in the form of a card containing an electronic contactless chip with simultaneous fingerprint registration. Another element of the integrated automated system was the automated identification systems used by the Expert service of the Ministry of Internal Affairs of Ukraine (fingerprinting, signs of appearance).

Taking into account the capabilities of modern algorithms for recognising a wide variety of biometric indicators of a person, it is possible in the future to introduce interrelated fingerprint and portrait identification, the identification features for which are taken into account in various automated identification systems. According to V. Bondar, the functioning of such a system provides for a qualitatively new level – information-analytical processing of information arrays [11, p. 30]. Agreeing with him, we believe that the collection and processing of experimental data and computational forensic methods, as well as image analysis in forensic research, occupy a special place in analytical processing. Therefore, the essence of information and analytical support can be expressed by the formula

"source information – the subject of forensic science – technology and technique of forensic science – the necessary information", which can be understood as the process of movement of forensic information from its receipt to processing by special subjects with the use of special knowledge and scientific and technical means and technologies in order to solve forensic problems [11, p. 31].

The provisions of the Law of Ukraine "On Personal Data Protection" apply to maintaining forensic records of biometric personal data. They provide for the processing of personal data, which is carried out using both automated and non-automated means, which are contained in the file cabinet, or will be entered in the file cabinet. Also, today there are instructions for regulating the procedure for the formation and functioning of certain types of forensic records, in particular instructions for organising the functioning of forensic records of the expert service of the Ministry of Internal Affairs [29], instructions on the procedure for the functioning of fingerprint records of the expert service of the Ministry of Internal Affairs of Ukraine [30], instructions on the procedure for the formation and use of automated accounting of human genetic traits [31]. The operation of these instructions provides legal regulation of each of the links of activities for conducting forensic records, which, for its part, creates conditions for relativity, reliability, and the possibility of verifying the information contained in this record [14, p. 92].

It is worth considering forensic records containing biometric personal data in more detail. According to paragraph 1.5. of the Instruction on the organisation of the functioning of criminal records of the Expert Service of the [29], among the criminal records that include biometric personal data, the following can be distinguished:

1) Dactyloscopic records;

2) records of persons on the basis of their physical appearance;

3) records of genetic traits of a person;

4) records of voices and speech records of persons.

Dactyloscopic record is leading among other types of criminal records, due to a large number of traces of human hands that remain during the commission of criminal offences. This type of record is one of the first record-keeping activities in the history of the development and refinement of state authorities in the investigation of crime. Dactyloscopic record is used to search for people who are missing; to establish the identity of a person behind an unidentified corpse; to confirm the identity of a previously fingerprinted person; to identify persons who left handprints at the scene; to establish the facts of leaving handprints by one person during the commission of various criminal offences. Elements of the dactyloscopic record subsystem are the handprint card index and the fingerprint card index. Both elements of the subsystem are interrelated, complement each other, and are used

in four areas of verification: fingerprint card index-print, print-fingerprint card index, print-print, and fingerprint card index-fingerprint card index. Modern automated dactyloscopic information systems (ADIS) facilitate and speed up the processing of dactyloscopic information, as well as the search for necessary data about specific accounting objects and individuals among a large number of similar data. The structural divisions of the State Scientific Research Forensic Centre (SSRFC) of the Ministry of Internal Affairs of Ukraine use ADIS software and hardware complexes: "Sonda" and "Dakto 2000". Also, for the purpose of registering dactyloscopic objects, ADIS software and hardware complexes are used, which are equipped with colourless image input scanners, which scan fingerprints, fingerprints index card or a photograph of a footprint and display them on a monitor screen. Having entered fingerprint information into the computer, such systems are used to check and establish the coincidence or discrepancy of certain objects [32, p. 282].

Record persons on the basis of their physical appearance is intended, first of all, to ensure the achievement of operational search tasks of pre-trial investigation of criminal offences. At the regional and local levels, subjective portraits of persons suspected of committing criminal offences are subject to registration. At the written request of employees of operational units of the National Police of Ukraine, such subjective portraits are compiled. If a person who has been subjected to a subjective portrait is identified, their photo after being detained is transferred to an expert unit by an employee of the National Police of Ukraine – the initiator of the subjective portrait assignment.

Automated record of genetic traits is conducted at the central and regional levels. Its functioning is carried out using the AIRS "MC–Lab", the database of which stores DNA profiles of persons suspected or accused of committing criminal offences, taken into custody, convicted persons only in the case of their voluntary consent, as well as biological traces seized during the inspection of the scene, other investigative actions and operational search measures, unidentified corpses. The draft Law of Ukraine "On state registration of human genomic information" offers a slightly different list of tasks of such registration, namely prevention of criminal offences; identification of persons who have committed criminal offences; search for persons who are missing; identification of unidentified bodies (remains); identification of the face of a person who, due to their state of health or age, cannot provide information about themselves. In contrast to the current legislation, which provides for exclusively voluntary registration of genetic traits of persons suspected or accused of criminal offences, detained, convicted persons, the draft law of Ukraine rightly provides for mandatory registration of genomic information, including concerning persons prosecuted for intentional crimes against life,

health, sexual freedom, sexual integrity of a person in respect of whom a measure of restraint has been chosen; persons who have committed socially dangerous acts against the life, health, sexual freedom or sexual inviolability of a person to whom compulsory measures of a medical nature have been ordered by a court; persons convicted of intentional crimes against life, health, sexual freedom and sexual integrity or a person; information established in biological material seized during investigative actions from places of commission of criminal offences committed in conditions of non-obviousness, or obtained during pre-trial investigation and not identified; unidentified corpses of people and their remains, information about the discovery of which is registered in the Single Register of Pre-Trial Investigations and an investigation has been initiated; missing persons, which, by court order, can be ascertained through molecular genetic examination (research) of previously taken biological samples or biological material taken from the missing person's personal effects.

After conducting expert studies of objects (their copies or images), the experts who conducted them draw up registration cards and add them to the operational search records. The object is checked in the criminal record system upon a written request of the established sample. The initiator is informed about the results of such verification by sending them a standard document of the established sample [32, p. 283].

Records of voices and speech covers the following types of collections:

1) the first type of collection includes audio recordings of voices and speech of individuals, as well as transmitting messages about threats to the safety of citizens and other socially dangerous acts anonymously;

2) the second type of collection includes audio recordings of voices and speech of identified persons who transmit messages about a threat to the safety of citizens and other socially dangerous acts.

Audio recordings of voices and speech of identified and unidentified persons are included in the collections in analog and digital format. Audio recordings of the voices and speech of identified persons are carried out by employees of the National Police of Ukraine, who conduct a pre-trial investigation, which involves a specialist in the recording process. Audio recordings of voices and speech of unidentified persons are carried out by duty units of territorial divisions of the state emergency service of Ukraine. Audio recordings attached to collections can be used for conducting expert research and investigative (search) actions.

Biometric personal data is also recorded in the system of the National Police of Ukraine. Units of the Department of Information and Analytical Support of the National Police of Ukraine (hereinafter – DIAS) are responsible for the functioning of forensic records of operational-investigative and reference-

informational purposes. These subdivisions include territorial departments of information-analytical support of the National Police, sectors of information and analytical support, as well as individual information support workers of district police bodies. These forensic records are formed into an automated database, the arrays of which comprise the records of the objects of record within a separate automated information subsystem. The data on the objects of record are contained in electronic cards. In 2017, the "information Portal of the National Police of Ukraine" (hereinafter – IPNP) was created, which combined numerous previously available forensic records. As an information and telecommunications system, it is an integral part of the unified information system of the Ministry of Internal Affairs of Ukraine. The information portal of the National Police of Ukraine consists of the following subsystems: "Person", "Wanted", "Inquest", "License plates", "Administrative practice", "Harpoon", "Delivered", "Unified accounting", "Criminal weapons", "Registered weapons", "Road accidents", "Wanted vehicles", "Cultural values", "Document", "House arrest", "corruption", "Atrium", "Dactyloscopic record".

It is important to take a closer look at the subsystems that include recording biometric personal data of individuals. The information subsystem "Person" takes into account information about persons involved in the commission of criminal offences, as well as in respect of whom employees of the National Police of Ukraine carry out preventive activities. The entire data array is divided into categories [33, p. 123]:

– "defendants" includes data on accused persons whose indictment has been sent to court;

– "previously convicted" – data on persons who were released from prison and served a sentence for an intentional crime and in respect of whom the criminal record has not been removed;

– "released from serving a sentence with probation" – data on persons given a non-custodial sentence;

– "administrative supervision" – data concerning previously convicted persons for whom administrative supervision has been established on the basis of a court ruling on the initiative of the police or in places of deprivation of liberty;

– "formal supervision" – data on previously convicted persons who have not been sentenced to imprisonment, as well as persons in respect of whom the term of administrative supervision has expired, and the criminal record has not yet been repaid (removed);

– "mentally ill" – data on persons with severe mental disorders and diseases and at the same time registered in health care facilities;

– "prostitutes" – data on persons who have been brought to administrative responsibility for prostitution;

– "Involved in ITN" – data on persons who have committed offences related to illicit trafficking in narcotic drugs and psychotropic substances;

– "delinquent child" – data on children who are on preventive registration and in respect of whom accounting and preventive cases are conducted;

– "domestic abuser" – data on persons who have committed domestic violence and against whom a formal warning has been issued that such violence is inadmissible.

The specified subsystem has a reference-informational purpose. The use of the data contained in it ensures the verification of information about individuals and the establishment of their location. Thus, law enforcement officers, if they find information about a person in a particular category of the "person" information subsystem, receive approximate information about them, which in turn contributes to the correct qualification of the event.

The information subsystem "Wanted" contains data on persons evading pre-trial investigation, trial, serving sentences, missing persons and other categories of persons wanted. By its purpose, this subsystem is operational-search and contains information about persons who have been or are subject to criminal liability, as well as missing persons. At the same time, the information subsystem "Inquest" contains data on persons hiding from the authorities, unidentified corpses, missing persons, persons who cannot provide any information about themselves due to their health or age. Data in the specified subsystem is formed by categories, for example, "unknown child", "unidentified corpse", "unknown patient".

The information subsystems "Wanted" and "Inquest" are interrelated due to the features of the objects of record. Thus, the same object can be in both information subsystems at the same time, e.g. a person evading serving a criminal sentence is counted in the IS "Wanted" and the same person as an unknown patient is counted in the IS "Inquest" (if in the process of evading serving the sentence, there was a traffic accident that resulted in the person being admitted to hospital without consciousness or identity documents). Therefore, in the process of entering information into these information subsystems, cross-validation of data is mandatory.

An electronic registration card is created for each registered person in the information subsystems "Person", "Wanted" and "Inquest". It records personal data of the person, citizenship, place of registration and actual residence, passport data, type and amount of the last sentence and articles of the Criminal Code of Ukraine under which such is assigned; date of release from the place of deprivation of liberty (if a penalty related to deprivation of liberty was imposed); category of registration and basis of registration of the person; date of registration of the person for preventive registration; registration number and date of material; type of offence and articles of the Criminal Code of Ukraine; brief plot (place, time and brief description of the circumstances of the offence, the nature of violent actions, motives, other information collected concerning the of-

fence); additional information about the person, that directly characterise their lifestyle, and so on.

The information subsystem "Dactyloscopic record" contains data with dactyloscopic information and is an electronic array of fingerprint card indexes that are compiled in relation to persons detained on suspicion of committing offences, unidentified corpses and persons who cannot provide any information about themselves due to illness or age. Thus, the data of the specified subsystem contains fingerprint card indexes of persons registered in other information subsystems.

Access to information contained in the information resources of the Information Portal of the National Police of Ukraine is limited. Authorised users may use such data within the limits of their functional responsibilities and the level of access provided to them. In total, there are four levels of access to IPNP data, which provide for searching or viewing information, and one level for entering information into information resources. Each user can only have one level of access to search or view.

Information from the information subsystems of the IPNP in the form of extracts is provided at the official requests of the prosecutor's office, pre-trial investigation, court, operational divisions of the National Police of other regions, officials of state authorities and law enforcement agencies of other states [33, p. 123].

CONCLUSIONS

The study found that biometric data is important in organising pre-trial investigations, as it facilitates the identification of an individual. At the same time, their active use also creates new threats to the security of both the state and the individual, and can also cause new organisational and legal problems, primarily regarding the collection and storage of biometric data and ensuring their confidentiality. It is indicated that biometric data should be divided into two groups, where the first group includes information related to body characteristics (physical or physiological features of a person), and the second – information related to human behaviour (any behavioural characteristics that are unique to a person and therefore can be identified). It is proved that the collection, processing and use of biometric personal data for use in the pre-trial investigation of criminal offences must meet the following requirements:

1) the owner of the database of biometric personal data should only be the state represented by a special state body. Accordingly, the state should ensure the storage and protection of biometric personal data;

2) physically, the media (servers) that store the database with biometric personal data must be located on the territory of the state, as this is a matter of national security;

3) the state may allow individuals to use a limited amount of biometric per-

sonal data to carry out their statutory activities only with the written consent of the persons who identify such data, and without the possibility of copying and accumulating them.

These types of biometric personal data are subject to state registration with the possibility of their use in the process of pre-trial investigation of criminal offences. It is concluded that the creation of a single automated information and analytical system of accounting for biometric personal data in the system of law enforcement and permitting authorities will create conditions for solving important tasks, namely:

1) to ensure the collection of complete information about objects with the formation of an "electronic profile" of potential offenders, identification and analysis of existing links with other objects and events of a criminal and illegal nature;

2) to record the social activity of persons who become involved in criminal proceedings, the emergence and change of their networks, and to analyse the degree of interest in them;

3) to improve the planning of investigative (search) actions and secret (search) actions, taking into account the complex set of numerous factors that affect the development of a particular investigative situation;

4) to form a set of methodological recommendations based on the analysis of a constantly updated array of all investigative situations and options for their development.

