Національна академія правових наук України
Національний юридичний університет
імені Ярослава Мудрого

ВІСНИК

НАЦІОНАЛЬНОЇ АКАДЕМІЇ ПРАВОВИХ НАУК УКРАЇНИ

Науковий юридичний журнал

Заснований у 1993 році
Періодичність випуску – 4 номери на рік

Том 27, № 4
2020

Харків
«Право»
2020

УДК 34
DOI: 10.37635/jnalsu.27(4).2020

ISSN 1993-0909
E-ISSN 2663-3116

Рекомендовано до друку вченою радою
Національного юридичного університету імені Ярослава Мудрого
(№5 від 18 грудня 2020 р.)

Свідоцтво про державну реєстрацію
Серія КВ № 23993-13833ПР від 11.07.2019 р.

Журнал внесено до Переліку наукових фахових видань України (категорія «Б») у галузі юридичних наук
(наказ МОН України № 6143 від 28.12.2019 р.)

Видання включено до міжнародних наукометричних баз
Scopus
Index Copernicus International

Вісник Національної академії правових наук України / редкол.: В. Тацій та ін. – Харків : Право, 2020. – Т. 27, № 4. – 295 с.

Засновники:
Національна академія правових наук України
Національний юридичний університет імені Ярослава Мудрого

Видавець:
Національна академія правових наук України

Відповідальний за випуск
О. В. Петришин

Адреса редакційної колегії: 61024, Харків, вул. Пушкінська, 70, Національна академія правових наук України. Тел. (057) 707-79-89

Офіційний сайт: visnyk.kh.ua
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National Academy of Legal Sciences of Ukraine
Yaroslav Mudryi National Law University

JOURNAL

OF THE NATIONAL ACADEMY OF LEGAL SCIENCES OF UKRAINE

Scientific Legal Journal

Founded in 1993
Periodicity – 4 issues per year

Volume 27, Issue 4
2020

Kharkiv
«Pravo»
2020

UDC 34
DOI: 10.37635/jnalsu.27(4).2020

ISSN 1993-0909
E-ISSN 2663-3116

Recommended for publication by the academic Council
Yaroslav Mudryi National Law University
(Protocol № 5 dated 18 December 2020)

The certificate of state registration
КВ № 23993-13833ПР date 11.07.2019

Journal included in the List
of scientific professional publications (category "B") in the field of legal sciences
(the order of MES of Ukraine No. 6143 dated on 28.12.2019)

Journal included in the international scientometric databases
Scopus
Index Copernicus International

Journal of the National Academy of Legal Sciences of Ukraine / editorial board: V. Tatsiy et al. – Kharkiv : Pravo, 2020. – Vol. 27, № 4. – 295 p.

The founders:
National Academy of Legal Sciences of Ukraine
Yaroslav Mudryi National Law University

Publisher:
National Academy of Legal Sciences of Ukraine

Responsible for the release of
O. V. Petryshyn

The Editorial Board address: 61024, Kharkiv, 70 Pushkinska Street, National Academy of Legal Sciences of Ukraine. Ph.: (057) 707-79-89

Official website: visnyk.kh.ua
e-mail: visnyk_naprnu@ukr.net

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DOI: 10.37635/jnalsu.27(4).2020.16-28

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Харків, Україна

М. ГРУШЕВСЬКИЙ ПРО УСТАНОВЧУ ВЛАДУ УКРАЇНСЬКОГО НАРОДУ

Анотація. *У статті зазначається, що українські історики і правознавці отримали можливість вивчити багату творчу спадщину та нові актуальні аспекти історії державо- і правотворення в творах М.С. Грушевського з часів горбачовської «перебудови». Доводиться, що сучасні вітчизняні дослідники звертають увагу на концепцію «національної ідеї», державного будівництва Київської Русі, козацької республіки Б. Хмельницького, конституційного процесу періоду УНР, організації конституційного процесу в творчості видатного державознавця, яка є актуальною й на сьогодні. Акцентується увага, що без вивчення цієї концепції неможливе дослідження не лише історії УНР, а й історії вітчизняного державотворення. У статті акцентується увага на важливості актуальних проблем конституційної реформи в Україні, що передбачають наступність, урахування традицій та історичного досвіду організації і функціонування державної влади, концептуальних засад здійснення установчої влади. Доведено, що історична відсутність законодавчо врегульованого складу, компетенції і процедури Генеральних, полкових і сотенних козацьких рад давали підстави царському уряду перебрати на себе право дозволу чи заборони їх скликання, визнання чи невизнання їх рішень. Відтак визначальним у державотворенні для М. Грушевського було верховенство народу, його установчої влади. М. Грушевський був впевнений, що «піднятий загальний матеріальний рівень життя» народу, духовної культури, «певний моральний ригоризм конче потрібний для успіху, розвитку й твердості демократичного ладу… Тільки тоді, коли держава, громада стане не пустою вивіскою,…а дійсним центром мислі і волі, предметом культу, релігії, яким вона була для старинного елліна або римлянина; тоді тільки збудується Велика Україна».*

Ключові слова: Київська Русь, Козацька республіка, народовладдя, установча влада, представництво, верховенство народу.

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M. HRUSHEVSKY ON THE CONSTITUENT POWER OF THE UKRAINIAN PEOPLE

Abstract. *The article notes that Ukrainian historians and jurists have the opportunity to study the rich creative heritage and new current aspects of the history of state and law-making in the works of MS Hrushevsky since the time of Gorbachev's "perestroika". Attention is drawn to the fact that Ukrainian historians and legal scientists have the opportunity*

to study the rich creative heritage and new current aspects of the history of state and law-making in the works of M.S. Hrushevsky. The study proves that modern Ukrainian researchers pay attention to the concept of "national idea", state building of Kyivan Rus, the Cossack Republic of B. Khmelnytsky, the constitutional process of the period of the Ukrainian People's Republic, the organisation of the constitutional process in the works of prominent statesman, which is relevant to this day. It is emphasised that without studying this concept it is impossible to explore not only the history of the Ukrainian People's Republic, but also the history of national statehood. The study places emphasis on the importance of current issues of constitutional reform in Ukraine, making provision for continuity, taking into account the traditions and historical experience of the organisation and functioning of state power, the conceptual foundations of the exercise of constituent power. It is proved that the historical absence of legally regulated composition, competences, and procedures of the General, regimental and hundreds of Cossack councils gave the tsarist government grounds to take over the right to allow or prohibit their convening, recognition or non-recognition of their decisions. Therefore, M. Hrushevsky defined the supremacy of the people and its constituent power as the decisive factor in state formation. Hrushevsky was convinced that the "increased general material standard of living" of the people, spiritual culture, "a certain moral rigor is absolutely necessary for the success, development and firmness of democracy... Only when the state, the community becomes not an empty sign, but a real centre 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".

Keywords: Kyivan Rus, Cossack Republic, democracy, constituent power, representation, supremacy of the people.

INTRODUCTION

Ever since M.S. Hrushevsky returned to Ukrainians during Gorbachev's "perestroika", historians and legal scientist, upon studying his rich creative heritage, discovered in it increasingly relevant aspects in the history of domestic state and law-making. They are primarily reflected in the multivolume work of the scientist called "History of Ukraine-Rus'", other historical studies and in his journalism. The historian's reflections on the constituent power of the Ukrainian people, presented in a historical context, are extremely meaningful and valuable. M. Hrushevsky saw its beginnings in veche assemblies since the creation of the state – Kyivan Rus, formulated a conclusion: the Russian-Ukrainian community was imbued with the spirit of democracy and equality, autocracy. It is interesting to study the interpretation of the competence of the chamber by scholars as an extraordinary body of direct democracy, its interaction with the princely power. An important aspect in the historical study of the origins of domestic parliamentarism by scholars is its study of the formation of the Sejm representation in the Grand Duchy of Lithuania, the Commonwealth, where Ukrainian magnates and gentry also gained parliamentary experience.

M. Hrushevsky paid considerable attention to the historical analysis of the Cossack self-government, the general Cossack councils. He provides information on the composition, competence, procedure of the General Cossack Councils, calls them the "Ukrainian Sejm", refutes Russian information on the composition, the significance of the decisions of the Pereyaslav Council of 1654[1]. In subsequent volumes of his multivolume work, the journalism of the scientist of the early 20th century provides valuable

[1] Pereyaslav agreement with Moscow. What was it about? (2019). Retrieved from https://www.radiosvoboda.org/a/donbass-realii/29700051.html.

information about the Ukrainian representation in the Austro-Hungarian Parliament, in the State Duma of Russia. With the beginning of the National Liberation Revolution and the organisation of the Ukrainian Central Rada (UCR) in 1917, as evidenced by the journalistic works of its Chairman, the prospects for "free political work" and the establishment of democracy were determined. Hrushevsky saw the task of transforming the Central Rada into the highest representative body of Ukraine, the "revolutionary parliament", as an urgent problem in the organisation of state formation. The wide organisation of local self-government bodies, fruitful measures on elections of the UCR, representation of not only Ukrainian citizenship, but also national minorities also draw attention of the researchers.

According to M. Hrushevsky, the UCR became the main factor of people's representation and democratic state formation – for the first time in the history of Ukraine. As shown by his works and public speeches, Hrushevsky attached great importance to consolidating democratic traditions in state-building – veche, Cossack councils of the Hetmanate, self-regulating Radas, initiated by the first Russian revolution of 1905-1907. Hrushevsky highly valued the III Universal of the UCR[1], which legislatively established the restoration of national statehood in the form of the Ukrainian People's Republic (UPR), consolidated the legal status and functions of the Central Rada and its government – "to make laws and rule". This outstanding statesman considered the IV Universal, which proclaimed the independence of the UPR as a parliamentary republic with a unitary system and democratic regime, and the Constitution of the UPR to be the logical peak of state-forming and legislative activity of the UCR[2].

According to the works of M. Hrushevsky, he and other UCR figures have long been captivated by the illusion of a federal connection with Bolshevik Russia, for which modern researchers blame them. However, Hrushevsky knew the political ideals and moods of the people better, understanding the real and complex circumstances of state formation. A study of the works of the scientist convinces that the Central Rada in the UPR and the Ukrainian National Rada in the West Ukrainian People's Republic began the history of national parliamentarism in the 20th century, and the Congress of the Working People in 1919 established a conciliar national representation. The works of the scientist confirm that the assertion of Soviet statehood in Ukraine and the proclamation of "sovereignty" of the Radas was never fulfilled in Soviet times. According to Hrushevsky's ideas, the parliament constitutes as the main factor in democratic state-building as a body of people's representation. Based on historical experience and traditions, the current constitutional reform in Ukraine has significantly expanded the scope of competence of the Verkhovna Rada of Ukraine, accelerated the process of decentralisation of public administration, the establishment and development of a parliamentary-presidential republic, the European model of the state.

1. MATERIALS AND METHODS

Researchers pay attention to the relevance of both Hrushevky's studies in general and the concepts of the "national idea", the constitutional construction of the UPR period, the organisation of the constitutional process in the work of a prominent statesman [1-9].

[1] (III) Universal of the Ukrainian Central Rada. (2017, November). Retrieved from http://gska2.rada.gov.ua/site/const/universal-3.html.

[2] Constitution of the Ukrainian People's Republic. (1918, April). Retrieved from https://zakon.rada.gov.ua/laws/show/n0002300-18#Text.

Without its study, it is impossible to investigate not only the history of the UPR, but also the history of Ukrainian statehood. Nowadays, Hrushevsky's works are referred to by legal scientists of various branches of law. In the context of this study, the publications of researchers on topical issues of constitutional reform in Ukraine are extremely important, which provides for continuity, taking into account the traditions and historical experience of the organisation and functioning of state power, conceptual foundations of constituent power [10-14]. The purpose of this article is a brief study of the the UCR Chairman's justification of the doctrine of constituent power, which seems very relevant in the context of the state and problems of the current constitutional reform in Ukraine. The methodological framework of the study of the constituent power of the Ukrainian people according to the historical intelligence of Hrushevsky is developed at the philosophical, general scientific, and special scientific levels. The study predominantly used the dialectical method, anthropological, axiological, and institutional approaches were used.

The dialectical method provided an opportunity to consider the establishment and development of the constituent power of the Ukrainian people and to identify the specific features of the formation of the state in Kyivan Rus. Axiological and institutional approaches allowed to consider such fundamental categories as "princely-druzhina system", "feudalism", "democracy", etc., which serve as the basis for building the constituent power of the Ukrainian people. General scientific methods of analysis and synthesis, induction and deduction contributed to the development of understanding of the constituent power of the Ukrainian people in the works of M. Hrushevsky, provided an opportunity to investigate the state system and identify the forms of government. The basis of special scientific research of the constituent power of the Ukrainian people in the works of Hrushevsky were historical legal and comparative legal methods. The comparative legal method is of particular importance for this study in the current conditions of the rule of law. Based on the comparative legal method of study of the constituent power of the Ukrainian people according to M. Hrushevsky, it is concluded that the supremacy of the people and its constituent power was definitive in the state formation.

2. RESULTS AND DISCUSSION

For Hrushevsky, constituent power is primary to other powers. As a historian, he noted the millennial traditions of public self-government rooted in the Ukrainian people. It existed in the social, pre-state life of the Slavic tribes [15]. According to the scientist, with the formation of the state in Kyivan Rus, "the princely-druzhina system did not go deep into the mass of the people, it was not adopted as a whole system, as Western feudalism, it did not take deep root, remaining something superficial, quite loosely attached to the people. The community remained the complete master of its lands, its affairs, and only in the more important affairs faced the princely system" [16]. The Russian-Ukrainian community was imbued with the spirit of democracy, equality, and autocracy.

Interestingly, Hrushevsky, like other leading Ukrainian and Russian political scientists of the second half of the 19th – early 20th century, refusing to interpret the form of government in Kyivan Rus as a "feudal monarchy", began to distinguish three bodies of supreme power – the prince, the boyar council, and the veche [17] or only two bodies – the prince and the veche [18-20]. M. Hrushevsky was less categorical in his

conclusions. Thus, "in moments of respect the Veche acted as a true sovereign" [21], but in the conditions of Kyiv centralisation (under Vladimir the Great, Yaroslav the Wise, Vladimir Monomakh – *V.Ye.*) it remained in the role of an emergency body and its supremacy was gained only in Novgorod, where "political self-government... brings the princely power to the background by a strong development of Veche's political functions, in other lands it shows its life weakly and rarely after the separation of land" [22]. This opinion of the scientist will later be developed by historians of law of the Ukrainian Free University in Prague – R. Lashchenko, S. Dnistrianskyi, M. Chubatyu, S. Fedoriv [23-26]. Thus, R. Lashchenko generally believed that "the Veche was the supreme people's body of power, it reflected the supreme will of the people". S. Dnistrianskyi went even further: "The Ukrainian state has a long history of parliamentarism, which begins with the existence of the Veche of the princely era, when the functioning of the latter gave the rule of the Kyiv princes the most democratic nature".

Thus, domestic historians, following Hrushevsky, called the veche people's assemblies as an extraordinary body of direct democracy the form of exercise of constituent power by the people of the Kyivan Rus era. This body had a wide competence of "summoning" princes. M.S. Hrushevsky counted that in the time between the rule of Yaroslav the Wise and the Mongol campaign, there were about fifty changes of princes on the Kyiv "table", which were based on the decisions of the council. They concluded a "riad" (agreement) with the prince or, as the chronicles show, a decision was made not to accept or expel the prince, sometimes – to try him, to resolve the issue of war and peace, to organise the people's militia, etc. The Veche's constituent power was recognised as primary to other authorities in the Kyiv state. With the beginning of the fragmentation of Rus, according to Hrushevsky, "the further development of princely power, the princely-druzhina element generally stopped; the community gains greater influence, greater presence in resolution of political affairs" [16].

In Galicia and Volhynia in the 12th-13th centuries, according to the chronicles, the Veche manifested itself quite rarely, it lost its significance as an organ of direct democracy. M.S. Hrushevsky noted: in Volhynia the druzhina and boyars reached a significant development. Even in Galicia, the political significance of the community was insignificant. In most cases, it considered the issues raised by princes and boyars, seeking approval of their proposals [27]. Summing up his reflections on the Veche as a body of "democracy", Hrushevsky wrote: "in general, the Veche considers itself entitled to interfere in all spheres of political life, organisation or management of the lands, and such right in this respect is recognised for it and the princes. But, having made an amendment, ...the Veche returned the current management to its usual owners". It was "a correction of the princely-druzhina management, but it did not engage in the ruling itself" [21]. In its customary law, the community valued natural rights, was "imbued with the spirit of democracy, equality, autocracy!" [16] Thus, in cases of exercise of its constituent power, when required by the political life of the state, this constituent power combined the exclusive rights of the people, both natural and secured by the "riad" with the princes.

As a historian, M.S. Hrushevsky condemned attempts in Russian historiography to create a separate "Russian" history, "the history of Russian law". According to the scientist, "it is impossible to include the Kyiv state in the history of the Great Russian people", "the genealogy of the Moscow dynasty" of the Russian tsars. "Sewing the Kyiv

state to the beginning of the state and cultural life of the Great Russian people "creates an eclectic nature of "Russian history" [16]. The transition of Ukrainian lands under the supremacy of the Grand Duke of Lithuania, according to Hrushevsky, did not bring significant changes in power structures, and the traditions of state life of Kyivan Rus and Principality of Galicia–Volhynia were adopted along with their legal provisions, becoming the Lithuanian-Russian state. Ukrainian lands remained autonomous, because the Grand Duke, according to the chronicle, "entered into friendship" with local feudal lords, consolidated by the traditional "riad" [28]. At the end of the 15th century, the Lithuanian Council of Lords became the estate-representative body of power in the Grand Duchy of Lithuania, which grew out of the advisory boyar council under the Grand Duke. According to the Lithuanian Statute of 1529[1], the Grand Duke undertook "not to diminish the lords in anything, observe all the old decrees, and agree the new ones with the lords". Other subjects of the Duchy had no representation until it the Lithuanian Sejm was formed in the 15th century, and in 1565 their lower echelon was formed – powiat sejmiks [29].

Hrushevsky connected their origin with the veche tradition, the social life of communities in Russia. In his opinion, the transition of Russian lands under the rule of the Grand Ducal governors had little effect on their self-government. "Princes, boyars, burghers in the affairs of the locals have long gathered in the veche" [30]. Measures to unite the Grand Duchy of Lithuania, strengthen centralised government and rapprochement with the Kingdom of Poland influenced the transformation of the veches of the main cities of the lands into representative bodies – the sejmiks. They also began to elect ambassadors to the "great" seims, to discuss and decide local affairs, to determine the amount and timing of payment of monetary and in-kind taxes, to draw up "decrees", letters to the Grand Duke, etc. Hrushevsky noted that zemstvo and powiat sejmiks also "created an appellate instance for local courts".

According to the representation, composition, competence and procedure, the national seims in the United Commonwealth of the Kingdom of Poland and the Grand Duchy of Lithuania in the 16th century became a real legislative body, where both Ukrainian magnates and nobility gained parliamentary experience [31]. With the formation of the united Rzeczpospolita in 1569, its parliamentary system (the bicameral sejm of the embassy and senate, the nobility zemstvo and powiat sejmiks) exercised the powers of the constituent, legislative power, and other parliamentary functions. The main fighters for the rights of the Ukrainian people, according to Hrushevsky, were Ukrainian ambassadors to the Sejm – representatives of the Volhynia, Bratslav, Kyiv, and other lands of the nobility [21]. However, the strengthening of the policy of Catholicisation and Polonisation, economic oppression in the Ukrainian lands brought closer the National Liberation War of the Ukrainian people, the revival of its statehood and its constituent power. Even in the Polish-Lithuanian era, the Cossacks became the main subject of preservation and transformation of veche forms of democracy, development of democratic traditions of the Ukrainian people, protection of their customary rights and freedoms. From the second half of the 16th century, its main centre was Zaporozhian Sich, where the Cossack self-government operates with its highest body – the General

[1] Statutes of the Grand Duchy of Lithuania. (1529). Retrieved from: https://chtyvo.org.ua/authors/Pankov_Anatolii/Statuty_Velykoho_kniazivstva_Lytovskoho_Tom_I_Statut_Velykoho_kniazivstva_Lytovskoho_1529_roku/

Military Council. It will begin the genesis of the highest legislative body of the Ukrainian Cossack state during the Liberation War of the mid-17th century. According to Hrushevsky, "the military council strongly resembles the old Ukrainian veche" [30]. From the very beginning of the existence of the Cossack councils (on the general military, regimental, and company levels) there were two "circles" – the council of the prosperous class of Cossacks or, as Hrushevsky called it, the "closer council", and the general council. The former often preceded the latter and offered its decision to the general council. With the victory of the National Liberation Revolution, the General Cossack Council became the highest authority of the Cossack Republic. It acquired the importance of the body of exercise of the sovereign power of the people. The Polish king stated: in Ukraine "all control, all power belongs to the Cossacks, they appropriate jurisdiction, establish laws". M. Hrushevsky cited the content of the letters of the Polish voivode to B. Khmelnytsky and the king, which conveyed the fears of Polish magnates and nobility caused by the Cossack state formation [32].

With the beginning of the Liberation War and the growth in the Cossack army, the increasing presence of the representatives of the peasantry, the bourgeoisie, and the clergy in the General Councils, the councils acquired national significance and a certain representation. Thus, Hrushevsky wrote about the "Ukrainian Sejm", the "Kyiv Congress" in February-March 1650, provided information about the preparation of the Chyhyryn General Council in 1652: the hetman sent letters to all colonels, osavuls, centurions, and all Cossacks "officials", so that they would come to him "for counsel", to the "General Sejm". The above mentioned "closer council", which apparently set the agenda and the norm of representation at the Chyhyryn Council, took place on Palm Sunday, and the "Great Council" – on Easter. The norm of representation at the convened General Council was established each time by the Hetman and the "closer council".

In contrast to the previous several thousand strong General Councils, the Pereyaslav Council of 1654 had a rather modest representation. If, according to the Russian voivode V. Buturlin, it was a "meeting of the entire people", "a large number of all ranks of people, Cossacks, and burghers", then M. Hrushevsky clarified: the Council was attended by about 200 people from the army, about half of them were regiments officers and Cossacks, the other – centurions, not counting the burghers [32]. Researchers and historians have established that there were about 300 members of the Pereyaslav council, together with the burghers, as it is known that the oath to the Russian tsar was then sworn by 284 people [33]. Thus, was this council "complete", i.e., legitimate for making a fateful decision for the Ukrainian people? As a rule, the lack of proper representation gave reason not to recognise the decisions of the General Council to those regiments whose Cossacks did not take part in it [21]. This pretext was used by the tsarist government not to recognise the validity of the decisions of individual General Councils.

Above all, the Cossack customary law referred to their competence constituent powers – election of the Hetman and the General Officer Staff (Hetmanate), sanctioning (adoption) of laws, such as the Charter "On the structure of the Zaporizhian Host" of 1648[1], conditions of the international agreements and unions, the organisation of military campaigns, control and, following the example of the Sejm of the Rzeczpospolita,

[1] State power in Ukraine during the liberation war of 1648-1654. (2020). Retrieved from https://ru.osvita.ua/vnz/reports/history/35751/

judicial functions. Recognised and permanent authority of the Cossack "circle" remained its control over the observance of Cossack rights and freedoms by the Hetman and the General Officer Staff. Decisions of the Cossack Council, especially the "black" councils convened on the initiative of the Cossacks themselves, as Hrushevsky notes, could be unpredictable and even dangerous for the Hetman's power. Thus, the lower Cossacks, dissatisfied with the terms of the Treaty of Zboriv, proclaimed Khudoliy their Hetman at the general meeting, which forced B. Khmelnytsky to resort to severe measures against the arbitrariness of the Cossacks [32].

A characteristic shortcoming of the procedure of the General Councils, according to Hrushevsky, was the lack of established representation, ochlocratic habits of the Cossack "circle", especially the "black" councils, which took place "among the noise and fury" [21]. Even during the times of Khmelnytsky, instead of convening the General Council, "ordinary officers' congresses" began to be convened by the hetman. "The competition of the Military Council with the closer council transformed into the struggle of the Cossack demos against the officers' oligarchy". It tried to seize the fate of the Hetman's government, removing or weakening the electoral system, the Cossack democracy, violating the sovereign will of the people [21]. The lack of legally regulated composition, competences and procedures of the General, regiment, and company Cossack councils gave grounds to the tsarist government to take over the right to allow or prohibit their convening, recognition or non-recognition of their decisions. After the death of B. Khmelnytsky, their constituent function was reduced mainly to the approval of the candidacies of the Hetman and General Officer Staff proposed by the tsarist government officials. The incomplete parliamentary development of the General Council and the Officers' Council was a consequence of many aspects, first of all, of the almost continuous war, the policy of autocratic Russia in Ukraine.

After the liquidation of the reign of hetmans by the tsarist government of Russia, the "Ukrainian idea", according to Hrushevsky, was most fruitfully developed by the founders and ideologues of the Cyril and Methodius Brotherhood. It "is important that here, for the first time, we see attempts to theoretically formulate the Ukrainian idea in the political and social spheres in the spirit of progress and freedom" [21]. The state and legal opinions of Cyril and Methodius Brotherhood members had a significant impact on the civil movement of the Ukrainian intelligentsia, who initiated Ukrainophilism, began to develop ideas of human and civil rights, democratic republic and federalism.

Influenced by the ideas of the Great French Revolution and the warm wave of the "spring of nations" in 1848 in Europe, with the adoption of the constitution in Austria and the establishment of the Reichstag, Western Ukrainians in Galicia, Bukovina, and Transcarpathia began to gain parliamentary experience, establish political parties and defend their political and economic rights. M. Hrushevsky, despite the intense scientific work, is deeply concerned about the fate of his people, political and electoral battles in Galicia, the matter of Ukrainian representation in the Austro-Hungarian Parliament and regional parliaments. In a series of journalistic articles (Galician Sejm, On Elections, Nasha Politika, etc.), he analysed and aptly characterised the shortcomings and "pressure points" of the electoral process, exposed the unfair "geometry" of constituencies in agreement with the Polish minority, administrative interference in the election process, "negligence of public control" over parliamentary activities by elected ambassadors, their

unprincipledness, ignoring the subject of the constituent power, etc. [16; 35; 36]. Hrushevsky concluded: "The current electoral system must be broken in the interests of parliamentarism" and noted that this experience will "renew Ukrainian parliamentary policy and give it a new scope and strength".

The first Russian revolution of 1905-1907 became a wake-up call for Ukrainians, and with the establishment of the State Duma, "the society went further and further in its critique of the modern regime and restructuring projects", it was for the first time given, albeit limited, the opportunity to fight for public administration and legislation, as Hrushevsky wrote in the article "The Constitutional Question and Ukrainianness in Russia" [16]. It made provision for the establishment of parliamentary government and decentralisation of the Russian state, granting the regions national or territorial autonomy, a clear definition of the status and powers of the federation, including Ukraine. Hrushevsky's constitutional draft stipulated three levels of self-government and organisation of representation: “community self-government; elected councils of smaller districts (volosts) and councils of wider districts (powiats) sent by them; regional sejms and the central parliament elected by them". Such a system of representation would be more effective in protecting country-wide and national interests: the sovereign right of the people should establish rules for the coexistence of community members within the state and determine the principles on which the government should operate. The scientist has repeatedly noted that there is only one, and also the simplest and most rational way – the broad decentralisation of the state and the organisation of self-government in national territories [2]. He came to the conclusion: "without the transformation of Russia into a free union of peoples, its complete renewal is inconceivable". M. Hrushevsky’s words about the State Duma of Russia: “the current parliament is only a rehearsal, after which a true play will begin”, have acquired a prophetic meaning. The February Revolution of 1917 in Russia and the fall of the autocracy, the beginning of the National Liberation Revolution in Ukraine naturally led to the formation of a socio-political centre – the Central Rada. Returning from exile to Kyiv, on March 19, 1917, M. Hrushevsky spoke in Ukrainian veche about the prospects of "free political work", the establishment of democracy and democratic autonomy as part of the future Russian Federal Republic [37].

The All-Ukrainian National Congress, convened by the Central Rada on April 5-7, 1917, joined its membership, elected M. Hrushevsky the Chairman of the UCR, legitimised its national, social, and party representation, and laid the legal foundations for the "revolutionary parliament". The head of the UCR was fully aware of the need to transform it into a full-fledged "national parliament" through the establishment of universal suffrage and territorial elections [38]. M. Hrushevsky's immediate task was to organise local committees, where they had not then existed, a network of county, city, and provincial councils to hold elections to the national parliament. Such territorial bodies were supposed to promote the representation not only of Ukrainian citizenship but also of national minorities. The formation of a strong democratic system was a "great cause". In the "Report on the state system of Ukraine based on the requirements of life and the theory of state law" at the Congress of Ukrainian Lawyers in June 1917, the Chairman of the UCR emphasised: the Ukrainian people have long lived a state life, the thread of state life was never interrupted in Ukraine. The Treaty of Pereyaslav united two independent states. He spoke again about the need for autonomy of Ukraine as part of federal Russia based on full equality of peoples, including national minorities [38]. He would continue developing

these federal illusions at the Congress of Peoples in Kyiv on September 10, 1917: "For all the people of Ukraine, federalism is not a transitional stage to state independence! On the contrary, for us, Ukrainians, state independence is not ahead, but behind us… We do not consider the federation as a path to independence, but as a path… to the federation of Europe and further to the federation of the entire world" [38]. In his draft Constitution, he noted that the supreme right belongs to the Ukrainian people, which would be implemented in a democratic republic through the National Assembly of Ukraine as part of the Federal Russian Republic [38].

Activists of the Central Rada did not abandon the prospect of federal ties with Bolshevik Russia and the proclamation of the Ukrainian People's Republic in the III Universal[1], readiness to "save Russia". Only the "Bolshevik invasion" forced the UCR to adopt the IV Universal, to proclaim the independence and autonomy of the free, sovereign state of the Ukrainian people. M. Hrushevsky believed that the proclamation of the independence of the Ukrainian People's Republic did not conflict "the traditional idea of federalism, leaving this matter to the Ukrainian Constituent Assembly", and imposed great responsibility on Ukrainian democracy. Hrushevsky believe that the Ukrainian people had to reject the illusion of a "united front", the solidarity of the peoples of the former Russian state, as it was slowing down, disorganising Ukrainians' efforts [38]. Later, in 1919, in the work "Separate Ukraine" he came to the conclusion: "Federalism was compromised by the fighters for a united Russia… Further, there can be no question of any obligation for Ukrainians to federate invariably within the former Russian state. … All-Russian convention of regions from "Moldavians" to "Finns" has gone down in history and no one is obliged to bring it back to life [37]. However, a year later, in the conditions of the victory of the Soviet government in Ukraine, in the work "Ukrainian Party of Socialists-Revolutionaries and its tasks", Hrushevsky approved the Soviet form of the federation of socialist republics [39]. The beliefs of the socialist-revolutionary prevailed in the political opinions of the scientist. Modern researchers blame the Ukrainian historian for his federalism: for him, "the idea of federalism has always been dominant" [40], "Hrushevsky and his followers in 1917-1918 found themselves not at the level of challenges of book history, but a real one", "tradition of Drahomanov-Hrushevsky parted ways with the real needs of the Ukrainian national liberation movement", "in the political heritage of a great scientist and a meager politician" [9].

As a contemporary and an activist, M. Hrushevsky knew challenges and the real needs of the national liberation movement, political sentiments, and ideals of the people better than current critics. He was fully aware: "One cannot make the same law for Siberia and Ukraine" [37]. For him, federalism was a step towards an independent Ukrainian statehood, which he associated with the decentralisation of Russia, its transformation into a federal, democratic state [41]. In the conditions of the First World War and Civil War, the aggressive policy of Bolshevik Russia, these hopes and expectations could not be fulfilled. V. Vynnychenko also testified to the practical calculations of the Central Rada: "To think that this connection will be broken in the near future would be a simple, unnecessary dream, and not a real political analysis. On the other hand, independence is also impossible due to the international situation…" [42].

[1] (III) Universal of the Ukrainian Central Rada. (2017, November). Retrieved from http://gska2.rada.gov.ua/site/const/universal-3.html

CONCLUSIONS

The proclamation of the independence of the Ukrainian People's Republic demanded the constitutional consolidation of its new status. The Constitutional Commission of the UCR, with the participation of M. Hrushevsky, prepared and promulgated the draft Constitution on December 10, 1917, finalised and adopted it at the last meeting of the Central Rada on April 29, 1918. "Charter on the state system, rights and freedoms of the UPR" defined in the UPR the affiliation of the sovereign right to the people, which it exercises through the National Assembly. Ukraine was proclaimed a sovereign democratic republic where citizens are guaranteed broad rights and freedoms. In the future parliamentary republic, the principle of separation of powers was to apply: "Ukrainian National Assembly, which directly exercises the highest legislative power and forms the highest executive and judicial power of the Republic of Ukraine". The Constitution of the Ukrainian People's Republic was an act of exercise of the constituent power of the people, its sovereignty.

Determinant in state formation for M. Hrushevsky was the supremacy of the people, its constituent power. State power – "only by choice of the people! This is called a democratic system – so that the people rule by themselves". In the pamphlet "On the Brink of New Ukraine", as its foundations laid down by UCR legislation, he saw "a raised general material standard of living" of the people, spiritual culture, "a certain moral rigor… absolutely necessary for success, development, and firmness of democracy... Only when the state, the community will become more than an empty word, but a real centre of thought and will, the object of worship, religion, as it was for the ancient Greeks or Romans; only then the Great Ukraine will be built".

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Suggested Citation: Ermolaev, V.M. (2020). M. Hrushevsky on the constituent power of the Ukrainian people. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 16-28.

Submitted: 16/08/2020
Revised: 20/10/2020
Accepted: 09/12/2020

УДК 348.97
DOI: 10.37635/jnalsu.27(4).2020.29-42

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КОРАН В ШИЇТСЬКІЙ ЮРИСПРУДЕНЦІЇ

Анотація. *Коран є фундаментальною основою ісламської релігії і права та містить одкровення Аллаха Пророку Мухаммеду, тому вважається Словом Божим. З юридичної точки зору Коран має найвищу юридичну силу і будь-які інші джерела ісламського права, що суперечать Корану, є недійсними. Ісламське право представлено сунітським та шиїтським напрямами, кожен з яких містить власні правові доктрини та мазхаби (правові школи). Автори вбачаютьо серйозний недолік у вітчизняних дослідженнях ісламського права через відсутність досліджень шиїтської правової доктрини. Мета даної праці полягає у розкритті значення і ролі Корану в шиїтській юриспруденції. Тому задля досягнення поставленої мети була розглянута історія складання Корану. Оскільки Коран є основним джерелом права для обох напрямів, в цій статті було досліджено специфіку тлумачення Корану в шиїтській правовій доктрині. У цій роботі, використовуючи порівняльно-правовий метод, автори змогли порівняти відмінності в тлумаченні Корану між сунітськими та шиїтськими екзегетами. В наш час ісламське право переважно реалізується через фетви муджтахидів. Для досягнення цього рівня одними з необхідним умов є знання арабської мови, знання тафсирів і тавіля, знання скасованих та скасовуючих аятів, історії ниспослання аятів. Саме ці аспекти і будуть розглянуті в статті з наведенням їх короткої характеристики. В роботі особливу увагу приділено джерелам тлумачення Корану відповідно до правил шиїтської екзегези. Встановлено, що шиїтські екзегети визнають 6 джерел тлумачення. Однак перекладачі сунітів використовують більш широке коло джерел, включаючи методи аналогії та переваг. Ці самі методи частково визнаються шиїтами і можуть бути частиною такого методу як причина. Оскільки шиїтські правознавці не дозволяють використовувати особисту думку при прийнятті юридичних рішень, очевидно, що використання методів, заснованих на особистій думці, буде заборонено при тлумаченні Корану. Саме тому в шиїтській юриспруденції так багато уваги приділяється раціональним методам.*

Ключові слова: Коран, ісламське право, шиїтське право, тафсир, екзегеза.

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THE QURAN IN SHIA JURISPRUDENCE

Abstract. *The Qur'an is the cornerstone of the Islamic religion and law and contains the revelation of Allah to the Prophet Muhammad; therefore, it is considered the Word of God. From a legal standpoint, the Qur'an has the highest legal force and any other sources of Islamic law that contradict the Qur'an are invalid. Islamic law is represented by Sunni and Shiite schools, each of which contains its individual legal doctrines and madhhabs (legal schools). The authors see a serious shortcoming in Ukrainian studies of Islamic law due to the lack of research on Shiite legal doctrine. The purpose of this study is to cover the meaning and role of the Qur'an in Shiite jurisprudence. Therefore, to achieve this purpose, the history of the compilation of the Qur'an was investigated. Since the Qur'an is the main source of law for both directions, this study examines the specifics of the interpretation of the Qur'an in Shiite legal doctrine. In this study, using a comparative legal method, the authors were compared the differences in the interpretation of the Qur'an between Sunni and Shiite exegetes. Nowadays, Islamic law is mainly realised through fatwas of mujtahids. To achieve this level, one of the necessary conditions is knowledge of the Arabic language, knowledge of tafsirs and Tawil, knowledge of the cancelled and abolishing ayats, the history of the sending down the ayats. These aspects will be considered in the study with a brief description. Particular attention was paid to the sources of interpretation of the Qur'an in accordance with the rules of Shiite exegesis. The study pays special attention to the sources of interpretation of the Qur'an in accordance with the rules of Shiite exegesis. It is established that Shiite exegetes recognise 6 sources of interpretation. However, Sunni translators use a wider range of sources, including methods of analogy and preference. These same methods are partially recognised by Shiites and may be part of such a method as a cause. Since Shiite jurists do not allow the use of personal opinion in legal decisions, it is clear that the use of methods based on personal opinion will be prohibited in the interpretation of the Qur'an. That is why so much attention is paid to rational methods in Shiite jurisprudence.*

Keywords: Quran; Islamic law, Shia law; tafsir; exegesis.

INTRODUCTION

The Quran is the fundamental foundation of the Islamic religion and law and contains the revelation of Allah to the Prophet Muhammad, so it is considered the Word of God. Given the Quran's importance for Islamic law, it becomes clear why a large number of

works are devoted to the subject of the Quran. In domestic science, H. Behruz, D. Lukianov, M. Lubska studied the legal features of the Quran, but they studied the Quran and its specifics from a Sunni point of view. Among foreign scholars of the Quran in Shiism, M. Momen, N. Calder can be noted [1]. But they viewed the exegesis of the Qur'an primarily in accordance with the achievements of non-Muslim scholarship. At the same time, the Shia exegetes of the Qur'an themselves identify the following six basic directions in this area: the foundations of interpretation, rules of interpretation, sources of interpretation, auxiliary sciences, the qualities of a commentator and the method of interpretation itself. The basics of interpretation include such problems as the inimitableness of the Quran and its various aspects, non-distortion of the Quran, the ability to penetrate into the plan of Allah, as well as the language of the Quran. The rules of interpretation include a set of principles that the commentator of the Qur'an must follow. The rules, in particular, include: establishing the meaning of a word in the era of the sending of the Quran, taking into account all meanings of the word, addressing various types of context, etc. Sources of interpretation provide us with such knowledge on certain issues related to the teachings of the Quran, which helps the commentator to better and more accurately understand certain Quranic verses – for example, legends and historical information. The auxiliary sciences mainly include philological sciences (etymology, lexicology, etc.). When analyzing the qualities of a commentator, the intellectual and moral abilities of the commentator are considered, as well as his qualifications and other factors that play a role in the process of interpreting the Quran. By the actual method of interpretation, we mean the presentation of the various stages through which the commentator goes to understand what Allah wanted to say [2]. In this paper, we have combined the achievements of non-Muslim and Muslim exegetes by examining the main aspects of the interpretation of the Quran.

From a legal point of view, the Quran has the highest legal force and any other sources of Islamic law that contradict the Quran are invalid. But the Quran is not a purely legal book, so its components, which contain legal norms and are called ayahs (verses) al-ahkam, will be considered by us in more detail.

Islamic law is represented by Sunni and Shia directions, each of which contains its own legal doctrines and madhhabs (legal schools). We see a serious shortcoming in domestic studies of Islamic law due to the lack of research on Shia legal doctrine. Since the Quran is the main source of law for both directions, the aim of this article is to examine the specifics of the interpretation of the Quran in Shia legal doctrine.

1. MATERIALS AND METHODS

There are almost no works in domestic legal science devoted directly to the Shia jurisprudence. Therefore, the works of foreign authors such a Mohammad Kazem Shaker, Ali Akbar Babai, Ali Akbar Velayati, Sayyid Muhammad Bakir Khujati and others were used in writing the paper.

During the research, we used the following methods:

1. Historical – the works of Shia scholars from different times were processed, which could contain valuable information about the Shiite specifics of the interpretation of the Quran. The verses of the Quran were revealed in connection with certain events in the life of the Prophet and historical events, therefore, the biographical method was also

used. The second method was used when studying historical facts from the life of the Prophet, imams, companions and their characteristics. The historical method was used in accordance with the criteria given by Dubber, namely a critical analysis of the events in question [3];

2. Axiological – the value of the Quran was determined, its significance for the development of Shia jurisprudence and Islamic jurisprudence in general. It is through the use of this approach that the opportunity arises to emphasize the ability of the Quran to serve as the basis for the formation of Islamic law. The value of the Quran is unique since the fact of recognition of the Quran is mandatory for all Muslim directions. In both Sunnism and Shiism, the Quran is the main value that the Prophet left behind to humanity;

3. Hermeneutic – the specifics of the interpretation of the main primary source of Islamic law were investigated. In general, the study of Islamic law, and even more so the specifics of the interpretation of the Scriptures, is impossible without the hermeneutic method. When applying the hermeneutic approach, it is possible with the help of metaphors to discover and reveal the true meaning of many provisions of the Quran. Indeed, according to Islamic theology, everything that takes place in Islam as a religion, civilization and law originates precisely in the Quran. In the Quran, as in other sacred scriptures, the basic principles and patterns of everything related to nature, society and man are laid down. Naturally, to understand the true meaning of this capacious, fundamental, theological phenomenon, it is necessary to use all the achievements that modern hermeneutics has at its disposal. Only this approach allows us to understand the true meaning of words, terms, metaphors, through which the basic tenets of Islam are transmitted, including its legal component [4]. It is possible in all cases to refer to all the prescriptions of the Quran and Sunnah, but they become law only when they receive a legal interpretation;

4. Comparative legal – we consider it necessary to draw attention to the importance of research on Islamic law. The methods of comparative jurisprudence should be used not only in the study of various legal systems but also in the analysis of the structural elements of Islamic law as a systemic and complex phenomenon. That is, a significant part of researchers, analysing Islamic law, does it incorrectly, considering Islamic law as a whole. Thus, most researchers mainly analyse the features of only Sunni Islamic law, extending their conclusions to all Islamic law. That is why there are no studies on Shiite Islamic law in the domestic legal doctrine. In this paper, using the comparative legal method, we were able to compare the differences in the interpretation of the Quran between Sunni and Shiite exegetes. General trends were found in the development of Shiite jurisprudence and interpretation of the Quran in the main areas of Islamic law.

2. RESULTS AND DISCUSSION

2.1 Shia view of the "correction" of the Quran

In scientific and religious circles, there was a misconception that the Shiites did not recognize the Quran in its modern form [5]. The Shiites recognize the Quran, although, in fact, there were several Shia scholars who believed that the Quran contained the name Ali and these verses were removed, but most reputable Shiite scholars reject this position.

Thus, the famous modern Shia scholar the Grand Ayatollah Makarem Shirazi quotes the words of some leading Shia theologians: "Sheikh Saduk, an outstanding scholar of the 4th century AH (X century) wrote in the fact that the Quran which was sent to the Prophet of Islam (may Allah bless him and his family) is the same Quran that is in our hands today and consists of 114 surahs, without abbreviations or distortions...". Muhammad ibn Hussein, better known as Bahauddin Āmilī, said: "The truth is that the Holy Quran is protected from any kind of distortion. And the statement of people who say that the name Ali (peace be with him) was present in the Quran, but then was removed from him, for Shiite scholars-faqīhs is unacceptable. Everyone who cites hadith knows perfectly well that the Quran cannot be changed" [6]. At the same time, it cannot be denied that there are hadiths about that the imams from Ahl-Beit had some "other" Quran.

Therefore, we consider it necessary to consider this aspect of this issue in more detail. Consider the history of the compilation of the Quran. When the Prophet received revelations, he communicated it to his closest companions, who taught them by heart. The Messenger of Allah had many scribes who wrote down revelations for him and also read and wrote various correspondence. The most famous of them were Ali ibn Abu Talib, 'Uthman ibn Affan, Zayd bin Thabit and others [7]. It existed only orally, in the memory of a large number of Companions. During the time of Abu Bakr, many Companions who knew the Quran by heart died in the battle of Yamama, and Umar advised Abu Bakr to write the Quran. To carry out this responsible assignment, Abu Bakr chose the scribe of the Messenger of Allah, one of those who collected the Quran during the life of the Prophet – Zaid ibn Thabit al-Ansari [8]. Abu Bakr also gathered the hafizs (who has completely memorized the Quran), known for their precision and thoroughness. The best of them were Zaid, Abu ibn Kab, 'Uthman, Ali, Abdallah ibn Abbas, Abdallah ibn Umar, Abdallah ibn al-Zubair, Abdallah ibn Ma'sud, Abdallah ibn Saib, Khalid ibn al-Waleed, and other. All of them knew him by heart, and before starting to rewrite the entire Quran, they more than once consulted their memory to make sure that they remember it word for word [9]. After the Prophet and his close companions, the most knowledgeable in the Quran was Ali ibn Abu Talib – this fact is recognized by all researchers. However, none of his works on exegesis have survived to this day, with the exception of certain passages in the sermons and letters of the imam, collected in Nahj al-Balagha ("The Way of Eloquence"). After Ali ibn Abu Talib, according to the general belief, none of the companions knew the Quran better than Ibn Abbas. He was called Tarjuma al-Quran ("Interpreter of the Quran") and Khibru al-umma ("The Eternal of Community"). He himself admitted that a lot in understanding and commenting on the Quran, he borrowed from his mentor – Ali ibn Abu Talib [9].

During the time of the third caliph 'Uthman, when the readers dispersed to different areas of the Islamic State, disagreements arose between them regarding the reading of the Quran. Although the Quran was compiled, some verses were pronounced differently due to differences in dialects (of the Arabic language). Hudhayfah ibn al-Yaman drew 'Uthman's attention to this and said that such disagreements could lead to schism and wickedness. To avoid misunderstanding, 'Uthman decided that in all areas Muslims should read the Quran in only one dialect, the very one in which He was sent to the Prophet – the dialect of the Quraysh tribe. By the order of 'Uthman, six of the most authoritative reciters, among whom was Zaid ibn Thabit again, copied the entire Quran

from the book that had been previously compiled during the time of Abu Bakr and Umar, adapting it to reading only in the Quraysh dialect [8]. The Companions made several copies of such a Quran, after which they sent them to all corners of the Islamic State. It is this Quran that exists now, and in accordance with the Muslim doctrine, no changes were made to Him during this entire period. Shiites recognize this Quran because Ali was personally present when it was compiled. At the same time, even during the time of the Prophet's life, Divine revelation was recorded on tablets, paper, ram's shoulder blades or leather. The Messenger of Allah bequeathed to Ali that after he completes the ablution and all types of funeral rites of the Messenger, immediately begin collecting the Quran in one book (Mushaf – a scroll). In fact, all the revelations were systematized, and in this case, there was such a form of systematization as "consolidation". In accordance with the domestic legal doctrine, during consolidation, several normative acts that are similar in content are combined into a single consolidated normative legal act.

The collection of the Quran by Imam Ali took place as follows: The Imam made holes in the tablets and skin on which the Quran was written, then tied them with a dense thread. The Imam began to collect the Quran in one book on Wednesday morning (because all the funeral rites of the Messenger of Allah were completed on Tuesday night) and ends on Friday morning. Then Imam Ali, with the help of his servant Kanbar, brought the Quran to the mosque of the Messenger of Allah. In this Quran, in addition to the Quran itself, there was also an interpretation called "Wahi Bayyan" – "clarifying the revelations", starting from the period of the message of the ayahs and ending with the last one (that is, the interpretation of the verses was not in the order in which the Quran was concluded). In Tafsir Shahristani it is said that the representatives of the first caliph did not allow Ali to enter the mosque with this Quran, which is why Ali said that they had no right to get acquainted with this Quran (and its true interpretation, respectively). According to the Shia doctrine, they are with Imam Mahdi and this is the Quran, which is mentioned in the Shia hadiths [10]. Therefore, the "other" Quran, which was mentioned in Shia collections, is not a new Quran, as some researchers assert, but the Quran with "Wahi Bayyan" – the Sunnah of the Prophet, which correctly interprets the verses of the Quran.

The Quran is divided into 114 surahs. It is also divided into 30 Juz's, each of which consists of 2 Hizbs. The first is surah Al-Fatiha, the second is the largest surah Al-Bakara (286 verses), then the surahs in the Quran are arranged approximately in decreasing order of the number of verses. Seyid Muhammad Bakir Khujati wrote that according to the unanimous opinion of all Muslims, the order and arrangement of the verses in the surahs of the Quran were carried out in the direction of the Prophet himself. Every time Revelation came, he called one of the scribes and ordered him to place this or that ayah or ayah in such and such a place in such and such a surah. Khujati also noted that the existing sequence of verses and surahs in the Quran did not depend on the time of their ascent. However, this sequence in all surahs must be adhered to invariably. In support of his words, he cites many hadiths and here is one of them. Uthman ibn Abulyas said: "We were near the Prophet and suddenly noticed that he slowly lifted his eyes upward", focused his gaze on one point and said: "Now Jibril visited me", who brought the following verse: "Indeed, Allah commands to observe justice", to do kindness and bestowing gifts on relatives. "He orders to place the verse in this place of the surah" [11].

2.2 Analysis of various interpretations of the Quran

The process of formulating various prescriptions of the Quran shows that revelations came in the event of various social, moral or religious necessities, or when one of the Companions consulted with the Prophet Muhammad on various issues that had a great influence on the life of Muslims [12]. That is why the exegetes of the Quran point out that the verses of the Quran should be interpreted only in the context of the events about which they were sent. So, there is a big difference in the interpretation of some verses by Sunnis and Shiites on this criterion. N. Zeynalov in his work "40 stories of the Holy Quran" collected 40 ayahs, according to Shia theologians, related to Ahl-Beit (sinless members of the Prophet's family) and their followers. Consider one of these stories. It concerns the message of verse 55 of surah 5: "Indeed, your patron is only Allah, as well as His Messenger and the believers who stand prayer, and with bowing [during prayer] bring zakat (that is, give alms)". In connection with the circumstances of the message of this verse, they say that once a beggar came to the Prophet's mosque and began to beg. But no one served him.

Then Ali, performing at this time a bow to the waist, marked the beggar with his finger and gave him his ring. In honor of this alms, this ayah was sent and this story was described by ten companions, among them Ibn Abbas, Ammar, Abu Zarr, Bilal and others [13]. The Sunnis do not recognize this story as reliable and bring their own. Also, the interpretation of this ayah has a peculiarity that the Sunnis understand the meaning of the ayah differently, and its translation into English reads as follows: "Your ally is none but Allah and [therefore] His Messenger and those who have believed – those who establish prayer and give zakah, and they bow [in worship]" [14]. Therefore, in this aspect, one should pay attention to the fact that in order to correctly understand the Quran and make decisions based on it, Muslim Fakih must have a high level of command of Arabic. That is, only the Arabic version of the Quran is authentic; translations into other languages are relative and cannot convey the exact meaning of the verses of the Holy Quran, since each exegete can use his own methods. For example, there is a translation of the Quran into Ukrainian "Quran. Translation of meanings in Ukrainian", compiled by Mikhail Yakubovich [15].

The Quran was the Word of God, which means that only God could provide its interpretation since it is, He who is the "author" of this Book. The first interpreter of the Quran was the Prophet Muhammad. Shia theologians agree that God revealed to Muhammad and the Quran, and its interpretation, and appointed him the teacher of the Book (that is, that the Prophet should teach the people of the Quran), while the Prophet, in turn, appointed his descendants to continue this work after him. Numerous hadiths and historical works describe the knowledge of the imams. The Prophet and the imams are distinguished by the inheritance of divine knowledge, and only they know the full meaning of the Quran since it was addressed primarily to them, and through them to all of humanity. In addition, they possess all the scriptures of the previous prophets and knew Tafsir and Tawil (that is, the obvious and hidden meaning), despite the number of languages in which they are written. As such, the imams have a unique relationship to the Quran, giving the Shia Tafsir its unique character. It is also believed that the Quran,

which Ali wrote down under the dictation of Muhammad with his real exegesis, was passed from one imam to the next and is now with a hidden imam who will reveal it and judge by him when he returns as the expected Mahdi (this is the Mushaf Ali, which we mentioned above) [16]. Thus, we see that the Shiites saw proper competent interpreters in the faces of their imams, but the possibility of direct contact with them also ceased over time. Therefore, the authority to interpret Scripture fell on the shoulders of ordinary people-interpreters, who were not protected from sins, unlike the Prophet and the imams. The need to interpret the Quran led to the creation of a number of sciences or the involvement of existing ones, among which the main one is the science of Quranology, which studies the peculiarities of the internal composition of the Quran text, its content, linguistic and stylistic properties, as well as the history of the preparation of the Quranic text, its codification and interpretation. The key object of the study of this science is Tafsir – commentaries on the Quran, which in fact are interpretations of the Holy Scriptures.

When researching tafsir, one should pay attention to the concept of Tawil. Tafsir is concerned with the interpretation of the explicit meaning of the Quran, while the Tawil is mainly devoted to the study of the hidden meaning of the Quran and is regarded as its esoteric interpretation. Tawil is not widely used by Sunni scholars, but Shia (especially Ismaili) and Sufi exegetes have paid particular attention to esoteric interpretation. In verse 7 of surah 3 of the Quran, Tawil is presented as a literary interpretation, and Tawil of the Quran is esoteric knowledge that belongs to Allah and those who accept the wisdom of God and have solid knowledge. This type of Tawil is a method of interpretation that returns to zahir (visible meaning) of ayah his batin (hidden meaning) [17]. According to classical Ismaili opinion, the Language of God is eternal and the Quran in Arabic is a God-inspired work of the Prophet Muhammad, "the word of the Messenger of God," and it expresses the Language of God in human language. The exoteric or literal form of the Quran in the form of Arabic words was created in time and space by the Prophet Muhammad, while its spiritual essence emerges from the eternal Word of God into the soul of the Prophet. The Quran in Arabic is viewed by the Ismailis as a God-inspired discourse of signs (ayahs), symbols, parables and metaphors that represent and indicate the transcendent and immanent "Principle of Revelation" consisting of the spiritual world of the Universal Mind and the Universal Soul, a hierarchy of religious teachings on Earth, led by the Ismaili Imam and the physical Cosmos or natural world. From this point of view, the purpose of the Quran is to help believers in recognizing God through the recognition of spiritual, religious and natural hierarchies. The role of the God-backed imams and their representative teachers is to perform Tawil – to "decipher" the Quranic symbols, revealing the cosmic, religious and spiritual realities that they symbolize. The Ismaili Tawil thus emerges as a hermeneutic discourse that makes the Quranic symbols "transparent" in relation to their inner meaning, so that the reader can recognize the symbolization of reality with the help of these symbols [18-20]. When interpreting the Quran, it is impossible not to use the achievements of hermeneutic science, since the latter primarily arose for the interpretation of the scriptures of the Christian religion. But the first exegetes of the Quran did not have access to the achievements of that science, so they had to use their own methods. To get a more complete picture of the course of the interpretation process in the form as it was presented by Muslim jurists, let us consider it using the example

proposed by B. Weiss, where he considers part of ayah 38 of surah 5: "As for the thief, both male and female, cut off their hands". He wrote that usually jurists understand this prescription as the duty of the head of the Muslim state or his legal representative to punish the thief by cutting off the hand, but in fact, all parts of this prescription raise questions from the exeget.

Weiss considered each of the words of this verse, we will consider the meanings of "yad" – the standard translation of the Arabic word for "hand" ("hands"). The word "yad" had three possible meanings that had to be taken into account: it was believed that this word could mean that part of the upper limb that reaches the wrist (if you go from the fingers up), or that that reached the elbow, or the entire limb, up to the shoulder. In other words, this word could mean both the hand, and the forearm, and the whole arm. This means that the forearm and hand also include a hand. It should be considered that jurists, based on the presence of these three meanings, offered any other lexicographic information to confirm this position. Regardless of the availability of this information, the mujtahid was faced with the question of considering all the meanings properly and, therefore, to consider "yad" as a polysemous word, or to consider a word "yad" as an unambiguous word. In his attempts to choose the course he should follow, the mujtahid had to be guided by his "sense of language", which was usually based on familiarity with the "high" literary tradition. What happened when a person who is well acquainted with the language and, therefore, is its bearer heard the word "yad"? Did all three meanings appear in his consciousness at the same time as equally possible, or is there only one of them in his consciousness, and the rest remained in the sphere of his consciousness only after some thought? Weiss believes that the answers to this question in different mujtahids will inevitably differ, and they will all have a serious impact on the interpretation process [21; 22]. It is impossible to disagree with this position, since, as it is known, in accordance with the position of the Sunni lawyers, the punishment for theft is the severing of the right hand, and according to the Shia – of four fingers of the right hand.

The ayah, which was analyzed by B. Weiss, belongs to the legally significant ayahs – the ayahs al-ahkam. They are legally significant from the point of view of Islamic law, and not from the "secular" understanding of law. In legal science, a large number of studies have been conducted on the issues of correlation law, religion (religious norms) and morality. In this aspect, we would like to draw attention to the Shia (and generally Islamic) view of the use of these categories. In this point, Muhammad Taki Misbah Yazdi writes that such a distinction cannot be considered acceptable in any religion, and from an Islamic point of view, religion is a system of theoretical knowledge and practical laws, and its practical laws cover all three areas: human attitude to God, attitude a person to himself and a person to others [23]. Obviously, from the point of view of modern legal science, the issue of rituals or ritual purity is not the subject of jurisprudence, but they are the subject of fiqh, that is, Islamic law. Therefore, when we say that the verses of al-ahkam contain legally significant norms, we mean those norms that are significant specifically for Islamic law.

H. Behruz provides a list of legal institutions (from a non-Muslim point of view), regulated by the Quran. He writes that the following verses of the Quran have legal norms: on marriage, polygamy, dowry, alimony, the rights and obligations of spouses, divorce and various methods of divorce, the period of abstinence after divorce, raising a child, contracts, loans, pledges, compensation for harm, oath, punishment for crimes,

will, inheritance, legal proceedings and so on. Abdali-Wahhab ibn Khallaf classified al-ahkam verses according to the criterion of the subject of regulation and received the following indicators: 70 verses on family law, 70 verses on civil law, 30 verses on criminal law, 13 verses on jurisprudence and procedure, 10 verses on state law, 25 verses on international law, 20 verses on the economic and financial structure and 50 verses on the sources of legal provisions in general [24]. Sunni scholars believe that half or a third of the Quran is al-Ahkam verses, while according to Shia scholars, their amount is about five hundred. Some of them are repeated, have a similar meaning, or are canceled, so their number in different authors is not the same.

Knowledge of the abrogated verses is very important and is necessary for a Shia jurist to attain the level of a mujtahid. It is known that the verses of the Quran were sent to the Prophet in connection with certain circumstances, so there are cases when due to new circumstances, there was a need to adapt to such changes, or for certain reasons Allah decided to change His own command, in connection with what, the Prophet received a verse that canceled the previous one. But despite its abolition, the verse remained an integral part of the Quran. Consider the example of verse 12 of Surah 58. Its text is as follows: "O you who have believed! If you are secretly talking to the Messenger, give alms before your secret conversation (to those who need it). So, it will be better for you and cleaner. But if you do not find anything, then Allah is Forgiving, Merciful". This verse was sent when a group of wealthy Muslims visited the Prophet to consult with him privately, not allowing the poor to do the same, and it offended the poor. Moreover, the Prophet was saddened by their pomp and that he sat there for too long. Thus, was sent this verse, which commanded the rich to pay alms to the poor before their private conversation with the Prophet. Many scholars point out that almost no one followed this rule, and most sources indicate that no one, except Ali himself, gave alms before meeting with the Prophet. Because people did not follow this, their disobedience was considered a sin, and to prevent this, Allah sent a verse in which he indicated that he forgave for this disobedience and that Muslims should focus on worship. This was the 13th verse of the same surah: "Were you afraid to give alms before your secret conversation? If you have not done so and Allah has accepted your repentance, then pray, pay zakat and obey Allah and His Messenger. Allah knows what you do" [25]. Thus, we have 2 verses, one of which was abolished by a newer (later) verse, but both of them are contained in the text of the Quran.

In terms of the peculiarities of the interpretation of the Quran, we consider it appropriate to consider the sources of interpretation of the Quran. Shia exegetes identified the following 6 sources of interpretation of the Quran as appropriate:

1. Quran. This follows from the statement that the Quran interprets itself. Almost all tafsirs referred to this source when one verse of the Quran was interpreted with the help of another verse.

2. Sunnah. In general, the Sunnah of the Prophet and the Imams consists of hadiths, and those hadiths that are used in the interpretation of the Holy Scriptures are called exegetical. These hadiths go back to the following personalities: Imam Sadiq (47%), Prophet (13.5%), Imam Baqir (13%), Imam Ali (7.4%), Imam Reza (3.2%), Imam Kazim (2.4%), Imam Husayn (1.1%), Imam Sajjad (1%), Ibn Abbas (1%), other imams, associates and followers (5.9%), unknown persons (4.5%) [26]. Exegetical hadiths are of the following types:

– hadiths that explain the meaning of individual words and connotations (total or total meaning of the word, both descriptive and emotional). For example, a hadith about various connotations of the word as-suht ("forbidden"): Imam Jafar al-Sadiq said: "The Commander of the faithful said: "The word as-sukht includes money for a killed animal, as well as a dog, and money given prostitutes and a bribe to a judge, and a reward for a soothsayer (sorcerer)" [27];

– hadiths that explain the meaning of the verses – these hadiths contribute to a better understanding of the verse. For example, one of the hadiths says that one of Imam Reza's companions asked about the meaning of the verse: "On that day they will be separated from their Lord by a veil" (83:15). The Imam said: "Indeed, Allah is great and holy, cannot be described by the place where He would be, so that He could be separated by a veil from His slaves. But He means that they will be separated by a veil from the reward from their Lord" [28];

– hadiths that reveal the hidden meaning of the verses – some verses of the Quran have an obvious meaning that can be grasped (external) and hidden (internal), the knowledge of which is known only to God and His elect. For example, the hadith: "It is narrated from the words of Daud ibn Jassas: "I heard Imam Jafar al-Sadiq (peace be upon him!) said: "[In the verse] "And landmarks. And by the stars they are [also] guided" the star is the Messenger of Allah (may Allah bless him and his family!), And marks are imams (peace be upon them!)" [27].

3. Lexicographic sources – these are the sources that help to better understand the meaning and scope of a word in the era of revelation [2]. The Quran and hadiths are considered to be because they help to establish the meaning of words (so they are sources of interpretation of the Quran in various aspects). Also, lexicographical sources of the Quran are monuments of the Arabic language of the era of the revelation of the Quran, utterances of the companions of the Prophet, dictionaries of the Arabic language and dictionaries of the Quranic vocabulary.

4. Historical sources are very important in the interpretation of the Quran, because the Quran itself describes historical events, such as the stories of previous prophets and certain aspects of the biography of the Prophet. It should also be borne in mind that the revelation of each verse was due to certain historical events (the battles of Badr, Uhud) or events that would affect the private life of the Prophet (his relationship with others or with members of his family).

5. Reason (meaning acl – intellect). In interpreting the Quran, the mind performs 4 functions:

– denial, critical – the evidence of reason does not accept the direct meaning of the verses of the Quran. For example, in the interpretation of the Quranic words "the Hand of Allah" denies the existence of God's hand, because God does not have the body and other characteristics of createds;

– confirmation – evidence of reason confirms or reinforces the meaning of the verse;

– analytical – the mind complements other sources, facilitating their application;

– logical – the mind reveals the logically necessary content of the verses [2]. The implementation of this function allows us to consider the Quran in perspective, adapting it to modern living conditions.

6. Data of practical experience – this includes the achievements of science, the specifics of natural phenomena, then or modern social conditions and others [2].

The source of interpretation of the Quran is also one of the criteria for classifying tafsirs.

CONCLUSIONS

The main aspects of Quranic studies in Shia doctrine were considered in this paper. Summarizing all the above, we present these main aspects. Shia theologians acknowledge the Quran in the form in which it has survived to the present day. The main difference is in the different interpretation of the Quran. The article discussed why Shia exegetes prefer to interpret the Quran not in the order of the verses, but in the order of their revelation. We also determined that from the point of view of non-religious law, the Quran is the result of the "consolidation" of revelations. Nowadays, Islamic law is mainly realized through fatwas of mujtahids. To achieve this level, one of the necessary conditions is knowledge of Arabic (the language of the revelation of the Quran), knowledge of tafsirs and Tawil, knowledge of the abolished and abolishing verses, the history of the revelation of the verses. These aspects were considered in the article, their brief description was given. Special attention was also paid to the sources of interpretation of the Quran in accordance with the rules of Shia exegesis. As you can see, Shiite exegetes recognize 6 sources of interpretation. In fact, Sunni interpreters use a wider range of sources, including methods of analogy and preference. Although these same methods can be partially recognized by the Shiites and be a part of such a method as reason. Since Shia jurists do not allow the use of personal opinion in making legal decisions, it is clear that the use of methods based on personal opinion will be prohibited in the interpretation of the Quran.

That is why so much attention is paid to rational methods in Shia jurisprudence. Thus, in this work, we examined the main features of the interpretation of the Quran in Shiite jurisprudence. Although this topic can be considered in more detail within the framework of a more voluminous study, including a detailed analysis of the methodology of the Shiite interpretation of the Quran using the example of specific surahs and verses.

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Suggested Citation: Lukianov, D.V., Ponomarova, H.P., & Tahiiev, A.S. (2020). The Quran in Shia Jurisprudence. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 29-42.

Submitted: 22/07/2020
Revised: 13/10/2020
Accepted: 25/11/2020

УДК 341.231.14
DOI: 10.37635/jnalsu.27(4).2020.43-52

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ЗАХИСТ ПРАВ ЛЮДИНИ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ З ТОЧКИ ЗОРУ МІЖНАРОДНОГО ПРАВА

Анотація. *Адміністративний судовий процес може вплинути практично на всі аспекти життя людини, такі як опіка, імміграція, соціальне забезпечення і житло. У той же час рішення державних органів не завжди є законними і відповідає міжнародно-правовим стандартам. В даний час можна констатувати глобалізацію адміністративного права, зокрема, адміністративного провадження. Актуальність досліджуваної проблеми зумовлена потребою в здійсненні аналізу тематики захисту прав людини в адміністративному судочинстві з точки зору міжнародного права, а також недостатньою теоретичною розробленістю даної тематики. З огляду на те, що міжнародне право впливає на верховенство права держав, в тому числі в адміністративному провадженні, було б доцільно проаналізувати міжнародно-правові акти у цій сфері. Мета статті полягає в аналізі джерел міжнародного права в сфері захисту прав людини в адміністративному судочинстві. При дослідженні проблематики були використані сукупність загальнонаукових та спеціальних методів пізнання, зокрема провідними методами були: метод системного аналізу; історико-правовий та порівняльно-правовий методи. У статті комплексно розглянуто питання захисту прав людини в адміністративному судочинстві з точки зору міжнародного права, зокрема на універсальному і регіональному, а саме в рамках Європейського правового простору. Встановлено, що органи державної влади відіграють ключову роль в демократичних суспільствах, а їх діяльність зачіпає права та інтереси фізичних і юридичних осіб. Практична значимість полягає в тому, що сформульовані в статті положення і висновки*

можуть бути використані в науково-дослідній сфері – для подальших досліджень загальнотеоретичних питань захисту прав людини в адміністративному судочинстві.

Ключові слова: глобальне адміністративне право, універсальні і регіональні міжнародні договори, практика Європейського суду.

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PROTECTION OF HUMAN RIGHTS IN ADMINISTRATIVE PROCEEDINGS FROM THE STANDPOINT OF INTERNATIONAL LAW

Abstract. *Administrative litigation can affect almost every aspect of a person's life, such as custody, immigration, welfare, and housing. At the same time, the decisions made by state authorities are not always legal and those that meet international legal standards. At present, it can be said that administrative law is becoming globalised, as well as, in particular, administrative proceedings. The relevance of the subject matter is conditioned by the necessity of analysing the topics of human rights protection in administrative proceedings from the standpoint of international law, as well as the insufficient theoretical development of this subject. Considering that international law has an impact on the rule of law of states, including in administrative proceedings, it would be appropriate to analyse international legal acts in this area. The purpose of the study is to analyse the sources of international law on human rights protection in administrative proceedings. Upon the study of the subject matter, a set of general scientific and special methods of cognition were used, in particular, the leading methods were as follows: the method of system analysis; historical legal method; comparative legal method. The study comprehensively considers the issue of protecting human rights in administrative proceedings from the standpoint of international law, in particular, on the universal and regional level, namely within the framework of the European legal space. It was established that the*

authorities have a key role in democratic societies and their activities affect the rights and interests of individuals and legal entities. The practical significance lies in that the provisions and conclusions formulated in the study can be used in the research area – for further research on general theoretical issues of protecting human rights in administrative proceedings.

Keywords: global administrative law, universal and regional international treaties, the practice of the European Court of Justice.

INTRODUCTION

"In a modern world complicated by globalisation, a person can exercise most of their rights only with the assistance or direct participation of public authorities in this" [1]. On the other hand, when individuals and legal entities interact with authorised government bodies, problems of human rights violations may arise. Administrative litigation can affect almost every aspect of a person's life, such as custody, immigration, welfare, and housing. At the same time, the decisions made by state authorities are not always legal and those that meet international legal standards.

"The historical conflict between the interests of the state and the citizen has led to an evolution of protecting human rights in law and in practice" [2]. Yu.S. Pedko defined the protection of the rights and freedoms of citizens from violations by state authorities, local government, and their officials as a strategic goal of administrative proceedings [3]. Therewith, "administrative court proceedings constitute an integral element of a more general system of human rights protection" [4]. Thus, "on the one hand, effective legal proceedings are the most important basis for the protection of human rights, and on the other hand, an important tool that improves the quality of administrative actions and ensures effective management" [5]. "The specificity of administrative proceedings is that any deviation from democratic or humanistic foundations can lead to a significant infringement of human rights, the interests of society and harm to the authority of the state" [6].

At present, it can be said that administrative law is becoming globalised, as well as, in particular, administrative proceedings. For example, B. Kormich means that "in a narrow meaning, global administrative law is associated with the development of certain universal requirements for the decision-making procedure within the global administrative space, forms autonomous legal regimes" [7]. Furthermore, the principles of administrative law have been adopted in key human rights instruments. The standards of administrative proceedings can be considered as an integral part of international standards of human rights and freedoms, since they are designed to ensure the effectiveness of judicial protection of human rights and freedoms in disputes with state authorities [8]. Thus, considering that international law has an impact on the rule of law of states, including in administrative proceedings, it would be appropriate to analyse international legal acts in this area.

Notably, having analysed the scientific articles of domestic and foreign scientists, the doctrine lacks comprehensive studies of the problems of protecting human rights in administrative proceedings from the standpoint of international law. Therewith, O. Radyshevskaya considered some of the international legal aspects of the impact of the globalisation on national administrative law. She noted that the concept of global administrative law arose to solve the problems of exercise and protection of human and civil rights in the public law sphere. Furthermore, scholars such as A. Pukhtetskaya,

B. Kormich [7] also studied the issues of global administrative law. E. Inshakova studied the issues of legal protection of the rights, freedoms and legitimate interests of citizens and organisations in administrative and other public legal relations [9]. M. Batalli studied the issue of increasing the efficiency of public administration through improving the system of administrative justice [5]. K. Kobylyansky investigated the human right to defence in an administrative court [6]. D. Poncet thoroughly analysed the functions of administrative procedures. Among the main functions, he distinguishes: (1) protection of personal dignity; (2) promotion of citizen participation; (3) increase in transparency and accountability; and (4) improvement of the rule of law. He also noted that administrative procedures contribute to the protection of the rights and interests of citizens, as well as, on the other hand, good governance and, therefore, the quality of final decisions.

The methodological framework of the study constitute a set of general scientific and special methods of cognition, the application of which is carried out within the framework of a systematic approach. Achievements of individual objectives of the study led to the use of the following methods: the historical legal method was applied when considering the evolution of administrative proceedings and the development of international legal provisions on human rights in administrative proceedings; comparative legal method – when comparing international legal provisions on the protection of human rights in administrative proceedings at the universal and regional level, within the framework of the European legal space; the method of systems analysis helped to comprehensively consider the issues of protecting human rights in administrative proceedings from the standpoint of international law.

1. ANALYSIS OF UNIVERSAL TREATIES ON PROTECTION OF HUMAN RIGHTS IN ADMINISTRATIVE PROCEEDINGS

The situation necessitates the establishment of mechanisms for monitoring the observance of human rights and the legality of actions/inaction of state authorities in public administration. Upon dealing with state authorities, it is very important for individuals and legal entities to be able to file a complaint and seek the renewal of violated rights from the state, local government, etc. These issues are dealt with by administrative proceedings, which "in general, makes provision for the activities of administrative courts for the purpose of considering and resolving public law cases" [10]. Importantly, the role of administrative justice is very important in the modern world, as it creates opportunities to guarantee the performance of everyday duties by officials in accordance with the laws [11]. Administrative litigation has played an important part in the struggle to restrict and establish judicial control over government action [12].

Administrative justice and human rights protection have similar goals. Firstly, they are both associated with the relations between the state and the individual. Secondly, administrative proceedings protect individuals and legal entities from illegal actions of representatives of state authorities, while human rights impose obligations on the state to respect and protect the rights and freedoms of people. Historically, "administrative justice" was formed in France when Napoleon Bonaparte created the Council of State in 1799. Councils of prefectures were soon established. By the law of 1872, the councils of the prefectures were given judicial powers, they were given the right to make judicial decisions. The decisions of the new courts, apart from influencing the legality of specific actions of the administration, gave rise to many provisions of administrative law" [13].