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OBJECT OF CRIMINAL OFFENCE: MODERN INTERPRETATIONS

Abstract. *The struggle of law enforcement and judicial bodies of the modern rule of law, as well as the entire society with the manifestations of crime is necessarily connected with the need for an in-depth study of crimes (hereinafter referred to as criminal offences), their essence, the structure of the constituent system elements, forms of external manifestation, which is a prerequisite for the development of the latest effective means of countering criminal offences. Among these issues, the object of a criminal offence is of particular importance, as it has a significant impact on the determination of the social characteristics of the offence and largely determines its actual objective and subjective characteristics. Meanwhile, there is no unity among scientists in the interpretation of the object of offence. The problem has therefore not yet been sufficiently studied. The purpose of the study is a scientific analysis of modern views on the object of a criminal offence and the establishment of a scientifically based content and essence of this concept. To achieve this goal, the following methods were used: dialectical, historical and legal, dogmatic, comparative, system-structural, legal hermeneutics. The article analysed the existing scien-*

tific approaches (positions) regarding the definition of the object of a criminal offense, which were systematised and reduced to two generalised groups: 1) ontological, which includes positions that recognise the object of a crime (criminal offence) as protected by criminal law public relations in various modifications; 2) axiological, which includes the interpretation of the object as values and related definitions: benefits, and individual interests. The authors made a reasoned conclusion that the object of a criminal offence is social relations that arise and exist in society about its social values, which are protected by the law on criminal liability

Keywords: *object (subject) of public relations, criminal offence, values, ontology, axiology*

INTRODUCTION

The fight against crime requires an in-depth study of crimes (hereinafter referred to as criminal offences), establishing their essence, structure, constituent elements, forms of external manifestation, etc. [1, p. 1–11]. Among these issues, the object of a criminal offence (misconduct or crime) is of particular importance, which significantly affects the social properties of the offence (public danger), largely determines the actual objective and subjective signs [2, p. 166–183]. Meanwhile, there is no unity of views among scientists in the interpretation of the object, and therefore this issue should be recognised as insufficiently studied. The conducted in-depth analysis of the scientific positions expressed in the literature on the definition of the object of a criminal offence made it possible to systematise them into two groups: ontological and axiological, considered their correlation and reasonably formulated their own position.

A large group of specialists not only in the sciences of the criminal cycle, but also legal theorists, philosophers, representatives of legal logic, etc. was engaged in the development of the issue of the object of a criminal offence (crime) both at the general theoretical and pragmatic-applied levels. Among them, special attention should be paid to the works of S. S. Alekseev [3], V. N. Vinokurov [4], V. K. Glistin [5], Yu. A. Demidov [6], A. G. Zdravomyslov [7], E. I. Kairzhanov [8], N. I. Korzhansky [9], P. S. Matyshevsky [10], B. S. Nikiforov [11], V. Ya. Tatsiy [12], E. V. Fesenko [13], E. A. Frolov [14], T. D. Lysko [15], L. S. Yavich [16], O. G. Danilyan [17], A. P. Dzeban [17] and other scientists.

The content of the discussion on modern interpretations of the object of a criminal offence (misconduct or crime) indicates that there are a significant number of opposite views in the literature about the same object of knowledge – the object of a criminal offence (misconduct, crime). Thus, a fairly common and dominant position is that the object of a criminal offence (criminal misconduct or crime) is the social relations protected by criminal law against criminal infringements. In various inter-

pretations, this approach is the basis for justifying the essence and socio-legal significance of an object, as well as its social properties and public danger. At the same time, the interpretation of an object as a good or social value or the interests of a person to whom a criminal offence causes or threatens to cause significant harm has become widespread and recognised. The authors of each of these points of view consider them as having the properties of fundamental and independent theories or concepts that differ significantly from others and reveal to a greater or lesser extent the content and essence of the object.

However, despite the differences in these scientific positions, all of them can generally be systematised and reduced to two generalised groups. The first group is ontological and includes positions that recognise the object of a criminal offence (misconduct or crime) as social relations protected by criminal law in various modifications. The second group is axiological and includes the interpretation of an object as a value and related definitions: benefits and interests of a person. However, these groups of positions defining the object of the criminal offence are not diametrically opposed and therefore can not be considered as having nothing in common and uniting them, because it is well known – ontological (phenomena of reality) can not be considered and known completely without analysis of the axiological (value) factor. It is necessary to consider these groups of scientific positions separately in order to establish the features by which these groups of positions differ and by which they are similar to each other or even coincidence in their individual features (attributes).

The essence of the first (ontological) group of scientific positions is that the object of a criminal offence is defined as social relations (in their various modifications) to which the offence causes significant harm or puts them at risk of causing such harm. Social relations are not a static unit, since they are always in a dynamic development with changes that occur in society due to various factors, and above all, scientific and technological progress.

The second (axiological) group of scientific positions on the definition of the object of a criminal offence defines it as "value" or related categories of "benefit", "interest". These categories are closely related to each other and are logically found in intersection relations. But the most extensive of them is the category of "value", which is widely used in philosophical, sociological and legal literature to determine the social, economic and cultural significance of certain phenomena or objects of reality. This is a specific social purpose of objects of real reality, in which their positive or negative significance for people and society (welfare, good, evil, beautiful or ugly) is revealed, which constitute the essence of objects and phenomena of social life.

The purpose of the study is to analyse modern scientific approaches to the in-

terpretation of the object of a criminal offence and establish the actual content of this extremely important concept for the science of criminal law. The aim of the research is to develop the authors' own reasoned position on the concept and content of the object of criminal offence based on contemporary scientific knowledge, using general scientific methods of cognition of social and legal reality.

1. MATERIALS AND METHODS

To fulfil the research objectives and achieve this goal, the authors in the course of their work relied on general scientific and special methods of scientific knowledge used in legal science [18, p. 170–183]. Dialectical method is a system of rules (requirements) formulated on the basis of knowledge of the regularities of the studied areas of reality. The main principles of the dialectical method of cognition are the following: the principle of reflection and comprehensiveness, the principle of activity, the unity of induction and deduction, as the basis of the principle of convergence from the individual to the general and vice versa, the principle of interrelation of qualitative and quantitative characteristics, the principle of determinism, the principle of historicism, the principle of contradiction, the principle of dialectical negation, the principle of convergence from the abstract to the concrete, the principle of unity of historical and logical, the principle of unity of analysis and synthesis. This method made it possible to find the content and correlation of such system-forming categories as social relations, benefit and value, which are widely used in the study of the object of an offence. The legal-historical method of research is a fundamental tool for learning about public phenomena and actions. Its essence is to study all phenomena and processes in the dynamic development, formation and in connection with specific stages of the history of society. This allows to gain knowledge about events, phenomena, legislative resolutions, and legal practices that existed in different periods of the human community's life, and draw appropriate theoretical conclusions. An important technique of the historical method is a scientific (imaginary) reconstruction of past events in order to form the most complete picture of them in the specifics of time and space. As a result, an information basis is created for conclusions about certain historical patterns (patterns in the origin and development of a particular object), which is already the subject of history. Using this method, the authors of the article traced the origin, development and transformation of the ideas of forensic scientists regarding one of the main elements of a criminal offense – its object in relation and relationship with other mandatory elements: the objective side, the subject, the subjective side. The formal-logical (dogmatic) method has a universal character and makes it possible to determine the compliance of the construction of criminal law norms with the laws and rules of formal logic. Logical techniques

are directly related to legal sciences, because the knowledge of concepts and categories of jurisprudence is carried out through an appropriate thought process, in which logical methods, as separate techniques of human thinking, should always be used in the study of criminal law phenomena, despite the use of other scientific methods in the research process.

Through the use of the formal-logical (dogmatic) method, the content of a number of concepts (definitions) constituting the content of the doctrine of criminal offence in general and its object in particular was revealed. The comparative-legal (comparative) method became the basis for comparing two main and different conceptual approaches to the interpretation of the essence and content of the object of a criminal offence (crime). The method of system-structural analysis is carried out in order to study the statistical characteristics of the system by identifying subsystems and elements of different levels in it and determining the relationships and connection between them. The objects of research of system-structural analysis are various variants formed in the process of decomposition of a system of structures. The system-structural method of analysing the phenomena of reality was used to analyse the content of social relations as an integral, internally determined system object with a corresponding complex structure and the relationships between its mandatory (unchangeable) elements. The method of legal hermeneutics, along with the semantic method, was applied to provide optimal methods for presenting author's positions using language and sign units in accordance with the subject of research.

These methods were used in unity and interrelation with ontological and axiological approaches, which contributed to the completeness of scientific research and the validity of the formulated recommendations and conclusions.

2. RESULTS AND DISCUSSION

Representatives of the so-called ontological group (the doctrine of being, of essence) [19, p. 458] consider social relations as objectively existing and relatively stable various connections that arise and exist between social groups, classes, nations, peoples, states, as well as within them in the process of their economic, social, political and cultural life. They determine the characteristics of the relevant society, its qualitative characteristics and social essence [20, p. 143–149] the structural component of public relations always appears in the form of three mandatory elements: 1) subjects (carriers) of public relations; 2) the subject or phenomenon (material or ideal), about or due to which these relations arise, function and change; 3) social connection in a dynamic or static form between subjects with correlating mutual rights and obligations in relation to the subject as an element of the content of public relations. Dynamic connection is expressed in the corresponding activities of participants (subjects) of

public relations. Static communication is characterised by a relatively stable position of subjects among themselves and in relation to the subject of the relationship. However, it is always the result of a preliminary, dynamic connection [17, p. 24–33; 21, p. 457–473]. And, if the first form of communication is always active behaviour of subjects of public relations, then the second is realised in passive behaviour, the content of which is manifested in preserving (providing) the opportunity to exercise rights and obligations in relation to the relevant subject of relations. Moreover, the structure of social relations is not just the sum of its constituent parts, but a system of interrelated and interacting elements that are in organic unity. Therefore, causing harm in the commission of a criminal offence to at least one of its elements means causing harm to public relations (object) as a whole [22, p. 27–60].

For a more in-depth clarification of the content of public relations as an object of a criminal offence the science of criminal law has developed a classification of objects, which is based on the ratio of the philosophical categories "general", "special" and "individual". On this basis, objects are divided into: a) general; B) generic; C) direct. The direct object, in addition, is arguably divided into direct main and direct additional objects, and the direct additional, in turn, into additional mandatory and additional optional. The developed classifications provide an opportunity to specify the object that is essential for its in-depth study, establishing the nature and degree of harm caused to legally protected public relations and, accordingly, correctly and with the necessary completeness assess and establish the nature and degree of public danger of the committed criminal-illegal act, which is the basis for solving extremely important problems of criminalisation and penalisation of socially dangerous acts in legislative activity. This classification is of great importance for the construction of criminal law norms and the systematisation and classification of criminal offences. In particular, the basis for classifying the norms of the special part of Criminal Law is the generic object of criminal offences, and the systematisation of norms within the sections of the special part is carried out by the direct object [23, p. 124–140].

Thus, the interpretation of the object of a criminal offence as public relations protected by criminal law from socially dangerous encroachments provides an opportunity to establish its content and structure, the nature of the harm that a criminal-illegal act causes to these relations, ultimately – to a person (individual or legal), society, the state and thus determine the social danger of this offence. In turn, the analysis of the public danger of an act makes it possible to draw a conclusion about its orientation to a particular group of public relations, show their relationship, identify the mechanism of causing harm to the object, and thus reveal the essence and content of a criminal offence not only

as a criminal-legal, but also as a socio-legal category [24, p. 131–140]. At the same time, it should be noted that the definition of the object of a criminal offence as public relations still has a rather abstract character, does not contain its specific characteristics and definitions from the point of view of an axiological (value) approach: what is the existence and functioning of public relations; does not provide a complete picture of the nature and essence of the harm caused to public relations, and therefore the content, nature and degree of public danger of criminal offences, especially at the level of individual criminal offences, including those that encroach on life, health, human honour and dignity [25, p. 2895–2902].

Scientists who are on the axiological position (the doctrine of value) [19, p. 763], when interpreting the object of a criminal offence, believe that social relations are too abstract a category and can not always be considered as an object. External values act as immanent properties of objects or phenomena, and are inherent in them (objects, phenomena) not only by nature and not only due to the structure of the object itself, but mainly because they are included in different spheres of human social existence, that is, different spheres of social relations. Values for a person serve as an object of their interests, in their consciousness they play the role of everyday guidelines in subject and social activities, designations of their various practical attitudes to surrounding objects and phenomena of reality. Both in terms of content and volume, the category of "value" largely determines the related categories of "benefit" and "interest".

Considering the benefit as an object of a criminal offence, scientists in general theoretical terms connect this concept to denote a positive value that has a material or non-material character and is able to meet the needs of subjects of public relations: people, society, and the state. Benefit is a metaphysical understanding of the value that expresses the state of fulfilled existence as the goal of human aspirations. In general, the concept of "benefit" is the most general, positive universality for denoting positive value, as well as certain objects, phenomena, entities that meet the needs, interests, goals and aspirations of people [19, p. 55].

Need is a state caused by dissatisfaction with the desires and requirements of the subject necessary for one's life, and is aimed at eliminating this dissatisfaction [19, p. 518–519]. The need can arise and exist in various spheres of human life: biological (food), social (self-expression through work, speeches at rallies [26, p. 3–24]), spiritual (love, friendship), etc. The richer, more diverse, more developed the life of a society, the richer, more diverse, more developed are the needs for certain values and benefits of its participants. Money, gold, and other means of payment as values and goods can meet the needs of people only in cases where there is an objective possibility for the latter to use them for their

actual purpose, which is possible only in the system of certain relations [27, p. 13–19]. Therefore, benefit becomes a value for people only if this value meets the needs within the existing social relations.

Benefit as a value is not only a qualitative indicator, it is also characterised by a quantitative indicator. Thus, the category of "security", as a state of protection of public relations from various threats of causing harm to the individual, society, the state, and in some cases, even humanity, is undoubtedly a value and certainly benefit. However, national security, production security, nuclear or radiation safety differ from each other precisely in quantitative indicators. This quantitative indicator directly depends on the attitude of subjects of public relations to the benefit (value), which is the subject of relevant public relations and can be considered not by itself, but only in a set of mandatory structural elements of these relations.

Some objects, phenomena of objective reality, which are the subject of social relations can sometimes play a variety of value roles and act as a benefit (value) or as a negative phenomenon (as an anti-value), which depends on what qualities they possess and to the system of which social relations belong as elements of the structure of the latter, for example, weapons, explosives, narcotic drugs, pornographic products, etc. Therefore, along with the category "benefit" ("value", "good"), there is a paired antonymic category "evil", which means negative value (anti-value, anti-benefit) in respect of which there are corresponding social relations characterised by the presence of static connections between the subjects of these relations, which constitute their need and interest. The commission of active criminal-illegal actions in relation to these and other objects that have negative (harmful) properties and violation of their legal regime (status) always means causing harm to the interests of subjects of social existence and the object of criminal legal protection as a whole.

So from the above, it follows that the definition of the object of a criminal offence using only categories [28, p. 142–154] "value" and "benefit", even "interest" has an incomplete and in many ways, according to the authors of this article, narrowed (limited) character, since values and benefits, as well as interests, the content basis of which are the corresponding values, always show their inherent qualities not by themselves, but only in the conditions of social reality, which is determined primarily by the system of certain social relations. The limitation of this position also lies in the fact that it excludes the possibility of further concretisation of the object [29, p. 313–335] by classifying it and dividing it into general, generic, direct and other, more detailed (and more specific) objects and therefore does not provide a further and in-depth study of the object of a criminal offence, which is unacceptable from both scientific and pragmatic (law enforcement) points of

view. It is believed that values, benefits, as well as interests as phenomena of social-legal reality, in connection with which criminal offences are committed, are in public organic relations and unity with public relations – the object of criminal encroachment. Thus, E. K. Kairzhanov, defining interest as an important element of public relations, came to the conclusion that public relations and interest are interrelated as philosophical categories "essence" and "phenomenon" and therefore interest acts as a concrete expression of public relations [8, p. 51, 56–57]. E. A. Frolov argued that benefit and interest act as the "core" in the structure of public relations [14, p. 111]. Thus, as follows from the previously stated, social values, benefits and interests make up the content of the subject of public relations. It is on their account or on their basis that social ties are formed between the subjects of these relations, that is, they act as elements of the content of social relations and perform the functions of their subject.

This decision corresponds to the social nature of public relations, which, as an object of criminal legal protection, actually arise and exist (function) in relation to social values, benefits, and interests. S. S. Alekseev reasonably argued on this occasion that "…. each phenomenon in society is revealed as social only when it is considered in the form of social relations" [3, p. 85]. In our case, the social connection between the subjects of social existence in relation to the subject of social relations as their mandatory element arises and exists in relation to the subject of these relations, which can act in the form of social value, material or ideal benefit, or the social Interest of the subjects of these social relations.

CONCLUSIONS

Based on the conducted research, the object of a criminal offence can be defined as follows: these are public relations protected by the law on criminal liability, which arise and function in society regarding social values, material and non-material benefits and interests of subjects of public relations, which are encroached upon by criminal offences and cause them significant harm or pose a threat of causing such harm.

The object of a criminal offence, for the purpose of concretisation, for a deeper clarification of its essence and meaning, authors propose to divide according to the scope of the concept (based on the logical operation of "classification") into types: general (the totality of all public relations protected from criminal-illegal encroachments by the norms of criminal legislation), generic (a certain circle (group) of identical or homogeneous in its social essence social relations, which are protected by a single complex (group) of interrelated criminal law) and direct (part of the generic object is a specific public relation protected by a certain to which harm is directly caused by a criminal offence or a threat of causing it is created), and direct can be devided into the main direct (a specific public attitude that the crimi-

nal offence encroaches on, and which is primarily placed under the protection of the relevant criminal law norm) and an additional direct object (public relation that complements the main object and to which harm is caused or a threat of causing it is created in connection with an attack on the main direct object), and the latter – to an additional-mandatory (public relations to which, when a criminal offence is committed, always (as a matter of law) harm if caused or a threat of causing it is created in connection with an infringement of the main object) and an additionalüoptional object (public relations, which in the commission of a certain criminal offense may be violated along with the main object, but may not be violated).

The analysis of the designated objects of criminal offences, as well as clarification using an axiological approach of the content of social values, benefits and interests as objects of public relations, on which a criminal-illegal encroachment is carried out, provides an opportunity in each specific case to establish the nature, content, scope and social significance of harm and, thus, to a large extent to identify the nature and essence of the public danger of a criminal offence and its legal properties: criminal illegality, criminal punishability, guilt.

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THE ROLE OF FORENSIC SCIENCE AND FORENSIC EXAMINATION IN INTERNATIONAL COOPERATION IN THE INVESTIGATION OF CRIMES

Abstract. *The application of forensic science and expertise is a necessary prerequisite for the investigation of crimes at the local and national level. Without the use of forensic science and expertise, an investigation within the framework of a criminal process becomes dead and unsubstantiated. But with the globalisation of world processes, the development of technologies, the speed of information transmission, the formation of crime outside the borders of one state and its entry into the international level has become an urgent problem, which has become a challenge in countering such crime and the need to steer forensic science and expertise towards assisting law enforcement activities. A special feature of countering the investigation of crimes was the creation of international cooperation between forensic specialists and expert witnesses even prior to the establishment of practical institutions that could counteract them in practice. Therewith, some representatives of such international unions and associations have taken serious steps in creating mechanisms for real counteraction to crimes at the international level (R. A. Reiss, G. Soderman, M. Sh. Bassiuni). Coverage of the problem of international cooperation in the investigation of crimes through the defnition of the role of forensic science and expertise allowed focusing on the following blocks: 1) international associations of forensic specialists for combating crime in the historical context; 2) international criminal police organisations in combating crime; 3) international cooperation in the feld of conducting forensic examinations; 4) the use of forensic and special knowledge in the activities of the International Criminal Court. Thus, a combination of theory and practice in the fght*

against crime is demonstrated. Historically, this is associated with the role of forensic science and expertise in recording traces of crimes, analysing them, and forming legal, forensic, and expert witness opinions. The purpose of the study is to establish the decisive role of forensic science and expertise in international cooperation in the investigation of crimes. For this, the authors turned to forensic science and expertise, historical processes that served to create substantial international organisations created to counter international crime

Keywords*: forensic expertise, expert knowledge, criminal investigation, forensic sciences, international cooperation, international criminal court*

INTRODUCTION

The origin and development of forensic sciences has had a protective (pragmatic) nature in the fght against crime from the very beginning. Forensic science traditionally relates to the dynamically developing sciences of the criminal law cycle. Literary sources fairly note that modern forensic science, as a certain reality, is quite difcult to describe, even within the framework of one scientifc school. The avalanche-like flow of new knowledge requires rethinking the subject and boundaries of forensic science, especially taking into account the processes of globalisation, integration, and differentiation of knowledge [1]. International cooperation in the investigation of crimes is designed to resolve one of the main contradictions: crime has become international, and the means of combating it mainly remain national [2; 3]. In this sense, it is necessary to state the important role of forensic science in international mechanisms for countering modern crime.

Coverage of the problem of international cooperation in the investigation of crimes through the defnition of the role of forensic science and expertise allowed focusing on the following blocks: 1) international associations of forensic specialists for combating crime in the historical context; 2) international criminal police organisations in combating crime; 3) international cooperation in the feld of conducting forensic examinations; 4) the use of forensic and special knowledge in the activities of the International Criminal Court. Thus, a combination of theory and practice in the fght against crime is demonstrated. Historically, this is associated with the role of forensic science and expertise in recording traces of crimes, analysing them, and forming legal, forensic, and expert witness opinions. Special attention in this context should be focused on recording traces of international crimes committed during the World War One, which was committed by the outstanding forensic specialist R.A. Reiss [4]. It was thanks to his research and opinions that the aggression of the Austro-Hungarian and related armies and the crimes committed during this period were condemned. The actual continuation of such research was the creation of Interpol,

which was developed with the involvement of a prominent forensic specialist G. Soderman [5].

The history of forensic science knows the periods when there were real steps to create certain associations of criminologists to solve their problems. In this regard, the history of the emergence and functioning of the International Forensic Union (hereinafter referred to as "the IFU") is of interest. The establishment of the IFU is associated not only with the emergence of a scientifc idea and a substantial circle of its supporters, but also with the active participation of famous personalities – Franz von Liszt, Gerardus Antonis van Hamel, and Benoit Adolf Georges Prince [6]. It is also important that since 1897 the IFU has had representatives from the Ukrainian lands (which at that time were part of the Russian Empire) (professor of the Imperial Kharkiv University V. P. Danevsky). Later (January 12, 1900) the well-known forensic specialist, the founder of the psychological area in criminal law, professor of criminal law of the Imperial Kharkiv University L. E. Vladimirov, and a little later (since January 1, 1901) – A. A. Levinstym and M. I. Kuplevasky joined the International Forensic Union [6]. The history of forensic science also knows other examples of the establishment of international organisations specialising in orensics. In particular, in 1929, the International Academy of Forensic Science was established, which was based in Vienna (Austria). Its founders: M. Bischoff, E. Locar, C. J. van Leddeen-Hülsebosch, G. Popp, Z. Türkel [7].

International cooperation requires the efforts of individual states at the national level to comply with international standards. Mechanisms of international cooperation in the investigation of crimes include mutual legal aid, extradition, transfer of prisoners, transfer of materials of criminal proceedings, international cooperation for the purpose of confscation of proceeds from criminal activities and return of assets, etc. Mechanisms for international cooperation in combating crime are based on bilateral and multilateral agreements or arrangements, and in some cases on national law. In this sense, UN conventions are of importance: the Convention Against Transnational Organised Crime, the Convention Against Corruption, the Convention for the Suppression of the Financing of Terrorism, etc. A substantial contribution to the development of forensic science and forensic expertise is the development of a series of Education for Justice training modules by the United Nations Ofce on Drugs and Crime. In particular, this refers to a module developed within the framework of the Education for Justice Initiative (E4J), which is a component of the global programme for the implementation of the Doha Declaration – Module 4 Cybercrime "Introduction to Digital Forensics" [8]. Recently, the terms "digital forensics" and "digital evidence" have been widely used. Therewith, "digital forensics" is considered as a branch of

forensic science that studies the extraction and investigation of data found on digital devices, which are quite often associated with cybercrime [9].

The issue of investigating the role of forensic sciences in international cooperation in the investigation of crimes was studied by M. Sh. Bassiuni [10], D. Maver [11], G. Malewski [1], R.A. Reiss [4], G. Soderman [5], E. Simakova-Yefremyan [12], C. Feniveshi [13], Y. Chornous [14] and others [15–23].

The purpose of the study is to establish the decisive role of forensic science and expertise in international cooperation in the investigation of crimes. For this, the authors turned to forensic science and expertise, historical processes that testify to the creation of substantial international organisations which served to counter international crime. Notably, the role of forensic specialists and expert witnesses in the implementation of such counteraction is particularly important.

1. MATERIALS AND METHODS

To achieve this purpose, the authors used the following methods: analysis and synthesis, induction and deduction – upon the development of the study, establishing trends in the approaches to international cooperation in the feld of crime investigation; Aristotelian method – upon the defnition and research of regulations of various levels; comparative legal method – upon comparing the achievements of the sciences of national and international mechanisms for countering crime; historical legal – upon the appeal to historical events and processes that served as a forensic and expert witness basis for the creation of international institutions for combating crime; and others. The use of analysis and synthesis, induction and deduction allowed the authors to create a study with a structure from general to individual problems of countering international crime at different levels (Association of forensic specialists in different countries – creation of International Criminal Police Organisations – creation of international forensic institutions – application of forensic science and knowledge in the activities of the International Criminal Court). The authors managed to focus on the development of forensic knowledge, which contributed to the development of international approaches to combating crime (from regional to national, from national to international). The use of induction and deduction made it possible to refer to the structure of forensic knowledge and pay attention to a separate level of countering international crime. At the same time, of importance was the development and application of the Rome Statute of the International Criminal Court, which has become special for Ukraine in the context of aggression in the Autonomous Republic of Crimea, Donetsk and Luhansk Oblasts (since 2014).

The system-structural method was used during the planning and execution of the study, as well as the establish-

ment of groups of bodies, institutions and organisations that were created for the purpose of investigating crimes. It also made it possible to logically structure the study in three areas: 1) international criminal police organisations in countering crime; 2) international cooperation in the feld of conducting forensic examinations; 3) the use of forensic and special knowledge in the activities of the International Criminal Court. The philosophical and legal method was used to establish the philosophical background of the study of the problem of determining the role of forensic science and expertise in international cooperation in the investigation of crimes. The development of philosophical thought made it possible to reach the need for real protection of human rights in the global meaning and to protect humanity after the catastrophic consequences of the frst and second World Wars through the creation of forensic, expert witness, legal and judicial institutions.

At the time of writing, the hermeneutics method was used as a philosophical method of analysing and interpreting the text of other studies and certain historical documents. In this sense, it is possible to talk about the specifc features of interpretation regarding the study of the processes of investigation of international crimes, the role of forensic and other special knowledge in international cooperation in the investigation of crimes in different countries of the world, the involvement of international institutions from the standpoint of hermeneutics. The semantic method was used to establish the exact meaning of "forensic science" and "forensic expertise" in international cooperation in the investigation of crimes (in linguistic and semiotic concepts). The comparative legal method was used to compare the mechanisms of legal response to international crime in the world, which takes place in cooperation with states at different levels in order to stop and condemn the behaviour of individuals and legal entities, as well as individual states (aggressors). At the same time, there is a clear tendency to combine such efforts in the global dimension and at the levels of law enforcement organisations that apply forensic expertise. The historical and legal method was used in the study of historical events and processes that served as a forensic expert basis for creating international institutions for combating crime. The processes related to the First and Second World Wars became special, which serve as the starting points for both uniting states in the pursuit of human rights and creating real mechanisms for countering international crime.

In the system of methods of this scientifc research, an important place is occupied by methods of studying (analysing) documents that store information about certain historical facts, archival cases, witness statements, expert proceedings, etc. The use of the document study method involved the use of two main methods: the classical (or conventional) method and content analysis. Content analysis is a formalised method

of studying documents using a quantitative approach.

2. RESULTS AND DISCUSSION

2.1. International criminal police organisations in countering crime

A special role in countering modern (transnational) crime belongs to international law enforcement agencies. One of such bodies is the *International Criminal Police Organisation* (Interpol) [24] – an international law enforcement organisation that coordinates international cooperation between police bodies (institutions) of different countries of the world [25].

The need for international cooperation between the police of different states in the fght against crime was frst proclaimed at the founding meeting of the International Union of Criminal Law in 1899. In 1914, the frst International Congress of the Criminal Police (Monaco) was held. Representatives of 14 countries discussed the coordination of police bodies of different countries in combating crime, the possibility of creating a department for recording international criminal information and unifying the procedure for the extradition of criminals. The main activities of Interpol, according to its charter, include: a) criminal registration, the object of which is information about international criminals and crimes of an international nature; b) international search for criminals; c) search for suspects to monitor them and control their movement; d) search for missing persons; e) search for stolen items [26].

Information received by the Ministry of Internal Affairs of Ukraine through Interpol channels is placed in the integrated database of the National Security Service of Interpol in Ukraine on the following subsystems: 1) document; 2) persons; 3) transport; 4) frms; 5) numbered items; 6) currency; 7) art objects [27].

Interpol's forensic (international) records are the most effective tool in the fght against international crime. These records relate to convention crimes, that is, crimes whose public danger is established by the relevant international conventions, namely: drug trafcking, counterfeiting, theft of cultural property, etc. Information related to the interests of two or more states is also registered: about persons who have committed a dangerous crime abroad; about crimes related to international criminal organisations; about persons who have committed a crime and are hiding abroad, etc. Interpol does not keep records related to crimes of a political, military, religious, or racial nature (Article 3 of the Interpol Charter). The records of Interpol and the NSS of the states that are members of this international organisation are: 1) an alphabetical fle of persons with a criminal record, suspected of committing crimes; 2) a fle of data on the appearance of the criminal (fle "S"), which contains 177 indicators, including the place of commission of the crime, race, nation-

ality. The "S" fle cabinet is used in cases where the identity of the criminal cannot be established either by fngerprinting or by a fle of photographs; 3) a fle of documents and names. In particular, the documents section contains information about passports, identity cards that have ever been used by criminals; documents on the right to own an airplane, car, frearms; 4) a fle of crimes (especially the method of committing); 5) a fngerprint fle; 6) a photo library (photos of more than 20 thousand of the most dangerous criminals); 7) a fle of persons who are missing; 8) a fle of stolen cars; 9) a fle of works of art, cultural values, antiques, precious jewellery; 10) reference fle of hand-held rifled frearms [27].