With the adoption by the UN General Assembly of the Universal Declaration of Human Rights[1] on December 10, 1948, civil, cultural, economic, political, and social rights were recognised. Therewith, Article 8 stipulates that everyone has the right to seek legal aid if their rights are not respected. This Article also provides for recourse to administrative remedies. It should be noted that although the Universal Declaration of Human Rights is not a legally binding instrument per se, since it was adopted by a General Assembly resolution, the principles it contains are currently considered legally binding on states as a custom of international law.

Articles 2 and 14 of the 1966 International Covenant on Civil and Political Rights[2] oblige states (a) to provide any person whose rights and freedoms are violated with an effective remedy, even if the violation was committed by persons acting in an official capacity; b) to ensure that the right to legal protection for any person claiming such protection is established by the competent judicial, administrative, or legislative authorities, or any other competent authority prescribed by the legal system of the state, and to develop judicial remedies; c) to ensure that remedies are applied by the competent authorities when they are provided; d) to ensure equality of all before the courts.

Therewith, in 2004, the Human Rights Committee, created to monitor the implementation of the International Covenant on Civil and Political Rights, noted that "the Committee attaches great importance to the fact that States parties establish appropriate judicial and administrative mechanisms to address complaints of violations of rights in domestic legislation"[3]. Furthermore, in 1998, the UN Committee on Economic, Social, and Cultural Affairs stressed that administrative remedies, not just remedies, are an important means of providing "effective remedies" to people whose rights are violated. "The right to an effective defence should not be interpreted as necessarily requiring a remedy. In many cases, administrative remedies will be sufficient, and those within the jurisdiction of the State party have a legitimate reason, based on the principle of good faith, to expect all administrative authorities to consider the requirements of the Covenant in making their decisions. Any such administrative remedies must be available, acceptable, timely, and effective"[4].

2. ANALYSIS OF REGIONAL TREATIES OF THE EUROPEAN LEGAL SPACE IN PROTECTION OF HUMAN RIGHTS IN ADMINISTRATIVE PROCEEDINGS

The issues of the protection of human rights in administrative proceedings within the Council of Europe were first raised on October 7-8, 2002 at the First Conference of the Heads of the Supreme Administrative Courts of Europe entitled "Opportunities and scope of judicial control over administrative decisions". As a result of the conference, conclusions were drawn up, which supported the creation of the Project Group from

[1]Universal Declaration of Human Rights. (1948, December). Retrieved from https://www.un.org/en/universal-declaration-human-rights/

[2]International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[3]General Comment No. 31. "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant". (2004, March). Retrieved from https://undocs.org/en/CCPR/C/21/Rev.1/Add.13

[4]Substantive issues arising in the implementation of the International covenant on economic, social and cultural rights. (1998, December). Retrieved from https://www.refworld.org/docid/47a7079d6.html

administrative law. It was also indicated that at the level of the European Convention on Human Rights and Fundamental Freedoms, general standards of judicial administrative procedure are enshrined in Article 13 and paragraph 1 of Article 6. Article 13 of the Convention establishes the right to an effective remedy "Everyone whose rights and freedoms... are violated, has the right to an effective remedy before a public authority, even if the violation was committed by persons acting in an official capacity"[1].

Later, the Committee of Ministers of the Council of Europe on protection of human rights in administrative proceedings adopted the following recommendations:

1. Recommendation of the Committee of Ministers to member states on the implementation of administrative and judicial decisions in the field of administrative law dated 2003[2].

2. Recommendation of the Committee of Ministers to member states on judicial review of administrative acts dated 2004[3].

3. Recommendation (2007) 7 of the Committee of Ministers to member states on good governance dated 2007[4].

In particular, the above documents stipulate the necessity of maintaining the confidence of individuals and legal entities in the administrative and judicial system. Furthermore, it is pointed out that effective judicial oversight of administrative acts to protect the rights and interests of individuals constitutes an essential element of the human rights protection system. Therewith, public authorities play a key role in democratic societies, and their activities affect the rights and interests of individuals and legal entities. Notably, when public authorities provide services to individuals and legal entities, as well as make decisions, they should act within a reasonable time.

In the 2001 case Kress v. France, the European Court of Human Rights noted that the very creation and existence of administrative courts can certainly be noted as one of the leading achievements of the state based on the rule of law[5]. Considering that the European Court of Human Rights has applied the Convention for the Protection of Human Rights and Fundamental Freedoms to protect individuals in their relations with the administration, it is necessary to analyse the practice of the Court in these matters. Although Article 6 refers to civil and criminal matters, it may appear that this Article does not cover the scope of administrative matters. But the practice of the European Court of Human Rights indicates that consideration of a case in another jurisdiction, in particular an administrative one, is not an obstacle to the recognition of the

[1]European Convention on Human Rights. (1950, November). Retrieved from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

[2]Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (2003, September). Retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805df14f

[3]Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts. (2004, December). Retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805db3f4

[4]Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration (2007, June). Retrieved from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d5bb1

[5]Judgment of The European Court of Human Rights No. 39594/98 "Case Kress v. France". (2001, June). Retrieved from https://www.menschenrechte.ac.at/orig/01_3/Kress.pdf

inadmissibility of the case under Article 6[1]. In general, the European Court of Human Rights has extended the scope of Paragraph 1 Article 6 to disputes between citizens and public authorities, in particular to:

1. Disputes on expropriation, cancellation of a building permit, land acquisition and, in general, decisions that violate the right to ownership.
2. Disputes regarding permits, licenses, including those necessary for conducting a certain type of economic or professional activity.
3. Disputes regarding contributions under the social security programme.
4. Disputes between civil servants and the state.

In accordance with the provisions of Articles 6 and 13 of the Convention, the system of European standards of administrative proceedings can be described as comprising the following elements: 1) the right to consider the case by a court established based on the law; 2) independence and impartiality of the court, transparency, and publicity in the consideration of the case; 3) a fair trial; 4) reasonable terms for the consideration of the case; 5) the obligation to comply with the judgement [8]. One example of a dispute between citizens and state bodies can be the case of Karelin v. Russia dated 2016. The European Court of Human Rights held unanimously that there had been a violation of Article 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. In the case, it was recognised that the absence of an accusing party in a trial for an administrative offence means a violation of the right to a fair and impartial trial.

At the 1990 Copenhagen Meeting, for the first time, OSCE Member States committed themselves to providing effective remedies against administrative decisions[3]. Also at this meeting, they drew up a list of "elements of justice" that are essential to fully express the inherent dignity of the human person and the equal and inalienable rights of all people. Therewith, one of the components of "justice" was that "everyone will have effective remedies against administrative decisions in order to guarantee respect for fundamental rights and ensure that the legal system is not harmed", as well as "administrative decisions directed against any or individuals who are fully substantiated and should usually indicate the usual remedies available". A year later, in 1991, at the Moscow meeting, the OSCE Member States established that "every person shall have effective remedies against administrative decisions in order to guarantee respect for fundamental rights and ensure that the legal system is not harmed. For the same purpose, effective remedies will be provided for persons who have suffered damage as a result of the administrative provisions"[4].

As a result of the interaction between the European legal order and the legal order of the EU member states, it is possible to note the influence of European administrative law on national legal orders. And although the EU still lacks a comprehensive set of

[1]European Convention on Human Rights. (1950, November). Retrieved from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

[2]Judgment of The European Court of Human Rights No. 926/08 "Case of Karelin v. Russia". (2016, September). Retrieved from https://hudoc.echr.coe.int/fre#{"itemid":["001-166737"]}

[3]Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE. (1990). Retrieved from https://www.osce.org/files/f/documents/d/0/14305.pdf

[4] Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE. (1991). Retrieved from https://eos.cartercenter.org/uploads/document_file/path/376/OSCOW_Moscow_RU.pdf

codified rules of administrative law, especially administrative procedural law, the process of approximation of the laws of the member states in this area should be noted. In accordance with Article 298 of the Treaty on the Functioning of the EU, as amended by the Lisbon Treaty of 2007, "in the performance of their functions, the institutions, bodies, offices, and agencies of the Union shall enjoy the support of an open, effective, and independent European administration"[1].

One of the important acts adopted in the EU with the purpose of codifying administrative procedures is, in particular, the Resolution of the European Parliament with the Commission's recommendations on the law of EU administrative procedures of January 15, 2013[2][14; 15]. Also, numerous principles follow from case law that apply to administrative proceedings, such as the principles of good governance; the duty to present facts impartially, accurately, and comprehensively; obligation to notify interested parties about the commencement of administrative proceedings; duties to be diligent; the obligation to complete the proceedings within a reasonable time; as well as the right of interested parties to information.

CONCLUSIONS

Thus, the study for the first time analyses the international legal provisions and practice of the European Court of Human Rights in protection of human rights in administrative proceedings. It has been established that administrative proceedings can affect almost all aspects of a person's life, for example, in the field of custody, immigration, social security, and housing. This means that the protection of human rights in this area is very important in the modern world. A number of universal international treaties, such as the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966, and the International Covenant on Economic, Social and Cultural Rights of 1966, contain a number of international legal provisions related to the protection of human rights in administrative legal proceedings. The study also analysed the specificity of the regulation of the protection of human rights in administrative proceedings within the framework of the European legal space, namely within the framework of the Council of Europe, the European Union and the Organisation for Security and Cooperation in Europe. Furthermore, it analysed the practice of the European Court of Human Rights in this area and established that Article 6 of the Convention for the Protection of Rights and Fundamental Freedoms also extends its scope of application to administrative cases.

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Suggested Citation: Miliienko, O.A, Sabitova, A.A., Sabitova, S.A., Khussainov, O.B, & Begaliyev, Y.N. (2020). Protection of human rights in administrative proceedings from the standpoint of international law. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 43-52.

Submitted: 29/08/2020
Revised: 19/10/2020
Accepted: 07/12/2020

УДК 342.41
DOI: 10.37635/jnalsu.27(4).2020.53-65

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ЗАПРОВАДЖЕННЯ ПОНЯТТЯ «СТАЛИЙ РОЗВИТОК» У КОНТЕКСТІ КОНСТИТУЦІЙНОЇ РЕФОРМИ УКРАЇНИ

Анотація. *На шляху розвитку інтеграційних процесів Україна потребує комплексного та системного оновлення законодавчих та нормативно-правових актів в тому числі і Конституції України. Стаття присвячена обґрунтуванню основних принципів та практичних шляхів реалізації новітніх підходів до конституційно-правового забезпечення соціальних та гуманітарних перетворень в Україні в контексті світових тенденцій сталого розвитку, а також проблемі практичного впровадження конституційних основ існування Української держави. Зазначається, що стратегічним бажанням України є формування власного майбутнього на основі принципів сталого розвитку з метою впровадження європейських стандартів життя та досягнення провідних позицій у світі. Також відзначається відсутність якісних зрушень у здійсненні соціально значущих реформ, спрямованих на розробку принципово нових підходів до стратегічних напрямків соціально-економічного та політичного розвитку країни в короткостроковій перспективі в контексті реалізації Декларації тисячоліття, яка визначає всебічну систему цінностей, принципів та ключових цінностей згідно з трьома основними мандатами ООН: мир та безпека; розвиток; права людини. Зроблено висновок, що за два десятиліття з моменту*

офіційного введення поняття «сталий розвиток», воно вже вийшло із суто наукового терміну й широко застосовується світовим співтовариством (зокрема, в актах ООН) та вітчизняною політичною елітою не лише в нормативно-правових документах, а й у повсякденних комунікаціях. Актуальність започаткування конституційної реформи в Україні передбачає виправлення суттєвих недоліків, які з різних причин існують у Конституції, та звернення до різних інституцій у сферах вдосконалення механізму державної влади (форми правління); створення конституційних передумов для децентралізації; зміцнення незалежності та професіоналізму судової влади тощо.

Ключові слова: міжнародний досвід, регуляторна підтримка, конституційний порядок, юридична сила, політичний розвиток держави.

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INTRODUCTION OF THE CONCEPT OF SUSTAINABLE DEVELOPMENT IN THE CONTEXT OF THE CONSTITUTIONAL REFORM OF UKRAINE

Abstract. *On the way to the development of integration processes, Ukraine needs a comprehensive and systematic update of laws and regulations, including the Constitution of Ukraine. The article is devoted to substantiation of the basic principles and practical ways of implementing the newest approaches to the constitutional and legal support of social and humanitarian transformations in Ukraine in the context of world tendencies of sustainable development, as well as the problem of practical implementation of the constitutional foundations of the existence of the Ukrainian state. It is noted that the strategic will in Ukraine is to form our own future based on the principles of sustainable development in order to implement in our country European standards of living and to reach leading positions in the world. It is also noted*

the lack of qualitative shifts in the implementation of socially significant reforms to aim in developing fundamentally new approaches to the strategic directions of socio-economic and political development of the country in the short term in the context of the implementation of the Millennium Declaration, which is defined a comprehensive framework of values, principles and key values under three major UN mandates: peace and security; development; Human Rights. It is concluded that in two decades since the official introduction of the concept of "sustainable development" has already come out of the purely scientific term, and is widely used by the world community (in particular, in UN acts) and the domestic political elite not only in the normative-legal documents, but also in everyday communications. The urgency of launching constitutional reform in Ukraine involves correcting the substantive deficiencies that exist in the Constitution for various reasons and referring to different institutions in the fareas of improvement of the mechanism of state power (forms of government); creation of constitutional preconditions for decentralization; strengthening the independence and professionalism of the judiciary etc.

Keywords: international experience, regulatory support, constitutional order, legal force, political development of the state.

INTRODUCTION

Our country, like the rest of the world, has a great need of professional scientific justification for the basic principles and practical ways of implementing the latest approaches to constitutional and legal support for social and humanitarian transformations in the context of world trends in sustainable development. Now Ukraine is going through an extremely difficult stage of its own state, when the very possibility of practical implementation of the constitutional foundations of the existence of the Ukrainian state is questioned. The Ukrainian people de facto cease to be the bearer of sovereignty and the only source of power in the state, but are held hostage to the engaged leaders of power institutions, for which patriotism and national dignity are often replaced, under a veil of political expediency, by the interests of transnational corporations. Analysis of recent research and publications shows that, according to many domestic and foreign lawyers, the Constitution of Ukraine[1] today loses the highest legal force in the state, its norms cease to be norms of direct effect, and certain provisions enter into antagonistic contradictions with modern realities of social, political and economic life in the country, and then it ceases to be a reliable foundation of the Ukrainian state. M. Orzikh, A. Yezerov [1] – point out, "however perfect the is Constitution..., there comes a time when it ceases to be partially or completely in line with the dynamically developing social relations"; V. Hrytsyk [2] – indicates that "the constitutional process in Ukraine in recent years can be compared to the snow ball, which rolls, accumulating on itself, as snow, more and problems"; Yu. Shemshuchenko, O. Batanov, A. Krusian et al. [3] – define the main trends in the development of domestic constitutionalism: substitution of the principle of the rule of law and the Constitution of Ukraine with the principle of political expediency; increasing the influence of civil society on the functioning of state institutions and mechanism, etc.

Direct violations of the Basic Law[2] have become an axiom in Ukraine and are not only obvious to legal specialists, namely:

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

– the sovereignty of Ukraine does not extend to the whole territory of the country, our country is not indivisible and inviolable within the existing border (Art. 2[1]);

– for officials of all levels, especially supporters of paternalism, it is not obligatory to have a single citizenship of Ukraine (Art. 4[2]);

– the right to change the constitutional order in Ukraine, the organization of state power and local self-government, territorial structure, national security pillars and other important institutions of constitutional and legal relations in Ukraine are in fact usurped by the state, its bodies and public officials (Art. 5[3]);

– recourse to the courts for the protection of constitutional human rights and freedoms directly on the basis of the Constitution of Ukraine[4] is not guaranteed (Art. 8[5]);

– the free development, use and protection of Russian and other languages of national minorities of Ukraine is not guaranteed (Art. 10[6]).

– the right of ownership of the Ukrainian people to land, its subsoil and other natural resources has passed to the state. The land ceased to be the main national wealth and lost special protection from the state (Art. 13, 14[7]).

The purpose of the article is the scientific and theoretical justification of the basic principles and practical ways of implementing the latest approaches to constitutional and legal support of social and humanitarian transformations in Ukraine in the context of world trends of sustainable development, as well as the provision of proposals for updating the Constitution of Ukraine on the basis of sustainable development.

The objectives according to the purpose are as follows: to provide specific reasons for introducing the concept of sustainable development into the Constitution of Ukraine; prove the relevance of constitutional and legal support for social and humanitarian transformations in Ukraine in the direction of sustainable development in new geopolitical realities in the near future.

1. CHARACTERISTIC OF CONSTITUTIONAL COMPLAINT AS A POTENTIALLY EFFECTIVE MEANS OF PROTECTING HUMAN RIGHTS

As a result of the constitutional reform of the sphere of justice, Ukraine has established a new constitutional right to a constitutional complaint. On June 2, 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to the Constitution of Ukraine (relating to justice)"[8] which provides for a new constitutional mechanism for the protection of the rights and freedoms of natural and legal persons through the introduction of the institution of a constitutional complaint. Constitutional changes came into force on September 30, 2016. In accordance with article 151-1 of the Basic Law[9],

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр
[2] *Ibidem*, 1996
[3] *Ibidem,* 1996
[4] *Ibidem,* 1996
[5] *Ibidem,* 1996
[6] *Ibidem,* 1996
[7] *Ibidem,* 1996
[8] Law of Ukraine No. 1401-VIII "On Amendments to the Constitution of Ukraine (relating to justice). (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1401-19.
[9] Constitution of Ukraine, op. cit.

the Constitutional Court of Ukraine decides on the constitutionality of the law of Ukraine on the constitutional complaint of a person who considers that the law of Ukraine applied in his or her final court decision is contrary to the Constitution of Ukraine. A constitutional complaint may be filed if all other domestic remedies have been exhausted. Under article 55, paragraph 3, of the Constitution, everyone is guaranteed the right to file a constitutional complaint with the Constitutional Court on the grounds established by the Constitution and in accordance with the procedure established by law. At the same time, a number of issues related to the further realization of this right in Ukraine remain unresolved and require much more active scientific, expert and analytical attention. Since everyone knows that judicial practice is still being formed in another way, and previous versions of the procedural codes have hardly developed, the principle contained in article 8[1] of the Basic Law significantly hinders the already not too big activity of judges in approving the supremacy of the Constitution of Ukraine. But if the courts have not yet been able to apply the Constitution correctly, what could be demanded of other participants in public relations, including politicians, ordinary representatives of public authorities or "ordinary citizen" [4].

On the basis of statistical information received by the Registrar of the Constitutional Court of Ukraine as of June 24, 2019, 1,539 constitutional complaints were registered, in particular, in 2016 there were 39, in 2017 – 435, in 2018 – 690, in 2019 – 375 constitutional complaints (Figure 1) [4].

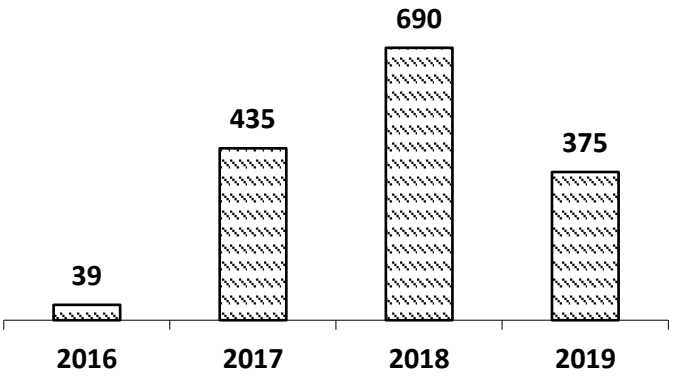

Figure 1. Number of constitutional complaints received and registered with the Registrar of the Constitutional Court of Ukraine from October 2016 to June 2019

Of the registered 1.539 constitutional complaints, 996 were returned to the subject of the appeal because of the non-compliance of its form with the requirements of the Law of Ukraine "On the Constitutional Court of Ukraine"[2]; 529 – distributed to the reporting judges; 14 – were under consideration in the Registrar of the Constitutional Court of Ukraine (Figure 2) [4].

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

[2] Law of Ukraine No 2136-VIII "On the Constitutional Court of Ukraine". (2017, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2136-19#Text

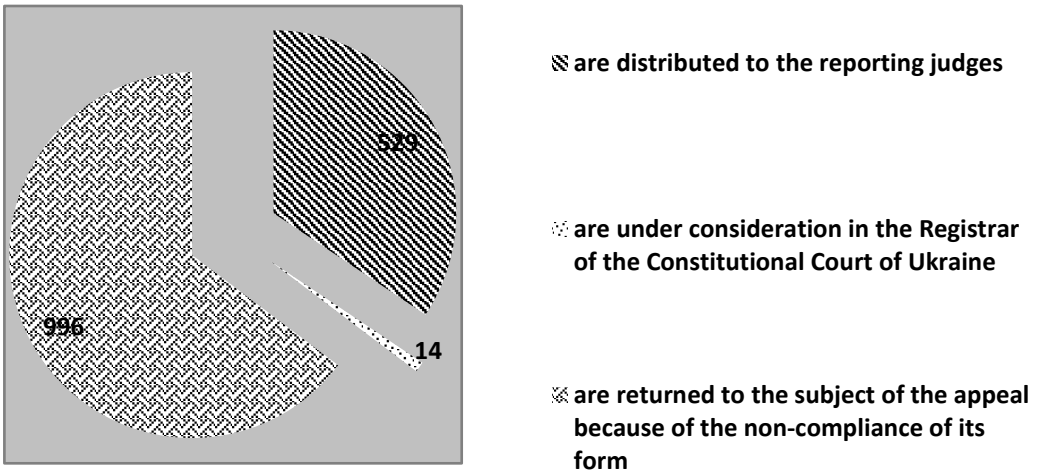

Figure 2. Number of registered constitutional complaints as of 24.06.2019

The issues raised by the subjects of the right to a constitutional complaint, on which constitutional proceedings were opened in 2018, concerned: pension and social law – 24%; civil procedural law – 10%; State budget of Ukraine – 8%; law of criminal procedure – 21%; economic procedural law – 5%; administrative offence – 5%; administrative proceedings – 5%; financial law – 11%; labour law – 11% [4].

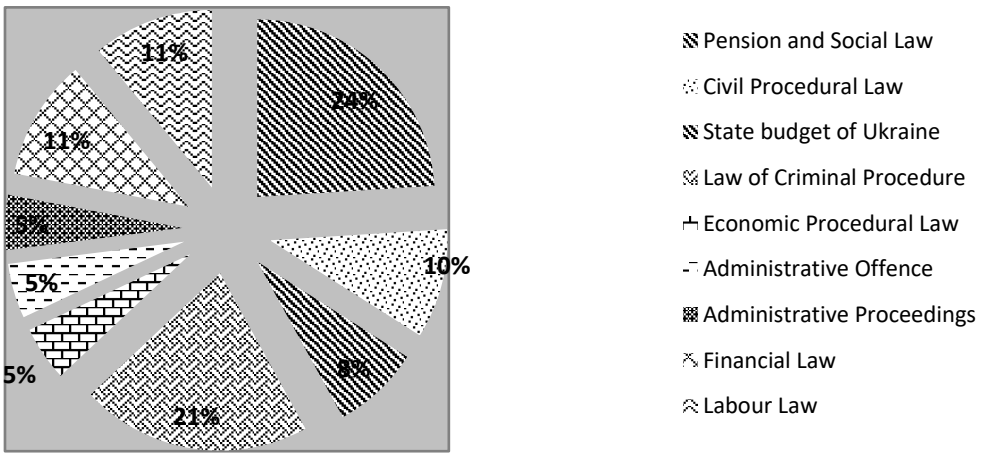

Figure 3. Issues raised by subjects of the right to a constitutional complaint, on which constitutional proceedings were opened in 2018

As Figures 1-3 show, the high expectations of a constitutional complaint as a potentially effective means of protecting human rights have not been fully met for the day. Today the society expects more active consideration and decision-making on constitutional complaints from the Constitutional Court of Ukraine. The level of legal literacy (professional qualifications) of the subjects of the appeal is one of the problems that can be

identified in the implementation of a constitutional complaint, which is confirmed by the data provided on the return of complaints to the subjects of the appeal or the decision to refuse to accept by a collegium or senate of the Constitutional Court of Ukraine. Only well-trained legal professionals can understand the complex issues of constitutionality, the fundamental nature of human rights and freedoms, the systemic relationship between the law and the provisions of the Constitution of Ukraine[1]. And this in turn affects the access to justice for the ordinary citizen [4].

The analysis suggests that this is not a complete list of direct violations of the Constitution of Ukraine, which not only hinder state construction, but also threaten the future of Ukrainian independence. Today, there is an objective need to revise the fundamental principles of the Ukrainian state and to develop fundamentally new approaches to the strategic directions of the social, economic and political development of the state in the near future in the new geopolitical realities caused by the annexation of the Crimean peninsula, the unflagging hybrid aggression by the Russian Federation, permanent outbreaks of pandemics (such as Swine influenza, COVID-19, etc.), as well as regular world economic crises [5-7].

2. ANALYSIS OF THE IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT STRATEGY IN UKRAINE

UN Millennium Development Goal, which was adopted in 2000, by 189 countries at the UN Millennium Summit, and which established a comprehensive framework of values, principles and key factors of development under the three core UN mandates: peace and security; development; human rights, is the modern guide to human development for the entire civilized world. The road map for the implementation of the Millennium Development Goal proposed a set of eight universal goals, with specific time frames and quantitative indicators, aimed at eliminating all major obstacles to the decent life of every human being in any society, namely, the eradication of hunger and extreme poverty; access to education; ensuring gender equality; reducing maternal and child mortality; reducing HIV/AIDS and other diseases; environmental sustainability and harmonization of external assistance for developing countries [8].

For 15 years, the Millennium Development Goals have been a driving force for reducing income poverty, ensuring critical access to water and adequate sanitary conditions, reducing child mortality and substantial improvement in maternal health [9-11]. They have also given a boost to the global movement for free primary education, encouraging countries to invest in future generations. Above all, however, the Millennium Development Goals have achieved tremendous success in the fight against HIV/AIDS and other curable diseases, in particular malaria and tuberculosis. The main achievements in the implementation of the Declaration (compared to 1990) were: more than 1 billion people were saved from extreme poverty; child mortality and the number of out-of-school children decreased by more than half; HIV/AIDS cases fell by almost 40% (compared to 2000) [12]. In September 2015, within the 70th session of the UN General Assembly, the world community defined new guidelines for the development of mankind for the next fifteen years (2015-2030), called Transforming our world: The 2030 Agenda for Sustainable Development and presented in the form of seventeen global

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

Sustainable Development Goals, namely, poverty reduction; overcoming hunger, developing agriculture; good health and well-being; quality education; gender equality; clean water and adequate sanitary conditions; clean and affordable energy; decent work and economic growth; industry, innovation and infrastructure; inequality reduction; sustainable urban and community development; responsible consumption and production; mitigation of climate change; marine resources conservation; protection and restoration of terrestrial ecosystems; peace, justice and strong institutions; partnership for sustainable development [13].

Ukraine, by participating in the historic United Nations Summit for Sustainable Development in Rio de Janeiro (Rio+20), has clearly demonstrated its strategic freedom to shape its own future on the basis of the principles of sustainable development. Along with other countries, our country has worked hard to realize the Millennium Development Goals determined by the results of the UN Millennium Summit held in 2000. Thus, in January 2015 the Strategy of Sustainable Development "Ukraine – 2020" was approved by the Decree of the President of Ukraine P. Poroshenko[1], in which, in addition to general phrases about the transition to a new era of history and a unique chance to build a new Ukraine, a number of concrete practical measures were defined with the aim of introducing European standards of life in our state and reaching the leading positions in the world [14-16].

According to the Roadmap and first priorities for the implementation of the Strategy, 62 reforms and programmes for the development of the state were to be implemented within certain four vectors of movement (development, security, responsibility and pride). At the same time, the implementation of such reforms and programmes as national security organization and defence reform; power renewal and anti-corruption reform; judicial reform; reform of a law-enforcement system; decentralization and public administration reform; deregulation and enterprise development; reform of a health-care system; tax reform; program of energy independence; program of popularization of Ukraine in the world and promotion Ukraine's interests in the world information space were identified as priorities.

The analysis suggests that as of April 2020 none of the identified 25 key indicators assessing the implementation of reforms and programmes (it. 4. Strategic indicators of realization of the Strategy) are not reached. None of the announced reforms (programs) has been fully implemented, and in certain spheres of social and political life the situation has deteriorated on the contrary (small and medium-sized businesses, state customs and integration into the customs community of the EU, municipal housing economy, attraction of investments; optimization of the system of state authority; pension reform; reforms of health systems, education, culture, public policy in science and research). Of particular concern is the lack of qualitative changes in the implementation of socially significant reforms, such as the renewal (not the change of personalities) of power and anti-corruption reform; ensuring that everyone has the right to a fair trial by an independent and impartial court; the establishment of a professional institute of the public service; enabling local self-government and building an effective system of territorial organization of power, etc.

[1]Decree of the President of Ukraine No. 5/2015 "On the Sustainable Development Strategy "Ukraine 2020"". (2015, January). Retrieved from https://zakon.rada.gov.ua/laws/show/5/2015.

In September, 2019 the Global sustainable development goals till 2030 proclaimed the Resolution of the General Assembly of the United Nations of September 25, 2015 No. 70/1[1] were supported by the Decree of the President of Ukraine V. Zelenskyi[2] and the results of their adaptation taking into account specifics of development of Ukraine stated in the National report of "a sustainable development goals of Ukraine" and also definite purposes of sustainable development of Ukraine until 2030 [17]. According to the carried-out analysis, for two decades from the moment of the official introduction the concept "sustainable development" already left the plane of purely scientific term, and is rather widely used by the international community (in particular, in acts of the UN and the EU) and domestic political elite not only in standard and legal documents, but also in daily communications. However, the Constitution of Ukraine does not mention the term "sustainable development" at all, which introduces a certain dissonance into the general hierarchy of the domestic legal and regulatory framework, in a certain way makes it difficult to adapt Ukrainian legislation to world standards and prevents the full ratification of concluded contracts (agreements) with foreign partners.

Constitutional reform in Ukraine is objectively necessary not only to expand (updating) the conceptual framework, but also due to better reasons, in particular, the need to restore the legitimacy of the Basic Law as an act of constituent power. At present, this legitimacy is significantly undermined by legally questionable decisions of the constitutional process of the last ten years related to the desire of individual politicians to strengthen the power vertical [18]. Equally important is the urgency of the beginning of constitutional reform in Ukraine – the need to correct the substantive shortcomings that exist in the Constitution for various reasons and concern various institutions in the directions: improvement of the mechanism of state power (form of government); creation of constitutional foundations for decentralization; reinforcing the independence and professionalism of the judiciary; solution to the dilemma of ensuring a certain amount of social and economic human rights in the Constitution, etc. [19]. More specific reasons for introducing the concept of "sustainable development" into the text of the Constitution include.

First, Ukraine has sufficiently specific international commitments on sustainable development as defined by the UN strategic documents, in particular the UN General Assembly Decision No. 70/1 of 25 September 2015[3] (17 global sustainable development goals covering 169 targets and 240 indicators), the Association Agreement between Ukraine and the EU regarding the introduction of innovative changes in Ukraine in the direction of sustainable development, etc. Secondly. Our country demonstrably needs a fundamental modernization of the strategic objectives, basic principles and public mechanisms of public administration of social and economic development in the direction of sustainable development in order to minimize the negative consequences of the dominance of resource and energy-intensive industries and technologies, the

[1]Resolution of the General Assembly of the United Nations, No. 70/1. (2015, September). Retrieved from https://undocs.org/A/RES/70/1

[2]Law of Ukraine No. 1678-VII "On the ratification of the 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, September). Retrieved from https://zakon.rada.gov.ua/rada/show/1678-18.

[3]UN General Assembly Decision No. 70/1. (2015, September). Retrieved from https://www.google.com/search?q=%chrome.69i57&sourceid=chrome&ie=UTF-8#

commodity orientation of exports, the excessive concentration of environmentally hazardous production in industrial regions and the like over the past decades. The third. The constitutional introduction of the term "sustainable development" creates a single conceptual basis for the purpose of analysing the level of social and economic development and well-being of the population, as well as compliance with the natural, scientific and technical, agricultural and industrial potential of Ukraine, the qualification and educational level of the population, and the social, historical and cultural traditions of the Ukrainian people. The fourth. The establishment of definitions, goals, objectives and mechanisms of sustainable development in the Basic Law will contribute to the improvement and more effective implementation of normative and legal acts in Ukraine, national, sectoral and regional documents. The fifth. Ukraine's transition to sustainable development is a sustainable concept for the domestic scientific school, has a proper theoretical justification, has undergone practical testing and enjoys appropriate public support.

The introduction of the term "sustainable development" in the text of the Constitution of Ukraine[1] should take into account that it is the official Ukrainian equivalent of the English term "sustainable development", the literal translation of which, according to the context, can be "viable development" and, within the meaning of "self-sustaining development", can also be interpreted as a comprehensively balanced development. According to the United Nations Commission on Sustainable Development, its purpose is to meet the needs of modern society without compromising the ability of future generations to meet their needs. The theory of sustainable development is an alternative to the paradigm of economic growth, which ignores the environmental danger from development according to an extensive model [20].

The constitutional entrenchment of the term "sustainable development" will contribute to the transition of Ukraine to the principles of sustainable development, will serve as the basis of legislative and institutional support for the system of public management of sustainable development, will improve the quality of life of the Ukrainian population and will achieve economic, social and environmental balance in the development of our country in practice. In addition, sustainable regional development will be achieved through the preservation of national cultural values and traditions and the harmonization of national and regional interests in all policy documents for sustainable regional development.

CONCLUSIONS

We are deeply convinced that the implementation of constitutional reform in Ukraine in the direction of sustainable development will allow:

– to overcome the imbalances that exist in the economic, social and environmental spheres of life more effectively;

– to ensure a state of the environment that will contribute to the quality of life and well-being not only of present but also of future generations;

– to create the necessary foundation for a social contract between government, business and civil society in order to improve the quality of life of citizens and ensure social, economic and environmental stability;

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

– to establish a system of public management of sustainable development;

– to take to a new qualitative level the partnership between state authorities, local self-government bodies, business, science, education and civil society organizations;

– to achieve a higher level of education and public health;

– to establish a constitutional framework for regional policies based on a harmony of national and regional interests;

– to fulfil Ukraine's international obligations in conditions of more effective preservation of national cultural values and traditions.

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Suggested Citation: Lelechenko, A.P., Lebedinska, O.Yu., Somin, S.V., Vakulenko, V.M., & Pikh., N.S. (2020). Introduction of the concept of sustainable development in the context of the constitutional reform of Ukraine. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 53-65.

Submitted: 16/07/2020
Revised: 28/10/2020
Accepted: 02/12/2020

УДК 347.615
DOI: 10.37635/jnalsu.27(4).2020.66-83

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ЄВРОПЕЙСЬКА КОНВЕНЦІЯ З ПРАВ ЛЮДИНИ ЯК МІНІМАЛЬНИЙ ЄВРОПЕЙСЬКИЙ СТАНДАРТ ДЛЯ НАЦІОНАЛЬНОГО ЗАКОНОДАВСТВА ПРО СПЕЦІАЛЬНІ СЛУЖБИ: ПОРІВНЯЛЬНИЙ АСПЕКТ

Анотація. *Кінець XX-го століття характеризується стрімким прийняттям державами-членами Ради Європи законодавчих актів про спецслужби, в яких правовою основою діяльності розвідувальних та контррозвідувальних органів, крім інших законів, є конституції. Актуальність роботи пов'язана з необхідністю дослідження нормативно-правових актів, що регулюють діяльність органів розвідки та контррозвідки. У статті за допомогою порівняльно-правового методу досліджено особливості імплементації положень Конвенції про захист прав людини і основоположних свобод 1950 у законодавство про спецслужби на прикладі деяких держав-членів Ради Європи. Установлено, що чинні законодавчі акти відрізняються як за формою, структурою та змістом, так й за різними підходами до визначення правовими приписами порядку дотримання прав і свобод людини під час здійснення розвідувальних та контррозвідувальних заходів. Розглянуто норми конституцій різних держав, що значною мірою відтворюють положення Конвенції 1950. Доведено, що відповідні конституційні положення щодо підстав обмеження прав і свобод людини містяться й у законодавстві про акти про спецслужби зі значними розбіжностями. Обґрунтовано, що законодавчі акти про розвідку обов'язково мають включати відсильні норми до міжнародних договорів у сфері прав людини. Наведено приклади із законодавства деяких держав-членів Ради Європи стосовно різних підходів до визначення принципів діяльності спецслужб, проаналізовано тенденції поширення конвергенції принципів, покладених в основу їх діяльності. Запропоновано, з огляду на досвід українських законодавців, не лише включати в законодавчі акти про спецслужби принципи законності та поваги до прав і свобод людини, а також детально розкривати їх зміст, враховуючи особливості діяльності спецслужб. Розглянуто різні доктринальні підходи щодо категорій "національна безпека" та "державна безпека", на підставі узагальнення яких запропоновано власне бачення їх змістового наповнення. Зроблено висновок, що не всі держави-члени Ради Європи належним чином імплементують положення Конвенції 1950 у національне законодавство про спецслужби. Наведене актуалізує запозичення кращих практик і досвіду держав-членів, які не залишили це питання поза увагою.*

Ключові слова: Рада Європи, основоположні свободи, спецслужби, національна безпека, державна безпека.

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EUROPEAN CONVENTION ON HUMAN RIGHTS AS THE MINIMUM INTERNATIONAL STANDARD FOR NATIONAL LEGISLATION ON SPECIAL SERVICES: A COMPARATIVE ASPECT

Abstract. *The end of the 20th century is described by the rapid adoption of legislation on special services by member states of the Council of Europe. In these adopted acts, the legal framework for the activities of intelligence and counterintelligence bodies, among other laws, is the constitution. The relevance of the study lies in the necessity of investigating the regulations governing the activities of intelligence and counterintelligence bodies. The study examines the specific features of the implementation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 in the legislation on special services on the example of some member states of the Council of Europe. It is established that the current legislative acts differ in form, structure, and content, as well as different approaches to determining the legal requirements for the observance of human rights and freedoms during the implementation of intelligence and counterintelligence activities. The constitutional provisions of different states are explored, which largely reproduce the provisions of the 1950 Convention. It is proved that the relevant constitutional provisions on the grounds for restricting human rights and freedoms are contained in the legislation on special services, but with significant differences. It is justified that intelligence legislation must include references to international human rights instruments. The study gives examples from the legislation of some member states of the Council of Europe on different approaches to defining the principles of intelligence services. Furthermore, the paper analyses the tendencies of spreading the convergence of the principles underlying the activities of intelligence services. It is proposed, considering the experience of Ukrainian legislators, not only to include the principles of legality and respect for human rights and freedoms in the legislation on special services, but also to disclose their content in detail, factoring in the specific features of special services. Different doctrinal approaches to the categories of "national security" and "state security" are considered, based on the generalisation of which the individual vision of their content is proposed. It is concluded that not all member states of the Council of Europe properly implement the provisions of the 1950 Convention into national intelligence legislation. The above mainstreams the borrowing of the best practices and experiences of Member States which have not ignored this issue.*

Keywords: Council of Europe, Fundamental Freedoms, special services, national security, national security.

INTRODUCTION

The presence of a strong and effective national legal framework for the functioning of special services is a hallmark of the country as a legal and socially oriented state. However, this framework should be based on the maximum possible number of international legal standards and include tools and mechanisms for their implementation. The scientist Ju.O. Voloshyn [1] spoke very aptly about this, noting that "in the process

of its development, national constitutional law is constantly subject to "external" control, as a result of which public international law becomes part of the national. This can be called a kind of "filter" that allows to avoid negative elements and control domestic lawmaking through the lens of *general international standards of legal ideas* and certain "channels" of influence" [1]. One source of such standards is the Convention for the Protection of Human Rights and Fundamental Freedoms[1], better known as the European Convention on Human Rights (ECHR), which was opened for signature in Rome on November 4, 1950 and entered into force in 1953. For the member states of the Council of Europe (CoE), this is a basic document that proclaims certain rights enshrined in the Universal Declaration of Human Rights[2].

International legal standards must be outlined in national legislation, in particular in constitutions (fundamental laws), and in legislation on the functioning of special services. A comparative analysis of the legislation of the CoE member states indicates that both the constitutions and the laws on the secret services of most countries include international legal standards and in some way define them with consideration of national legal customs and traditions. However, the constant complaints of citizens of individual states with subsequent appeals to the European Court of Human Rights (ECHR) about illegal actions of special services that violated their constitutional rights and freedoms raise legitimate questions – why ECHR decisions in favour of citizens-plaintiffs indicate non-compliance and violations of the ECHR provisions by special services; what is the content of the implementation of the provisions of the ECHR in the national legislation on special services; how are international standards reflected in national legislation (perhaps they are not considered whatsoever or are reflected partially, incompletely, or there may be different interpretations of the essence and content of some categories that denote problems of national security and its provision by special bodies)? This study is supposed to find answers for all these questions.

The Contracting States of the ECHR have undertaken to guarantee to everyone under their *jurisdiction* the rights and freedoms set forth in its first section (Articles 8, 10, 11)[3]. Thus, as Professor V.V. Mytsyk [2] points out, "the jurisdiction of the state, and not citizenship or territory, is decisive for the provision and protection of convention rights and freedoms". Implementing the provisions of the ECHR, the Member States of the Council of Europe state in the preambles or first articles of their constitutions (fundamental laws) that person, their life and health, honour and dignity, immunity, and security are recognised as the highest social value; that affirmation, provision, and guarantee of human rights and freedoms is the main duty of the state, the content and direction of its activities[4].

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765.

[2] The Universal Declaration of Human Rights. (1948, December). Retrieved from https://www.un.org/en/universal-declaration-human-rights/.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14, op. cit.

[4] Constitution of the French Republic. (1958, October). Retrieved from https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur; Basic Law for the Federal Republic of Germany. (1949, May). Retrieved from https://www.bundestag.de/gg; Constitution of the Republic of Poland. (1997, April). Retrieved from

With regard to rights that may be restricted under international law, the ECHR prescribes that they may, as an exception, be partially restricted if they are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (Articles 8, 10)[1]. These legal restrictions may be exercised by "members of the armed forces, of the police or of the administration of the State" (Article 11)[2]. However, if the security or intelligence services, having legitimate grounds for interfering in a person's private life, exceed their authority, "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (Article 13)[3]. These convention rules are reflected in the constitutions of the CoE member states, which state that national law enforcement and special bodies may partially restrict human rights and freedoms, but only based on law and in the interests of national security.

1. GENERAL PROCEDURE FOR IMPLEMENTING THE ECHR PROVISIONS IN LEGISLATION ON SPECIAL SERVICES

The emergence of the first legislative acts on the activities of special services (mid-20th century)[4] signified dismantlement of conventional and established notions of their activities from exclusively specialised, closed, secret structures to ordinary state bodies with special powers, which should function within the legal framework, *inter alia*, based on international law and constitutional provisions. An essential feature of the end of the 20th century was the rapid adoption of legislation on special services by the CoE member states, which necessarily determined that the legal framework for intelligence and counterintelligence bodies, among other laws, is the constitution. It is the constitutional and legal provisions that establish the basic principles of ensuring human and civil rights and freedoms during the functioning of special services, outline the main components of the competencies of public authorities that manage, control, and supervise their activities. These provisions constitute the legal framework for the regulation of public relations in special services. However, constitutional, and legal regulation cannot cover the entire sphere of outlined social relations. Apart from the provisions of constitutional law, they are also governed by the provisions of other branches of law, in particular civil, labour, administrative. Nowadays, the world has already developed a certain array and continues to grow the number of regulations governing the activities of intelligence and

https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm; The Constitution of the Republican Romania. (2003, October). Retrieved from http://www.cab1864.eu/upload/constituA_ia_rom.pdf; Constitution of the Republic of Bulgaria. (1991, July). Retrieved from https://www.parliament.bg/bg/const; The Constitution of the Russian Federation. (1993, December). Retrieved from www.constitution.ru/; Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765.

[2] *Ibidem*, 1950.

[3] *Ibidem*, 1950.

[4] Central Intelligence Agency Act. (1949, June). Retrieved from http://legcounsel.house.gov/Comps/CIA49.pdf; National Security Act. (1947, July). Retrieved from https://www.ncsc.gov/training/resources/nsaact1947.pdf

counterintelligence. Comparing the legislation of the CoE member states in legal regulation of the organisation and activities of special services, one can immediately notice a huge variety of acts in form, structure, content, and differing approaches to defining legal requirements, principles, tasks, functions, powers, control, supervision by their activities, etc. However, with regard to the general features of the implementation of the ECHR provisions, the procedure is almost the same in almost all legislative acts. Firstly, the studies on the legal framework of the intelligence service, among other legal sources, emphasise "the respective international regulations", and, secondly, the observance of human rights and freedoms in intelligence acts is a blanket reference to national constitutions and laws, the content of which is similar to that in Article 5 of the Law of Ukraine "On the Security Service of Ukraine"[1]: "in exceptional cases in order to stop and disclose state crimes, certain rights and freedoms of a person may be temporarily restricted in the manner and within the limits set forth by the constitution and laws". Table 1 below reveals the chronology of the adoption of constitutions (fundamental laws), legislative acts on the activities of intelligence agencies and state security bodies by some CoE member states as member states of the ECHR.

Table 1. Chronology of the adoption of constitutions (fundamental laws), legislative acts on the activities of intelligence agencies and state security bodies by some CoE member states

Country	Signing of the Convention 1950	Adoption of the Constitution	Adoption of the law on intelligence	Adoption of the law on the state security agency
Azerbaijan	25.01.2001	12.11.1995	13.01.2016	13.01.2016
Armenia	25.01.2001	05.07.1995	28.12.2001	28.12.2001
Bulgaria	07.05.1992	12.07.1991	01.10.2015	01.01.2008
Bosnia and Herzegovina	24.04.2002	21.11.1995	22.03.2004	22.03.2004
Great Britain	04.11.1950	Constitutional laws	26.05 1994	27.04.1989
Germany	04.11.1950	08.05.1949	29.11.1990	20.12.1990
Georgia	27.04.1999	24.08.1995	27.04.2010	08.07.2015
Spain	24.11.1977	07.12.1978	06.04.2002	13.03.1986
Latvia	10.02.1995	06.07.1993	04.06.1991	05.05.1994
Lithuania	14.05.1993	25.10.1992	17.07.2000	20.01.1994
Moldova	13.07.1995	29.07.1994	23.12.1999	23.12.1999
Poland	26.11.1991	02.04.1997	09.06.2006	24.05.2002
Russia	28.02.1996	12.12.1993	08.07.1992	03.04.1995
Romania	07.10.1993	21.11.1991	12.01.1998	24.02.1992
Turkey	04.11.1950	07.11.1982	01.11.1983	04.03.2010
Ukraine	11.09.1997	28.06.1996	22.03.2001	25.03.1992
France	04.11.1950	04.10.1958	02.04.1982	22.12.1982
Croatia	06.11.1996	22.12.1990	01.04.2002	05.07.2006
Estonia	14.05.1993	28.06.1992	01.03.2001	01.03.2001

Table 1 demonstrates that legislation on special services in almost all countries, except Ukraine, Latvia and Russia, was adopted after the accession to the ECHR, while

[1] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

in Latvia and Russia – in addition to the adoption of constitutions. Considering the constant amendments to the fundamental laws and the analysis of the current versions of the constitutions, it can be argued that in these three states the general classical approach is generally followed, when the provisions of the ECHR are first implemented in the constitution and then in national intelligence legislation.

Analysing and comparing the current legislation on the activities of the secret services of the CoE member states, it can be stated that the rules of international law play an important role in the development and improvement of national legislation. Thus, the Law of the Republic of Lithuania "On Intelligence" states that "In performing their assignments, intelligence institutions shall be guided by the Constitution of the Republic of Lithuania, the Law of the Republic of Lithuania on the Basics of National Security, this Law, other legal acts and international treaties to which the Republic of Lithuania is a party"[1]. Similarly, the provisions of international treaties are legally defined by the core of the legal framework for the activities of special services of other countries[2]. However, in the intelligence legislation of France (articles D.3126-1-D.3126-4)[3], Great Britain[4], Russia[5], USA[6] (many CoE member states have developed their legislation on intelligence on the example of US acts) and other states, the legal framework for the activities of intelligence agencies is determined exclusively by the constitution and the provisions of national legislation.

Furthermore, under Russian legislation, the Federal Security Service (FSB) may use the provisions of international treaties in its activities, while intelligence agencies may not. According to Croatian legislation, the legal framework for the activities of security and intelligence agencies is exclusively the Constitution of the Republic of Croatia, national laws, and other regulations[7]. Therefore, some CoE member states, which are parties to numerous international human rights treaties, do not consider it their duty to include a reference rule referring to the provisions of existing international treaties in national legislation on the activities of special services. The Ukrainian experience is indicative in this context. Despite the fact that Article 9 of the Constitution

[1] Law on Intelligence of the Republic of Lithuania No XI-2289. (2012, October). Retrieved from https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.450750

[2] Law of the Republic of Moldova "On the Security and Intelligence Service" No 753-XIV. (1999, December). Retrieved from http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=311721; Federal Law of the Russian Federation No 40-FZ "On the Federal Security Service". (1995, April). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_6300/; Law of Georgia No 2984 "About the Intelligence Service of Georgia". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92248?publication=12; Law of Georgia No 2983 "On Intelligence Activities". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92242?publication=2

[3] Defense Code (France). (2004, December). Retrieved from https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307

[4] Intelligence Services Act 1994 of the Parliament of the United Kingdom. (1994, November). Retrieved from http://www.legislation.gov.uk/ukpga/1994/13/contents

[5] Federal Law of the Russian Federation No 5-FZ "On External Intelligence". (1996, January). Retrieved from http://svr.gov.ru/svr_today/doc02.htm

[6] Central Intelligence Agency Act. (1949, June). Retrieved from http://legcounsel.house.gov/Comps/CIA49.pdf

[7] Act on the Security Intelligence System of the Republic of Croatia. (2006, June). Retrieved from https://www.soa.hr/en/about-us/security-intelligence-system-of-the-republic-of-croatia/

of Ukraine[1] states that "current international agreements, the binding force of which has been approved by the Verkhovna Rada of Ukraine, shall form part of the national legislation of Ukraine"[8], in the Laws of Ukraine "On Security Service of Ukraine" 4) and "On the Foreign Intelligence Service of Ukraine" (Article 2) also stipulates that the legal framework for their activities are international agreements, the binding nature of which has been approved by the Verkhovna Rada of Ukraine[2]. Such duplication provides ample opportunities for the implementation of the provisions of international treaties, including the ECHR, in the national legislation on the activities of special services.

However, the legislative definition of the fact of inclusion of international agreements in the legal framework of the activities of special services does not guarantee the implementation or compliance with the provisions of these agreements. The case law of the ECHR indicates that, despite the commitment of States parties to fully implement the provisions of the ECHR into national legislation, the problem remains relevant. It is no coincidence that the Committee of Ministers of the Council of Europe adopted the Copenhagen Declaration on 12-13 April 2018[3], which declared that "Ineffective national implementation of the Convention, in particular in relation to serious systemic and structural human rights problems, remains the main challenge confronting the Convention system. The overall human rights situation in Europe depends on States' actions and the respect they show for Convention requirements" (Article 12). The Copenhagen Declaration contains a complete list of actors on which the effectiveness of the implementation of the ECHR provisions at the national level depends: "Effective national implementation requires the commitment of and interaction between a wide range of actors to ensure that legislation, and other measures and their application in practice comply fully with the Convention. These include, in particular, members of government, public officials, parliamentarians, judges and prosecutors, as well as national human rights institutions, civil society, universities, training institutions and representatives of the legal professions" (Article 14)[4].

Thus, again, there are numerous legitimate issues, namely: how the current legislation on special services correlates with the provisions of the ECHR; how and with what tools can its convention provisions be implemented in the legislation of different states on the activities of special services? It is possible to put forward a scientific hypothesis that the legislative acts of each individual state, having their essential features, reproduce the ECHR provisions differently and with large discrepancies in legal requirements. That is, it is necessary to analyse specific legislation on the special services of a particular country on other criteria, not only on the fact that the laws indicate the

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12; Law of Ukraine No 3160-IV "On the Foreign Intelligence Service of Ukraine". (2005, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3160-15/ed20150715

[3]Copenhagen Declaration. (2018, April). Retrieved from https://zib.com.ua/files/Copenhagen%20Declaration.pdf.pdf

[4] Case of Patricia Hope Hewitt and Harriet Harman v. the United Kingdom. Application No 12175/86. Report of the European Commission of Human Rights. (1989, May). Retrieved from https://www.bailii.org/eu/cases/ECHR/1989/29.html

unconditional implementation of international agreements. Such other main criteria, in our opinion, are the categories "law", "principles", and "national security" in the phrases "based on law", "principles of intelligence", and "national security".

2. CATEGORY "LAW" THROUGH THE LENS OF THE ECHR PROVISIONS AND NATIONAL LEGISLATION

The ECHR states that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law" (Article 8)[1]. What does "in accordance with the law" mean? The creation of a legal framework in some states was not without problems, as some political circles did not consider it possible to define the secret activities of the secret services, especially their methods, forces, and measures, in open legislation. However, the fact of ratification of the ECHR and the complaint of citizens with a subsequent appeal to the ECHR on illegal actions of the secret services forced the parliaments of some states to adopt laws in intelligence services. In this context, the United Kingdom is a typical example of the creation of a legal framework for the activities of intelligence and counterintelligence services in accordance with the decisions of the European Court of Human Rights. In August 1985, Patricia Hope Hewitt and Harriet Harman[2] appealed to the ECHR against the British secret services, which, in their view, contrary to Articles 8, 10, 11, and 13 of the ECHR, had been monitoring them illegally and unjustifiably for a long time. The European Commission of Human Rights, having examined the case on the merits, found that there had indeed been a violation of the ECHR provisions, justifying its legal position by Articles 10 and 11 of the ECHR, which stated that restrictions on rights could be established solely by law. At that time, secret surveillance units used the provisions of the Maxwell Fyfe Directive, which gave special services the right to interfere in a citizen's private life by covertly monitoring them or tapping their telephone conversations. The ECHR did not find good grounds to consider this Directive as law, so it upheld the complaint of citizens whose rights had been violated. Apparently, to prevent such losses in court cases, the decision of the European Court of Human Rights became a kind of stimulus for the development and adoption of legislation on counterintelligence (MI-5) and intelligence (MI-6) by the British Parliament in 1989 and 1994, respectively[3].

The question arises, what does the ECHR, whose decisions belong to case law, understand by the terms "law" and "prescribed by law"? The answer can be found in its judgment in The Sunday Times v. The United Kingdom, which states that The Court observes that the word "law" in the expression "prescribed by law" covers not only statute but also unwritten law… In fact, the applicants do not argue that the expression "prescribed by law "necessitates legislation in every case; their submission is that legislation is required only if – as in the present case – the common-law rules are so

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765

[2] Case of Patricia Hope Hewitt and Harriet Harman v. the United Kingdom. Application No 12175/86. Report of the European Commission of Human Rights, op. cit.

[3] Intelligence Services Act 1994 of the Parliament of the United Kingdom (1994, November). (2020). Retrieved from http://www.legislation.gov.uk/ukpga/1994/13/contents

Security Service Act 1989 of the Parliament of the United Kingdom. (1989, April). Retrieved from http://www.legislation.gov.uk/ukpga/1989/5/contents

uncertain that they do not satisfy what the applicants maintain is the concept enshrined in that expression, namely, the principle of legal certainty "(paragraph 47)[1], "a norm cannot be regarded as a" law "unless it is formulated with sufficient precision to enable the citizen to regulate his conduct)" (paragraph 49)[3]. That is, a rule of law can be qualified as a law if it is adequately and precisely formulated, is clear to the citizen and allows them to regulate their behaviour. It should be noted that the CoE member states, considering the clarification of the ECHR on the concept of "law", have developed and adopted a set of legislative acts that, to a certain extent, regulate intelligence, counterintelligence, and law enforcement intelligence operations, as well as within the framework of which measures are taken to restrict the constitutional rights and freedoms of person and citizen. However, judging by the ECHR decisions, the current legislation of individual states does not yet meet the ECHR requirements. Thus, the decision of the European Court of Human Rights of December 4, 2015 in the case[2] states that Russian law does not clearly define the categories of people whose telephone and other conversations can be tapped, does not fully list situations in which tapping should be stopped, does not prescribe in detail by legal provisions the procedure for issuing permits for its implementation. Oversight of the legality of covert law enforcement intelligence measures does not meet the ECHR requirements for the independence of the oversight body, the adequacy of its powers to conduct effective oversight, and its openness to public scrutiny[4]. The judgment of 12 January 2016 in case[3] stated that one of the problems with Hungarian legislation was the lack of sufficient safeguards against the abuse of covert surveillance. The case[4] found that the judicial procedures for granting covert surveillance permits under Russian law could not guarantee that the measures had not been taken recklessly, irregularly, or without due and appropriate consideration.

The Republic of Belarus, as a candidate for membership in the Council of Europe, is one of the few states that still does not have a law on intelligence activities. Over the last twenty years, the draft law has been included in the work plan of the parliament three times, but the case has not been discussed and considered. Currently, only the Decree of the President of the Republic of Belarus "On Foreign Intelligence issues"[5], which defines the legal framework of its activities do not consider the rules of international law. Obviously, as soon as Belarus becomes a full member of the Council of Europe and joins the ECHR, the question of considering and adopting such a law will at once be on the agenda. Thus, the category "law" in the ECHR does not mean any particular law, even the direct law on the secret service, but provides a set of legal provisions contained in various legislative acts that allow the secret services to interfere in the private life of individuals and citizens to ensure national security. In Ukraine, such provisions are found in the Laws of Ukraine "On the Security Service of Ukraine", "On the Intelligence Bodies of Ukraine", "On

[1] Case of The Sunday Times v. the United Kingdom. Application No 6538/74. Judgment European Court of Human Rights. 1979. (1979, April). Retrieved from https://www.bailii.org/eu/cases/ECHR/2015/1065.html
[2] Case of Roman Zakharov v. Russia. Application No 47143/06. Judgment European Court of Human Rights, 4 December, 2015. (2015, December). Retrieved from https://www.bailii.org/eu/cases/ECHR/1979/1.html
[3] Case of Szabo and Vissy v. Hungary. Application No 37138/14. Judgment European Court of Human Rights. (2016, January). Retrieved from https://www.bailii.org/eu/cases/ECHR/2016/579.html
[4] Case of Dudchenko v. Russia. Application No 37717/05. Judgment European Court of Human Rights. (2017, November). Retrieved from https://www.bailii.org/eu/cases/ECHR/2017/965.html
[5] Decree of the President of the Republic of Belarus "On Foreign Intelligence Issues" No 116. (2003, March). Retrieved from http://kgb.by/ru/ukaz116/

Law Enforcement Intelligence Operations", "On Counterintelligence Operations"[1], etc. Similar laws exist in other states. It is quite clear that the quality, specificity, completeness, and clarity of these legal provisions determine the effectiveness of the implementation of the ECHR provisions at the national level.

3. PRINCIPLES OF ACTIVITY OF SPECIAL SERVICES THROUGH THE LENS OF THE ECHR PROVISIONS AND NATIONAL LEGISLATION

The articles of the ECHR, which set out the conditions for the possible restriction of human rights and freedoms, are the basic or general principles for the activities of special services, when the latter apply measures that may affect a person's private life. However, there are principles that are explicitly defined in the legislation on special services or intelligence. These principles determine the essence, content, purpose of the secret services and the main trends of its development in a particular state in a particular period of time, as well as reflect the content and direction of its activities in a democratic society. The principles enshrined in the legislation on special services are conditioned by the political, economic, social, and other needs of the safe existence of a particular society or are implemented from international treaties to which the respective state is a party. If the state has created, for example, an intelligence community, the principles ensure the functioning of a stable, harmonious system of intelligence agencies, as the integrated use and application of special methods, forces, and means helps to effectively protect individuals, society, and the state not only from external threats, but also from possible arbitrariness of some officials of special services. Therefore, prescribing a list of principles of special services in the legislative act is a conscious necessity, albeit insufficient if there is no emphasis on their content.

The list of principles of activity in the legislative acts of different states differs, because each state has its specific opinions on the nature, content, and purpose of the secret services. Thus, the Law of Ukraine "On Intelligence Bodies of Ukraine"[2] enshrines the following principles: legality; respect and observance of human and civil rights and freedoms; continuity; combination of explicit and implicit methods and means within the limits defined by the law; delimitation of spheres of activity of intelligence bodies, interaction, and coordination of their activity; independence and efficiency in providing intelligence; non-partisanship; controllability and accountability to the relevant state authorities within the limits provided by law. However, the Law of Ukraine "On Security Service of Ukraine"[3] defines another list of principles, which includes legality, respect for human rights and dignity, non-partisanship, and responsibility to the people, a combination of unity and collegiality, transparency, and conspiracy.

At the same time, the Law of the Republic of Lithuania "On Intelligence" [4] defines

[1] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12; Law of Ukraine No 2331-III "On the Intelligence Bodies of Ukraine". (2001, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2331-14#Text; Law of Ukraine No 2135-XII "On Law Enforcement Intelligence Operations". (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2135-12

[2] Law of Ukraine No 2331-III "On Intelligence Agencies of Ukraine". (2001, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2331-14

[3] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[4] Law on Intelligence of the Republic of Lithuania No XI-2289. (2012, October). Retrieved from https://e-

two groups of principles: general and special. The general principles include 1) lawfulness; 2) allegiance to human rights and fundamental freedoms; 3) precedence of public and national interests; 4) accountability to the main government institutions of the State in charge of ensuring national security. The legislator outline the special principles as follows: 1) political neutrality – intelligence institutions and intelligence officers may not use the powers granted to them so that they wilfully interfere, by their active or passive conduct, in the democratic processes taking place in the State and participate in political decision-making; 2) prohibition of publication of activity methods – the methods of activities of intelligence institutions are not public and may not be disclosed to persons not engaged in intelligence and counterintelligence or not exercising control or coordination of these activities; 3) timeliness – intelligence information must be provided to institutions ensuring national security within a reasonable time limit; 4) objectivity – intelligence information may not be distorted and biased; 5) clarity – intelligence information must be provided in a manner that would prevent it from being interpreted ambiguously and differently.

Notably, Article 6 of the Law of Georgia "On Intelligence"[1] and Article 5 of the Law of Georgia "On the Intelligence Service of Georgia"[2] provide a significant list of principles, namely: legality; strict observance and respect for human rights and freedoms; objectivity and impartiality; political neutrality; accountability; unity and centralisation; purposefulness; efficiency; continuity; planning; privacy. The Law of the Russian Federation "On Foreign Intelligence"[3] also attracts attention, in which the principles of its activity define distribution of powers of federal executive bodies, which are part of the security forces of the Russian Federation; legality; respect for human and civil rights and freedoms; control over the President of the Russian Federation and the Federal Assembly; combination of explicit and implicit methods and means (Article 4). The legislation emphasises the strict observance of the above principles, emphasises their mandatory observance by both individual staff and bodies in general. Sometimes the most important principles are outlined in a single article. For example, in the Law of Ukraine "On Security Service of Ukraine"[4], despite the fact that the principle of "non-partisanship" is mentioned together with others in Article 3, it is also covered in detail in Article 6. It should be noted that the disadvantage of the laws on special services of some states is that they do not define the principles[5] of their activities. The principles should be defined in the legislative act, although not all, but only those that are directly inherent in the activities of special services. For example, the expediency of including such principles as continuity, accountability, unity, centralization, non-partisanship, etc. in the legal framework for regulating the activities of special services is questionable. They do

seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.450750

[1]Law of Georgia No 2983 "On Intelligence Activities". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92242?publication=2

[2]Law of Georgia No 2984 "About the Intelligence Service of Georgia". (2010, April). Retrieved from https://matsne.gov.ge/ru/document/view/92248?publication=12

[3] Federal Law of the Russian Federation No 5-FZ "On External Intelligence". (1996, January). Retrieved from http://svr.gov.ru/svr_today/doc02.htm

[4]Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[5] Law on the Organization and the Operation of the Romanian Intelligence Service No 14. (1992, February). Retrieved from https://www.sri.ro/fisiere/legislation/Law_SRI.pdf

not reflect the specific features of the activities of special services, especially their essence, content, and purpose. Such principles are inherent in the activities of any other state body. Instead, the principles that ensure the rule of law, guarantee the observance of the constitutional rights and freedoms of person and citizen, must be reflected in the legislation on special services, as well as in the legislation on the activities of law enforcement agencies. A comparative analysis of the above provisions of the legislation of the CoE member states suggests that legislators, compared to other principles, give preference to the rule of law and respect for human rights and freedoms.

Obviously, it is insufficient to simply define the principles without covering their content in the legislation on special services, as such an approach cannot guarantee the proper protection of human and civil rights and freedoms in the implementation of activities by special services. In this context, Article 5 "Activities of the Security Service of Ukraine and Human Rights" of the Law of Ukraine "On Security Service of Ukraine"[1] can be cited as a positive example, which covers the content of the principle of respect for human rights and freedoms, namely inadmissibility of disclosure of information about a person's personal life; humane treatment of a person and respect for their dignity; consideration of the conditions under which rights and freedoms may be temporarily restricted; strict observance of the established order of restriction; liability for unlawful restriction of legal rights and freedoms; measures to restore violated rights or freedoms or compensation for moral and material damage; prosecution of perpetrators; terms and forms of providing written explanations to a citizen regarding the restriction of their rights or freedoms; the possibility of appealing to the court with regard to illegal actions of officials (officers) and security agencies, etc.

It is not entirely clear whether all legislators include the principle of legality in foreign intelligence regulations without any reservations or explanations. As a rule, intelligence agencies operate outside the national territory, in violation of foreign legislation. Therefore, intelligence cannot follow the principle of legality, considering its activities abroad. Furthermore, intelligence is sometimes prohibited from conducting its activities against the citizens in its own state. Thus, "application of methods and means of intelligence activities against citizens of the Russian Federation in the territory of the Russian Federation is inadmissible"[2]. Finally, the most compelling argument is that since intelligence agencies are not law enforcement, it is legally incorrect to include the principle of legality in a foreign intelligence regulation without any clarification, to put it mildly. The inclusion of this principle in the legal act is expedient only with reservations, such as: "in case of application of intelligence measures on the territory of the state" or "in case of application of methods and means of law enforcement intelligence operations", etc.

In recent years, Ukrainian scientists have increasingly resorted to the analysis of problems related to the necessity of improving, clarifying the legislative definition of the principles of law enforcement and special services. Thus, V.M. Halunko [3] proposes to legally define the principles of law enforcement as follows: the rule of law; legality; priority of human and civil rights and freedoms; equality; prohibition of abuse of power; justice; data protection and respect for private information; compliance with the

[1] Law of Ukraine No 2229-XII "On the Security Service of Ukraine". (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[2] Federal Law of the Russian Federation No 5-FZ "On External Intelligence". (1996, January). Retrieved from http://svr.gov.ru/svr_today/doc02.htm

requirements of confidentiality of information during the execution of requests; transparency; openness to external verification, transparency to inspections and supervision; accessibility of administrative power and administrative services, e-government and the use of e-mail; efficiency and effectiveness; mutual responsibility of the state and person [3]. V.D. Firsov [4] is more categorical on this matter, believing that "the legislative definition of intelligence activities, as well as the regulation of its implementation in Ukraine, are outdated and do not meet modern global trends in intelligence activities", therefore, it is necessary to bring regulatory regulation of intelligence activities in line with practical activities of intelligence agencies and general world trends in intelligence regulation" [4]. Agreeing with the above opinions, it can be stated that before the inclusion of a principle in the law, it must be scientifically substantiated in detail. If the relevant principle is subject to legislative consolidation, its content in the law must be disclosed and defined in detail by law.

Summarising the above, the violation of human rights and freedoms by the secret services contrary to the ECHR provisions may well be a formal legislative designation only of a list of principles, without their detailed coverage, or vague, and sometimes even ambiguous interpretation of the principles of activities in the law, concerning, first of all, those which provide observance of the constitutional rights and freedoms of the person and the citizen.

4. NATIONAL SECURITY AS A BASIS FOR RESTRICTING THE RIGHTS AND FREEDOMS OF PERSON AND CITIZEN

The ECHR states that rights and freedoms are not subject to any restrictions, except those established by law and necessary in a democratic society to ensure certain interests, the full list of which is contained in Articles 8, 10, and 11 of the ECHR[1]. Among all others, the interest of *national security* comes first, followed by territorial integrity, public safety, prevention of riots or crimes, protection of health or morals, protection of reputation or rights of others, prevention of disclosure of confidential information, or to maintain authority and impartiality of the court. That is, the ECHR clearly distinguishes the interest of national security from other interests. This was aptly noted by Hans Bourne and Ian Lei, who argued that the secret services and intelligence agencies acted solely in the interests of *national security*; legislative consolidation of their areas of competence should be different from the areas of competence of law enforcement agencies; the special powers of special services and intelligence cannot be used in ordinary situations where there is no serious threat to *national security* [5]. They propose a distinction between threats to national security and criminal acts: "Terrorism and espionage are criminal acts that directly undermine and even contradict democratic processes, as well as threaten the integrity of the state and its key institutions. However, organised crime is something else" [5].

This gives rise to several legitimate questions. What does the category "national security" include? How special services and intelligence should ensure such an overarching phenomenon? When do legal grounds for restricting human rights and freedoms upon ensuring national security appear? Notably, the concept of "national security", despite many scientific developments in this area, is still an understudied

[1] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No 11 and No 14. (1950, November). Retrieved from https://rm.coe.int/1680063765

category. The ECHR, summarising the case law, in its decisions on specific cases found that there are grounds to consider the following activities as threats to national security, namely: espionage; terrorism; incitement to terrorism; subversive activities in relation to parliamentary democracy; activities of separatist and extremist organisations that threaten the unity or security of the state by violent or undemocratic means; incitement to breach of oath by servicemen [5]. Therefore, the ECHR tends to consider threats to national security in the context of the possible commission or preparation for the commission of specific crimes.

Some states interpret threats to national security directly in the legislation on special services in order to give the latter an indication of when and under what circumstances the existing special forces, methods, and means can be used. Thus, Article 5 of the Law "On Intelligence and Security Services of Bosnia and Herzegovina"[1] states: "For the purpose of this Law," threats to the security of Bosnia and Herzegovina "shall be understood to mean threats to the sovereignty, territorial integrity, constitutional order, and fundamental economic stability of Bosnia and Herzegovina, as well as threats to global security which are detrimental to Bosnia and Herzegovina, including… ", further listing the components of crimes, namely: terrorism; espionage; sabotage; organized crime; illegal drug, arms and human trafficking; illegal international proliferation of weapons of mass destruction, and the components thereof, as well as materials and tools required for their production; illegal trafficking of internationally controlled products and technologies; acts punishable under international humanitarian law; and organized acts of violence or intimidation against ethnic or religious groups within Bosnia and Herzegovina. Thus, the legislator of Bosnia and Herzegovina, like the ECHR, also tends to consider specific crimes as a threat to national security, although the first part of the article was about sovereignty, territorial integrity, constitutional order, and the fundamentals of economic stability.

Numerous studies acknowledge that national security belongs to key categories and, at the same time, is understudied [6; 7], still not being scientifically separated from such related concepts as state security, national security protection, state security protection, etc. Thus, V.F. Smolianiuk [8] proposes to distinguish the system of national security from the system of national security protection, emphasising that the former is a more complex entity. Therewith, "both systems are in a state of dynamic development. They have not acquired their final forms. This could not happen, considering the complexity of nation-building processes in modern Ukraine, insufficient definition of national interests, the superficial nature of their legal consolidation, as well as the lack of experience (traditions) of national security of independent Ukraine" [8]. Scholars A. Yanchuk, P. Pryhunov, and V. Kolesnik [9] note that the constitutional provisions on national security and its protection "require immediate improvement and clarification", because "it is not clear from the text of the Constitution of Ukraine[2] what the interests of national security are and how they differ from the interests of the state… Can they restrict human rights only in the interests of national security and not in the interests of the state? Are the interests of national security separate from the interests of the state?

[1] Law on the Intelligence and Security Agency of Bosnia and Herzegovina. (2004, April). Retrieved from https://www.legislationline.org/download/id/1199/file/35d065b27c243a9098a01793763f1b86.pdf

[2] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

That is, there is an urgent need for regulatory improvement of the definition of "national security", the definition of the main functions of the latter, which should be provided by the state: defence, protection, guardianship" [9].

Studies offer various ways to improve the system of national security, one of which is "the development of a hierarchical tree of national security goals, which will be achieved by identifying and implementing appropriate methods that form a single systemic idea of national security policy" [10]. Furthermore, "National security activities are now addressing a far wider array of phenomena than in the past, both in the Western world and beyond. We take as our starting point the assumption that national security cannot be completely divorced from 'traditional' interpretations, in which policy is shaped by agencies, ministries and other institutions tasked with the protection of national interests from exogenous threats" [11]. That is, the modern realities are filled with a completely different meaning than in the past, and this significantly expands the scope of phenomena that are currently covered by the category of "national security". Dexter Fergie aptly and humorously notes that "When the two-word phrase became a national obsession, it turned everything from trade rules to dating apps into a potential threat to the United States", that "In the United States, "national security" is the preoccupation that never has to explain itself" [12]. Researchers at the Council of Bars & Law Societies of Europe (CCBE) [13] also point out that the European Court of Human Rights (ECtHR) has not sought to define national security. Case law from the ECtHR has focused instead on the conditions which justify an interference with an individual's rights on grounds of national security. The European Commission of Human Rights believes that national laws do not require a complete definition of the concept of 'the interests of national security'. It justified its position by underlining the fact that "many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice"[1]. In other words, it is not the very notion of national security or "national security interests" that is important for the ECHR, but the conditions under which there has been an interference with human rights for reasons of national security protection [14-16].