2.2. International cooperation in the feld of forensic examinations

There are various forms of international cooperation in the feld of forensic expertise. In particular, the main ones may include the following: 1) information exchange (scientifc and information exchange); 2) joint scientifc and practical events (conferences, symposia, congresses, etc.); 3) training of expert personnel and advanced training abroad; 4) interaction within the framework of improving the quality of forensic examinations in different countries; 5) international standardisation of forensic activities; 6) interaction within international expert associations (organisations); 7) involvement of forensic experts from different countries in the investigation and trial of international crimes. Important in international cooperation in the feld of forensic expertise is the exchange of information on quality improvement and training by non-governmental organisations (European Network of Forensic Institutions (ENFSI), International Association for Identifcation (IAI), etc.) [28–30]. A considerable influence on forensic expertise is exerted by the development of relationships within the European Network of Forensic Institutions (ENFSI), which includes participation in the organisation of thematic conferences, exchange of methods and reference materials, replenishment of the list of members of the organisation [30].

In modern realities, in most countries of the world, as a rule, the question of the need to standardise and unify forensic expertise is raised. A so-called verifcation of the results of expert research and certifcation of expert methods is required. The problem of the need to improve the quality of forensic expertise and standardise expert methods was addressed at one time in the United States. In 2015, the US Department of Justice and the FBI admitted that their experts had been giving false testimony in courts based on the results of hair analysis for two decades. In particular, up to 32 defendants were sentenced to death and executed. In 2015, the national forensic commission of the US Department of Justice, together with the National Institute of Standards and Technology (NIST), published the report Directive Recommendation: Root Cause Analysis (RCA) in Forensic Science, which recog-

nised these shortcomings [31]. A form of international cooperation in the feld of forensic expertise is the participation of forensic experts from different states in the investigation and judicial review of humanitarian law offences and other crimes of an international nature.

2.3. Use of forensic and specialised knowledge in the activities of the International Criminal Court

The work of the international community to establish tribunals – special courts for the investigation of the most serious crimes is of great importance. AS early as in 1919, at the Paris Peace Conference, it was proposed to establish an international body (Permanent Chamber) of criminal justice for political leaders accused of committing international crimes. The establishment of the International Criminal Court has its own history [32]. Countering international crimes (the crime of aggression, the crime of genocide, crimes against humanity, war crimes) has always been the subject of cooperation of the international community. Therewith, quite often states cannot prove guilt and bring to justice specifc persons (top ofcials of the state) who committed the mass destruction of people without assistance. Historical examples of real prosecution of persons for international crimes are the decisions of the Nuremberg military tribunal against certain persons involved in crimes and mass killings during World War II, the international tribunals for Yugoslavia and Rwanda, etc.

The International Criminal Court is the frst permanent International Criminal Court established based on an international treaty with the purpose of overcoming impunity for persons responsible for the most serious international crimes. Article 17 of the Rome Statute refers to the principle of complementarity, which lies in the fact that the International Criminal Court exercises its jurisdiction only in cases that the state does not have the desire or ability to investigate independently. As of today, the jurisdiction of the International Criminal Court has already been partially recognised by Ukraine. At one time, Ukraine actively took part in the preparation of the Rome Statute and signed it on January 20, 2000, but has not yet ratifed it. Literature sources have drawn attention to certain problems of ratifcation of the Rome Statute of the International Criminal Court in the light of Ukraine's European choice [33]. Ukraine has already applied twice to the International Criminal Court for recognition of its jurisdiction in February 2014 and 2015 based on Part 3 of Article 12 of the Rome Statute. The frst application concerned the commission of crimes against humanity by top state ofcials during peaceful protests between November 2013 and 22 February 2014. The second is crimes against humanity and war crimes committed by senior ofcials of the Russian Federation and leaders of the terrorist organizations "DPR" and "LPR", as well as aggression, as a result of which

the Autonomous Republic of Crimea has been annexed [33]. Noteworthy are the reports of the International Criminal Court on the actions of the preliminary investigation of 2017 [34], 2018 [35] and 2019 [36] on these issues.

The most striking example in the history of forensic science regarding the collection of evidence in difcult conditions of armed conflict is the activity of Prof. R. A. Reiss. In 1914, R.A. Reiss arrived in Serbia at the invitation of its government as an expert to investigate the crimes of the Hungarian, German, and Bulgarian armies in the World War One. In 1916 R.A. Reiss published "Report upon atrocities committed by the Austro-Hungarian army during the First invasion of Serbia" (London, 1916). In 1918, R.A. Reiss published another work, which he dedicated to the events of the World War One: "Infractions aux lois et conventions de la guerre commises par les enemies de la Serbie depuis la retraite Serbe de 1915. Resume de l`enquete execute sur le front de Macedoine" (Paris, 1918). Both works by R.A. Reiss constitute a forensic study of the facts that took place during the World War One. These works are made in the form of reports or conclusions, which were illustrated by photographs, witness statements, and expert studies [37]. These materials were used to convict crimes committed during the World War One. The practice of using forensic knowledge to collect evidentiary information during global armed conflicts (including hybrid wars) is also relevant in modern conditions. The process of investigating war crimes involves the use of separate forensic techniques. It is also possible to talk about the need to develop and apply the latest forensic tools, methods, techniques, and technologies.

Article 15 of the Rome Statute makes provision that a prosecutor may initiate an investigation propriomotu based on information about crimes within the jurisdiction of the Court (Part 1). The prosecutor evaluates the gravity of the information received. To this end, he or she may request additional information from the state, United Nations bodies, intergovernmental or non-governmental organisations, or from other reliable sources that he or she deems appropriate, and may obtain written or oral evidence at the court's seat (Part 2). In addition, Part 3 Article 15 of the Rome Statute states that "victims may make submissions to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence"[1]. The activities of the International Criminal Court make provision for the possibility of applying special knowledge. A form of international cooperation in the feld of forensic expertise is the participation of forensic experts from different states in the investigation and judicial review of humanitarian law offences and other crimes of an international nature. The rules of Procedure of the International Criminal Court[2] contain

[1] Rome Statue of the International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/resourcelibrary/ofcialjournal/rome-statute.aspx.

[2] Ofcial site of International Criminal Court. (n.d.). Retrieved from http://www.icc-cpi.int.

Provision 44 "Experts", which stipulates the possibility of involving experts in the activities of the International Criminal Court. In particular, Paragraph 2 of this regulation states that "the chamber may instruct participants in the process to jointly bring their instructions to the attention of the expert." Paragraph 5 states that "the chamber may make any orders regarding the subject of the expert report, the number of experts to receive instructions, the method of communicating instructions to experts, the form of providing their evidence, and the time frame for preparing and reporting their report". The Rules of Procedure and Evidence of the International Criminal Court[1], which are a tool for applying the Rome Statute, also make provision for the use of specialised knowledge. Thus, Rule 19 "Expertise in the Unit" regulates the possibility of applying for an expert examination in various cases.

CONCLUSIONS

In the context of global threats to the world community and the evolutionary transformation of crime, the use of forensic and other specialised knowledge should play an important role as a factor in countering negative trends and restoring justice. In the historical dimension, the real need to unite forensic specialists from different countries of the world to solve important tasks in international cooperation in the investigation of crimes (the International Forensic Union, the International Academy of Forensics, etc.) is traced, and the main mechanisms of international cooperation in countering crime in modern realities are identifed. International law enforcement agencies and, in particular, the International Criminal Police Organisation (Interpol) are essential in countering transnational crime. In the most important areas of Interpol's activity, the forensic component is identifed – the creation and use of forensic (international) records as the most effective means in countering international crime. The specifc features of international cooperation in the feld of forensic expertise were identifed. Attempts were made to identify various forms of international cooperation during forensic examinations. The study emphasised the role of international non-governmental organisations (European Network of Forensic Institutions (ENFSI), International Association for Identifcation (IAI), etc.) in optimising forensic expertise, improving the quality of forensic expertise, standardising expert methods, and improving stafng.

In modern conditions, cooperation between different countries of the world in the investigation of crimes can be traced in the activities of the International Criminal Court. The investigation of international crimes is the subject of research both at the national level and in cooperation with the international community. Based on the scientifc and

[1] Rules of Procedure and Evidence of the International Criminal Court. (2002, September). Retrieved from https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf.

legal analysis of the Rome Statute and other regulatory documents, attention is drawn to the use of forensic tools and the possibility of conducting expert research in the activities of the International Criminal Court. The International Criminal Court should be a symbol of international justice, which makes balanced and fair decisions. The International Criminal Court is one of the most important institutions of international criminal law, which applies mechanisms for investigating international crimes and protects human rights at the International and national levels. The process of investigating international crimes should be based on forensic and other specialised knowledge. The activities of the International Criminal Court are also important because they directly relate to the events in Ukraine (the occupation of certain areas of the Donetsk and Luhansk Oblasts, as well as the Autonomous Republic of Crimea).

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THE WEIGHT OF CRIMINAL JUDICIAL EVIDENCE

Abstract. *The study is devoted to the current issue of the weight of criminal judicial evidence, which is understudied in the national doctrine. The legislator, having introduced this evaluative concept in 2012 (Paragraph 1, Part 11, Article 1 of 178 CCP), did not provide its normative definition. As a result, there is a conceptual uncertainty, which is inappropriate given the requirements of the rule of law (Article 8 of the Constitution of Ukraine, Article 8 of the CCP). Therefore, the purpose of study is to attempt to formulate a definition of the "weight of evidence", to propose a scheme of work of a lawyer to determine the signs of this activity phenomenon in situations of making appropriate procedural decisions. The study is based on the activity methodology using a number of special methods – search and bibliographic; semantic; Aristotelian; hermeneutic; historical-le-*

gal; comparative-legal; functional analysis; generalisation. The study formulated the definition of the "weight of evidence" as an activity characteristic. The latter is the result of a pragmatic logical and legal evaluation of ad hoc evidence within its totality. Thus, certain evidence is prioritised due to the greater suitability attributed to it by the lawyer to serve as a convincing evidence base of the procedural decision. Therefore, the conclusion is substantiated that the "weight of available evidence" as its activity characteristic is "the fifth element" of the structure of "criminal judicial evidence" along with such characteristics as "credibility", "admissibility", "reliability", and "sufficiency". The study includes conclusion that the introduction by the legislator in 2012 of the "weight of available evidence" meets the requirements of the evidentiary practice of the modern national adversarial process and the ECHR

Keywords: *criminal judicial evidence, weighty evidence, court proof, evidence evaluation, weight of judicial evidence*

INTRODUCTION

The Criminal Procedure Code of Ukraine of 2012 (hereinafter referred to as the CCP), among many others, introduced such a new evaluative approach for national doctrine and practice as the "weight" of available evidence (Paragraphs 1.11 of Part 1 of Article 178 of the CCP). However, the legislator, having taken this further step in terms of constructing the concept of "criminal judicial evidence" [1], did not define their position on it. Thus, if the text of the law defines such concepts as "evidence" (Article 84), "credibility of evidence" (Article 85), "admissibility of evidence" (Article 86), the definition of "weight of evidence" was ignored by the legislator. It is clear that such a decision caused a conceptual uncertainty, which is inappropriate given the requirements of the rule of law (Article 8 of the Constitution of Ukraine, Article 8 of the CCP), and especially given the practical context of using this concept – the situation of choosing preventive measures by the accusatory authorities.

Despite the fact that law enforcement practice requires clear and understandable normative definitions of this concept and reasonable scientific recommendations, this issue has not been purposefully studied in the literature on the subject of this study. The only relevant studies are the ones by D. Sergeieva [2, p. 109], T. Lukashkina [3 p. 684–685], V. Rozhnova [4 p. 340–341], T. Fomina [5 p. 96], the authors of which *ad marginem* concern the issue of the weight of criminal judicial evidence. Notably, the attitude of national proceduralists to this legislative *novum* remains quite restrained. For example, D. Sergeieva, presenting a scientific position on the concept and essence of the reliability of evidence as its property, rightly notes: the investigating judge, the court, deciding on the choice of a preventive measure, is obliged to evaluate all the circumstances, including the weight of

the available evidence about the commission of a criminal offence by a person (Paragraph 1 of Part 1 of Article 178 of the CCP). The author, without objecting to the presence in the text of the law of such terminological formulations as "weight of evidence", "sufficiency of evidence", at the same time emphasises that they need to be clarified [2, p.109]. In turn, T. Lukashkina, upon analysing the conditions and grounds for applying preventive measures, notes that the legislator among the circumstances that are considered in deciding on the choice of a preventive measure indicated "the weight of the available evidence about the commission of a criminal offence" and "the weight of the available evidence to substantiate the relevant circumstances". However, in her opinion, it is impossible to agree with the attribution of these data to the above circumstances, because, firstly, the conditions, grounds, and circumstances that are considered when choosing a preventive measure constitute a local subject of proof, that is, these are certain circumstances, and, secondly, the "weight" of evidence is a concept that concerns the process of proof, more precisely, the availability of evidence and its evaluation. Therefore, the author argues that evidence is necessary to establish all the circumstances that constitute the local subject of proof; in addition, T. Lukashkina emphasises that it is impractical to introduce the concept of "weight" of evidence, because the CCP applies the concept of credibility, admissibility, and reliability of evidence, the sufficiency of the evidence to make a certain decision (Article 94 of the CCP) [3, p. 684–685].

Another researcher, V. Rozhnova, considering the issue of the weight of available evidence when choosing preventive measures in the aspect of compliance of national legislation with international standards, interprets the weight of evidence as an element of its sufficiency, characterised by the relative importance that should be given to each evidence when deciding whether a certain statement was proved with its help or not. The author states that this is a qualitative evaluation of evidence; weight is a rather subjective criterion, depending on the actual quality and characteristics of particular evidence, and on the quantity and quality of other available evidence of the same fact. Thus, she concludes, the weight of the available evidence characterises its sufficient totality and, according to its qualitative indicators, creates the conviction of the investigating judge and court of the possibility and necessity of making an appropriate procedural decision.

The investigating judge, the court in this case should ascertain that the quantity and quality of available evidence are sufficient to ensure that there is no doubt about the possibility and necessity of making a decision, in particular on the application of a certain type of preventive measure [4, p. 340–341]. Sharing the scientific positions of T. Lukashkina and V. Rozhnova, T. Fomina, in the framework of analysing the cir-

cumstances that are considered when choosing preventive measures, draws the following conclusions. First, it is clear that the investigator, prosecutor, when filing a petition to the investigating judge, court for the application of a preventive measure, must justify it with certain evidence; secondly, use the wording "note the weight of the available evidence, which justifies the relevant circumstances" considering the theory of proof is unacceptable; third, it is necessary to replace the word "weight" with "sufficiency" in Paragraph 11 of Part 1 of Article 178 of the CCP [5, p. 96].