V.O. Antonov [17] believes that the concept of national security is based on three fundamental categories: "interest", "threats", "protection". The forms, methods, and means of ensuring national security largely depend on their content". In other words, special services, using specific forms, methods, forces, and means in their activities to perform their objectives, must proceed from the constitutional definitions of forms, methods, and means of national security protection. Professor O.N. Yarmysh [18] emphasises that "issues of national security are always a priority in the system of functioning of any state. The importance of this function is growing in modern world, due to the necessity of responding to a range of destructive globalisation challenges"; "National security and defence legislation does not meet the threats to Ukraine's national security and requires development, revision, or clarification". His proposal to amend the Constitution of Ukraine[1] with the section "National Security" is very reasonable.

Considering the above, national security and state security, as stated in Article 1 of the Law of Ukraine "On National Security", differ in that the former covers "protection

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

of state sovereignty, territorial integrity, democratic constitutional order, and other national interests of Ukraine from real and potential threats" [1], while state security covers "protection of state sovereignty, territorial integrity, and democratic constitutional order and other vital national interests from real and potential threats of *non-military nature*"[1]. It is threats of a *non-military nature*, as noted by the Ukrainian legislator, which distinguish state security from national security. In this way, a direct reference is made to the fact that these threats arise from entities that encroach on state sovereignty, territorial integrity, and democratic constitutional order, and in actions, activities, or inaction which express signs of crimes, including: espionage, terrorism, intelligence and subversive or separatist and extremist activities, drug distribution, human trafficking. Admittedly, such threats should be countered only by state security bodies, which constitute special purpose state authorities with *law enforcement functions*[2].

With regard to national security, it is ensured by counteracting threats that constitute "phenomena, trends, and factors that render impossible or complicate or may render impossible or complicate the fulfilment of the national interests and preservation of the national values of Ukraine" (Clause 6)[2]. These threats usually arise from foreign individuals or legal entities whose actions, activities, or inaction do not express direct signs of crime, but the nature of which is clearly unfriendly, mercantile, and sometimes provocative and hostile. Only intelligence agencies can counter these threats, because, firstly, the threats are external in nature, and, secondly, only intelligence has in its arsenal the full set of necessary forces and means to counter these threats. It is no coincidence that the legislator in Article 6 of the Law of Ukraine "On Law Enforcement Intelligence Operations" provided the intelligence agencies with the opportunity to perform law enforcement intelligence operations, apart from protecting their security, also to procure intelligence information[3].

CONCLUSIONS

Thus, the uncertainty of the category of "national security", as well as the vagueness of the place and role of state security and intelligence in its protection are factors of possible violation of constitutional rights and freedoms of person and citizen contrary to the ECHR provisions. The comparative analysis demonstrates different approaches of the legislators of the CoE member states to the implementation of the provisions of the ECHR in the national legislation on special services. Simple replication or transfer is clearly insufficient to really guarantee the protection of human rights and freedoms by the secret services. Constitutions or individual laws should set forth a detailed understanding of the category of national security, as well as related categories that are directly associated with its protection. It is impossible for the legislation on special services to be limited only to enumeration of principles of their activities. It is necessary to thoroughly outline each principle based on previous scientific development by a legal provision, to prevent vagueness and ambiguity, to consider the areas of national and state

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

[2] Law of Ukraine "On the Security Service of Ukraine" No 2229-XII. (1992, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12

[3] Law of Ukraine "On Law Enforcement Intelligence Operations" No 2135-XII. (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2135-12

security protection on the part of law enforcement agencies, intelligence, and counterintelligence bodies. This is especially true of the principle of respect for and observance of human and civil rights and freedoms.

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Suggested Citation: Proshchaiev, V. (2020). European convention on human rights as the minimum international standard for national legislation on special services: a comparative aspect. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 66-83.

Submitted: 07/08/2020
Revised: 28/10/2020
Accepted: 31/11/2020

УДК 342.6
DOI: 10.37635/jnalsu.27(4).2020.84-106

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СИСТЕМА ДЕРЖАВНОГО УПРАВЛІННЯ ТА ДЕРЖАВНА СЛУЖБА В УКРАЇНІ: ПЕРЕХІД ДО ЄВРОПЕЙСЬКИХ СТАНДАРТІВ

Анотація. *Сьогодні в Україні постають наступні проблеми: реформування системи державного управління та державної служби, вдосконалення нормативної бази їх функціонування, розширення прав та повноважень органів місцевого самоврядування, приведення їх діяльності у відповідність до вимог ЄС, закріплення та створення механізмів реалізації таких принципів, як баланс централізації та децентралізації, повсюдність, субсидіарність та компетентність, а також трансформація державної служби відповідно до європейських стандартів. Тому основна мета роботи полягає у оцінці системи державного управління та державної служби України. За допомогою методу аналізу було встановлено, що в умовах соціально-економічної та політичної турбулентності, спричиненої внутрішніми та зовнішніми факторами, інститут державного управління України стикається з широким колом проблем, зокрема, таких як негативний баланс довіри суспільства, відсутність балансу централізації та децентралізації системи державного управління, поганий зв'язок як у владних структурах, так і між державою та суспільством, дефіцит кваліфікованих кадрів, низька якість адміністративних послуг та недостатній рівень морально-етичної*

свідомості державних службовців. Однак на даний час слід зазначити таку кількість нововведень, спрямованих на підвищення ефективності та забезпечення якості державної служби: поділ адміністративної та політичної позицій; з'ясування правового статусу державного службовця; відокремлення державної служби від політичної діяльності; встановлення вичерпного переліку осіб, на яких не поширюється дія законодавства про державну службу; запровадження нового підходу до класифікації посад державних службовців; компетентний підхід до відбору кандидатів на державну службу; визначення загальноприйнятих законодавством підходів до вступу на посаду, виконання та звільнення від державної служби; вдосконалення професійних навичок та професійної підготовки державних службовців, оплата їх праці, виплата премій та заохочення, а також дисциплінарна відповідальність.

Ключові слова: державна політика, центральні органи виконавчої влади, місцеве самоврядування, формування політики.

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PUBLIC ADMINISTRATION SYSTEM AND CIVIL SERVICE IN UKRAINE: TRANSFORMATION TO THE EUROPEAN STANDARDS

Abstract. *Today in Ukraine, the following problems emerge full blown: reforming the public administration system and civil service, improving the regulatory framework for their functioning, extending the rights and powers of local self-government authorities, bringing their activities into compliance with the EU requirements, enshrining and creating mechanisms for implementing such principles as the balance of centralization and decentralization, ubiquity,*

subsidiarity and capacity, as well as the transformation of the civil service institution according to the European standards. Therefore, the main purpose of the work is to assess the system of public administration and civil service of Ukraine. Using the method of analysis, it was found that in the conditions of the socio-economic and political turbulence caused by internal and external factors, the public administration institute of Ukraine faces a wide range of problems, including such as the negative balance of the society's trust, the lack of balance of centralization and decentralization of the state administration system, bad communication both within the power structures and between the state and society, shortage of qualified personnel, low quality of administrative services and insufficient level of moral and ethical consciousness of civil servants. However, at the present time, such a number of innovations aimed at improving the performance and ensuring the quality of civil service should be noted: separation of administrative and political positions; clarification of the legal status of a civil servant; separation of civil service from political activity; establishing an exhaustive list of persons who are not subject to the civil service legislation; introduction of a new approach to the classification of civil servants' positions; a competency-based approach to the selection of candidates for the civil service; defining legislatively common approaches to entry, performance and separation from civil service; improving professional skills and professional training of civil servants, their labor remuneration, bonus payment and encouraging, as well as disciplinary responsibility.

Keywords: state policy, central executive bodies, local self-governance, policy-making.

INTRODUCTION

Ukraine has been in the internal conflict situation since 2014. Being disappointed by an unexpected change of country development vector towards Russia and a try to suppress the peaceful mass protests by use of a rough force, the people managed to dismiss the corrupt government after several months of bloody clashes with Yanukovych regime (these events were called later as the Revolution of Dignity) and created the prerequisites for returning the country to a European vector of development. Unfortunately, this moment of the state's institutional weakness was used by the Russian Federation to annex Crimean Peninsula and launch a hybrid war in the Eastern part of Ukraine by direct military interventions as well as military and financial support of two quasi-states within Donetsk and Luhansk regions. In this way, an internal political and social conflict turned into external one, which took a massive death toll measured by many thousand people. However, these conflicts speeded up the country's development and had a strong effect on its sector of public administration. During this time, there have been the key events that dramatically affected the public administration system in Ukraine, i.e.: election of a new president, parliamentary election, establishing civil and military administrations, introduction of approximately 60 reforms, among which public administration reform and decentralization of power were the most palpable ones for the society, etc.

Today in Ukraine, the following problems emerge full blown: reforming the public administration system and civil service, improving the regulatory framework for their functioning, extending the rights and powers of local self-government authorities, bringing their activities into compliance with the EU requirements, enshrining and creating mechanisms for implementing such principles as the balance of centralization and decentralization, ubiquity, subsidiarity and capacity, as well as the transformation of

the civil service institution according to the European standards. And although there were some attempts to change the Soviet model of public management organization, which was inadequate to the current challenges; since the country independence was declared, they proved to be unsuccessful. An assessment indicator for crisis phenomena in the public administration system is the Fragile States Index, the value of which for Ukraine in 2015 was 76.3, in 2019 71.0 [1] demonstrates that Ukrainian state is still not stable. Ukraine remains within the group of states, whose situation is labelled as "warning". Having felt the consequences of the financial and economic crisis, the citizens do not believe in the success of reforms launched by the after-revolution government, which caused the failure of the President Poroshenko for being re-elected in 2019. It should be noted that the reasons for such a difficult situation are not only economic factors, but also the hybrid war with Russia and the low efficiency of public administration.

Civil service as a social institution is called to increase the life quality standards for the population by delivering high-quality administrative services, forming and ensuring the implementation of state policy, supervision and control over legal compliance. However, it does not fully meet these objectives and requires being reformed (hence the new Civil Service Act[1]was adopted in 2015). The considerations regarding the importance and necessity to reform the civil service system are also being strengthened within the context of exacerbation of the economic and political crisis. From the perspective of the effectiveness of the institute, the main task of the reforms is its focus "on ensuring the exercise of the powers by public authorities; protection of individuals' rights and interests; approximation of the constitutional ideal of a legal, democratic state to the objective reality; focusing of civil servants and citizens on compliance with moral norms, rules of human co-residence, etc."[2]. Thus, according to the Strategy on Sustainable Development "Ukraine–2020", the objective of the public administration reform is "to build a transparent public administration system, to create a professional civil service institute, and to ensure its effectiveness. The result of the reform implementation has to be the establishment of an efficient, transparent, open and flexible public administration structure using the latest information and communication technologies (e-governance) that is able to produce and implement a coherent public policy aimed at sustainable social development and adequate response to internal and external challenges[2]".

During the research, a thorough work of the peculiarities of the development of public administration and governance in Central and Eastern Europe was analyzed [3-7]. The achievements of administrative reforms in Czechia after 2000 [8]; in Lithuania in 2004–2017 [9] were also researched.

1. MATERIALS AND METHODS

The history and organizational structure of the central government should be considered in the context of changes in the functions of public authorities at different levels. As for the central executive bodies (CEBs), in 2014 the first important step in changing their

[1]Law of Ukraine "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19#Text

[2]Decree of the President of Ukraine "On the Strategy on Sustainable Development "Ukraine–2020". (2015, January). Retrieved from https://zakon.rada.gov.ua/laws/show/5/2015.

functions was to revise the control and supervisory functions of the CEBs, which were suggested to be understood as auditing the compliance of public authorities, local self-government authorities, their officials, legal entities and citizens with mandatory rules and norms of behavior in economy and public life established by the Constitution of Ukraine[1], laws of Ukraine and other regulations, the differentiation of the normative and the actual state of the control object, implementation of measures aimed at bringing the control object into normative state [10].

It should be noted that in 2010 the Public Administration Modernization Plan acknowledged the main problem in functioning of central executive bodies, which should be accepted, – a built-in conflict of interests, which is caused by the necessity to implement conflicting types of functions in one body (combination of statutory regulation with the functions in delivering administrative services or oversight functions; in managing state property and implementing oversight measures) [10], leading to the following consequences: (1) CEBs carry out all administrative procedures from adopting a rule to controlling its compliance; (2) there is a suppression of strategic decisions are displaced by tactical and operational actions. The typology of functions proposed at that time (state policy formulation, approval of statutory instruments, control and supervision in a certain sphere of activity, the delivery of public services and management of state property) resulted in the criteria for determining the types and the CEB system in 2010–2011, and in 2015 it identified the main tasks of civil servants in the public service legislative act.

Thus, on 25 August 2014, at the government session, it was decided that it was necessary to leave 680 control functions belonging to different CEBs from 1032 ones (in 2010, there were 1623 of them), and to reduce the number of bodies with controlling functions by 51 per cent. The reasons for this were the reduction of pressure on business and the reduction of corruption level, and the implementation steps were: preparation of the target model of the CEB system; optimization of the CEBs and the number of their employees; reducing the number of functions and eliminating their duplication; devolving part of the authority to the local level or self-regulatory organizations. Since the change in oversight functions had to reduce the pressure on business and ensure the efficient control, the number of control functions was reduced through the dissolution of the CEBs; the consolidation of the functions of the controlling CEBs, the deprivation of certain CEBs of control functions, the abolition of control functions. Thus, during 2014–2017, most of the ministries were deprived of control functions in the field of economic activity, control functions were consolidated in the activities of the newly formed CEBs, part of the control functions regarding price control, assay supervision, building control and topographic-geodetic control was cancelled, which led to devolving of supervision in the sphere of housing and utilities sector to local self-government authorities as well.

However, as long ago as 2014, many experts and field-specific industry associations warned that such an approach to changing oversight functions would require a considerable enhancement regarding: the need to adhere to the principle of preserving "reasonable state regulation", especially in those areas that seriously endanger the lives of the citizens; clear understanding that it is necessary to proceed not from the number of inspectorates but from the necessary functions and for these functions there has to be a certain body; changes in

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

the work quality of newly-created bodies, so that the next deregulation reform did not bear signs of changing only the number of supervisory and inspection bodies; inappropriate reduction of control bodies by consolidating services while preserving the same functions [11]. At the same time, it can be stated that changes in the oversight function have not brought positive changes into the Ukrainian economy because according to the Global Competitiveness Index published by the World Economic Forum, Ukraine ranked 73th out of 144 countries in 2012–2013, 84th out of 148 in 2013–2014, 76th out of 144 in 2014–2015, 79th out of 140 in 2015–2016, 85th out of 138 in 2016–2017 [12]. According to the Federation of Employers of Ukraine, in 2017, the Business Ombudsman Council received 1,638 complaints about the actions of controlling and law enforcement authorities, twice as many as in 2016, 61 per cent of which are related to the actions of the fiscal service and tax authorities [13]. Both in 2014 and as of March 2018, no legislative act on self-regulatory organizations was passed (it was included in the agenda of the eighth session of the Verkhovna Rada of Ukraine of the eighth convocation among the issues prepared for consideration in plenary meetings on 20 March 2018), which should be delegated part of state oversight functions.

In 2016, regarding the change of functions, the Government focuses on both its own functions and the CEBs' functions for managing state property, which means the exercise of the powers of the owner regarding natural resources that are in state ownership, state property, including the one which was transferred to state enterprises and institutions, as well as management of shares of state-owned open joint-stock companies [10]. It should be noted that the Government's political functions include defining (formulating) the policy of Ukraine, together with such state institutions as the Verkhovna Rada of Ukraine and the President of Ukraine. The Government's political functions are entrenched primarily in the Program of its activities. However, most of the functions performed by the Cabinet of Ministers of Ukraine, including the management of state property, have a state-management nature and require corresponding analyzing the appropriateness of their deconcentration.

According to experts, in early 2018 the Cabinet of Ministers of Ukraine are reluctant to lose the rights to create, reorganize and dissolve business entities, appoint and dismiss their managers, decide about discarding, alienation or transfer of property, corporate rights, approve financial plans of enterprises, approve of leasing state property and a number of others [14]. The existence of Government's steps in this direction of changing functions can be confirmed with introducing by the Cabinet of Ministers of Ukraine a draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Deprivation of the Cabinet of Ministers of Ukraine of Non-Relevant Authorities"[1] as a legislative initiative and its active support in the Verkhovna Rada of Ukraine. A similar draft act has to be developed regarding the deprivation of CEBs of similar functions.

The steps regarding the changes in the functions made in 2017–2018 are aimed at distinguishing the functions in formulating the state policy and adopting laws and regulations in CEBs' activities. The first ones are to identify the basic priorities and directions of development, the methods to achieve them, set terms and expected socio-

[1] Law of Ukraine No 2501-VIII "On Amendments to Certain Legislative Acts of Ukraine Regarding Deprivation of the Cabinet of Ministers of Ukraine of Non-Relevant Authorities". (2018, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2501-19#Text

economic outcomes in a particular area of the economy and public life; the others are to issue norms and rules that govern relations in a particular sphere, extend to an indefinite number of individuals and are binding on the public authorities, local self-government authorities, their officials, legal entities and citizens based on and pursuant to the Constitution of Ukraine[1] and the laws of Ukraine [10].

As of December 2017, the Cabinet of Ministers of Ukraine states: (1) a possible conflict in the ministries between the functions of state policy formulation and certain functions in implementing the state policy, in particular regarding the management of state-owned objects, inspection and supervision activity and delivery of administrative services; (2) the lack of policy formulation based on its analysis and strategic planning that makes it difficult to detect, predict, prevent problems in the relevant areas and to achieve the long-term goals, and constrains a significant number of reform processes in the state; (3) the lack of a clear distribution of authorities, which results in function duplication and, consequently, inefficient use of human and financial resources, and the separate functions, with which ministries are burdened, are not appropriate in terms of the development of the corresponding spheres (sectors) and are superfluous[2].

In 2017, the Cabinet of Ministers of Ukraine, its Secretariat and ministries as institutions for implementing the function of state policy formulation, taking into account the government decision[3], change their organizational structure (they form directorates) and start procedures to fill posts in them. It should also be noted that this function is partly assigned to the National Agency of Ukraine on Civil Service and the State Agency for E-Governance, where general departments are established. According to the provisions on directorates of the ministries, they are formed to perform the tasks connected with ensuring the state policy formulation in one or several areas of the ministry's competence, such as: (1) ensuring the state policy formulation based on constant analysis of the state of affairs within its competence, elaboration of alternative solutions of the existing problems; (2) monitoring and evaluating the results of the state policy implementation, drawing up proposals regarding its continuation or correction; (3) ensuring statutory regulation within its competence. The directorates of the Secretariat of the Cabinet of Ministers of Ukraine perform tasks in coordinating work on strategic planning, organizing drawing up the proposals to the Prime Minister of Ukraine regarding the priorities of the state policy, draft plans of priority actions of the Government and coordination of their further implementation, analysis of powers and functions of executive authorities, evaluation of their performance efficiency and other activities of the Cabinet of Ministers of Ukraine in regard to expert-analytical and other[4]. The distinction of positions in ministries contributes to the emphasis on their functions of state policy formulation regarding performing political and administrative functions, and

[11]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

[2]Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Concept of Optimization of the Central Executive Bodies System". (2017, December). Retrieved from http://zakon3.rada.gov.ua/laws/show/1013-2017-%D1%80

[3]Resolution of the Cabinet of Minister of Ukraine "Some Issues of Ordering the Structure of the Secretariat of the Cabinet of Ministers of Ukraine, the Apparatus of Ministries and Other Central Executive Bodies". (2017, August). Retrieved from http://zakon5.rada.gov.ua/laws/show/644-2017-%D0%BF.

[4]*Ibidem*, 2017

for this purpose the posts of state secretaries were introduced[1]. It should be noted that Ukraine has already introduced the posts of state secretaries as chiefs of staff [15]. Since 2016, they revived the position title "state secretary" of a ministry, and in the Law of Ukraine "On Central Executive Bodies"[2]the words "deputy minister – chief of staff" were replaced by the words "state secretary of the ministry".

The further implementation of the idea of changing the functions of ministries is aimed at: depriving them of their functions in delivering administrative services, inspection and oversight functions and functions in managing state-owned objects (apart from the management of state-owned objects, whose activities are aimed at delivering economic services to ministries, and as well as management of state-owned objects used for placement of foreign diplomatic institutions of Ukraine); their focus on strategic planning, ensuring the public policy formulation, monitoring (control) and assessing the outcomes of its implementation; possibility to leave the functions of the ministries in the state policy implementation in exceptional cases, if their volume and content does not dictate the reasonability to establish a new central executive body or transfer them to other entities, in particular local executive authorities or local self-government authorities, in the context of decentralization of certain powers[3].

Notwithstanding all the attractiveness of this approach, there are several precautions: (1) if the ministries will not take over the functions traditionally performed by the Secretariat of the Cabinet of Ministers of Ukraine, if the latter did so in view of the limit of slightly more than 1000 civil servants, then by 2020, the number of specialists for reforms at the ministries has to reach 5500; (2) the loss of classical public administration functions by ministries (the functions of state policy implementation) will require to solve the issue of another redistribution of functions, and hence another reorganization of CEBs and the redundancy of civil servants (and taking into account the continuing reorganization of the CEBs, this will become another "organizational stress" both for the state and for the society); (3) it is difficult to imagine such dramatic changes, for example, in the Ministry of Justice of Ukraine, the Ministry of Finance of Ukraine or the Ministry of Foreign Affairs of Ukraine, taking into account the functions that they are currently performing.

Thus, such a radical change in the functions of the ministries, or the transition to the target model of the ministries, requires a well-reasoned approach in order not to turn the ministries into an additional security apparatus of the Cabinet of Ministers of Ukraine, not to destroy the integrity of the state administrative apparatus and not to create a system that will provoke reforms and ideas without any opportunities for their practical implementation. It is appropriate to have reform teams or state experts over time consisting of up to 20 persons as one of the minister's services, however, provided that the institutional relations of this service with the ministry staff are established.

[1]Law of Ukraine "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19#Text; Resolution of the Cabinet of Ministers of Ukraine "On Approval of Strategy for Reforming the Civil Service and Service in Local Self-Government Bodies in Ukraine until 2017 and Approval of the Action Plan for its Implementation". (2015, March). Retrieved from http://zakon5.rada.gov.ua/laws/show/227-2015-%D1%80

[2]Law of Ukraine "On Central Executive Bodies". (2011, March). Retrieved from http://zakon0.rada.gov.ua/laws/show/3166-17/print1478020568592555.

[3]Resolution of the Cabinet of Ministers of Ukraine No. 1013-r "On Approval of the Concept of Optimization of the Central Executive Bodies System". (2017, December). Retrieved from http://zakon3.rada.gov.ua/laws/show/1013-2017-%D1%80.

Besides, in order to implement the idea of assigning the strategic planning functions to the ministries and ensuring the state policy formulation, it is necessary to define legislatively the sectors of state policy/public administration. Consequently, the minister has to be responsible for state policy formulation in one or more sectors, and the positions of deputy ministers would appear. The state secretary's functions of the ministry should be limited to the issues regarding the management of the ministry's staff and general organizational matters without direct responsibility for the sectors of state policy [16]. The confirmation of this idea is found in the draft law as of 14 July 2016[1].

In regard to the practical implementation of changing the functions of the Cabinet of Ministers of Ukraine and the ministries as of 31 March 2018, having analyzed the Action Plan fulfillment for implementing the Strategy of Public Administration Reform in Ukraine for 2016–2020, the experts noted that the following important measures remained untaken: amendments to the Laws of Ukraine "On the Cabinet of Ministers of Ukraine[2]" and "On Central Executive Bodies[3]" regarding organization of strategic planning and analysis of state policy [17]. Regarding the functions of delivering administrative services, which are understood as the issue of permits (licenses) for certain types of activities and (or) particular actions by the public authorities, local self-government authorities, their officials at the request of individuals and legal entities; registration of acts, documents, rights, objects, as well as issuance of individual legal acts, they will be changed only through deconcentration (transfer from the Cabinet of Ministers of Ukraine and the CEBs to local executive authorities, including the territorial CEB offices) and decentralization (transfer to local self-government authorities), taking into account the possibilities of the established centers for administrative services [10].

Thus, the analysis shows that the main emphasis of the Government regarding changing the functions of the executive bodies at its higher and central level on a short-term horizon (by 2020) is the distinguishing and resourcing of the function for developing and implementing a coherent state policy. This function should include the following components: analytical (constant analyzing the state of affairs in the sphere and developing alternative Law solutions of the existing problems); monitoring (monitoring and evaluating the results of the state policy implementation, elaborating proposals regarding the continuation or adjustment of the policy); coordination (coordination of the state policy implementation, interaction with other authorities); regulatory (development of laws and regulations in policy). Today, the implementation of this function depends on: drafting and submitting a draft regulations on amendments to the Regulation of the Cabinet of Ministers of Ukraine regarding policy coordination, strategic planning and agreement of draft acts of the Cabinet of Ministers of Ukraine[4]; development of the methodology of preparation and examples of programmatic and strategic documents of the state policy (policy brief, "green book", "white book",

[1]Law of Ukraine "On Amendments to Some Laws of Ukraine in Connection with the Adoption of the Law of Ukraine "On Civil Service"". (2016, July). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59725

[2]Law of Ukraine "On the Cabinet of Ministers of Ukraine". (2008, May). Retrieved from https://zakon.rada.gov.ua/laws/show/279-17#Text

[3]Law of Ukraine "On Central Executive Bodies". (2011, March). Retrieved from https://zakon.rada.gov.ua/laws/show/3166-17#Text

[4]Resolution of the Cabinet of Minister "Some issues of public administration reform". (2019, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1034-2019-%D0%BF?lang=en#Text

concept, strategy, program, etc.) and identification of their specific features and purpose in the process of formation, implementation and monitoring of the state policy. Without these documents, the measures to implement the Public Administration Reform Strategy of Ukraine cannot be taken in this area. Besides, the state policy implementation, and hence the classical public administration, will cover the functions of delivering administrative services, oversight and state property management regarding which the possibility of their deconcentration or decentralization will be constantly monitored.

The organizational structure of the public administration system is a result of functional changes, as well as the basis for the future ones; "over the years of Ukraine's independence, approximately four hundred transformations of CEBs took place. Only in recent years (since 2011, when government authorities were liquidated, resulting in a decrease in the number of CEBs from 111 to 74 bodies), several times the improvements were made to the CEB system. This is important because the optimization of the CEB system is a framework for reforming and modernizing the civil service, it opens reserves for significant reduction of expenditures on management as a whole and the staff, approximates delivering the administrative services to the consumer, contributes to reducing oversight functions and deregulation" [17]. As of 31 March 2018, 63 CEBs operate in Ukraine, in particular 18 ministries, 23 state services, 14 state agencies, 4 state inspections and 7 other CEBs[1].

The change of functions in regard to their redistribution between the state and local self-government authorities is the subject of ongoing discussions in the scientific, expert and managerial environments, which has been in place since the declaration of Ukraine's independence. However, the processes of unification of territorial communities become a significant factor in addressing this issue. Therefore, it should be noted that today the state is ready for the fact that all the issues of local concern related to economy, finance, management of communal property (local finances, economic development of communities, communal property management, communal land use and use of local natural resources, planning and development of settlements, maintenance and construction of local roads, sewage, electricity, gas and water supply, lighting of settlements, housing construction, work of local public transport, beautification, work of preschool institutions, primary and secondary education institutions, healthcare delivery, etc.) should be solved by local self-government authorities. The state is also ready to transfer functions in the spheres of social protection, additionally in health and education, functions in delivering administrative services, herewith assessing the ability of local self-government authorities to implement them. However, the state is quite cautious towards the property transfer, and therefore the functions of managing them. For example, in regard to land resources management, the draft act on implementing which (register number 4355 as of 31 March 2016) has already been in the Verkhovna Rada of Ukraine for three years.

The state would certainly be more actively involved in the transfer of functions to local self-government authorities, when amending the Constitution of Ukraine[2] regarding decentralization of power, at the local level reserving the right to control/supervise the compliance with the Constitution and laws of Ukraine, acts of the President of Ukraine, the

[1]Resolution of the Cabinet of Ministers of Ukraine "On Optimization of the System of Central Executive Bodies". (2014, September). Retrieved from http://zakon2.rada.gov.ua/laws/show/ 442-2014-%D0%BF

[2] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

Cabinet of Ministers of Ukraine and the CEBs of Ukraine, coordination of activities of territorial CEBs, control over financial activities of local self-government authorities within the limits established by law in regard to their use of state funds. However, the functions can be transferred without such constitutional changes. In particular, in compliance with the new version of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Associations" as of 26 November 2015[1], the functions of delivering administrative services in state registration of legal entities and individual entrepreneurs were transferred from justice authorities to local self-government authorities. Currently, there is a process of transferring the State Architectural and Construction Inspectorate's functions in construction objects commissioning to the local self-government authorities. For such a transfer it is sufficient to analyze the functions implemented by the CEBs, primarily through their territorial bodies and local state administrations to find out if they comply with their subsidiarity principle with subsequent legislative regulation of such transfer.

2. RESULTS AND DISCUSSION

2.1 Peculiarities Inside the Administration at the Central Level

The attitude towards the civil service, its organization and regulation, to its performance by officials is an indicator of the state mechanism and its apparatus. The civil service system consists of institutional (legal, organizational) and procedural structures, as well as civil servants – persons, who are specially trained and professionally employed in the system of government authorities. The social purpose of the civil service is to create conditions for the effective operation of government authorities, to seek the optimal combination of personal, group and state interests, to express and protect the interests of all segments of the population. It has to become a daily channel of communication between the state and the people, their interaction. Such an approach can be provided only by such a state apparatus and its personnel, which can reasonably put forward standards of behavior and work understandable for people. The citizens of Ukraine, who have come of age, are fluent in the national language and assigned the level of higher education not lower than: (1) for the positions of category "A" and "B" – Master's Degree; (2) for the positions of category "C" – Bachelor's Degree, Junior Bachelor's Degree, have the right to civil service.

The following persons cannot enter into civil service: (1) persons, who have reached the age of sixty-five; (2) persons declared incapable or of limited capability in the manner prescribed by law; (3) persons. who have a record of conviction for an intentional crime, if it has not been removed from official records or expunged in accordance with the law; (4) persons, who are disbarred by the court ruling from engaging in activities related to performance of the state functions or from holding the respective positions; (5) persons, who were imposed an administrative penalty for corruption or corruption-related offence – during three years since respective decision entered into force; (6) citizens of other states; (7) persons, who have not passed special check and have not given consent to such check; (8) persons, who is a subject to the ban stipulated by the Law of Ukraine "On Cleansing of Power[2]".

[1] Law of Ukraine No 755-IV "On State Registration of Legal Entities, Individual Entrepreneurs and Public Associations". (2003, May). Retrieved from https://zakon.rada.gov.ua/laws/show/755-15#Text

[2]Law of Ukraine "On Cleansing of Power". (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1682-18#Text

During implementation of citizens' right to the civil service, no forms of discrimination defined by the legislation shall be allowed. The relations regarding the remuneration of civil servants in Ukraine are regulated by: (1) provisions of the law; (2) norms of labor legislation and international treaties ratified by Ukraine in regard to relations not regulated by the Law[1] and are general norms of the legal institution of remuneration of civil servants that are compatible with the norms of the Law on labor remuneration as general and separate (norms for determining the minimum salary, the differentiation of the general and base rate of salary, equal salary for work of equal value, etc.); (3) separate statutory regulations of labor in regard to the relations that are not regulated by the Law and are not meaningfully related to its norms (on the salary payment deadlines, regarding determination of the amount of overtime compensation, as well as weekend, holiday and non-working days, night overtime pay, etc.).

By reference to the specific features of civil service, the law restricts the opportunities of civil servants to protect their right to labor remuneration. Besides, a civil servant has no right to organize and participate in strikes (part 5 of article 10 of the Law[2]). In case a civil servant reveals the facts of the violation of the Law by the public authorities or their officials during their service or outside the office, to ensure the rule of law, they have to contact to the central executive body which ensures the formulation and implementation of state policy in civil service (part 2 of article 8 of the Law[3]). This also applies to the issues on remuneration of civil servants. At the same time, state regulation of post salary schemes, bonuses, allowances and payments to civil servants virtually eliminated the possibility of influence by civil servants and their trade unions on solving these issues (except through consultations of the relevant government authorities with the representatives of civil servants' trade unions).

Currently, a number of measures have been taken in our country to prevent and fight corruption, most of which are aimed at preventing corruption, like in most European countries. One of the main directions in prevention of corruption is the detection of corruption risks that may arise in the activities of civil servants, as well as elimination of the conditions and causes of these risks. The specified corruption risks are constantly investigated by scientists and non-governmental organizations in various spheres of public administration. At the same time, by incidence, corruption risks in civil servants' activities can be arranged in the following order: bad faith of civil servants; conflict of interests; lack of control from management; discretionary powers.

It should be noted that it is no coincidence that the first place among the corruption risks is taken by the bad faith of civil servants. Since 01 July 2010, in the context of legal examination, the Ministry of Justice of Ukraine introduced the examination of draft regulatory acts for the existence of corruption-causing norms. It should be noted that from 01 July to 31 December 2010, corruption-causing factors were revealed in 213 draft regulatory acts, of which in 52 drafts there is inappropriate definition of functions, rights and responsibilities of public authorities and local self-government authorities. Thus, anti-corruption expertise facilitates to eliminating corruption-causing factors at the rule-making stage, which ultimately excludes discretionary powers. This is a very important and positive step in the corruption prevention sphere.

The enshrining of the rule of law principle in the Constitution of Ukraine

[1]Law of Ukraine "On Cleansing of Power". (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1682-18#Text
[2]*Ibidem,* 2014
[3]*Ibidem,* 2014

(article 8[1]) reflects the influence of European and world traditions of constitutionalism, trends to the formation of modern legal systems. At the same time, the interpretation of the rule of law principle in the decision of the Constitutional Court of Ukraine as of 02 November 2004 No. 15-rp[2] became of great significance: "The rule of law is the supremacy of law in society. The rule of law requires the state to implement it in lawmaking and human rights activities, in particular, in the acts that in their content have to be permeated, first of all, with the ideas of social justice, freedom, equality, etc. One of the manifestations of the rule of law is that the law is not limited only by legislation as one of its forms, but also includes other social regulators, in particular, norms of morality, traditions, customs, etc., which are legitimized by the society and conditioned by the historically achieved cultural level of the society". The main purpose of forming a new administrative-legal doctrine is to give back the civilized "face", which this sector has now in all developed countries worldwide, to the national administrative law. In particular, the updated administrative law has to be focused on ensuring the most effective exercise of rights and interests of an individual, their effective protection, whereas now the national administrative law continues to be mainly focused on meeting the needs of the state, and in fact – the apparatus (i.e., officers) of the state administration.

Today, with the formation of market economy, development of democracy, new, often veiled (and sometimes open), forms of corruptive acts have emerged and are actively used, such as lobbyism, protectionism, contributions to political goals, the transition of deputies and public officials to the posts of honorary presidents at corporations and private firms, investing in commercial structures using state budget funds, transfer of state property to joint-stock companies. Unfortunately, in these situations no political will of the power structures is observed that are responsible for fighting corruption, and the society does not react to them actively. In the fight against corruption, legality is an important component of the rule of law principle. Thus, the current state of doctrinal comprehension of the rule of law principle requires the normalization of the specific relations between the executive bodies and an individual. Particular attention needs to be given to creating adequate conditions for the exercise of human rights and freedoms, which involves the need to reform administrative law on democratic principles.

In Ukraine, not only the President and the Cabinet of Ministers play an important role in the political process; unlike most European countries, the Parliament (Verkhovna Rada) also plays an important role as the initiator of draft acts and a powerful player in the "veto policy" [18; 19]. Over four years of Parliament's work, the President submitted about 200 draft acts, the Cabinet of Ministers of Ukraine – about 1000, and people's deputies – about 3800. Approximately 76 per cent of the draft acts of the President, about 40 per cent draft acts of the Cabinet of Ministers and about 15 per cent of the draft acts of people's deputies were passed. Thus, out of approximately 1200 passed acts, about 150 were submitted by the President, about 450 – by the Cabinet of Ministers and about 600 – by the Verkhovna Rada of Ukraine.

The President is the most important source of strategic initiatives in both domestic

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

[2]Decision of the Constitutional Court of Ukraine "On the conformity with the Constitution of Ukraine (constitutionality) of Article 69 of the Criminal Code of Ukraine". (2004, November). Retrieved from http://www.ccu.gov.ua/en/docs/273

and foreign policy. It should be noted that that in addition to the draft acts passed by the Verkhovna Rada of Ukraine, the President issues nearly 1500 decrees annually, as well as more than 3000 resolutions and instructions. Most of the resolutions are addressed to the Cabinet of Ministers of Ukraine; they prescribe the actions of one or several ministers. According to the data of the Secretariat of the Cabinet of Ministers of Ukraine, last year, the Cabinet of Ministers of Ukraine issued approximately 1000 resolutions, and daily about 250 instructions (more than 60 thousand annually) are registered by the Cabinet of Ministers, the Prime Minister, the Vice Prime Minister and the Minister of the Cabinet of Ministers of Ukraine, addressed to ministries and other bodies. A considerable quantity of these documents is related to politics. Some of them are really important decisions regarding policy, and many of them direct the political process itself, for example, initiating work on politics in a particular area, changing projects, resolving conflicts, etc. Besides, many instructions are connected with specific issues of executing decisions or administrative issues of a situational nature.

Under the condition of the ambiguity of certain norms of the Constitution[1] and the lack of its support by the general public, the system of public administration weakens, the possibilities for open institutional cooperation and the integrated legislative process diminish. Even considering the fact that during transition periods such problems are peculiar to many countries, a strong political will to create the basic conditions that would allow political authorities to put development problems in the center of political action is essential more than ever. Due to the long-lasting confrontation and lack of transparency, the trust between key political institutions and activists was undermined, as well as the trust of the citizens to the politicians. Under such conditions, when constitutional conflicts turn into a politico-legal maze, and the Constitution becomes a battlefield, instead of being a clear direction for political institutions and citizens, it may be concluded that it will be very difficult to improve the rule of law in Ukraine.

Currently, we can make a conclusion that the system for policy development and coordination has not been improved since the assessment in 2006, and that the theoretical difficulties that were foreseen in this area have turned into a real problem. Now, new circles of the decision-making process in Ukraine are fuzzy and it is unclear who has to make one or another decision or even how and why. The conflicts of competences intensify every day, weakening the state's authority and the rule of law, while the policy making system is predominantly blocked.

2.2 Efficiency and effectiveness of the administrative system, overall government performance

In order to assess the quality of public administration in Ukraine, different indicators and ratings are used, which are compiled by international organizations, as well as the results of national sociological surveys. According to international agencies on the efficiency of public administration and the quality of public services, Ukraine is on a level with countries that are much inferior to it in economic development. According to a number of integral indicators used in international practice, Ukraine is significantly inferior to not only developed countries, but also most of the countries of Eastern Europe. According to

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

the GRICS index, Ukraine is at the bottom of the rating regarding such indicators of the quality of public administration bodies' work as quality of public services, accountability, quality of regulatory policy, rule of law, as well as corruption control.

The research has shown that the executive branch remains closed to the citizens and business: by the opacity index of Kurtzman Group, Ukraine is ranked 46th among the largest countries (along with Indonesia and China). With such level of opacity, the additional costs of Ukrainian and foreign investors amount to 5.64 per cent of the invested funds in connection with the increase in risks. At the same time, according to experts, the decrease in the opacity level on average by one point correlates with the increase in average annual gross domestic product per capita by 986 USD, direct foreign investments in relation to GDP by one per cent and inflation reduction by 0.46 per cent.

The results of national research also confirm the low efficiency of state power, give evidence of a decline in the citizens' trust in state institutions. The polling data show the citizens' negative assessment of the public service delivery process (more than 70 per cent of respondents). According to the study, only 14 per cent of the citizens, who applied to public authorities over the last 2 years, were able to receive a public service of acceptable quality which they are interested in. The research has shown that only one third of the population trusts the executive bodies, only half of the population trusts the legislative and judicial bodies. The consumer study revealed a number of problems with delivering public services, which lead to a low level of consumer satisfaction. Such problems may include: high time consumption (for example, on average the expectation of such a service as issuing a passport is 30 days), poor information support for consumers, limited channels of receiving services, high "moral" costs associated with poor quality of service [20].

In assessing the results of the administrative reform in Ukraine, it is also planned to use an integral indicator, such as the quality of public administration, assessed by external experts. Summarizing, we can draw some significant conclusions. Firstly, the specific features of executive bodies, as public service providers, determine the diversity of approaches to assessing the quality of their activities – public administration. The selection of assessment criteria, data sources and the method of their aggregation depends on the objectives of the assessment and management tasks. Such tasks may include:

– assessment and monitoring of the public administration bodies' activity in the framework of budgeting according to the results;

– rating of executive bodies by the efficiency and effectiveness indicators for the purpose of comparative analysis and development of recommendations to improve the processes and results of activities;

– benchmarking and analysis of the best practices in executive bodies;

– rating of subnational or national systems of executive bodies by the quality of public administration to adopt managerial decisions in line with the policy pursued by national governments or international organizations.

Among the managerial tasks that can be solved by analyzing the public administration quality, especially outstanding is assessing the effectiveness of changes that are made in the executive bodies (implementing new management tools). Based on the modern concept of "good public management", it is possible to identify the main groups of parameters for the public administration quality, which have to be taken into

account at assessing the activities of executive bodies: improvement of the quality of public services; reduction in the unit cost of the services delivered; enhancing the efficiency; transparency and accountability of public authorities; the responsiveness of the public authorities to newly emerging needs (changing expectations).

Thus, the search for a universal conceptual approach to assessment continues, which would allow assessing and analyzing the activities of public administration bodies in terms of their ability and progress in achieving the goal of maximizing public welfare. Such an approach to assessment is needed that would allow to consider different quality indicators of public administration integrally, that would be based on the principles of "good public administration" and focused, first of all, on external public service consumers' evaluation of the executive bodies' activities. The concept of public value can underlie such an integrated approach to assessing the activities of public administration bodies.

2.3 Relating the peculiarities to the post conflict situation

The time for ending the Ukraine–Russia confrontation depends directly on how we see our post-conflict future and how it is seen by our opponents. Perhaps, here the most acute issue is the one of ethical and legal responsibility for the crimes committed by aggressor and its satellites and human rights violations. S. Huntington called it "the problem of executors" [21]. This category of people already has nothing to lose, they will fight to the end, turning their environment into hostages. Will justice take place? Will justice be restored? Will the guilty be punished? We do not know the unambiguous answer yet, thereby we call to the experience of those peoples and states that came through such trials in the past.

According to many experts, there are certain specific features of the post-conflict situation in Ukraine. Firstly, it is necessary to step up efforts in training highly skilled specialists. Each reform requires a professionally trained staff. The dynamics and contradictory reforms require the transformation of the state administration and local self-government system, making professional the civil service and service in the local self-government authorities, which is connected with the competence of civil servants and local self-government officials (public servants). The competence of public servants under complication of social processes has to increase. The state personnel policy has to be aimed at creating conditions regarding training, retraining, advanced training and assessment of professional competencies during the civil servants' professional activity.

This context gives raise to the task of developing a system of professional training for public servants with the simultaneous assessment of their qualifications and the level of professionalism in the "Public Management and Administration". The methodological basis for solving this task has to be a series of legislative acts, in particular, the Strategy of Public Administration Reform in Ukraine for 2016–2020, approved by the Resolution of the Cabinet of Ministers of Ukraine as of 24 June 2016 No. 474-r[1]; the Strategy for Reforming the Civil Service and Service in Local Self-Government Bodies in Ukraine until 2017, approved by the Resolution of the Cabinet of Ministers of Ukraine as of 18

[1]Resolution of the Cabinet of Ministers of Ukraine "Some Issues of Public Administration". (2016, June). Retrieved from https://zakon.rada.gov.ua/laws/show/474-2016-%D1%80#Text

March 2015 No. 227[1]; the Concept of Reforming the System of Vocational Training of Civil Servants, Heads of Local State Administrations, Their First Deputies and Deputy Heads, Local Self-Government Officials and Local Council Deputies, approved by the Decree of the Cabinet of Ministers of Ukraine as of 01 December 2017 No. 974-r[2], that contain: the goal-setting in transforming the civil service; defining the directions of the state policy and regulatory framework of civil servants' professional training; setting professional qualification requirements for public administration personnel, their training and advanced training; definition of the content of education, development of educational programs.

Thus, the institutionalization of public servants' professional development in public management and administration has to include:

– development and implementation of a sectoral qualifications' framework, considering the National Qualifications Framework;

– development of civil service professional standards and service in local self-government authorities based on a competent approach with the participation of interested parties and their approval;

– development and implementation of standards in the specialty 281 Public Administration and Management of the area 28 Public Administration and Management and the educational standard for the training of public servants;

– introduction of a nation-wide qualification examination for persons, who receive higher education in the specialty Public Administration and Management of the area Public Management and Administration;

– development and adoption of educational-professional and research-educational programs of the specialty Public Administration and Management of innovative nature;

– advanced training in the programs for specialized short-term training courses, perpetual and short-term thematic seminars, trainings, workshops on urgent issues of social development.

Secondly, at decentralization, the transfer of powers from the center to the regions would mean the transformation of the power vertical where most issues were resolved by the transfer and execution of orders which come from the top to bottom, and the middle- and low-ranking officials remained a usual performer.

Thirdly, Ukraine is doomed to reform the administrative-territorial system. So far, all the attempts to carry out the administrative-territorial reform were unsuccessful and did not go beyond the concepts that are very controversial in their nature. On 05 February2015, the Verkhovna Rada of Ukraine passed the Law "On Voluntary Association of Territorial Communities[3]". The purpose of this act is to consolidate territorial communities through the voluntary association, which should eventually lead

[1]Resolution of the Cabinet of Ministers of Ukraine "About the consolidated provision about the State service of Ukraine and the State service of Ukraine". (2016, March). Retrieved from https://zakon.rada.gov.ua/laws/show/227-2019-%D0%BF#Text

[2]Decree of the Cabinet of Ministers of Ukraine "About the concept of reforming the system of professional education of state services, heads of state administrators, first defenders and defenders, posadovs of the citizens of the state self-government and deputies of citizens". (2017, December). Retrieved from https://zakon.rada.gov.ua/laws/show/974-2017-%D1%80#Text

[3]Law of Ukraine "On Voluntary Association of Territorial Communities". (2015, February). Retrieved from https://zakon.rada.gov.ua/laws/show/157-19#Text

to an increase in their capacity and efficiency. However, a detailed analysis of this act shows its significant defects, the main of which is the discrepancy of its norms with the current Constitutional provisions and acts. Moreover, the implementation of the act in practice can lead to unpredictable social consequences, which is opposite to the declared goal, as the experts expressly say. For example, the conclusions of the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine indicate: "Practical implementation of the draft act in case it is passed in the proposed version is unlikely to allow forming self-sufficient territorial communities that would have the appropriate material, financial resources and public amenities necessary for the effective performance of bodies' tasks and functions or to improve the quality of delivering administrative, social, public services to the communities, as stated in the explanatory note.

It is obvious that forming the united territorial communities, the average number of which will be 9 thousand people, who will live in 16 settlements on average, the expected average area of which will be approximately 400 sqr km, and the distance from the administrative center of a united territorial community to the most remote settlement of such a community is determined in view of the availability of basic public services (administrative, social and others) delivered on the territory of such a community (arrival time for an ambulance in urgent cases and a fire-fighting team must not exceed 30 minutes), is doubtful in terms of the possibility of practical implementation, and will lead to the alienation of the citizens not only from the authorities, but also from the relevant administrative and other services, thereby such consolidation of territorial communities seems excessive and does not contain a proper justification". Besides, the proposed voluntary association of territorial communities does not consider the special features of separate territories, for example, the southern districts of Odessa region, where national minorities are concentrated.

Fourthly, upon signing the EU–Ukraine Association Agreement, Kyiv undertook several commitments that concern not only the economic regime liberalization, but also the bringing of domestic legislation in line with European norms. This concerns the introduction of EU regulations. Therefore today, not only knowledge of domestic legislation becomes relevant for a civil servant, but also the fundamentals of the EU legislation and European experience in public administration [22; 23].

Fifthly, decentralization cannot replace effective state regional policy, it is only an essential prerequisite for its implementation. On 05 February 2015, the Law "On the Principles of State Regional Policy[1]" was passed, but like the Strategy for Civil Service Reform, it is mainly declarative. Its key disadvantage is the lack of effective mechanisms for simulating the development of regions. And of course, the key issue to be solved as part of the reform is the fight against corruption. Despite all the declarations of power holders, the demonstrative dismissals of certain corrupt officials, corruption remains an incurable disease both of the state and the society. In the Global Competitiveness Report of 2014, Ukraine ranked 130th among 144 countries by state institutions quality indicator, and the 142th place among 175 countries by the Corruption Perceptions Index.

First of all, the factors that cause corruption and create a nutrient medium for it remain unchanged. Moreover, with the deepening economic crisis and political instability, unemployment growth, some of them are only aggravated. The main ones are:

[1]Law of Ukraine "On the Principles of State Regional Policy". (2015, February). Retrieved from https://zakon.rada.gov.ua/laws/show/156-19#Text

– poverty of majority of the population, the excessive stratification of the society to 5 per cent very rich and the rest, who barely make ends meet. Today, a small middle-class stratum is under considerable pressure. Along with this, the concept of labor as a source of well-being is diminished which creates a corresponding atmosphere in the society;

– controversial attitude of society towards such a phenomenon as corruption. On the one hand, in the society there is a rejection and condemnation of corruption and calls for solving this problem in a non-legal way, on the other hand, there is an attempt to solve the arising problems and to evade the requirements of the law by using corruptive mechanisms;

– low quality of legislation, which creates legal conflicts and allows ambiguous interpretations, regulation of a large number of issues by subordinate legislation;

– frequent change in the government machinery for political reasons, "quotas principle" at taking up posts, political corruption and, as a result, ordinary corruption;

– excessive regulation of entrepreneurial activity, imperfect tax system, the possibility to gain profit, mainly by close approximation to authorities;

– ineffective law enforcement and judicial system;

– inconsistency between the remuneration level of persons authorized to perform state or local self-government functions, and the scope of their authority.

It is impossible to overcome these reasons in a short period of time, although in society there is demand for "quick" solutions. One example of this may be the Law "On Cleansing of Power[1]", which in fact not only did not meet the its adoption initiators' expectations, but also caused obvious damage. Unfortunately, in public opinion a generalized image of an official has been created, who bears all negative assessment of the government's actions. At the same time, it is forgotten that a civil servant is the same profession as the others, which does not only require professionalism, but is also limited by certain legal frameworks.

Nowadays, under conditions of the socio-economic and political turbulence caused both by internal and external factors, the public administration institute of Ukraine faces a wide range of problems, including such as the negative balance of the society's trust, the lack of balance of centralization and decentralization of the state administration system, bad communication both within the power structures and between the state and society, shortage of qualified personnel, low quality of administrative services and insufficient level of moral and ethical consciousness of civil servants. At the paradigm level, the main task of managerial reforms in Ukraine can be formulated as a transition from direct control of the social activity subjects to control of the factors systemically important for this activity. In other words, in the center of democratic governance there is an informal control over those factors of social environment that determine the behavior, motivation, orientation of the activities of certain subjects of political and administrative activity, which is determined by the concepts of social modernization and information revolution. The analysis of the latter allows for the conclusion that in general the social modernization process is considered as the acquisition of new management opportunities by the Ukrainian society, as the optimization of the ways of social functioning, where the

[1]Law of Ukraine "On Cleansing of Power". (2014, September). Retrieved from https://zakon.rada.gov.ua/laws/show/1682-18#Text

main role is assigned to the managerial factor. In the context of Ukrainian modernization reforms, the search and formation of an effective public administration model in Ukraine has not been completed yet.

CONCLUSIONS

An important factor in the civil service reform implementation is the optimization of political and administrative interaction, the delineation of political and administrative levels, and building effective interaction between all subjects of the management process. It is reasonable to choose the frequency of its vacancy filling with the change of a minister at the central level and the head of the administration at the regional level as a sign of political engagement of a certain post. Although such a sensitivity index cannot be recognized as absolute, it indicates quite clearly to what extent this post is actually biased in this period in power-political competitions and how making the highest priority political decisions a reality depends on it. An important point is also that the delineation line of political and administrative functions does not coincide in the legal and factual aspects.

The civil service reform is aimed at solving the problems facing the public administration system, namely:

– insufficient level of state policy quality in various spheres, legislative and regulatory framework (policy formation and drafting of legislative acts based on detailed analysis, public participation, integrity and consistency of actions and decisions of the Cabinet of Ministers of Ukraine as a whole);

– lack of highly-qualified personnel at civil service positions that are important for developing and implementing national reforms and are capable of meeting the challenges of reforming in various sectors;

– high level of corruption in the civil service system, which obstructs the efficiency and effectiveness of public administration; gender imbalance;

– insufficient level of human resources management in ministries and other central executive bodies, lack of automated human resources management system.

The study of the Law of Ukraine "On Civil Service[1]" as of 10 December 2015 identified a number of innovations aimed at improving the performance and ensuring the quality of civil service, namely: separation of administrative and political positions; clarification of the legal status of a civil servant; separation of civil service from political activity; establishing an exhaustive list of persons, who are not subject to the civil service legislation; introduction of a new approach to the classification of civil servants' positions; a competency-based approach to the selection of candidates for the civil service; defining legislatively common approaches to entry, performance and separation from civil service; improving professional skills and professional training of civil servants, their labor remuneration, bonus payment and encouraging, as well as disciplinary responsibility. Reforming the civil service legislation has become the most important step towards the full public administration reform. Despite the imperfection of the newly passed legislation, as evidenced by the constant changes to it, nevertheless it should be noted that the direction in which legislators and reformers are working is right.

[1]Law of Ukraine "On Civil Service". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/889-19#Text

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Suggested Citation: Khadzhyradieva, S.K., Sitsinska, M.V., Kovalenko, N.V., Nikolaev, V.O., & Pukir, Y.H. (2020). Public administration system and civil service in Ukraine: transformation to the European standards. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 84-106.

Submitted: 25/08/2020
Revised: 05/10/2020
Accepted: 07/12/2020

УДК 351/354
DOI: 10.37635/jnalsu.27(4).2020.107-120

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СУЧАСНІ ТЕОРІЇ ПУБЛІЧНОГО УПРАВЛІННЯ: ДОСВІД ДЛЯ УКРАЇНИ

Анотація. Розвиток інтеграції та глобалізації в світі сприяє пошуку сучасних складових моделей публічного управління, які забезпечують гармонійний та стабільний розвиток суспільства та держави сьогодні. Органи публічної влади сьогодні *в певному територіальному колективі представляють відносини планування та підпорядкування, а також є усвідомленими суб'єктом. Метою даної роботи є розгляд сучасних теорій публічного управління, а також вивчення світового досвіду з питання публічного управління. Методологічною базою для проведення дослідження стали теоретичні методи наукового пізнання. Були використані методи синтезу та аналізу даних, порівняльно-правовий метод та порівняльний метод. Також було розглянуто наукову літературу з тематики публічного управління на прикладі України та різних країн світу. У даній роботі розглянуто досвід успішного публічного управління в інших країнах. Публічне управління не обмежується діяльністю державних органів та посадових осіб, публічне управління здійснюється за участю установ прямої демократії. Було розглянуто класичні види та принципи публічного управління. Розглянуто український досвід*

публічного управління на прикладі Запорізької, Львівської та Дніпропетровської областей. У всіх регіонах України процес публічного управління здійснюється за однією моделлю. Процес розвитку публічного адміністрування в Україні вже розпочато, однак органи виконавчої влади мають більше контролювати дане питання та впроваджувати нововведення, які б приводили до позитивних змін в країні та суспільстві. Вивчення досвіду організації та здійснення публічного управління інших країн є важливим для виявлення його найбільш дієвих систем публічного управління. Представлена інформація у даній роботі може бути використана студентами та викладачами вищих навчальних закладів, які спеціалізуються на вивченні державного управління, соціології, юриспруденції, політології та інших суміжних дисциплін.

Ключові слова: суспільні відносини, органи публічної влади, публічне адміністрування, державне управління, децентралізація, публічне управління.

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MODERN THEORIES OF PUBLIC ADMINISTRATION: EXPERIENCE FOR UKRAINE

Abstract. *The development of integration and globalisation in the world contributes to the search for modern components of public administration models that ensure the harmonious and stable development of society and the state today. Public authority in a certain territorial group represents the relationship of planning and subordination, and is also a conscious subject. The*

purpose of this work is to consider modern theories of public administration, as well as to study world experience in public administration. The methodological basis for the study were theoretical methods of scientific knowledge. Methods of data synthesis and analysis, comparative law method and comparative method were used. The scientific literature on public administration on the example of Ukraine and different countries was also considered. This paper examined the experience of successful public administration in other countries. Public administration is not limited to the activities of state bodies and officials, public administration is carried out with the participation of institutions of direct democracy. The classical types and principles of public administration were considered. The Ukrainian experience of public administration on the example of Zaporizhia, Lviv and Dnipro regions was considered. In all regions of Ukraine, the process of public administration is carried out according to one model. The process of developing public administration in Ukraine has already begun, but the authorities need to control this issue more and implement innovations that would lead to positive changes in the country and society. The study of foreign experience in public administration is important for identifying the most effective systems of public administration. The information presented in this paper can be used by students and teachers of higher education institutions specialising in the study of public administration, sociology, law, political science and other related disciplines.

Keywords: public relations, public authorities, public administration, public administration, decentralisation, public administration.

INTRODUCTION

Public power is a special phenomenon and relationship. Public authority in a particular territorial group is a relationship of planning and subordination, and is a conscious subject [1]. According to Marx, public power is the appropriation of another's will [2]. Some political scientists define public power as the ability to defend one's own will despite resistance [3; 4]. However, elements of voluntary coercion may also occur in other non-public groups. The one who acts as the head of a family exercises his will in a family, in some cases by coercion, uses his power, decides on payments and so on. Such power is formed not on the basis of social and public interests, as in a social collective, but on the basis of family, economic and spiritual ties. Public authorities are called to act primarily in the interests of society. Public authorities often use their powers, which dominate a particular team economically, politically and ideologically. In some cases, this can become the personal power of a leader, and the owners of state power can take positions on a team that are directly contrary to the interests of a team.

In the performance of public administration functions, there are state-administrative relations that ensure the existence of the subject of management, which has the authority and responsibility for the management and the subject of management. The subject of management is the active beginning of the management process. Such an entity may be the state itself, acting on its behalf, bodies and officials (parliament, president, government), local governments and officials (local council, mayor), bodies of public associations, if it is a public team or elements of a public body, such as the central committee of a political party, which determines the rules of administrative procedure [5].

The object of the relationship in public administration is what the entity does. Finally, such actions are carried out for the purpose of acquiring or providing any material or spiritual goods, their restriction, appropriation, separation, alienation or deprivation of rights. These benefits apply to citizens, foreigners, stateless persons,

persons with multiple citizenships and their groups in connection with the realisation of their interests. The subject of management is the regulations of the head of state, president or monarch, which apply to all persons or certain groups of people. Such acts may be state regulations or decisions of the constitutional court and others. The powers, governing body and responsibilities of a governing body are determined by the documents required by a particular social group. For the state, and hence for society, the constitution is such a document. It defines the powers of public authorities, their responsibilities and the administrative boundaries within which they can act in regulating life in society [6]. Such documents include laws, orders of the head of state, government decrees. Some of these acts are adopted by federal authorities, autonomous authorities of a political nature. For many other groups of the territorial community or groups with elements of public administration the main internal to document is the statute, the statute of self-government, the statute of the political party, although the basic legal provisions of these groups are regulated by constitutions and laws [7]. Documents regulating the procedure of public administration contain not only provisions on the powers of institutions and officials, but also on their responsibilities. Bodies and appointed officials created by a community are created to perform public tasks on behalf of society. The purpose of this work is to consider modern theories of public administration. This study will also take into account the experience of successful public administration in other countries. The Ukrainian experience of public administration is considered on the example of Zaporizhia, Lviv and Dnipro regions.

1. MATERIALS AND METHODS

Theoretical methods of scientific knowledge were used to study the concept of public administration, its types and principles, as well as foreign and Ukrainian experience of public administration. Scientific publications on public administration were studied and analysed. Methods of synthesis and analysis of information were used, comparative law method and comparative research method were also used. A theoretical review of the scientific literature on public administration and foreign experience was also conducted.

Using such methods as synthesis and analysis, the concept of public administration was considered. Types and principles of public administration in Ukraine and the world were considered. Using the method of synthesis, the foreign experience of public administration was regarded, as well as the existing shortcomings and advantages of the public administration system. Using the method of synthesis, it is possible to combine abstract aspects of a particular topic and display it as a whole. The method of synthesis involves the study of a particular concept, object or phenomenon in general. In the process of scientific research, the method of synthesis is related to the method of analysis, because it allows combining all the parts of a subject, which can be further discussed in the process of analysis. The method of synthesis involves establishing a relationship between all parts and knowledge of a subject, phenomenon or concept as a whole. The method of analysis helped to analyse the concept of public administration and the principles using which it becomes possible to regulate and implement public administration in public regulation. The method of analysis is a method of cognition, by which the object is studied imaginary or actual, divided into basic elements and components. The method of analysis studies the main properties of the object, its

characteristics and relationships between them, each of the selected elements is considered separately. The Ukrainian and foreign experience in public administration was studied with the help of the comparative legal method. The comparative law method requires the use of special research methods determined by the nature of an object, such as the normative nature of law on specific issues. The application of this method to the sources of law in administrative proceedings allowed obtaining new scientific results in the analysis of the sources of law of different legal systems. The next method used was the comparative method, it was used to compare modern theories of public administration in Ukraine and the world. The comparative method is one of the main scientific methods, which through comparison establishes the general, special and different in the studied phenomena, concepts and objects, as well as in the laws of their development. The comparative method was used to consider and analyse the types of public administration in different countries. Using a comparative method, it was studied that for Western countries the modern concept is the concept of "Governance" and its variants: "Good governance", "Responsive governance" and "Democratic governance".

A theoretical review of the scientific literature on public administration was conducted. Several scientific papers on public administration in Ukraine and around the world were considered. In the first paper, the researcher examined how public participation in environmental planning and management generates democratic legitimacy. Distinguishing between the literature on optimistic and critical participation, the author argued that both areas of research tend to disregard public opinion on the issue. The author concluded that the continued involvement of research on public expectations and governance experiences may reveal a critical understanding of the potential and challenges for implementing the results of democratic planning. In the following paper, the author proposed to consider the concept of urban governance, which includes decentralisation, support for entrepreneurship and democracy and which is designed to promote sustainable and inclusive urban development. This concept was proposed as a tool for participation and interaction between different stakeholders. The last considered work was devoted to the issues of decentralisation on the territory of Ukraine. As a result of the study, the authors found that the Institute of Local Self-Government established in developed democracies is a unique area that promotes the introduction of such features of democracy as common tasks, shared responsibility, common agreement, brotherhood, tolerance and equality. The authors noted the necessity for local democracy, and also emphasised that it should be developed and strengthened in all directions. The authors found that an active form of citizen participation in community affairs is the implementation of the idea of participation budget or state budget.

2. RESULTS

2.1 Principles and types of public administration

Public administration and its principles are classified by various researchers, A. Fayol presented the most complete classification of the principles of public administration. Most of the principles put forward by scholars are used in public administration, but some need to be revised. The scientist identifies nine basic principles governing public

administration. The first principle of public administration is the assertion that the performance of public administration requires power, authority, will and bodies to ensure the execution of orders. Powers and authority at the levels of public administration and self-government differ significantly. They differ within voluntary public associations, such as parties and trade unions. The second principle is the division of managerial work and the unity of leadership. The division of labour provides specialisation and, consequently, the quality of management, it should be noted that without a single leadership, chaos reigns. The third principle is the uniqueness of the performers and the uniformity of the order. In the presence of many managers who give instructions on the same problem, there is a mess, as without defining an executor specifically an order will not be fulfilled. The fourth principle is the subordination of the interests of other persons in the civil service to the interests of public administration. A civil servant, a municipality and a public association have different goals and interests, but in the performance of their duties it is important to set priorities and prioritise the interests of the state. The fifth principle is the presence of the necessary degree of centralisation and a hierarchical management system that will ensure the stability and unity of the management mechanism. The sixth principle is the stability of the leadership, which is an important principle, because the constant changes of leaders and administrative staff are detrimental to the common cause. Support and punishment must be proportionate, reasonable, lawful and understandable. This is the basis of the seventh principle, according to which management must be fair and impartial to subordinates and other employees of the governing body. The eighth principle of management is important, which provides feedback in management. This means that a leader must take into account the results of their actions and adjust them if the feedback indicates the need. The last, ninth principle, provides for remuneration for management work, i.e. the work should be paid in accordance with its public benefit, quantity and quality of management services provided.

The main type of public administration, especially the functioning of the state team, is primarily community administration. Community administration is carried out by bodies established by the world community, in particular the United Nations. Community administration is primarily exercised by the UN Security Council and the UN General Assembly. Community administration can also be carried out by regional international associations, if they are given management functions through state agreements. Community administration can be global and regional in nature [8]. In both cases, it will be obtained from countries that have established a competent international body. The second type of public administration is public state administration. Public state administration can be carried out in a state-organised society in a particular country. Public administration can also be carried out in government agencies that have not been recognised by the world community. Such government departments may have a president and parliament, as well as other government agencies and officials, may monitor the situation in a particular area, and manage human groups in an unrecognised state. For example, such a situation may occur in the territory liberated from the coloniser during the war of liberation. Similar situations have been observed in Angola, Mozambique and Guinea-Bissau. This type of public administration is also called public administration, which literally means one that is similar to public administration. A special type of public

administration is management, which exists in the subjects of the federation. The territories that are part of the federation can be called states and have their own presidents. Another type of public administration is public administration, which exists in autonomous units. Examples are Scotland in the United Kingdom and the Åland Islands in Finland. Autonomous entities, unlike federal ones, do not have joint powers, they have an autonomous state non-government [9]. The last existing type of public administration is public administration of municipalities that represent the territorial collective. The federation or state system must provide in the constitution and relevant laws for the extent to which the municipal administration applies and which is a public non-state municipal administration.

2.2 Experience of public administration in the world

Public administration is not limited to the activities of state bodies and officials, public administration is carried out with the participation of institutions of direct democracy. Institutions of democracy include elections in which citizens make decisions and elect the party that forms the government, as well as elect a candidate for the highest public office [3]. In some countries, citizen participation in public administration is achieved through the removal of voters by deputies and heads of municipalities. Citizens can adopt a constitution or other law by voting in a referendum. Public debates on important issues of public administration are used, in small municipalities city councils are used to solve local problems, congresses are held in political and other associations, general meetings of members of local organisations are held to make administrative decisions. In Japan, every citizen has the right to receive a copy of every administrative act, including government decisions, for a small fee (2-3 US dollars), if the act is not secret. There are also many other forms of public administration. Mass demonstrations with demands to the authorities, with a simple appeal of a citizen to a state body or local self-government body, can be a form of direct participation in power. Society can use specific institutions in the system of public administration [10]. In such countries of Muslim fundamentalism as Iran, Saudi Arabia, Qatar, Oman, religion plays a huge role in controlling the behaviour of the population, so the Koran plays the role of the basic law, is above the constitution, there is religious moral police – Mutawa. In many countries in Africa, in some countries in Asia, in some parts of Latin America, important tools of governance are tribal institutions, represented by leaders, elders, tribal councils, tribal customs. In some countries, public associations are used for governance, such as in Cuba and in some other countries of totalitarian socialism, and a separate association in the field of culture and sports has taken over some functions of state bodies.

For Western countries, the modern concept is the concept of “Governance” and its variants: “Good governance”, “Responsive governance” and “Democratic governance”. This concept develops the previous concept and is based on: greater attention of a state to the interests of civil society, expanding the participation of its subjects in public administration (citizens, public organisations, business structures), openness of the government to public control, based on cycles of self-organisation and interdisciplinary networks, which are characterised by interdependence, exchange of resources and weak dependence on the state. The main tools for implementing the principles of the Governance concept are aimed at: decentralisation of public administration, partnership

with business structures, interaction with the public in the provision of services involving non-state resources, citizen participation in policymaking and implementation, transition from "guardianship state" to "partner state", etc. In the modern dimension, the concept of "good governance" has expanded in the form of the principles of the European Innovation Strategy and good democratic governance at the local level.

Based on the analysis of key trends in social development and internal driving forces of public administration, researchers identify the main components of their long-term and radical reform, which include: public authorities, their management relations, relations and their organisation, leadership, leadership functions, communication projects, management ideas and theories, leadership training [11]. Analysing the nature of these changes, it can be assumed that possible forms of objectification of the main innovations of public administration, which will provide: democratisation of power, its partnership with the population in decision-making, development of forms and methods of their interaction, strengthening government openness, horizontal coordination, associative forms of organisation and management, coordination. It is also possible to increase public participation in decision-making, dialogue, communication with influential public and opposition structures, the right balance between centralisation and decentralisation, corporatisation of public administration, management focused on social values, decision-making technology, strengthening the role of communication, organisational culture, leadership, motivation, management style, social responsibility, group dynamics and business ethics. Effective planning, motivation and coordination, regulation, deregulation and self-regulation, self-control and external control, as well as rational allocation of resources to achieve a certain result, use of project management goals, provision of quality social services, including through partnerships, information sources, state domination in various spheres of society in partnership with public structures. It is possible to introduce effective management of administrative-territorial reform on the basis of optimising the ratio "centralisation – decentralisation", creating concepts of "breakthrough" to overcome crisis and stagnation processes that will provide the country's leadership, combining ideologies of organisational-administrative, information-analytical, social services and public communication. Probably the creation of national concepts of governance and public administration based on the experience of foreign management, the formation of politically neutral, professional, honest, sensitive to the requirements of citizens, employees and public managers with modern management knowledge, developed innovative worldview, able to operate in conditions of uncertainty [12]. In recent decades, some of these innovations have been introduced into the practice of public administration in various countries during the implementation of reforms. Based on the analysis of their diversity, four models of administrative reform were developed. The constant recording of their consequences created trends in the development of this system, according to which innovative changes mainly affected the subjects of the public administration system, management activities and functions. In the United Kingdom, France, Mexico, Germany, Poland, and Hungary, reform has taken place by combining several models of these reforms. At the same time, none of the reforms was aimed at centralising power. According to scientists, models are introduced that ensure reforms: the subjects of public administration through its decentralisation, management through the spread of public administration tools, management functions

through the adaptation of public policy to globalisation, the principles of civil service by universalising management principles, management processes decisions by increasing public participation in government. Ukrainian practice of public administration reform in 2011-2013 was focused mainly on: optimisation of public administration, improvement of management (introduction of public administration tools) and streamlining of management functions, development of civil service principles, professional training and e-government, as well as gradual implementation of elements public participation in decision making. The current model of internal reforms, the "new public administration policy", focuses mainly on decentralisation and public administration reform, regional policy and local self-government, and civil service development.

2.3 Features of public administration in Ukraine

Among the tools of interaction between public authorities, civil society institutions and citizens in Ukraine are: public consultations, citizen participation in the work of the Public Council, conducting public examinations, participation in competitions for financial support and participation in training and public events. In Ukraine, public administration is carried out equally in all regions [13].

The Lviv Regional State Administration is carrying out a number of measures within the framework of the decentralisation project and in order to improve the process of public administration. In particular, public consultations are held in the Lviv region. Citiznes can participate in the discussion of regulations and drafts of regional target programs. Citizens are also provided with reports from the main budget managers, in order to inform the community about the expenditures of the regional budget for the past year. The purpose of public consultations is to involve members of the local community in the implementation of local self-government. Public consultations should help to establish a systematic dialogue of local governments with residents of the region, improve the quality of preparation of decisions on important issues in the field of local government, taking into account public opinion, creating conditions for participation of members of the local community in drafting such decisions. The consultations were initiated by the executive bodies of the Lviv Regional Council, its deputies and the chairman. The subject of public consultations may be draft regulations of the Lviv Regional Council and its executive bodies. Public consultations are mandatory before the Lviv Regional Council or its Executive Committee makes decisions on: adoption of the Statute of the territorial community of the Lviv region; adoption of the program of social and economic development and cultural development of the region; approval of the list of objects for which expenditures will be made at the expense of the budget in the next year; placement of ecologically dangerous objects on the territory of the region, issuance of permits, which belongs to the competence of the Lviv regional council. Public consultations can last from seven days to one month. During this period, an official document that is the subject of discussions must be submitted. During the consultations, citizens can submit comments and suggestions.

Citizens of the Lviv region may also be involved in the work of the Public Council under the Lviv Regional State Administration and joint working groups consisting of representatives of the executive authorities, the legislature and local authorities. On February 10, 2011, pursuant to the Resolution of the Cabinet of Ministers of Ukraine No.

996 of November 3, 2010 "On Ensuring Public Participation in the Formation and Implementation of State Policy"[1], the first public council at the Lviv Regional State Administration was established amounted 192 people, which powers ended on February 10, 2013. The main tasks of the Public Council are: promoting the implementation of the constitutional right to participate in the management of public affairs, promoting the consideration of public opinion by the regional state administration in the formation and implementation of state and regional policy, facilitating the involvement of stakeholders and monitoring and regional policy, conducting public monitoring of the activities of the regional state administration in accordance with the legislation, preparation of expert proposals, conclusions, analytical materials on the formation and implementation of state and regional policy [14].

Citizens of Lviv region also have the right to participate in conducting public examinations of the activities of the regional state administration. Public examination of the activities of executive bodies is a component of the mechanism of democratic governance, which provides for civil society institutions, public councils to assess the quality of executive bodies, the effectiveness of decision-making and implementation of such bodies, preparation of proposals for solving socially significant problems in order executive authorities include it in their work. An important tool of public administration in Ukraine is the opportunity for citizens to participate in competitions for financial support for the implementation of their programs, projects and activities. Support from the state budget is provided for the implementation and realisation of programs, projects and activities at the national level, and local budgets – programs, projects and activities of the relevant administrative-territorial level. According to the decision of the tender commission, the implementation of national programs, projects, activities by public associations of persons with disabilities at the expense of the state budget may be carried out at the regional, district and city levels. Residents of Lviv region can also participate in trainings and public events, which are held at the expense of Lviv region.

3. DISCUSSION

Ukrainian and foreign researchers are increasingly turning to issues of public administration, decentralisation and other related issues. In The democratic legitimacy of public participation in planning: Contrasting optimistic, critical, and agnostic understandings, the researcher examined how public participation in planning and environmental management generates democratic legitimacy. Distinguishing between the literature on optimistic and critical participation, the author argues that both areas of research tend to disregard public opinion on the issue. This has in fact given rise to a purely normative and essentialist understanding of democratic legitimacy, which views legitimacy as an integral part of the process or essence of public administration. Based on the anti-essentialist understanding of democratic legitimacy, which is primarily based on modern social ideas and expectations of democratic institutions, the author outlined a normative agnostic basis for the study of how legitimacy is generated through participation. Using this framework to study the experience of Swedish citizens in

[1] Resolution of the Cabinet of Ministers of Ukraine No. 996 "On Ensuring Public Participation in the Formation and Implementation of State Policy". (2010, November). Retrieved from https://zakon.rada.gov.ua/laws/show/996-2010-%D0%BF#Text

governance processes, the author emphasised how democratic legitimacy can be understood as multidimensional, temporary and conditional, which individual citizens can provide and withdraw in many ways. Based on this, the author concluded that the continued involvement of research on public expectations and governance experiences can reveal a critical understanding of the potential and challenges for implementing the results of democratic planning [4]. The following study examines the concept of urban governance, which includes decentralisation, support for entrepreneurship and democracy, and aims to promote sustainable and inclusive urban development. This concept is used to evaluate the management practices of the city of Tamale in Ghana. The study identified significant gaps in practice, especially with regard to the application of the principles of decentralisation and democratic governance, although entrepreneurship has made a clear contribution to the development, in particular, of the informal sectors that dominate the city's economy [15]. This work may be interesting for studying the experience of decentralisation and democratic governance, an analysis of the most effective management measures in this concept can be performed.

The last considered work was devoted to the issues of decentralisation of power in Ukraine, unification of territorial communities, development of democratic local self-government, establishment of local democracy and factors influencing the process of citizen participation in solving everyday life of the community [16-19]. The purpose of this work was to reveal the mechanisms of decentralisation of power at the local level, as well as to identify the main trends that arise during its implementation, to find ways to improve local governance and local democracy in a crisis. As a result of the study, the authors found that the Institute of Local Self-Government established in developed democracies is a unique area that promotes the introduction of such features of democracy as common tasks, shared responsibility, common agreement, brotherhood, tolerance and equality. The authors emphasised the need for local democracy, and emphasised that it should be developed and strengthened in all directions. The authors found that an active form of citizen participation in community affairs is the implementation of the idea of participation budget or state budget. The project was supported in almost all regions of Ukraine, thanks to which people managed to solve a large number of local cases under its responsibility, while increasing the transparency and accountability of management structures and deepening decentralisation processes.

CONCLUSIONS

Public authority in a certain territorial group represents the relationship of planning and subordination, and is also a conscious subject. In the performance of public administration functions, there are state-administrative relations that ensure the existence of the subject of management, which has the authority and responsibility for the management and the subject of management. In the context of this work, the basic principles and types of public administration were considered. Nine basic principles of public administration were considered. Two main types of public administration were also considered, the first type of public administration, in particular the functioning of the public team, is community administration. By nature, public administration can be global and regional. The second type of public administration is public state administration, it can be carried out within the state-organized society of a particular country. Also, in the context of this work, the foreign experience of public administration is considered. It was

established that public administration is not limited to the activities of state bodies and officials, public administration is carried out with the participation of institutions of direct democracy. It is also determined that the institutions of democracy include elections in which the citizens of the state decide and elect a party to form a government, as well as the selection of a candidate for the highest public office. It was studied that in some countries the participation of citizens in public administration is carried out by dismissing deputies and heads of municipalities, while in others citizens can adopt a constitution or other law by voting in a referendum.

The mechanism of public power in Ukraine on the example of Lviv, Zaporizhia and Dnipropetrovsk regions was considered. It is established that the tools of interaction between public authorities, civil society institutions and citizens in Ukraine are: public consultations, citizen participation in the work of the Public Council, conducting public examinations, participation in tenders for financial support and participation in training and public events. In Ukraine, public administration is carried out equally in all regions. In general, it should be noted that the issue of public administration has not yet been thoroughly studied. However, Ukrainian and foreign scientists study this and related issues and learn from positive experiences from around the world. The process of developing public administration in Ukraine has already begun, but the authorities need to control this issue more and implement innovations that would lead to positive changes in the country and society.

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Suggested Citation: Bobrovska, O.Yu., Drobot, I.O., Nadyuk, Z.O., Hrytsko, R.Yu., & Pokataev, P.S. (2020). Modern theories of public administration: experience for Ukraine. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 107-120.

Submitted: 29/08/2020
Revised: 16/10/2020
Accepted: 30/11/2020

УДК 334.7
DOI: 10.37635/jnalsu.27(4).2020.121-133

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МІСЦЕВЕ ПАРТНЕРСТВО ЯК ІНСТРУМЕНТ СТИМУЛЮВАННЯ РОЗВИТКУ СІЛЬСЬКИХ РАЙОНІВ УКРАЇНИ

Анотація. *У науковому дослідженні розглядаються шляхи та стратегії використання місцевого партнерства для вирішення проблем розвитку сільських територій. Сюди входять переваги та економічні, законодавчі й соціальні обмеження як принципи використання місцевих партнерств для розвитку сільських територій України. Основні економічні вигоди отримують завдяки сукупним ресурсам, кооперaційній діяльності, зменшенню ризиків, зайнятості та диверсифікації доходів і витрат населення. Переваги впровадження місцевих партнерств полягають у застосуванні нормативної бази, яка є ефективною для реалізації проекту та сприяння зростанню сільських територій у його постійному вдосконаленні на підтримку місцевих проектів міжнародними організаціями на міжнародному рівні. Соціальні переваги місцевого партнерства визначаються його використанням як основою для інновацій у сільській місцевості, з метою покращення добробуту, вирішення загальних місцевих проблем, набуття передового досвіду, забезпечення інформаційно-комунікативних систем та інформаційних ресурсів і захисту інтересів місцевих товариств на національному рівні. Вибірковий характер проектів місцевого партнерства, низький інформативний рівень та недостатня підтримка місцевих органів влади, недостатній розвиток інформаційно-комунікативних систем у сільській місцевості, що знижують рівень мобільності деяких факторів виробництва та мають негативний вплив на добробут, – все це визначає*

обмеження використання місцевих партнерств на національному рівні. Основною причиною використання місцевого партнерства для стимулювання сільського зростання в Україні є підтримка адаптації до змін в аграрному секторі, об'єднаних громадах, навколишньому середовищі, добробуті, що постраждали від європейської інтеграції. Серед принципів впровадження місцевого партнерства у всіх сільських районах України є відкритість, рівні права всіх партнерів, байдужість до політики, точність та прозорість, активність та інтеграція, спільна економічна та соціальна відповідальність партнерства. У статті розглядаються етапи послідовного впровадження місцевого партнерства у сільській місцевості: діагностика інтересів зацікавлених сторін та довкілля, планування партнерства, стратегічні підстави для партнерства, реалізація партнерства, моніторинг етапів партнерства та якості результатів за чіткими критеріями, стратегічне партнерство підтримувати широкий та гнучкий спектр діяльності протягом довгострокового періоду.

Ключові слова: державно-приватне партнерство, співпраця, економічна безпека, фінансова підтримка.

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LOCAL PARTNERSHIP AS A TOOL FOR STIMULATING THE DEVELOPMENT OF RURAL AREAS OF UKRAINE

Abstract. *The scientific research deals with the ways and strategies of using local partnerships to address the challenges of rural development. These include the advantages and economic, law-based and social restrictions as well as the principles of using local partnerships for rural development of Ukraine. The main economic benefits raise due to the aggregated resources,*

cooperation activities, risk reduction, employment and diversification of income and expenditures of the population. The advantages of local partnerships implementation lie in the application of the normative framework that is efficient for the project's implementation and promotion of the rural growth, in its continuous improvement, in support of the local projects by international organizations on the international level. Social advantages of the local partnerships are determined by its usage as the base for innovations on the rural areas with the aims to improve the welfare, solve common local issues, gain the advanced experience, provide informative-communicative systems and informative resources and secure the interests of local societies at the national level. The selective character of local partnership projects, low-informative level and insufficient support of local authorities, insufficient development of informative-communicative systems in the rural areas that lower the mobility level of some factors of production and have negative impact on the welfare – all determine restrictions of using local partnerships at the national level. The main reason to use the local partnership for stimulating the rural growth in Ukraine is to support the adaptations to changes in the agrarian sector, united communities, environment, welfare affected by European integration. Among the principles of the local partnership implementation on all rural areas of Ukraine are openness, equal rights of all partners, indifference to politics, accuracy and transparence, activity and integration, common economic and social responsibility of partnership. The paper examines stages of the successive local partnership implementation on rural areas: diagnosis of the interests of stakeholders and environment, partnership planning, strategic grounds for partnership, partnership implementation, monitoring the stages of partnership and quality of the results by precise criteria, strategic partnerships support a wide and flexible range of activities for the long-term period.

Keywords: public-private partnership, cooperation, economic security, financial support.

INTRODUCTION

Deepening European integration opens new opportunities for the activities intensification in rural areas of the regions, as evidenced by the positive experience of EU countries (J. Bański, M. Mazur [1])); (P. Chromy, V. Jancak, M. Marada, T. Havlicek [2]). Development of rural areas of Ukraine is an uneven, asynchronous and disproportionate process, as evidenced by research results of S. Ivanov, M. Rogoza, K. Vergal [3], V. Melnyk, O. Pogrishchuk [4]. Given the dynamism of the external environment, there is a need to study the latest factors, forms, prerequisites and parameters of activating the overcoming of disparities in rural development in terms of integration and convergence, which affects economic security of Ukraine. Local partnership is one of the most effective mechanisms for overcoming the asymmetry of rural development.

The study of the local partnership phenomenon in the context of intensifying the development of rural areas is largely considered in the works of foreign scientists, such as M. Moseley [5], E. Schauppenlehner-Kloyber [6], J. Benington, M. Geddes [7]. In current conditions of decentralization in Ukraine, the issue of using local partnership in the regional development system remains out of the attention of domestic researchers, only some aspects of it are covered. In particular, local partnership in rural areas is studied in the context of the adaptation of European models of local partnership to national legislation in the paper of N. Martynova [8; 9]. The most well-known theoretically described and practically implemented forms of the local partnerships functioning for rural development are the models of the European program, namely Leader I, Leader II, Leader+ (local groups of actions) [8]. According to the European

practice, public involvement in solving rural development problems, provided by this program, on the principle of "bottom-up" by selecting the most promising programs for the human development gave impetus to their development and economic growth, and the local partnership model proved effective. However, despite the significant accumulated global and, in particular, European, experience in the field of rural development, principles, approaches and models of using local partnership for rural economy still remain a novelty in the Ukrainian reality. The asymmetry of rural development is due to the action of its various material factors, as well as the conflict of interests of agrarian economy. Excessive centralization, over-regulation of the business environment and insufficient support for small businesses are the main reasons for the asymmetry of rural development in Ukraine. The presence of disparities in the development of rural areas of the regions is also comprehensively influenced by the demographic situation, unfavorable age structure of the population, outflow of the working age population abroad, infrastructural problems that level the quality of life in rural areas. For the younger generation, the main reason for unwillingness to stay and work in rural areas is the lack of employment with adequate wages [10].

In this regard, the research objective is to substantiate the advantages and limitations of using local partnership, principles and motives for its implementation to enhance rural development, as well as determine the main stages of the consistent implementation of local partnership in rural areas of Ukraine [11].

1. CHARACTERIZATION OF LOCAL PARTNERSHIP AS A SPECIAL TYPE OF TIES AND RELATIONS

The problem of asymmetric distribution of benefits and advantages requires the adoption of collective measures in rural areas aimed at a fairer distribution of the effect. One of the mechanisms of the rural development intensification in the conditions of limited financial resources is local partnership, as a specific type of connections and relations, which arises as a result of the cooperation for the implementation of the common interests of individual subjects of rural areas (population, public organizations, business entities, local authorities), the key integrating element of which is local governments.

By the mechanism of implementation, this kind of cooperation is very similar to public-private partnership (PPP), and in practice it often works like: specifically, public functions are performed by the non-governmental sector [12]. However, there is a significant difference between these two phenomena of interaction between the state and the rest of the stakeholders. In the case of PPPs, despite the term "partnership", which supposes the joint efforts and equality of the parties of the agreement, in fact there is a transfer of power from the state to private business in creating of common use infrastructure, production of goods and services, traditionally considered as a monopoly of the state and settlement between the parties in this regard the following issues: distribution of responsibilities, risks, obligations for financial support, design, construction, maintenance, operation, ownership, participation in the management and distribution of profits, based on the principles of equality, openness, non-discrimination, competitiveness, efficiency and minimizing of risks and costs. That is, such relations are more similar to public procurement, where the customer and, at the same time, the supervisory authority for the implementation of the agreement is the state [13].

Local Partnership supposes joining the efforts of stakeholders to respond to challenges and address the problems of the territory development based on the principles of partnership, equality, openness, transparency, accountability, complicity, agreeing of participant's objectives and non-discrimination (Figure 1). In practice, it can be formed on a contractual basis in the form of a local partnership agreement, or by establishing a special purpose vehicle as a separate legal entity.

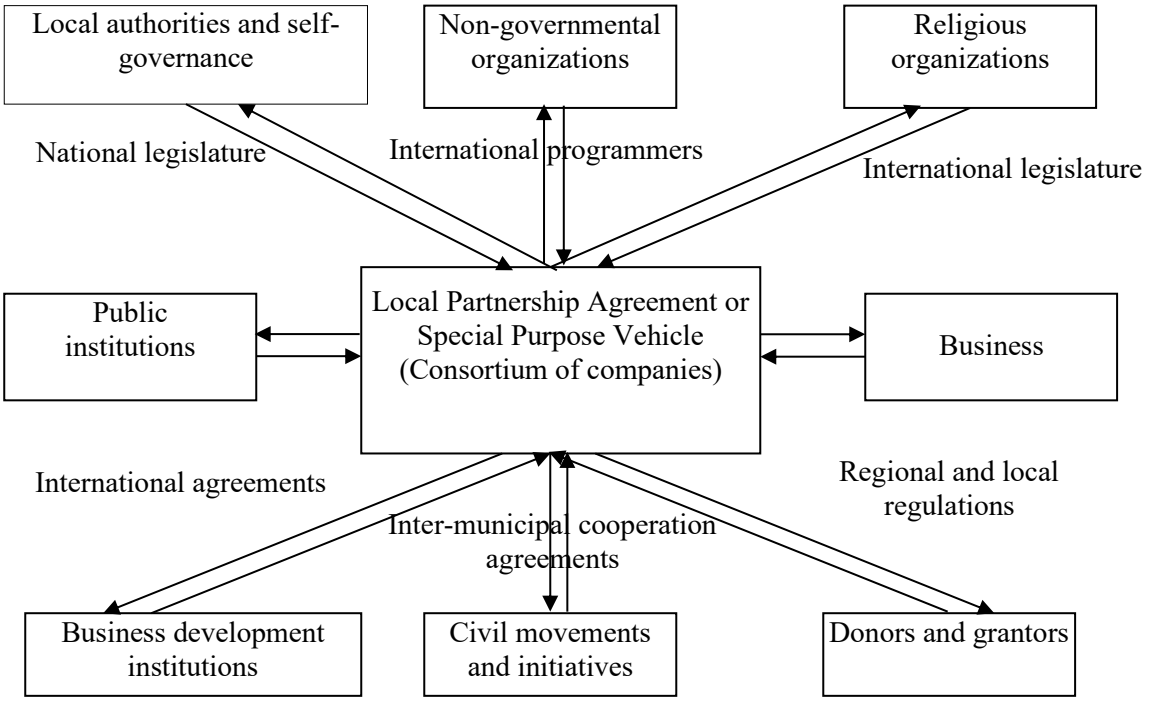

Figure 1. Relationships in Local Partnerships

Source: compiled by the author.

As can be seen from the figure above, all the stakeholders can be divided into three main groups, which differ significantly by their interests: the state, business and civil society institutions. Thus, the state is represented by local authorities and self-government, as well as government institutions such as schools, hospitals, kindergartens, cultural establishments and more. In this case, it plays a social, coordinating and controlling role. The main objectives here will be to protect the interests of society, especially its most vulnerable stratum, and to ensure that all stakeholders comply with existing legislation, in particular on the quality and affordability of infrastructure services (when their provision is transferred to private business) [14].

The main motivation of business is profit maximization. Involvement of this participant in the Local Partnership and empowerment to perform some functions of local government will give an opportunity to attract private sector resources, such as financial, technological, managerial, human, which allows not only to solve the problem of lack of available resources of local communities, but also to introduce technological managerial, marketing and other innovations, as well as the experience of private business in better meeting the needs of consumers. All this will ultimately lead to a better use of available

local resource potential and the provision of services in appropriate volumes and quality in relation to today's requirements. Private business here will get new opportunities to expand the market [15]. The general purpose of the functioning of civil society institutions is an achieving of a social effect. In particular, if they are business development institutions, such as business centers, established in the form of a non-governmental organization, their activities are aimed on stimulating entrepreneurial initiative of the population by conducting training or consulting to increase the number of businesses or encourage self-employment. In addition, civil society institutions in the course of their activities defend the interests of certain groups of the population and control the activities of the government itself. They may also be entrusted with certain social functions that are financially unattractive to private business, such as the maintenance of orphanages or nursing homes at public expense or grant funding. In this regard, donors or grantors must be mentioned who provide funds for the implementation of local partnership projects. In many cases, for the purpose of receiving of a grant they require the formation of such local partnerships in the form of a consortium of participants from the state and the non-governmental sector [16].

The legal basis for the functioning of such entities is, first of all, national legislation and the regional and local levels regulations. Perspectives in this sense are agreements on Inter-Municipal Cooperation – arrangements that encompass two or more administrative-territorial units; they are considered to be effective tool in the implementation of large-scale infrastructure projects, when one locality is unable to implement them alone. Also, as sources of legal regulation of Local Partnerships, international agreements, international legislation and international programs ratified by the Supreme Council of Ukraine are used. The latter is usually a source of grant funding for local partnership projects. As an example, the so-called Neighborhood programs initiated by the European Union can be mentioned, which are designed to finance agreements on cross-border cooperation of border territorial communities of neighboring countries on the borders with EU countries [17].

2. BENEFITS AND LIMITATIONS OF USING LOCAL PARTNERSHIPS

Generalization of theoretical research [3-5] and practical results of individual local projects in rural areas of Ukraine allowed identifying a number of advantages and limitations of using local partnerships (Table 1).

Table 1. Advantages (opportunities) and limitations of using local partnerships in rural areas of Ukraine

Advantages (opportunities)	Limitation
economic character	
attracting private business resources and grant funds	insufficient level of opportunities and experience of cooperation with private sector and attracting of grant funds
employment promotion, including self-employment, income diversification of the rural population	insufficient diversification of the population employment
financial support of regional programs	insufficient transparency in the distribution and spending of funds

mobilization of all types of resources, creation of additional value at all stages of cooperation	insufficient level (or improper condition) of certain types of resources (for example, depreciation of fixed assets)
distribution of benefits (effects), responsibilities and risks	disproportionate distribution of responsibilities and risks, imbalance in obtaining the effect
solving infrastructural problems of rural development	selective nature of projects implementation due to the lack of sufficient funds in communities
development of interregional cooperation at the level of adjacent rural areas, including within Euro regions	low level of preparation of domestic grant projects, which limits their selection for the implementation in the early stages of evaluation
increasing the effectiveness of economic, social and environmental policies, maximally adapting them to local needs and opportunities by deepening the level of differentiation, specificity, responsibility to respond to the needs of individual social groups of local communities	contradictory (in some cases general) nature of strategies and annual programs of rural development, low level of monitoring and control of the implementation of measures declared in program documents, non-implementation of program measures due to underfunding
organizational and legal nature	
availability of a regulatory framework sufficient for successful implementation of partnership projects and stimulating the development of rural areas; its gradual improvement (Law of Ukraine "On Public and Private Partnership"[1]; directive of the Cabinet of Ministers "On Approval of the Rural Development Concept"[2]; directive of the Cabinet of Ministers of Ukraine "On Approval of the Action Plan for the Implementation of the Rural Development Concept"[3])	lack of the unified approach to the definition of "local partnership", differences in the terminology and interpretation of the partnership essence in domestic and European legislation, lack of bylaws regulating local partnership; a number of measures to stimulate the development of rural areas remain exclusively declared; a significant gap in the timing of the adoption of certain regulations
support of local projects by international organizations	one-time, short-term nature of projects, limited dissemination of the experience
support of some local projects at the national level, implementation of national programs for rural development ("Ridne Selo", Poltava)	pilot (selective) nature of projects, support of individual regions, unclear selection criteria, limited access to the information on project results
social character	
establishing a dialogue and developing a culture of cooperation between different contractors both within a single territory and in an interregional context	conflict of interests of individual communities due to specific characteristics of the individual territories' development; different activity of partners in the partnership implementation
solving common problems of local development	lack of awareness and level of perception and support of the local population

[1] Law of Ukraine No. 2404-VI "On Public and Private Partnership". (2010, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2404-17#Text.

[2] Directive of the Cabinet of Ministers No. 995-r "On Approval of the Rural Development Concept". (2015, September). Retrieved from https://zakon.rada.gov.ua/laws/show/995-2015-%D1%80#Text.

[3] Directive of the Cabinet of Ministers of Ukraine No. 489-r "On Approval of the Action Plan for the Implementation of the Rural Development Concept". Retrieved from https://zakon.rada.gov.ua/laws/show/489-2017-%D1%80#Text.

a platform formation for the dissemination of innovations and pilot projects for local development	low level of the information technology development in rural areas; inaccurate data about partners
Interests protection of the local community at the national level by taking into consideration a number of common needs of different territories at the national level	in the context of limited resources, priorities for the implementation and state support are given to individual territories which interests are lobbied at the highest level
development of common "rules of conduct", improvement of means, methods and rules of the interaction between interested players	corruption schemes of certain agreements, a system of "kickbacks" and "conspiracies" at all levels of government, lobbying the interests of individual agricultural holdings or individuals

Source: compiled by the author.

Motives for new forms of the interaction at the level of rural areas are:

– pooling and combining available human and financial resources from the public and private sectors to obtain a tangible economic effect from their use;

– uniting members of rural communities around collective projects and multi-sectorial actions in order to achieve a synergistic effect, equalizing the competitiveness of rural areas;

– strengthening cooperation and mutual dialogue between different participants of rural development, eliminating possible interpersonal conflicts, reaching an agreement through discussion and consultation;

– support for the process of adaptation to changes taking place in the agricultural sector in the united territorial communities (for example, changes in the quality standards of agro-industrial products or promotion channels), environment, quality of life through the rural economy diversification, etc.

In addition, there are a number of common restrictions on the use of the local partnership instrument in rural areas of Ukraine: imperfection of legislation, lack of bylaws to regulate various aspects of local partnership; short-term (one-time, selective) nature of local partnership projects, which positive experience does not extend to other territories; impossibility of implementing local partnerships in areas where there is no awareness and support of local communities; insufficient development of information and communication technologies in rural areas, which reduces the mobility of certain factors of production and negatively affects the level of the goods availability (goods, services, work, information, etc.) to rural residents.

Analysis of the experience of implementing local projects for the rural areas development by international organizations in Ukraine [18; 19] shows that in order to avoid / mitigate conflicts of interest of stakeholders in the formation of local partnerships in rural areas, one should be guided by the following principles:

– openness to all partners operating in the territory – anyone can join the partnership on the principles adopted by the group;

– equality of all partners – the voice of each partner is equally important;

– apolitical character in partnership – the partner group does not represent the views of political parties and acts for the whole society;

– joint responsibility of partners for results and risks;

– activity and integration of partners who jointly implement the strategy of the group, and each of which invests in the strategy, according to their capabilities, their intellectual, technical, logistical and financial resources;

– representativeness – each sector is represented by a number of entities adequate to the number of entities operating in the region;

– clarity and transparency of the partnership – all activities within the partnership, including the leader, are open, and each partner has equal access to information.

The above allows to determine the stages of the development of effective local partnership in rural areas:

I. Diagnosing (needs of partners and residents of rural areas; areas of the planned partnership; possible stakeholders; likely effects on the territory of the partnership and beyond; scenarios of the territory development before and after the project).

II. Preparation of a local project (organization of the interaction of interested parties (presentation of the idea of partnership to communities and stakeholders, acquaintance with previous experience, meetings with potential partners from related fields); search for investors, preparation and conclusion of contracts; analysis of the potential of rural areas, available resources and risks, opportunities for economic, social and other benefits).

III. Building a partnership (strategic support of the partnership (idea, mission, goals, objectives); structure and terms of partnership (creation of working groups, distribution of powers, responsibilities and risks of the parties, degree of participation, term of the project implementation); partnership program (verification of goals, program activities, detailed plans, ensuring equal access to information); funds accumulation(creation of a fund for the local partnership implementation – community funds, public funds, grant funds, funds of private investors) with a fixed contribution of each party; determination of expected results and criteria for their effectiveness).

IV. Partnership implementation (fulfillment of the schedule of planned works).

V. Monitoring of the stages of the partnership implementation and quality of the obtained results according to certain criteria: quantitative (indicators characterizing economic growth, quality of life and sustainable development of the environment, etc.) and qualitative (raising awareness and perception of the local partnership mechanism by partners, residents, gaining new knowledge and experience , strengthening the cooperation between partners, strengthening the competitiveness of local producers, developing new forms of business, promoting employment, increasing the level of satisfaction of residents, reducing social tensions, reducing the outflow of young people, etc.).

VI. Continuation of measures to implement the goals of the partnership on a long-term (permanent) basis and promote the partnership (promoting the results and positive experience of the partnership in other areas, for other activities; expanding the network of stakeholders; modifying the partnership; reporting, new partnerships).

According to the latest research of the International Labor Organization [20], one of the most promising forms of local partnership in rural areas in today's realities is the resumption of the cooperative movement. Activities of cooperatives are based on social responsibility in matters of environmental protection, food safety and combating unemployment, therefore, their formation in rural areas will have a positive impact on the

employment growth, infrastructure development, promote self-realization, self-government and collective protection of community interests. Pilot projects for the formation of communal cooperatives are already working in Ukraine (Poltava region). Therefore, this practice should be extended to other regions, taking into consideration all the benefits and identified risks. In addition, the introduction of agricultural clusters ("Medvino", "Frumushika-Nova", "Resort Koblevo", "Dykanka all year round", "Gorbo Gory") has been started at the national level as the platforms for sustainable rural development in 5 pilot regions of Ukraine. In the formation system of agricultural clusters at the initial stages of their formation, it is local projects that can act as a catalyst for economic growth in rural areas.

CONCLUSIONS

The problem of asymmetric distribution of benefits and advantages requires the adoption of collective measures in rural areas aimed at a fairer distribution of the effect. Given the complexity and versatility of this problem, we believe that a local partnership is one of the mechanisms to intensify the development of rural areas in the face of limited financial resources. Advantages (opportunities) and limitations of the use of local partnership should be grouped by economic, organizational, legal and social characteristics. Increased economic benefits from pooling resources, cooperating in activities, reducing risks, promoting employment and diversifying incomes are the main economic benefits. Advantages of implementing the local partnership of organizational and legal nature are related to the availability and gradual improvement of the regulatory framework sufficient for successful implementation of partnership projects, support for the implementation of local projects by international organizations and at the national level. Social benefits of the local partnership are due to its use as a platform for spreading innovation in rural areas in order to improve the quality of life, solve common problems of local development, gain best practices, information and communication support, protect the interests of local communities at the national level.

However, it was found that there are a number of restrictions on the use of the local partnership instrument in rural areas of Ukraine, including the absence / limitation of a prolonged effect from the implementation of local partnership projects; impossibility to implement local partnerships in the areas where there is no awareness and support of local communities, etc. In these conditions, the main motive for using local partnership to stimulate the development of rural areas of Ukraine is to support the process of their adaptation to changes in the united territorial communities under the influence of European integration processes, which should be based on openness, equality, apolitical character, joint economic and social responsibility. Given the above, the process of consistent implementation of the local partnership in rural areas should include the following stages: diagnosing interests of stakeholders and the environment, partnership preparation, strategic support of partnership building, partnership implementation, monitoring of partnership implementation stages and quality of results obtained according to certain criteria, continuation of measures to implement partnership goals on a long-term (permanent) basis and promotion of partnership activities to other territories and activities.

In modern conditions, one of the promising forms of local partnership in rural areas is cooperation, the use of which will fully implement the above benefits through an organic combination of personal and collective interests of the rural population and their key partners. Prospects for further research should focus on finding new opportunities and forms of the local partnership for the development of integrated structures in rural areas of Ukraine, within which united territorial communities can develop.

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Suggested Citation: Zybareva, O.V., Shylepnytskyi, P.I., Verbivska, L.V., Belei, S.I., Parubchak, I.O. (2020). Local partnership as a tool for stimulating the development of rural areas of Ukraine. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 121-133.

Submitted: 12/08/2020
Revised: 24/10/2020
Accepted: 08/12/2020

УДК 347.615
DOI: 10.37635/jnalsu.27(4).2020.134-144

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ТЕОРЕТИЧНЕ, ЮРИДИЧНЕ ТА ПРАКТИЧНЕ РЕГУЛЮВАННЯ ГРОМАДСЬКИХ ВІДНОСИН, ЯКІ ВИЗНАЧАЮТЬ І ГАРАНТУЮТЬ ПРАВА ГРОМАДЯН І ДОТРИМАННЯ КОНСТИТУЦІЇ УКРАЇНИ ПРИ ПАНДЕМІЇ

Анотація. *Закон є головним аспектом регулювання суспільних відносин. Конституція України зазначає, що всі громадяни України є вільними та рівними у своїй гідності та правах. Обмеження прав громадян у всіх випадках повинні мати чітко визначену мету, яка полягає у пошуку балансу між суспільною необхідністю та інтересами тих, хто має право. В умовах пандемії сформувалися нові структури конституційного регулювання громадських відносин. Для захисту здоров'я та безпеки населення було прийнято ряд жорстких кроків, які обмежують людину на різних рівнях. В цьому випадку виникає питання, чи у повній мірі відповідають прийняті кроки реальній необхідності? Дослідження новосформованих структур здатне висвітлити ефективність механізму дії та повноту конституційного регулювання. Мета цієї роботи полягає у дослідженні явищ регулювання у трьох аспектах: теоретичному, юридичному та в аспекті практичного виконання. У якості методів дослідження було використано аналітичний підхід та індуктивний метод спостереження, а також метод узагальнення і порівняння, та діалектичні принципи для виявлення основних характеристик явищ, що вивчаються. Використовувалися методи системного,*

структурного, функціонального та порівняльного аналізу, методи групування та обробки даних. Це дослідження визначило типи обмежень, які застосовуються в Україні для збереження біль-менш стабільної ситуації під час пандемії COVID-19. Описано закони та акти, що контролюють обмеження періоду пандемії. Визначено заходи, необхідні для безпеки життя та здоров'я населення. Було зроблено висновок, що коронавірус в Україні сприяв розвитку нових напрямків теоретичного супроводу та розвитку нового типу зв'язків з громадськістю під час пандемії. Він посприяв формуванню відповідальності, у тому числі юридичної, за ставлення до поширення коронавірусу та розробці чітких вимог для працівників служб охорони здоров'я та робітників прикордонних державних служб.

Ключові слова: права та свободи людини, обмеження прав, карантин, COVID-19, конституційне регулювання.

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THEORETICAL, LEGAL AND PRACTICAL REGULATION OF PUBLIC RELATIONS, WHICH DETERMINE AND GUARANTEE THE RIGHTS OF CITIZENS AND COMPLIANCE WITH THE CONSTITUTION OF UKRAINE DURING A PANDEMIC

Abstract. *The law is the main aspect of regulating public relations. The Constitution of Ukraine states that all citizens of Ukraine are free and equal in their dignity and rights. Restrictions on the rights of citizens in all cases must have a clearly defined goal, which is to find a balance between public necessity and the interests of those who are entitled. In the conditions of the pandemic, new structures of constitutional regulation of public relations were formed. To protect*

the health and safety of the population, a number of tough steps have been taken to limit people at various levels. In this case, the question arises as to whether the steps taken are fully consistent with the real need? The study of newly formed structures can highlight the effectiveness of the mechanism of action and the completeness of constitutional regulation. The purpose of this work is to investigate the phenomenon of regulation in three aspects: theoretical, legal and in the aspect of practical implementation. The analytical methods and the inductive method of observation, as well as the method of generalization and comparison, and dialectical principles were used as research methods to identify the main characteristics of the studied phenomena. Methods of system, structural, functional and comparative analysis, methods of grouping and data processing were used. This study identified the types of restrictions used in Ukraine to maintain a more or less stable situation during a COVID-19 pandemic. Laws and acts controlling the limitation of the pandemic period are described. Measures necessary for the safety of life and health of the population have been identified. It was concluded that the coronavirus in Ukraine contributed to the development of new areas of theoretical support and the development of a new type of public relations during the pandemic. He helped to create responsibilities, including legal ones, for the spread of coronavirus and to develop clear requirements for health care workers and border guards.

Keywords: human rights and freedoms, restrictions on the rights, quarantine, COVID-19, constitutional regulation.

INTRODUCTION

The law is undoubtedly the main aspect in the regulation of social relations in all states. At the same time, social relations are regulated not only by legal norms, but also by other social norms, among which moral, religious and customary norms are distinguished. Researchers in Ukraine claim that the instrument of social management in the vast majority of cases is legal norms [1]. The issue of regulation of social norms in general is quite debatable, because there are different views on social management, especially in business [2], but in most cases no one denies the primacy of law in the regulation of social relations. Law is known to be the regulator of most relations in society, and it has a hierarchical structure. Today, international regulations, such as United Nations conventions, Council of Europe conventions, and a number of other international organizations, are considered major in most legal systems. In Ukraine, these international regulations are prevalent, which has been repeatedly stated in the scientific literature[1]. It should be noted that most regulations of Ukraine were adopted and are adopted only on the basis of international law.

However, depending on the political regime and the system of public administration, there are states where international regulations are not recognized as the main ones, we can include countries such as the Russian Federation, North Korea and some others [3-5]. It can also be stated that in most countries the main normative document that defines the system of regulation of public relations is the Constitution. In Ukraine, the Constitution is the main tool for establishing a system of legal regulation of public relations and control over respect for human rights. As in Ukraine, most constitutions in different countries clearly define the rights of citizens, the structure of states, but at the same time there are certain restrictions of human rights [6-8]. There is a

[1] Criminal-Executive Code of Ukraine. (2004, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1129-15#Text.

view that the restriction of rights and freedoms is intended both to protect society and to protect the rights and freedoms of others from the wrongful acts of persons who exercise their rights and violate the rights of others. The theory of Ukrainian law provides that the main regulator of all social relations and a guarantee of their observance is the Constitution of Ukraine[1].

The Constitution of Ukraine[2] states that all citizens of Ukraine are free and equal in their dignity and rights. Human rights and freedoms are inalienable and inviolable[3]. Thus, the restriction of rights must have the same natural origin as the rights and freedoms themselves. Restrictions on the rights of citizens, researchers argue, should in all cases have a clearly defined purpose, which involves finding a balance between public necessity and the interests of those who have the right. At the same time, restrictions were first applied with the formation of human society, and some researchers argue that they first began to be applied during the primitive communal system[4]. There is a view that the restriction of rights and freedoms is intended both to protect society and to protect the rights and freedoms of others from the wrongful acts of persons who exercise their rights and violate the rights of others. The theory of Ukrainian law provides that the main regulator of all social relations and a guarantee of their observance is the Constitution of Ukraine. The Constitution of Ukraine[5] states that all citizens of Ukraine are free and equal in their dignity and rights. Human rights and freedoms are inalienable and inviolable[6]. Thus, the restriction of rights must have the same natural origin as the rights and freedoms themselves.

1. RESTRICTIONS ON THE RIGHTS OF CITIZENS IN UKRAINIAN LEGISLATION

Restrictions on the rights of citizens, researchers argue, should in all cases have a clearly defined purpose, which involves finding a balance between public necessity and the interests of those who have the right. At the same time, restrictions were first applied with the formation of human society, and some researchers argue that they first began to be applied during the primitive communal system[7]. In general, some researchers identify several types of restrictions on the rights and freedoms of citizens that can be applied in Ukraine. The first are general restrictions that apply to all citizens and are reflected in the relevant laws adopted to comply with constitutional requirements[8] [9]. For example,

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[2] *Ibidem*, 1996.
[3] Resolution of the Cabinet of Ministers of Ukraine No 211 "On Prevention of the Spread of Coronavirus COVID-19 on the Territory of Ukraine". (2020, March). Retrieved from https://www.kmu.gov.ua/npas/pro-zapobigannya-poshim110320rennyu-na-teritoriyi-ukrayini-koronavirusu-covid-19.
[4] Law of Ukraine No 1645-III "On Protection of the Population from Infectious Diseases". (2000, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1645-14#Text.
[5] Constitution of Ukraine. (1996, June), op. cit.
[6] Resolution of the Cabinet of Ministers of Ukraine No 211 "On Prevention of the Spread of Coronavirus COVID-19 on the Territory of Ukraine", op. cit.
[7] Law of Ukraine No 1645-III "On Protection of the Population from Infectious Diseases". (2000, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1645-14#Text.
[8] Constitution of Ukraine. (1996, June). Retrieved from

Article 32 of the Constitution of Ukraine[1] stipulates that "the collection, storage, use and dissemination of confidential information about a person without his / her consent is not allowed"[2]. However, the Law of Ukraine "On Operational and Investigative Activities" stipulates that law enforcement agencies are allowed to "monitor a person, thing or place, as well as audio and video surveillance of a place in accordance with Articles 269, 270 of the Criminal Procedure Code of Ukraine" [10]. However, these grounds must be substantiated and they are conducted only with the permission of the court. The next type of restrictions concerns the status of certain categories of citizens. The main reason for such restrictions is the establishment of certain restrictions by the court. If a person has committed a crime and his guilt is proven in court, he has a special status, and his certain rights and freedoms are limited. However, these restrictions are in most cases temporary, except for persons sentenced to life imprisonment[3]. Another type of restriction provided for in the Constitution of Ukraine is the restriction of the rights of citizens in a state of emergency. A state of emergency, as defined in the Law of Ukraine "On the legal regime of the state of emergency" is a special legal regime that can be temporarily imposed in Ukraine or in some localities in emergencies of man-made or natural nature not lower than the national level[4].

In accordance with the Constitution and the said law, in the conditions of such a state, in order to ensure the protection of citizens and the constitutional order in accordance with the constitutional law, certain restrictions on rights and freedoms may be established with a specified period of validity. However, it should be noted that the conditions for the introduction of a state of emergency in the law provides for the emergence of particularly severe emergencies of man-made and natural nature [11]. The list includes: natural disasters, catastrophes, especially large fires, the use of means of destruction, pandemics and panzootia. The main condition for the imposition of a state of emergency should be the threat to life and health of large sections of the population[5]. At the same time, the law defines the content of measures of the legal regime of the state of emergency. Such measures include restrictions on the movement of citizens and vehicles, a ban on mass events, strikes and the forcible seizure of property. In connection with emergencies of man-caused or natural nature, such measures as evacuation, housing, i.e. resettlement of evacuees, prohibition of construction of enterprises, establishment of quarantine restrictions, mobilization, change of mode of operation of enterprises, institutions, organizations of all forms of ownership, replacement the heads of state enterprises, institutions and organizations may also be carried out.

Additional conditions of the state of emergency include the imposition of curfew,

https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

[2] Resolution of the Cabinet of Ministers of Ukraine No 211 "On Prevention of the Spread of Coronavirus COVID-19 on the Territory of Ukraine". (2020, March). Retrieved from https://www.kmu.gov.ua/npas/pro-zapobigannya-poshim110320rennyu-na-teritoriyi-ukrayini-koronavirusu-covid-19.

[3] 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.

[4] Code of Ukraine on Administrative Offenses. (1984, December). Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10.

[5] Code of Ukraine on Administrative Offenses, op. cit.

verification of documents from citizens, as well as personal inspection, inspection of things, vehicles, luggage and cargo, office space and housing, restriction or temporary ban on the sale of weapons, toxic and potent chemicals, and as well as alcoholic beverages and substances produced on the basis of alcohol, temporary seizure of registered firearms and ammunition, prohibition of production and distribution of information materials that may destabilize the situation, regulation of civilian television and radio centers, establishing special rules of use and communication transmission of information through computer networks, as well as raising the issue of banning the activities of political parties, public organizations in the interests of national security and public order, public health or protection of the rights and freedoms of others[1]. At the same time, the legislation does not specify when certain restrictions should be introduced. The law stipulates that a state of emergency may be imposed for a period of no more than 30 days in the country as a whole and no more than 60 days in certain localities. It can be extended for another 30 days. In the situation with the crown viral pandemic in Ukraine, as evidenced by the facts, some elements of the state of emergency were imposed, but the state of emergency was not fully imposed. The analysis showed that the restrictions on citizens 'rights imposed in connection with the pandemic, but not the imposition of a state of emergency, were legally a violation of citizens' constitutional rights. To some extent, human rights violations were allowed.

2. LEGAL MEASURES IN UKRAINE DURING A PANDEMIC

The introduction of restrictions in Ukraine began with the Resolution of the Cabinet of Ministers of Ukraine of March 11, 2020 No. 211[2]. It should be noted that the resolution is not about the introduction of a state of emergency, but about the introduction of quarantine with reference to the Law of Ukraine "On protection of the population from infectious diseases" [12]. However, the law itself defines "quarantine" as "administrative and health measures used to prevent the spread of particularly dangerous infectious diseases", but they have nothing to do with restricting the rights of citizens. Moreover, the law does not provide for an increase in the powers of the Cabinet of Ministers of Ukraine in the field of restriction of citizens' rights. This resolution was adopted on March 11, 2020, and the relevant amendments to the Law of Ukraine "On Protection of the Population from Infectious Diseases"[3] were adopted on March 30, 2020 and later on April 13, 2020. Thus, we can talk about illegal restrictions on the rights of citizens by the Cabinet of Ministers of Ukraine, which were carried out in the period from March 11, 2020 to March 30, 2020. At the same time, the mentioned Resolution of the Cabinet of Ministers of Ukraine and other measures has positive aspects. To some extent, they stabilized the situation in Ukraine and reduced the active growth of coronavirus patients at the beginning of the pandemic. However, at the same time, it should be noted that today there is a fairly large increase in patients with coronavirus, but the introduction of certain elements of the state of emergency is not discussed or resolved. In our opinion, it

[1] Law of Ukraine No 1645-III "On Protection of the Population from Infectious Diseases". (2000, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1645-14#Text.
[2] Criminal Code of Ukraine. (2001, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[3] Law of Ukraine No 1645-III "On Protection of the Population from Infectious Diseases", op. cit.

is necessary to analyze the restrictions that were introduced by this resolution and determine their significance for the system of rights and freedoms of citizens. These measures included the following restrictions and prohibitions:

–being in public places without appropriate personal protective equipment;

–relocation by groups of more than two persons, except in cases of official necessity and accompaniment of some individuals;

–stay in public places of persons under 14 years of age, unaccompanied by parents or other persons in accordance with the law or adult relatives of the child;

–visits to educational institutions by its applicants;

–visiting parks, squares, recreation areas, forest parks and coastal areas;

–visiting sports and children's playgrounds;

–conducting all mass cultural, entertainment, sports, social, religious, advertising events;

–work of business entities, which provides for the reception of visitors, in particular catering establishments, i.e. restaurants, cafes, shopping and entertainment centers, other entertainment establishments, fitness centers, cultural institutions, trade and consumer services;

–regular and irregular transportation of passengers by road in urban, suburban, intercity and interregional traffic;

–transportation of passengers by subways in Kyiv, Kharkiv and Dnipro;

–transportation of passengers by rail in all types of domestic services

–visits to social protection institutions and establishments in which children, elderly citizens, war and labor veterans, persons with disabilities and other persons temporarily / permanently reside / stay;

–visiting points of temporary stay of foreigners and stateless persons who are illegally staying in Ukraine and points of temporary accommodation of refugees;

–being on the streets without identity documents confirming citizenship or its special status;

–unauthorized leaving of the place of observation (isolation).

From the point of view of law, these restrictions to some extent included certain elements of the state of emergency, but it, as already mentioned, was not imposed. The analysis shows, first of all, that such pandemics have never occurred in the history of mankind and therefore to some extent the actions of the government can be justified [13; 14]. On the other hand, in order to ensure these restrictions, it was necessary to impose severe penalties on those who violated these restrictions. In order to fulfill the requirements of the mentioned Resolution by The Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)”[1] amended the Code of Ukraine on Administrative Offenses and the Criminal

[1] New Text of the Constitution of the Russian Federation with Amendments. (2020, July). Retrieved from http://duma.gov.ru/news/48953/.

Code of Ukraine[1]. Article 44-3 was added to the Code of Ukraine on Administrative Offenses, which defined the responsibility for violating the rules on quarantine of people. The content of the article stipulates that violations of the rules on human quarantine, sanitary and hygienic, sanitary and anti-epidemic rules and norms provided by the Law of Ukraine "On Protection of the Population from Infectious Diseases"[2], other legislation, as well as local government decisions on infectious diseases, – entails the imposition of a fine on citizens from one to two thousand non-taxable minimum incomes and on officials – from two to ten thousand non-taxable minimum incomes[3]. In addition, Article 325, "Violation of sanitary rules and regulations for the prevention of infectious diseases and mass poisoning" was added to the Criminal Code of Ukraine[4]. The article stipulates that "violation of the rules and regulations established to prevent epidemic and other infectious diseases, as well as mass non-communicable diseases (poisoning) and control them, if such actions have caused or may have caused the spread of these diseases – shall be punishable by a fine of one thousand to three thousand tax-free minimum incomes, or arrest for a term up to six months, or restriction of liberty for a term up to three years, or imprisonment for the same term. If the acts resulted in death or other serious consequences, they are punishable by imprisonment for a term of five to eight years"[5]. It should be noted that the additions to administrative and criminal legislation are somewhat mild, as statistics show that the number of diseases and deaths in Ukraine is increasing, but there is no active application of both administrative and criminal legislation to stop the spread of the disease.

On the other hand, there has been and still is a tendency among Ukrainians to disobey certain laws, and in some cases legal nihilism. It is these factors that have led to a sharp increase in the incidence of COVID-19. As a result, you can identify the following aspects: the coronavirus pandemic has set the Ukrainian leadership a rather difficult and responsible task. Solving it required quick and extraordinary decisions. The task of making changes to the system of legal regulation of public relations during the pandemic was especially extraordinary. It was necessary to resolve the issue of restricting the rights of citizens to be applied during the introduction of quarantine and their compliance with constitutional requirements [15; 16]. Particular attention should be paid to changes in legislation that formulate new legal relations during emergencies and pandemics, as well as new aspects of developing the theory of legal regulation during emergencies and pandemics. These aspects directly affect society as a whole and each of the citizens, because there is a question about the most important right for citizens – the right to life. However, the implementation of appropriate measures by the government was not always timely and clear, especially with regard to changes in legislation.

[1] Code of Ukraine on Administrative Offenses. (1984, December). Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10; Criminal Code of Ukraine. (2001, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.

[2] Law of Ukraine No 1550-III "On the Legal Regime of the State of Emergency". (2000, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1550-14#Text.

[3] Law of Ukraine No 1550-III "On the Legal Regime of the State of Emergency", op. cit.

[4] Criminal Code of Ukraine. (2001, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.

[5] Law of Ukraine No 2135-XII "On Operational and Investigative Activities". (1992, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2135-12#Text.

CONCLUSIONS

Coronavirus in Ukraine has contributed to some extent to the development of new areas of theoretical support and the development of a new type of public relations during the pandemic. The new areas include the following:

–elimination of legal nihilism, which was instilled in the minds of citizens during the existence of the Soviet Union and to some extent independent Ukraine, who believe that the state should provide everything, and citizens themselves should only consume everything provided by the state;

–formation of responsibility, including legal, for the attitude to the spread of coronavirus and the state of things and the territory in which the citizen lives and the attitude to the threat to life and health of other citizens;

–the formation of responsibility for the state of their health and the health of others, because the infection of a large number of citizens occurred precisely in connection with the irresponsible attitude of some citizens to themselves and to others who were infected through irresponsibility;

–development of new legal norms that would more clearly define the limits of behavior of individuals during emergencies and pandemics, and especially the punishment for irresponsible attitude to the implementation of decisions to prevent infection of other citizens;

–development of new clear requirements for law enforcement officers in the field of protection of life and health of citizens, especially for violations of the quarantine regime;

–development of new standards for employees of the State Border Guard Service, the State Emergency Service and other government agencies that should ensure the protection of life and health of citizens in the country as a whole

–development of clear recommendations and algorithms of actions for medical workers in order to prevent the spread of coronavirus throughout Ukraine.

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Suggested Citation: Zarosylo, V.O., Yevchuk, T.V., Muraviov, K.V., Gunchenko, O.V., & Smirnova, V.V. (2020). Theoretical, legal and practical regulation of public relations, which determine and guarantee the rights of citizens and compliance with the constitution of Ukraine during a pandemic. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 134-144.

Submitted: 06/08/2020
Revised: 27/10/2020
Accepted: 23/11/2020

УДК 347.121.2
DOI: 10.37635/jnalsu.27(4).2020.145-160

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ОСОБЛИВОСТІ ОНОВЛЕННЯ ЦИВІЛЬНОГО ЗАКОНОДАВСТВА УКРАЇНИ У СФЕРІ ПРАВА НА ІНФОРМАЦІЮ В УМОВАХ РОЗВИТКУ ГЛОБАЛЬНОГО ВІРТУАЛЬНОГО СЕРЕДОВИЩА

Анотація. *Право на інформацію вирізняється сьогодні особливостями реалізації і захисту порівняно із первісними підходами, закладеними у Цивільному кодексі України і пов'язаними із звичними для врегулювання правом відносинами у матеріальному «фізичному» світі. Стаття присвячена особливостям оновлення цивільного законодавства України у сфері права на інформацію в умовах розвитку глобального віртуального середовища, а також аналізу поняття «віртуальності» для виявлення специфіки врегулювання інформаційних відносин. Зроблено висновок, що правове регулювання у сфері інформаційних відносин загалом і права на інформацію, зокрема, повинно ґрунтуватися передусім на традиційних правових конструкціях і з використанням притаманного цивільному праву категоріального апарату, а для створення адекватного викликам інформаційного суспільства законодавства необхідно чітко узгодити позиції науковців і законотворця щодо поняття, змісту, ознак інформації, специфіки інформаційних процесів і систем, про яку йдеться також у роботах представників інших галузей науки – філософії, фізики, кібернетики та ряду інших. Звертається увага на те, що інформація в цивільному праві розглядається як окремий нематеріальний об'єкт (ст.200 Цивільного кодексу України), а в Книзі другій Цивільного кодексу України цей об'єкт набуває ознак особистого немайнового блага з усіма його ознаками і особливостями. Автор приходить до висновку, що розуміння процесів, які відбуваються у розвиненому віртуальному середовищі, потребує на сьогодні узгодження позицій щодо забезпечення і реалізації, охорони і захисту цього права із Європейськими і світовими тенденціями. Такі чинники зумовили, окрім іншого, необхідність оновлення (рекодифікації) Цивільного кодексу України. Автором встановлено, що починаючи з першої, практично кожна стаття Цивільного кодексу України містить елементи інформаційного змісту, інформаційно наповнена, або пов'язана з інформацією чи інформаційними відносинами, інформаційними правами учасників цивільних відносин, що потребує, у свою чергу, уточнення, легального закріплення і доповнення у нормах оновленого кодексу. Пропозиції, які висловлюються у цій статті, спрямовані на подальші дослідження права на інформацію і допомагають знайти відповідь на основне питання – яким має бути оновлене законодавство у сфері регулювання відносин, пов'язаних із правом на інформацію в умовах розвитку віртуальних систем і мереж, і з урахуванням сучасних Європейських і світових тенденцій у правовому забезпеченні процесів, що відбуваються у глобальному віртуальному середовищі.*

Ключові слова: немайнове право, міжнародні акти, віртуальність, інформаційні відносини, рекодифікація.

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FEATURES OF UPDATING THE CIVIL LEGISLATION OF UKRAINE IN THE FIELD OF THE RIGHT TO INFORMATION IN THE CONDITIONS OF DEVELOPMENT OF THE GLOBAL VIRTUAL ENVIRONMENT

Abstract. *Nowadays, the right to information stands out with its specific features of implementation and protection compared to the original approaches laid down in the Civil Code of Ukraine and related to the usual legal relations in the material, "physical" world. The study investigates the features of updating the civil legislation of Ukraine in the field of the right to information in the development of the global virtual environment, as well as the analysis of the concept of "virtuality" to identify the specifics of information relations. It is concluded that legal regulation in the field of information relations in general and the right to information, in particular, should be based primarily on traditional legal constructions and using the terminology inherent in civil law, and to establish adequate legislation for the challenges of the information society, it is necessary to clearly agree on the positions of scientists and legislators on the concept, content, features of information, specifics of information processes and systems, which is also discussed in the studies of other fields of science, i.e., philosophy, physics, cybernetics, etc. Attention is drawn to the fact that information in civil law is considered as a separate intangible object (Article 200 of the Civil Code of Ukraine), and in the Book Two of the Civil Code of Ukraine this object acquires the characteristics of personal intangible property with all its features. The author concludes that the understanding of the processes taking place in a developed virtual environment requires the coordination of positions on the provision and implementation, protection and defence of this right with European and global trends. Such factors led, among other things, to the need to update (recodify) the Civil Code of Ukraine. The author found that starting with the first one, almost every article of the Civil Code of Ukraine contains elements of information content, is information-filled, or related to information or information relations, information rights of participants in civil relations, which requires, in turn, clarification, legal consolidation and additions to the provisions of the updated code. The proposals expressed in this study are aimed at further research on the right to information and help to find an answer to the main question – what should be the updated legislation in the field of regulation of relations related to the right to information in the context of the development of virtual systems and networks, and taking into account modern European and world trends in the legal support of the processes that occur in the global virtual environment.*

Keywords: non-property law, international acts, virtuality, information relations, recodification.

INTRODUCTION

At present, to lead a discussion that touches on the problems of updating the Civil Code of Ukraine[1] (hereinafter referred to as "the CC of Ukraine"), given the role of information as a phenomenon and as an object of civil rights in this process, information relations, virtuality, robotics, artificial intelligence, and even more so, a set of information rights

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

led by the personal intangible right of the individual to information in the development of modern theories of virtuality and posthumanism, it is necessary to return to the origins of society and science of these concepts, as well as a number of others that accompany and supplement them, as well as to the studies of the head of the working group of developers of the current CC of Ukraine A.S. Dovhert, where the need and main directions of updating the civil legislation in Ukraine are substantiated [1; 2]. Explanation of the phenomenon of virtuality is also important from the standpoint of further search for the correct legal approaches to solving the issues of guilt and legal responsibility, protection of rights when it comes to causing harm by a person – a living being, and a machine, robot, or artificial intelligence generated by a person. The competition of ideas about the essence of "human" on the one hand and "cybernetic", "informational", "virtual", on the other hand, is currently at the forefront of science as never before, since it is in this century that many previously fantastic ideas associated with the above concepts find their implementation. In addition, legal science and practice cannot stay away from these truly global and comprehensive processes, as principles, tools, history and philosophy of law, centuries-old practice of exercise and protection of human rights, including the right to information, can and should serve as the basis for humane resolution of many controversial issues in the modern rapidly changing information world.

As for information, as an object of civil law regulation, mention of it can be found in various institutions and provisions of civil law, but one should not forget that information is primarily an independent object of civil rights, and those rules that govern information relations are still in the stage of development, the right to information is stipulated only in a few articles of the CC of Ukraine and its structural parts (Articles 200, 277-278; 302 of the CC of Ukraine)[1], but even under these conditions an independent institution of civil rights has developed in Ukrainian legislation – the right to information, which has prospects for further development. The above approaches were substantiated in a monograph on the regulation of information relations in 2006 [3].

Nowadays, information is also considered a component of a substantial number of personal intangible assets, which are protected by Book Two of the CC of Ukraine[2]. Thus, within the system of personal intangible goods that ensure the natural existence of an individual and his or her social existence, protected are the goods that have an information component, and the rights to them can be described as defensive. This group of rights includes: the right to information about one's health and the right to secrecy about one's health (Articles 285, 286 of the CC of Ukraine); the right to reliable information about the state of the environment, the quality of food and household items, as well as the right to collect and disseminate it (Part 1 of Article 293 of the CC of Ukraine); the right to a name and to change and use it (Articles 294-296 of the CC of Ukraine); the right to honour, dignity and business reputation (Articles 297, 298 of the CC of Ukraine); the right to express one's individuality (Article 300 of the CC of Ukraine); the right to privacy (Article 301 of the CC of Ukraine); the right to personal papers and the right to secrecy of correspondence (Articles 303-306 of the CC of Ukraine); the right of a person to conduct photo, film, television, and video shootings (Articles 307-308 of the Civil Code); the right to freedom of literary, artistic, scientific

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15
[2] *Ibidem*, 2003.

and technical creativity (Article 309 of the CC of Ukraine), etc., which are not currently enshrined, but may actually have individuals and legal entities. This refers to the turnover of rights, the probability of their economic, monetary valuation and contractual regulation, and personal intangible assets (name, honour, dignity, business reputation, health information) under no circumstances can have economic meaning and be freely transferrable.

After the adoption of the current CC of Ukraine[1] in 2003, research and development of the mechanism of legal regulation and protection of personal non-property rights, including the right to information, became especially important for the entire spectrum of civil relations. Among the main achievements of the first private law codification of independent Ukraine is the settlement of relations in the field of personal non-property right to information of an individual within the Book Two of the CC of Ukraine, which positively influenced the introduction of liberal ideas of all human rights, implementation of adequate legal mechanisms and protection of personal non-property relations. The developers of the draft of the current CC of Ukraine, and later the entire civil society, made a positive regulation of personal non-property relations, including information, which was either not carried out or took place outside the civil legislation, although its content should be consolidated precisely in civil legislation. Currently, the situation has radically changed, as after the adoption of the current CC of Ukraine, dozens of theses on personal non-property rights and various aspects of the right to information and information rights were defended, including several doctorate theses [4-8]. The desire to establish a true democratic society with comprehensive provision of fundamental, including informational human rights and freedoms, found expression in 1990, in the Declaration of State Sovereignty of Ukraine[2], and the Book Two of the CC of Ukraine[3] in general became the embodiment of morality, justice, self-worth of each particular individual, each of its articles took into account the progressive provisions of international human rights instruments: the Universal Declaration of Human Rights of 1948[4], the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[5] and others, civil codes of numerous highly developed countries. codifications of civil law, which significantly strengthened and updated the wording in which its rules are built. The provisions of the Constitution of Ukraine have led to changes in the understanding of human information rights from those received by the state to the concept of human rights, which are related to the very fact of its existence, i.e., relate to its fundamental properties, which fully complies with private law theory of natural law. In the years since the adoption of the CC of Ukraine, the idea that civil law both regulates information relations and protects the right to information and the information itself as an intangible asset has found unconditional support in the national doctrine; therefore, the provisions of the CC of Ukraine can and should not only protect personal non-property rights to information, but also engage in their further positive regulation.

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

[2] Declaration of State Sovereignty of Ukraine No 55-XII. (1990, July). Retrieved from https://zakon.rada.gov.ua/laws/show/55-12#Text

[3] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

[4] Universal Declaration of Human Rights. (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/card/995_015

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

Meanwhile, although the CC of Ukraine[1] currently contains a considerable set of provisions governing personal non-property relations in the field of the right to information and other information rights, it does not provide for a systematic presentation of legal material on personal non-property rights to information and other information rights; therefore, there is little to say about the consistent provision of positive regulation of the content of personal non-property information rights. Moreover, in the new century, during the current CC of Ukraine, it did not have rules that would fully regulate information relations, taking into account the features of the virtual environment, new technologies, the needs of the global information society, the place of personal non-property rights to information in these circumstances, proposals for the implementation and protection of personal non-property rights to information of individuals and legal entities. The search for answers to these problematic questions constitutes the essence of this study, and proposals for their solution can be used as a basis for further research and be used to update civil legislation.

1. MATERIALS AND METHODS

To develop an idea of the phenomena stated in the title and briefly outlined in the introduction to this study, an idea of the theoretical trends related to the problems of virtuality, information, the right to information, information rights in an era increasingly called posthumanism, it is necessary to analyse not only the articles of modern legal scholars and their legislative initiatives, but also works on philosophy, psychology, sociology, biology, cybernetics, physics, journalism, literature and other sources, including books and movies in the genre of science fiction. These are the works of prominent scientists Peter Anokhin, Viktor Glushkov, Vladimir Vernadsky, Norbert Winner, Claude Shannon and many others, as well as works by classics of the 20th century, including the "golden age of science fiction" – Isaac Azimov, Alfred van Vogt, Clifford Simak, John W. Campbell, Hugo Gernsbeck, Paul Anderson, Alfred Bester, James Blish, Frederick Brown, Ray Bradbury, Arthur Clark, Arkady and Boris Strugatsky, films by directors such as James Cameron, Lana and Lilly Wachowski, Robert Zemeckis, Christopher Nolan, Steven Spielberg, Ridley Scott, Andrew Tarkovsky, George Lucas, Vladimir Bortko, John Carpenter, Ron Howard, Luke Besson and many others, the work of modern science fiction writers of the 21st century: Peter Watts, Ken McLeod, Chey Meville, Peter Hamilton, Karl Schroeder, Charles Stross, John Scalzi, Alastair Reynolds, Stephen Baxter, Adam Roberts, Anne Lecky, Lauren Buckets and others. [9-11]. Moreover, many words that we use nowadays to speak the modern language of yet another technological revolution and some of which are introduced into special legislation, were invented by science fiction: android, blaster, cyberspace, clone, spaceship, cryonics, multiverse, science fiction, posthuman, force field, superhero, telepathy, teleportation, etc. [12].

The methodological framework for studying the problems of the right to information in a virtual environment is the doctrine of civil law on these issues, international acts on information, objects of information rights, information relations, rights to information, provisions of the Constitution of Ukraine, provisions of Ukrainian

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

and foreign civil legislation. Special attention is paid to the practice of the ECtHR, namely disputes over the right to information: the freedom to receive and impart information, for example, Ahmet Yildirim v. Turkey, 18.12.2012; on freedom of the media (for example, Lingens v. Austria, 08.07.1986; Times Newspapers Limited v. the United Kingdom, 10.03.2009); on freedom of scientific activity and access to the Internet (Sorguc v. Turkey, 23.06.2009; Ahmet Yildirim v. Turkey, 18.12.2012); access to public information (Leander v. Sweden, 26.03.1987; Gaskin v. The United Kingdom, 07.07.1989) and many others.

2. RESULTS AND DISCUSSION

2.1 Features of the term of "virtual"

An insight into the meaning of the term "virtual" suggests that it has many meanings. Virtual is both "conditional" and "possible", "imaginary", "potential", "real". The word itself appeared in the early Byzantine philosophy of the 2nd century, has Latin roots and means an object or state that does not really exist, but may arise under certain circumstances (which emerge due to software), in philosophy the term "virtuality" is known since the 13th century and is attributed to Thomas Aquinas, who argued that a person is a combination of body and soul; in the information society, the term "virtuality" acquired a new meaning, which is associated with the so-called virtual reality and is understood in philosophy, psychology, aesthetics and culture in general as a certain state in which the subject loses the difference between real and constructed (virtual) world, which is a feature of consciousness and perception of the subject [13].

This concept is mentioned when terms such as "post-humanism", "post-humanity" are brought up. Therefore, it is important to take this into account in legal science which, in a broad sense, should be based on morality, ethics, human psychology in society. The world generated by the human imagination can be described as conditional or possible, which creates a certain image, which can be implemented in a particular form under certain conditions. Since it is necessary to convey this image to society, its individual representatives, it is embodied in human society in signs that carry the meanings conditioned in it and are broadcast in this form. Linguists and philosophers believe that it is important not only to understand the meaning of signs, but also their relationship for learning in human society to become the property of the culture of each individual. Thus, the images seen in films are perceived as real and sometimes it takes some effort to understand that they are virtual. The image is in fact a form of reflection of the surrounding reality, which is generated by human mental activity.

It is extremely important to remember that the very phenomenon of virtuality did not emerge with the advent of certain technical devices or with the invention of computers, but, most likely, with the advent of the sign system of humankind. Today, scientists around the world are asking questions regarding the virtualisation of the material world or the materialisation of the virtual one. Related to this are some additional questions – what in general is virtuality, which is called a phenomenon of modernity; is virtuality related to human nature, in particular, to its mental component; what the nature of virtuality is, etc. Virtuality as a subject of study is so interesting that it causes, among other things, a considerable emotional response in people's minds,

becomes the basis of literary works, films, inspires artists and is reflected in philosophy, sociology, cybernetics, psychology, etc. Cybernetics, mathematics, physics, and philosophers made a special contribution to the study of the phenomenon of virtuality in the 20th and 21st centuries. Thus, with the advent of the new century, one central problem has emerged that requires a modern explanation – what is virtuality and what are the features of the virtual world, if there is so much controversy about it.

Experts, among other things, also pay attention to the historical conditionality and gradual change (improvement) of the human psyche as the main cause of virtuality, while technical devices, including computers, only contributed to the process of human understanding of nature, essence, which became especially noticeable in the era of the information society. One can agree that "…the fear it causes is each time more related to the nature of human themselves, the peculiarities of their psyche, which works to fulfil themselves as a person…", and that "…virtuality is a fundamental attribute of mental consciousness (a specific form of reflection of the surrounding reality)" [14]. At the same time, when it comes to scientific progress, not only enthusiastic voices of approval are always heard, but also the stern warnings of sceptics who point out the possible negative consequences of the use of the said progress. Discussions, for example, revolve around everything that is described by such a part of speech as "post". Thus, articles and television programmes, books and films are now filled more ever with the concepts of "post-industrial society", "post-modernism", "post-apocalypse", and even "post-science". Meanwhile, at the heart of all these concepts – new, previously unknown opportunities that can carry both positive and negative aspects.

It is believed that the word "post-human" first appeared in the story of the classic of horror literature, "Beyond Time" by Howard Phillips Lovecraft, which was published back in 1936, and Lovecraft interprets this concept somewhat differently than it is perceived today: the author uses it not to describe the transformation of humans, but to describe the beings who will come after us. Around the same time, the word "posthumanism" appeared – a trend in philosophy which states that the evolution of human has not yet ended and after human should appear a superhuman [15]. This worldview recognises the inalienable human rights to improve human capabilities (physiological, intellectual, etc.) and achieve physical immortality [16].

Thus, as a principle, this could be formulated in law as follows: "Everyone has the right to improve their human capabilities, physiological, mental and intellectual, in order to achieve physical immortality", if it did not sound too fantastic to a modern person. As for immortality in networks, it is an even more controversial subject today, related to the problems of neurolink and "electronic immortality". The difference between transhumanism and posthumanism remains debatable to this day.

2.2 Analysis of the right to information

The right to information has become one of the greatest achievements in the process of human development and today belongs to the personal intangible rights of an individual, to which the Book Two of the CC of Ukraine "Personal Non-Property Rights of an Individual"[1] is dedicated. Since Book Two comprises three chapters ("General Provisions on Personal Non-Property Rights of an Individual", "Personal Non-Property Rights

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

Ensuring the Natural Existence of an Individual", "Personal Non-Property Rights Ensuring the Social Existence of an Individual"), it is important to define the place of the right to information in the structure of this Book. Therewith, a significant array of rules governing the personal non-property right to information is contained not only in other parts of the CC of Ukraine, but also in other acts of civil legislation[1].

The advantages of the current CC of Ukraine in terms of regulation of relations in the field of information rights are as follows: the information is mentioned in general provisions on personal non-property rights of an individual, which means that the concept is consolidated, as well as its types, content, guarantees and ways to protect personal non-property rights to information; composition of articles on the right to information on the same principles according to a holistic approach to understanding the subject and method of regulating public relations; consolidation of provisions on this right in the appropriate order, etc. Thus, the Book Two contains provisions that regulate personal non-property relations regarding the right to information based on such principles as dispositivity, legal equality, inadmissibility of interference in the private life of an individual; judicial protection of any violated civil right; as well as justice, good faith, reasonableness, etc. These principles equally apply to all other personal non-property rights.

With the rapid development of the information society in the 21st century, the time has finally come for Book Two to become a system-forming factor for all other pieces of legislation governing information relations, and especially for those relating to the personal inalienable right to information, whether they have a complex or private nature. In the Book Two, the personal non-property rights of an individual are divided into those that ensure natural existence (Chapter 21 of the CC of Ukraine)[2] and those that ensure its social existence (Chapter 22 of the CC of Ukraine). Meanwhile the right to information can be attributed both to Chapter 21 – "Personal Non-Property Rights that Ensure the Natural Existence of an Individual" and to Chapter 22 – "Personal Non-Property Rights that Ensure the Social Existence of an Individual", because a person has the right to information from birth, and in the process of social existence expands its capabilities. In addition, this right may belong to legal entities, which also needs to be standardised in the process of updating the CC of Ukraine in terms of changing the title of Book Two to "Non-property rights" or "Personal non-property rights".

As for personal non-property relations that develop regarding the information, in the process of applying the relevant provisions of the CC of Ukraine, certain changes have occurred[3]. Thus, the presumption of "integrity" was excluded from the current CC

[1] Law of Ukraine No 48 "On Information". (1992, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12#Text; Law of Ukraine No 34 "On Personal Data Protection". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/2297-17#Text; Law of Ukraine No 32 "On Access to Public Information". (2020, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2939-17#Text

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

[3] Law of Ukraine No 47 "On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Simplification of Pre-trial Investigation of Certain Categories of Criminal Offences". (2020, June). Retrieved from https://zakon.rada.gov.ua/laws/show/720-20#Text; Law of Ukraine No 48 "On Information". (1992, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2657-12#Text; Law of Ukraine No 15 "On Amendments to the Civil Code of Ukraine on the Right to Information". (2005,

of Ukraine, according to which negative information disseminated about a person was considered unreliable until proven otherwise (while the judicial practice on the protection of honour, dignity, and business reputation was based on the fact that that the obligation to prove that the disseminated information is reliable rests with the defendant[1], and the Law of Ukraine "On Amendments to the Law of Ukraine "On Prevention of Corruption" regarding Corruption Detectors"[2] adopted in 2019 is still under discussion; the regulation of relations for the dissemination of information obtained from official sources was clarified; dissemination of information obtained from official sources; the list of personal non-property rights in the field of medical care[3] has undergone certain changes that now require clarification in the context of the right to information, namely in matters of sterilisation of a minor individual, reproductive rights, and several other issues.

Information related to intellectual activity can have various forms of its external reflection, suitable for perception directly by a person or with the help of various technical devices in a virtual environment. As a result of intellectual activity of the person the information can be personified both in an independent object, and in the form of results of intellectual creative activity, to be protected by system of the intellectual property right. Today there is some uncertainty between the system of intellectual property rights and the information capabilities of the individual regarding the free collection, storage, dissemination and use of information, while the monopoly right of the subject of intellectual property must undergo numerous restrictions (in time, space, etc.).

In general, a gradual weakening of the regulatory system of intellectual property protection should become the trend of development of legal regulation of intellectual activity in the information society, in order to ensure a balanced combination of interests of creators and their successors. This is important primarily in matters of remuneration by the creator and the interests of members of society in exercising their right to access, receive, disseminate, and use information. Here are some examples. Thus, essential information is embedded in the commercial (brand) name. All requirements for this object of intellectual property rights are "informational" in nature. It should give an objective, reliable, complete, up-to-date idea of what is additional to the information, which is the name of the person – the designation of the person, which may be part of the name of the person or be a fictitious name or abbreviation. This explains foreign approaches, for example, in the United Kingdom, when it comes to the mandatory

December). Retrieved from https://zakon.rada.gov.ua/laws/show/3261-15#Text; Law of Ukraine No 32 "On Access to Public Information". (2020, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2939-17#Text

[1] Resolution of the Supreme Court in the Composition of the Panel of Judges of the First Judicial Chamber of the Civil Court of Cassation in Case No 522/14156/14-ts. (2018, February). Retrieved from <http://reyestr.court.gov.ua/Review/72269115

[2] Law of Ukraine No 140-IX "On Amendments to Certain Legislative Acts of Ukraine to Ensure the Effectiveness of the Institutional Mechanism for Preventing Corruption". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/140-20#Text

[3] Law of Ukraine No 47 "On Amendments to Article 281 of the Civil Code of Ukraine". (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/140-20#Text; Law of Ukraine No 47 "On Amendments to Article 290 of the Civil Code of Ukraine". (2011, March). Retrieved from https://zakon.rada.gov.ua/laws/show/140-20#Text; Law of Ukraine No 47 "On Amendments to the Family and Civil Codes of Ukraine". (2020, March). Retrieved from https://zakon.rada.gov.ua/laws/show/140-20#Text

disclosure of information about a person by indicating the person's name and address. This refers to the responsibility of each person who uses such a name to indicate, taking into account the legal status, the name of the corporation, or the name of each partner or the name (individual) of the person and other information.