To summarise the data on the content of the scientific positions presented above, it is possible to outline the existing discrepancy among researchers regarding the "weight of evidence", and, – more importantly, – lack of scientific recommendations for working with it. The authors, considering the relevance and absolute importance of this scientific issue, selected an attempt to formulate a definition of this evaluation concept and model the scheme of work of a lawyer to determine the signs of the weight of evidence as the *purpose of the study*.

1. MATERIALS AND METHODS

According to the pattern of the basic research programme on the weight of criminal procedural evidence, the authors of the study chose the activity methodology of H. Shchedrovytskyi (1929-1994). The authors' choice of this version of the activity approach among others (philosophical, praxeological, and psychological) is conditioned by the following factors. First, in the national doctrine, the phenomena of criminal procedure and proof are conventionally considered as specific types of human purpose-oriented activity. Secondly, the activity methodology, (or system-thought-activity methodology (STA) methodology) in the post-Soviet scientific space is qualified by specialists as the most developed platform for effective work with social masslike (population) objects. Therefore, the main characteristic feature of the activity-based approach and activitybased methodology is its consistent and sharp opposition to the naturalistic approach, which still reigns in modern science. The science of criminal procedure in this regard, admittedly, is no exception. The essence of the naturalistic approach is that everything in the world is declared natural, therefore it can be studied by scientific methods that correspond to nature, that is, by natural scientific methods. However, in the activity methodology, everything is stated exactly the opposite: for a person, not nature, but the activity itself is the only reality in which one lives, therefore, everything related to the activity is its "traces" ("organisations"); moreover, even "nature" itself is a kind of construction of activity and can be "material" for activity. It has a substantive (speech) character, therefore, being an independent entity, phenomenon, exists independently of a person who can "come" to the activity either as a "variable material" (for example, someone

comes to the judicial activity, works as a judge, and then leaves, while the place comes to another person; the activity exists further) or "source material" (for example, a person, after completing studies at the Faculty of Law, "turns" from a student to a specialist in the field of law). Activity methodology also rejects archaic the positivist idea of the possibility of the independent existence of the object and subject "from themselves". The latter, as stated by methodologists, can only exist within the framework of specific activities. This means that such objects as "offences" or "evidence" are not entities that exist outside of activity, as stated in the national substantive and procedural criminal law. From the standpoint of activity methodology, they are products, "organisations" of the activities of the court and the parties in adversarial criminal proceedings, the result of attributing certain legal characteristics to them. The chosen methodology rejects the so-called "reflection theory" and does not address the question of truth, offering in return other – activity criteria for achieving results – practicality, implementation capability, and efficiency.

Within the framework of the chosen basic research programme, special methods were used: search and bibliographic, which allowed conducting a systematic search of national and foreign sources of literature on the subject of research; semantic – to clarify the meaning of the term "weighty" and its place among its synonyms; Aristotelian was used to determine the state of national procedural thought regarding the issue under study, analysis of the provisions of the current CCP; hermeneutical, necessary to establish the legal content of the provisions of evidentiary law in solving the question of the place of the characteristic "weighty" in the structure of "criminal judicial evidence"; historical-legal – to identify trends in understanding the content and purpose of the modern model of criminal procedure and to distinguish the concepts of "evidence" and "proof"; comparative-legal was used to clarify the state of research on the activity of judicial evidence in Ukraine and in other countries. It was also necessary to compare the case-law of the ECHR and the practice of national courts in terms of using such a characteristic of criminal judicial evidence as its "weight"; functional analysis – allowed determining the place and role of the prosecution and judicial authorities in preparing evidentiary materials by the police and establishing criminal judicial evidence in an adversarial trial; generalisation allowed bringing the obtained scientific data and evaluations into a systematic whole and formulating reasonable conclusions and suggestions.

The main stages of the study of the weight of criminal judicial evidence were: (1) *putting forward* the scientific hypothesis that the "weight" of evidence (along with "admissibility", "belonging", "reliability", and "sufficiency") is their "fifth element", the fifth characteristic of "criminal judicial evidence"; (2) *verification* of hypotheses: (2.1.) lin-

guistic analysis of "weight" in the context of Ukrainian and English languages; (2.2) comparative-legal analysis of "weighty evidence" in the doctrine of *common law* countries and the caselaw of the European Court of Human Rights; (2.3) analysis of the practice of using the "weighty evidence" in national judicial practice; (2.4) clarification of the place and function of "weighty evidence" in the system of provisions of national evidentiary law; (2.5) research of the scientific positions of Ukrainian processalists regarding the interpretation of "weighty evidence"; (2.6) synthesis of the obtained scientific results; (2.7) development of scientific position; (2.8) making arguments in support of it; (2.9) reflexive criticism of the obtained scientific results from the position of interested parties opponents; (2.10) final formulation of conclusions and proposals in terms of further research on "weighty evidence in national criminal proceedings".

2. RESULTS AND DISCUSSION

The evaluative concept of "weight" of criminal judicial evidence introduced by the legislator is proposed to be *prima facie* defined as its activity characteristics (the general scientific concept of "characteristic" in this narrative is considered a *distinguishing feature* of something [6, p. 629]), according to which a certain proof as a result of a pragmatic logical and legal evaluation *ad hoc* is outlined from its totality due to the suitability attributed to it by a lawyer to serve as a more convincing, stronger evidentiary basis for a procedural decision in comparison with other available evidence.

Therefore, in the post-Soviet theory of proof, "criminal procedural evidence" (Article 84 of the CCP) is further considered using a natural-scientific method, that is, as a natural object, Kant's "thing-in-itself", having immanent "properties" that the lawyer can only identify; however, from the standpoint of activity approach, it can be considered completely differently – the result of the evidentiary activity of authorised participants in criminal proceedings. Such participants are the ones who can *attribute* the characteristics defined in the law to the evidence (Articles 85–86 of the CCP). As S. Pashyn convincingly emphasises in this regard, in a process where decisions are made based on internal conviction, the only purely *legal* characteristic of the evidence is its *admissibility* [7, p. 16]. In the current CCP of Ukraine, it is interpreted as compliance of evidentiary materials (factual data together with procedural sources of their origin) with the requirements of the established *standard* of admissibility (Article 86 of the CCP) and the rules of the standard of inadmissibility of evidence (Articles 87–88 of the CCP). Legal *permits* and *prohibitions* enshrined in these two standards (positive and negative) are procedural *rules* of proof, following which allows deciding on the admissibility (inadmissibility) of materials as criminal court evidence. As J. Skorupka rightly notes in this regard, the standards of admis-

sibility of evidence determine the scope of permitted procedural activities for the authorities, and, consequently, establish the limits of permissible interference with the rights and freedoms of participants in criminal proceedings [8, p. 97].

In addition to admissibility, the procedural law also mentions *other* legally unregulated logical and cognitive characteristics of evidence – its *credibility* (Article 85 of the CCP), *reliability* (Part 1 of Article 94 of the CCP), and for the totality of the evidence – *sufficiency* and *relationship* for making a relevant procedural decision (Part 1 of Article 94 of the CCP). The need and opportunity to attribute the mentioned characteristics to the materials (objects specified in Part 2 of Article 84) arises during the work of authorised participants in criminal proceedings with acceptable materials as part of solving problems caused by their procedural positions (prosecution – defence – arbitration). Therefore, according to the authors of the study, the abovementioned characteristics of evidence can be called *activity-based* characteristics. Thus, the positive conclusion of the investigator, inquirer, prosecutor, and the court as an arbitrator-evaluator on the admissibility of evidence is a *conditio sine qua non* of their further use as procedural evidence in general. The decision on the possibility of attributing to materials the activity characteristics required by law allows using procedural evidence to solve specific practical problems of evidence activity in the conditions of *place* and *time*, a specific situation of criminal proceedings, for example, the choice of a certain preventive measure. Notably, the above refers to evidentiary materials (and not judicial evidence) provided by judicial charges, based on the following grounds. *Firstly,* the concept of "criminal procedure" covers only the activities of the court and the parties to consider a criminal legal claim (*sensu largo*), therefore, no evidence in out-of-court police detective activities is out of the question in general. Police detectives monopolistically perform an informative historical reconstruction of a right-wing event of the past in closed mode, and its products – facts as knowledge with a claim to reliability are used by the prosecutor to form a reasonable suspicion and accusation, which will be defended as part of the judicial proof procedure. *Secondly*, the possibility of the latter implies the presence of such indispensable *attributes* as a presence of *an arbitrator*(court) and equal *parties-players* (prosecution and defence) as procedural *proponents* and *opponents*, respectively. Proof also provides for the presence of *theses* – a legal position that one party defends (prosecutor-proponent), and the other – refutes (defender-opponent). While *in merito* issue is decided by the court. Evidently, all this in the pre-trial proceedings, guided by the principles of the *Inquisition*, do not exist. Accordingly, *thirdly*: procedural criminal judicial evidence as a *product* of the interpretive efforts of the parties and the court arise in court as part of the proper procedure of judicial proof

of legal "raw materials", which is the evidence of the prosecution; approval of their use is given by the court, positively resolving the issue of their admissibility as evidence. It is unnecessary to prove that raw materials and products are different concepts. *Fourthly,* the analysis of the content of Part 2 of Article 23, and the related Part 4 of Article 95 of the CCP, leaves no room for rational doubts about the validity of the given position on "evidence materials". This statement does not detract from their weight and value: it is simply the task of the prosecutor to be able to show one's evidence in court.

In other words, if in the first case the lawyer decides on the fundamental possibility of *using* the collected materials in evidence as procedura*l evidence*, the second is the possibility of the most *efficient* use of the latter for evidentiary purposes in various procedural situations "*here and now"*. That is, the procurator (prosecutor) in the perspective of defending their legal position in court in pre-trial proceedings should be concerned about how *best* – from the standpoint of *evidence-based praxeology* – to justify the available evidence (*à propos*, the volume and quality of which in practice do not always correspond to the theoretical (ideal) ideas about it). In this situation, there is the need to attempt to attribute to the existing evidence material *other*, activity characteristics that are not covered by the normative template (Articles 85–86 of the CCP), but which are necessary for solving their evidence-based tasks. *Vice versa* the prosecutor must give an answer to the pragmatic question of how they should manage to properly use the evidentiary potential of both each individual piece of evidence and their available totality. Therefore, in this regard, it should be noted that in western doctrines, especially in *common law* countries (Great Britain, USA, Canada, Australia, New Zealand, Israel, India, Japan, South Korea, etc.) and – to a lesser extent – in the case-law of the European Court of Human Rights (ECHR), where, in contrast to national legislation, there is no legal (normative) *definition* of "procedural evidence", more attention is paid to work with performance *characteristics* (activity grounds) of evidence, the catalogue of which is much more meaningful than the current national CCP. Lawyers of these countries, remembering that *argumenta non numeranda, sed ponderanda sunt*, work with such concepts as "the best evidence"; "supporting evidence"; "irrefutable evidence"; "contradictory evidence"; "negative evidence"; "positive evidence"; "prima facie evidence"; "probable evidence"; "rebuttal evidence"; "side evidence", "credible evidence"; "weighty, strong, valuable evidence" etc. [9; 10, p. 1–4; 11, p. 1661; 12, p. 81–82]. The mentioned and other characteristics of procedural evidence are not a reflection of their objectively inherent *properties*, as is conventionally stated in the post-Soviet theory of proof but are *the result* of logical and cognitive operations and the reasons for their

choice, because they are *derivative* from the evidentiary activity of authorized participants in criminal proceedings.

For example, an investigator finding a passport with traces of blood at the scene should not only decide on the criminal procedural *qualification* of the case, i.e., its classification in a certain type of evidence (evidence matrix specified in Part 2 of Article 84 of the CCP) – a document or physical evidence with the simultaneous determination of its affiliation and admissibility, but also – more importantly – properly *work* with this evidence (which, unfortunately, in the special and educational literature is not paid attention to). The above refers to the fact that within the framework of a specific evidentiary situation, the investigator (prosecutor) must decide what the evidence obtained in criminal proceedings is suitable for: for example, the same evidence can be used to prove some circumstances of criminal proceedings, but cannot be used to establish others; evidence can be evaluated for one situation as *prima facie evidence* or as "supporting evidence" in another, etc. This requires a lawyer to be very professional and creative because the law in this case, in contrast to situations of deciding on the admissibility of the use of materials as procedural evidence *does not contain* any substantive instructions on specific means and methods of their use to address these issues.

Notably, paragraphs 1.11 of Part 1 of Article 178 of the current CCP "Circumstances considered when choosing a preventive measure" mention another unconditional *activity* characteristic – "*weight*" of available evidence of a suspect, accused criminal offence, as and "weight" of available evidence justifying the amount of damage or amount suspected income. The European Court of Human Rights (hereinafter referred to as the ECHR) draws attention to this characterisation of procedural evidence both in its decisions on specific cases and in the context of doctrinal positions regarding the standard of proof "beyond a reasonable doubt" (Part 2 of Article 17 of the CCP). For example, the ECHR decision in Prade v. Germany of 03 March 2016 stated that "40… [drugs] found in the applicant's home constituted *weighty* evidence" [13], and in the case of Buid v. Belgium of 28 September 2015, the ECHR, in particular, noted: "82. Allegations of ill-treatment contrary to Article 3 must be supported by relevant evidence. To evaluate this evidence, the Court applies the standard of proof "beyond reasonable doubt" but adds that such evidence may result from a set of fairly clear, *weighty*, and consistent conclusions or similar compelling presumptions of fact" [14], which logically presupposes the existence of a body of *weighty*, clear, and consistent procedural *evidence*.

Based on this, there are grounds to assert that the "weight" of evidence in the practice of the ECHR is considered an important activity characteristic of procedural evidence in general, which is used not only to justify procedural deci-

sions on choosing a preventive measure but also other decisions in criminal proceedings. This position is shared by individual Ukrainian courts. For example, the Kyiv Court of Appeal, in its ruling of 8 June 2015 in case № 757/16862/15-k, stated: "…with regard to a person, if the question of the application of an exceptionally strict measure of restraint arises, the investigating judge should pay special attention to evaluating the *weight* of evidence of the crime. Evidence that does not have signs of weight cannot justify a suspicion that was sufficient for the application of a preventive measure in the form of detention but is only the basis for further pre-trial investigation in a criminal proceeding" [15].

The procedural law does not provide a legal definition of the evaluative concept "weighty evidence", which creates the above-mentioned situation of conceptual uncertainty. Therefore, to clarify its content to a certain extent, it is advisable to turn to the linguistic characteristics of the *correlative* adjectives "weighty" and "strong", and then to the interpretation in the doctrine of Anglo-American evidentiary law of the *same root noun* – the concept of "*weight of evidence*" (weight, strength, value of evidence). Thus, according to linguists, the adjective "weighty" means one that has *weight*, is *meaningful, authoritative*, *convincing*, and the adjective "strong" is interpreted as *reasonable*, *sufficient* to convince someone of something, *convincing* [16, p. 72]. Thus, it logically follows that "strong evidence" is one of them that has the necessary *weight* for a lawyer, is *meaningful*, *authoritative*, *convincing, sufficient* to convince its addressee.