The essence of such results of intellectual activity as know-how, business information, and commercial secrets refers to information per se. On 8 July 2016, Directive (EU) 2016/943 of the European Parliament and of the Council[1] concerning the protection of undisclosed know-how and business information (trade secrets) against their unauthorised acquisition, use and disclosure was adopted. The adaptation of Ukrainian legislation is currently aimed at revising it to launch new approaches to the protection of trade secrets and know-how. A trade secret can actually comprise two types of information – non-creative information (this is the so-called business information about the number of employees, customers, etc.) and creative information. Since Directive 2016/943 contains a definition of a trade secret, which corresponds to its definition in the TRIPS Agreement[2], it can be considered and consolidated in Chapter 15 of the CC of Ukraine[3], which deals with intangible assets by a separate rule, or supplement Article 200 of the CC of Ukraine, define this object in Article 505 of the Civil Code, as proposed by the authors, and to supplement its content with the provision that a trade secret includes information in the form of know-how and business (commercial) information. It is also logical to make provision for changes in the title and content of Chapter 46 of the CC of Ukraine, which would be called "Intellectual property rights to know-how", thereby supporting the proposals of intellectual property experts who believe that such changes will add business information to the objects of intellectual property rights and contribute to the harmonisation of approaches to the protection of know-how in Ukraine. The right to information can also be the subject of various types of agreements, which has been repeatedly emphasised in the literature [17]. Since information has an intangible nature and is embodied in various forms of its external expression, it should be noted that within the framework of civil turnover, there can be a turnover of rights to information as such, and not just turnover of the information itself, for example, the provision of information by the acquirer to the copyright holder. In addition, such rights can be obtained by the acquirer for a certain period – then it would refer more to the provision of information rights, indefinitely or on terms specified in the contract.

An important contribution is made to the understanding of law in the field of personal non-property information relations in the process of making decisions by the Constitutional Court of Ukraine and other judicial bodies. This primarily refers to the protection of the right to information and other personal non-property information rights, in particular, to the constitutional interpretation of the concept of "information about a

[1] Directive of the European Parliament and of the Council of the European Union 2016/943 on the Protection of Confidential Know-How and Business Information (Trade Secrets) from Illegal Acquisition, Use and Disclosure. (2016, June). Retrieved from http://base.garant.ru/71615160/#ixzz6Y1vvv6EQ

[2] World Trade Organization (WTO) Agreement No 981_018 "On Trade-Related Aspects of Intellectual Property Rights". (1994, April). Retrieved from https://zakon.rada.gov.ua/laws/show/981_018#Text

[3] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

person's private and family life"[1]; to the decision of the Constitutional Court of Ukraine on the recognition of certain provisions of Sub-paragraph 1 of Paragraph 40 of Section VI "Final and Transitional Provisions" of the Budget Code of Ukraine on the right of the Ministry of Finance of Ukraine to receive information containing personal data[2]; to the protection of honour, dignity, and business reputation[3].

A number of aspects of personal non-property information rights are covered by the content of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, respectively the case law of the ECHR applies in particular to: protection of personal data (Rotaru v. Romania, 04.05.2000); access to personal information (Odievre v. France, 13.02.2003); secrecy of health information (Z v. Finland, 25.02.1997); the right to information on environmental risks or accidents (Tătar v. Roumanie, 27.01.2009); freedom to receive and impart information (Ahmet Yildirim v. Turkey, 18.12.2012); freedom of the media (Lingens v. Austria, 08.07.1986; Times Newspapers Limited v. the United Kingdom, 10.03.2009); access to public information (Leander v. Sweden, March 26, 1987; Gaskin v. The United Kingdom, July 7, 1989); electronic messages (emails) (Bărbulescu v. Romania, 05.09.2017); use of the Internet (Copland v. The United Kingdom, 03.04.2007), and many others. Among the acts of the *acquis communautaire* concerning the right to information, mention should be made of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC)[4].

In the process of updating the CC of Ukraine[5] it is necessary to pay attention to some general provisions that have an impact on the development of personal information non-property rights. This primarily concerns the principles of their regulation, the features of their implementation and guarantees; places in the system of all personal non-property rights; clarification and addition of the list of special ways to protect these rights; mechanism for ensuring the proportionality of their application, especially if the application of mechanisms for ensuring and protecting other personal non-property rights may lead, for example, to a restriction of the right to freedom of speech, the right to information, etc. The harmonious process of updating the CC of Ukraine cannot take place without the simultaneous introduction of changes and additions to other codified acts that govern personal information intangible relations, for example, the Family Code, the Code of Ukraine on Electronic Communications, etc. An adequate response to

[1] Decision of the Constitutional Court of Ukraine in the Case on the Constitutional Petition of Zhashkiv District Council of Cherkasy Region Regarding the Official Interpretation of the Provisions of Parts One, Two of Article 32, parts Two and Three of Article 34 of the Constitution of Ukraine No 2-rp/2012. (2012, January). Retrieved from https://zakon.rada.gov.ua/laws/show/v002p710-1.

[2] Decision of the Constitutional Court of Ukraine in the Case on the Constitutional Petition of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine on the Constitutionality of Certain Provisions of the First Paragraph of Paragraph 40 of Section VI "Final and Transitional Provisions" of the Budget Code of Ukraine No 7-r/2018. (2018, October). Retrieved from https://zakon.rada.gov.ua/laws/show/v007p710-18#Text.

[3] Resolution of the Plenum of the Supreme Court of Ukraine No 1 "On Judicial Practice in Cases of Protection of the Dignity and Honor of Individuals, as well as the Business Reputation of Individuals and Legal Entities." (2009, February). Retrieved from https://zakon.rada.gov.ua/laws/show/v_001700-09#Text

[4] Directive 2003/4/EC of the European Parliament and of the Council. (2003, January). Retrieved from https://eur-lex.europa.eu/eli/dir/2003/4/oj

[5] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15

challenges of the modern information society should be to ensure the statutory regulation of contractual relations arising from personal information non-property objects, which, upon receiving an objective form, acquire signs of turnover. This refers to the solution of issues of ensuring the rights of the physical person to use such objects for the commercial purpose. Signs that personalise an individual, and the possibility of their commercial use is covered by the content of consolidated personal non-property information rights – powers of positive and negative direction and protection. Therefore, this does not refer to the use of the good itself, which is the information, but rather its projection on a material medium. Information itself as a personal non-property right remains a non-property good and it does not change in the process of commercial use.

Virtuality as a phenomenon and environment, where the right to information and other information rights are currently actualised and developed, is impossible to cognise without immersion in philosophical, historical, and artistic sources. The modern virtual world, among other things, includes information systems and networks. Hans Moravets also called the very human personality an information system or structure, believing that this definition becomes a reality if human consciousness is embedded in a computer and a certain scenario is simulated to prove that it is possible in principle. He argued that machines could become the receptacle of human consciousness and that machines could become human beings for any practical need, that is, a human could in fact be identified with a cyborg, and vice versa. [15] Meanwhile, humans described mechanical creatures long before the words "android" and "cyborg" appeared. History mentions, for example, the Catholic priest Albert the Great, who in the 13th century created a mechanical head that could answer questions, and Ephraim Chambers, a famous encyclopedist, in 1728 combined the Greek prefix "*andr-*" – "a human" with the suffix "*-oid*" – "to have a form, to be similar" to describe Albert's machine [18].

Finding the difference between the processes of "thinking like a human" and "thinking like a machine" was one of the tasks of Hans Moravets, who was mentioned above. Notably, at the same time with this research there was a development of the basic principles of an information society in combination with distribution of liberal perception of the world. Nowadays, it is a sacred human right to cultivate the right to life in a civil democratic society. The revision of the boundaries between a machine and a human has, as expected, led to the replacement of the question "who can think" with the question "what can think"; to take a decisive step towards determining the difference between a physical, real human body on one side of a computer screen and a body that is "represented" in an electronic environment on the other side. These discussions should take place in the legal environment in order to more fully consolidate all possible information rights for the real subject of civil rights.

The state of affairs described in this study, according to researchers, necessarily "makes the subject a cyborg, because both of the described entities merge due to the technologies that unite them", which means that those who believe that in the moment a person first began to look at the monitor screen, he or she actually became a post-human – a hypothetical prototype of the future human, who abandoned the usual human posture as a result of the implementation of advanced technologies, computer science, biotechnology, medicine, etc. [15]. At the global level, this problem has been studied by scientists such as A. Peng-JuSu [19], M. Barker et al. [20], B. Custers et al. [21], S.D. Cardoso et al. [22]. Notably, the author of this study has performed a long-term research

on the analysis of all these sources, which were interpreted and, as a result, allowed to look at the problem of virtuality from the standpoint of a civilist, whose goal is to update civil legislation in the context of fast development of a new society of information, networks, and systems. The purpose of the law in the development of general provisions on personal non-property rights in Chapter 20 of the CC of Ukraine[1], among which the right to information plays one of the key roles, should from the outset be understood as the need to establish general rules applicable to all personal non-property information rights, as well as a new stage in ensuring the comprehensive development of the individual, protection of his or her life, freedom, honour, dignity, and personal inviolability in the context of increasing coverage of all spheres of life by a new specially created virtuality. Meanwhile, discussions are still underway regarding the content of certain rules that are already stipulated and that can be included in Chapter 20 of the CC of Ukraine in the process of updating, in particular regarding the principles of personal non-property rights. Admittedly, some of these principles should remain in place, but they must be supplemented by those that describe the existing and subsequent stages of development of the information society, take into account the creation and use of robots and elements of artificial intelligence, new species, experiments with living organisms in everyday life, including humans from the moment of conception, the specific features of electronic money circulation and e-commerce, copyright protection in networks, the issue of settlement of relations on such a complex object of information and intellectual creative activity as digital content. These discussions are becoming increasingly thorough in the process of updating the CC of Ukraine, and in the conclusions to this study the author once again suggests ways to resolve the outlined issues.

Thus, this study differs from previous publications on the right to information as a personal non-property right of an individual, by the breadth of coverage of the problem, primarily due to the clarification of what is virtuality, a virtual world to which the processes, which previously could occur only in real life and be embodied in real relations, including those governed by law, are partially (and sometimes completely) transferred. The author analysed the problematic issues of the concept, types, specifics of the right to information as a personal intangible right, its implementation and protection in a context that covers all spheres of life, the global information virtual world. This approach allows for an almost interactive continuation of information rights research in the future.

The updating of civil legislation in the current period is described and conditioned, among other things, by the rapid development of a global virtual environment where the right to information should occupy one of the leading places, and the solution of all personal non-property information rights should be the priority task for civilistics. The very title of the Book Two of the CC of Ukraine[2] should cover the entire sphere of non-property relations and be called "Non-property rights", as it should govern the provisions on all non-property relations of both individuals and legal entities, as well as provisions relating to virtual the environment where these relations currently arise. The content of the articles of Chapter 20 of the CC of Ukraine should be clarified and supplemented by provisions that take into account the achievements of the information society,

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15
[2] *Ibidem*, 2003.

information technologies, the emergence of new personal non-property assets to which non-property rights can be extended; the subjective composition of these relations, the specific features of the exercise, implementation, and protection of rights in their existence, including in a virtual environment, and Chapter 20 of the CC of Ukraine should be entitled "General Provisions on Non-Property Rights".

It is necessary to significantly supplement the list of intangible assets and rights to them, to determine their place in Chapters 21 and 22 of the CC of Ukraine, and the rule on the right to information (and all related non-proprietary information rights) should be transferred to Chapter 21 of the CC of Ukraine[1] (provided that the current classification of personal non-property rights is retained). It is also possible to provide for the amendment of the Book Two of the CC of Ukraine with additional chapters, which would cover non-property rights that cannot be attributed to the current classification. These are non-property rights of legal entities; non-property rights related to the development of information relations, etc. It is proposed to discuss the possibility of supplementing the said Book Two with a rule on the turnover of rights to the objects of non-property rights, in particular on the turnover of certain information rights, while the list of obligations in Book Three should be supplemented with obligations with non-property content subject to the development of the corresponding provisions.

The provisions of the CC of Ukraine on objects of civil rights should also be expanded with regard to the emergence of objects unknown at the time of adoption of the current CC of Ukraine. These are different types of information, information products, resources, systems, etc. and objects of rights created and located in the Internet, cryptocurrency, personal data (personal information), autonomous works, artificial intelligence, content (digital content), etc. These objects should be clearly listed among the intangible assets of Chapter 15 of the Book One of the CC of Ukraine, clarified in Articles 199-201 of the CC of Ukraine and additional articles to avoid errors in their misinterpretation, errors in determining their legal nature and regulatory mechanisms, methods of protection. It is necessary to expand Chapter 15 of the CC of Ukraine with additional articles that would amend the general provisions on such objects and emphasise the general significance for all other books of the Code. First of all, this applies to information as an intangible asset – an object of civil rights, which would allow to introduce important and timely additions to many articles of all the books of the CC of Ukraine.

The provisions of the updated CC of Ukraine on transactions should ensure the full functioning of relations in the field of e-commerce, smart contracts, web banking, and other attributes of the digital economy in a virtual environment, which will not only preserve all assets and achievements of the current CC of Ukraine of Ukraine but will also allow to adapt it to modern realities.

CONCLUSIONS

Summing up, it should also be noted that the right to information and other intangible information rights of individuals are not only developing at a significant pace, but in the last few years are very closely confronted with the problems posed by information technology, robots, and artificial intelligence. Virtuality has never been so similar to

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.

reality, and post-humanity has never seemed so close. These processes must be taken into account in the current development of civil legislation at the level of principles and individual articles, but it is necessary to "make haste slowly", bearing in mind that the legal consolidation of processes occurring in society in the development of information society should be based on well-being of people as the highest virtue", which Aristotle advocated for, and the "morality in law", on the need to comply with which insisted I.O. Pokrovsky. This study is of interest to scholars, in particular, representatives of the civilistic school of law, teachers and students of higher educational institutions of law, lawmakers, representatives of the working group on recoding (updating) civil legislation and all those interested in civil law, information relations, personal non-property rights of individuals in general and in a virtual environment in particular.

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Suggested Citation: Kokhanovska, O.V. (2020). Features of updating the civil legislation of Ukraine in the field of the right to information in the conditions of development of the global virtual environment. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 145-160.

Submitted: 11/06/2020
Revised: 20/10/2020
Accepted: 27/11/2020

УДК 347.919 (477)
DOI: 10.37635/jnalsu.27(4).2020.161-171

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ВИЗНАННЯ ФАКТУ НАРОДЖЕННЯ АБО СМЕРТІ НА ТИМЧАСОВО ОКУПОВАНІЙ ТЕРИТОРІЇ ЗА ПРАВИЛАМИ ОКРЕМОГО ПРОВАДЖЕННЯ

Анотація. *Стаття присвячена дослідженню практики застосування новели окремого провадження цивільного судочинства, зокрема визнанню факту народження або смерті фізичної особи на тимчасово окупованій території України. Проаналізовано окремі нормативні акти та законодавчі зміни, ухвалені для захисту прав і суб'єктів правовідносин у зв'язку із збройною агресією Російської Федерації, здійсненою з метою порушення суверенітету та територіальної цілісності нашої держави, що вважається актуальністю обраної тематики даної статті. Звертається увага на труднощі доказування зазначеного факту, особливості процедури розгляду справ вказаної категорії, суб'єктного складу процесуальних правовідносин та наслідків набрання судовим рішенням законної сили. Поряд із цим категорія справ, що розглядається у статті, характеризується специфічними правилами підсудності. Метою статті є аналіз практики застосування норм цивільного процесуального права при розгляді справ зазначених категорій. У зв'язку з цим звертається увага на застосування так званих Намібійських винятків, розроблених у зв'язку з необхідністю надання доказів, пов'язаних з їх видачею на тимчасово окупованих територіях держави. Тому методи, що використовувались для досягнення мети статті, зумовлені необхідністю наукового пізнання явищ, що описуються в ній. Відтак, при підготовки статті використовувався порівняльно-правовий метод правового регулювання, який полягає в порівняльному аналізі негативних наслідків соціально-правових явищ, пов'язаних із збройною агресією проти України та інших держав, зокрема Республіки Кіпр. Герменевтичне тлумачення застосовувалось для представлення правових норм інших держав. Застосовувався також аналітико-синтетичний підхід, що передбачає аналіз і синтез, зокрема синтез параметричний. Він полягає в обґрунтуванні необхідності й достатності сукупності показників. Результати та рекомендації автора полягають у пропозиціях законодавчого закріплення особливостей розгляду цивільних справ судами, пов'язаних із захистом правовідносин, що виникли (існують) на тимчасово-окупованій території України, та вдосконалення доказування тих чи інших правовідносин.*

Ключові слова: окреме провадження, збройна агресія Російської Федерації, підсудність, доказування, процедура розгляду справи.

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RECOGNITION OF THE FACT OF BIRTH OR DEATH IN THE TEMPORARILY OCCUPIED TERRITORY UNDER THE RULES OF SPECIAL PROCEEDINGS

Abstract. *This study investigates the practice of application of the special civil proceedings, in particular the recognition of the fact of birth or death of an individual in the temporarily occupied territory of Ukraine. The study analyses certain regulations and legislative changes adopted to protect the rights and subjects of legal relations in connection with the armed aggression of the Russian Federation, committed to violate the sovereignty and territorial integrity of Ukraine, which is considered relevant to this subject. Attention is drawn to the difficulties of proving this fact, the specific features of the procedure for consideration of cases of this category, the subjective composition of procedural legal relations and the consequences of the entry into force of a court decision. In addition, the category of cases considered in the study is described by specific rules of jurisdiction. The purpose of the study is to analyse the practice of applying the rules of civil procedural law in cases of the specified categories. In this regard, attention is drawn to the application of the so-called Namibian Exception, developed in connection with the need to provide evidence related to their issuance in the temporarily occupied territories of the state. Therefore, the methods used to achieve the purpose of the study are conditioned by the need for scientific cognition of the described phenomena. Therefore, in preparing the study, a comparative legal method of legal regulation was used, which lies in a comparative analysis of the negative consequences of social and legal phenomena associated with armed aggression against Ukraine and other states, including the Republic of Cyprus. Hermeneutic interpretation was used to represent the legal provisions of other states. An analytical-synthetic approach was also used, which involves analysis and synthesis, in particular parametric synthesis. It lies in substantiation of necessity and sufficiency of set of indicators. The results and recommendations of the author include proposals for legislative consolidation of the specific features of consideration of civil cases by courts related to the protection of legal relations that have arisen (exist) in the temporarily occupied territory of Ukraine, and for improvement of the proof of certain legal relations.*

Keywords: special proceedings, armed aggression of the Russian Federation, jurisdiction, evidence, proceedings.

INTRODUCTION

On February 20, 2020, the seventh year of the armed aggression of the Russian Federation against Ukraine began. During this period, Ukraine faced violent challenges caused by the indicated criminal acts of the neighbouring state. First of all, these are significant human losses, broken destinies, the need to provide material support to repel the armed aggression of the Russian Federation and overcome its consequences, etc. Therewith, Ukraine was faced with the need to regulate a number of legal relations concerning the legal regulation of this aggression, ensuring the rights and freedoms of citizens living in its temporarily occupied territories, as well as adopting regulations to ensure the rights and freedoms of internally displaced persons [1-5].

The author has previously published one of the studies on this subject [6]. However, due to the need for scientific development of this area of study, it is considered necessary to approach the analysis of this issue more carefully and thoroughly. Thus, the previously published studies left out the characteristics of the means of proof and the procedure for proving the facts of birth or death in the temporarily occupied territories of Ukraine, the specifics of notification of the time and place of consideration of the case of persons interested in the resolution of the case, as well as evidence of the need to record some personal data in court decisions. Therewith, the objective and subjective limits of acts of justice in the specified categories of cases of separate proceedings require in-depth study. These circumstances, among others, necessitate the return to the scientific study of the specific features of civil cases on the establishment through judicial procedures of the facts of birth or death in the temporarily occupied territories of Ukraine.

At the same time, one cannot ignore the need to legally record certain facts that have legal significance and take place in the temporarily occupied territories of Ukraine as an integral part of the territory of the state covered by the Constitution and laws of Ukraine. Thus, according to Part 3 of Article 5 of the Law of Ukraine No. 1207-VII "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" of April 15, 2014[1], the Russian Federation as the occupying power is responsible for violating the rights and freedoms of a person and citizen defined by the Constitution and laws of Ukraine in accordance with the provisions and principles of international law. According to Article 2 of the Law of Ukraine "On the Features of National Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts"[2], the legal status of the temporarily occupied territories in the Autonomous Republic of Crimea and Sevastopol, Donetsk and Luhansk Oblasts along with the legal regime in these territories, are determined by the specified regulation, the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens in the Temporarily Occupied Territory of Ukraine"[3], other laws and international treaties approved by the Verkhovna Rada of Ukraine, principles and provisions of international law.

The annexation of the territory of a sovereign state by a neighbouring state as a result of an alleged violation of the rights of a group of the population ethnically close to the titular nation of the aggressor state is not new in world history. For example, on July 20, 1974, as a result of Turkish military aggression against the Republic of Cyprus due to alleged violations of the rights of Turkish Cypriots, about 40% of the territory of a sovereign island state was annexed. 40 years later, on February 20, 2014, the Russian Federation began its armed aggression against Ukraine as a result of the alleged protection of the Russian-speaking population in the territories of the Autonomous Republic of Crimea, Sevastopol, Donetsk, and Luhansk Oblasts. The negative consequences of the armed aggression of the 20th and 21st centuries have not gone unnoticed by the international democratic community. In

[1]Law of Ukraine No 1207-VII “On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine”. (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18#Text

[2]Law of Ukraine No 2268-VIII “On the features of national policy to ensure the state sovereignty of ukraine in the temporarily occupied territories in Donetsk and Luhansk Oblasts”. (2018, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2268-19#Text

[3]Law of Ukraine No 1207-VII “On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine”, op. cit.

addition, the European Court of Human Rights (hereinafter referred to as "the ECHR") provided a legal assessment of the consequences of aggressive actions of neighbouring states in a number of its decisions. Examples include Loizida v. Turkey, Eugenia Michelidou, Michael Timvios and Dimeids v. Turkey, Cyprus v. Turkey [7-11], etc. Along with violating the rights of the population of sovereign states, the aggressor state maintains separatist sentiment in the occupied territories during military intervention. During the Moldovan conflict of 1991-1992, as stated in the Grand Chamber's decision in Ilashku and Others v. Moldova and Russia, the forces of the former 14th Army, which was first a formation under Soviet rule, then the CIS and later the Russian Federation), stationed in Transnistria, participated in operations on the side of the separatist forces of Transnistria. Many weapons from the 14th Army were voluntarily handed over to the separatists, who also had the opportunity to seize other weapons, which was not opposed by the Russian military. In addition, throughout the period of these clashes between the Moldovan authorities and the Transnistrian separatists, Russian leaders supported the separatist government with their political declarations" [12].

1. MATERIALS AND METHODS

The materials used in the preparation of the study include both regulatory and scientific framework. Therewith, it was considered possible to investigate the specific features of the application of legal provisions in the consideration of cases by both national courts and an international judicial institution whose jurisdiction is recognised by Ukraine. The use of foreign and regulatory sources in the study of the subject of this study will shed light on the practice of legal regulation of similar legal relations in the legislation of another state, faced with similar problems, the need to solve which is currently relevant in Ukraine [13]. At the same time, it is quite interesting to describe the modern legislation of the Republic of Cyprus, which operates in this country after the republic's independence from Great Britain and after the end of the active phase of Turkish aggression [14]. The methods of scientific cognition used in this study are materialised in the elements of the legal regulation mechanism of those relations where a particular method manifests itself. This conclusion is based on the position of a fundamental study of the specific features of the method of legal regulation of civil procedural legal relations. In this method, in addition to the above, as V.V. Komarov points out, the elements of the legal regulation mechanism, in which the method of the above legal relations is manifested, include both the specific nature of legal relations and legal facts, along with rights, obligations, and sanctions [15].

Apart from the above features of the method of legal regulation of civil procedural legal relations, the preparation of this study would not be possible without the use of one of the modern sources, where O.G. Danilyan and O.P. Dzoban published advice on the proper organisation of scientific research, along with the application of their adequate methodology. The use of their research allowed, in the context of this study, to answer the questions of scientists regarding the need to guide the researcher in the use of epistemological concepts, which, at times, contradict each other. The application of the methods of scientific cognition took place primarily in view of phenomenological principles, existentialism, and particularism. A special place was occupied by the use of the method of socio-legal experiment as a method of studying socio-legal phenomena

and processes, which is carried out by observing changes in the subject under the influence of those factors that control and guide their development [16]. In this aspect it is also necessary to note the attempts of active use of a comparative legal method. The need for its use in the preparation of this study was conditioned by the existence of phenomena that constitute the subject matter of the study, in other countries and internationally.

The need for a comparative legal study of the legislation of different states, the territorial integrity of which was compromised by the armed aggression of another state, led to the use of comparative legal method of legal regulation. In this regard, the interpretation of the provisions of law of the states affected by aggression was combined with the use of hermeneutic interpretation of the idea of foreign legal provisions. Analysis and synthesis led to the presence of an analytical-synthetic approach to solving issues related to achieving the purpose of the scientific study. The historical legal method of scientific cognition helped investigate the historical origins of certain phenomena, in particular the "Namibian exception". The methods of scientific cognition used allowed to provide knowledge about the studied objects. The process of their cognition is conditioned, among other things, using historical preconditions for the need to introduce courts of international jurisdiction over the leaders of armed aggression of the last century (Nuremberg, The Hague).

2. RESULTS AND DISCUSSION

Legal relations, in particular those governed by branches of civil law, require constant updating due to the need for legal regulation of social relations that arise at different times. For some time after the emergence, these legal relations remain unregulated by law. For example, this refers to the legal regulation of surrogacy and related legal relations, e-commerce, artificial intelligence, etc. Therewith, along with these positive changes in social life, civil science and legislation need to be updated due to the specific features of regulation and resolution of legal relations caused by the armed aggression of the Russian Federation, the activities of illegal groups in Donetsk and Luhansk Oblasts and the impossibility of implementing national legislation in the temporarily occupied territories of Ukraine.

The impossibility of actual exercise of power by public authorities and local governments in these territories of Ukraine necessitates the implementation of legally significant actions and the establishment of legal facts on which depends the emergence, change, or termination of personal or property rights of individuals by public authorities (in particular, judicial) outside the temporarily occupied territories of Ukraine. Such a need is required by the statutory rule that any bodies, officers, and officials, as well as their activities, are considered illegal if such bodies or persons are established, elected, or appointed in a manner that is not stipulated by national legislation. Any act (decision, document) issued by these bodies (persons) is invalid and does not create legal consequences. Thus, the establishment of legal facts of birth or death of an individual in the temporarily occupied territories by illegal (within the meaning of Article 9 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal

Regime in the Temporarily Occupied Territory of Ukraine"[1]) bodies and their officials entails, on the one hand, the legal consequences for the legitimate legal relationship that is associated with it. The provision of the events of the birth or death of a person in the temporarily occupied territories of Ukraine with the opportunity to obtain legitimate legal confirmation was reflected in the provisions of the Civil Procedural Code of Ukraine[2], while the provisions of civil substantive law have not undergone additions in connection with the social relations of this branch, taking into account the specifics of establishing and legal registration of facts of birth or death of individuals in the temporarily occupied territory of Ukraine.

It is quite logical for the legislator to assign this category of civil cases to special civil proceedings. In this regard, V.V. Komarov fairly pointed out that in all periods of codification of civil procedural law the catalogue of cases of separate proceedings was different. The legislator only determined their list. Such a technical and legal method of assigning certain cases to the sphere of civil jurisdiction has not found a proper scientific interpretation, and the analysis of the composition of cases of separate proceedings indicated their obvious heterogeneity [17].

The provision of civil procedural legislation, which stipulates the establishment of facts of birth or death in the temporarily occupied territories of Ukraine, is located in Chapter 6 of Section IV of the Civil Procedural Code of Ukraine[3], which contains the procedure for civil courts to establish facts of legal significance in general. Despite the lack of statutory consolidation of the fact of birth or death of a person in the temporarily occupied territory of Ukraine in Part 1 of Article 315 of the Civil Procedural Code of Ukraine, the possibility of considering cases of this category follows from the content of Part 2 of Article 315 of the Civil Procedural Code of Ukraine. In accordance with this provision, other facts may be established in court, on which the emergence, change, or termination of personal or property rights of an individual depends, unless otherwise specified by law. Article 317 of the Civil Procedural Code of Ukraine[4] establishes the procedural features of the proceedings in cases of establishing the following facts: 1) birth in the temporarily occupied territories of Ukraine; 2) death of a person in the specified territories. Based on this, the purpose of this study is to investigate the features of consideration of civil cases of the specified categories. Parents, relatives, their representatives, or other legal representatives of the child are *the subjects of appeals to the court* to establish the fact of birth in the temporarily occupied territories. An application for establishing the fact of death of a person in the above-mentioned territory of Ukraine may be filed by the relatives of the deceased or their representatives.

The jurisdiction of the subject matter of both categories of these cases is not clearly defined and does not apply to any of the types of jurisdiction recognised in the legal literature [18]. Article 317 of the Civil Procedural Code of Ukraine enshrines the possibility for applicants to apply to any court outside the temporarily occupied

[1]Law of Ukraine No 1207-VII "On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine". (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18#Text

[2] Civil Procedural Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text

[3]*Ibidem*, 2004.

[4] *Ibidem*, 2004.

territories, regardless of the applicant's place of residence. This approach of the legislator appears logical based on the following. Establishing these facts and giving them the proper legitimate legal status necessitates the recognition of the legal consequences of such facts. Proceeding from this, the granting of the right to apply to the court with statements on establishing the facts of the birth or death of a person in the temporarily occupied territories of Ukraine to any court of civil jurisdiction, regardless of the applicant's place of residence, contributes to ensuring the individual's right to access to justice in the most approximate or for other reasons convenient location of the court in terms of the convenience of ensuring attendance, providing factual material, etc. The analysis of court decisions on the indicated categories of civil cases, according to the Unified State Register of Court Decisions, suggests that there is a fairly considerable number of decisions of the courts of first instance in such cases (55,523 decisions) in the period from the moment of consolidation of the legislative ability to establish such facts by the judicial authorities throughout the territory of Ukraine [19].

Part 2 of Article 317 of the Civil Procedural Code of Ukraine stipulates *the urgency of consideration of cases of these categories* from the date of receipt of the application to the court. This specific feature of the trial does not necessitate prior and proper notification of the parties to the time and place of the trial, which takes place in civil cases involving the need to summon to court persons residing in the temporarily occupied territory. The armed aggression of the Russian Federation against Ukraine has made changes in the specific features of the courts' actions regarding the proper informing of the subjects of civil procedural legal relations about the time and place of consideration of the case. The lack of postal communication with the temporarily occupied territories makes, unfortunately, impossible the conventional notice of the participants in the case living in the specified territory by sending summons. Given this circumstance, the procedure for summoning to court and notification of the court decision stipulated in Article 12-1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine"[1]. Specific features of these procedural actions lie in their implementation through announcements on the official website of the judiciary of Ukraine with reference to the website address of the relevant judicial act in the Unified State Register of Judgments. The latter must be posted no later than twenty days prior to the date of the hearing. At the same time, it should be recognised that not all subjects of civil procedural legal relations living on the territory of Ukraine have sufficient experience in the use of electronic resources. This circumstance sometimes leads to the fact that individuals do not receive information about the summons to court. However, the judiciary, based on the regulations of the above content, place ads on the official website of the judiciary of the state in compliance with the terms of such placement, which is considered appropriate notification of the parties about the time and place of the trial [20].

The difficulty of proof in this category of cases lies in the possible consideration by the court of documents issued by bodies (persons) operating in the temporarily occupied territories. The above reference to Article 9 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied

[1]Law of Ukraine No 1207-VII “On ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine”. (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/1207-18#Text

Territory of Ukraine" indicates the absence of any legal force in the content of documents issued by illegitimate officials and bodies. This position is sometimes taken by the judiciary, but the conclusions of local courts are corrected by the courts of appeal, which decide to grant applications to establish the facts of birth or death in the temporarily occupied territories[1]. As appropriate and admissible evidence, the court, as an exception, taking into account the key importance of establishing the fact of a person's birth for the exercise of the applicant's rights, considers the medical birth certificate, medical documents issued by institutions operating in the temporarily occupied territory of Ukraine, where the authorities of Ukraine temporarily do not exercise their powers, namely the information contained in the specified documents and confirmed in the aggregate and interrelation with other evidence in the case. However, Part 3 of Article 2 of the Law of Ukraine "On Features of National Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts"[2] stipulates the illegality of the activities of the armed formations of the Russian Federation and the occupation administration in the Donetsk and Luhansk Oblasts since it contradicts the international law provisions. As a result, any act issued in connection with the activities of such entities is rendered invalid and does not create any consequences. Exceptions are documents confirming the facts of birth or death in the temporarily occupied territories in Donetsk and Luhansk Oblasts, provided they are attached to the application for state registration of birth of an individual and the application for state registration of the death of a person.

The possibility of giving legal force to documents of illegitimate occupation authorities is quite problematic. In this regard, the world experience knows the so-called "Namibian exception", the rules of which are applied in Ukrainian judicial practice. In one of the rulings, the Supreme Court pointed to the defendant's objection that the court could not consider the evidence issued in the temporarily occupied territory that the courts of first and appellate instance had reasonably reached the following conclusion. The legal relations that were the subject of judicial review by the judicial authorities of Ukraine were subject to the so-called "Namibian exception" of the International Court of Justice. This means that documents issued by the occupying power must be recognised if their non-recognition will lead to serious violations or restrictions on the rights of citizens. The fact is that in 1971 the UN International Court of Justice in its document "Legal Implications for States on the Continuing Presence of South Africa in Namibia" stated that UN member states must recognise the illegal and invalid continued presence of South Africa in Namibia, but "at the same time, official actions taken by the Government of South Africa on behalf of or against Namibia after the termination of the mandate are illegal and invalid, such activities cannot be applied to actions such as birth, death and marriage registration".

The ECHR also disclosed this principle in its practice (for example, Loizidou v. Turkey, 18 December 1996, para. 45), Cyprus v. Turkey (10 May 2001), Moser v. Republic of Moldova and Russia" (February 23, 2016). Judges of the said international judicial institution consider that the obligation to ignore and disregard the actions of

[1]Resolution of the Donetsk Court of Appeal (2020, March). Retrieved from http://www.reyestr.court.gov.ua/Review/88539634.

[2]Law of Ukraine No 2268-VIII "On the features of national policy to ensure the state sovereignty of Ukraine in the temporarily occupied territories in Donetsk and Luhansk Oblasts". (2018, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2268-19#Text

existing de facto institutions and bodies [of the occupying power] is far from absolute. For people living in such an area, life goes on. And it needs to be made more tolerable and protected by the de facto authorities, including their courts. Only in the interests of the inhabitants of the said territory, the actions of the said authority, which are relevant to the above, cannot be ignored by third countries or international organisations, in particular by courts, including the ECHR. Otherwise, to solve such a problem would be to deprive people living in the occupied territories of all rights whenever such rights are discussed in an international context. This meant depriving them of even the minimum level of rights they had. Therewith, the recognition of acts of the occupation power in a limited context in exceptional cases when protecting the rights of residents of the occupied territories in no way legitimises such power[1].

It is considered appropriate to address the absence of an obligatory requirement in the provisions of civil procedural law (Article 317 of the Civil Procedural Code of Ukraine[2]) to specify in the content of the court decision on establishing the fact of death in the temporarily occupied territories *the data on the date and death of a person, the fact of which the applicant requires to establish*. On the other hand, part 3 of this provision stipulates the obligatory indication of data on the date and place of birth of a person and information about this person's parents. The specific features of the proceedings to establish the facts of birth or death of a person in the temporarily occupied territories include *the obligation to immediately enforce the court decision*. In this regard, an appeal against an act of justice does not suspend the execution of a court decision.

The court decision on the specified categories of civil cases constitutes the basis for the state registration of birth or death of an individual on a place of acceptance of the act of justice. Based on this, it appears that the establishment of a court decision does not entail automatic state registration of these facts. The opposite situation is observed in the dissolution of marital relations in court. In this situation, in the case of divorce by a court, the marital relationship is terminated on the day of entry into force of the court decision on divorce, and not after its state registration.

CONCLUSIONS

The information stated in this study does not exhaust the problems of applying civil procedural legislation regarding legal relations that arose in the temporarily occupied territory of Ukraine with the participation in the civil process of its citizens who live in this territory. Consideration of civil cases related to inheritance of property and acceptance of inheritance in the above territories requires special attention, with the specific features of appellate and cassation challenging court decisions. Outside of civil proceedings, it is also worth investigating the specifics of resolving disputes related to social payments to residents of the temporarily occupied territories, with the execution of court decisions, the issue of the legitimacy of letters rogatory to illegal bodies operating in the occupied territories (there is a precedent), etc.

The authors of the study does not aspire to obtain the final solution to the issues highlighted in this study. Therewith, the problems of applying the national civil

[1] Resolution of the Supreme Court of October 22, 2018. Retrieved from http://www.reyestr.court.gov.ua/Review/77310529.

[2] Civil Procedural Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text

procedural legislation in the context of ensuring the rights and freedoms of subjects of legal relations associated with the armed aggression of the Russian Federation should be given more attention in the pages of legal literature.

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Suggested Citation: Gusarov, K.V., & Popov, O.I., (2020). Recognition of the fact of birth or death in the temporarily occupied territory under the rules of special proceedings. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 161-171.

Submitted: 18/06/2020
Revised: 09/10/2020
Accepted: 10/12/2020

УДК 347.1
DOI: 10.37635/jnalsu.27(4).2020.172-184

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ПРАВА ДИТИНИ В МЕДИЧНИХ ПРАВОВІДНОСИНАХ: ДО ПОСТАНОВКИ ПИТАННЯ ПРО ПОНЯТТЯ

Анотація. *Дитина як суб'єкт будь-яких правовідносин користується особливою увагою з боку права, а забезпечення її прав у всіх сферах життя є безумовним пріоритетом у розвитку сучасного суспільства. Мета статті полягає у дослідженні основних проблем у сфері правового регулювання відносин у галузі охорони здоров'я за участю неповнолітніх, їх правосуб'єктності при наданні медичної допомоги. Методика дослідження полягала у визначенні особливостей та підстав для застосування такого способу захисту, як визнання права дитини в медичних правовідносинах, виявленні суперечностей у законодавстві України, судовій практиці та вироблені пропозицій щодо їх усунення. Окреслена в статті проблема первинності суспільних відносин, зокрема й правовідносин у сфері медичного права набуває особливого значення за участі дітей. Суб'єкти відносин у сфері медичного права переважно виступають як учасники цивільних відносин, відтак характеризуються цивільно-правовим статусом. Правовий статус дитини та обсяг її дієздатності в медичних правовідносинах залежать від віку, та поділяється на два періоди: до 14 років та з 14 до 18 років. Однак в законодавстві мають місце численні суперечності у регулюванні відносин у сфері медицини за участі дітей, а з окремих питань правове регулювання взагалі відсутнє. На практиці проблемними питаннями є застосування норми про надання згоди батьками, права дитини на відмову від лікування, відкликання батьками згоди на лікування тощо. Окремі проблеми у сфері медичних відносин за участі дітей були предметом розгляду не тільки національних судів, а й Європейського суду з прав людини. У міжнародних актах у сфері прав дитини виокремлюють два основних принципи у сфері охорони здоров'я дітей: принцип найкращих інтересів дитини та принцип участі дитини. Рівень участі дітей залежить як від їхнього віку, можливостей, зрілості, так і від важливості рішення, яке необхідно ухвалити. Проблематика дослідження є вкрай актуальною як для України так і на міжнародному рівні.*

Ключові слова: згода на медичне втручання, відмова від лікування, допоміжні репродуктивні технології, медична допомога, медичні документи.

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THE RIGHTS OF THE CHILD IN MEDICAL RELATIONS: ADDRESSING THE MATTER OF THE CONCEPT

Abstract. *The child as a subject of any legal relationship enjoys special attention from the law and ensuring its rights in all spheres of life is an unconditional priority in the development of modern society. The purpose of the study is to investigate the main problems in the field of legal regulation of relations in the field of healthcare with the participation of minors, their legal personality in the provision of medical care. The research methodology consisted in determining the characteristics and grounds for the application of such a method of protection as recognition of the child's right in medical legal relations, identifying contradictions in the legislation of Ukraine, judicial practice, and developing proposals for their elimination. The outlined issue of the primacy of public relations, in particular legal relations in the field of medical law, acquires special significance with the involvement of children. The subjects of relations in the field of medical law mainly act as participants in civil relations, and therefore are described by civil status. The legal status of a child and the extent of its legal capacity in medical relations depend on age and is divided into two periods: up to 14 years and from 14 to 18 years. However, there are numerous contradictions in the legislation regarding the regulation of relations in the field of medicine with the participation of children, and some issues lack any legal regulation whatsoever. In practice, the problematic issues are the application of the rule on parental consent, the child's right to refuse treatment, withdrawal of parental consent for treatment, etc. Certain problems in the field of medical relations with the participation of children have been the subject of consideration not only by national courts but also by the European Court of Human Rights. International instruments on the rights of the child distinguish two basic principles in the field of child health: the principle of the best interests of the child and the principle of the participation of the child. The level of children's participation depends on their age, abilities, maturity, and the importance of the decision to be made. The research issues are extremely relevant both for Ukraine and at the international level.*

Keywords: consent to medical intervention, refusal of treatment, assisted reproductive technologies, medical care, medical documents.

INTRODUCTION

The child as a subject of any legal relationship enjoys special attention from the law. The state of Ukraine guarantees the rights and freedoms of man and citizen in accordance with generally accepted norms and principles of international law. Numerous international instruments state that children need special care, security, and protection. In

particular, the preamble to the UN Convention on the Rights of the Child[1] states that "the need for such special protection of the child was stipulated in the Geneva Declaration of the Rights of the Child of 1924[2] and the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959[3], and recognised by the Universal Declaration of Human Rights[4], the International Covenant on Civil and Political Rights (in particular Articles 23 and 24)[5], the International Covenant on Economic, Social, and Cultural Rights (in particular Article 10)[6], and the statutes and relevant instruments of specialised agencies and international organisations dealing with issues of children's well-being"[7]. Ensuring the rights of the child in all spheres of life is an unconditional priority in the development of modern society. However, despite the rapid dynamics of science, technology, and medicine, in the doctrine of private law there are gaps in the application of the rights and interests of such a special group of society as children, and hence doubts about the effectiveness of human rights in general.

The rights and interests of the child, in particular in the medical field, have been studied in the Ukrainian legal literature in the scientific works of T.V. Bodnar [1], S. Buletsa [2], V.V. Valakh [3], R.A. Maidanyk [4], V.Ya. Kalakura [5], L.V. Krasytska [6], I.Ya. Seniuta [7; 8], H.O. Reznik [9] and others. Among European and American scholars, the rights of the child in medical relations were studied by: C.J. Wick [10], L.A. Weithorn [11], C. Jenny, J.B. Metz [12], R. Ciliberti [13], M.A. Ott [14], Y. Nazarko [15], S. Breathnach [16], M. Peled-Raz [17], M. Abbasi [18]. Therewith, the issue of children's rights in the field of healthcare indicates the need to further study the theoretical provisions of children's rights, identify problems of their legal regulation and provide suggestions for improving the legislation of Ukraine in this area.

In particular, V.V. Valakh focuses on the special legal status of the child as such, and notes that the child patient has a set of rights, among which the right to tactful treatment constitutes an independent subjective medical right of the child to polite, friendly, attentive, individual treatment by the physician and other healthcare professionals, taking into account the latest features of the psychology of each child [3]. S. Buletsa points to the problems in the field of exercise of children's rights to medical care, namely that the participation of children and adolescents (10-18 years) in making medical decisions should be proportional to the degree of their development, which will

[1] Convention on the Rights of the Child (1989, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_021#Text

[2] Geneva Declaration of the Rights of the Child. (1924, November). Retrieved from https://www.humanium.org/en/text-2/

[3] Declaration of the Rights of the Child (1959, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_384#Text

[4] Universal Declaration of Human Rights (Russian/Ukrainian). (1948, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_015?lang=uk#Text

[5] International Covenant on Civil and Political Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_043#Text

[6] International Covenant on Economic, Social and Cultural Rights. (1966, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_042#Text

[7] UN Convention on the Rights of the Child, Convention. (1989, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_021#Text

allow them to understand the essence and consequences medical problem, assess the expected risks and benefits of treatment [2]. I. Seniuta emphasises the importance of compliance with international standards on the rights of the child, on which national legislation is based in this area, in particular in the field of healthcare. The author draws attention to the state of Ukraine in the fight against poverty and ensuring the right of children to medical care in Ukraine [7]. The scientist draws attention to the fact that one of the most pressing problems in the field of medical law in the context of ensuring the patient's rights is the exercise of his or her constitutional right to personal inviolability, projecting which for the healthcare sector, one can obtain the right to consent or refuse medical intervention. The role of legal representatives in the exercise of these patient's rights is, under certain conditions and grounds, decisive [8].

The purpose of the study is to investigate the main issues concerning the legal regulation of relations in the field of healthcare with the participation of minors, their legal personality in the provision of medical care.

1. MATERIALS AND METHODS

The study of the issue of children's rights in medical relations is not possible without the use of methodological basis as a tool with which it is possible to solve certain problems of private law. Studying the rights of children in the field of medical relations, the authors agree with the opinion of O.Yu. Ilyina, that the family law methodology is quite difficult to combine private and public principles, dispositive and imperative norms [19]. The difficulty in combining private and public principles regarding the rights of the child is considered at least for the reason that their settlement almost always occurs from a public legal position. Given that the field of medical relations is complex, the legal regulation may not always be properly implemented. Life and health constitute the fundamental goods of a person; therefore, the field of medicine as particularly sensitive to a person in general and children in particular requires special treatment and legal regulation.

The methodology of this study is determined by its purpose and lies in the determination of the features and grounds for such a method of protection as recognition of the rights of the child in medical relations, identifying inconsistencies in the legislation of Ukraine, judicial practice arising from the application of appropriate subjective rights, and made proposals for their elimination. The methodological framework of scientific study of children's rights in medical relations has been developed at the general scientific and special levels, including the philosophical basis. The dialectical method, institutional, comparative legal approach, and other scientific methods were used to study the outlined problems. The general scientific method of analysis and synthesis, deduction and induction allowed to form an understanding of the concept of children's rights in medical relations, led to the identification of gaps in their legal regulation and further formulation of proposals to improve private law in Ukraine. The comparative method provided an opportunity to analyse the proposed approaches to the definition of "children's rights", the creation of a single legal understanding of children's rights, knowledge of which will enrich the content of legal science, including the science of family law. The institutional and axiological approach provided an opportunity to consider such basic categories as "the right of the child" and "the interest of the child", which form the basis for the

development of medical relations. The special scientific level of the study was covered due to the comparative legal method because modern Ukrainian realities contain many problematic aspects regarding the protection of children's rights in medical relations, related on the one hand to imperfect legal regulation of the medical sphere, and on the other hand, to rapid development of society and scientific progress.

The use of Aristotelian and system-structural methods allowed to conclude that children, taking into account their age and maturity, as well as their families, should be fully informed and involved in the exercise of their right to take an active part in decision-making concerning their health. The method of systematic analysis allowed for a generalisation of the accumulated theoretical knowledge on the understanding of children's rights in medical relations, its relationship with key categories of family and civil law, the prospects of creating a collective understanding, including in the international sphere of medical relations. The materials of judicial practice on violations of children's rights in the field of medical relations were studied using the empirical method. The method of theoretical cognition was used to generalise and develop a holistic understanding of the mechanism of resolving differences in judicial practice. The systematic method provided an opportunity to investigate the sustainability of the practice of the Supreme Court as an important feature of the system of legal means to ensure the unity of judicial practice. The application of a systematic approach, interpretation, and construction of a theoretical model of the studied phenomena provided an opportunity to identify and develop problematic aspects of law enforcement and offer an original vision for their solution.

All scientific research methods were used in interconnection and interdependence, which contributed to the comprehensiveness, objectivity, and completeness of the study. The chosen aspect allowed to lay the foundation for further directions of scientific development of theoretical ideas about the rights of the child in medical legal relations.

2. RESULTS AND DISCUSSION

One of the basic civilistic categories is legal relations. Unfortunately, the modern doctrine of private law still lacks a holistic theory of civil legal relations. The fundamental work "Legal Doctrine of Ukraine", which considers the subject, method, system of private law and relations, contains no special section that would cover the general problems of understanding the category of legal relations. Ye.O. Kharytonov, O.I. Kharytonova have repeatedly addressed this issue. [20]. Legal relations are considered as a legal relationship between the subjects. However, sometimes scholars do not distinguish or fail to clearly distinguish public relations and legal relations in cases where they are included in the legal sphere by the legislator. This is conditioned by the insufficient consideration of the need to differentiate legal relations at the level of the general division of rights into private and public. This also applies to legal relations in the field of medical law, the subjects of which are children.

In the private sphere, public relations are primary. They usually arise based on such legal facts as agreement, consent, as a result of the practical acts of the parties or their inaction. The existence of private public relations is not affected by the absence or, conversely, the presence of acts of civil legislation. After all, the rights and obligations of the participants are based on the rules of natural law. However, in the public sphere,

under certain conditions, legal relations precede public relations or may arise simultaneously. Based on the presence of private and public elements of the legal relationship, which may be dominated by either private or public (in particular, organisational) elements, Ye.O. Kharytonov, O.I. Kharytonova note that civil legal relations constitute a social connection between legally equal subjects who are holders of civil rights and obligations (regardless of their regulation by legislation) [21]. The outlined problem of the primacy of social relations, including legal relations in the field of medical law, acquires special significance also in the emergence of medical relations whose subjects are children. Notably, this is a kind of special connection of a special legal nature.

Articles 1-14 of the Civil Code of Ukraine (hereinafter referred to as the "CC of Ukraine")[1], refer to civil relations. Thus, according to A.S. Dovhert, the legislator emphasised the relative independence of the existence of civil (private) relations from the provisions of acts of civil legislation and state coercion [22]. It is known that acts of civil legislation, means of state influence, etc., can be applied to the regulation of relations in the medical sphere if disputes have arisen between the participants of such relations. Therefore, several problems arise in determining and describing the features of the subject composition of civil law in the medical field. The starting point is that the subjects of relations in the field of medical law mainly act as participants in civil relations, and therefore are described by civil status. According to Article 2 of the CC of Ukraine[2], participants in civil relations may be individuals and legal entities, the state of Ukraine, territorial communities, foreign states, and other subjects of public law. The above suggests that the legislator distinguishes between two types of subjects of civil relations: private law subjects and public law subjects. For public law persons, participation in medical relations is the main purpose and may also be conditioned by a particular situation. As for the participation of individuals in these legal relations, based on this approach, children as a special category of society certainly belong to this category of persons. This raises the question of the legal personality of the child in the medical relationship.

It is known that the legal status of a child and the extent of its legal capacity in medical relations depend on age and is divided into two periods: up to 14 years and from 14 to 18 years. In accordance with the provisions of Article 43 of Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare"[3], medical intervention to a patient under the age of 14 (a minor patient) is carried out with the consent of the child's legal representatives. In turn, the provision of medical care to an individual who has reached 14 years of age is carried out with his or her own consent. In the case of exercising the right to consent to medical care, the consent must meet the following criteria of legality: a) awareness; b) voluntariness; c) competence [23]. In accordance with Part 2 of Article 284 of the CC of Ukraine[4] an individual who has reached 14 years

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text
[2] *Ibidem*, 2003.
[3] Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare" No 2801-XII. (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text
[4] Civil Code of Ukraine, op. cit.

of age and who has applied for medical treatment has the right to choose a doctor and to choose methods of treatment in accordance with the obtained recommendations. However, the right to receive information is governed by Part 1 of Article 285 of the CC of Ukraine[1] and in Part 1 of Article 39 of the "Fundamentals of the Legislation of Ukraine on Healthcare"[2], which states that an adult individual has the right to accurate and complete information about the state of his or her health, including access to relevant medical documents relating to their health. The above suggests that the right to information, which is a component of the right to consent, cannot be exercised by persons aged 14 to 18 years. Admittedly, the acquisition of full civil capacity (emancipation) will not affect the legal possibility to obtain information about the state of health. Thus, a minor (child) is effectively deprived of informed consent or refusal of medical intervention until he or she reaches the age of eighteen.

According to Part 2 of Article 285 of the CC of Ukraine[3], parents (adoptive parents), guardian, and trustee have the right to information about the health of the child or ward. If information about the disease can worsen the child's health, impair the process of treatment, health professionals have the right to provide incomplete information about the health of the individual, to limit their access to certain medical documents. In urgent cases, in the presence of a real threat to the life of an individual, medical care is provided without the consent of the individual or his or her parents (adoptive parents), guardian, or trustee. The consent of the patient or his or her legal representative to the medical intervention is not required only in the presence of signs of direct threat to the patient's life, provided that it is impossible for objective reasons to obtain consent for such intervention from the patient or his or her legal representatives. According to Article 44 of the "Fundamentals of the Legislation of Ukraine on Healthcare"[4], new methods of prevention, diagnosis, treatment, rehabilitation, and medicines that are under consideration in the prescribed manner, but not yet approved for use, and unregistered medicines can be applied or administered to a person under 14 years of age (minor) with the written consent of his or her parents or other legal representatives, and to a person aged from 14 to 18 – with his or her written consent and the written consent of their parents or other legal representatives.

In practice, the problematic issue is the application of the rule on parental consent. According to the literal interpretation, both parents, the mother and the father, must consent to the provision of medical care. In practice, if the parents are married, then they are guided by the provision of Part 3 of Article 54 of the Family Code of Ukraine (hereinafter referred to as "the FC of Ukraine")[5], which stipulates that the actions of one spouse regarding the life of the family are committed with the consent of the other spouse, health professionals provide aid to the child with the consent of one parent. If the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text

[2] Law of Ukraine No 2801-XII "Fundamentals of the Legislation of Ukraine on Healthcare". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text

[3] Civil Code of Ukraine, op. cit.

[4] Law of Ukraine No 2801-XII "Fundamentals of the Legislation of Ukraine on Healthcare", op. cit.

[5] Family Code of Ukraine. (2002, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14#Text

other parent objects to the child's medical care, the dispute between the parents may be resolved by a guardianship authority or a court. Unfortunately, there are currently many questions regarding the consent to the treatment of children whose parents are outside Ukraine, live separately or are not married or whose whereabouts are unknown. There is also no mechanism for the parents' transfer of authority to treat children to another person. Situations of abortion in persons aged 14 to 18 without the consent of parents and other legal representatives are also common. According to the order of the Ministry of Health No. 423 "On approval of the Procedure for providing comprehensive medical care to pregnant women during unwanted pregnancy, forms of primary accounting documentation and instructions for their completion" dated 24.05.2013[1], artificial termination of unwanted pregnancy, the term of which is from 12 to 22 weeks, if there are grounds of a non-medical nature specified in the Procedure, are carried out at the request of a pregnant minor woman or her legal representatives and in accordance with the provided documents confirming these circumstances.

According to Article 13 of the Law of Ukraine "On the use of transplantation of anatomical materials to humans"[2], if the recipient has not reached 14 years of age or declared legally incapable, transplantation is performed with the consent of objectively informed parents or other legal representatives. In case of recipients over the age of 14 or who are legally recognised as having limited legal capacity, transplantation is used with the consent of such objectively informed persons. In case of refusal of parents or other legal representatives of the recipient to provide medical care with the use of transplantation to a person under 14 years of age or a person declared legally incapable in accordance with the law, if such refusal may lead to serious consequences for the recipient, the head of healthcare institution must immediately notify the guardianship authority, which no later than 24 hours from the date of notice decides to consent or disagree to the provision of medical aid to such a person with the use of transplantation, which can be appealed in accordance with the law, including in court.

According to the requirements of Article 14 of the Law of Ukraine "On the Use of Transplantation of Anatomical Materials to Humans"[3], a living donor of anatomical materials can only be an adult legally capable individual, except for the donation of hematopoietic stem cells, provided there is no adult legally capable compatible donor for medical reasons; the recipient is a full brother or full sister of the donor; transplantation is performed to save the life of the recipient. One of the possible risks is the birth of a child, including through ART programmes, only to become a donor for a sick child. Currently there is no mechanism in Ukraine for monitoring the living conditions of this child. Some problematic issues concern the child's right to refuse treatment. Thus, according to the provisions of Article 43 of the "Fundamentals of the Legislation of Ukraine on

[1] Order of the Ministry of Health No 423 “On approval of the Procedure for providing comprehensive medical care to pregnant women during unwanted pregnancy, forms of primary accounting documentation and instructions for their completion”. (2013, May). Retrieved from https://zakon.rada.gov.ua/laws/show/z1095-13#n25

[2] Law of Ukraine No 2427-VIII “On the use of transplantation of anatomical materials to humans”. (2018, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2427-19#Text

[3] Law of Ukraine No 2427-VIII “On the use of transplantation of anatomical materials to humans”, op. cit.

Healthcare"[1], a patient who has acquired full civil capacity and is aware of the importance of their actions and can manage them, has the right to refuse treatment. According to Part 4 of Article 284 of the CC of Ukraine[2] an adult legally capable individual who is aware of the significance of one's actions and can manage them has the right to refuse treatment. The analysis of the above provisions indicates the existence of a certain conflict, as the concepts of "full civil capacity" and "adulthood" are not identical. After all, adulthood occurs at the age of 18, while full civil capacity can occur in an individual before he or she reaches 18 years, in particular in cases of marriage registration, employment contract, as well as minors registered by the mother or father of the child. Full civil capacity may be granted to an individual who has reached the age of sixteen and is registered as a business entity. Thus, the above suggests that there is a problem of application of special and general regulations in the medical field, especially when a child chooses between the enjoyment of the right to treatment or refusal thereof. Guided by the rules on special regulations, in the above case, the application of competition rules is subject to a special regulation – "Fundamentals of the Legislation of Ukraine on Healthcare".

Since medical care is provided to children with the consent of parents, the latter have the right not to give such consent, or to withdraw it later. In the context of granting consent to certain types of medical treatment, an interesting situation is highlighted in the ECtHR decision (*Case of Glass v. the United Kingdom*) [24], where the applicant's son was treated without her consent and received treatment as directed by doctors without a court order. The Court concluded that the authorities' decision to ignore the second applicant's objection to the proposed treatment without the permission of the judicial authorities had violated Article 8 of the Convention[3]. However, in accordance with Ukrainian legislation, in particular Article 43 of the "Fundamentals of the Legislation of Ukraine on Healthcare"[4], if the refusal is given by the patient's legal representative and it may have serious consequences for the patient, the doctor must notify the guardianship authorities. According to the Law of Ukraine "On Child Protection"[5], in case of refusal to provide the child with the necessary medical care, if it threatens its health, parents or persons replacing them are liable under the law. Medical staff in case of a critical condition of a child in need of urgent medical intervention is obliged to warn the parents or persons replacing them of the responsibility for leaving the child in danger (Article 12). The refusal of a child or its parents (adoptive parents), guardians, or custodians to consent to prevention (including vaccination) makes it impossible, in particular, to properly exercise the child's right to education. Indicative in this sense is the Resolution of the Supreme Court of the panel of judges of the First Judicial Chamber of the Civil

[1] Law of Ukraine No 2801-XII "Fundamentals of the Legislation of Ukraine on Healthcare". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text

[2] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text

[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

[4] Law of Ukraine No 2801-XII "Fundamentals of the Legislation of Ukraine on Healthcare". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text

[5] Law of Ukraine No 2402-III "On Child Protection". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2402-14#Text

Court of Cassation of April 17, 2019 in case No. 682/1692/17[1] on the claim for the obligation not to interfere with the acquisition of preschool education. The content of this Resolution emphasises the predominance of the principle of public interest over personal interests in matters of compulsory vaccination of the population against particularly dangerous diseases and the possibility of exercising the child's right to preschool education. The right of the plaintiff's minor son to education in a preschool educational institution was, in view of public interests, temporarily limited (until vaccination, improvement of the epidemiological situation, obtaining a positive opinion of the medical advisory commission) due to the fact that the plaintiff herself, having distrust in the quality of the vaccine (without properly motivating her distrust or inability to use the vaccine she trusts), did not follow the calendar of mandatory vaccinations and refused the next vaccination of the child[2].

International instruments on the rights of the child identify two main principles in the field of children's health. The first is the principle of the best interests of the child. In all actions against children, whether carried out by public or private social security institutions, courts, administrative or legislative bodies, priority is given to the best interests of the child (Article 3 of the UN Convention on the Rights of the Child)[3]. Article 1 of the Law of Ukraine "On Child Protection"[4] stipulates that ensuring the best interests of the child – actions and decisions aimed at meeting the individual needs of the child according to his or her age, sex, health, development, life experience, family, cultural and ethnic belongings and take into account the opinion of the child, if he or she has reached such an age and level of development that can express it. The second is the principle of child participation. Article 12 of the UN Convention on the Rights of the Child establishes the obligation of States parties to ensure that a child who is capable of expressing his or her views has the right to express those views freely on all matters affecting the child, with due regard to the child's age and maturity.

According to the Recommendations of the Committee of Ministers of the Council of Europe on Child-Friendly Health, approved by the Committee of Ministers of the Council of Europe at the 112th Meeting of the Ministers' Deputies on 21 September 2011[5], there are five principles of child-friendly healthcare, among which is participation, which means that children should have the right to be informed, listened to or advised, to express their opinion independently of their parents and the right to have their opinion to be taken into account.

[1] Resolution of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation in the case No 682/1692/17. (2019, April). Retrieved from http://www.reyestr.court.gov.ua/Review/81652333

[2] Resolution of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation in the case No 682/1692/17. (2019, April). Retrieved from http://www.reyestr.court.gov.ua/Review/81652333.

[3] Convention on the Rights of the Child. (1989, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_021#Text

[4] Law of Ukraine No 2402-III "On Child Protection". (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2402-14#Text

[5] Council of Europe guidelines on child-friendly healthcare adopted by the Committee of Ministers at the 1121st meeting of the Ministers' Deputies. (2011, September). Retrieved from https://rm.coe.int/090000168046ccef

CONCLUSIONS

Legal relations in the field of medical law also acquire special significance with the participation of a special subject – a child. It is a kind of special connection of a special legal nature. The level of children's participation depends on their age, abilities, maturity, and the importance of the decision to be made. The legal status of a child and the extent of his or her legal capacity in medical relations depend on age and is divided into two periods: up to 14 years and from 14 to 18 years. Children, taking into account their age and maturity, as well as their families, should be fully informed and involved. According to the current legislation, the right to be informed, which is a component of the right to consent, cannot be exercised by persons aged 14 to 18, and the acquisition of full civil capacity (emancipation) will not affect the legal possibility to obtain health information. In practice, the problem lies with the application of the rule on parental consent to provide medical care to the child. Unfortunately, currently there are many questions regarding the consent to the treatment of children whose parents are outside Ukraine, live separately, or are not married, or whose whereabouts are unknown. There is also no mechanism for parents to delegate the authority to treat children to another person. Since medical care is provided to children with the consent of parents, the latter have the right not to give such consent, or to withdraw it later.

International instruments on the rights of the child distinguish two basic principles in the field of child health: the principle of the best interests of the child and the principle of the participation of the child. Children should be encouraged to exercise their right to take an active part in making decisions about their health. There are problems with the application of special and general regulations in the medical field, especially when a child chooses the right to undergo treatment or to refuse from it.

The issues outlined in the study are important both for health professionals and directly to legal practitioners, as they will serve in the future for a more detailed scientific analysis of children's rights in the medical field, including their protection, as well as developing a common legal approach and judicial practice.

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Suggested Citation: Pleniuk, M.D. & Vodopian, T.V. (2020). The rights of the child in medical relations: addressing the matter of the concept. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 172-184.

Submitted: 18/07/2020
Revised: 10/11/2020
Accepted: 03/12/2020

УДК 347.5:004.4
DOI: 10.37635/jnalsu.27(4).2020.185-198

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ШТУЧНИЙ ІНТЕЛЕКТ: ПРАВОВІ ПРОБЛЕМИ ТА РИЗИКИ

Анотація. *Використання цифрових технологій та штучного інтелекту є реаліями сьогодення. Беззаперечною є значна кількість переваг, що надає штучний інтелект – це і зменшення витрат, ресурсів, часу, швидкий аналіз великих обсягів даних, збільшення продуктивності діяльності, побудова точніших прогнозів в різних сферах життєдіяльності, можливість одночасного виконання багатьох задач та ін. Втім, використання штучного інтелекту також супроводжується й низкою правових проблем та ризиків, що може обернутися завданням шкоди. Тому метою цієї публікації є виявлення правових проблем використання штучного інтелекту та окреслення підходів до розподілу ризиків, пов'язаних із використанням штучного інтелекту. У статті на підставі системного аналізу з використанням діалектичного, порівняльного, логічно-догматичного та інших методів окреслюються проблемні ситуації, що виникають у зв'язку з використанням штучного інтелекту та пропонуються окремі напрями їх вирішення. Зокрема серед проблем використання штучного інтелекту називаються: визначення особи, відповідальної за шкоду, завдану штучним інтелектом; прогалини у нормативно-правовому регулюванні відносин у сфері використання цифрових технологій, що ускладнює захист прав та законних інтересів фізичних та юридичних осіб; неможливість у багатьох випадках застосування чинних правил притягнення до цивільно-правової відповідальності за шкоду, завдану використанням штучного інтелекту. Напрямами вирішення таких проблем можуть бути: визначення статусу електронних осіб та окреслення їх правосуб'єктності, моменту її виникнення та припинення з одночасним вирішенням питання ідентифікації роботів та штучного інтелекту; вирішення питання відповідальності за шкоду, завдану штучним інтелектом, виходячи з того наскільки такий штучний інтелект був автономним; застосування правил відшкодування шкоди, завданої джерелом підвищеної небезпеки, до відносин із використанням цифрових технологій, виходячи з того, чи була шкода, завдана дією чи бездіяльністю штучного інтелекту, передбачуваною.*

Ключові слова: делікт, відповідальність, цивільне право, цифрові технології, конфіденційність.

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ARTIFICIAL INTELLIGENCE: LEGAL PROBLEMS AND RISKS

Abstract. *The use of digital technologies and artificial intelligence are today's realities. Undoubtedly, there are many advantages of artificial intelligence – it reduces costs, resources, and time for rapid analysis of large amounts of data, an increase in productivity, making more*

accurate forecasts in various spheres of life, the ability to simultaneously perform many tasks and more. However, the use of artificial intelligence is also accompanied by several legal problems and risks, which can result in damage. Therefore, the purpose of this paper is to identify legal problems in the use of artificial intelligence and to outline approaches to the distribution of risks associated with the use of artificial intelligence. The paper, based on systems analysis using dialectical, comparative, logical-dogmatic and other approaches, outlines the problem situations that arise in connection with the use of artificial intelligence and suggests ways to solve them. In particular, among the problems of using artificial intelligence are listed: identification of the person responsible for the damage caused by artificial intelligence; gaps in the legal regulation of relations in the use of digital technologies, which complicates the protection of the rights and legitimate interests of individuals and legal entities; the impossibility in many cases of applying the current rules of civil liability for damage caused by the use of artificial intelligence. The directions for solving such problems can be: determination of the status of electronic persons and their legal personality, the moment of its occurrence and termination while addressing the issue of identification of robots and artificial intelligence; resolving the issue of liability for damage caused by artificial intelligence, based on how autonomous such artificial intelligence was; the application of the rules of compensation for damage caused by a source of increased danger to the relationship with the use of digital technologies, based on whether the damage caused by the action or inaction of artificial intelligence was predictable.

Keywords: tort, liability, civil law, digital technologies, confidentiality.

INTRODUCTION

In recent years, the concept of "artificial intelligence" has come into use and taken root in human life. Today it is quite difficult to imagine the existence without social networks, e-banking, various applications used on the Internet and as applications for smartphones. Such Internet activity is simply impossible without the use of highly developed systems capable of analysing certain conditions and making autonomous decisions in a certain way, which is artificial intelligence in a broad sense. Technology and artificial intelligence are critical in all aspects of responding to the COVID-19 crisis. Artificial intelligence (AI) tools and systems can help countries respond to the COVID-19 crisis. However, to make the most of innovative solutions, AI systems need to be designed, developed and applied reliably. They must respect human rights and confidentiality; be transparent, explainable, reliable and secure; and participants involved in their development and use must remain accountable[1].

There is a large number of definitions of "artificial intelligence" and approaches to understanding its essence – from identification with robotics to the perception of AI as an innovative direction in the development of science and technology aimed at creating intelligent machines and intelligent computer software. According to M.O. Stefanchuk, AI is essentially the ability of machines to learn from human experience and perform human-like tasks. It is a modelling of the ability to abstract, creative thinking – and especially the ability to learn – using digital computer logic [1]. The Oxford Dictionary defines artificial intelligence as the theory and development of computer systems capable of performing tasks that normally require human intelligence, such as visual perception,

[1] Recommendation of the Council on Artificial Intelligence. (2019, May). Retrived from https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449.

language recognition, decision making, and translation between languages [2]. According to Amit Tyagi, AI is an imitation of human-like behaviour, such as learning, planning, reasoning, problem solving, environmental perception, natural language processing, etc. [3]

The essence of artificial intelligence was explained in the most detail by A.A. Baranov, noting "AI carries out processing (transformation) of input information by algorithms that implement the functions of the human brain and knowledge, pre-embedded in AI or acquired by it in the process of self-development, into new information that can play a role or direct informational impact to control some processes or perform the role of source information for a new (next) stage of information processing. Thus, AI is a set of software and hardware methods, tools (computer programmes) that implement one or more cognitive functions equivalent to the corresponding cognitive functions of a person" [4]. The attitude of the scientific community and the public to AI is also ambiguous. Admittedly, Elon Musk, Stephen Hawking, Bill Gates warned against the development of artificial intelligence, considering it a threat to humans. For example, Elon Musk once compared AI to the dangers of the dictator of North Korea [5]. Instead, Mark Zuckerberg points to the benefits for all mankind in the use of artificial intelligence. According to him, artificial intelligence will help humanity cope with many problems: people will be able to receive better treatment, diagnose diseases, reduce the number of accidents (which is currently the most common cause of death) [6]. For example, as noted by Chen X., Chen J., Cheng G., Gong T., AI is already used to predict people's reactions to decisions, including their perception or rejection [7].

The April 9, 2018 IEEE Confluence Report on AI and ML Applied to Cybersecurity states that the worst challenges for the future of AI are likely to be social in nature. Although AI promises to improve security by automating some aspects of defence, caution is needed in the design, deployment, and use of these systems. AI can cause irreversible damage to national security, economic stability and other social structures if not designed and used very carefully. Security networks with legal and ethical restrictions are required. It is necessary to build a social, ethical, and legal context that would prepare the world for the introduction of AI as well as the creation of technical systems themselves [8]. After all, as noted by Stephen Hawking, everything that is not forbidden can happen and will happen someday [9]. Therefore, there is an urgent need to outline the legal problems of using artificial intelligence and its inherent risks and work out ways to overcome them.

The purpose of this paper is to identify the legal problems of using artificial intelligence and to outline approaches to the distribution of risks associated with the use of artificial intelligence.

1. MATERIALS AND METHODS

Any study is aimed at acquiring theoretical knowledge, which in turn makes it possible to identify the essential, main properties of the object under study and separate them from secondary, random features. This is possible only with the use of appropriate methods. As noted by S.V. Vyshnovetska "... it is important not only to determine the subject of study, but also to find appropriate ways, methods and techniques by which this subject is covered" [10]. One of these techniques is systems analysis, the methodological basis of

which is dialectics. It is designed for systematic study of relevant issues, provided that a particular system (object) is considered as a whole, taking into account its goals and functions, structure, all external and internal connections. According to systems theory, the surrounding world is known as a set of systems of different complexity and different levels that interact with each other. Any object arises and exists within a certain large system, and the connections between objects and the system are the essential foundations of the origin, existence and development of the object and the system as a whole.

A system is a set of elements that are in certain relationships and connections with each other, interact with each other, form certain integrity and as a whole interact with the external environment. And at the same time the system is a set of means for solving problems. In this case, based on the provisions of systems theory, the problem always arises in a particular system. The dialectic of problem solving is that by solving one problem, one changes the system. The new system contains a new problem. In some cases, this problem is not significant and it can be assumed that the second system solves a problem for the first system. The next steps are aimed at solving the problem of the second system, which leads to another new system. Therefore, the system is considered as a set of means to solve the problem. The application of such an approach provides a systematic knowledge of problem situations that arise in connection with the use of artificial intelligence and the development of directions for their solution. Based on a systems analysis, the damage by artificial intelligence is considered as an element, an integral part of tortious obligations to compensate for damage. The issue of determining the place of artificial intelligence in the structure of civil matters is studied in the plane of systems of objects and subjects of such legal relations. At the same time, it is established that the introduction of artificial intelligence as an element of a system leads to certain problems. The development of an adequate theory of solving such problems should become the task of the science of civil law, the solution of which depends on the right goal and adequately chosen means. This led to the use of structural analysis, which establishes the relationship between the components of their impact on the environment – the general rule of law.

The use of the logical-dogmatic method along with the method of hermeneutics made it possible to consider the essence of the concept of "artificial intelligence" through the prism of its perception by interstate institutions and researchers. In particular, such methods were used to interpret the concept of "smart autonomous robots" through the analysis of the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics and the scientific literature.

Using the analogue approach, it was hypothesised that the damage caused by artificial intelligence can be compensated according to the rules of compensation for damage caused by a source of increased danger. And the comparative approach allowed to clarify this hypothesis. Thus, having established the essence of the concepts of "infliction of harm by artificial intelligence" and "infliction of harm by a source of increased danger" and found differences between them. It was concluded that damage caused by artificial intelligence cannot always be compensated by the rules of compensation for damage caused by a source of increased danger, as it may have signs of unpredictability.

2. RESULTS AND DISCUSSION

2.1 Legal problems and risks of using artificial intelligence

In June 2019, the G20 Ministerial Statement on Trade and the Digital Economy was adopted, stating that innovative digital technologies continue to offer enormous economic opportunities. At the same time, they create challenges. The benefits of increased productivity through the use of new technologies such as artificial intelligence (AI), fifth generation mobile telecommunications technology (5G), Internet of Things (IoT), Distributed Ledger Technologies (e.g. blockchain) will expand the opportunities of individuals and legal entities, creating new opportunities, services and employment, which can lead to greater well-being and further inclusion of these people. However, while digitalisation has a huge potential to benefit society, it is also a matter of concern. Digitalisation issues include privacy, data protection, intellectual property rights and security issues [11]. This is especially true for the healthcare sector, where the personal data of many patients are collected [12]. Although, as noted by W. Nicholson Price II, AI can play at least four major roles in the health care system: pushing the boundaries of human activity (for example, Google Health has developed a programme that can predict the onset of acute kidney injury two days before trauma will occur, which is impossible for current medical practice, as the damage is often noticed only after it has happened [13]); democratisation of medical knowledge and excellence; automation of heavy work in medical practice; management of patients and medical resources [14].

The literature also suggests that the key area where artificial intelligence problems and risks are observed, in addition to information in the form of data and personal data, is language. In particular, issues related to privacy, data protection, are issues related to the quality of information, aspects of its creation, dissemination, updating and language barrier. This concerns the programme's understanding of the user's query, the search for meanings in verbal constructions, the division into semantic tuples for the formulation of phrases and their natural use. The language problem is primarily related to the processing of natural language. This is especially relevant for Ukraine, as on various platforms and sites there is no option to automatically create Ukrainian subtitles (for video) or translate the site into Ukrainian, recognition of spoken Ukrainian. The situation with the protection of personal data, which is an integral part of the information privacy of each person, is not better [15; 16].

Indeed, the collection and processing of personal information that is publicly available is a problem of great concern today. All users of social networks have repeatedly encountered cases of targeted advertising, which often has signs of discrimination. For example, a woman's profile feed often advertises tools, materials, information resources, webinars related to pregnancy and childcare, cooking, while a man's profile advertises watches, cars, yachts, and more. There are also cases of discrimination on the basis of skin colour, when for people with light skin colour luxury items are offered, and for dark skinned people – fast food. Now property discrimination is spreading, in particular, iPhone users with the Apple iOS operating system complain that when ordering a taxi, the cost of travel for them under the same conditions and for the same distance is higher than for users of phones with other operating systems, such as Android. Therefore, the need to protect personal data comes to the fore, and especially

from persons who collect personal information on a commercial basis for analysis and sale to companies that target or provide services. The McKinsey Global Institute's November 28, 2017 report, "Jobs lost, jobs gained: What the future of work will mean for jobs, skills, and wages" points to another problem with the use of artificial intelligence. In particular, it is noted that by 2030, from 400 to 800 million people worldwide may lose their jobs due to automation. Of this number, 75 to 375 million may need to change occupational categories and learn new skills according to the middle and earliest automation scenarios [17]. Instead, Oleksiy Reznichenko, the founder and head of the Boteon Robotics Centers network, told Radio Svoboda that although there are many automation tools that have replaced a lot of human labour, people still find work. The possibilities of AI are endless, the speed is incredible, the ability to combine and synchronise with a million more such robots, or to produce a million more such programmes – is endless, so here everything depends on people. There is a threat of hacker interference in the work of "smart" robots. It is the person who manages artificial intelligence on the first principles and robots – this is the greatest danger to other people" [6].

Daniel Larimer, CTO of EOS startup Block.one, sees the risk of using artificial intelligence as a possibility of total censorship, noting that recent blockades of cryptocurrency videos on YouTube indicate that powerful corporations are plunging the world into total censorship. In his opinion, it should be taken for granted that people do not own anything and do not control anything on their phone. Software will increasingly only be available for exclusive access [4]. Susanne Hupfer also points out the difficulties in managing the risks associated with AI [18], due to the fact that they cannot be reliably calculated [19]. Such risks, for example, may be that, when hiring and lending, AI may increase historical bias against women candidates and members of minorities or lead to non-transparent decisions [20]. Whether in the field of AI health care, using data collected by academic medical centres, there is less "knowledge" about patients from groups of the population who do not usually visit academic medical centres, and therefore will treat them less effectively. Similarly, if speech recognition systems are used to decipher patient appointment notes, the AI may perform worse, especially if the provider has a race or gender that is underrepresented in the training set [21]. Some scientists point out that the widespread use of AI will eventually reduce human knowledge and capabilities, as a result of which providers will lose the ability to detect and correct AI errors and further develop medical knowledge [22].

Another problem that stands in the way of effective use of artificial intelligence is the lack of necessary digital skills in many people and the backlog of legal regulation of the use of digital technologies [23]. In particular, as noted by I.V. Ponkin and A.I. Redkina on the inadequacy of regulatory regulation of the use of AI, insufficient attention on the part of the state to the use of AI as a new rapidly evolving technology can lead to loud disputes, critical technical failures and even causing death [24].

There is also the problem of determining the place of artificial intelligence in the structure of civil law. As noted by M.O. Stefanchuk, there are three main approaches to determining the legal status of robots (and artificial intelligence): 1) the perception of them exclusively as objects of civil law, which should be subject to the legal regime of things; 2) their perception exclusively as subjects of civil legal relations, holders of

subjective rights and responsibilities, who are able to act independently and to realise and evaluate the significance of their actions and the actions of others; 3) differentiated definition of the place of robots in the structure of civil relations, when they can be both subjects of civil relations and objects. In this case, according to the scientist, the most balanced is the third approach, which is primarily due to the technical capabilities of the robot as a carrier of artificial intelligence. That is, the attribution of a robot to the subject or object of civil law depends on how high a level of intelligence and autonomy it has and whether it can act independently and realise the importance of its actions [1].

In general, the problems of AI use and development are formulated in a generalised way in the report of the research group of Stanford University "Artificial Intelligence and Life in 2030". In particular, this report points to: problems of ensuring the confidentiality of personal information; problems of developing an effective policy in the field of innovation development; problems of civil and criminal prosecution; problems of determining the legal personality of the AI system, in particular in which situations the AI can act as an intermediary of a natural or legal person, enter into contracts; problems of certification of AI systems when using them to solve problems that, otherwise, require competent professionals whose activities are licensed by the state; the problem of the negative impact of the use of AI systems on the number of jobs for people [25].

The lack of an unambiguous understanding of the very category of "artificial intelligence" does not add certainty to its use. There are at least a few dozen different definitions of AI, grouped into four categories: think human, act human, think rationally, and act rationally [26]. However, the attempt of scientists to define the concept of AI by analogy with human intelligence does not improve the situation, because, as indicated by O.A. Baranov, representatives of various branches of knowledge characterise human intelligence not by one sign, but by a certain set of various properties (functions). Moreover, a stable, generally accepted definition of neither the actual cognitive function nor their list, which are taken as signs of human intelligence, has not yet been formed in science [4].

Thus, along with the advantages of using artificial intelligence, it is important to state a number of problems, the solution of which should become a priority for scientists and the state. Such problems are the problem of determining the place of artificial intelligence in the structure of civil law, gaps in the legal regulation of digital technology, ensuring the protection of the rights and legitimate interests of individuals and legal entities from violations of digital technology, prosecution for damage caused by digital technology. Let us try to outline some areas for solving such problems.

2.2 Approaches to the distribution of risks of using artificial intelligence

The High Level Group of Experts on the EU AI Development Strategy in April 2018, noting that trusted AI must respect all relevant laws and regulations, has developed seven key requirements for AI: 1) mediation and supervision of human activities: AI systems should ensure just societies while upholding human rights and fundamental rights, not reducing or restricting human decision-making rights; 2) reliability and security: algorithms must be stable, reliable and sufficient to eliminate errors or inconsistencies during all phases of the life cycle of AI systems; 3) confidentiality and data management: citizens should have full control over their own data, while data concerning them should not be used to harm or discriminate against them; 4) transparency: traceability of AI systems must be ensured; 5) diversity, non-discrimination and equity: AI systems must

take into account 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 accountability for AI systems and their results [27]. Taking into account these principles, the authors will outline some areas for solving problems related to the use of artificial intelligence.

Determining the place of artificial intelligence in the structure of civil law directly depends on what it means by "artificial intelligence". Today, as already noted, there is no single understanding of this category. Moreover, it is suggested that in the absence of a generally accepted definition of of artificial intelligence, it is appropriate to describe it through distinctive features, which include the ability to learn and make decisions independently. O.A. Baranov adds another feature – simulation (modelling, performance) of functions equivalent to human cognitive functions, to which he includes the perception, memory, exchange, analysis, comparison, evaluation, generalisation, and use of information (data) to solve problems or make decisions, recognition of objects and their classification (gnosis), choice of strategy and specific actions, expert assessment of the situation, goal setting, planning, text-to-speech and vice versa, self-learning, self-organisation, generating new knowledge, etc. [4]. Therefore, the problem of understanding AI as a subject (quasi-subject) or object of legal relations needs to be solved, as determining the place of AI in the structure of civil matters will answer the question of the possibility of applying the relevant rules of civil liability.

In the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics in paragraph 59 suggests the idea of creating a specific legal status for robots, so that complex autonomous robots can be defined as having the status of electronic persons responsible for redressing the harm they can cause. It is also possible to use the status of an electronic person in situations where robots make autonomous decisions or interact independently with third parties. In this case, the term "smart autonomous robot" is proposed to mean technologies that have the following characteristics: 1) the ability to gain autonomy through sensors and/or by exchanging data with the environment and analyse this data; 2) the ability to learn through experience and interaction; 3) the form of physical support of the robot; 4) the ability to adapt their behaviour and actions to the environment; 5) lack of life in the biological sense. To track robots, it is proposed to introduce a system of registration of advanced robots based on the criteria established for their classification[1].

In general, the idea is quite progressive. Based on the trends in the development of science, including in the field of robotics and AI, sooner or later humanity will face the need to determine the status of intelligent robots and AI. And, as an option, it can be the status of an electronic person. In this case, giving robots and AI such a status, it is necessary to take the next step and recognise them as subjects (quasi-subjects) of legal relations, including subjects of civil liability. Accordingly, based on the current rules, compensation for damage should be relied on such electronic persons. And here logically there is a question of a way and sources of compensation of the caused damage. It is obvious that the traditional rules of civil liability are not able to solve this issue.

[1] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. (2017, February). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html?redirect.

Therefore, recognising AI as an independent subject of legal relations, at the same time it is necessary to resolve the issue of bringing to legal responsibility for the damage caused by AI. It is possible that the recognition of intelligent robots and AI as subjects of legal relations implies endowing them with a certain legal personality – the ability to have and acquire appropriate rights and responsibilities. Then civil liability, as the ability to bear adverse consequences, including property, will be covered by their legal personality. But it is necessary to outline the legal personality of electronic persons, as well as the moment of its occurrence and termination. The issue of identification of such robots and AI will also be urgent.

However, it should be noted that the understanding of AI as a subject (quasi-subject) of legal relations, including in the context of electronic persons, is only a prospect. Currently, given the current state of development of robotics and artificial intelligence, it is not time to talk about the prevalence of intelligent autonomous robots. Therefore, it is now more appropriate to consider robots and AI as objects of legal relations. Although in this case, the question of liability for damage still remains open. Thus, in the already mentioned Resolution of the European Parliament, it is stated that in the case where the robot can make autonomous decisions, there are difficulties in determining the party responsible for providing compensation. This applies both to contractual liability, where machines select contractors, agree on contractual terms, conclude contracts and decide whether and how to perform them, and cases of non-contractual liability, as Directive 85/374/EEC can only cover damage caused by manufacturing defects of robot, provided that the victim will be able to prove the actual damage, the defect of the product and the causal link between the damage and the defect. On the other hand, the damage caused by next-generation robots does not quite fall within the scope of this Directive, as such robots may be equipped with adaptive and learning abilities that cause a certain degree of unpredictability in their behaviour. Therefore, these robots will learn independently from their own experience and interact with the environment in a unique and unpredictable way. Accordingly, the rules of strict liability or liability without fault will not be able to resolve such a situation[1].

There is also no consensus among researchers on the principles of responsibility for the use of AI. For example, O.M. Vinnyk proposes, firstly, to legalise a person who uses AI by registering in the relevant register. Secondly, to hold accountable for damage caused by AI, to carry out: "a) for the use of AI – by analogy with the responsibility for the use of a source of increased danger, because all the consequences of AI use are difficult to predict, as well as ensuring 100% control over it; b) for unfair (in violation of the law, rights and legitimate interests of users/consumers) use of the site for business activities, responsibility should be assigned: as a general rule – the owner or person using the site for business activities (if it can be identified); if the participants of the virtual enterprise use one electronic resource/site, the principle of responsibility should be determined in the agreement on joint activities concluded between them and, accordingly, on the joint use of the site (the actual user defined in the agreement with the site owner), and in the absence of such agreement – the responsibility should rest with the owner of the site or its actual user, registered in the relevant register" [23].

[1] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. (2017, February). Retrieved from https://www.europarl.europa.eu/doceo/document/TA-8-2017-0051_EN.html?redirect.

Unfortunately, the problem of determining the subject of responsibility was left without attention in the case when, by analogy, responsibility for the use of a source of increased danger is applied. According to the legislation of Ukraine, compensation for damage caused by a source of increased danger is entrusted to a person who on the appropriate legal basis (ownership rights, other property rights, contract, lease, etc.) owns a vehicle, mechanism, other object, the use, storage or the content of which creates an increased danger (Part 2 of Article 1187 of the Civil Code of Ukraine)[1]. It is also allowed to impose the obligation to compensate for such damage to several entities in cases of misappropriation of a vehicle, mechanism, other object and due to the interaction of several sources of increased danger (Part 4 of Article 1187, Article 1188 of the Civil Code of Ukraine)[2]. And according to Article 5:101 of Principles of European Tort Law[3], strict liability for damage caused by activities that are highly dangerous is borne by the person whose activities are associated with increased danger. In this case, the activity that creates an increased danger to others is recognised as such activity that: a) is characterised by the infliction of alleged and significant damage, regardless of whether the necessary precautions were taken to prevent it or not and b) is not generally accepted. This raises the question of the subject of responsibility for the harm caused by AI.

European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics[4] notes that A. Azimov's laws (1) a robot cannot cause harm to a person, or by its inaction allow a person to be harmed; 2) the robot must obey human orders, except for those that contradict the first law; 3) the robot must protect itself, unless its actions do not contradict the first and second laws. The author later added a zero law, according to which a robot cannot harm humanity or by its inaction allow humanity to be harmed) should be considered as aimed at engineers, manufacturers, and operators of robots, including robots, which are designed for built-in autonomy and self-learning, because these laws cannot be converted into machine code. Accordingly, in order for those involved in the development and commercialisation of AI programmes to develop safety and ethics from the outset, they must be prepared to take legal responsibility for the quality of the technology they produce. That is, it is the responsibility of engineers, manufacturers, and operators of robots. However, as noted by D.D. Pozova, the Resolution does not provide an unambiguous answer to the question of defining the range of responsible persons and does not contain a clearly defined concept of responsibility, setting out only the basic principles according to which such a concept should be developed and the factors to be taken into account [28].

It is considered that the determination of the person who should be liable for the damage caused by AI should be made on the basis of who caused the action or inaction of the AI, as a result of which the damage was caused. Thus, if the cause of the damage was, for example, an error in the programme code, and this, according to experts in the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.
[2] *Ibidem*, 2003.
[3] Principles of European Tort Law: Text and Commentary. (2005, January). Retrived from https://www.researchgate.net/publication/321568630_Principles_of_European_Tort_Law_Text_and_Commentary.
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field of IT, occurs in the vast majority of cases, the responsibility for causing damage to AI should rest with software developers. But, aware of the existing risks, developers try to shift responsibility to users through a license agreement with the end user. The standard end user license agreement contains general terms, terms of use under the agreement, license to use and permissible use of the service, user guarantees under the agreement, license to use user content, restrictions on use. Without compromising the importance of such a license agreement, as it can be an effective means of protecting software developers from unscrupulous users, it is advisable to pay attention to a number of issues related to such an agreement. First, it is common among users to automatically agree to such a license agreement, when in order to install and use a particular programme, the user ticks in the "I agree" window, mostly without reading the terms of the agreement. This is, of course, the responsibility of the users themselves. However, perhaps by analogy with credit relationships, software developers need to pay special attention to their responsibilities and the consequences of non-compliance. Secondly, quite often the agreement states that it can be changed by the administration without any special notice to the user. In this case, the new version of the agreement, as a rule, comes into force from the moment of its placement on the website of the administration or bringing to the notice of the user in another convenient form, unless otherwise provided by the new version of the agreement. This, in turn, allows developers to shift responsibility for damage caused by the software to users at any time by amending the license agreement with the end user. In this case, it is advisable to establish the obligation of the developer to prove the fact of personal information to the user about changes in the license agreement. That is, the user must still receive a special message stating what exactly changes in the license agreement or use of the programme.

Based on the above, it is appropriate to support the position that the determination of the person who will be liable for the damage caused to AI depends on how autonomous such AI was. In other words, civil liability should be carried out in accordance with and in proportion to the actual level of instructions given in accordance with the degree of autonomy of the AI. Non-autonomous or partially autonomous robots should be considered as tools used by the subjects of legal relations – manufacturer, owner, software developer, user, public authority, military commander, etc. Accordingly, in this case, the responsibility for the damage or negative consequences should be placed in proportion to the developers of robots, their owners and users [29].

It is also worth agreeing with the opinion expressed in the scientific literature that compensation for damage caused by AI, according to the rules of compensation for damage caused by a source of increased danger, does not quite correspond to the essence of such a relationship [30]. It should be borne in mind that when it comes to compensation for damage caused by a source of increased danger, the infliction of such damage occurs in the case of using a particular vehicle, mechanism, equipment, which, although can get out of control, but not able to take autonomous decision. Instead, the feature of AI is its ability to make decisions independently. Consequently, the point is not in its uncontrollability, but also the unpredictability of its actions and causing harm. Accordingly, since such damage is unpredictable, its infliction is not covered by the concept of activities that pose an increased danger to others, in the sense of the Principles of European Tort Law. Therefore, in answering the question whether the damage caused by AI can be compensated according to the rules of compensation for damage caused by

a source of increased danger, it is necessary to determine not only the person who caused the action or inaction of AI, which resulted in damage, but also whether such damage is predictable. If such damage was not predictable, then the application of these rules does not seem possible.

CONCLUSIONS

Total digitalisation of all spheres of human life, the use of innovative digital technologies has a number of advantages: reduced costs, resources, time for information processing, rapid analysis of large amounts of data, increased productivity, more accurate forecasts in various spheres of life and more. This stimulates the more rapid development of such technologies, which results in the improvement of artificial intelligence. However, along with the undeniable advantages of such technologies, it is necessary to state a number of risks associated with the use of artificial intelligence. In particular, the uncertainty of the place of artificial intelligence in the structure of civil law raises the problem of determining the person responsible for the damage caused by artificial intelligence. Gaps in the legal regulation of the use of digital technologies, ensuring the protection of the rights and legitimate interests of individuals and legal entities from violations with the use of digital technologies and holding accountable for the harm caused by the use of digital technologies, creates the impossibility of compensation for damage, since the current rules cannot always be applied. Accordingly, the solution of these problems lies in the modernisation of current legislation in the following areas: 1) determining the status of electronic persons and outlining their legal personality, the moment of its occurrence and termination, solving the problem of identification of robots and artificial intelligence; 2) addressing the issue of liability for damage caused by artificial intelligence, based on how autonomous such artificial intelligence was; 3) the rules for compensation for damage caused by a source of increased danger to relations with the use of digital technologies, based on whether the damage caused by the action or inaction of artificial intelligence was predictable.

At the same time, it is also interesting for further research to study the feasibility of introducing into the current legislation rules on compensation for damage caused by artificial intelligence, as a kind of special tort and the use of insurance to minimise the risks of artificial intelligence damage.

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Suggested Citation: Velykanova, M.M. (2020). Artificial intelligence: legal problems and risks. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 185-198.

Submitted: 02/05/2020
Revised: 23/07/2020
Accepted: 09/12/2020

УДК: 341.231.14
DOI: 10.37635/jnalsu.27(4).2020.199-213

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АКТУАЛЬНІ ПРОБЛЕМИ ЗАХИСТУ ПРАВ ЛЮДИНИ, ЩО ПЕРЕБУВАЄ У КОНФЛІКТІ ЗІ ЗАКОНОМ В УКРАЇНІ

Анотація: *Відповідно до статті 3 Конституції України: «Людина, її життя і здоров'я, честь і гідність, недоторканність і безпека визнаються в Україні найвищою соціальною цінністю». Такий підхід не є виключенням і вже давно відображений у законодавстві кожної демократичної та розвиненої європейської країни. Сьогодні права і свободи людини та їх гарантії визначають основний зміст і спрямованість дій держави, що повністю відповідає перед людиною за свою діяльність та має своїм головним обов'язком утвердження і забезпечення прав і свобод людини. Проте не зважаючи на усі зусилля з боку держав, у тому числі й України, щодо профілактики порушення прав людини і громадянина, їх кількість з кожним роком тільки зростає. Особливо гостро постає питання захисту вразливих верств населення, однією з яких є особи засуджені та узяті під варту. У статті робиться висновок про удосконалення інституту досудової доповіді, для призначення відповідного покарання. Доводиться потреба у постійному забезпеченні кваліфікованого соціального та психологічного супроводу засуджених, як під час заходів наглядової пробації так і на етапі пенітенціарної пробації. Наголошується на створенні системи патронажу над засудженими, що звільнилися умовно достроково протягом одного року після звільнення. Здійснення контролю за їх поведінкою, перевірка соціально побутових умов, психологічно та емоційного станів є важливими складовими у механізмі застосування апробаційних програм. Саме тому не викликає сумнівів актуальність проведення повного та ґрунтовного наукового дослідження питання захисту прав людини, що перебуває у конфлікті з законом, крізь призму кількісної та якісної складової скарг, що надійшли до компетентних органів української держави, з метою встановлення основних причин виникнення порушень, та забезпечення їх профілактики у майбутньому.*

Ключові слова: робота з засудженими, альтернативні покарання, механізм попередження порушень, система патронажу, умови тримання засуджених.

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CURRENT ISSUES OF PROTECTION OF HUMAN RIGHTS IN CONFLICT WITH THE LAW IN UKRAINE

Abstract. *According to Article 3 of the Constitution of Ukraine: "A person, their life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value". This approach is not exceptional and has long been reflected in the legislation of every democratic and developed European country. Nowadays, human rights and freedoms and their*

guarantees determine the basic content and direction of state action, which is fully responsible to human for its activities and has its main duty to establish and ensure human rights and freedoms. However, despite all the efforts of states, including Ukraine, to prevent violations of human and civil rights, their number is growing every year. The issue of protection of vulnerable groups, one of which is convicted and taken into custody, is particularly acute. The study concludes on the improvement of the institution of pre-trial report, for the imposition of appropriate punishment. There is a need for constant provision of qualified social and psychological support for convicts, both during supervisory probation and at the stage of penitentiary probation. Emphasis is placed on the establishment of a system of patronage over convicts released on parole within one year after release. Monitoring their behaviour, checking social conditions, psychological and emotional states are important components in the mechanism of application of approbation programmes. That is why there is no doubt regarding the urgency of conducting a full and thorough scientific study of the protection of human rights in conflict with the law, through the lens of quantitative and qualitative components of complaints received by the competent authorities of the Ukrainian state in order to establish the main causes of violations and ensure their prevention in the future.

Keywords: work with convicts, alternative punishments, mechanism of prevention of violations, system of patronage, conditions of detention of convicts.

INTRODUCTION

The allegation that there is a violation of the rights of citizens in Ukraine, unfortunately, is not new or unfounded, and is confirmed by statistics from both governmental and international organisations. Thus, in 2019, Ukraine became one of the three leading countries violating the Convention on Human Rights. At the same time, the Strasbourg court found 86 violations of the European Convention on Human Rights in Ukraine. According to this indicator, Ukraine ranked third among the member states of the Council of Europe. The President of the European Court Guido Raimondi noted that Russia often did not abide by the international agreement – 238 times, the second place was taken by Turkey, where 140 violations of the Convention were registered. In Ukraine, violations of the "right to liberty and security" have been legally recognised 45 times. In particular, this applies to illegal detentions of citizens. In second place – unjustifiably long court proceedings – 41 decisions. The third place was taken by violations related to ineffective legal protection in national courts. In some decisions, the ECtHR found violations under several articles of the Convention.

But even such significant numbers are ambiguous compared to the actual number of cases pending before the European Court of Human Rights in which Ukraine is the defendant. Thus, in Strasbourg, Guido Raimondi said that as of January 1, 2019, the ECtHR was considering approximately 7,100 complaints, which is the fourth indicator among the member states of the Council of Europe. In the top three – Turkey (7,500), Russia (7,750), and Romania (9,900). A year ago, Ukraine was in first place by this indicator, then the Court was considering more than 18,000 complaints against it. However, such a sharp decline is due to the unprecedented decision in the case of *Burmych and Others v. Ukraine*, under which the ECtHR struck out more than 12,000 complaints against Ukraine on systematic non-compliance with national court decisions, referring them to the Committee of Ministers. Thus, the ECtHR did not improve its decision, but rather worsened the situation for those who turned to it for help. The situation in Ukraine currently remains unresolved, as thousands of citizens, having fallen

prey to Ukraine's breaches of its obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms regarding the failure to enforce judgments by national courts, appealed to the European Court of Human Rights with the last hope for justice. In turn, the Committee of Ministers of the Council of Europe, which oversees the implementation of ECtHR decisions, also does not in fact have an effective mechanism for resolving such issues, and all previous recommendations of this body have not been properly implemented. Therefore, nowadays one can only expect action from the authorities and hope that the decision of the Grand Chamber will become a wake-up call for urgent action. Thus, if one does not take into consideration the group "Burmych and Others", the number of other cases in the ECtHR has only grown [1].

This situation is very deplorable and requires swift action on the part of all stakeholders. Unfortunately, modern Ukrainian society approaches the consideration of complaints only from the inefficiency of the activities of certain bodies, without considering this issue on the merits. It is important not only to record violations and bring the perpetrators to justice, but also to establish the causes and conditions of such violations, assess their subjectivity or objectivity, and try to develop an effective mechanism for legislative prevention of such conditions in the future. Scholars such as A. Mowbray [2], J. Dute [3], and V. Veebel [4; 5], C. Altafin [6], Y. Orlov [7], A. Vilkova, E. Timofeeva [8], V. Todeschini [9], C. Nirala [10], and K. Onishi [11] are studying the relevance of the problem of protecting human rights in conflict with the law. However, nowadays the scientific development of this issue in the context of Ukraine is not carried out. Firstly, due to the closed nature of some data or the lack of a mechanism for their collection, which will not allow to draw the right conclusions. Secondly, because of the unwillingness to recognise the imperfections of the system, which in fact should be the first step towards solving this problem. Therefore, to introduce an effective mechanism for preventing human rights violations in Ukraine, it is necessary to develop an effective system of measures to prevent future human rights violations, in accordance with the requirements of society, world standards and current trends, based on consistent scientific research. This situation determines the relevance of the subject matter, and the results can be used not only to prevent violations in the future, but also to assess the law enforcement system of Ukraine and increase its efficiency, improve legislation, develop new preventive mechanisms, thereby promoting faster and more effective development of Ukraine as a legal and democratic state.

1. MATERIALS AND METHODS

In accordance with the set goals and objectives, the author used a set of both general and special methods of scientific cognition, the use of which allowed to comprehensively analyse the scope of issues related to the protection of human rights, especially for convicts as a separate, more vulnerable category. The study includes international treaties that define the general principles of sentencing, the Constitution of Ukraine, the Criminal Code of Ukraine, and the Criminal Law Enforcement Code of Ukraine[1], current laws and

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text; Criminal Code of Ukraine. (2001, April). Retrieved from

regulations, draft regulations governing relations in the field of enforcement and serving of criminal sentences through the lens of ensuring rights and freedoms of convicts and detainees, and the case law of the European Court of Human Rights. Methods of comparative law and documentary analysis were used to identify shortcomings in the legislation that guarantee the protection of the rights of convicts and detainees in comparison with the actual state of affairs. Separately, with the help of this method, the historical periods of legislative initiative and their implementation in modern realities were analysed.

Due to the statistical method, it was possible to process statistical data on the number of appeals for protection of violated rights by convicts, the impact of alternative punishments on crime trends was analysed and, based on statistics, the positive impact of modern technologies on correction and resocialisation was substantiated. The method of statistical analysis allowed to investigate the results of surveys and questionnaires for each section, to trace the relationship between statistics from diverse groups, such as the impact of ill-considered compensatory mechanism on crime, etc., and legal-comparative method allowed to compare them by certain criteria. The prognostic method was used to predict the legal regulation of this issue in the future. In addition, the method of legal forecasting was used, which formed the possibility of continuing the study of this subject based on previously obtained results, and as a consequence, the implementation of international norms and more effective enforcement of the rights of convicts and detainees.

2. RESULTS AND DISCUSSION

2.1 Analysis of factors related to human and civil rights violations

A study of human and civil rights violations in Ukraine was conducted by means of understanding the problematic issues of human rights violations in relation to one of the most vulnerable categories – convicts. According to the statistics of the Secretariat of the Ukrainian Parliament's Commissioner for Human Rights, as of mid-2019, 1,765 convicts had filed a complaint with the Commissioner alleging violations of their rights and freedoms. This figure is 7.5% of the total number of cases received by the Commissioner. More often than convicts, only representatives in the interests of the family turned to the Commissioner for the protection of violated rights – 1,787 persons and 2,007 pensioners. However, the total number of pensioners in Ukraine is 11.5 million, of which only 2,000 thousand applied to the Commissioner, and out of 57,000 thousand convicts 1,765 for comparison in percentage is 0.018% and 3.09% respectively. This suggests that it is often convicts who need protection of their rights and freedoms the most. This is caused by several other factors, the analysis and understanding of which will form the basis of this study [12].

Firstly, it is a negative and outdated legal legacy of the past, which is still present in the penitentiary system of Ukraine. As unfortunate as it may sound, the transformation of the vector of the purpose of punishment towards the correction of behaviour and resocialisation of convicts and the improvement and development of the probation

https://zakon.rada.gov.ua/laws/show/2341-14#Text; Criminal Law Enforcement Code of Ukraine. (2003, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1129-15#Text

system in general, and especially the penitentiary system, is selective and too slow. Few Ukrainian citizens are aware that criminal law enforcement law and the policy of enforcement of punishments, including those not related to imprisonment and further rehabilitation of persons serving sentences, cease to be exclusively in the legal plane and the sphere of responsibility of executive bodies, which implement the national policy on the enforcement of punishments and probation, and shift towards the legal and social plane and become the responsibility of society as a whole. Therewith, in Ukrainian society, there is an increasing demand for punishment (punitive policy), the safe confinement of criminals behind high fences, without the desire to realise that after serving their sentence, they will return to society, and without proper correctional and rehabilitation work, effective penitentiary probation, support from local communities, they will not be prepared for law-abiding behaviour. And under the influence of life circumstances such as lack of housing, work, and livelihood, they will return to the only thing they know best – committing crimes.

The average citizen still believes that a convict can be corrected only through punishment, pain, and suffering. Therefore, there are constant disputes between the scientific community, civil society, and practitioners over fundamental issues. In the course of this study, carried out based on the Committee of the Verkhovna Rada of Ukraine on Matters of Legislative Support of Law Enforcement and the Ministry of Justice of Ukraine, in the working group on penitentiary reform, to study the feasibility of solving the issue of increasing the maximum penalty for imprisonment for particularly serious crimes, it was found that anti-humanist sentiments currently prevail in society. Upon answering the questions, the majority of respondents slightly distorted the notion of the purpose of punishment by putting punishment in itself in the first place (59.6%). In addition, according to them (almost 85% of respondents), it is achieved by placing a person in penitentiary institutions for as long as possible, which is not really the main purpose of punishment and is carried out solely to isolate socially dangerous elements until their resocialisation in order to ensure the security of society. 62.3% of respondents generally believe that the maximum limit of imprisonment for a certain period of 15 years established by the Criminal Code of Ukraine[1] is insufficient, not taking into account the global trend and repeated studies confirming that the longer a person is held imprisoned, the more difficult it becomes to maintain socially significant ties and return to a law-abiding lifestyle. In addition, even despite the active punitive policy of the state, the crime rate in Ukraine, especially recidivism, is constantly growing. Thus, analysing the data for almost 8 years (from 2005 to November 20, 2012), one can trace the following trend: in the period from 2005 to 2009, the level of crimes committed by persons who previously committed a crime was stable, and the share ranged from 24% to 26.6%. Since 2010, there has been a considerable increase in the level of these crimes: in 2010 – 96,830 offences (29.8%); in 2011 – 147,585 offences (46.2%); in 2012 – 138,310 offences (48.8%). If we compare 2005 and 2012, the absolute number of criminal offences has more than doubled. Since 2013, criminal statistics have been kept by the Prosecutor General's Office of Ukraine, whose official statistical reports do not contain

[1] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text

information on the number of crimes and persons who had an unexpunged conviction or unresolved criminal record (i.e., recidivism in its legal sense) at the time of committing a new crimeinal offence, but only indicates the number of offences committed by persons who previously committed them: in 2013 – 62,625 (11.1%); in 2014 – 63,746 (12%); in 2015 – 58,242 (10.3%); in 2016 – 50,510 (8.5%); in 2017 – 60,509 (11.6%). Only in 2018, the overall crime rate decreased by 8%, and accordingly the level of recidivism, which is directly related to the increase in the use of alternative punishments and the active work of the probation service [13]. This situation encourages the improvement of the main vector of the national internal policy in the field of crime control – the criminal law enforcement policy of the state. It should be stable, which does not prevent it from undergoing certain changes in connection with the adjustment of the state and under the influence of other factors, the development of which is presented and the logical conclusion of which would be manifested in conceptual foundations of reforming the state penitentiary service and probation with the ways of their implementation.

Secondly, the reform and reorganisation of both the approach to the execution of punishment and the service as a whole requires the legislator to radically change the system of existing legislation: bringing it into line with international standards, its systematisation, unification. At present, the legislation of Ukraine contains outdated provisions and concepts, there are legal conflicts on a number of issues, and some issues are not regulated at all.

The legislator attempted to address these issues in the process of constant reform of the penitentiary service; therefore, it is proposed to pay attention to the stages of reforming the penitentiary system based on targeted programmes and/or the concept of reforming (developing) the system, including the following programmes, adopted since the early 1990s: "Priority measures to ensure the life support in correctional labour institutions and medical and labour dispensaries in the transition to market relations, approved by the resolution No. 22 of the Council of Ministers of the Ukrainian SSR of February 5, 1991"[1]; "The main directions of reforming the penitentiary system in the Ukrainian SSR, approved by the resolution No. 88 of the Council of Ministers of the USSR of July 11, 1991"[2]; "The programme for bringing the conditions of detention of convicts serving sentences in places of deprivation of liberty, as well as persons held in pre-trial detention centres and medical and labour dispensaries, in accordance with international standards, approved by the Resolution of Cabinet of Ministers of Ukraine No. 31 dated January 26, 1994"[3]; "Priority measures to ensure the activities of the penitentiary system and state support for its further reform, approved by the resolution of the Cabinet of Ministers of Ukraine No. 73 of January 18, 2000"; "Programme to

[1] Resolution No 22 “On priority measures to ensure the viability of correctional facilities and medical and occupational health centers in the transition to market relations”. (1991, February). Retrieved from https://zakon.rada.gov.ua/laws/show/22-91-п#Text

[2] Resolution No 88 “On the main directions of reform of the penitentiary system in the Ukrainian SSR”. (1991, July). Retrieved from https://zakon.rada.gov.ua/laws/show/88a-91-п#Text

[3] Resolution No 31 “On the Program of bringing the conditions of detention of convicts serving sentences in places of imprisonment, as well as persons held in pre-trial detention centers and medical-labor prophylactics, in accordance with international standards”. (1994, January). Retrieved from https://zakon.rada.gov.ua/laws/show/31-94-п#Text.

strengthen the material base of bodies and institutions of the penitentiary system for 2000-2004, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 986 of June 20, 2000"[1]; "Programme for further reform and state support of the penitentiary system for 2002-2005, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 167 of February 15, 2002"[2]; "Concept of reforming the State Penitentiary Service of Ukraine (approved by the Decree of the President of Ukraine No. 401 of April 25, 2008)"[3]; "National programme to improve the conditions of detention of convicts and detainees for 2006-2010, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1090 dated August 3, 2006"[4].

However, all these programme documents were not supported economically, as a result of which they were implemented only partially, mainly at the expense of the internal reserves of the penitentiary system or remained non-performed. In particular, according to the National Audit Office, the last of the mentioned national programmes was financed only by 6% of the need. In pursuance of the Concept of National Policy in the Sphere of Reforming the State Penitentiary Service of Ukraine (approved by the Decree of the President of Ukraine No. 631 of November 8, 2012), the Cabinet of Ministers of Ukraine No. 345 of April 29, 2013[5] approved the National Target Programme for Reforming the State Penitentiary Service for 2013–2017 with a projected amount of funding amounting to 6 billion UAH. However, the Government of Ukraine prematurely terminated the implementation of this programme due to the need to save budget funds (Resolution of the Cabinet of Ministers of Ukraine No. 71 of March 5, 2014[6]). As a result of the amendments to the Law of Ukraine "On the State Penitentiary Service of Ukraine"[7] made in 2016, the Minister of Justice of Ukraine actually became the "chief penitentiary servant" in the country. The structural subdivisions that managed and ensured the activities of penitentiary bodies and institutions "dissolved" in the central office of the Ministry, which led to an imbalance in the management system of the department. Proceeding from this, the Ministry of Justice of Ukraine initiated the preparation of a new Concept of reforming (development) of the penitentiary system of Ukraine, which was approved by the Resolution of the Cabinet of Ministers of Ukraine

[1] Resolution No 986 "On measures to strengthen the material base of bodies and institutions of the penitentiary system for 2000-2004". (2000, June). Retrieved from https://zakon.rada.gov.ua/laws/show/986-2000-п#Text

[2] Resolution No 167 "On approval of the program of further reform and state support of the penitentiary system for 2002-2005". (2002, February). Retrieved from https://zakon.rada.gov.ua/laws/show/167-2002-п#Text

[3] Decree of The President of Ukraine "On the Concept of Reforming the State Penitentiary Service of Ukraine" (2008, April). Retrieved from https://zakon.rada.gov.ua/laws/show/401/2008#Text

[4] Resolution No. 1090 "On approval of the state program for improving the conditions of detention of convicts and detainees for 2006-2010". (2006, August). Retrieved from https://zakon.rada.gov.ua/laws/show/1090-2006-п#Text

[5] Resolution No 345 "On approval of the State target program for reforming the State Penitentiary Service for 2013-2017". (2013, April). Retrieved from https://zakon.rada.gov.ua/laws/show/345-2013-п#Text

[6] Resolution No 71 "Some issues of optimization of state target programs and national projects, budget savings and recognition as repealed of some acts of the Cabinet of Ministers of Ukraine". (2014, March). Retrieved from https://zakon.rada.gov.ua/laws/show/71-2014-п#Text

[7] Law of Ukraine No 2713-IV "On the State Penitentiary Service of Ukraine". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2713-15#Text

No. 654-r dated September 13, 2017[1] (but at the same time the Concept of national policy in the field of reforming the State Penitentiary Service of Ukraine, approved by the Decree of the President of Ukraine No. 631 dated November 8, 2012[2] remained in force). In accordance with the content of this concept, the Resolution of the Cabinet of Ministers of Ukraine No. 709 dated September 13, 2017[3] approved the decision to establish the Administration of the State Penitentiary Service of Ukraine as an interregional territorial body of the Ministry of Justice of the highest level, which again concentrates powers to organise protection and regime, criminal intelligence operations of law enforcement bodies, penitentiary institutions, pre-trial detention centres, and the probation service, which deals with the implementation of non-custodial sentences and post-adaptation of released persons [14]. And in accordance with the latest innovations, the Resolution of the Cabinet of Ministers of Ukraine No. 20 dated 24.01.2020[4] liquidated the Administration of the State Criminal Law Enforcement Service of Ukraine and established a legal entity under public law interregional territorial body of the Ministry of Justice – Department for the Enforcement of Criminal Sentences, which further emphasises the ephemerality and inconsistency of reforms. Processes of optimisation (conservation and liquidation) of penitentiary institutions are constantly underway, which is not effective.

Today's optimisation is conditioned by a decrease in the number of convicts. Thus, in 2010, there were 154,027 convicts; in 2011 – 54,029; in 2012 – 147,112; in 2013 – 126,935; in 2014 – 73,431; in 2015 – 69,997; in 2016 – 60,399; in 2017 – 57,100, but this optimisation does not correspond to modern realities. Instead, it creates additional costs for the conservation process, for the transfer of convicts, eliminates human resources, and is based solely on the present without taking into account the future, that the number of convicts may increase, and the recovery process is much more complex and lengthier than the liquidation process. Special attention should be paid to the omitted principle of territoriality when determining the place of punishment, which is relevant in the international arena. For example, the European Penitentiary (Prison) Rules in Recommendation Rec(2003)23[5] state that those sentenced to deprivation of liberty should be accommodated, as far as possible, in penal institutions located close to the places where their families or close relatives live. At present, Ukraine exercises a completely different practice, which can be illustrated by the case of the European Court

[1] Order No 654-r "On approval of the Concept of reforming (development) of the penitentiary system of Ukraine". (2017, September). Retrieved from https://zakon.rada.gov.ua/laws/show/654-2017-p#Text

[2] Decree of the President of Ukraine "On the Concept of State Policy in the Sphere of Reforming the State Penitentiary Service of Ukraine". (2017, September). Retrieved from https://zakon.rada.gov.ua/laws/show/631/2012#Text

[3] Resolution No 709 "On the establishment of an interregional territorial body of the Ministry of Justice for the execution of criminal penalties". (2017, September). Retrieved from https://zakon.rada.gov.ua/laws/show/709-2017-п#Text

[4] Resolution No 20 "Some issues of territorial bodies of the Ministry of Justice". (2020, January). Retrieved from https://zakon.rada.gov.ua/laws/show/20-2020-п#Text

[5] Recommendation N Rec (2003) 23 of the Committee of Ministers of the Council of Europe to member states "On the implementation of the execution of life sentences and other long terms of imprisonment by administrations of places of deprivation of liberty". (2003). Retrieved from https://zakon.rada.gov.ua/laws/show/994_848

of Human Rights "*Vintman v. Ukraine*", which declared unlawful the transfer of a convict to a colony located about 700 kilometres from his place of residence, and subsequent transfer to an even more remote colony, located about 1,000 kilometres away [15].

Thirdly, the Ukrainian legislation in no way enshrines the possibility, and most importantly the urgent need for full digitalisation of the penitentiary system, the introduction of the latest information technologies and technical means. Full digitalisation of bodies and institutions of the State Penitentiary Service of Ukraine and probation is required not only technically, but also as a means of resocialisation of the convict, and especially to maintain the latter's contact with the outside world, the opportunity to study or even work by means specified below.

1. Introduction of a centralised for all penitentiary institutions Internet network for monitoring the movement of convicts (system "electronic bracelet – server"), IP-phones, electronic plastic cards for convicts, and staff with different levels of access, chest video recorders, etc. All this will help improve the process of general management of the State Criminal Law Enforcement Service of Ukraine. Introduction of a unified system of internal and external electronic document management.

2. Continuation of modernisation of engineering infrastructure and engineering and technical means of protection, introduction of modern technologies to ensure the safety of convicts and staff, prevention of crimes in prisons and video monitoring, creation of automated information and telecommunication systems, introduction of a common electronic database of convicts.

3. Increasing the possibility of contacts of prisoners convicted with the outside world, if it does not violate their legitimate interests and rights and does not contradict progressive international law, not only through direct contact, but for example, as additional forms, to conduct online meetings with relatives and friends, if they do not have the opportunity to come on a date in person. In this aspect, Ukraine is a fairly progressive state, making amendments to Article 110 of the Penal Code in 2014, allowing convicts to use the global Internet, including Skype to communicate with the outside world (mainly relatives and friends). A year after the adoption of this rule, the right to use the global Internet had already been enjoyed by more than 2,300 convicts [16]. Unfortunately, to date, official statistics on this issue have not been published anywhere. However, according to statistics summarised by the Institute of Criminal Law Enforcement Service from April 2017 by Order of the Deputy Minister of Justice of Ukraine No. 109/23/32-17 dated 14.04.2017, at the end of 2017, the number of convicts who used the Internet amounted to 31,544 persons, and as of the end of October 2018 – 23,009 persons. In this state of affairs, positive changes in the process of re-socialisation of convicts who had access to the Internet were noted by both employees of institutions and the convicts themselves. And in some European countries today, there is even a practice of re-socialisation through the convicts' conduct of their personal blogs under the supervision of the administration or broadcasting videos that do not contain negative content and comply with moral standards (such as a dance flash mob of 1,500 Philippine convicts in memory of Michael Jackson), and as a result change the negative attitude towards convicts by society for the better [17].

2.2 Analysis of the legislation on prevention of violation of the rights and freedoms of convicts

However, the main issue that needs to be addressed today is to reconsider the introduction of a law that could prevent violations of the rights and freedoms of convicts. This was to be the Law of Ukraine "On Preventive and Compensatory Measures in Connection with Torture, Inhumane or Degrading Treatment or Punishment of Convicts and Detainees, and Introduction of the Institution of Penitentiary Judges"[1], the draft of which was submitted for consideration to the Verkhovna Rada of Ukraine in July 2016, but at the end of 2017 it was withdrawn from consideration without replacement or at least the possibility of reconsideration after amendments and modifications. This draft law was designed to establish preventive and compensatory measures in connection with torture, inhumane or degrading treatment or punishment of convicted and detained persons, as well as to establish the subjects and procedures for taking such measures as in the leading European countries such as Spain, France, Poland, etc. The very need for appropriate preventive and compensatory measures in Ukraine is required by its obligations to the United Nations and the Council of Europe. However, the draft was withdrawn from consideration and it is extremely difficult to answer when it will be able to attract the attention of the legislator again. Between 2012 and the first half of 2019, the European Court of Human Rights issued 79 final judgments on violations of the rights of convicts and detainees, for which Ukraine must pay the applicants monetary compensation (reimbursement) totalling 1,467,727 EUR.

Instead, the legislator, under the guise of a compensatory mechanism, adopted the infamous Savchenko Law, which, on the one hand, by recalculating the period of detention in a pre-trial detention centre, would compensate the persons for the suffering they experienced during the pre-trial investigation in unsatisfactory conditions of detention in the detention centre. On the other hand, the Law of Ukraine "On amendments to the Criminal Code of Ukraine regarding the improvement of the procedure for the court's admission of the term of preliminary detention to the term of punishment"[2] (in the media it is called "the Savchenko Law", according to the name of the author – MP Nadiia Savchenko) entered into force on 24.12.2015.

The Penitentiary Service of Ukraine previously informed Transparency International Ukraine, which has only general data on the number of convicts released from prisons due to these changes in the law. Thus, according to the Penitentiary Service of Ukraine, from December 26, 2015 to June 3, 2016, 6,420 people were released from prison. At the same time, 38,933 convicts were sentenced to imprisonment. But government agencies declined to elaborate – to date, it was not known how many were released under the Savchenko Law for murder, rape, or other crimes. Relevant information is not provided by the Judicial Administration, the Prosecutor General's Office, or the Penitentiary Service. Transparency International Ukraine and the First

[1] Draft Law of Ukraine “On Preventive and Compensatory Measures in Relation to Torture, Inhuman or Degrading Treatment or Punishment of Convicts and Detainees and the Introduction of the Institution of Penitentiary Judges”. (2016). Retrieved from https://ips.ligazakon.net/document/XH3T400Q

[2] Law Of Ukraine “On Amendments to the Criminal Code of Ukraine to Improve the Procedure for Enrollment by a Court of the Term of Pre-Trial Imprisonment”. (2015, November). Retrieved from https://zakon.rada.gov.ua/laws/show/838-19#Text

Instance website obtained this data through their own analysis of the court register. The study covers the period from December 2015 through August 2016. According to the data obtained, during this time about 900 people were released who were convicted of premeditated murder (Article 115 of the Criminal Code of Ukraine[1]), premeditated murder in a state of great emotional distress (Article 116 of the Criminal Code of Ukraine), premeditated murder of the mother of her new-born child, premeditated murder in excess of the necessary self-defence (Article 118 of the Criminal Code of Ukraine). According to the verdicts, the average term of imprisonment for these persons was about 11 years (10 years and 10 months). After the recalculation, their time behind bars decreased on average by almost two years (1 year and 8 months). According to the Ministry of Justice of Ukraine, 10% of persons released under the Savchenko Law committed a new crime and returned to prison less than a year after release, and in 2016, compared to the year before last, robberies increased by 20% [18]. Therefore, the legislator should pay more attention to the development of a truly compensatory mechanism, rather than be influenced by criminal subcultures and only imitate this kind of legislative initiative. Most of the convicts' complaints are related to poor conditions of detention, inadequate quality of food and medical care.

An example is the case of Honcharuk Vitalii Pavlovych v. Ukraine. During the transfer between the colonies, the applicant was not provided with antiretroviral therapy (ART) for about 4 months without justification or good reason. This violated his right to adequate medical care. A complaint under Article 3 of the Convention has already been lodged with the ECtHR, which has already been registered with the Court. Although in this case it is exceedingly difficult to prove the negative impact of a break in ART on the applicant's health, the issue will be more complex, as the problem of ART discontinuation is common and systemic. Although there are enough medicines in the country, in the case of uncommon ART regimens they have to be specially ordered to places of imprisonment. If the ART regimen is common, the breaks can only be explained by the negligence of doctors. "The result of the review of this complaint in the ECtHR should result in amendments to the legislation regarding the inadmissibility of interruption of ART and strengthening the responsibility of officials and doctors for unjustified failure to provide ART to convicts and detainees," said Mykhailo Tarakhkalo, director of the Strategic Affairs Centre at Ukrainian Helsinki Human Rights Union.

Considering the remarks of the ECtHR and other international partners in Ukraine, the reform of medical care of the State Criminal Law Enforcement Service of Ukraine was launched. Thus, by the Order of the Government No. 684-r of September 13, 2017[2], a new State Institution "Health Centre of the State Criminal Law Enforcement Service of Ukraine" was established. Such a reform allowed to remove the sphere of medical care for convicts from the subordination of the State Criminal Law Enforcement Service of Ukraine, which would allow to avoid conflicts or, on the contrary, corrupt relations between the administration of the colony and medical workers. In addition, other positive developments have taken place since the reform, such as for the first time in the history

[1] Criminal Codex of Ukraine. (2001). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text

[2] Order No 684-r "On the establishment of the state institution 'Health Center of the State Penitentiary Service of Ukraine'". (2017, September). Retrieved from https://zakon.rada.gov.ua/laws/show/684-2017-p#Text

of the penitentiary system with the assistance of the Administration of the State Criminal Law Enforcement Service of Ukraine, the USAID regional mission in Ukraine, which finances the PATH "For Life" project, the International Committee of the Red Cross in Ukraine, Non-Budgetary Fund "Coalition of HIV Service Organisations", the Public Health Alliance ICF, the FREE ZONE NGO, and the Public Health Centre of the Ministry of Health of Ukraine, the implementation of a pilot project on the introduction of substitution maintenance therapy in penitentiary institutions began based on the Buchanska penal colony. Fruitful work continues with the international organisation "Pompidou Group", which is one of the world leaders in the fight against drug addiction.

In addition, in 2018, purchases of medicines and medical equipment for the total amount of 295 million UAH were made. Aid received from international non-governmental partners amounted to 19 million UAH. The main donors of such aid were the Global Fund, the PATH organisation (USAID project "For Life"), and the International Committee of the Red Cross. Laboratory equipment, emergency medical care equipment for the diagnosis and treatment of cardiovascular diseases were received, medical personnel were trained, and medicines for the treatment of socially dangerous infections were provided by international partners. All this makes it possible in 2019-2020 to fully provide convicts with treatment for tuberculosis, HIV/AIDS, and to start selection for the treatment of patients with viral hepatitis C. The coverage of persons receiving regular antiretroviral therapy is 83%, which exceeds the indicators of the Ministry of Health of Ukraine for 2018 by 14%. Patients are separately provided with drugs for the treatment of tuberculosis at the level of 100%. Rapid tests were purchased to diagnose viral hepatitis C and B, which for the first time in the history of Ukraine will allow to test the penitentiary population [19].

In view of the above, a number of conclusions can be drawn, the consideration of which will allow to solve, or at least come closer to solving the outlined problems.

To prevent violations of human rights and promote the protection of human rights, especially those in conflict with the law in Ukraine, a number of measures should be taken, in particular:

– ensure adequate funding of the bodies and institutions of the State Criminal Law Enforcement Service of Ukraine and develop a proper scheme for the use of these funds;

– optimise the organisational and managerial structure of the State Penitentiary Service of Ukraine by creating modern multifunctional penitentiary institutions with block detention and a gradual transition to cell detention (except for minimum security institutions with facilitated detention conditions given the agricultural nature of the latter and the specifics of their management) based on the model of "dynamic security";

– eliminate high-security, medium-, and maximum-security penal colonies because they have not lived up to their purpose and are hardly used by prison administrations;

– improve the conditions of detention of convicts and detainees;

– create conditions of detention of convicts, aimed at individualising the serving of punishment and encouraging law-abiding behaviour (providing, depending on the behaviour and attitude towards labour, open short-term visits, individual use of TV and other appliances).

– change the existing system of serving a sentence where the differentiation of serving a sentence in places of imprisonment has been eliminated;

– involve the community, volunteers, social educators, coaches, etc. in the implementation of certain tasks related to the process of execution of sentences and the activities of the probation service; establish cooperation with local communities, subjects of social patronage, public, religious and non-governmental organisations in order to provide probation subjects with qualified assistance, work and housing after release;

– improve the healthcare systems of convicts and detainees, improve the quality of medical care;

– improve the prison management system and change the approach to production;

– reorganise the systems of professional training of convicts taking into account not only the interests of production of penitentiary institutions themselves, but also those of the labour market, as well as possible employment and continuing education after release;

– introduce the institution of a penitentiary judge to hear cases involving convicts only;

– introduce institutions of mediation and restorative justice that would promote the development of the convict's law-abiding behaviour, stimulate a life position that meets social norms, based on the restoration, preservation, and development of socially useful qualities and relationships, including with victims of crime, for further adaptation to independent living out of prison without the use of imprisonment;

– create a state fund to compensate victims of crimes in accordance with court rulings.

CONCLUSIONS

This study established the need to ensure the development and active implementation of alternative types of punishment that are not related to imprisonment, since the criminal subculture that a person meets while serving a sentence of imprisonment constitutes one of the main determinants that contributes to the becoming and development of a criminal and professional crime as the most dangerous manifestation. This is confirmed by the results of the study of professional crime because the connection with the criminal environment is carried out through it.

Notably, the places of imprisonment hold all the prerequisites for the creation, development, and maintenance of professional crime. In correctional colonies, criminals are grouped according to different criteria: common interests and views, acquaintances, connections out of prison, etc. The question "Do you think that places of imprisonment can help "improve your criminal skills?" was answered by the majority of respondents in the affirmative (76%), and only 24% of respondents gave a negative answer. Thus, the question "While serving your sentence, did you meet with elements of the criminal subculture in places of imprisonment (prison "residence registration", stratification of people, etc.)?" most respondents (66%) answered in the affirmative, and 34% – in the negative. The question "From whom did you first receive information about the norms and rules of the criminal subculture?" the vast majority of respondents (50%) answered that they first received such information in places of imprisonment, from convicts (when they first served their sentences); 18% of respondents stated that they received this information for the first time in a pre-trial detention centre (temporary containment cell); 22% of people answered that they received it for the first time from acquaintances, friends, and family members who were out of prison (mostly from those who had

previously served their sentences); 4% of people answered that they received the above information for the first time from TV shows and movie series; 2% of respondents stated that they received it for the first time from police officers, and 3.7% of respondents said they did not remember where they first received such information [20].

The author of this study also concluded on the necessity of improving the institution of pre-trial report for the imposition of appropriate punishment; provision of constant and qualified social and psychological support for convicts, both during supervisory probation and at the stage of penitentiary probation; establishment of a system of patronage over convicts released on parole within one year after release; monitoring behaviour of convicts, checking social conditions, psychological and emotional states; establishing an effective mechanism for applying approbation programmes.

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Suggested Citation: Barash, Ye.Yu. (2020). Current issues of protection of human rights in conflict with the law in Ukraine. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 199-213.

Submitted: 15/07/2020
Revised: 17/11/2020
Accepted: 05/12/2020

УДК 347.6
DOI: 10.37635/jnalsu.27(4).2020.214-230

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ОСОБЛИВОСТІ ПРАВА СПАДКУВАННЯ ДІТЕЙ, НАРОДЖЕНИХ У РЕЗУЛЬТАТІ ШТУЧНОГО ЗАПЛІДНЕННЯ

Анотація. *Серед інноваційних медичних технологій, що підвищують народжуваність, виділяються допоміжні репродуктивні методи лікування безпліддя, при застосуванні яких деякі або всі стадії зачаття та раннього розвитку ембріонів проводяться поза організмом матері. За допомогою допоміжних репродуктивних технологій (включаючи штучне запліднення) діти народжуються в сім'ях, в яких питання зачаття та пологів не вирішено природним шляхом. Дослідження охопило питання спадкових прав дітей, народжених в результаті штучного запліднення. Спадкові права дитини, народженої за допомогою технологій штучного відтворення, є досить важливими для подальшого здійснення інших її прав. Таким чином, це може сприяти здійсненню прав дитини, які мають матеріальну, тобто фінансову основу. Виконати цей обов'язок можна в різних країнах, забезпечивши право дитини на спадкування, не дискримінуючи інших генетичних дітей, оскільки всі діти, народжені з однаковим обсягом прав, також мають однакову кількість правових очікувань. Також акцентується увага на тому, що однією з найгостріших юридичних проблем сурогатного материнства в Україні є те, що закон не передбачає реєстрації такої дитини в органах державної реєстрації у разі розлучення батьків-генетиків, смерті генетичної матері або обох генетичних батьків до народження дитини сурогатною матір'ю, а отже, подальша доля цих дітей залишається невизначеною. Участь у програмі сурогатного материнства громадян тих іноземних держав, в яких застосування цього методу заборонено, наразі залишається актуальною проблемою. Спадковий правовий статус особи, не тільки народженої, але і задуманої після смерті спадкодавця із застосуванням допоміжних репродуктивних технологій, залишався поза правовим полем та поза увагою вітчизняного законодавця. Щодо цього факту вчені України пропонують включити дітей, зачатих після смерті спадкодавця, до кола спадкоємців за заповітом спадкодавця і називати їх "посмертними дітьми". Обґрунтовано наступні умови надання таким дітям спадкових прав: наявність відповідного волевиявлення спадкодавця у заповіті, здійснення запліднення із застосуванням допоміжних репродуктивних технологій виключно з генетичним матеріалом спадкодавця протягом шестимісячного строку, встановленого для прийняття спадщини.*

Ключові слова: спадкові права, штучне запліднення, сурогатне материнство, посмертна (постмортальна) репродукція.

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FEATURES OF THE INHERITANCE RIGHTS OF CHILDREN BORN AS A RESULT OF ARTIFICIAL INSEMINATION

Abstract. *Among the innovative medical technologies that increase the birth rate, assisted reproductive methods of treating infertility stand out, in the application of which some or all stages of conception and early development of embryos are carried out outside the mother's body. Using assisted reproductive technologies (including artificial insemination), children are born into families in which the issue of conception and childbirth has not been resolved naturally. The study covered the issues of the inheritance rights of children born as a result of artificial insemination. The inheritance rights of a child born through artificial reproduction technologies is quite essential for the further exercise of its other rights. Thus, it can contribute to the exercise of the rights of the child, which have a material, i. e. financial basis. It is possible to perform this obligation in different countries by ensuring that the child has the right to inherit, without discriminating among other genetic children, because all children, born with the same amount of rights, also have the same amount of legal expectations. Emphasis is also placed on the fact that one of the most acute legal problems of surrogacy in Ukraine is that the law does not make provision for the registration of such a child with the vital records authorities in case of divorce of genetic parents, death of genetic mother or both genetic parents prior to the birth of a child by a surrogate mother, therefore, the future fate of these children remains uncertain. Participation in the programme of surrogacy of citizens of those foreign states in which application of this method is forbidden currently remains a relevant problem. The hereditary legal status of a person, not only born but also conceived after the death of the testator with the use of assisted reproductive technologies, remained outside the legal field and out of the attention of the domestic legislator. Regarding this fact, scientists of Ukraine propose to include children, conceived after the testator's death, in the circle of heirs by will of the testator, and call them "postmortem children". The following conditions for granting such children inheritance rights are substantiated: the presence of a corresponding expression of the will of the testator in the will, the implementation of fertilisation using assisted reproductive technologies exclusively with the genetic material of the testator within a six-month period established for accepting the inheritance.*

Keywords: inheritance rights, artificial insemination, surrogacy, posthumous reproduction.

INTRODUCTION

There are many treatments for infertility, ranging from simple interventions, such as drugs that help a woman ovulate, to more complex procedures, such as in vitro fertilization (IVF). Surrogacy is associated with married couples, where it is proven that the wife is not able to bear and give birth to her own children, but still has the ability to produce ova. In this case, couples can get help through advanced assisted reproductive technologies (ART) – treatments used to help people achieve pregnancy. The concept of artificial insemination includes two procedures: insemination and IVF. The first involves fertilisation of the ovum under natural conditions (i. e. inside the female body), the second – outside the female body. Both reproductive techniques are designed to help

conceive a child, however, each of them has its own indications and features [1]. For example, artificial insemination, sometimes called intrauterine insemination (IUI), involves the insertion of sperm from a male partner (or donor) into a woman's uterus during or just before ovulation. IUIs can help couples with so-called unexplained infertility, or couples who have minor sperm abnormalities, achieve pregnancy. To date, in vitro fertilization (IVF) is considered the most reliable method. The essence of the method is to fertilise the ovum outside the body using the sperm of a partner or donor. The fertilised ovum is implanted in the uterus, then the pregnancy proceeds as usual. It has become possible to delay the IVF process due to cryogenics, which is described as the science of freezing, subsequent defrosting and regeneration of body parts. Since the late 1970s, medical technicians have been able to freeze sperm and ova before they are combined for fertilisation. Significant is the fact that after fertilisation, embryos can also be stored frozen until implantation.

At present, surrogacy is a form of ART when a woman (surrogate mother) agrees to bear and give birth on behalf of another person or couple, the so-called "authorised parent(s)" or "alleged parent(s)" [2]. In other words, the surrogate mother "leases" her uterus to implant an embryo derived from the sperm and ova of the prospective parents. This agreement is called a gestational agreement. The problem is whether the child is considered the legitimate child of the prospective parents or the surrogate mother. The ability to classify a child from a legal standpoint will make it easier to determine from whom the child has the right to inherit. Understanding the legal fate of gestational surrogacy is also crucial in determining a child's inheritance rights. In this context, the issue of genetic relatedness deserves attention, which is conditionally divided into two different types: traditional surrogacy and gestational surrogacy. Traditional surrogacy, as defined in the 8th edition of Black's Legal Dictionary, is "a pregnancy in which a woman provides her own ovum, fertilised by artificial insemination, bears a foetus, and gives birth to a child for another person." As for gestational surrogacy, this concept is contained in the same publication and is considered as "pregnancy, when one woman (genetic mother) gestates an ovum that is fertilised, and another woman (surrogate mother) gestates a foetus and gives birth to a child" [3]. Although traditional surrogacy has been the only way to conduct surrogacy for most of history, over the past 30 years, gestational surrogacy has become the more popular of the two types of surrogacy. This not only allows both parents of a heterosexual couple to have a biological relationship with their child, but also helps to eliminate some legal and emotional problems that arise from the genetic connection of a surrogate mother with the child she is gestating.

Another factor that distinguishes types of surrogacy is the payment for surrogacy, which includes compensated surrogacy (so-called commercial surrogacy) and altruistic surrogacy [4]. Commercial surrogacy refers to any surrogacy agreement under which the surrogate mother receives compensation for her services, apart from a compensation for medical expenses. In case of altruistic surrogacy, a woman must act as a surrogate mother with the consent of the prospective parents without receiving any income from the act, but may still receive payment to cover certain surrogate mother's expenses, such as travel expenses, medical care, etc. These two types differ in the desire to undergo the procedure, either performing it selflessly and without reimbursement demands, or performing it with compensation. The third factor that classifies the types of surrogacy is where it ends. This factor mainly classifies the place of the procedure: domestically or

abroad. The location of the home can be chosen by prospective parents who live in a country with careful and clear rules of surrogacy. Being in a country where there are no surrogacy rules, or in a country that prohibits such actions, the intended parents will have no choice but to carry out the procedure abroad. If there is a possible danger, a person has the right to use the so-called "deferred parenthood" – cryopreservation of sperm for further use during artificial insemination, which can occur in a number of years. In this regard, the term "posthumous (postmortem) reproduction" refers to the birth of a child after the death of each parent. From a historical standpoint, the corresponding fact made provision for the conception of a child by both parents, but its birth – after the death of its father. Currently, posthumous conception with the use of cryopreserved sperm and embryos is used. In modern medical technology, it has become possible to obtain the required amount of sperm from a recently deceased man for further use in in vitro fertilisation programmes. This technique has become known as "postmortem sperm production" and tends to increase in cases of reproductive problems [5].

Against the background of the growing popularity of these technologies, in practice there are several complex issues regarding the exercise of the rights of children born in the above ways. The birth of a child automatically gives rise to its rights and responsibilities, which are inextricably linked to parents and families, and which, even after the death of relatives, will affect the issue of inheritance and the rights of legal heirs. For children born by artificial insemination, the division of their share of the inheritance seems much more difficult than for children born in traditional families. In this regard, the need for a scientifically sound search and identification of the specific features of the right to inherit children born as a result of artificial insemination becomes quite relevant. To achieve this purpose, the following tasks of the study are defined: 1) to consider specific mechanisms of legal regulation of the right to inherit by children born due to assisted reproductive technologies in Ukraine and in some foreign countries; 2) to identify problems in the implementation of the inheritance rights by children born as a result of artificial insemination; 3) to determine ways to solve the relevant problems of exercise of the inheritance rights by children born as a result of the use of the mechanism of assisted reproductive technologies.

The scientific literature lacks comprehensive studies of legal relations that arise within the institution of surrogacy, with the exception of articles that fragmentarily cover the issues and problems that emerge from the use of assisted reproductive technologies. In general, certain issues of the subject matter were considered by Ukrainian and foreign scientists, whose works were used in the study. In the process of scientific research the studies by H.V. Anikina [6], V. Valakh [7], O.A. Yavor [8], D. Hudyma [9], F. Dakhno [5], E. Zhuravlova [10], A. Kasatkina [11], J. D'Almaine [12], K. Kirichenko [13], O.Kukharev [14], O. Malkin [15], I. Rosenblum [16], O. Rozgon [17], M.J. Xavier [18], E. Riabokon [19], D. Savulescu [20], R. Stefanchuk [21], K. Tremellen [20], S. Simana [22], O. Shyshka [23] and others.

1. MATERIALS AND METHODS

The methodological basis of the study includes such methods as: dialectical, comparative law, historical law, analysis and synthesis, Aristotelian, dogmatic, analogy, legal modelling, etc. The leading method in the research process was the dialectical method of cognition of phenomena and processes, which allowed to determine the state, directions

and prospects of research and legislative developments in the field of legal regulation of surrogacy in Ukraine and inheritance of children born by artificial insemination. A special place is also occupied by the comparative legal method, which was used in the comparative analysis of the current Ukrainian legal provisions in the field of inheritance based on the results of the approbation of surrogate motherhood with the systems of legislation and scientific developments of other states, in order to identify positive legislative practice that would be appropriate and eligible for approbation on the territory of Ukraine, considering the specific features of the legal system in this country.

The historical and legal method facilitated the study of the genesis of the development of legislation governing the use of assisted reproductive technologies in Ukraine and foreign countries in the context of regulating the inheritance of newborns with the use of such technologies; methods of analysis and synthesis were used to establish the nature and content of the powers of heirs born as a result of artificial insemination. Furthermore, these methods allowed to outline the variability of legal definitions of the concept of "surrogacy" at both the doctrinal and legislative levels.

Analysis of the literature indicated that the institution of surrogacy was not an independent subject of study in the research of post-Soviet countries in recent years, the dissertations covered only issues related to the establishment of parental rights under the use of surrogacy, the legal nature of surrogacy, the implementation of constitutional human rights. Despite the considerable number of studies in the field of surrogacy, the legal regulation of this institution remains imperfect, the interpretation of terminology is especially difficult. Furthermore, the elimination of gaps by the legislator is extremely slow, which does not correspond to the modern development of the outlined legal relations. Given the above, it can be argued that the outlined issues do not lose their relevance, given the innovative component of modern realities, and require additional study, proposals and recommendations to improve the current legal regulation.

The Aristotelian method allowed to identify gaps in the current national legislation of Ukraine in the subject area. With the help of the dogmatic method, conclusions were formulated in accordance with the purpose of the study. The method of analogy allowed, considering the experience of foreign countries, to draw a conclusion about the need to reform the domestic legal field and focus on promising innovations of family and civil legislation. During the formulation of legislative proposals, the normative-semantic method, logical methods of cognition and the method of legal modelling were used.

The methodology used is conditioned by the purpose of the study and the outlined tasks, which, in turn, allowed to maximally cover the issues indicated in the study and propose an original solution to the problems arising in law enforcement in modern realities.

2. RESULTS

In modern conditions, a special place is given to the problems of establishing paternity and motherhood during the use of artificial insemination. In this regard, a correct interpretation of the definitions of "biological child" and "heir" is required. The legal status of the embryo of the child which was conceived during the life of the testator at use of the concluded contract on surrogacy has significant features. The Family Code of

Ukraine[1] quite clearly describes the legal relationship between a surrogate mother and the child's genetic parents. According to Article 123, part 2, the parental rights to the new-born belong exclusively to the spouses who are biological parents. If an embryo conceived by a married man and another woman is implanted in his wife's body, the child is considered to be born of a spouse. In the case of application of a contract for the provision of services, according to O. Rozgon, the relevant legal document must be concluded before conception of the child, due to the fact that after conception it will be an agreement on the assignment of an already conceived or born child [17]. Therefore, the testator must be alive at the moment of the conclusion of this contract, and in case of death a will must be written in advance in favour of the yet unborn child, which will help protect the interests of the child.

In accordance with the law, surrogacy in Ukraine has the following features: a surrogacy agreement, which was concluded on a commercial basis (that is, implying payment of a fee to a surrogate mother), is permitted in Ukraine and has no restrictions on the amount of remuneration; there is no need to obtain permission from the guardianship authority (as in the case of adoption). However, the adoption itself is also not required: at the birth of a baby, surrogate mother simply writes permission to transfer the child to biological parents. It is also not envisaged to consider the case in court, all legal relations are regulated primarily by the Family Code of Ukraine[2] and the concluded agreement; the birth certificate immediately indicates the names of the biological parents; the parental rights to the child belong entirely to the genetic mother and father; the surrogate mother cannot make any claims and declare her motherhood. Also, the basis of legal regulation is the Law of Ukraine "On the basis of legislation on healthcare"[3] and the Procedure for the use of assisted reproductive technologies in Ukraine, approved by the Order of the Ministry of Health of Ukraine No. 787 dated 09.09.2013[4]. Notably, there is also a list of special legal requirements for medical institutions that render medical services during the surrogacy procedure. This suggests that the current legislation of Ukraine lays the foundation for the possibility of using assisted reproductive technologies, one of which is surrogacy.

Recently, legal scholars have had quite serious discussions regarding surrogacy, concerning the rights and obligations of future children born as a result of using the appropriate method. Notably, the leading issues that remain unresolved by law include, inter alia, the procedure for registration of a child in the state registration of civil status, born to a surrogate mother – in case of divorce of genetic father and mother, in case of death of genetic parents (or one of the parents) at the time of birth. It is not possible to precisely determine the future fate of these children at the legislative level. Particularly acute in modern realities is the issue of participation in surrogacy programmes for citizens of states where the use of a suitable method of infertility treatment is prohibited

[1] Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/

[2] *Ibidem*, 2002.

[3] Law of Ukraine No 2801-XII "On the basis of legislation on healthcare". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2801-12#Text

[4] Order of the Ministry of Health No 787 "On approval of the Procedure for the use of assisted reproductive technologies in Ukraine". (2013, September). Retrieved from https://zakon.rada.gov.ua/laws/show/z1697-13#Text

at the legislative level. The problems related to the execution of documents for the export of children born in Ukraine as a result of the legal process of infertility treatment by surrogacy and who are registered with the civil registry office as children of their biological parents remain unresolved. Accordingly, there is a risk that parents will be forced to leave the child in Ukraine. In this regard, it is necessary to note the following legislative initiatives that were registered in the Verkhovna Rada of Ukraine in 2011: 1) the draft Law of Ukraine No. 8282 "On Amendments to Certain Legislative Acts of Ukraine on Restrictions on the Use of Auxiliary Reproductive Technologies" dated 23.03.2011[1], which made provision for the introduction of a ban on the use of the surrogacy method for citizens of countries where the use of this infertility treatment is banned, and contained a number of uncertain points about the procedure and process of fixing the countries concerned; 2) draft Law of Ukraine No. 8703 "On Foster Care" dated 17.06.2011[2], which made provision for an increase in the number of persons (non-married couples, single women or men), the introduction of social requirements, the division of foster care into public and private, regulatory consolidation of some issues of surrogacy. However, the proposed draft laws have not passed the approval procedure in the Verkhovna Rada of Ukraine and remain unfinished.