American and British jurists, in turn, associate the *weight of evidence* with the *weight*, *strength*, *value*, and *plausibility* of evidence provided by one party *compared* to the evidence provided by the other party. If, in accordance with Rule 401 of the Federal Rules of Evidence of the United States of America, "appropriate evidence" is evidence that *makes* any fact more or less *relevant* to the case more likely than it would be without it, [17] the "weight of evidence" is a tool for evaluating the *extent to which* the *degree of probability* of a fact may change in the case of the use of certain evidence. Thus, American lawyers, for whom working by plausible standards is a cultural norm (habit), believe that the *weight* of procedural evidence is *what* can cause the desired *evidentiary* or *rebuttal* (damaging) *competitive effect* in proving the circumstances of a criminal case in an adversarial trial. In this context, it is worth mentioning that logic treats the strength of evidence – "*nervus probandi*", "*vis argumentationis*" – as a *strength* that consists in a strictly logical connection of the thesis with arguments, as a result of which the confessor of the truth of *arguments* must recognise the truth of the *thesis*, which logically follows from these arguments [18, p. 528].

The procedural law, as mentioned above, does not establish any formal rules for *determining* the weight

(strength) of procedural evidence, except that for the proponent no evidence must have a *predetermined* strength (Part 2 of Article 94 of the CCP), including expert opinion (Part 10 of Article 102 of the CCP). In the plan under consideration, this means, firstly, a legal *prohibition* for the court to give *preference* to certain types of evidence over others (for example, direct over indirect or material over personal) and to *determine* the weight (strength) of evidence according to depending on the party *which* received it.

In this context, it should be noted that the rapid development of information technologies creates the possibility of new ideas about the procedures for obtaining criminal procedural evidence. Therefore, J. Du, L. Ding, G. Chen reasonably identify electronic evidence as a new type of evidence in the criminal procedure legislation of the PRC [19, p. 111–112]. According to Y. V. Francifirov, A. P. Popov, P. P. Muraev, Y. V. Komissarova, the development of the information society has led to the intensive introduction of telecommunications technologies in the field of criminal proceedings. This requires solving the actual issue of switching from paper documents to electronic ones [20, p. 674–675].

Lawyers, deciding in their practice on the presence (lack) of signs of the weight of procedural evidence may, in the opinion of the authors of the study, consider the following provisions.

1. The need to *evaluate* the weight of evidence is directly related to the legal *obligation* of the prosecution to comply with the *standards of proof* of the circumstances of criminal proceedings in the course of establishing the factual grounds for issuing important procedural decisions. For example, the "reasonable suspicion" and "beyond reasonable doubt" standards require the law enforcement officer to establish, on an *ad hoc* basis, *facts* sought in a particular criminal proceeding. This is due to the fact that the first standard of proof guides the establishment of grounds for *lawful* restriction of the human right to freedom and personal inviolability provided for in Article 29 of the Constitution, and the second – compliance with the requirement specified in Article 62 and Paragraph 3 of Part 3 of Article 129 of the Constitution to ensure the *guilt* of the defendant, i.e., in both situations, it is a question of the *validity* of the attempt to encroach on the accusatory power on the social *values* of fundamental importance. Therefore, Part 2 of Article 177 of the CCP establishes a direct *prohibition* for an investigator or prosecutor to initiate the application of a preventive measure without the existence of legal *grounds* for this, and in accordance with Part 1 of Article 290 and Article 291 of the CCP, an indictment cannot be sent to the prosecutor without *sufficient evidence* in criminal proceedings, while the performance of these tasks requires authorised persons primarily to form and rely on a reliable *body of strong evidence*.

2. The issue of determining the weight of available evidence is also

directly related to the need for a well-thought-out, activity-based meaningful definition of *subject of proof* in specific criminal proceedings. This step should ensure that the evidence is *grouped* according to the circumstances of the case to *convince* the court of: (a) the existence of a criminal offence; (b) the existence of a criminal *offence* in the act; (c) the *commission* of this offence by the *suspect* (accused); (d) the *guilt* of the accused in committing the incriminated offence in accordance with the requirements of a particular *standard of proof* (for example, "reasonable suspicion" in deciding whether to choose a measure of restraint (Article 178 CCP) or "beyond reasonable doubt") in the case of a conviction (Part 2 of Article 17, Part 1 of Article 368, Part 1 of Article 373 of the CCP).

Such an approach allows the prosecution to form a *systematically* organised body of *evidence*, thus avoiding its submission to the court by a chaotic, disordered *mass* [21, p. 13]. Therewith, the procedure of grouping evidence allows identifying *links* and *interdependencies* both between evidence within a certain group and between individual groups of evidence, which, on the one hand, will help determine the degree (index) of the *real* weight of each "isolated" evidence, second, will "add" to it the weight of evidence within a specific body of evidence. Comparing individual separate evidence with the circumstances to be established helps to determine the weight of *specific* proof.

3. Simultaneously with the development of a *body of evidence* in criminal proceedings, the selection and examination of *certain* available procedural evidence (Paragraph 1 of Part 1 of Article 178 of the CCP) as its *components* should take place. This logical operation is of *paramount* importance because from the *activity* standpoint, *every* procedural evidence – no matter how "weak" – always has a certain *weight*, *somehow justifies itself*, independently of others [22, p. 13]. For example, failure to identify the valuables in the suspect's safe undoubtedly establishes the fact of their apparent *absence* at the time of the search, the interpretation of which allows the defence to insist that it is *exculpatory evidence* and the prosecution to claim that this is *strong evidence* of criminal "qualification" of the offender, so the mentioned valuables should be sought elsewhere [23, p. 9–13].

Therefore, the selected evidence can and should be worked on in the *context* of its place in the existing *body* of evidence to form judgments about: (a) the *degree* of its potential *reliability* (*certainty*), (b) the *degree of sufficiency* of the evidence to prove a *particular* thesis (*factum probandum*), (c) its *inconsistency* (*harmony*) with other evidence, and (d) the possible *purpose* of using that evidence within a particular body of evidence; nevertheless, in the body of evidence, as in a special evidence structure, each of them is called to perform a certain *function*, for example, be "decisive" evidence, laxative, or reinforcing, etc.

In this regard, it should be emphasised that the *reliability* of evidence (as, indeed, its other characteristics) must be proved *independently*, regardless of the justified *theses*, since the latter, by its logic, is always a *plausible* judgment. Therefore, it is necessary to *separate* the evidence from the *fact* proved by it, from the *conclusion* about it, while the evaluator must be guided by the rule of *independence of arguments from the proved thesis* to avoid logical errors. For example, in the criminal proceedings on the death of a motorcyclist as a result of a collision at an unregulated intersection with a truck, the testimony of two identified witnesses suggested a probable logical thesis (version) that the motorcyclist, leaving the yard of the house on the main road, turned left, where the collision took place immediately. The truck driver categorically denied his guilt, explaining that he, turning left at the intersection, as a person with many years of experience, could not help but notice and miss a motorcyclist who was moving in the opposite area to him. The new investigator, who was assigned an investigation a year and a half later, decided to carefully check the arguments (witness statements) without seeming to be tied to the obvious reliability of the thesis. As a result, it was established that both witnesses were mistaken in stating on repeated interrogations not *what* they *actually* saw, but their own *judgments* about the critical day they perceived. As a result, very strong evidence on some facts of criminal proceedings immediately turned into no less *weighty* evidence on other circumstances. In turn, the degree of *sufficiency* of the evidence is determined by evaluating the probability of its real "contribution" to ensuring the *quality* and *quantity* of evidence taken in their entirety, if they logically followed the required *reliability* of the *proven* judgment and not some other thesis. Therefore, when deciding on the degree of the weight of evidence, firstly, it is necessary to strive to use only *those* evidence that within a specific *situation* and *purpose* to the *maximum* extent indicate the *reliability* of the proven thesis.

4. In the practice of proof, it is standard practice to attribute – with equal reliability – *more* weight to *direct* evidence than *indirect*. In *one* way, the situation is evaluated, for example, the detention of a person *at the time* of commission or attempt to commit a criminal offence or immediately after the commission of a criminal offence or during its direct prosecution (Paragraphs 1–2 part 2 of Article 207 CCP), and in *another* – the situation of finding stolen valuables in one's home. In the case of *direct* evidence, the rules of probabilistic logic must be taken into account, according to which the weight of this evidence is *greater the* more they *increase* the probability of the existence of a substantiated thesis. Therefore, for example, the expert's opinion on the individual *identification* of a person by fingerprint will always be more important than the *diagnostic* opinion on the sex and age of the alleged offender.

5. The procedural law (Part 2 of Article 242 of the CCP), without formally establishing a list of *pre*established evidence, determines the grounds *for the mandatory* appointment of expertise in certain criminal proceedings. In addition, investigative and judicial practice establishes the grounds for the appointment of mandatory examinations in certain types of offences (e.g., automotive, drugs, economic, fire and technical, etc.), or mandatory in certain situations of criminal proceedings (eg, car science, ballistics, dactyloscopic, psychological, etc.). Therefore, the presence of evidence obtained as a result of the examination in the materials of the criminal proceedings is *mandatory*, and their *weight* to establish certain circumstances of the case is in fact presumed *a priori greater* than other evidence.

6. The weight of procedural evidence in criminal proceedings is always determined only "*here and now*", strictly *individually* within the *available* body of evidence, by examining each of them and correlating with the circumstances of the evidence, given their credibility, admissibility, reliability, and other performance characteristics; notably, in the totality of evidence each individual evidence has its function (purpose): for example, to be "weighty" evidence, to be "decisive" evidence, to be "reinforcing" evidence, to be "convincing" evidence, *etc*.

CONCLUSIONS

1. The authors of the study state that the introduction by the legislator in 2012 of the evaluative concept "weight of available evidence" is quite reasonable, meeting the requirements of the evidentiary practice of modern national adversarial proceedings, and the ECHR. Introducing this concept, the legislator thus required the judicial authorities to decide on the choice of precautionary measures, relying primarily on "weighty" evidence as the basis of a sufficient body of evidence, around which *other* evidence "gathers", which has other functions in this body. This decision of the legislator can be interpreted in the sense of a procedural guarantee for the protection of two fundamental values – the good name of a person and the protection of one's property rights.

2. Upon evaluating *in merito* scientific positions analysed in the introductory part of this study, it can be assumed that they are a consequence, firstly, of the fundamental non-distinction between the "weight" and "sufficiency" of evidence (the first is a characteristic of an individual proof, and the second is their totality), secondly, the non-distinction between normative and activity characteristics of the evidence.

3. The "weight of available evidence" as its activity characteristic is the mentioned in the title of this study "fifth element" of the structure of "criminal procedural evidence" along with such characteristics as "credibility", "admissibility", "reliability", and "sufficiency"; the study of activity characteristics of criminal judicial evidence belongs to the field of the doctrine of evidentiary

law and lays down the need for a deep examination of the practice of forming evidentiary aggregates in criminal proceedings based on the achievements of logic (the logic of evaluations), psychology, praxeology, pragmatism, theory of activity, axiology, theory of decision-making, rhetoric, etc.

4. The prospect of further research on the weight of evidence is the construction of the "weight of evidence" concept in the doctrine and the development of technology for issuing decisions on the weight of evidence within a specific evidentiary situation in criminal proceedings.

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ECHR DECISION TO REFUSE TO WAIVE THE IMMUNITY OF A PERSON UNDER ARTICLE 1 OF THE PROTOCOL No. 6: INDIVIDUAL INTERPRETATIONS OF THE ESSENCE AND CONSEQUENCES

Abstract. *In present-day Ukraine, there is no unanimous answer to the question of the essence and consequences of the ECHR decision to refuse to waive immunity under Article 1 of the Protocol No. 6 either in the national criminal procedural legislation, or in the theory of criminal procedure, or among judges, investigators, prosecutors. Therefore, the purpose of the present paper is to try to attempt to formulate individual approaches to address this issue. The relevance of the subject under study is conditioned upon its theoretical and practical components. The former is that there this area is heavily understudied, and judicial practice, among other things, requires a certain scientific basis to formulate individual positions in their unity. The dilemma proposed in the title of this study was also addressed by members of the Scientific Advisory Board of the Supreme Court, who were approached by judges of the Grand Chamber for scientific opinions, emphasising the urgency and necessity of feedback from practitioners. To formulate the individual approaches serving the purpose of this study, the authors employed such general and special research methods as dialectical, induction and deduction, Aristotelian, system-structural, sampling method, comparison, and legal forecasting. Notwithstanding the fact that the*

ECHR decision to refuse to waive the immunity stipulated in Article 1 of the Protocol No. 6, adopted by its plenary session in accordance with Article 4 of the Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe, is "procedural", it was proven that the Grand Chamber of the Supreme Court has the authority to conduct proceedings on the application of such a person to review the judgment precisely in exceptional circumstances. It is emphasised that the ECHR decision should be considered as one that does not aim at the final assessment of criminal proceedings, so it cannot be equated with the decision of an international judicial institution, which would state Ukraine's violation of international obligations in court and the order of its execution will differ. The authors also address the fact that the consequences of the ECHR decision to refuse to waive the immunity stipulated in Article 1 of the Protocol No. 6 are critical. After all, such a decision of the European Court of Human Rights is the "bell" for Ukraine, which, among other things, may hint at the probability that the Court will identify the facts of human rights violations

Keywords*: privileges and immunities, exceptional circumstances, human rights, international obligations, procedural decision*

INTRODUCTION

According to the national criminal procedural "algorithm of actions" when the European Court of Human Rights (hereinafter referred to as "the ECHR", "the Court") finds a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms [1] (hereinafter referred to as "the Convention") and its protocols, applications are submitted to the Grand Chamber on review of a court decision in exceptional circumstances (Part 3, Article 463 of the Criminal Procedural Code of Ukraine (CPCU)). A logical question arises: what is the criminal procedural mechanism for eliminating the consequences of the pretrial investigation authorities' violation of the immunity guaranteed by Article 1 of the Protocol No. 6 to the General Agreement on Privileges and Immunities of the Council of Europe (hereinafter referred to as "the Protocol No. 6") and does it exist at all? This also refers to the so-called "procedural" decisions of the ECHR, which should not be equated with the decisions of an international judicial institution whose jurisdiction is recognised by Ukraine. These include the ECHR decision to refuse to waive the immunity of a person under Article 1 of the Protocol No. 6 (hereinafter referred to as "the ECHR Decision"). This study covers the approaches to interpreting the essence of such decisions and the importance of their consequences. To achieve the stated purpose, the tasks are set as follows: to establish the presence of legal grounds to equate the ECHR Decision with a decision of an international judicial institution that would state the Ukraine's violation of international obligations upon litigation; to establish the possibility, based on the ECHR Decision, of interfering in the decisions of the investigating judge and the appellate

court, adopted in the order of judicial control over the pre-trial investigation of other persons; to establish the presence of procedural mechanisms addressing the consequences of the pre-trial investigation authorities' violation of the immunity guaranteed by Article 1 of the Protocol No. 6 [2]?