Addressing the specific features of inheritance by such children, it is worth noting that, according to Article 1222 of the Civil Code of Ukraine[3], heirs by will and by law can be individuals who are alive at the time of the opening of the inheritance, as well as persons who were conceived during the life of the testator and who were born alive after the opening of the inheritance. Thus, to be recognised as an heir, a person must be born alive, or at least be conceived during the life of the testator. Thus, the hereditary legal status of a person, not only born but also conceived after the death of the testator with the use of assisted reproductive technologies, remained outside the statutory requirements. In other words, the exercise of the inheritance rights by persons conceived after the opening of the inheritance is ruled out by Ukrainian legislation. This, in turn, indicates that inheritance law does not fully consider the achievements of modern medical science and the specific features of the relevant legal relationship. The latest innovative scientific technologies give a reason to take a different approach to the analysis of the problem of conceiving a child after the death of its parents. Furthermore, natural disasters, anthropogenic disasters, the widespread spread of cancer, numerous war zones indicate a considerable number of deaths of persons of reproductive age. Frozen gametes are capable of retaining their properties under appropriate conditions for a long time; therefore, the conception of a child born through their further use may take place well after the death of the testator. And despite the fact that in 1980 the first case of not only posthumous birth, but also of the posthumous take-off of reproductive material was already described, there is no proper legal regulation of this procedure and its subsequent consequences in almost any country in the world [18].

[1] Law of Ukraine No 8282 "On Amendments to Certain Legislative Acts of Ukraine on Restrictions on the Use of Auxiliary Reproductive Technologies". (2011, March). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8282&skl=7

[2] Law of Ukraine No 8703 "On Foster Care". (2011, June). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8703&skl=7

[3] Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/

The possibility of conception after the death of the testator creates the problem of exercise of inheritance rights by such children. Thus, the presumption of paternity established in Article 122 of the Family Code of Ukraine[1], which determines the origin of a child born before the expiration of ten months after the dissolution of marriage, cannot be applied to this legal relationship. It is proposed to call children conceived after the death of the testator from the latter's genetic material by ART "post-mortem children", from Latin "*post mortem*" – after death. Assisted reproductive technologies allow the use of donor and cryopreserved gametes in artificial insemination, which can cause certain legal issues, in particular, regarding the child's inheritance rights.

Legislation in different countries has a different position on this matter. In the United States, major litigation revolves around embryos after the divorce of potential parents. Ex-husbands do not intend to pay child support for children conceived without their consent. To resolve this conflict, a law was adopted in Arizona stipulating that in case of divorce, the embryos must be transferred to the former spouse who wishes to have a child. According to a state Supreme Court ruling, an Arizona woman cannot use frozen embryos fertilised by her ex-husband to have children, and she must donate them. According to court documents, Ruby Torres fertilised ova before cancer treatment in 2014. At the time, she and her then-partner John Joseph Terrell signed an agreement at a reproductive health clinic stating that if they shared embryos, they could be transferred to another couple or used by one of them to have children – but only with the "express written consent of both parties". A few days later, the couple married and underwent in vitro fertilization, viable embryos were frozen and preserved. Court documents say that Torres's chemotherapy caused a "significant reduction in her reproductive function". The family court initially ruled in Terrell's favour, declaring that his "right not to be a forced father outweighs (Torres's) right to have a child and the desire to have a biologically born child". The appellate court then overturned the family court's decision and ruled in Torres's favour. In its decision, the Arizona Supreme Court pointed to the contract and the conditions under which embryos "cannot be used for conception against the will of a partner", but because the couple could not agree, the court ruled that under the contract, the court could only award direct embryo donation" [24]. According to E. Trenchman, an ambiguous and aggressive law was passed that would order judges to ignore the parties' wishes regarding the future of their genetic material and the future of their descendants [25].

The regulatory framework governing post-mortem reproduction varies from country to country. In some countries, such as Germany and France, post-mortem reproduction is prohibited. The key points in determining the origin of a posthumously conceived child from deceased parents, according to foreign legislation, is the consent of the deceased to post-mortem reproduction and their consent to be the father of such a child. Traditionally, in order to inherit, it is necessary to be alive on the day of the testator's death or to be conceived before their death, but this rule has already been changed in 21 US states and the Canadian province of British Columbia, where posthumously conceived children have the right to inherit. However, apart from establishing their origin from the testator, there are several additional conditions for the

[1] Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/

emergence of their inheritance rights. According to the legislation of those states in which posthumous reproduction is not only practiced but also regulated in detail, the key condition for its implementation and further establishment of the child's descent from a person who provided their genetic material but died before conception is the person's consent to posthumous use of assisted reproductive technologies. The form of such consent must, as a rule, be in writing. In the absence of a written expression of will, consent, for example in Israel, can be established by a court. The fact is that intravital cryopreservation of genetic material (gametes, embryos) by itself does not necessarily indicate an intention to resort to posthumous reproduction: in some cases, when donating genetic material and creating embryos, only their intravital use is planned for the purpose of giving birth to a child, in others – both types of reproduction are meant (intravital, and in case of failure – post-mortem), or the task of posthumous conception is directly posed, considering the expected or supposed death of a person who seeks to have a child. For greater certainty in establishing a person's will for posthumous reproduction (consent or absence, identification of the person authorised to dispose of the deceased's genetic material), Israeli lawyer Irit Rosenblum proposed a so-called biological testament that can be made by Israeli servicemen with regard to their deaths excludes the possibility of having children. The author of this idea proceeds in part from the fact that frozen gametes and embryos are objects of property rights [16]. A well-known company New Family currently operates in Israel, which develops and stores such documents. To date, it has made about 5,000 wills [26].

Establishing the origin of children born as a result of posthumous use of ART abroad is regulated separately. The registration of the deceased as the father of a child in case of post-mortem conception, except for the consent of the deceased to the post-mortem use of his genetic material, is conditioned by his written consent to be the father of such a child. Such a condition is contained, for example, in the Uniform Parentage Act[1] approved in most US states, which concerns cases of posthumous birth of children only to spouses, and the UK Fertilisation and Human Embryology Act[2]. The latter makes provision for the registration of the deceased husband as the father of the child even when the woman, after the death of the specified man, but with his consent (moreover, a written one) to be registered as the father of the child, was implanted with an embryo created using donor sperm, that is, when the deceased is not the genetic father of the child. A record of the paternity of the deceased husband in both cases (both in case of the genetic origin of the child from the deceased, and when using the donor sperm under these conditions) is made if the child's mother indicates it in writing no later than 42 days (no later than 21 days in Scotland) from the date of birth of the child. The marital status of the parents is irrelevant. This approach corresponds to the theory of intention, which underlies the emergence of parental rights in cases of ART [13]. In the absence of written consent to register the child's father and the deceased's intention to be its father, as stated

[1]Uniform Parentage Act. (2017, October). Retrieved from https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e4a82c2a-f7cc-b33e-ed68-47ba88c36d92&forceDialog=0

[2] Human fertilisation and Embriology Act (2008, December). Retrieved from https://www.legislation.gov.uk/ukpga/2008/22/contents

in the commentary to the US Uniform Probate Code[1], which includes provisions on the origin of children, paternity can be confirmed by other convincing evidence.

Article 1116 of the Civil Code of the Russian Federation[2] stipulates that "citizens who are alive at the time of the opening of the inheritance, as well as conceived during the life of the testator and born alive after the opening of the inheritance" may be called upon to inherit. In the "Medical Encyclopaedia", conception is interpreted as "the occurrence of pregnancy", which includes "fertilisation of the ovum and implantation of a fertilised ovum". If an ovum has been fertilised but not implanted in a woman, conception is not considered to have occurred. Russian law has not yet defined the legal status of the embryo obtained by IVF[3]. In other words, when the Family and Civil Codes[4] were written and clarified, childbirth took place mostly naturally, and nowadays the legislation does not keep up with medical technologies. In Russia, when concluding an IVF agreement, lawyers advise to immediately think about the possible divorce or death of one of the participants and indicate who has the right to dispose of the fate of embryos. In particular, there are court precedents where one of the parties has in fact been forced into parenting against their will. Thus, a married couple from Moscow signed a contract with one of the capital's reproductive clinics, the ova were fertilised and placed in a cryogenic storage. Soon the man decided to divorce and hoped that this process would serve as the basis for the destruction of embryos [27]. However, in 2014, the Moscow City Court denied the plaintiff's claims. The reason is that both have signed an informed consent, where, in case of divorce, the right to dispose of the embryos passes to the woman. Another court precedent occurred in Rostov-on-Don in 2018. The woman and her husband signed a contract with a reproductive clinic for in vitro fertilisation. The first attempt was unsuccessful, and soon the man, who was 30 years older than the woman, died. After the funeral, the widow attempted to make a second IVF attempt, but it turned out that prior to all medical manipulations the man and woman signed an agreement that in case of death of one of them, the clinic must dispose of all biomaterial, which was ultimately destroyed.

Judicial practice in the United States led to a positive solution to the issue of the possibility of inheriting the father's property by his posthumously conceived children. Thus, since the 1990s, lawsuits have been filed in the country at the request of mothers of children conceived after the death of their parents to receive social benefits in connection with the loss of a breadwinner (Social Security Survivors" Benefits). In accordance with the legislation governing such payments, in deciding whether the applicant is the child of the insured, the same law shall apply as would have been applied by the court in determining the right to inheritance under the law after the deceased[5]. Therefore, the right of posthumously conceived children to monthly insurance benefits began to be linked by

[1] Uniform Probate Code. (2020, January). Retrieved from https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=df980b01-f7c0-d66e-20fb-8b7425Dialog=0

[2] Civil Code of the Russian Federation (part three). (2001, November). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34154/620cbac8df1078128fbd57102ac49f59876e857e/

[3] *Ibidem*, 2001.

[4] Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/; Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/

[5] U.S. Code. Retrieved from https://www.law.cornell.edu/uscode/text/42/416

the courts to whether children could be considered heirs of the deceased by law, governed by the law of that state in which the deceased resided. In 2005, the California Hereditary Code was described as the most modern in approbation of approaches to solving the issue of the possibility of inheritance by posthumously conceived children of the testator. It stipulates the following conditions of inheritance by a posthumously conceived child of the testator: written consent of the testator for the posthumous conception of a child using his genetic material (which can be revoked or changed by the testator also in writing); limitation of the period of conception ("in utero") to a two-year period from the date of the death certificate or the court's decision to establish the fact of death, if it preceded the issuance of the certificate; the appointment by the testator of a person to exercise control over the use of their genetic material; notice after opening the inheritance by such a person (by registered mail with acknowledgment of receipt) about the presence of the genetic material of the testator for the purpose of posthumous conception. The notice must be sent to the person authorised to control the distribution of the deceased's property or payments in connection with their death, not later than four months from the date of issuance of the death certificate or court decision to establish the fact of death, if it preceded the issuance of the certificate[256]. In California, the child's exercise of the inheritance rights in such cases is guaranteed by the fact that, after receiving notification, the person authorised to control the distribution of the property of the deceased or social benefits in connection with his death does not have the right to distribute this property or give orders for such benefits before the expiration of the two-year period (the start of which is defined in the manner specified above), unless the birth of a posthumously conceived child would not affect such distribution and payments, or a written message was received with a personal signature, and also signed by a witness, that the person does not want his the genetic material used after his death to conceive his child. During this period, the issue of the distribution of the deceased's property or receiving social benefits in connection with his death may be decided in court at the request of the person concerned, provided that it will not cause property damage to the posthumously conceived child of the deceased[1].

The study allowed to state the following:

- in Ukraine, the following aspects are not regulated at the legislative level: the procedure for registering a child with the state registration of civil status acts born of a surrogate mother, in the event of a divorce of the genetic father and mother, or in the event of the death of the genetic parents (or one of the parents) at the time of the child's birth; procedural issues of paperwork for the export of children from Ukraine, born as a result of the legal process of infertility treatment by surrogacy and registered with the civil registry office as children of their biological parents;

- the possibility of conception after the death of the testator creates the problem of exercise of inheritance rights by such children. Thus, the presumption of paternity established in Article 122 of the Family Code of Ukraine[2], which determines the origin of a child born before the expiration of ten months after the dissolution of marriage, cannot be applied to this legal relationship. It is proposed to call children conceived after the

[1] California Probate Code. Retrieved from https://codes.findlaw.com/ca/probate-code/prob-sect-249-5.html

[2] Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/

death of the testator from his genetic material with the help of ART "post-mortem children". Assisted reproductive technologies allow the use of donor and cryopreserved gametes during artificial insemination. This can cause legal issues, in particular with regard to the child's inheritance rights;

- the testator's consent to posthumous reproduction and the limitation of the period of conception of the child, as mentioned above, are recognised abroad as necessary conditions for calling for the inheritance of his posthumously conceived children, but in order not to imbalance the regulation and the period of conception or time of birth of the child-heir, is defined more thoughtfully and humanely, and also the additional rules providing certainty of relations and preservation of hereditary property are established.

3. DISCUSSION

In legal doctrine, there are two opposing positions on the possibility of recognising inheritance rights for a child in Ukraine who was not only born but was conceived after the discovery of the inheritance. Proponents of the former deny the possibility of inheritance by post-mortem children, basing their position on the legal uncertainty that arises between the day of the opening of the inheritance and the possible birth of a child, which in turn can destroy the structure of all inheritance law [23]. E. Ryabokon emphasises that a will made in favour of a child conceived in the future must be declared invalid, and not based on a special rule of Article 1257 of the Civil Code of Ukraine[1], given the absence of violations regulated by it as grounds for invalidity (nullity) of the will, and under Part 1 Article 203 of the Civil Code of Ukraine[2], which, among the general conditions of the agreement, determines that the content of the transaction may not contradict the Civil Code, other acts of civil legislation, as well as the interests of the state and society, its moral principles [19]. However, opposite opinions are also expressed in relation to the issues under study.

In particular, D. Hudyma [9], A. Malkin [15] consider it appropriate to admit persons conceived as a result of IVF to inheritance after the death of the testator, by introducing corresponding changes to the current legislation. Some legal scholars conclude that the state of modern legislation allows to inherit persons born as a result of posthumous reproduction. Thus, O.A. Yavor came to the conclusion that the testator's child belongs to the heirs of the first order, regardless of the method of conception and gestation, as well as regardless of the date of birth after the death of the testator, if the testator left genetic material during his lifetime for a specific purpose regarding the subsequent birth of the child [8]. A. Kasatkina takes a similar position with the only caveat that the birth of a post-mortem child must take place within one year from the date of the opening of the inheritance [11].

The lack of legislative regulation of the problems of inheritance by persons conceived after the opening of inheritance forced researchers to look for other possibilities of solving them. Scientist V. Valakh proposes to use the mechanism of changing the order of obtaining the right to inherit, defined by Article 1259 of the Civil

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/
[2] *Ibidem*, 2003.

Code of Ukraine[1], considering the possibility of birth of a biological descendant of the testator. The author also considers it possible to establish such a condition of the will as the conception of a child after the death of the testator using his biological material. This is conditioned by the fact that the conscious desire of two people to give birth to an heir, even after the death of one of them, cannot be considered illegal, and therefore there is no reason to declare such a condition of the will invalid in court [7]. According to O. Zhuravlova, it is advisable to extend the legal status of nasciturus to a post-mortem child born in accordance with the will of the testator within a certain time after the opening of the inheritance [10]. The legal literature also suggests that the only way to transfer property from the inheritance to a person who was not conceived on the day of the opening of the inheritance is a testamentary renunciation [28].

The current legislation of Ukraine does not consider a legal heir, or a person conceived and born after the death of the testator with the use of assisted reproductive technologies to be legal. However, the recognition of the testator as the heir of a post-mortem child concerns not only the implementation of the principle of freedom of will, but is also closely related to the personal non-property right of an individual to reproductive choice. According to R. Stefanchuk, the meaning of this right refers to a person's choice of the way in which they will perform a reproductive function – by natural biological means or using safe, effective, affordable, and acceptable assisted reproductive technologies permitted in Ukraine and international treaties, consent on the binding nature of which was granted by the Verkhovna Rada of Ukraine [21]. According to O. Kukharev, it is possible to expand the personal inalienable human right to reproductive function, including in its content the choice of the timing of this function – during the life of the person or after their death [14]. The scientist believes that, despite the fact that artificial insemination from the genetic material of the testator is carried out after their death, the exercise of the right to reproductive choice in this case can reasonably be recognised as a person's consent to such reproductive technology. The regulatory potential of private law in the context of its adequate impact on hereditary relations is not fully used, which requires amendments to the Book 6 of the Civil Code of Ukraine[2]. In particular, to expand the dispositive basis of inheritance law, A. Kukharev proposes to include the children of the testator, conceived after his death in the circle of heirs by will. It is proposed to call such persons “post-mortem children”. The lawyer substantiates the following conditions for granting them inheritance rights: the presence of appropriate will of the testator in the will, insemination with the use of assisted reproductive technologies exclusively by the genetic material of the testator within six months established for acceptance of the inheritance. Notably, the proposed innovation will contribute to the implementation of the principle of freedom of will and the exercise of personal non-property right of the testator to reproductive choice.

However, not all modern bioethics experts agree with the thesis that new reproductive technologies bring future generations only benefit. Any interference with the natural process can have negative consequences. Scientific advances allow to extract and use the gametes of a deceased person, thus creating a child after the death of the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/
[2] *Ibidem*, 2003.

genetic father. Sh. Simana, examining and comparing the legislation governing post-mortem reproduction in the United States, Britain, Australia, and Israel, concludes that each country has its distinctive features, but there are three common elements: legal ambiguity, requiring prior consent and permission from the partner, but not their parents, to remove and use the deceased's gametes. The scholar states that courts often do not comply with the law, and therefore there are no clear guidelines for post-mortem reproduction [22]. S. Simana gives three excuses for the implementation of posthumous reproduction in the absence of prior consent of the deceased. The first excuse is related to the interest in "genetic inheritance", which reflects the desire of people to leave a "particle" of themselves in the world and maintain the chain of succession. The second justification concerns the model of autonomy of "respect for desires", according to which people should be treated the way we assume that they would like to be treated. The third excuse affects the interests of the partner and parents of the deceased, as well as the new-born child.

Based on the results of this scientific discussion, the following conclusions can be drawn:

- in modern realities in Ukraine, there are opposing positions on the possibility of recognising inheritance rights for a child who was not only born but was conceived after the discovery of the inheritance. Some deny the possibility of inheritance by post-mortem children, others consider it appropriate to allow the inheritance of persons conceived as a result of IVF after the death of the testator, by introducing appropriate changes to current legislation;

- legal scholars substantiate the following conditions for granting hereditary rights to children born as a result of artificial insemination: the presence of appropriate will of the testator in the will, insemination with the use of assisted reproductive technologies exclusively by the genetic material of the testator within six months. The proposed innovation will contribute to the implementation of the principle of freedom of will and the exercise of personal non-property right of the testator to reproductive choice.

CONCLUSIONS

Recent advances in medical technology have led to possible conflicts with succession. Three specific medical advances that cause inheritance laws to malfunction are artificial insemination, surrogacy, and post-mortem children. Assisted reproductive technologies allow the use of donor and cryopreserved gametes in artificial insemination, which can cause legal issues, in particular the right to inherit the child. It can be concluded that hereditary relations involving children born through artificial insemination require detailed legislation, such children are the most vulnerable subjects of these relationships, so there are many problems in this area of law enforcement. Existing legal provisions do not meet the interests of heirs, such as surrogate mothers and post-mortem children. The following issues remain unresolved in legislation: the procedure for registration of a child born to a surrogate mother, in case of divorce of the genetic father and mother, in case of death of the genetic parents (or one of the parents) at the time of the child's birth; issues related to the execution of documents for the export of children from Ukraine who were born as a result of the legal process of infertility treatment by surrogacy and who are registered with the civil registry office as children of their biological parents. It is also

necessary to point out the fact that the possibility of conception after the death of the testator creates a problem of exercise of inheritance rights by such children. Therefore, the presumption of paternity established in Article 122 of the Family Code of Ukraine, which states the origin of a child born before the expiration of ten months after the termination of marriage, cannot be applied to this legal relationship.

As a result of the analysis, it was concluded that the consent of the testator to posthumous reproduction and the limitation of the period of conception of a child are recognised abroad as necessary conditions for inheritance by posthumous conceived children, but in order not to unbalance the regulation and not violate the interests of all persons involved, a period that limits the period of conception or birth of a child-heir is determined more thoughtfully and humanely, and additional rules are established to ensure certainty of relations and preservation of hereditary property. In Ukraine, there are opposing views on the possibility of recognising inheritance rights for a child who were not only born but also conceived after the discovery of the inheritance. Some legal scholars deny the possibility of inheritance by post-mortem children, others consider it appropriate to allow the inheritance of persons conceived as a result of IVF after the death of the testator, by introducing appropriate changes to current legislation. Lawyers substantiate the following conditions for granting hereditary rights to children born as a result of artificial insemination: the presence of appropriate will of the testator in the will, insemination with the use of assisted reproductive technologies exclusively by the genetic material of the testator within six months. The proposed innovation will contribute to the implementation of the principle of freedom of will and the exercise of personal non-property right of the testator to reproductive choice.

These circumstances demonstrate that the legislation of Ukraine does not fully consider the current achievements of reproductive medicine. At present, the legislator must clearly identify possible options for the development of events, because these issues are increasingly arising in practice and remain, unfortunately, unresolved. Furthermore, as a result of the proposals made by lawyers, it will be possible to avoid many controversial issues in establishing the inheritance rights of children born with the help of assisted reproductive technologies.

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Suggested Citation: Diakovych, M.M., Mykhayliv M.O., & Kossak, V.M. (2020). Features of the inheritance rights of children born as a result of artificial insemination. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 214-230.

Submitted: 27/08/2020
Revised: 19/10/2020
Accepted: 04/12/2020

УДК 347.615
DOI: 10.37635/jnalsu.27(4).2020.231-241

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ПРАВО ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ НА ПРОДУКТ ШТУЧНОГО ІНТЕЛЕКТУ

Анотація. *Штучний інтелект – відносно нове поняття, яке поступово впроваджується в життя суспільства. Вже сьогодні сучасні технології допомагають людині удосконалювати процеси виробництва готових продуктів у творчій сфері. Віднедавна штучний інтелект може виробляти певні продукти самостійно, без участі людини. При таких швидких темпах розвитку техніки, а також штучного інтелекту, законодавці не встигають доповнювати законодавчу базу, що захищає права інтелектуальної власності відповідними нормативно-правовими актами. Це означає, що на даний момент не визначено, кому належить право інтелектуальної власності на продукт штучного інтелекту. Мета дослідження полягає у визначенні таких понять, як «штучний інтелект», «право на інтелектуальну власність», в даній статті вивчена діюча нормативно-правова база в сфері авторського права на продукти штучного інтелекту. Вивчено існуючі теорії щодо штучного інтелекту і способів законодавчого регулювання питань в даній сфері. Для написання даної статті були застосовані такі методи дослідження: інтегральний метод наукового аналізу, метод синтезу, загальнонауковий метод класифікації, метод дедукції. Також були використані метод порівняльно-правового аналізу, юридико-телеологічні методи і метод правового регулювання. У статті виявлені проблеми міжнародної правової системи. Автор з'ясував, що на даний момент право інтелектуальної власності на продукти штучного інтелекту не регулюється правовими нормами. Система правового регулювання права на інтелектуальну власність потребує модернізації. Сучасні технології розвиваються дуже швидко, а правова система не встигає приймати відповідні закони для регулювання таких питань як право інтелектуальної власності на продукти штучного інтелекту, відповідальність за результати діяльності та можливості використання штучного інтелекту. З практичної точки зору, дана тема має глобальне значення. На сьогоднішній день штучний інтелект і сучасні технології успішно впроваджуються в суспільне життя. Вчені-програмісти вже сьогодні створюють програми штучного інтелекту, які роблять наше життя простішим; інвестори фінансують такі організації з метою збільшення капіталу. Однак питання приналежності прав на інтелектуальну власність на продукт штучного інтелекту залишається неврегульованим.*

Ключові слова: сучасні технології, програмне забезпечення, авторське право, результати інтелектуальної діяльності, правова система.

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INTELLECTUAL PROPERTY RIGHTS TO AN ARTIFICIAL INTELLIGENCE PRODUCT

Abstract. *Artificial intelligence is a relatively new concept that is gradually being introduced into the life of society. Even today, modern technologies help a person improve the production processes in the creative field. More recently, artificial intelligence can produce certain products on its own, without human intervention. With such a fast pace of technology development, as well as artificial intelligence, lawmakers do not have time to supplement the legislative framework protecting intellectual property rights with the appropriate regulations. This means that it is not currently determined who owns the intellectual property rights to the artificial intelligence product. The purpose of the study is to define such concepts as "artificial intelligence", "the right to intellectual property". This paper investigates the current regulatory framework in copyright for artificial intelligence products. The author studied the existing theories regarding artificial intelligence and methods of legislative regulation of issues in this area. To write this paper, the following research methods were applied: the integral method of scientific analysis, the method of synthesis, the general scientific method of classification, the method of deduction. Also, the method of comparative legal analysis, legal and teleological methods, and the method of legal regulation were used. The paper identified problems and shortcomings of the international legal system. The author established that at present the intellectual property rights to artificial intelligence products are not governed by legal regulations. The system of legal regulation of intellectual property rights requires modernisation. Modern technologies are developing very quickly, and the legal system does not have time to pass the appropriate laws to regulate issues such as intellectual property rights to artificial intelligence products, responsibility for the results of activities and the possibility of using artificial intelligence. From a practical standpoint, this subject is of global importance. Nowadays, artificial intelligence and modern technologies are being successfully introduced into public life. Scientists-programmers are already creating artificial intelligence software that makes everyday life easier; investors finance such organisations to increase capital. However, the issue of ownership of intellectual property rights to an artificial intelligence product remains unresolved.*

Keywords: modern technologies, software, copyright, results of intellectual activity, legal system.

INTRODUCTION

Every day technologies are being introduced more and more into the life of modern society. The humankind has faced the problem of insufficient legal regulation of issues related to artificial intelligence. Currently, the introduction of artificial intelligence into the life of society is only in its infancy, but even now exist precedents pointing at the necessity of improving the regulatory framework. Problems arise from the insufficient degree of study of such a concept as artificial intelligence. Lawyers and scientists have only recently begun to think about this issue globally and actively discuss legal regulation in modern technologies and products of artificial intelligence. Modern legal

literature contains no specific definition of the concept of "artificial intelligence". There is also no clear distribution of legal responsibility for the products of artificial intelligence, and the issue of rights to intellectual property produced in this way remains unresolved [1].

Developments in the field of artificial intelligence and robotics are among the most funded to date. International companies are investing billions of dollars in this area. Modern technologies allow introducing artificial intelligence into various spheres of human activity and constantly improving them. More and more tasks that humans used to perform are being delegated to software with artificial intelligence. Also, this technology allowed to solve problems that were previously not subject to human control or were difficult to handle. Development in the field of artificial intelligence can solve a set of difficult problems for humanity [2]. The first and foremost challenge is the ability to study the human brain, to understand the way it functions. The second, no less important task, is the ability to develop and implement programmes in everyday life of a person that will be useful in periodic or daily use.

Artificial intelligence is a technology based on an intelligent machine or intelligent computer software. Artificial intelligence provides a machine or software with the ability to perform creative functions that are inherent in humans. Artificial intelligence in systems of software and machines can copy human behaviour to performs the tasks assigned. This happens by means of collecting information and gradual learning based on the accumulation of acquired knowledge. Artificial intelligence technology is already being used in various industries [3]. For example, in programming chat bots, this technology is used to improve communication with a person. Artificial intelligence quickly analyses chatting behaviour and simulates appropriate responses. Artificial intelligence is also used to program "smart assistants" – this technology helps the software search and filter information from the Internet and optimise data and tasks. Also, artificial intelligence technology has long been used for recommendation systems at various sites on the Internet. For example, it is used to generate a list of recommended films, TV shows or programmes for viewers by analysing previously viewed content on a given resource.

Artificial intelligence technology cannot replace the human mind, since at present only the initial version of this technology has been invented. At this stage of development, artificial intelligence constitutes a valuable resource for business projects. It is aimed at empowering people, helping collect, analyse, and simulate a large amount of information. Artificial intelligence in search engines helps find the most accurate data. This process is possible because of the use of neural networks with numerous hidden levels. Currently, only weak artificial intelligence has been developed. It is also called narrow-purpose artificial intelligence. This is the only artificial intelligence that exists today. It can perform up to one task at a time [4]. These can be tasks such as: writing an article based on the analysis of information and data, playing chess with the software user, monitoring and organising weather data. Artificial intelligence can function in real time and is capable of solving the specific task for which it is programmed. The artificial intelligence developed to date is incapable of thinking independently, like a person does – it can only perform the tasks provided for by the programme.

There is also a second type of artificial intelligence called general purpose intelligence or strong artificial intelligence. The design and development of this

technology will open up new horizons for humanity. Such a programme will be able to think abstractly, devise strategies, use its own thoughts and memories, put forward innovative ideas. However, artificial intelligence is already developed enough to generate unique creative products based on the information gathered [5]. Thus, there is software endowed with artificial intelligence and capable of producing poetry, articles, and musical compositions by analysing and collecting existing data. Such works are unique, and accordingly, there are those who want to obtain intellectual property rights for these products. Intellectual property right is the property right to the result of intellectual, creative activity of one person or group of people. The authors' monopoly on the use of products of creative or intellectual activity by third parties is enshrined at the legislative level. Third parties can use the results of intellectual activity only with the permission of the creators thereof.

1. MATERIALS AND METHODS

To write this scientific paper, the author used various methods and techniques of scientific research. The methodology of this research includes the study, search, and analysis of publications, articles, books, scientific papers, and other scientific literature on the subject matter. The author also analysed the legal provisions that form the basis for regulating relations in society concerning issues of intellectual property, rights to intellectual property, as well as issues related to intellectual property rights to artificial intelligence products. During the study of the subject matter, the author used various generally accepted methods of scientific knowledge: dialectical, historical, Aristotelian, synthesis method, systemic method, methods of deduction, induction, and systemic data analysis. The author also used the formal legal method, the methods of analogy, legal modelling, and the method of comparative legal analysis.

The dialectical method was used for an objective and particular consideration of state-legal phenomena regarding the subject of intellectual property law. Connections and contradictions were identified, state-legal phenomena were assessed in terms of quantitative and qualitative aspects. The dialectical method is based on such methods of cognition of information as synthesis and analysis of data, as well as abstraction and the principle of ascent from abstract concepts to specific ones. The historical method was used to examine historical data and information about artificial intelligence and the legal protection of its products. The Aristotelian method constitutes a set of laws and methods of correct thinking, aimed at a more accurate and specific study of the subject matter. The main techniques that are used in logic are analogy, hypothesis, deduction, and induction. Synthesis, as a method of scientific research, represents a mental or material connection of the parameters of one object, such as properties and features, identified through analysis into a single system. The system method, or the method of systems analysis of data, was used to study the concepts of artificial intelligence, since it is a new and not fully understood phenomenon. The use of the systemic method allowed the author to study the concept of artificial intelligence, as well as the regulatory framework that refers to the protection of intellectual property rights to artificial intelligence products, as an integral system. System analysis is one of the key methods of scientific cognition of state-legal phenomena, regulations acts and laws. It helps to structure and study the relations of the state legal system with social and other phenomena.

The method of deduction lies in directing the process of cognition from the general to the particular. With the use of this technique, the author formed ideas about specific artificial intelligence software. According to the method of deduction, the author considered the general features of development of artificial intelligence and technology in general. The induction technique is the opposite of the deduction technique. It lies in direction of thought process from particular facts and experience to general ones, that is, in the generalisation and drawing of conclusions. With the use of the induction technique, the author studied individual facts about the system of legal provisions and laws according to the subject matter and formed a general understanding of the international legal system in intellectual property law. These two techniques were complementary in the course of the study. The author used a formal legal, or dogmatic method to study the existing legal facts and regulations on the protection of intellectual property rights to artificial intelligence products. This method assumes a consistent and logical study of all of the above. With the help of this method, the author studied the legal provisions for protecting the products of artificial intelligence, sorted out legal responsibility and legal relations associated with the subject matter.

The analogy method helps to establish similarities in certain aspects between objects and concepts that are not identical. The analogy method provides probable knowledge, but does not provide reliable information. The method of legal modelling is used to build models of possible legal situations and find ways to solve them; this method helps to cognise and hypothetically solve certain legal situations. The final method used by the author during the research was the method of comparative legal analysis. This method allowed to study and compare legal documents and the regulatory framework of different countries, it helped to compare and draw conclusions about the degree of study of the problems and the quality of legal regulation of intellectual property rights in the context of artificial intelligence in Moldova and the world. To explore the theoretical side of the issue of artificial intelligence, the author used a theoretical basis, which includes the scientific articles of the following scholars: Moriggi [6], Clifford [7], Ponkin and Redkina [8], Ihalainen [9], Abbott [1], González [2], etc. The legal basis of this paper is the Constitution of the Republic of Moldova[1], State Agency for Intellectual Property, the Code of Science and Innovation of the Republic of Moldova[2], the Law of the Republic of Moldova on Copyright and Related Rights No.139[3], international treaties and regulations governing intellectual property issues. The empirical base on which the content of this scientific paper is based includes information of a methodological nature, materials of judicial practice, recommendations of working groups in the countries of the European Union, as well as materials of scientific conferences on the subject of artificial intelligence.

[1] Constitution of the Republic of Moldova. (1994, July). Retrieved from http://www.legislationline.org/documents/action/popup/id/16261/preview

[2] Code of Science and Innovation of the Republic of Moldova. (1994, July). Retrieved from https://cis-legislation.com/document.fwx?rgn=7758

[3] Law of the Republic of Moldova No 139 “On Copyright and Related Rights”. (2010, February). Retrieved from http://agepi.gov.md/sites/default/files/law/national/l_139_2010-en.pdf

2. RESULTS AND DISCUSSION

2.1 Artificial intelligence products

Artificial intelligence is capable of completely changing the processes of human life in particular and society at large. As a phenomenon, artificial intelligence is already launching revolutionary processes in technology. It changes and transforms literally all types of human activity, it modifies the process of communication, doing work, learning. Science and technology progress does not stand still, and the speed with which robotics and various artificial intelligence systems are being improved is steadily growing. Scholars are beginning to argue about the possibility of a new industrial revolution and the entry of humankind into a completely new technological era. Nowadays, robots and software can do more than just count numbers and perform simple tasks. The advancement of artificial intelligence has transformed software and systems – they are now capable of performing creative tasks and create products that would normally fall under the intellectual property law, as unique and human-made. The field of robotics and artificial intelligence is constantly transforming and developing very rapidly.

As noted earlier, the international legal system fails to timely modernise the legal aspects of new technologies and currently it is required to transform legislation in all spheres of public activity [10]. One area that definitely needs improvement is the area of artificial intelligence. International laws and regulations were not prepared for the fact that the product of intellectual activity would be produced not by a person, but by something else. Modern international legislation has not been prepared; it does not contain a specific definition of the owner of the rights to the product of artificial intelligence. Accordingly, there is no specific understanding of who owns the copyright for a verse generated by artificial intelligence – the person who wrote the software, the artificial intelligence itself, or the owner of the computer where such software was installed. Legal scholars have started raising these questions due to the emergence of real-world practical examples.

In Spain, programmers have developed an artificial intelligence project WASP (Wishful Automated Spanish Poet). This software creates poetry based on the poems of famous Spanish poets. It uses news from Internet sources, which allows it to make poems relevant, as they can be devoted to events that are currently taking place. The software is equipped with an extensive vocabulary, which allows it to generate literary works of really high quality. To obtain the final result, the software needs an operator, since the application itself generates only a draft version of the poem. The operator serves as a key link, refining the quality of the finished poem through certain sequential actions. Such actions, performed by a computer software, force the study of the legal side of this issue. In this case, the programmer created the software, the software generated a draft of the poem, and the operator finalised the poem. Let us suppose that someone decides to publish these poems. Who will be considered the author and who will own the intellectual property rights for this product? It is noteworthy that world leaders in technology and new developments have been funding this industry for a long time. Google plans to implement a project for an application that will write news reports and articles. This software will analyse all available media sources and produce finished news articles.

In 2016, a group of programmers and art historians from the Netherlands presented to the public a painting that was created with the use of artificial intelligence. This work of art was modelled by the software after analysing over three hundred paintings by Rembrandt. The scientists who developed this project consider the invention to be revolutionary and see the prospects for the practical application of this software. According to the results obtained, this software will open up opportunities for the restoration of partially lost works of art, thus expanding the opportunities for studying art and its history. Within the framework of the Shinichi Hoshi Literary Competition, the novel The Day a Computer Writes a Novel, written by artificial intelligence, qualified for the final selection stage. The software generated a literary novel with the use of the data provided by the developer. These were such data as the approximate plot line, gender of the main character, a set of phrases, as well as sentences that must be used in the writing process. The jury of the competition recognised the novel as worthy of public attention and drew the attention of the developers to the shortcomings of the software. Thus, one of the main shortcomings was the insufficient completion and underdevelopment of plot characters.

2.2 Legal provisions regarding the products of artificial intelligence

At the moment, scholars are discussing whether artificial intelligence can be the subject of intellectual property rights. The question is also open whether artificial intelligence can be responsible for the consequences of the influence of the product of its creativity on society, with the ensuing legal consequences. From a legal standpoint, artificial intelligence cannot claim intellectual property rights since it does not physically exist [11]. Scientists believe that at this stage in the development of artificial intelligence, there are gaps in legislation between copyright and artificial intelligence software. Similar tendencies have already emerged during the invention and development of the Internet. During that period, legislation also lagged behind the pace of technological progress at times. At this stage, considering the speed of improvement of artificial intelligence, immediate and correct amendments to international and regional laws regarding intellectual property law and copyright are required. Artworks created with the use of artificial intelligence are not covered by copyright and legislation on intellectual property rights. Accordingly, the programmers who create such software will not have the opportunity to financially benefit from the creative products generated with the use of artificial intelligence. Considering this, developers will not have sufficient motivation to create and improve artificial intelligence and related software. This can serve as a catalyst for slowing down or stopping the development and modernisation of artificial intelligence software [12]. To prevent this scenario from unfolding, programmers need to obtain intellectual property rights for products created by artificial intelligence, as, for example, artists obtain the rights to their paintings.

European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics[1], indicates that, at present, the development of robotics is at such a stage when machines can perform more actions than those for which they were programmed. The document states that robots, and in particular artificial

[1] Civil Law Rules on Robotics. (2017, February). Retrieved from https://clck.ru/Q3wkV

intelligence software, can currently perform certain actions inherent in a human individual; they can learn from the experience of tasks performed and mistakes made; they can make quasi-independent decisions. This level of development makes them similar to agents who can interact with the outside world, changing it. Accordingly, the system of legal legislation and the definition of legal responsibility for the action and inaction of such programmes should be promptly regulated. In this context, scholars and lawyers propose two possible models for resolving the issue of civil liability and legal rights of artificial intelligence programmes. Possible models for resolving the legal issue of artificial intelligence are presented in Table 1.

Table 1. Models of civil law regulation of artificial intelligence

Artificial Intelligence	**Artificial Intelligence**
Special type of property	Electronic person
Human property	Autonomous legal entity
The owner is responsible for causing damage	Independently responsible for the damage caused

It is necessary to provide mutually beneficial conditions for programmers and for society, which will benefit from the results of artificial intelligence at the legislative level. If, according to regulatory documents, a programmer owns copyrights to products and this stimulates them to further work, then this should be consolidated in legislative provisions [13]. In case of regulating the machine as a separate object, the completed products will become part of the public domain. The second option is economically unprofitable for the developer and will likely lead to the suspension of development in this area.

2.3 Review of possible theories for the settlement of intellectual property rights to artificial intelligence products

For several years now, the countries of the European Union have been seriously thinking about resolving the issue of intellectual property for products produced by machines and software equipped with artificial intelligence. This matter is of strategic importance, since the areas of activity in which intellectual property rights are used on an ongoing basis account for more than 42 % of the total economic activity in these countries [14]. The existing European regulations, such as the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law[1].

Civil Law Rules on Robotics[2], do not have specific legal provisions that would be applicable to artificial intelligence software, however, they contain provisions that can be modified and subsequently applied to these new technologies. At the same time, scholars indicated the necessity of making several particular amendments. In their articles, I.V. Ponkin and A.I. Redkina [8] have repeatedly mentioned the need to make operational amendments to legislative acts [8]. The author of this paper agrees with their statement that currently the process and speed of development of laws in copyright has lagged

[1] European Parliament Resolution. (2017, February). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0051

[2] Civil Law Rules on Robotics. (2017, February). Retrieved from https://clck.ru/Q3wkV

behind the dynamics of development of artificial intelligence and other modern technologies. Back in 1997, R.D. Clifford, professor of law school in New York, outlined the necessity of changing the existing concepts of intellectual property law. He studied the development of autonomous creative software and made sound conclusions that it does not fit into the existing legislative provisions [7].

A. Moriggi [6] considers several possible options for the development of modern intellectual property law. He sees the emergence of modern creative programming as an incentive for analysis and revision. The most realistic option for resolving the issue of intellectual property of artificial intelligence software is the transfer of rights to the results of their activities to the software creators. The second option, as already indicated, is the transfer of all the results of activities to the public. From an economic standpoint, the second option is neither beneficial for programmers who develop such software nor for investors who expect a return on their investment in these projects. In his scientific works, Moriggi [6] draws public attention to the necessity of creating a comfortable environment for programmers and investors, and also points to the potential for the global and regional economy that artificial intelligence technologies possess. Another problematic aspect in the issue of intellectual property can be a negative reaction and litigation initiated by third parties. Such problems may arise for developers of artificial intelligence software as a result of the self-learning of the software. It can analyse the data that consumers of these services upload and use it to generate new creative content [6].

K. Hristov [15-17] also raised the issue of copyright and artificial intelligence in his research. He believes that the recognition of artificial intelligence as the author of creative products will lead to the destruction of the entire legal system, in particular in the United States, since there will be more legal questions than answers [15]. In turn, such circumstances can provoke restrictions on the part of legislation and, as a result, lead to reduction of the scale of production of artificial intelligence technologies [18-20]. Another opinion concerning the problem of copyright protection for artificial intelligence products was put forward by the scientist and lawyer J. Ihalainen [9]. In his articles, he describes the theory that programmers who develop software for writing musical compositions can obtain almost unlimited rights to them. Care should be taken to introduce a provision in future amendments stating that products created by humans and software are separate objects of law. Such amendments are necessary to understand the difference between the contribution of a person and a programme to the creation of a particular creative product. Thus, the intellectual property rights to artificial intelligence products will be protected, but will not be considered in terms of authorship. Under such a system, the rights to each work written will be protected in common with trademark rights. This will protect the market from mass production of artificial intelligence products, providing an opportunity to develop this area [9].

CONCLUSIONS

The author study of the international legal framework, as well as the study of international scientific articles on the subject matter, showed very ambiguous results. The author discovered gaps in international and regional legislation, including the legislation of Moldova. Legal systems in different countries of the world are not ready for the legal

regulation of artificial intelligence software, as well as for justifying the rights to the products of their activity. At the moment, the development of technologies in robotics, as well as in artificial intelligence software, is happening faster than the development of the legal system. Such conclusions are made by scholars all over the world. Scholars discuss issues related to the regulation of the legal aspects of activities of artificial intelligence software. However, they fail to come to an agreement in resolving this issue. Some believe that the products of the creative activity of artificial intelligence should be made part of public domain. Others strongly disagree with this concept, as it will slow down the development of technology. Such a concept would not provide creators and investors with income from the sale of these products. Accordingly, the former will not develop software, and the latter will not invest in these projects. Most scholars agree that the regulatory framework is outdated and requires modernisation. The emergence of new technologies and the need for new legislation can provoke legislatures to reform and modernise the existing systems. The second concept of artificial intelligence copyright settlement lies in the transfer of all rights to the creator or operator of the software. It will also resolve issues related to accountability for the consequences of artificial intelligence software activities.

Consequently, the author found a complete lack of regulation of intellectual property rights to artificial intelligence products. The author established that the international legal system fails to match the pace of development of modern technologies in terms of adapting the regulations. The legal framework must undergo an immediate modernisation. Legislation in force must be audited and current intellectual property laws amended. As of today, technologies are rapidly developing, and to succeed in the legal regulation of all aspects of this area, it is recommended to develop a plan for the future, taking the technological progress and the possible emergence of new technologies and more advanced artificial intelligence software into consideration.

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Suggested Citation: Gribincea, A. (2020). Intellectual property rights to an artificial intelligence product. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 231-241.

Submitted: 03/08/2020
Revised: 12/10/2020
Accepted: 25/11/2020

УДК 349.3
DOI: 10.37635/jnalsu.27(4).2020.242-254

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ФОРМУВАННЯ СИСТЕМИ СОЦІАЛЬНОГО ЗАБЕЗПЕЧЕННЯ НАСЕЛЕННЯ УКРАЇНИ В КОНТЕКСТІ ЄВРОІНТЕГРАЦІЇ

Анотація. *На етапі формування в Україні нової системи соціального забезпечення важливо дослідити та вивчити всі можливі моделі та розробити рекомендації, щодо впровадження найбільш ефективних. Актуальність даного дослідження полягає у вивченні нормативно-правової бази, яка функціонує в Україні та можливостей її вдосконалення й реформування у більш конкретний нормативно-правовий акт. Мета дослідження полягає у вивченні основ та принципів системи соціального забезпечення населення, вивченні існуючих системи соціального забезпечення, які успішно функціонують на території зарубіжних країн. Для вивчення та аналізу можливостей покращення системи соціального забезпечення населення, авторами були використані специфічні та загальнонаукові методи пізнання, був використаний метод синтезу та аналізу літературних джерел, досліджено українські та закордонні нормативно-правові акти з питань соціального забезпечення населення. В роботі використані методи збору та обробки інформації, порівняльний метод, для вивчення можливості впровадження досвіду європейських країн в українську систему соціального забезпечення громадян. Під час написання даної статті авторами вивчено існуючі системи та моделі організації надання соціальної допомоги населенню в різних країнах. Проведено порівняння моделей соціальної допомоги, виявлено переваги та недоліки. Вивчено та проаналізовано структуру та перспективи наявної в Україні системи соціального забезпечення населення. Виявлено найбільш позитивні приклади для їхнього впровадження в існуючу нормативно-правову базу з метою удосконалення та покращення якості надання соціальних послуг на території України. Встановлено, що дослідження та аналіз закордонного досвіду*

допоможе виокремити найбільш дієві моделі соціального забезпечення населення. Проведення аналізу та вивчення проблеми дозволить дослідити, які недоліки та переваги мають системи різних зарубіжних країн. За допомогою поетапного аналізу, можливо виокремити ряд принципів соціального забезпечення, які в подальшому зможуть стати базою для формування Соціального кодексу України.

Ключові слова: декларація соціальних прав, фінансові виплати, Соціальний кодекс України, соціальна політика, реформа.

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UKRAINIAN SOCIAL WELFARE SYSTEM DEVELOPMENT IN THE CONTEXT OF EUROPEAN INTEGRATION

Abstract. *At the stage of development of a new social security system in Ukraine, it is important to research and study all possible models and develop recommendations for the implementation of the most effective ones. The relevance of this study lies in the investigation of the regulatory framework that operates in Ukraine and the possibilities of its improvement and reform into a more specific regulation. The purpose of the study is to examine the basics and principles of the social security system, the study of existing social security systems that operate successfully in foreign countries. To investigate and analyse the possibilities of improving the social security system, the study used specific and general scientific methods of cognition, including the method of synthesis and analysis of literature sources, review of Ukrainian and foreign regulations on social security. The methods of information collection and processing, a comparative method, were used to research the possibility of implementing the experience of European countries in the Ukrainian social security system. The study examined the existing systems and models of organisation of social assistance to the population in different countries. The models of social assistance are compared, and the advantages and disadvantages were identified. The structure and prospects of the current system of social security of the population in Ukraine were studied and analysed. The most positive examples were identified for implementation in the current legal*

framework in order to improve and enhance the quality of social services in Ukraine. It was established that research and analysis of foreign experience would help identify the most effective models of social security. Analysing and studying the problem would allow to explore the disadvantages and advantages of the systems of different foreign countries. With the help of a step-by-step analysis, several principles of social security were identified, which would have the opportunity to become the basis for the development of the Social Code of Ukraine.

Keywords: declaration of social rights, financial payments, the Social Code of Ukraine, social policy, reform.

INTRODUCTION

Compared to the leading welfare states, Ukraine is just beginning to develop a legal system with regard to social welfare. The world legal system in social security very clearly defines the human rights to social welfare, which is to be ensured by the state. The rights to social security of every citizen are officially recognised by the international community, they are considered to be some of the fundamental and crucial rights for ensuring normal human life [1]. The right to social welfare protects a citizen from crisis life situations and provides them with material assistance from the state. A citizen can receive welfare benefits in case of loss of livelihoods and due to circumstances beyond their control. Such circumstances include unemployment, the acquisition of the status of a person with a disability by a person, reaching old age, illness, or loss of primary income earner. The Universal Declaration of Human Rights[1] is the main international document that clearly regulates the human right to social security. It was developed and approved by the UN General Assembly in 1948. This legal act defines an array of basic and fundamental rights of every person. These rights are designed to provide a person with decent living conditions and social welfare that guarantees a decent standard of living, including food, clothing, certain living conditions, regular medical examinations, and social services necessary to ensure and maintain the health and well-being of citizens and their families. her. A set of social rights stated in the declaration guarantee the citizen support and security from the state in case of disability, reaching old age, obtaining the status of unemployed, and in case of illness [2].

The basic and most significant shortcoming in the system of state provision of social welfare is the lack of clear definitions and general systematisation of all regulations [3]. Currently, Ukraine is undergoing a continuous process of reform and improvement of the existing social assistance system. Improvements and changes are not adopted in a structured way, as the modernisation of the legal framework occurs by means of adopting new regulations. For example, the Law of Ukraine "On State Assistance to Families with Children"[2] has been revised and improved 30 times since 2001. In 2008, the law was amended to provide family and child care for parents to receive until the child reaches the age of three. In 2009, this law was once again submitted for revision and improvement. Thus, since 2009 the state has been providing care for parents upon adopting a child. In 2011, changes were made to the amount of

[1]Universal Declaration of Human Rights. (1948). Retrieved from https://www.un.org/en/universal-declaration-human-rights/

[2] Law of Ukraine No 2811-XII "On the state help to families with children". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2811-12#Text

financial aid at the birth of a child and the procedure for assigning child benefit to single mothers was adjusted. In 2013 and 2014, the procedure for granting and quantifying financial benefits at the birth of a child was adjusted. In addition, the aforementioned changes introduced in 2008 were repealed. The Law of Ukraine "On the State Social Assistance to Low-Income Families"[1] has also been revised and amended many times. Thus, it has been subjected to as many as 17 amendments [4].

Thus, there is a trend of regular changes in current legislation and the lack of regulations that could govern and consolidate information on social welfare. The presence of such a document would give citizens the opportunity to learn about the list of welfare benefits, the list of categories of citizens entitled to receive them, and would increase the general awareness of Ukrainians in legal regulation of social protection [5]. Currently, in the absence of a complete list of social benefits and the above-mentioned list of categories of citizens, the majority of the population is not informed and as a result cannot exercise their right to social welfare. To discontinue such trends, it is advisable to reform the legal regulation of social welfare in Ukraine. The process of reforming and systematising the laws of Ukraine in social welfare system was launched in 1998. The Verkhovna Rada of Ukraine received four drafts of the Social Code of Ukraine. However, the Verkhovna Rada did not accept any of the drafts and returned them for revision. In January 2020, the possibility of adopting the Social Code of Ukraine in the next 3-4 years was announced [6]. Systematisation of the legal framework is a complex procedure that requires a phased implementation. For this, consolidation and codification are required. Consolidation will systematise the information in the current legislation and allow to organise it, thereby eliminating the contradictions between the acts and laws that have undergone amendment and improvement [7]. Once consolidated, it is important to codify the existing regulatory framework. Subject to high-quality codification, it is possible to obtain a clear system of regulations that can become the basis for the creation of the Social Code of Ukraine.

It is noteworthy that in recent years Ukraine has pursued a course to implement a European social welfare system [8]. To develop an effective and efficient social welfare system, it is necessary to consult the international practices, which have already passed the stage of testing various models of social welfare system and has worked out effective strategies and tactics for implementing changes in the said system. Ukraine is on the way to developing a system of social welfare; therefore, it is possible to analyse the experience of all leading countries and implement only the most effective methods.

1. MATERIALS AND METHODS

The theoretical methods used to write this scientific paper were as follows. Analysis of legal scientific literature on the subject matter. The paper analyses the scientific articles of leading scholars who studied the problems of social welfare, state social assistance, and investigated the functioning of the social welfare system in different countries. The authors also considered the general theses in the scientific literature on the subject matter. To obtain information on the current social welfare system in Ukraine, an array of

[1]Law of Ukraine No 1768-III "On the state social assistance to low-income families". (2000, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1768-14#Text

regulations, laws, and the Constitution of Ukraine[1] were studied. In particular, the study includes analysis of such laws of Ukraine as "On Social Work with Families, Children, and Youth"[2], "On Social Services"[3], "On the Basic Principles of Social Protection of Labour Veterans and Other Elderly Citizens"[4], "On the Status of War Veterans, Guarantees of Their Social Protection"[5], "On the Rehabilitation of Persons with Disabilities in Ukraine"[6], "On the Basics of Social Accounting of Homeless People and Homeless Children"[7], "On Pensions"[8], "On the Obligatory State Pension Insurance"[9], "On the State Help to Families with Children"[10], and "On the State Social Assistance to Low-Income Families"[11]. The authors analysed several drafts submitted to the Verkhovna Rada of Ukraine in order to identify opportunities to finalise these projects and understand the profitability of the implementation of such drafts in Ukraine. The authors studied the European Social Charter and other legal instruments in force in European countries so as to obtain information on the development and functioning of social security systems in other countries, including in the Member States of the European Union.

The combination of various methods of scientific knowledge has laid the foundation for exploration of the subject matter. The grouping and use of various methods led to the analysis of issues related to the current situation of the social welfare system in Ukraine. Through the study of scientific and legal sources of various foreign countries, the authors developed an understanding of the principles of building a social welfare system existing abroad. The analysis of the Scandinavian model of social welfare helped learn about the principles of building an effective model and policy of social welfare. The study used an Aristotelian method, which allowed to outline and propose a set of changes to the current legal regulation of social relations and to develop possible prospects for implementing the European practices. Methods such as generalisation and abstraction allowed to systematise the data obtained and develop clear recommendations

[1]Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

[2]Law of Ukraine No 2558-III "On social work with families, children, and youth". (2001, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2558-14#Text

[3]Law of Ukraine No 2671-VIII "On social services". (2019, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2671-19#Text

[4]Law of Ukraine No 3721-XII "On the basic principles of social protection of labour veterans and other elderly citizens". (1993, December). Retrieved from https://zakon.rada.gov.ua/laws/show/3721-12#Text.

[5]Law of Ukraine No 3551-XII "On the status of war veterans, guarantees of their social protection". (1993, October). Retrieved from https://zakon.rada.gov.ua/laws/show/3551-12#Text

[6]Law of Ukraine No 2961-IV "On the rehabilitation of persons with disabilities in Ukraine". (2005, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2961-15#Text

[7]Law of Ukraine No 2623-IV "On the basics of social accounting of homeless people and homeless children". (2005, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2623-15#Text

[8]Law of Ukraine No 1788-XII "On pensions". (1991, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1788-12#Text

[9]Law of Ukraine No 1058-IV "On the obligatory state pension insurance". (2003, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1058-15#Text

Law of Ukraine No 2811-XII "On the state help to families with children". (1992, November). Retrieved from https://zakon.rada.gov.ua/laws/show/2811-12#Text

[11]Law of Ukraine No 1768-III "On the state social assistance to low-income families". (2000, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1768-14#Text

for the social welfare system in Ukraine, evidence from the experience of legislation and policy of other countries. Comparative and structural-functional methods were used to substantiate the selected models and systems of social welfare, as well as to consider the possibility of their implementation in the Ukrainian social welfare system.

2. RESULTS AND DISCUSSION

Varieties of systems and models of welfare system. Analysis of the literature on the subject matter and study of the corresponding legal documentation provided the authors with information on the structures and systems of social welfare in different countries. Based on the received information it is possible to compare foreign structures with the Ukrainian system of social protection of the population. Existing systems of social protection in the world are divided into different groups depending on the ratio of structural elements [9]. There are two main systems: insurance and universal. The universal system is financed from the state budget, and its main advantages are the reduction of inequality among citizens, the achievement of maximum social justice, as well as the reduction of the difference in the status and income of citizens. In this system, the state acts as a guarantor of a certain level of income and the provision of social welfare regardless of the personal contribution of each citizen. To meet the social needs of the most vulnerable population segments, the state uses the direct (targeted) redistribution of funds from the tax system and budget. This system also shows an increase in the importance of municipal and private social funds to provide assistance to individuals and groups of citizens. The main basis for determining the required level of financing for social funds is the social needs of the population. According to the concept of this system, the financing of social welfare of citizens is a direct investment in human resources, therefore the state invests in the prospects of its economy. The interpretation of this system can be defined as the investment of citizens in their welfare through the development of strategies and systematic work [10].

Many scholars have studied and analysed the development of effective social protection systems. Table 1 presents several basic models of social policy used by the world's leading countries. Among the models of social policy in different countries are the four most common models, such as Catholic, conservative, liberal, and social democratic.

Table 1. Characteristics of social policy models

Model / Characteristic	Catholic	Conservative	Liberal	Social-democratic
Central unit	Family	Local labour market	Central government	Local authorities
Level of spending on social welfare	Low	High	High	High
Employment	Low for women	High, distributed part-time employment	High	High, state-stimulated
Private sector participation	-	+	+	+
Main source of funding	Self-help, family help, community	Market (insurance payments)	State for the poor unemployed (taxes), insurance payments	State and communes (municipalities), tax redistribution

	help		for taxpayers	
Emphasis on compulsory social insurance	-	++	+	-
Emphasis on voluntary insurance	+	+	+	-

The authors consider and analyse each of the models provided in Table 1 and theoretical information from different resources in more detail. The Catholic model of social welfare was developed in the scientific works of Vatican scholars in the 20th century. In particular, it was considered in such scientific articles as "Populorum Progressio"[1] and "Sollicitudo Rei Socialis"[2]. According to the basic principle of this model, every person and citizen should first seek help from themselves or their immediate environment. The immediate environment is the family. If they do not have the opportunity to help, the person should turn to the local community, neighbours, church, other public organisation. In case of inability of all the above instances to provide adequate assistance, the citizen may apply to state insurance services or other state organisations and government agencies. Scholars have concluded that the Catholic model is not viable anywhere but the Vatican. Thus, it is rather considered as a theoretical model. Researchers believe that the modern world has no room for such a model [11].

The conservative model obliges citizens to social insurance, keeps records and controls this process. It is attributed to the insurance system of social welfare. Such a system is financed by means of collecting taxes from employees and employers. In this model, the welfare of the citizen and their further social security depends on the results of their work. This model guarantees proper social welfare for citizens employed in well-developed industries. A significant disadvantage of the conservative model is the insufficient security or a complete lack thereof with regard to citizens who are employed part-time or have the status of unemployed. This shortcoming emerged due to the insufficient level of tax redistribution. Therefore, people belonging to the above groups do not receive adequate aid from the state and can only rely on charitable social organisations [12].

The liberal model has some similarities with the conservative one. It is also based on market positioning as the most important area for the organisation of relations in society. However, there are still several differences between the two models. Firstly, according to the liberal model, the state envisages a residual social policy. Residual social policy involves the ability of citizens to exist in society without social aid from the state. According to the liberal model, the social sphere is financed on a residual basis, therefore the amount of social benefits will depend on the contributions available from volunteers and charitable organisations [13]. Secondly, the liberal model presumes that the state bears part of the responsibility for its citizens as against the conservative model. The Great Britain and the United States can be considered classic countries representing

[1]Populorum Progressio. Encyclical of Pope Paul VI on the development of peoples. (1967, May). Retrieved from http://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_26031967_populorum.html

[2]Sollicitudo Rei Socialis. (1987). Retrieved from http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html

the liberal model. In recent decades, the liberal model has undergone some modifications in these countries. There, the social policy still maintains the specific features and principles of this model. Over the years of operation of this model in the said countries, the social responsibility of the state for the welfare of the population has increased. However, the model is still based on two main principles. These are the principles that oblige citizens to social insurance, payment of contributions, and the principle of state social assistance to citizens. The condition for receiving such assistance from the state can only be the financial disadvantage of the citizen [14].

The social democratic model was popularised in the Scandinavian countries. It started taking shape at the turn of the last century in order to reduce the difference in living conditions of rich and poor. This model is attributed to the universal social welfare system. This means that the state fully ensures the social welfare of its citizens. This model had a positive impact on the development of social policy in the Scandinavian countries, enabling the removal of the term "poverty" in relation to the population of these countries, leaving only the concept of "weak population groups". These include the elderly, children under the age of six, the unemployed, troubled children, and people addicted to alcohol or drugs. According to the liberal model, there are several approaches to solving the problem of "weak groups", which are based on certain fundamental principles. The first principle lies in the statement that every citizen has an equal value for the state, i.e. the state undertakes to provide social assistance to each person, if necessary [15]. The second principle is that the package of social services is provided to everyone on a voluntary basis, but if a citizen cannot make decisions to receive social assistance from the state, it can be provided compulsorily. The third principle declares that state social assistance should be introduced in all spheres of a citizen's life, it should enable them to live a normal social life and must constitute a continuous process. The last fundamental principle states that social assistance should equalise the level of social and material assistance in society, the state should guarantee every citizen the same level of education, living conditions, and provide employment.

Principles and possibilities of reforming the social sphere in the context of European integration. As mentioned above, Ukraine focuses on the European model of social policy. However, the Ukrainian government, after announcing the direction of the European integration movement, has repeatedly passed laws that contradict European principles on social protection. For example, laws specific to the Soviet model of social protection were proposed or adopted. These were legislative acts that provided benefits for new categories of citizens. The first decisive step in the process of European integration for Ukraine was the harmonisation of the Convention for the Protection of Human Rights and Fundamental Freedoms[1]. The authorised legal bodies of Ukraine also revised the European Social Charter[2]. These actions provoked the need for reforms [16]. Ukraine is carrying out reforms in the existing social system, the share of insurance relations between the state and citizens is growing, such a policy in social and legal relations can increase the level of social welfare of citizens and eventually improve

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

[2]European Social Charter (revised). (1996, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_062#Text

socio-economic conditions. However, there are currently several negative factors in Ukraine that may slow down reforms and negatively affect future steps towards European integration. Such factors include a considerable number of benefits for the population and the inability to control their intended use, the lack of available funds in the Pension Fund, the poor demographic situation, and low levels of public confidence in public and private financial institutions. In the European Union, citizens are monitored for financial assistance from the state. In Ukraine, there are no relevant bodies that could control the profitability of financial assistance and the financial situation of persons receiving social benefits from the state [17]. This situation has led to the receipt of social assistance by citizens who do not need it and a low level of payments to citizens who are in a difficult financial situation.

Social protection in the countries of the European Union has certain differences and features according to the situation in the country. In general, these differences are found in the fundamental principles that are the same for each country of the European Union. One of such principles is the guarantee of financial aid to every citizen of the state in the form of a living wage, as well as opportunities for fulfilment in society. Every citizen of the European Union can count on state social assistance from the state or non-governmental social organisations and foundations. Below is a review of models and systems developed in different Member States of the European Union [18].

The experience of the Netherlands can be applied to implement reforms in the Ukrainian social welfare system. The social policy system in the Netherlands includes social security for employees, social assistance, and state insurance. The country fully supports the livelihoods of people with disabilities, and social assistance also includes the provision of motorised transportation and the provision of housing for special needs. Unemployed citizens, the elderly, children, and the disabled also receive assistance. In general, under the social insurance system of the Netherlands, the state provides social assistance to citizens only in urgent cases, such as when the amount of social insurance is less than the allowable norm. Systematic assistance to the above categories of citizens is under the constant supervision of state bodies, including the amount of funding, and the expediency of using the assistance received by the citizen. Denmark and Finland are considered to be among the most socially oriented European countries. Denmark has been developing a socially oriented policy since the 1930s. The country has introduced free primary care for the entire population. The government has also introduced programme that guarantee assistance to pregnant women, providing them with everything they need, as well as compensating for 90% of lost income in the first fourteen weeks after the birth of a child. The country provides financial aid, which is indexed to the current cost of living, to families with children under the age of sixteen, and to large families. Finland has introduced a Scandinavian system of social policy. The country is one of the five best countries in the world to live in. As mentioned above, the Scandinavian system promotes equality of social security for the entire population. Finland also provides assistance to the unemployed, children, pregnant women, and people with disabilities. The state provides permanent social assistance to kindergartens and extended day-care groups in schools, as well as implements social adaptation programmes for people with disabilities.

At the beginning of the last century, Ukraine abandoned the old system of social welfare and started implementing new regulations and social programmes [19]. With the processes of European integration that have been actively taking place in recent years, the country is undergoing transformation and reformation. The social sphere is also subject to reforms based on European experience. Ukraine has the opportunity to take the best of the leading countries, while rebuilding the existing outdated system.

CONCLUSIONS

After analysing all available sources of information on the subject matter, certain conclusions can be drawn about the state of the Ukrainian social welfare system and possible solutions for launching reform and modernisation. The study investigated the possibilities of developing and approving the Social Code of Ukraine, which should be based on the introduced international regulations and laws. Notably, Ukraine is gradually approaching the systematisation of the current legal framework and is ready to create a unified legal document that would govern social and legal relations in the country. A considerable number of practicing scholars agree on the necessity of introducing a new social insurance system, which would oblige economically active citizens of Ukraine to make unified insurance contributions to social funds. Subsequent to attracting such contributions to state and non-state social funds, the economic situation of the country should change for the better. Such a social welfare system operates in countries that with a liberal or conservative model of social welfare. If the experience of these countries is borrowed, Ukraine will be able to adopt an already existing system, thereby avoiding mistakes in creating and implementing a new system. Considering Ukraine's limited financial resources, some scholars insist on the development of a social insurance system, including individual insurance. Such an insurance system must be combined with state guarantees. It is also worth paying attention to citizens who receive social assistance from the state, to assess their living conditions, and financial situation. It is recommended to review the recipients of assistance, as well as to more carefully select the persons in need of it in the future.

Thus, Ukraine's orientation towards European integration processes requires gradual changes and adjustments to the social protection system. The existing system should be adjusted in accordance with European legislation and should be adapted to the standards of the European Union. Ukraine has ratified most of the International Labour Organisation's conventions in social welfare, but the approved standards have become non-regulatory. This means that the standards are considered to be indicative, but not mandatory for the development of the social welfare system. As a result, the level of pensions and social benefits does not meet the requirements of European and international legislation. On the other hand, the market and economic situation in Ukraine does not allow for the full transposition and implementation of generally accepted international social welfare standards into the country's legal framework. This is economically impossible due to the low level of financing for social funds in Ukraine and the unstable economic situation. In this regard, the implementation of foreign practices requires an in-depth study of the subject matter, solutions, and changes in some principles and legal provisions for their proper functioning in the current economic conditions.

The examples of social welfare systems in European countries that were presented in this study are based on high-quality planning and distribution of state budget assets. European social security systems are based on the principles of fair and useful distribution of public funds, as well as on the decentralisation of the social assistance process. The functioning of such a coordinated mechanism on the territory of European states is possible due to the self-government of individual bodies, which is regulated by the state. They have the opportunity to use and allocate funds provided by the state to finance the social needs of citizens at their own discretion. A certain autonomy of local communities helps to consider the specific features of social assistance in particular localities.

Thus, with the successful redistribution of funds, decentralisation of social assistance, introduction of a system of audit and control of social assistance financing, creation of a quality social insurance system, and improvement of financing of state and non-state social funds, as well as being guided by foreign experience, Ukraine will be able to build a social welfare system that would satisfy all of the existing social needs of citizens.

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Suggested Citation: Gnatenko, K.V., Vapnyarchuk, N.M., Vetukhova, I.A., Yakovleva, G.O., & Sydorenko, A.S. (2020). Ukrainian social welfare system development in the context of European integration. *Journal of the National Academy of Legal Sciences of Ukraine,* 27(4), 242-254.

Submitted: 29/08/2020
Revised: 16/10/2020
Accepted: 08/12/2020

УДК 349.6
DOI: 10.37635/jnalsu.27(4).2020.255-266

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КОНЦЕПЦІЯ ПРАВ ТВАРИН КРІЗЬ ПРИЗМУ КРИТИЧНОГО АНАЛІЗУ

Анотація. *У статті розглядається поширювана нині тенденція запровадження у понятійно-категорійний апарат сучасної юридичної науки лексичної конструкції «права тварин», що умовно названа автором статті концепцією прав тварин. Підкреслюється поглиблення світових рухів захисників прав тварин, які виливаються у створення відповідних громадських організацій, декларування прав тварин, а також проведення щорічних маніфестацій з приводу Міжнародного дня тварин тощо. Свого часу існувала навіть ідея запровадження в Україні посади Уповноваженого з прав тварин за аналогією з Уповноваженим Верховної ради з прав людини. Наведене в цілому підкреслює належний рівень актуальності розглядуваної проблеми. Проведене дослідження базується передусім на міждисциплінарному підході, адже концепція прав тварин виходить за межі сугубо юридичної науки. В роботі наведені позиції представників натуралістичних і філософських наукових напрямів обґрунтування доцільності запровадження прав тварин, зокрема нововиниклої науки екологічної етики, прихильники якої розробили навіть класифікацію прав тварин з пропозицією її поширення на всіх без виключення живих організмів, включаючи мікробів і вірусів, а також рослин. Критично аналізуються також здобутки філософської доктрини у частині виокремлення інтересів тварин як основи формування їх прав. Обґрунтовується, що всі соціо-натуралістичні та філософські напрями обґрунтування концепції прав тварин є хибними з погляду формальної логіки, бо базуються на логічній помилці, викликаної порушенням закону тотожності в процесі доказування, якою є підміна тези. З огляду на алогічні спроби науковців юридичного профілю втиснути існування тварин у рамки виключно людського абстрактного мислення, наслідком якого є суспільні відносини та безпосередньо право, як регулятор суспільних відносин наводиться критичне ставлення до цього. Вважається, що значно прийнятною є концепція «благополуччя тварин», у основі якої лежить необхідність визнання потреб тварин жити в природних умовах та гідного ставлення до них з боку людей. Зазначається, що саме ця концепція покладається в законодавство передових країн світу та в національне законодавство. Звертається увага, що стаття є цінною на лише для науковців юридичного профілю, а й для фахівців натуралістичних і філософських наукових напрямів для зосередження своїх досліджень на сугубо морально-етичних аспектах, що більше відповідає викликам сьогодення.*

Ключові слова: захист тварин, природні права тварин, концепція благополуччя тварин, природні закони тваринного співіснування.

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THE CONCEPT OF ANIMAL RIGHTS THROUGH THE LENS OF CRITICAL ANALYSIS

Abstract. *The study investigates the current tendency to introduce the lexical construction "animal rights" into the terminology of modern legal science, which is conditionally called by the author of the study the concept of animal rights. Emphasis is placed on the intensification of global movements of animal rights defenders, which result in the establishment of relevant public organisations, the declaration of animal rights, as well as holding annual events on the occasion of International Animal Day, etc. At one time, there was even the idea of introducing the position of the Animal Rights Commissioner in Ukraine by analogy with the Human Rights Commissioner of the Verkhovna Rada. This in general emphasises the appropriate level of relevance of the issue. The study is based primarily on an interdisciplinary approach because the concept of animal rights goes beyond purely legal science. The study presents the positions of representatives of naturalistic and philosophical scientific areas to substantiate the feasibility of animal rights, in particular the emerging science of environmental ethics, whose supporters have even developed a classification of animal rights with a proposal to extend it to all living organisms, including microbes, viruses, and plants. The achievements of philosophical doctrine in terms of separating the interests of animals as a basis for the formation of their rights were also critically analysed. It was substantiated that all socio-naturalistic and philosophical directions of substantiation of the concept of animal rights are erroneous in terms of formal logic, because they are based on a logical error caused by violation of the law of identity in the process of proof, which is a substitution of the thesis. Given the illogical attempts of legal scholars to squeeze the existence of animals into the framework of exclusively human abstract thinking, the result of which is social relations and law itself, as a regulator of social relations, a critical attitude is given to this. It is considered that the concept of "animal welfare" is much more acceptable, which is based on the need to recognise the needs of animals to live in natural conditions and a dignified attitude towards them by humans. It is noted that this concept is enshrined in the legislation of the advanced countries of the world and in national legislation. Attention is drawn to the fact that the study is valuable not only for legal scholars, but also for specialists in natural sciences and philosophical sciences to focus their research on purely moral and ethical aspects, which is more in line with current challenges.*

Keywords: animal protection, natural animal rights, the concept of animal welfare, natural laws of animal coexistence.

INTRODUCTION

Over the past half century, the global trend towards animal protection has significantly intensified, the main focus of which is to give the animals rights. On this occasion, at the initiative of the International League for Animal Rights, on September 23, 1977, the Universal Declaration of Animal Rights was adopted in London, which was announced

on October 15 of the same year at the UNESCO headquarters in Paris[1]. Admittedly, the expansion of the ranks of animal rights activists has certain positive aspects in terms of improving the morality of the humankind, rooting in the minds of people the idea of preserving biological diversity in order to ensure sustainable civilisation. At the same time, from the legal standpoint, this declaration necessitates a number of remarks. First of all, the declaration is an international document on the fundamental principles on certain issues [1], which combines declarative rules that do not contain specific rules of conduct, but define the goals, objectives, principles of certain branches of law, legal institutions, subject, form and means of legal regulation [2]. Thus, the legal nature of the declaration is devoid of universality as one of the essential features of normativeness, which is replaced by indicativeness in the implementation of national legislation. The only indirect confirmation of this is the announcement at the UNESCO meeting, i.e., the announcement without proper procedure of its identification. For comparison, the Universal Declaration of Human Rights was adopted and proclaimed by the UN General Assembly on December 10, 1948[2], the articles of which later became the basis for further international treaties and national laws of UN member states regarding human rights guarantees.