Along with the attempt to offer original scientific approaches to solving the declared problems, the authors of the present study do not consider themselves pioneers in this subject area, since several other authors have already conducted corresponding discourses. In particular, those who referred to the source of the review of cases and the resumption of proceedings at the national level in connection with the ECHR decisions, suggested that the Recommendation of the Committee of Ministers of the Council of Europe [3], preceded by the ECHR decision in Papamichalopoulos v. Greece. According to this ECHR decision, if the Court finds a violation, it obliges the respondent state to put an end to such violations, as well as to make commensurate reparations to restore the situation. This enables the implementation of the principle of international law restitutio in integrum [4, p. 232]. Evidently, following such recommendations in the national legislation, the Supreme Court of Ukraine was and is provided with these powers. In turn, upon a thorough analysis of the doctrine of banning the use of "poisonous fruit" and exceptions to it, Judge of the Grand Chamber of the Supreme Court Oleksandra H. Yanovska states that of the 108 applications for review of decisions on exceptional grounds stipulated by Section 2, Part 3, Article 459 of the CPCU, 55 applications with the provided materials were returned to the applicants, proceedings were denied on 32 applications and decisions in 21 cases were reconsidered. There is a practice according to which the Court refuses to initiate proceedings in cases where the application of the restitutio in integrum principle cannot be an adequate way to restore the applicant's rights, violation of which was recognised by the ECHR (for example, see the Judgment of the Grand Chamber of the Supreme Court No. 182/166/15-k, proceedings No. 13-36zvo20 dated May 19, 2020) [5–7]. The authors of this paper believe that such ECHR decisions should separately include the position on to the so-called "procedural" decisions, with a particular emphasis on the refusal to waive the immunity stipulated in Article 1 of the Protocol No. 6 [8].

The authors' "scientific concern" with this issue is caused by its practical side, that according to the data published by the Supreme Court, the Grand Chamber carries out such proceedings [9]. The second important factor for this investigation is to prove the presence of gaps in the current criminal procedural legislation in this subject area, as well as different practical and scientific approaches to interpreting the essence and consequences of the ECHR Decision. Given such context, there are no grounds to contemplate the unity or sustainability

of judicial practice, the development of which is an urgent task [10, p.128]. Thus, analysing the conflicting provisions of the current criminal procedural legislation, the authors came to the conclusion that the said ECHR decision renders lawful proceedings against persons covered by immunity under Article 1 of the Protocol No. 6 impossible [11, p.11–15]. Therewith, in the vast majority of cases, it cannot serve as grounds for interfering in the decisions of the investigating judge and the appellate court based on the results of their review, adopted in the order of judicial control over the pre-trial investigation of other persons. However, due to the gaps and conflicts of the current criminal procedural legislation in this area, the authors partially supported Ya. Zeikan's opinion on the approval of the "standard of proof of reasonable suspicion" [12] to avoid unjustified criminal prosecution of persons and preventing indirect measures to ensure criminal proceedings against such persons.

Ultimately, it is necessary to appeal to the fact that the Grand Chamber of the Supreme Court appealed to the members of the Scientific Advisory Board of the Supreme Court to obtain relevant scientific opinions on a certain list of issues [2]. Such conclusions were prepared by researchers, expressing their personal opinions [13], but so far, the decision of the Grand Chamber is absent. This only emphasises the urgency of the issues raised in this paper and the necessity of developing scientific ways to address them. Admittedly, in this discussion, the authors priorities the judges of the Grand Chamber of the Supreme Court because the ECHR categorically approaches the importance of judicial practice and repeatedly emphasises that the relevant established judicial practice cannot be ignored [10, p.133].

1. MATERIALS AND METHODS

Thus, this study will attempt to offer the scientific community a systematic review of sound conclusions and recommendations of leading specialists in procedural and international law, professors, including O. V. Butkevych [14], A. M. Drozdov [15], O. V. Kaplina [16; 17], L. M. Loboiko [4], O. H. Shylo [10; 18], O. H. Yanovska [6; 7; 19], who, considering their individual scientific interests, expressed their opinions on the issue of observance of conventional and constitutional human rights and freedoms, application of ECHR practices, etc. at the monographic level. Such a review has become possible and informative as a result of applying an inductive approach and a system-structural method, which allowed considering human rights and the need to track their violations through the lens of the entire system of issues concerning the consequences and the specific features of executing the ECHR Decision. In addition, the applied system-structural and comparative methods allowed concluding that the implementation of the ECHR Decision, due to its inherent procedural features, should be carried out according to the rules of Part 3, Article 463 of the CPCU on review in exceptional

circumstances, even though this study proved that the ECHR Decision should not be equated with the decision of an international court referred to in Part 3, Article 463 of the CPCU.

Using the comparative method and the method of sampling, the authors carried out an excursion to the judicial practices of both Ukrainian courts and the ECHR. As a result, the study identified the gaps and shortcomings in the Law of Ukraine "On Enforcement of Judgments and Application of the Judicial Practice of the European Court of Human Rights". In particular, the authors highlighted the inaccuracy of the wording of basic concepts, such as "ECHR practices", "ECHR decision", used in the Ukrainian legislation, which does not contribute to the stability and unity of judicial practice. Admittedly, a similar issue is inherent not only in the category of decisions that are the subject of this study, but is generally inherent in the implemented terms, as well as situations where conventional approaches to the definition of certain concepts are abandoned [20, p. 162].

Legal forecasting allowed modelling a set of negative legal consequences, including human rights violations, the admission and/or non-recognition of which are foreseeable and highly probable given the narrow and limited interpretation of the ECHR Decision by lawyers. Using sampling and the Aristotelian method, the authors of the present study selected the court decisions placed in the Unified State Register of Judgments that are of scientific and practical interest and/or can serve as an illustrative example to identify and emphasise the urgency and practical need for the development of original approaches to interpreting the essence and consequences of the ECHR Decision. Furthermore, in a separate legal situation, which is a consequence of the ECHR Decision, the Aristotelian method allowed proposing a certain logic of application of the current CPCU to eliminate the consequences of pre-trial investigation authorities' violation of immunity guaranteed by Article 1 of the Protocol No. 6.

Dialectical approaches and sampling methods have formed the basis for the assumption that the Law of Ukraine "On Enforcement of Judgments and Application of the Judicial Practice of the European Court of Human Rights" and the current CPCU do not fully define the appropriate mechanism and effective means to remedy the applicant. As a result, the application of these methods further developed the scientific opinions of researchers on supplementary individual measures [21] that are the key to effective and rapid implementation of the ECHR Decision and, accordingly, a guide to restore the applicant's condition that they had been in prior to the violation committed against them [13, p.14–17].

The authors of the present study are eagerly awaiting a scientific discussion since the scale of the subject matter is significant and the dilemma itself is very ambiguous, and this issue is generally

understudied. From the standpoint of a practical approach [4] the authors applied a research-to-practice investigation providing for three logically interconnected blocks.

2. RESULTS AND DISCUSSION

2.1. Analysis of the legal grounds for identifying the ECHR Decision with the decision of an international judicial institution [7]

The current state of both Ukrainian and international law is described by new trends in the optimisation of mechanisms aimed at ensuring decent protection of human rights and freedoms in any state [22]. The development of each country as a democratic and legal state requires the protection of the rights of all population categories [23]. Implementation of measures to protect human rights at the national level is possible only by harmonising Ukrainian legislation, its adaptation to European Union law, including criminal procedural legislation, specifying the aspects of such adaptation, thereby creating proper theoretical grounds for future legislative innovations [18, p. 110].

Appealing to national strategies relating to the observance of human rights to a certain extent, considering law enforcement activities, Yu. M. Chornous states that there is an urgent need to increase the efficiency of criminal investigations in accordance with international standards and the judicial practice of the ECHR [24, p. 269]. Contrary to the conciseness of this scientific opinion, its content is extensive, as it covers not only such a cumbersome stage of criminal proceedings as pre-trial investigation, but also stages of appeal, which will have their individual course in case of human rights violations committed upon pre-trial investigation, as well as consideration in the ECHR in case of relevant grounds. Furthermore, it is worth emphasising the fact of a decades-long fruitful scientific discussion on those components of legislative activity, personal qualities and competencies of "professional participants in criminal proceedings" [25, p. 286], which in their symbiosis capable of immensely improving the state of investigation and trial, adding quality to such activities. At present, Ukraine has numerous "international doors" to fulfil its national potential in various areas, as Ukraine is a member of the United Nations, a member of the Organisation for Security and Cooperation in Europe, the Council of Europe, the International Monetary Fund, The World Bank and other international intergovernmental organisations. This level of participation which imposes on the state of Ukraine – a sovereign subject of international law – the corresponding obligations [26, p. 120–122]. Numerous laws and resolutions of the Cabinet of Ministers of Ukraine have been adopted to effectively perform these obligations. In the case under study, the authors focus on one of them, such as the Law of Ukraine "On Enforcement of Judgments and Application of the Judicial Practice of the European Court of Human Rights"

No. 3477-IV of February 23, 2006 (hereinafter reffered to as "the Law", "the Law of Ukraine").

Researchers fairly emphasise that Ukraine is one of the few Council of Europe states that has directly regulated the practice of enforcing ECHR decisions by a separate Law of Ukraine. However, this Law, as argued by O. V. Butkevych, has several conflicts and gaps [14, p. 12], which will be closely considered below. The analysis of the preamble to this Law of Ukraine suggests that one of the parties in these relations must be the state of Ukraine, against which a complaint has been filed in the form of a violation of fundamental rights or fundamental freedoms protected by the Convention and its Protocols. Furthermore, Ukraine is therefore obliged to eliminate the causes of violations of the Convention and its Protocols [27]. Under Section 1, Article 35 of the Convention, the Court accepts applications only after all internal remedies have been exhausted. That is, one should first turn to the national courts to, including the relevant higher court, within whose jurisdiction the one's case falls, to protect their violated rights they intended to remedy through the Court. It is necessary to comply with national procedural rules, especially the legislatively provided time limits. The Court may consider only those allegations of violations of the rights that are guaranteed by the Convention and its Protocols [28]. These include Article 2 "Right to life", Article 3 "Prohibition of torture", Article 5 "Right to liberty and security of person", Article 6 "Right to a fair trial", Article 8 "The right to respect for private and family life", Article 10 "Freedom of expression", Article 11 "Freedom of Assembly and Association", Article 13 "Right to an effective remedy" and others of the Convention [26, p. 120–123]. As for some of these violations of Ukraine's international obligations found by the ECHR during the pre-trial investigation and trial, there are extensive studies and even guidebooks translated by Ukrainian proceduralists to update such issues as the way to avoid such violations of the Convention and minimise them [15].

In turn, the national criminal procedural "algorithm of actions" in the ECHR's finding of violation of the Convention and its Protocols by Ukraine, is prescribed, albeit not flawlessly. Thus, based on the fact of ECHR's finding of violation of international obligations by Ukraine upon delivering justice, the Grand Chamber of the Supreme Court must consider the materials of criminal proceedings (criminal case) under the rules of proceedings in exceptional circumstances in accordance with Chapter 34 of the CPCU [26, p. 120–123]. The authors of this study believe that the phrase "…upon delivering justice" employed by the legislator has a substantial semantic load. Firstly, it a priori determines that procedural decisions made during pre-trial investigation and the conclusions obtained must be reviewed by a court. Moreover, it is no longer just a matter of trial at first instance, but a priori it is assumed that the

available Ukrainian appeal mechanisms have already been exhausted. Therewith, the attention to the violations committed during the pre-trial investigation is not reduced in any way, although in comparison with the Civil Procedural Code of 1960 the current CPCU slightly shifted the emphasis towards the importance and juxtaposition of pre-trial and trial stages of criminal proceedings. Legal literature contains scientific publications, the authors of which tend to believe that the pre-trial investigation has currently lost its flagship [29, p. 153; 30, p. 151–156]. This opinion is highly controversial, especially among practitioners – prosecutors, interrogators, and investigators, who justifiably defend their professional positions, appealing to the provisions of the current CPCU, which only emphasise the importance of criminal proceedings in the first stage of criminal procedure. The authors of this study believe that pre-trial investigation and trial cannot be compared, equated, or dominate over each other because they are separate stages of criminal procedural activity with their participants, terms, procedure, procedural decisions, etc. Proceduralists have repeatedly addressed this both under the Civil procedural Code of 1960 [31, p. 122–126] and the current CPCU [4, p. 21–23]. Stages, forming a single system of proceedings, replacing each other, should ultimately solve the problems of criminal proceedings, regulated by Article 2 of the CPCU. The overarching goal is to establish the truth (although some researchers, as well as the legislator, who virtually "bypassed" such a principle of criminal proceedings in the current CPCU, do not share this goal) [32, p. 161–173]. Given the stages and importance of each, only the court has a duty to directly investigate the decisions, procedural actions and conclusions that took place during the pre-trial investigation. Based on this, the court formulates a conclusion about their pertinence, admissibility, truthfulness, and sufficiency [33, p. 53]. This is the content of the eponymous principle of criminal proceedings, stipulated by Article 23 of the CPCU and the establishment and development of which in Ukrainian legislation was directly influenced by the ECHR decisions [16]. Therefore, as a general rule, those pieces of evidence that have not been directly examined by a court cannot acquire the status of appropriate, admissible, or truthful. Conversely, only the court ultimately finds the evidence to be inadequate, inadmissible, and untrue.

Secondly, based on the above, it is illogical to state the number and nature of violations of the Convention and its Protocols at the stage of pre-trial investigation, as the collection and verification of evidence by investigators and prosecutors is ongoing and will continue. Only after the completion of the pre-trial investigation, at the trial, judges have the right to evaluate the existing violations of both the current CPCU and the Convention. Judges may also commit such violations in their activities and/or fail to properly evaluate the violations

that occurred during the pre-trial investigation. It is worth remembering that in criminal proceedings, justice is delivered exclusively by a court, and refusal to deliver justice is prohibited (Parts 1–2, Article 30 of the CPCU) [34]. A person has the right to file a complaint against the state of Ukraine to the ECHR only after exhausting all national mechanisms of appeal [28].

In turn, the ECHR decision to waive the person's immunity under Article 1 of Protocol No. 6 is initiated by a party and adopted (or refused) by the plenary session of the Court at the stage of pre-trial investigation or at the stage of including information in the Unified Register of Pre-trial Investigations (this is a very debatable issue that can be discussed in a separate study). At none of these stages is it possible at all to contemplate a final assessment of the evidence in criminal proceedings, which is performed only at the trial stage. The authors of the study believe that this is why the question of the final evaluation of evidence in criminal proceedings as such should not be raised in the first place. Admittedly, the interim evaluation has some relevance and its presence affects the prudence and objectivity of the decision to waive immunity or refuse to do so. Therewith, the Court first considers the fact that privileges and immunities are granted to judges not for their personal benefit, but to ensure their independence in the performance of their duties. The plenary of the Court shall waive the immunity of a judge in all cases where, in its opinion, the immunity interferes with the delivery of justice and when it may be revoked without prejudice to the purposes for which it was granted (Article 4 of Protocol No. 6) [35].

Therefore, the ECHR decision to waive the immunity of a person should be considered procedural, interim, which gives the pre-trial investigation authorities the possibility of opening criminal proceedings against one of the judges, their spouses or both, their minor children and carrying out any investigative, coercive measures, interrogation of them as witnesses. Similarly, the ECHR interim decision refusing to waive the person's immunity, taken by its plenary session, should be described as procedural in accordance with Article 4 of Protocol No. 6.

At the same time, the decision of the ECHR to refuse to remove a person's immunity is the "bell" for the state of Ukraine, which, among other things, signals not only the existence of a well-formed belief of the court, which sat in plenary sessions, that the cancellation of the granted immunity is not possible without prejudice to the purposes for which it was granted, but can also casually indicate the likelihood that the court will detect human rights violations in the process of studying the materials provided to it. After all, it is logical that those materials, including criminal proceedings, that are sent to the ECHR to resolve the issue of immunity under Article 1 of protocol No. 6, are aimed at convincing the court that the person

has committed (continues to commit) illegal activities that fall under the qualification under a certain article(we) of the Criminal Code of Ukraine and there is a need to apply certain measures to this person to ensure criminal proceedings. As for the status of this person as a participant in criminal proceedings, it is logical that if there is the specified immunity, she cannot be legally recognized as a suspect(we are talking about drawing up such a procedural document as a notice of suspicion), because this will automatically indicate a violation of the immunity guaranteed to her. Moreover, even the fact of carrying out certain procedural actions against this person, which, according to the current provisions of the Criminal Procedure Code of Ukraine, will themselves determine his status as a suspect (we are talking about his detention on suspicion of committing a criminal offense), is unacceptable without a positive decision of the issue by the plenary session of the ECHR to lift this person's immunity.

But this state of affairs is a partially idealized training case, which does not exclude those negative trends in the investigation process that may take place and, in their final result, have every chance of leading to a violation of the rights of individuals. In this regard, we partially support the position of Ya. Zeikan regarding the urgency of developing a "standard for proving reasonable suspicion" [12] in order to exclude the indirect adoption of measures to ensure criminal proceedings against individuals. We are inclined to agree that such a standard should also be reserved for such unacceptable criminal procedural activities, the results of which may de facto indicate that the subjects authorized for pretrial investigation treat a person as a suspect, considering him such. At the same time, we cannot support the arguments and the statement itself as an absolute author's fact of the fact that "despite the fact that investigative judges and courts of Appeal are obliged to check whether a reasonable suspicion is proved, but in practice investigative judges check only the fact of reporting a reasonable suspicion, and not its content" [12]. We do not share our position on the totality of such egregious manifestations, based on our analysis of investigative and judicial practice, although we have no reason to object that in some cases such situations can actually take place.

So, despite the fact that we adhere to such positions, which cannot be identified with the decision of an international judicial institution that would State a violation of Ukraine's international obligations when deciding a case by a court, the decision of the ECHR to refuse to lift a person's immunity under Article 1 of protocol No. 6, because it should be considered procedural, intermediate, such that the aim of the final assessment of evidence in criminal proceedings is not set, but still the Grand Chamber of the Supreme Court has the power to carry out proceedings in exceptional circumstances if there is an application from a person in respect of whom the lifting

of immunity provided for in Article 1 of protocol no is refused. 6. this suggests only one clarification that the legislator should make appropriate additions to Paragraph 2 of Part 3 of Article 459 and Part 3 of Article 463 of the Criminal Procedure Code of Ukraine. In this situation and these circumstances, in each specific case, using the provided criminal procedural mechanisms, it is very important in the activities of the Grand Chamber of the Supreme Court not only to clarify the existence of human rights violations, but also to stop the violation of Rights, restore the position of the applicant.

2.2. Can the adoption of such an act by the ECHR be grounds for interfering with the decisions of the investigating judge and the court of appeal based on the results of their review, adopted in the order of judicial control over pre-trial investigations against other persons? [2]
We fully agree with such a scientific position that the law does not specify what should be attributed to the practice of the ECHR, whether these are decisions that relate to Ukraine, or the entire practice of the ECHR, as well as whether we are talking about Case Law (own decisions on cases) or the entire practice of the ECHR (administrative and procedural decisions) [14, p. 12–14]. Although leading processalists also reasonably emphasize that "given that Ukraine recognizes the jurisdiction of the ECHR in all matters concerning the interpretation and application of the convention, its application by courts should be carried out with mandatory consideration of the practice of the ECHR not only in relation to Ukraine, but also in relation to other states" [36, p. 745]. And it is based on this that scientists and practitioners, respectively, in their scientific research [37, p. 383–384; 38, p. 551] and professional activities, rely on the decisions of the ECHR not only in relation to Ukraine and operate with them. At the same time, we fully agree that, unfortunately, there is no legislative clarity on this issue.

The question of whether the decisions of the Chamber of the court or the president of the Chamber of the court belong to this practice also remains open. It would be worth noting here the types of case-law decisions of the court (which constitute the concept of "case-law of the Court"). More relevant is the concept of the court's "case-law": a decision on bringing to the attention of the government, on admissibility, a decision on the merits. In general, speaking about the significance of ECtHR decisions in the law enforcement practice of Ukraine, we can note a not sufficiently correct interpretation of the concept of "ECtHR decisions" in the law of Ukraine "on the execution of decisions.", because these are not only those decisions that recognize the violation of the ECHR by Ukraine, since the standards and principles of the court for the protection of human rights can also be contained in decisions on the inadmissibility of the case. Decisions against Ukraine with a finding of a violation but without just satisfaction must also be enforced (for example, decisions

in Savinsky v. Ukraine, No. 6965/02, 28 February 2006), as well as judgments in which the court finds no violation of the convention (judgment in Gennadiy Naumenko v. Ukraine, No. 42023/98, February 10, 2004) [14, p.12–14].

As we can see, the author of the above thorough scientific and practical discourse does not resort to considering and describing such a decision of the ECHR as refusing to remove the immunity provided for in Article 1 of protocol No. 6, which we consider procedural. And this is not surprising, because our own scientific search has established that solutions like the ONE analyzed are isolated in all practice during the existence of the ECHR, and, obviously, for this reason, there is practically no scientific intelligence on these problems in domestic science, including Criminal Procedure. At the same time, we hope that our international colleagues and processalists will respond very thoroughly to the stated issues, because they are relevant. The sixth protocol to the general agreement on privileges and immunities of the Council of Europe was ratified on May 15, 2003 by law of Ukraine No. 800-IV, so it is part of the national legislation of Ukraine (Article 9 of the Constitution of Ukraine, Part 1 of Article 19 of the law of Ukraine "On International Treaties of Ukraine").

In the case under consideration, as was already stated during the consideration of the previous issue, the decision of the ECHR to refuse to remove the immunity provided for in Article 1 of protocol no from a person. 6 is one that, as a result, does not allow the pre-trial investigation authorities to initiate criminal proceedings against one of the judges, their spouses or both, their young children and to carry out any investigative actions, coercive measures, questioning them as witnesses, that is, it makes it impossible for such procedural activities legally in respect of the listed persons who are subject to the immunity provided for in Article 1 of protocol No. 6.

At the same time, Article 2 of the code of Criminal Procedure imposes certain obligations on the investigator, prosecutor, court to protect the person, society and the state from criminal offenses and bring to justice those responsible, and by virtue of such a basis of criminal proceedings as publicity, the prosecutor, the investigator are obliged, within their competence, to start a pre-trial investigation in each case of direct detection of signs of a criminal offense (except in exceptional cases), as well as to take all measures provided for by law to establish the event of a criminal offense and the person who committed it (art. 25 of the Criminal Procedure Code of Ukraine). In turn, the principle of legality also imposes on the prosecutor, the head of the pre-trial investigation body, and the investigator the obligation of a high-quality and impartial investigation of the circumstances of criminal proceedings (Part 2 of Article 9 of the Criminal Procedure Code of Ukraine). It follows from the above that despite the existence of such a circumstance as the existence of

an ECtHR decision, which legitimately makes certain procedural activities impossible in respect of persons covered by the immunity provided for in Article 1 of protocol No. 6, such a decision of the ECHR cannot be considered as an obstacle to the performance of all those tasks defined in Article 2 of the Criminal Procedure Code of Ukraine. Unlike persons covered by the immunity provided for in Article 1 of protocol No. 6, in relation to other persons who are participants in criminal proceedings and to whom this and other immunities do not apply, the legal procedure provided for by the current Criminal Procedure Code of Ukraine should also be applied. At the same time, the investigating judge, whose powers in accordance with paragraph 18 of Part 1 of Article 3 the code of Criminal Procedure of the Russian Federation is supposed to exercise, in accordance with the procedure provided for by the code of Criminal Procedure of the Russian Federation, judicial control over the observance of the rights, freedoms and interests of persons in criminal proceedings, must exercise these powers, including in relation to those participants in criminal proceedings to whom immunities do not apply.

It is worth listening to the recommendations of experts on the expediency and urgency of making amendments and additions to the law of Ukraine "on the implementation of decisions and application of the practice of the European Court of human rights", in particular, among other things, already proposed by wellknown international researchers [14, p. 25] and mentioned above, to highlight the practice of implementing the decision of the ECHR on refusal to remove immunity from a person, which was adopted by its plenary session, in accordance with Article 4 of protocol No. 6 to the general agreement on privileges and immunities of the Council of Europe and on the removal of immunity from a person.

2.3. Are there procedural mechanisms for remedying the consequences of a violation by pre-trial investigation authorities of the immunity guaranteed by Article 1 of protocol No. 6? [2]

It has already been noted that despite the fact that the payment of compensation to the applicant, the adoption of measures of a general nature are ways of implementing the ECtHR decision provided for by the Basic Law of Ukraine, the adoption of additional measures of an individual nature (reopening of the proceedings and reexamination of the case in a domestic court instance) is capable not only of correcting the violation of the convention committed by the state of Ukraine, but is also a way of bringing the applicant's condition into the same state as he was before the violation of the convention (restitutio in integrum). Also additional measures of an individual nature, according to Paragraph "B" of Part 2 of Article 10 of the law, there are "other measures provided for in the decision".

Based on the above, we believe that the foresight in the ECtHR decision on

refusal to remove immunity from a person of such additional measures of an individual nature is the key to its effective and rapid implementation and, accordingly, a pointer to bringing the applicant's condition to the same state in which he was before the violation committed against him [11, p. 14–17]. However, in the situation we are considering, there are no such clarifications regarding additional individual measures in the ECHR decision.

Since the decision provided for in Paragraph 2 of Part 3 of Article 459 of the Criminal Procedure Code of Ukraine and the decision of the ECHR to refuse to remove a person's immunity under Article 1 of protocol No. 6 differ in essence, then their execution will obviously have certain differences. If existing violations of the rights of persons covered by the immunity provided for in Article 1 of Protocol No are found. 6, and / or breach by the pre-trial investigation authorities of the immunity guaranteed by Article 1 of protocol No. 6, then such persons, among other things, have the right to raise questions and demand compensation for the damage caused to them in civil proceedings, if there are appropriate grounds for this. At the same time, damage caused by illegal decisions, actions or omissions of a body carrying out operational search activities, pre-trial investigation, prosecutor's office or court is compensated by the state at the expense of the state budget of Ukraine in cases and in accordance with the procedure provided for by law, and having compensated for such damage, the state applies the right of reverse claim to these persons in cases provided for in Part 2 of Article 130 of the code of Criminal Procedure of Ukraine. As for the grounds and conditions for imposing civil liability for the damage caused on the state, the explanation was provided by the Grand Chamber of the Supreme Court in a decision of September 3, 2019 [39].

CONCLUSIONS

Despite the fact that the ECtHR's decision to refuse to lift a person's immunity is "procedural" and refers to those decisions in which, among other things, the ECtHR does not summarize a violation of the convention "which would be directly related to the ongoing judicial proceedings and the judicial decisions taken as a result of them" [2;3], nevertheless, the Grand Chamber of the Supreme Court has the power to conduct review proceedings for exceptional circumstances (Part 3 of Article 463 of the code of Criminal Procedure of Ukraine) if there is an application from a person in respect of whom the immunity provided for in Article 1 protocol No. 6. In order to avoid different perceptions of the provisions of the current code of Criminal Procedure of Ukraine regarding the powers of the Grand Chamber of the Supreme Court to carry out these procedural activities, the legislator should make appropriate additions to Paragraph 2 of Part 3 of Article 459 and Part 3 of Article 463 of the code of Criminal Procedure of Ukraine. It would be advisable to provide for a separate paragraph of the powers for

consideration by the Grand Chamber in relation to other decisions of the ECHR, which, although "procedural", should also be recognized as exceptional circumstances at the level provided for in Paragraph 2 of Part 3 of Article 459 of the Criminal Procedure Code of Ukraine.

Unlike persons covered by the immunity provided for in Article 1 of protocol No. 6, in relation to other persons who are participants in criminal proceedings and to whom this and other immunities do not apply, the legal procedure provided for by the current Criminal Procedure Code of Ukraine should also be applied. The decision under consideration may be the "bell" for the state of Ukraine, which, among other things, signals possible violations of human rights identified by the court in the course of studying the materials provided to it, despite the fact that the purpose of the ECHR's decision to refuse to lift a person's immunity under Article 1 of protocol No. 6 is not a general assessment of criminal and judicial proceedings.

Proven violation of the rights of persons subject to immunity under Article 1 of protocol No. 6, and / or breach by the pre-trial investigation authorities of the immunity guaranteed by Article 1 of protocol No. 6th creates, among other things, prerequisites for resolving the issue of compensation (compensation) for damage caused by illegal decisions, actions or omissions of the body carrying out operational search activities, pre-trial investigation, prosecutor's office or court, based on the provisions of Article 130 of the code of Criminal Procedure of the Russian Federation.

We sincerely hope that our scientific research will understand the essence and consequences of the ECHR's decision to refuse to remove a person's immunity under Article 1 of protocol No. 6, which was adopted by its plenary meeting in accordance with Article 4 of protocol No. 6 to the general agreement on Privileges and immunities of the Council of Europe will be useful for continuing scientific discussion in this area, and final judgments can at least partially withstand both scientific discussion and well-deserved reasoned criticism, both from fellow scientists and judges and other practicing lawyers.

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