Nevertheless, every year on December 10, the world celebrates the International Day of Animal Rights [3], even in quarantine, mass actions are carried out to protect animals, both abroad [4] and in Ukraine [5; 6]. At one time, there was even the idea of introducing the position of the Animal Rights Commissioner in Ukraine by analogy with the Human Rights Commissioner of the Verkhovna Rada. This in general emphasises the appropriate level of relevance of the issue. In addition, the provisions on animal welfare were once the basis of the Model Law on Animal Treatment and the Law of Ukraine "On Protection of Animals from Cruelty"[3]

1. MATERIALS AND METHODS

The study is based primarily on an interdisciplinary approach because the concept of animal rights goes beyond purely legal science. Animal rights issues are in the field of ecological ethics (complex science at the intersection of ecology and ethics as a philosophical science), philosophy, in particular the concept of speciesism, sociology and biology, i.e., a number of social and natural sciences. As a result, the basis of the study were the relevant scientific developments in the field of these natural and general humanities in their logical combination with the opinions of representatives of legal doctrine, which are predominantly polar in nature.

The regulatory framework included the provisions of current national legislation determining the legal status of animals, in particular the provisions of the Civil Code of Ukraine[4], which describe the object-material regime of animals, as well as the faunal

[1] World Declaration of Animal Rights. (1977, September). Retrieved from http://www.vita.org.ru/law/Zakonu/world_declaration_animal_rights.htm.

[2] Universal Declaration of Human Rights. (1948, December). Retrieved from https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/ukr.pdf.

[3] Law of Ukraine No 3447-IV “On Protection of Animals from Cruelty”. (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3447-15.

[4] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.

nature of the Law of Ukraine "On Protection of Animals from Cruel Treatment"[1], which stipulated the legal principles of the concept of animal welfare. The methodological framework of the study was developed by an organic combination of philosophical (dialectical materialism), general scientific (logical methods of analysis, synthesis, and the law of identity), as well as special legal methods (dogmatic and comparative legal).

The philosophical method of dialectical materialism, despite not always justified critical attitude of modern researchers towards it for purely political reasons, made it possible to consider the rights of animals in retrospect, their origin and development, as well as in relation to the material basis of their emergence as a very acute social issue of the inappropriate treatment of wildlife.

The analytical direction of the study of the concept of animal rights is conditioned directly by the title of the article. Thus, the critical analysis makes provision for division of the specified concept into components, their studying, identification of unacceptable positions with the subsequent development of an original vision of the resolution of problematic aspects. This predominantly concerns the decomposition of the problem of animal rights into biological, moral, philosophical, and legal components. In turn, further analysis of the biological component focused on animals that really need protection from abuse and the introduction of a proper regime. Analysis of the moral and philosophical foundations of the concept of animal rights suggested that there are only moral and ethical grounds for the introduction of the legal matter of the construction of animal rights. In the legal sphere, using a logical method of analysis, the general statutory array of relevant legislation was differentiated into two subsystems: civil law provisions that establish the material regime of animals, and provisions of natural resource legislation aimed at ensuring proper attitude of society towards wildlife, with their subsequent fragmentation to the level of the provisions of certain legal norms, which allowed to clarify the features of the object-material and protective legal regimes of animals. Therewith, it was established that the provisions of natural resource legislation also perceive the material and legal regime of animals established by the provisions of civil legislation. This is evidenced by the provisions of the Law of Ukraine "On Protection of Animals from Cruelty"[2], in particular in terms of spreading the regime of ownership and other property rights to animals (Article 4), highlighting the specifics of these property rights to animals (Article 12), as well as determining animals as the subject of transactions (Article 13), etc.

The principle of synthesis had a dual application. Firstly, animal rights were considered as a holistic phenomenon in isolation from its division into legal and naturalistic components. Secondly, based on the generalisation of the results of the analysis, a conceptual conclusion was made about the illogical application of a purely anthropocentric terminological construction of subjective rights to animals. In addition to logical methods of analysis and synthesis, the provisions of the law of identity were used as one of the fundamental laws of formal logic, which identified the logical error underlying the concept of animal rights, which shifts the authors' attention to legal

[1] Law of Ukraine No 3447-IV “On Protection of Animals from Cruelty”. (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3447-15.
[2] *Ibidem*, 2006.

aspects instead of focusing on morality.

The dogmatic (formal legal) method allowed to identify the content of the relevant legal provisions that define the legal regime of animals as things and objects of legal relations and led to the possibility of diverting attention from the naturalistic perception of animal rights to improve the latter. Ultimately, this led to the conclusion that the application of the anthropocentric category of "human rights" to animals is inadmissible.

The comparative legal method was implemented through a comparison of national, international, and foreign legislation in the field of animal protection, which further confirmed the prospects for deepening the concept of physical welfare of animals by creating appropriate conditions for their maintenance.

2. RESULTS AND DISCUSSION

One of the first (if not the first) Ukraine studies in legal science to address the animal rights was the thesis research by L.D. Nechyporuk, which covered the ecological and legal regulation of the rational use of wildlife, the author of which came to the conclusion about the direction of the Law of Ukraine "On the Protection of Animals from Cruelty"[1] towards the protection of the natural rights of animals and the legislative consolidation of the natural rights of animals in the said law [7]. Meanwhile, this conclusion contradicts the provisions of current legislation and legal doctrine, which form the basis of this legislation, according to which rights are granted only to legal entities, i.e., individuals and legal entities, in particular the holder of natural rights can only be a person as an individual. In addition, civil legislation applies to animals the legal regime of an inanimate object, and an inanimate object cannot have rights. Then the author of the thesis attempted to justify her position on the possibility of animals having not only natural rights, but also legal personality, which she called "conditional". But animal rights are mentioned only in the preamble of the Law of Ukraine "On Protection of Animals from Cruelty"[2] without elaborating on the meaning of this concept. Despite declaring the concept of "natural rights of animals" in its preamble, the provisions of this Law indicate the spread of property rights and other real rights to animals (Article 4), highlighting the features of these real rights to animals (Article 12), as well as the definition of animals as subject of agreements (Article 13), etc. There is a recognition of animals as a thing, and therefore there can be no question of any natural rights of animals. Therewith, the author draws the main arguments from certain scientific approaches, forgetting that the opinions of scientists are not a reason to give animals rights. Based on modern realities, scientific ideas about animal rights lie in the plane of morality rather than law.

A clear confirmation of this is the development of national science of "environmental ethics" as a doctrine of moral relations of human with nature, other living beings, where the role of moral agents is played by people, and animals and plants act as moral partners [8]. Therewith, it is proposed to give the rights to all living beings without exception (including microbes and viruses), as well as ecosystems, considering the rights

[1] Law of Ukraine No 3447-IV “On Protection of Animals from Cruelty”. (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3447-15.

[2] *Ibidem*, 2006.

of nature as natural laws of nature, living beings, embodied in the law and legal culture of people. The following rights of all living beings can be recognised: life; natural freedom; inheritance; protection from suffering through human fault (protection from cruelty); compensation for damage through human fault; the share of earthly goods necessary for life; genetic diversity (protection against genetic contamination); lack of responsibility to the person; care (for domestic and farm animals and plants), etc. The basis for the emergence of the rights of living beings is their interests that require protection [9-15].

These proposals raise a crucial question regarding the determination of the area of distribution of animal rights. The above suggests the need to cover all living organisms, including microbes and viruses, as well as plants. However, the fate of harmful living beings (pathogenic viruses, rodents, insects, fungi, weeds, etc.), which put humanity in a dilemma of choosing their life and health or the existence of harmful living organisms, remains unclear. Modern refined animal rights activists, living in comfortable conditions, ignore the fact that the history of human civilisation is a chronicle of the constant struggle for survival with hostile flora and fauna. For example, since biblical times, humankind has struggled with hordes of locusts, not bothering about the moral aspects of the latter's right to life. If one is to agree with the selectivity of animal species to which it is appropriate to apply the concept of rights, the concept of animal rights will automatically become its antipode – the concept of speciesism.

As for the substantive features of the above environmental ethics, it is an interdisciplinary fusion of two scientific fields, which are ecology and philosophy, because ethics is the philosophical science of the origin and essence of morality, moral consciousness of a human [16]. All the less understandable and explainable is the interference of apologists of this science in the scope of law through the use of the term "animal rights", which cannot be considered other than through the lens of the theory of subjective rights, developed in detail by legal theorists. There is another attempt to squeeze the natural laws of animal coexistence into direct human standards, in particular the sphere of rights and interests. It is known that some representatives of philosophical doctrine work in this subject area. Thus, V.A. Vorona believes that if for the modern legal doctrine, the interests of people constitute an argument valid enough to constantly improve legislation for the sake of security and protection of people, then the interests of those species of animals that are unable to express them, although undoubtedly have such interests, are ignored [17].

These statements about the interests of animals are devoid of any empirical basis. As for human interests, they are developed only by conscious needs, which determine a meaningful model of activities aimed at satisfying the relevant interest. Unconscious needs remain at the level of instinctive urges, aspirations, passions, etc. Deprived of rational thinking, animals are unable to consciously build behaviour aimed at meeting their needs, acting reflexively, and therefore any statement about the interests of animals claims at least the level of fantastic blockbusters. Again, there is an attempt to assess the behaviour of animals using human stereotypes, but by representatives of philosophical science. To complete the holistic picture of the interdisciplinary vision of assimilating subjective status to animals, a purely naturalistic approach should be provided. For example, there are attempts by scientists to endow individual animals with the ability for

politics, that is, in fact, for collective communication and the conscious organisation of coexistence, although with the caveat of direct comparisons with human politics except for some random comparisons [18]. However, it is hardly possible to identify, considered by the author as a form of self-awareness, the ability of great apes to recognise themselves in the mirror with exclusively human ability to think abstractly, which gives a person the opportunity to consciously perceive and master abstractions, the system formation of which is law as a social regulator and one of the highest social values.

There is another illogical attempt to squeeze the existence of animals into the "bed of Procrustes" of human abstractions, which are primarily social relations. Relationships are an exclusively human property that describes only human relationships directly. As a result of conscious action, relationships constitute an outward manifestation of human interrelations. The spread of the immanent properties of human society to animals goes beyond any logical ideas about the nature of humans and animals. With regard to animals, only the rules of treatment of humans are subject to regulation, which follows from Part 2 of Article 180 of the Civil Code of Ukraine[1], but in no way relations of people with animals. There is a terminological manipulation (conscious or unconscious), when there is a supposedly probable substitution of concepts. Meanwhile, the substitution of the thesis is a logical error caused by the violation of the law of identity in the process of proof. Wanting to prove something unfair in the moral sense, one instead proves that it is unfair in the legal sense [19]. This provision completely emphasises the erroneous desire of animal rights activists to translate the solution of the problem from the moral to the legal plane.

Against this background, similar attempts to naturalise the concept of animal rights by legal scholars and representatives of various scientific fields seem rather incomprehensible and trivial. Thus, from the first pages of her thesis research, V.O. Turska declares the acquisition of a new status by animals [20], acknowledging that animal rights are a purely human artificial construction, and it exists only in relations either between humans or in human relations with animals. Animal rights are protected from violence by humans and the state, not from violence by other animals, such as predators. Moreover, animals are not responsible for their actions when they violate human laws [21]. There is only one thing to agree with the author – the rights of animals (as well as humans) are a purely human "invention", an artificial construction, an abstraction that exists only in the minds of people as a consequence of their perception of the laws of social coexistence. The granting of legal status to wild animals is discussed in separate works of V.V. Shekhovtsov [22]. However, a number of other publications do not agree with the status level of animals, where V.V. Shekhovtsov considers animals as an object of property rights [22-25], which leads to the question of the possibility of animals to be both a subject and an object of law. For a person, such a situation is probable only in a slave-owning system, while in modern realities this ratio acquires pronounced dichotomous features. Therewith, the current civil legislation makes it impossible to extend the subjective status to animals, providing in Article 2 of the Civil Code of Ukraine[2] a clear list of participants in civil relations, while extending to animals the legal regime of inanimate objects (Part 1 of Article 180 of the Civil Code of Ukraine).

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.
[2] *Ibidem*, 2003.

The conclusion that the use of the definition of "right" in relation to animals that are not subjects of law is based on the inadmissibility of the principles according to which "the object of law cannot be its subject" and "rights are correlated with obligations" [26]. For this position, its authors were even labelled "the dog hunters of science" [27], although one of the co-authors is indeed recognised as the main dog hunter of the country by animal rights activists on social networks [28]. However, given their content, these principles are a significant stumbling block for supporters of the concept of animal rights.

First of all, all rights and obligations by their legal nature are subjective, i.e., they must correlate with a particular entity. In the etymological sense, the word "subject" comprises the prefix *sub* (Latin – under, below, less) and the base of the verb *jacio* (Latin – throw, deliver) [29]. If the latter is considered as a kind of certain action, then the subject is that which produces certain actions. The bearer of conscious actions is exclusively a person whose physical actions in a certain form constitute the result of a corresponding mental process. Therefore, the real subject in the physical and social aspects can only be a person, and in the legal (as a bearer of rights and responsibilities) – an individual and a legal entity. In essence, these are the fundamentals of the theory of law, which for some reason are ignored by proponents of the concept of animal rights. In addition, each subjective right substantively, as a measure of possible behaviour, implies the need to assess the limits of the latter, which can be made and perceived only by a human as a carrier of rational thinking, but in no way an animal.

Another important point of refutation of the idea of animal rights is the impossibility of imposing subjective responsibilities on the latter, which are an even category with subjective rights, together forming the content of any legal relationship. It is unlikely that there will be at least one animal that understands, accepts, undertakes, and performs a certain obligation. This raises doubts regarding the viability of individual proposals by legal scholars to designate a person as the subject of the relevant duty (similar to a trust property relationship), and the legal status of the animal owner will become similar to that of a guardian [30]. The result is an illogical pairwise correlation of "animal rights, human responsibilities", and the person must be the owner of the animal. First, the presence of the owner of the animal automatically translates the latter into the rank of a real object of law, which eliminates any substantive conversation about rights and responsibilities. Secondly, any analogy with guardianship (Article 55 of the Civil Code of Ukraine)[1], which cannot be established to a material object, is unacceptable. In addition, the emergence of subjective human rights is directly related to the legal structure of legal personality enshrined in Articles 25-26 and 30-42 of the Civil Code of Ukraine[2]. Recognition of animals as holders of rights, and their owners – the corresponding responsibilities, will require amendments to these articles, which is nonsense on both substantive and formal grounds. In view of this argument, the concept of "animal welfare" is much more acceptable, the followers of which believe that the demands of animal rights activists are not only unfounded, but do not have any scientific basis [31]. The lack of a coherent concept of animal rights was emphasised above. But even its supporters mask the need to ensure their well-being under the term "animal rights". The latter follows from the

[1] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15.
[2] *Ibidem*, 2003.

content of modern publications of animal rights activists, outwardly aimed at declaring the importance of protecting animal rights, but meaningfully highlights the need to directly recognise the need for animals to live in the wild and be treated by humans, not some mythical animal rights. The need for proper care of people towards animals, which lies in the moral plane, is replaced by a purely legal construction of animal rights. The common argument of the supporters of the concept of animal rights is the allegedly dominant trend in the world, in particular in developed European countries, towards the recognition of such rights with their subsequent consolidation in legislation. Meanwhile, the analysis conducted by experts in international law indicates the exact opposite. In the EU, on the other hand, animal welfare standards have been enshrined, first in individual legislation (Germany – the Animal Welfare Act[1], Austria – the Federal Act on the Protection of Animals[2], the United Kingdom – the Animal Welfare Act[3], Finland – the Animal Welfare Act[4]), and then at the regional level (Council Of Europe – European Convention for the Protection of Animals in International Transport 1968[5], European Convention for the Protection of Animals Kept on Farms 1976[6], European Convention for the Protection of Vertebrate Animals Used for Experimental or Other Scientific Purposes 1986[7], European Convention on the Protection of Domestic Animals in 1987[8]). The next stage should be a universal level when the welfare of animals and their protection from cruelty will be a necessary requirement for a modern developed country [32].

For comparison, the very concept of animal welfare at the time of the CIS countries was the basis of the Model Law on Animal Treatment[9], and even earlier – in the Law of Ukraine "On Protection of Animals from Cruelty"[10]. This is a progressive direction of legislation, which lies at the intersection of a rational combination of moral and legal components.

CONCLUSIONS

The concept of animal rights is based on the substitution of the thesis, i.e., the logical error caused by the violation of the law of identity in the process of proof. Proponents of this concept, wanting to prove the unfair treatment of animals in the moral meaning, instead argue that it is unfair in the legal sense, translating the solution of the problem from the moral plane to the legal one. From a legal standpoint, the introduction of the

[1] Animal Welfare Act. (1972, July). Retrieved from https://www.gesetze-im-internet.de/tierschg/BJNR012770972.html.

[2] Federal Act on the Protection of Animals (Animal Protection Act – TSchG). (2004). Retrieved from https://docs.google.com/viewer?url=http://www.ris.bka.gv.at/Dokumente/Erv/ERV_2004_1_118/ERV_2004_1_118.pdf.

[3] Animal Welfare Act, op. cit.

[4] *Ibidem*, 1972.

[5] European Convention for the Protection of Animals during International Transport. (1968, December). Retrieved from https://zakon.rada.gov.ua/laws/show/994_227.

[6] European Convention for the Protection of Animals kept for Farming Purposes. (1976, March). Retrieved from https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680076da6/.

[7] European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes. (1986, March). Retrieved from https://zakon.rada.gov.ua/laws/show/994_137.

[8] European Convention for the Protection of Pet Animals. (1987, November). Retrieved from https://zakon.rada.gov.ua/laws/show/994_a15.

[9] Model Law of Ukraine “On the Treatment of Animals”. (2007, October). Retrieved from https://zakon.rada.gov.ua/laws/show/997_i36.

[10] Law of Ukraine № 3447-IV “On Protection of Animals from Cruelty”. (2006, February). Retrieved from https://zakon.rada.gov.ua/laws/show/3447-15.

lexical and legal construction of "animal rights" into the current legislation does not fit into any of the modern concepts of legal understanding. From a practical standpoint, this determines not only the denial of the logical basis of modern rulemaking by replacing the basic anthropological foundations of the legal system, but over time will require a de facto break with the existing model of law as a whole. Hence, the concept of ensuring animal welfare, enshrined in the legislation of advanced countries, is much more appropriate.

The materials of the study are valuable not only for legal scholars as a basis for the development and improvement of a certain evidence base to substantiate their position, but also for specialists in natural sciences and philosophical sciences to focus their research on purely moral and ethical aspects, which is more in line with modern challenges.

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Suggested Citation: Yermolenko, V.M. (2020). The concept of animal rights through the lens of critical analysis. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 255-266.

Submitted: 30/07/2020
Revised: 19/09/2020
Accepted: 02/12/2020

УДК 341.4
DOI: 10.37635/jnalsu.27(4).2020.267-281

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АКТУАЛЬНІ ПИТАННЯ РОЗСЛІДУВАННЯ ТА СУДОВОГО РОЗГЛЯДУ МІЖНАРОДНИМ КРИМІНАЛЬНИМ СУДОМ СПРАВ ПРО МІЖНАРОДНІ ЗЛОЧИНИ

Анотація. *Важливим завданням нашої держави є ратифікація Римського Статуту Міжнародного кримінального суду, а також подальша імплементація його положень до національного законодавства і правозастосовної практики. Це забезпечить належні правові підстави розслідування та ефективного судового розгляду Міжнародним кримінальним судом справ про міжнародні злочини, що посягають на інтереси нашої держави. Нові завдання постають і перед криміналістикою, яка, використовуючи останні досягнення природничих, технічних та суспільних наук, пристосовує їх до розв'язання завдань судочинства, трансформує у криміналістичну практику, здійснює криміналістичне забезпечення розслідування та судового розгляду справ про міжнародні злочини. Питання розслідування та судового розгляду Міжнародним кримінальним судом справ про міжнародні злочини не були предметом окремого наукового дослідження, що визначило мету представленої наукової статті. Визначальним для досягнення поставленої мети є загальний діалектичний метод наукового пізнання. У процесі дослідження було надано характеристику міжнародних злочинів, визначено засади діяльності Міжнародного кримінального суду, до юрисдикції якого належать міжнародні злочини, обґрунтовано необхідність ратифікації Україною Римського статуту Міжнародного кримінального суду; визначено основні засади криміналістичного забезпечення розслідування та судового розгляду справ про міжнародні злочини Міжнародним кримінальним судом; з'ясовано важливість формування криміналістичної методики розслідування та судового розгляду міжнародних злочинів. Обґрунтовано, що ефективне розслідування та судовий розгляд справ про міжнародні злочини Міжнародним кримінальним судом потребує криміналістичного забезпечення, застосування криміналістичних засобів, методів, прийомів із дотриманням міжнародних стандартів. Основними напрямами реалізації криміналістичного забезпечення є техніко-криміналістичне, тактико-криміналістичне і методико-криміналістичне. Криміналістична методика розслідування та судового розгляду Міжнародним кримінальним судом справ про міжнародні злочини покликана пропонувати найбільш ефективні методи і засоби діяльності відповідно до міжнародних стандартів та з метою досягнення завдань правосуддя. Вказана криміналістична методика характеризується рядом особливостей, зокрема, вона повинна охоплювати питання взаємодії досить широкого кола компетентних суб'єктів як у межах держави, так і на міжнародному рівні.*

Ключові слова: міжнародний злочин, розслідування, криміналістичне забезпечення, судовий розгляд, міжнародний стандарт.

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TOPICAL ISSUES OF INVESTIGATION AND TRIAL BY AN INTERNATIONAL CRIMINAL COURT OF CASES OF INTERNATIONAL CRIMES

Abstract. *An important task for Ukraine is the ratification of the Rome Statute of the International Criminal Court, as well as the further implementation of its provisions into national legislation and law enforcement practice. This will provide proper legal grounds for the investigation and effective trial by the International Criminal Court of cases of international crimes that encroach on the national interests. New tasks are also facing forensic science, which, using the latest advances in natural, technical, and social sciences, adapts them to the tasks of criminal procedure, transforms them into forensic practice, provides forensic support for the investigation and trial of crimes under international law. The issues of investigation and trial of international crimes by the International Criminal Court were not subjected to a separate study, which determined the purpose of the paper presented. The general dialectical method was decisive for the achievement of the set purpose. In the course of the study the characteristics of international crimes were given, the principles of activity of the International Criminal Court, to whose jurisdiction international crimes belong, were determined; the necessity of ratification of the Rome Statute of the International Criminal Court by Ukraine was substantiated; the basic principles of forensic support of investigation and trial by the International Criminal Court of cases of international crimes were determined; the importance of formation of criminological methods of investigation and trial of international crimes was clarified. It is substantiated that the effective investigation and trial by the International Criminal Court of cases of international crimes requires forensic support, the use of forensic tools, methods, techniques in compliance with international standards. The main areas of forensic support are technical, tactical, and methodological. The forensic methodology for the investigation and trial of international crimes by the International Criminal Court is designed to offer the most effective methods in accordance with international standards and to achieve the goals of justice. The specified forensic methodology is characterised by a number of features, in particular, it should cover the interaction of a wide range of competent entities both within the state and at the international level.*

Keywords: international crime, investigation, forensic support, judgement, international standard.

INTRODUCTION

The effective investigation of international crimes and their judicial review by the International Criminal Court requires amendments and additions to the national legislation, stipulates increased requirements for the activities of law enforcement agencies, judicial bodies at the national and international levels. The need to ratify the Rome Statute of the International Criminal Court of 1998[1], according to which the jurisdiction of the International Criminal Court extends to international crimes –

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588.

genocide, crimes against humanity, war crimes, crime of aggression – is stipulated by the provisions of the Constitution of Ukraine 1996[1], the Law of Ukraine "On International Treaties" of 2004[2]. It also follows from the content of the Association Agreement between Ukraine, of the one part, and the European Union and its Member States of 2014[3] of the other part. Art. 8 of the Agreement stipulates that States shall cooperate with a view to strengthening peace and international justice through the ratification and implementation of the Rome Statute[4] of the International Criminal Court and related instruments.

The important tasks for Ukraine in this direction are highlighted in the Action Plan for the implementation of the National Strategy in the field of human rights for the period up to 2020, approved by the order of the Cabinet of Ministers of Ukraine dated November 23, 2015 No. 1393[5]. In particular, it is necessary to analyse the compliance of international humanitarian law and criminal legislation of Ukraine in order to identify gaps and inconsistencies; development, based on the results of the above analysis, of a draft law on amending the Criminal Code of Ukraine[6] and, if necessary, in other regulations and submission to the Verkhovna Rada of Ukraine in order to harmonise with the norms of international humanitarian law (in particular, on the definition of war crimes) (p. 3). It is necessary to create an effective crime investigation system in accordance with international standards and taking into account the practice of the European Court of Human Rights (p.1, p.2, p.6)[7] etc.

In the context of an armed conflict that continues in the eastern Ukraine, the harmonisation of criminal legislation with the provisions of the Rome Statute acquires particular importance, which has been repeatedly noted by scientists[8]. New tasks are also facing forensics, which, using the latest advances in natural, technical, and social sciences, adapts them to the problems of justice, transforms them into forensic practice, provides forensic support for the investigation and trial of international crimes. Problematic issues of ratification of the Rome Statute of the International Criminal Court by Ukraine, some aspects of the investigation and trial of cases of international crimes

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

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[7] Action plan for the implementation of the National Strategy in the field of human rights for the period up to 2020 No 1393-r, op. cit.

[8] Opinion of the Constitutional Court of Ukraine in the case on the constitutional petition of the President of Ukraine on issuing an opinion on the compliance of the Constitution of Ukraine with the Rome Statute of the International Criminal Court (Rome Statute case) (case No 1-35 / 2001): Opinion of the Constitutional Court of Ukraine of 11 July. 2001 No 3-v / 2001. Retrieved from http://zakon2.rada.gov.ua/laws/show/v003v710-01.

are covered in the works of N.A. Zelinska [1], N.V. Kaminska [2], O.V. Senatorova [3], R.K. Goel [4], M.V. Shepitko [5] and others. Among European scholars dealing with the investigation of international crimes were: A.G. Kibalnik, [6], J. P. Pérez-León Acevedo, [7], H. Grigoryan, [8], Č. Chepelka, [9], U. Cedrangolo, [10], V. Felbab-Brown, [11], R. Ivory, [12].

However, there are a number of topical issues of investigation and trial by the International Criminal Court of cases of international crimes that have not been the subject of scientific research. Accordingly, the objectives of the study are: to characterise international crimes, determine the principles of the International Criminal Court, which has jurisdiction over international crimes; justify the need for Ukraine to ratify the Rome Statute of the International Criminal Court; determine the basic principles of forensic support of investigation and trial by the International Criminal Court of cases of international crimes; substantiation of the need to form a forensic methodology for the investigation and trial of international crimes.

1. MATERIALS AND METHODS

The study is based on the analysis of legislative acts and regulations of Ukraine, namely the provisions of the Constitution of Ukraine of 1996[1], the Criminal Code of Ukraine of 2001[2], the Criminal Procedure Code of Ukraine of 2012[3], the Law of Ukraine "On International Agreements" of 2004[4], bylaws and others. The provisions of the Rome Statute of the International Criminal Court of 1998[5], a number of ratified international treaties of Ukraine (the Vienna Convention on the Law of Treaties of 1969[6], the United Nations Convention against Transnational Organised Crime of 2000[7], the Second Additional Protocol to the European Convention on Mutual Convention) assistance in criminal cases in 2001[8] etc.).

The methodological tools were chosen taking into account the goal, the specifics of the subject in hand. The dialectical approach was applied to become privy to the event and composition of an international crime, its consideration from the activity aspect, to determine the correlations between its elements. The dialectical approach was necessary to determine the principles of the International Criminal Court in the implementation of the function of justice. Important for forensic science are the provisions of dialectics on the ability of matter to reflect, on the relationship and interdependence of phenomena.

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[2] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14.
[3] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.
[4] Law of Ukraine No 1906-IV “On International Agreements”. (2004, June). Retrieved from https://zakon.rada.gov.ua/laws/show/1906-15#Text.
[5] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588.
[6] Vienna Convention on the Law of Treaties. (1969, May). Retrieved from https://zakon.rada.gov.ua/laws/show/995_118.
[7] United Nations Convention against Transnational Organized Crime. (2000, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_789.
[8] Second Additional Protocol to the European Convention on Assistance in Criminal Matters. (2001, November). Retrieved from https://zakon.rada.gov.ua/laws/show/994_518#Text.

Revealing the features of forensic investigation and trial of international crimes, using a dialectical method, various forms of reflection of the event of an international crime were studied, ranging from the simplest, related to the contact interaction of two objects, and to psychophysiological, when facts and circumstances are recorded in consciousness of people. To study the criminologically significant information, the peculiarities of the use of technical means and tactics were revealed.

In the course of the research general scientific methods were used. Namely: empirical: observations and comparisons; general: analysis and synthesis, induction and deduction; concretisation, generalisation, and analogy. In particular, analysis and synthesis, induction and deduction were used to determine the characteristics of international crimes, which depend on both international law and the law of a particular state, as well as applied methods, means, methods of criminal activity. General scientific methods were used in the study of international forensic standards, the content of which is constantly changing depending on the pace of scientific and technological progress, integration of the best achievements of science and technology to solve problems of effective investigation and prosecution of international crimes. Generalisation methods and analogies were used to form practical recommendations for improving the investigation and trial of international crimes based on the study of legislation, scientific papers, and foreign practices.

Special research methods were also applied. Comparative law research – to compare the legal norms of Ukraine and foreign countries that regulate the procedure of criminal proceedings and the conduct of certain procedural actions, the application of international cooperation. Historical method – to highlight the scientific views on the interpretation of the concepts of "forensic support", "international crime", "forensic methodology", "international standard". Systemic and structural method – for formulating tasks that are solved as a result of forensic support for the investigation and judicial consideration by the International Criminal Court of cases of international crimes. These tasks were considered in accordance with the technical, tactical, and methodological areas of forensic support. Using the systemic and structural method, the foundations of the creation and operation of international investigation groups – the subjects of the investigation of international crimes were revealed. The method of legal forecasting made it possible to identify areas for further development of scholarly views on the issues of forensic support and trial of international crimes, to form the principles of appropriate forensic methodology. These proposals also apply to the expansion of the content of such a structural element of the science of forensics as a method of investigating certain types of crimes.

Thus, the applied methodology provided knowledge of the essence of international crimes, the principles of the International Criminal Court, which has jurisdiction over cases of international crimes; theoretical and legal bases of forensic support of investigation and trial of cases on international crimes by the International Criminal Court; the main provisions of the forensic methodology of investigation and trial of cases of international crimes.

2. RESULTS AND DISCUSSION

The academic literature in this field has substantiated that international crime consists of transnational crimes and crimes of international significance [1]. International crimes are violations of the principles and norms of international law that are especially dangerous for

human civilisation and are fundamental to ensuring peace, protecting the individual and the vital interests of the international community as a whole [13]. In order to effectively combat international crimes, within the framework of the Diplomatic Conference of Plenipotentiaries under the auspices of the United Nations in Rome in 1998, a decision was made to establish a permanent International Criminal Court [4]. The Statute of the International Criminal Court provides for the onset of international criminal liability for: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) crime of aggression[1]. The International Criminal Court is an independent institution of international justice. The International Criminal Court exercises jurisdiction based on the principle of complementarity. In fact, the implementation of legal proceedings on international crimes and persons accused of their commission is entrusted to the courts of a particular state. Thus, the International Criminal Court does not replace the national legal system. However, in the presence of the grounds specified in Art. 17 of the Rome Statute of the International Criminal Court[2], when a state cannot ensure the implementation of proceedings in relation to international crimes, it is carried out by the International Criminal Court.

Today, Ukraine needs to implement the Statute into national legislation and bring law enforcement practice in line with its provisions. However, to this day, the Rome Statute of 1998, on the basis of which the International Criminal Court[3], operates, remains unratified by the Verkhovna Rada of Ukraine, which causes difficulties in law enforcement. Today 123 states are Parties to the Rome Statute. Ukraine signed this international agreement in 2000, but did not ratify it, as the Constitutional Court of Ukraine ruled that the Rome Statute[4] was inconsistent with the Constitution of Ukraine[5]. Only on June 30, 2019 Art. 124 of the Constitution of Ukraine was amended, which gave the state the right to ratify the Rome Statute and recognise the jurisdiction of the International Criminal Court. That is, it took Ukraine almost nineteen years to come close to an important strategic decision. Given the urgent need to consider cases of international crimes, Ukraine has twice recognised the jurisdiction ad hoc (for specific situations), submitting special applications to the International Criminal Court under Part 3 of the Statute. The first statement concerned the recognition by Ukraine of the jurisdiction of the International Criminal Court to commit crimes against humanity by high-ranking state officials, which led to particularly serious consequences and mass killings of Ukrainian citizens during peaceful protests between November 21, 2013 and February 22, 2014[6]; on recognition by Ukraine of the jurisdiction of the International

[1] Charter of the United Nations and Charter of the International Court of Justice. (1945, June). Retrieved from http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_010

[2] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588.

[3] *Ibidem*, 1945.

[4] Opinion of the Constitutional Court of Ukraine in the case on the constitutional petition of the President of Ukraine to issue an opinion on the compliance of the Rome Statute of the International Criminal Court with the Constitution of Ukraine. (2001, July). Retrieved from http://zakon2.rada.gov.ua/laws/show/v003v710-01.

[5] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

[6] Statement of the Verkhovna Rada of Ukraine to the International Criminal Court on recognition by Ukraine of the jurisdiction of the International Criminal Court on crimes against humanity by senior state

Criminal Court on the commission of crimes against humanity and war crimes by senior officials of the Russian Federation and leaders of terrorist organisations "DPR" and "LPR", which led to particularly serious consequences and mass murder of Ukrainian citizens[1].

Thus, first of all, Ukraine needs to ratify the Rome Statute of 1998, on the basis of which the International Criminal Court[2] operates, which is conditioned by the European integration direction of Ukraine's development. However, this is only the first of the important and urgent tasks. The next task is due to the fact that in order to implement effective law enforcement, achieve the objectives of investigation and trial of cases of international crimes, it is necessary to provide forensic activities. The actual "forensic support" can be described as activities to create conditions for the readiness and implementation of methods, tools, techniques of forensic techniques, tactics, and methodology, based on the principles of general theory of forensics and aimed at achieving the objectives of criminal justice. The main areas of implementation of forensic support are technical, tactical, and methodological.

Effective investigation and trial by the International Criminal Court of cases of international crimes requires forensic support, the use of forensic tools, methods, techniques in compliance with international standards. The concept of "international standards" is used in all spheres of public life and is a generalised concept that covers the requirements for a particular field of activity, taking into account international law, the requirements of the world community and the best foreign practices. Thus, scientists note that today the important tasks for Ukraine is to fulfil the international obligations and to bring the national legal system to international and European standards. The implementation of universally recognised standards in national constitution and legislation is achieved by enshrining the fundamental principles of cooperation in joint agreements [14]. International standards are a source of critical information, as they contain norms and regulations based on advances in various fields of engineering, technology, and practical experience and recognised by consensus by representatives of all stakeholders [15]. International standards include standards developed by an international standard-setting body. The most famous of which is the International Organisation for Standardisation. The International Organisation for Standardisation (ISO) defines standardisation as an activity aimed at achieving the optimal degree of order in a particular area by establishing provisions for general and repeated application of existing or potential tasks [16]. For example, A.O. Poltavskyi refers to the standardisation of the crime scene inspection. According to the author, activities on the crime scene in accordance with international standards will improve the functioning of government agencies and institutions in this area with the projected improvement of its

officials, which led to particularly grave consequences and mass murder of Ukrainian citizens during peaceful protests between November 21, 2013 and February 22, 2014, No 790-VII. (2014, February). Retrieved from https://zakon.rada.gov.ua/laws/show/790-18#Text.

[1] Resolution of the Verkhovna Rada of Ukraine “On Recognition of Ukraine's Jurisdiction of the International Criminal Court on Committing Crimes against Humanity and War Crimes by Senior Officials of the Russian Federation and Leaders of Terrorist Organizations “DPR” and “LPR”, which Lead to Serious Consequences and Mass Murder of Ukrainian Citizens” No 145-VIII. (2015, February). Retrieved from https://zakon.rada.gov.ua/laws/show/145-19#Text.

[2] Charter of the United Nations and Charter of the International Court of Justice. (1945, June). Retrieved from http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_010

quality, increase the confidence of international partners in the investigation of cross-border crimes and provide impetus to update forensics [17]. Compliance with international standards is also relevant for certain areas of forensic support, in particular, technical.

Technical and forensic support of criminal proceedings should be in line with the best foreign practices. For example, 3D scanning technologies have become part of the daily practice of law enforcement agencies of leading world countries. Such forensic support is necessary for law enforcement agencies in Ukraine. Scanning creates a three-dimensional image with the ability to freely change the angle, which can be saved on any digital media. The software included with the scanner is able not only to visualise three-dimensional images of the scanned area, but also to arbitrarily change the position of the viewpoint. This creates a virtual three-dimensional view of the crime scene of the incident, in particular different views from different points, and then analyses the situation in detail. With the help of the scan results, the investigating bodies have the opportunity not only to "return" to the crime scene to determine the location of certain objects after the inspection, but also to study the traces in more detail [18]. This image can be used during forensic examinations, in the trial process, etc. According to Yu.Yu. Orlov, the use of laser scanning to capture the situation at the crime scene complies with the Criminal Procedure Legislation of Ukraine. Laser scanning is a promising method of capturing the situation at the crime scene. Media with recording of laser scan results should be attached to the protocol of investigative action in the form of appendices. Subsequently, these carriers can be used when procuring evidence [19].

One of the progressive achievements is the use of videoconferencing technology in criminal proceedings. This technology has a wide scope of use, because the procedural actions in the mode of videoconferencing are carried out both during the pre-trial investigation and trial. Videoconferencing is used in criminal proceedings both within the state and in international cooperation. The actual forensic support for the conduct of procedural actions in the videoconference mode requires the development of uniform, internationally unified approaches regarding the legal framework, technology, organisation, tactics of conduct, and staffing.

Modern databases of law enforcement agencies and international organisations provide information and reference support for investigations and trials, provide a search for missing persons and suspects in crimes. In the context of the investigation and trial of cases of international crimes, it is important to use the main databases of information maintained by Interpol: "Persons", "Database of stolen vehicles", "Database of DNA profiles", "Database of fingerprints" etc. [20; 21]. Forensic examinations in criminal proceedings must comply with international standards (ISO / IEC17025: 2006). In this case, the standards of forensic activity are enshrined in the methods of expert research, which are, conditionally, programmes for solving expert problems, a list of consecutive operations [22]. Standardisation of forensic support should be understood as an activity to achieve optimal ordering of forensic activities by unifying the regulatory and methodological support of expert research. Given the beginning of work in this direction in Ukraine, it is important to understand that standardisation is a continuous process, and involves the development of new standard methods with the emergence of new types of expertise [23]. As noted by N.V. Nestor, of particular relevance is the unification of

examination methods and the harmonisation of forensic expertise in Ukraine with the relevant international standards in this area, in particular, with the requirements of the European Network of Forensic Science Institutions (ENFSI) [23].

In the case of tactical support of investigation and trial of international crimes, attention is paid to the conduct of procedural actions with the use of modern tactics and their complexes. In turn, the methodological support of the crime investigation is aimed at developing the most effective forensic recommendations that will ensure the achievement of the objectives of criminal proceedings. Thus, the next urgent task is to develop a methodology for the investigation of international crimes and judicial consideration by the International Criminal Court of cases of international crimes. This forensic methodology is characterised by a number of features, in particular, it should cover the interaction of law enforcement agencies, individual entities both within the state and at the international level. The issue of application of measures of international cooperation in accordance with certain directions [24], as well as new forms of international cooperation, for example – "secret investigations" is relevant [25].

An important aspect of the study is the creation of international investigative teams and the settlement of forensic support for their activities. According to Art. 19 of the UN Convention against Transnational Organised Crime of 2000, in connection with cases that are the subject of investigation, prosecution or trial in one or more participating States, the competent authorities concerned may establish bodies to conduct joint investigations (subject to the conclusion of appropriate agreements or arrangements)[1]. According to p. 1-2 of Art. 20 of the 2001 Second Additional Protocol on the European Convention on Mutual Assistance in Criminal Matters in 1959[2], a joint investigation team may be established in cases when: a) the investigation of a crime by a Party requires complex investigative activities involving other Parties; b) Several Parties conduct investigations of crimes, the circumstances of which require the possibility of coordinated, concerted action in the territory of the parties concerned. Any interested Party may request the establishment of a joint investigation team, and the request should include proposals for the composition of the team. The team is established in one of the Parties where the investigation is expected to take place[3]. The Law of Ukraine "On Ratification of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters"[4] of 2011 stipulates that in Ukraine the body that decides on the establishment of a joint investigation team is the Prosecutor General's Office of Ukraine (p. 10). These provisions are provided in Part 2 of Art. 571 of the Criminal Procedure Code of Ukraine[5]. The establishment and operation of international joint

[1] United Nations Convention against Transnational Organized Crime. (2000, November). Retrieved from https://zakon.rada.gov.ua/laws/show/995_789.

[2] European Convention on Mutual Assistance in Criminal Matters. (1959, April). Retrieved from https://zakon.rada.gov.ua/laws/show/995_036#Text.

[3] Second Additional Protocol to the European Convention on Assistance in Criminal Matters. (2001, November). Retrieved from https://zakon.rada.gov.ua/laws/show/994_518#Text.

[4] Law of Ukraine No 3449-VI "On Ratification of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters". (2011, June). Retrieved from https://zakon.rada.gov.ua/laws/show/3449-17#Text.

[5] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

investigation teams is a progressive step of the world community in the fight against international crime. This measure allows to increase the efficiency of investigation and trial of international crimes, to optimise the implementation of measures of international cooperation in criminal proceedings. Under the conditions of the investigation by the joint investigation team, the efficiency of cooperation between the representatives of the competent authorities of foreign states, in particular increases. After all, the differences between the legislation and the practice of its implementation by foreign states are significant, and it is often difficult for the competent authorities to agree on the procedure for objective and subjective reasons. The provisions of international law regulating interstate relations on a global or regional scale are partially devoted to the settlement of the outlined issues. However, despite the importance of such regulation, it is necessary to be guided by other sources of law, in particular, national legislation. The activities of international joint investigation teams should be implemented in a coordinated manner. It is a question of interaction of competent bodies of the states, their separate divisions and employees: investigators, operational workers, experts, the prosecutors carrying out the set tasks. Clarification of procedural, organisational, forensic features of such interaction is important in practice and requires in-depth study.

Given the progressive nature of legislation, it should be noted that Ukraine's practical experience on this issue requires improvement. Moreover, the events in eastern Ukraine on July 17, 2014, namely the crash of an MH17 airliner of Malaysian airlines, as a result of which 298 people from different countries were killed, led to unification in the fight against the common evil, creation of the Joint Investigation Team (JIT). It included representatives from Australia, Belgium, Malaysia, the Netherlands, and Ukraine, as well as International Civil Aviation Organisation (ICAO), the European Organisation for the Safety of Air Navigation (Eurocontrol), the International Criminal Police Organisation (Interpol), and the European Police Office (Europol), The European Aviation Safety Agency (EASA), etc. From the Ukrainian side, employees of the General Prosecutor's Office of Ukraine, the Kyiv Scientific Research Institute of Forensic Expertise, and other competent bodies were involved.

In September 2016, this investigative team announced the preliminary results of its work. The official report of the International Investigation Team on flight MH17 states that for a long period of time, between 100 and 200 investigators and experts participated in the investigation as part of the Joint Investigation Team. In two years, the contents of dozens of containers containing thousands of fragments have been carefully analysed. 1448 of these fragments were added into the database as material evidence. 60 requests for legal assistance were sent to more than 20 countries. Twenty different weapon systems have been studied. Five billion pages of the Internet have been recorded, the content of which is considered for significance for the investigation. A thorough study and recording of half a million of video and photo materials was conducted, and more than 200 witnesses were interrogated. In addition, 150,000 recorded telephone conversations were listened to, the content of which was summarised and analysed. In this regard, more than 3,500 of these wiretapped telephone conversations were fully and carefully recorded, translated and studied. All of this is documented in more than 6000 protocols. The Joint Investigation Team (JIT) investigated a number of versions. Attracting experts and conducting expert examinations was of great importance. It was due to forensic examinations that it was

established that the MH17 airliner was shot down by a 9M38 missile. In addition to forensic examinations, the so-called simulation modelling was carried out, which involved the explosion of a combat unit and an entire missile in conditions specially prepared for testing, performed by a group of forensic experts from countries belonging to the JIT. The investigation identified individuals who may be involved in criminal acts against the MH17 airliner or transportation of the anti-aircraft complex BUK [26]. On March 9, 2020, the court hearing on the MH17 case began in the Netherlands. The trial was taking place in a country whose citizens were made up the majority of passengers of the Malaysian Airlines aircraft, following a procedure under the laws of the Kingdom of the Netherlands [27], although the issue of transferring the case to the jurisdiction of the International Criminal Court has been discussed [28].

It is obvious that it is impossible to establish the circumstances of the crime without proper forensic support and the formation of methods of investigation and trial of cases of international crimes. According to empirical sources, Ukraine has faced a number of difficulties related to the organisation of the investigation, the tactics of procedural actions, the involvement of specialists and the conduct of examinations as part of an international joint investigation team. Thorough developments are required in this direction. Another feature of the forensic methodology of investigation and trial of international crimes by the International Criminal Court is the involvement of a wide range of entities that can collect information about the event. First of all this refers to law enforcement agencies of the state, which conduct investigations of crimes in accordance with the provisions of national law. However, other entities – non-governmental organisations, activists, volunteers – can also collect and transmit information to the Prosecutor's Office. It is important that on the basis of the received data, the International Criminal Court also conducts its own investigation. Directly during the trial, only the International Criminal Court has the power to declare certain evidence admissible or inadmissible, and in general to recognise or reject any information as evidence.

It should also be noted the participation of the International Humanitarian Fact-finding Commission. The Commission is a permanent, independent mechanism for investigating violations of international humanitarian law committed in both international and non-international armed conflicts. The activities of the Commission reflect the humanitarian and non-political nature of legal norms on the protection of victims of armed conflict [3]. The International Humanitarian Commission may investigate violations of international humanitarian law during armed conflicts between states [3]. The investigation is being conducted by a chamber of seven members of the Commission who are not nationals of the states participating in a conflict. The Commission may invite the parties to provide evidence within a fixed period of time, and the Commission may conduct its own investigation, including on the spot, by questioning witnesses. Chamber members can split up and conduct simultaneous investigations in different regions. The Commission shall report the findings to the states accused of the offenses, which shall have the right to challenge the evidence provided. The report shall be confidential, but the Commission may decide to make it public at the request of the parties to the conflict or if it considers that no action is being taken to put an end to the offenses. The Commission is not a judicial body, so it merely communicates the results of the investigation to stakeholders and considers measures to be taken to help restore respect for international humanitarian law [3].

The range of subjects involved in the investigation and trial of cases of international crimes has been expanded to ensure interaction and the application of measures of international cooperation between the competent authorities of foreign states, international, public organisations, individual citizens, in order to establish the circumstances of the committed international crime. Considering that, according to the Constitution of Ukraine, "current international agreements, the binding nature of which has been approved by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine" (p. 1, Art. 9)[1], and the provisions of the Criminal Procedure Legislation of Ukraine are provisions international treaties, the binding nature of which was approved by the Verkhovna Rada of Ukraine (p. 2 of Art. 1 of the CPC of Ukraine[2]), an important task of Ukraine is the ratification of the Rome Statute, as well as further implementation of its provisions to national law and law enforcement practice. This will provide a legal basis for investigation and trial by the International Criminal Court of cases of international crimes that encroach on the interests of Ukraine.

The effective investigation and trial of international crimes by the International Criminal Court depends to a large extent on the forensic support of these activities in accordance with international standards. The implementation of forensic support is carried out in accordance with the technical, tactical, and methodological areas, both within the state and at the international levels. It is necessary to develop a forensic methodology for the investigation and trial of international crimes by the International Criminal Court. The methodology of crime investigation offers the most effective methods and means of activity, based on the use of data on typical investigative situations, systems of standard versions, complexes of investigative actions, law enforcement intelligence operations, etc. The development of a methodology for investigating international crimes is an urgent requirement of the time, because it is necessary to ensure the achievement of the objectives of criminal proceedings against international crimes committed on the territory of Ukraine. Thus, in September 2015, Ukraine submitted to the International Criminal Court a Statement recognising the Court's jurisdiction over all crimes (primarily crimes against humanity and war crimes) committed in Ukraine since the beginning of the Russian military aggression against Ukraine. The statement must be of indefinite period.

The General Prosecutor's Office of Ukraine has prepared materials confirming the commission of crimes against humanity and war crimes by militants in Donbass and officials of the Russian Federation. They can become an evidence base in the International Criminal Court [29]. In a 2018 report, the Office of the Prosecutor of the International Criminal Court noted that among the alleged crimes committed in Crimea and Donbas are murder, torture, sexual and gender crimes, forced conscription into the armed forces of the occupying state, violation of the right to a fair trial, illegal imprisonment, seizure of property, etc. The Prosecutor's Office is currently conducting a preliminary study of the situation. The state of investigation and trial of criminal cases concerning these crimes, which were carried out by law enforcement agencies of Ukraine, is assessed. According to the Office of the General Prosecutor, the Prosecutor's

[1] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.

[2] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17.

Office of the International Criminal Court is currently considering 14 information reports on serious violations of international humanitarian law in the temporarily occupied territories of Crimea and Donbas: premeditated murder, torture, deportation or forced displacement of the population, intentional directions of attacks against civilians and civilian objects [30; 31].

CONCLUSIONS

The listed above and other circumstances eloquently testify to the need to form a comprehensive forensic methodology for the investigation and trial of international crimes by the International Criminal Court. Forming the specified technique, it is necessary to be guided by work of V.A. Zhuravel, which characterises a separate forensic methodology as an information and cognitive model, which reflects a set of methods, tools, techniques, and recommendations of a typical nature, set out in descriptive form for the rational organisation of the process of collecting, evaluating and using evidence of specific and investigating various criminal manifestations and judicial review of criminal cases. It covers not only a system of methods, techniques, and tools, but also recommendations to the investigator and judge on the most optimal, rational organisation of the investigation of certain types of crimes and the trial of criminal cases.

It is the forensic methodology that should form a kind of "algorithm" for the basics of investigation and trial of international crimes by the International Criminal Court, taking into account high international standards and practices of the world's leading states. This methodology should include the following elements: forensic characterisation of an international crime; a typical list of circumstances to be established; a typical algorithm of procedural actions and other measures at each stage of the investigation; tactics of carrying out separate procedural actions, tactical operations; features of the use of special knowledge; organisation of interaction of representatives of law enforcement agencies, including at the international level; attracting the help of citizens and non-governmental organisations, using the opportunities of the media, etc. Particular attention should be paid to the methodology of judicial review of international crimes by the International Criminal Court, taking into account its specifics.

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Suggested Citation: Chornous, J.M. (2020). Topical issues of investigation and trial by an international criminal court of cases of international crimes. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 267-281.

Submitted: 18/07/2020
Revised: 14/11/2020
Accepted: 07/12/2020

УДК 343.211
DOI: 10.37635/jnalsu.27(4).2020.282-293

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ДО ПРОБЛЕМИ ФОРМУВАННЯ СТРУКТУРИ ТА КЛАСИФІКАЦІЙ КРИМІНАЛЬНОЇ ПОЛІТИКИ

Анотація. *Наявність різних підходів в розумінні кримінальної політики та її співвідношення з політичними та стратегічними категоріями наук кримінально-правового циклу повертають до оновлення підходів щодо формування структури та видів кримінальної політики. З огляду на актуальність даної тематики стаття присвячена розгляду проблеми формування структури та класифікацій кримінальної політики. Для цього автор звернувся до наук кримінально-правового циклу та наявних в них досліджень щодо політичного та стратегічного підходів у протидії кримінальним правопорушенням (злочинності). Це надало можливість виробити власний підхід щодо визначення елементної структури кримінальної політики, що складається із: 1) предмета, мети, методу, принципів та її споживачів; 2) засобів, обстановки та професійних учасників її реалізації. Також було надано класифікації кримінальної політики «за вертикаллю» та «на підставі кримінально-правової класифікації кримінальних правопорушень за об'єктом». Поділ кримінальної політики на види дозволив вказати на співвідношення кримінально-правової, кримінально-виконавчої, кримінальної процесуальної, кримінологічної, міжнародної кримінальної політики та криміналістичної стратегії із їх родовим поняттям – кримінальною політикою. Також важливим є їх розгляд в єдності, що дозволить сформувати стратегії, програми, плани та алгоритми під час протидії кримінальним правопорушенням, досягти цілей та виконати завдання нормативно-правових актів. Структура кримінальної політики та класифікації її на види надає можливість розглянути більш детально стратегічну протидію кримінальним правопорушенням засобами громадського та державного впливу на системне реформування кримінальної юстиції та її органів на віддалену перспективу. Встановлення єдиних підходів щодо розуміння кримінальної політики серед науковців у сфері наук кримінально-правового циклу надає можливість її сформувати як науку або міжгалузевий та міждисциплінарний інститут з відповідною структурою.*

Ключові слова: принцип законності, криміналістична стратегія, кримінально-правововий цикл, кримінально-виконавча політика.

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TO THE PROBLEM OF STRUCTURE AND CLASSIFICATIONS OF CRIMINAL POLICY FORMATION

Abstract. *The existence of different approaches in the understanding of criminal policy and its relationship with the political and strategic categories of sciences of the criminal law cycle return to the renewal of approaches to the formation of the structure and types of criminal policy. Given the*

relevance of this topic, the article is devoted to the problem of forming the structure and classifications of criminal policy. To do this, the author turned to the sciences of the criminal law cycle and their existing research on political and strategic approaches to combating criminal offences (crime). This provided an opportunity to develop their own approach to determining the elemental structure of the criminal policy, consisting of: 1) the subject, purpose, method, principles and its consumers; 2) means, environment and professional participants in its implementation. Classifications of criminal policy "vertically" and "based on criminal law classification of criminal offences according to an object" were also provided. The division of criminal policy into types allowed to indicate the relationship between criminal law, criminal executive, criminal procedural, criminological, international criminal policy and criminalistics strategy with their generic concept – criminal policy. It is also important to consider them in unity, which will form strategies, programs, plans and algorithms in combating criminal offences, achieve goals and meet the objectives of regulations. The structure of criminal policy and its classification into types provides an opportunity to consider in more detail the strategic counteraction to criminal offences by means of public and state influence on the systemic reform of criminal justice and its bodies in the long run. Establishing common approaches to understanding criminal policy among scientists in the field of criminal law provides an opportunity to form it as a science or interdisciplinary and interdisciplinary institution with an appropriate structure.

Keywords: principle of legality, criminalistics strategy, criminal law cycle, criminal executive policy.

INTRODUCTION

According to the "narrow" understanding, criminal policy is an interdisciplinary institute of sciences of the criminal law cycle. According to the "broad" understanding, criminal policy is a separate science of the criminal law cycle, which continues to take shape (with its subject, method and system). Given the possibility of formulating strategic objectives of the sciences of the criminal law cycle, it is necessary to distinguish the following types of criminal policy (vertically): 1) criminal law policy; 2) criminal executive policy; 3) criminal procedural policy; 4) criminological policy; 5) criminalistics strategy. In the author's opinion, in this context it is necessary to add "international criminal policy" [1; 2], which will take place during the joint efforts of several states in the strategic fight against crime by means of their interstate influence (in the long run).

In fact, the unity of these types of criminal policy is its structure. This view is supported in some scientific studies [2; 3]. However, such types of criminal policy are sometimes referred to as elements or components [2; 4; 5]. It is clear that such an approach is based on attempts to use a synonymous approach "criminal policy" is equal to "criminal law policy", and such a "criminal policy" is an element of "policy in the fight against crime". It is obvious that with such an approach there is a terminological "confusion" and the types of criminal policy (or policy in the field of combating crime) become its elements.

The problem of forming the structure of criminal policy was addressed by V.I. Borisov [4], P.L. Fris [6], E.V. Epifanov [7], M.I. Panov [8], N.P. Kirillova [9], A. Vilks [10], M. Ambrož [11], A.H.G. Suxberger [12], C. Côté-Lussier [13], E. Knackmuhs [14], A. Dukalskis [15], J. Lobato [16] and others. V.I. Borisov and P.L. Fris paid particular attention to the study of criminal policy in general and the definition of its elemental structure [4; 6]. At the same time, the existence of different

approaches in understanding criminal policy and its relationship with the political and strategic categories of sciences of the criminal law cycle return to the renewal of approaches to the formation of the structure and types of criminal policy. Establishing common approaches to understanding criminal policy among scientists in the field of science of the criminal law cycle will provide an opportunity to form it as a science or interdisciplinary institution with an appropriate structure.

The purpose of the study is the formation of (elemental) structure and classifications of criminal policy. To do this, the author turned to the sciences of the criminal law cycle and their existing research on political and strategic approaches to combating criminal offences (crime).

1. MATERIALS AND METHODS

To achieve the outlined goal, the author used the methods of logic (analysis and synthesis, induction and deduction, analogy) during the construction of the article, establishing trends in criminal policy; formal-logical method – during the formation of a range of regulations that are necessary for the study of legislation; comparative-legal method – when comparing the achievements of the sciences of the criminal-legal cycle and enshrining these achievements in regulations, historical-legal – when establishing the historical prerequisites for the formation of criminal policy.

The use of analysis and synthesis, induction and deduction allowed the author to construct the article logically by dividing it into two blocks (problems of forming the structure of criminal policy and forming the structure of criminal policy in connection with the study of its classifications), as well as to form an introduction, materials, methods and conclusions. During the study, the author analysed and compared the concepts of criminal and criminal law policy, formed a conclusion about their dissimilarity, thus rejecting the use of analogy in this part. The use of induction and deduction provided an opportunity to form a position on the structure and classification of criminal policy, as well as trends in criminal policy. The formal-logical method was used during the study of the Criminal, Criminal Procedure, Criminal-Executive Codes of Ukraine, as well as the Rome Statute of the International Criminal Court, which allowed to demonstrate the real state of criminal policy in Ukraine and the necessity to change it in the future.

The comparative law method was used to compare the levels of formation of criminal policy within the implementation of the provisions of criminal, criminal procedure, criminal executive law, criminology and criminology. The use of this method demonstrated the difficulty of the transition from the law-making level to the law-enforcement level, from the formation of the idea to its implementation. The historical and legal method was used in establishing the historical preconditions for the formation of criminal policy. This is especially true of the transition of research from the 19th century to the 20th century, because it is in this period of time the rapid development of criminal law and change in its subject were recorded. In fact, at this time criminalistics, criminology and forensics with their methodological apparatus formed. This approach led to certain oblivion in criminal law about criminal policy (as a separate institution or science) or its identification with criminal law policy, which is impossible given the formation of policies and strategies within other sciences of the criminal law cycle.

2. RESULTS AND DISCUSSION

2.1 Problems of forming the structure of criminal policy

Taking into account the existence of different approaches to understanding criminal policy and trying to identify it with "state policy to combat crime" or "criminal law policy" creates a terminological "confusion" that can be overcome only by developing common approaches to understanding it. Attempts to develop approaches that differ from the synonymous use of types and elements of criminal policy have recently begun to appear in the scientific literature. Thus, in the author's opinion, it is necessary to support the position of those scholars who are trying to put a slightly different meaning in understanding the elements of criminal policy. For example, E.V. Epifanov points out that the elements of criminal policy should be considered the concept of criminal policy, its goals, objectives, factors influencing its content, levels of implementation of criminal policy [7]. I.A. Aleksandrova points to the "amnesty of capital" as an element of "criminal policy to ensure economic security" [17]. In certain policies in connection with the study of criminal justice, E. Fairchild and W. Webb pointed to its subject and the persons to whom it applied [18]. It should be noted that similar approaches can be traced in the earlier works of well-known specialists in criminal law (F. von Liszt [19], P.A. Feuerbach [20] and M.P. Chubinsky [21]).

In the presence of such different positions on the understanding of the elements of criminal policy, it is necessary to indicate that they are indeed in some way traced in the existing definitions of criminal policy. The existing definitions of criminal policy combine the following elements: 1) conceptual idea (core), which is necessary in the formation of the subject; 2) the goal (task) that must be achieved during the implementation of this idea; 3) methods and means of implementing such an idea; 4) participants in the implementation of such an idea; 5) consumers of this idea. In addition, the principles of criminal policy and the factors influencing its content are added. In the author's opinion, it is the unity of these elements that can fill the content of criminal policy and this is what should be taken in the formation of criminal policy in any area that is planned to be reformed in the long run, in order to combat criminal offences.

Thus, criminal policy, in the author's opinion, includes the following elements:

1) the subject of criminal policy – the field of scientific knowledge about the causes and consequences of criminal offences, which are aimed at strategic counteraction to this phenomenon through the systematic reform of criminal justice in the long run;

2) the purpose of criminal policy – strategic counteraction to criminal offences through the systematic reform of criminal justice in the long run;

3) the method of criminal policy – a set of techniques and methods by which public relations are regulated, which are part of the subject of criminal policy;

4) principles of criminal policy – "the principle of legality, the principle of equality before the law, the principle of democracy, the principle of justice, the principle of humanism, the principle of inevitability of responsibility, the principle of scientific criminal policy" [8] and other principles inherent in its types according to criminal law cycle which are involved in the strategic counteraction to criminal offences in a particular area;

5) means of implementation of criminal policy – this is what is used to implement criminal policy. In this context, it is important to adopt a legal act that is able to implement it (for example, the Law of Ukraine, the Presidential Decree, an international

convention or agreement). Such a legal act may regulate a separate area of combating criminal offences (corruption, organised crime, justice, etc.) or may be adopted as a whole, and in some respects indicate the reform of various areas of activity. It is also important to implement these regulations that already requires the adoption and implementation of specific plans (enforcement);

6) a situation of the implementation of criminal policy – a situation within which the criminal policy is implemented in the relevant field. Assessment of such a situation is important because it establishes the purpose and means of its implementation, methods and techniques of combating criminal offences, the range of professional participants in criminal policy and its consumers;

7) professional participants in the implementation of criminal policy – entities that are professionally engaged in law-making and law enforcement processes and on which its implementation depends. Such persons include representatives of the state and the public who influence the reform process and, accordingly, directly reform the criminal justice authorities;

8) consumers of criminal policy (vector of direction) – persons to whom the action of criminal policy is directed. Given the purpose of "strategic counteraction to criminal offences", the persons to whom it applies are members of society who have found themselves in a criminal environment or are already in it. Thus, it is important to reduce the number of such persons in the state and society.

2.2 Formation of the structure of criminal policy in connection with the study of its classifications

The essence of criminal policy is filled not only with its elements but also with the content of its types, as the classification distribution is carried out according to the philosophical approach of the ratio of the whole and its parts. Aristotle, based on the study of this philosophical category, in this regard noted that the consideration of the existing as such and what belongs to it as such, is the subject of one science, and that the same science considers not only in essence but also that is in them – as… in relation to the previous and next, genus and species, whole and separate and all other similar definitions [22]. Criminal policy and criminal law policy in this sense should be distinguished, not identified, as is popular, unfortunately, among specialists in the field of criminal law [23]. Criminal law policy should solve problems in the formation of the tasks of criminal law; principles of criminal law; strategies for changing it; the number of types of punishments and their understanding; purposes of punishment, release from criminal liability, punishment and its serving. The primary task of criminal law policy is the strategic (long-term) impact on criminal law through accurate knowledge of the cause and effect of a criminal offence. Thus, certain elements of criminal law policy are already reflected in the Constitution and the Criminal Code (hereinafter – the CC of Ukraine, the CC) of Ukraine. Contents of Art. 1 of the Criminal Code of Ukraine "Tasks of the Criminal Code of Ukraine"[1]; Art. 2 of the Criminal Code of Ukraine "Grounds for criminal liability" (in terms of the formation of general criminal law principles – *non bis in idem; omnis indemnatus pro innoxis legibus habetur*)[1]; Art. 50 of the CC of Ukraine "The concept of punishment and its purpose"[1], etc. Formulating the tasks of the CC of

[1] Criminal Codex of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14

Ukraine, the legislator defined them in Art. 1 of the Criminal Code of Ukraine as "legal provision of human and civil rights and freedoms, property, public order and public safety, environment, constitutional order of Ukraine from criminal offences, ensuring peace and security of mankind, as well as prevention of criminal offences"[1]. Thus, criminal law policy is unlikely to go beyond the existing strategic perspectives of "legal support", which usually significantly narrows the concept compared to the concept of criminal policy. It is necessary to remember that criminal law policy is also influenced by international agreements, conventions, strategic development of the state and public attitude to such changes. For example, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Visa Liberalization by the European Union for Ukraine Concerning Liability of Legal Entities"[1] of April 15, 2014 in the Criminal Code of Ukraine actually introduced criminal liability. legal nature) of legal entities.

Analysis of the provisions of the Criminal Executive Code (hereinafter – CEC of Ukraine, CEC)[2] of Ukraine allows concluding about the content of criminal executive policy and the attitude of the legislator to this problem. Thus, Art. 1 and 2 of the Criminal Procedure Code of Ukraine set out the purpose and objectives of criminal executive legislation. The purpose of this legislation is to protect the interests of the individual, society and the state by creating conditions for correction and re-socialisation of convicts, prevention of new criminal offences by convicts and others, as well as prevention of torture and inhuman or degrading treatment of convicts. At the same time, in the context of protection of the interests of a person, society and the state, there is no indication of the protection of which person is in question – criminally illegal or one who has suffered from a criminal offence. There are also no indications that there is a necessity to appeal not only to certain principles of execution of punishment, summarised in the list, but to the "criminal person". C. Lombroso draws attention to this – "there is an even more important subject of study – it is also interesting for the prison authorities and in general for those who use punishment; I'm talking about the study of a criminal… I mean the interesting observations in Zwickau, which indicated that criminals should be treated according to the individuality of each of them and applied to their character if any satisfactory results are needed" [24]. G. Aschaffenburg is even more categorical in relation to the goals set in the penitentiary sphere – "the seriousness of punishment is incompatible with the purely formal execution of a sentence; it is necessary to bring a convict to awarness that he himself can fix an offence committed by him by self-correction; if he is unable to do so, he must suffer in order to relieve the whole society of suffering." [25] That is why the connection between criminal law and criminal executive policy is important – criminal law policy formulates the purpose of punishment, which affects the formation of the purpose of all criminal law legislation (see: Part 2 of Article 50 of the CC of Ukraine[3] and Part 1 Article 1 of the CEC of Ukraine[4]). Probably because

[1] Law of Ukraine No 314-VII "On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of the Action Plan on Visa Liberalization by the European Union for Ukraine Concerning Liability of Legal Entities" (2014, April). Retrieved from https://zakon.rada.gov.ua/laws/show/314-18

[2] Criminal Executive Code of Ukraine. (2003, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1129-15

[3] Criminal Codex of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14

[4] Criminal Executive Code of Ukraine, op. cit.

of this Part 2 of Art. 1 of the CEC of Ukraine[5] mentions the legal status of convicts, guarantees of protection of their rights, interests, responsibilities, the procedure for applying measures of influence to them, etc. At the same time, the CEC of Ukraine does not contain the necessary instructions on monitoring the implementation of these tasks, which with the proclamation of this goal and objectives makes them only ideal models without a mechanism for achieving them. In this case, it can be concluded about the subject formation of criminal executive policy, which produces goals, objectives, principles, guidelines for the system of criminal executive law to protect the rights, freedoms and interests of convicts, victims and other stakeholders.

Of particular interest is the consideration of problems related to criminological policy. A.P. Zakalyuk, pointing out the main problems of criminology in the first decade of the 21st century, identified the challenges facing this science and ways to implement them. One of such vectors was identified – the development of a modern strategy to combat, primarily organised, economic, related to corruption, drug trafficking, violent crime, including "commissioned", selfish and violently selfish, as well as among previously convicted and minors [26]. Thus, taking into account the tasks criminology facing, it is also possible to raise the question of the existence of a single vector for the sciences of the criminal law cycle, common goals and objectives, as well as strategies to combat crime (criminal offence). That is, in the context of criminal policy, it is about criminological policy (strategy). This approach is confirmed in the activities of international institutions. For example, the holding of United Nations Congresses has led to the implementation of crime prevention and criminal justice policies. On the agenda of the Thirteenth UN Congress on Crime Prevention and Criminal Justice, successes and challenges in implementing a comprehensive policy in crime prevention and criminal justice strategy to promote the rule of law at the national and international levels and support sustainable development were highlighted [27]. Therefore, in the context of criminal policy in the field of justice, it can be said about the existence of criminological policy, which should meet international standards for crime prevention and be enshrined at the national level in the form of regulations (strategies and plans).

Information on the content of criminal procedure policy may be disclosed by the Criminal Procedure Code (hereinafter – CPC of Ukraine, CPC) of Ukraine (for example, Article 2 "Tasks of criminal proceedings", Chapter 2 "Principles of criminal proceedings" (which collected the principles of criminal procedure – Articles 6-29 of the CPC of Ukraine, etc.)[1]. The tasks of criminal proceedings are the protection of the individual, society and the state from criminal offences, protection of the rights, freedoms and legitimate interests of participants in criminal proceedings, as well as so that everyone who commits a criminal offence is prosecuted to the extent of their guilt, no innocent person is accused or convicted, no person is subjected to unreasonable procedural coercion, and every participant in criminal proceedings is subject to due process of law. The list of tasks corresponds in general to criminal procedural principles and has nothing to do with the formulation of the planned result of the application of criminal procedure law.

[1] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17

The criminal procedural policy, which is formed by the current procedural legislation of Ukraine, does not contain a single goal, which could be formulated as the achievement of objective truth and the restoration of justice [28]. In addition to fixing a single goal, the result that the individual, society and the state need for the successful implementation of criminal procedure policy are extremely important to identify and establish a real mechanism for achieving the goal and control of criminal justice. Criminalistics, unlike other sciences of the criminal law cycle, traditionally and historically uses the term "criminalistics strategy" instead of "policy". This may be due to the fact that criminalistics tactics are a generally accepted separate section in the criminalistics system. At the same time, in some states the criminalistics strategy acquires special significance, and sometimes the question of isolating a specific section of forensics is raised [29].

It is necessary to state the high interest of scientists in the strategy in criminology in the 21st century. Attention is drawn to the work that has emerged on this issue [30-34]. Moreover, positions on the place of criminalistics strategy in criminalistics differ. For example, O.Ya. Baev and M.O. Baev formulated an approach according to which the question of the emergence of a separate section of criminology called "criminalistics strategy" [30]. The authors invest in this concept – a system of scientific provisions and recommendations based on them to determine the professional participant in criminal proceedings of general areas and means of using criminally relevant information, special knowledge of identification, interaction with others and organisations, planning the implementation of these areas to achieve the ultimate goal their professional activity [30]. In this case, in favour of the position of O.Ya. Baev and M.O. Baev, the fact points out that in the German school of criminology criminalistics strategy has already taken a special place [35]. O.G. Filippov, in turn also insists on the need to separate a separate section in criminology. However, the relationship between the name "criminalistics strategy" and its content is questioned, as the author proposes to use the term in the sense of organising the detection and investigation of crimes [34]. There are other understandings of criminalistics strategy. Investigating the criminalistics strategy, G. Malewski singled out three approaches to its understanding: 1) a certain tool that demonstrates the trends and direction of development of science; 2) an independent part of science; 3) a kind of model or program to investigate a specific crime.

It is important to point out that the criminalistics strategy has already been formed as a category and a separate direction. The development of criminalistics strategy as a separate category in criminalistics has not reached the level of a separate section of science. The criminalistics strategy also cannot be implemented in the investigation of a specific criminal offence, as it contradicts the implementation of the criminal policy of the state. Therefore, criminalistics strategy is a field of knowledge on combating criminal offences by forensic means in the long run. Interesting in connection with the study of criminalistics strategy in the structure of criminal policy is the survey of 82 judges, 86 prosecutors and 102 lawyers (The survey was conducted by the author during 2020 as part of the Verkhovna Rada of Ukraine scholarship program for young scientists). Judges expressed a desire for qualitative changes in the scientific and technical support of the trial through the automation of the trial process – the development and use of special computer programs, algorithmization of the trial (91% of respondents). Instead,

prosecutors pointed to the need to use modern technical means to work at the crime scene (86%) and to use photographic, video, audio, drone and other special equipment in investigative (search) operations (52%). Lawyers took a similar (intermediate) position to judges and prosecutors and expressed a desire to automate the process of advocacy (54%) and the use of photo, video, audio and other special equipment in pre-trial investigation and trial (58%). That is why the author considers it necessary for the effective performance of functions by professional participants in the proceedings (proceedings) to provide them with modern technical means during the pre-trial investigation and trial. Equally important is the requirement of professional participants in the proceedings to automate their activities. The author believes that this will provide an opportunity to more quickly and correctly perform their inherent functions, to obtain a wide range of technical and forensic knowledge necessary to achieve the goals and objectives of the judiciary (proceedings). This approach will allow implementing not only the criminalistics strategy, but also the criminal policy in general.

International criminal policy is a type of criminal policy and involves the efforts of at least two states to strategically combat crime. Today, such activities include participation in the ratification and implementation of international conventions, the practical application of the rules that are implemented through them. Equally important is participation in international governmental and non-governmental organisations that work to combat crime, detect and investigate international crimes. A separate area of implementation of international criminal policy is the activities of international criminal courts. For example, the activities of the International Criminal Court (The Hague), whose jurisdiction has been recognised in part in connection with the tragic military events in the Autonomous Republic of Crimea and certain districts of Donetsk and Luhansk oblasts, are important for Ukraine. Criminal law, criminal executive, criminal procedural, criminological policy, criminalistics strategy, as well as international criminal policy should be considered not only and not so much in the field of their own maternal sciences, but should be considered together, taking into account the common purpose and tasks they have in a single complex intersectoral and interdisciplinary institute of sciences of the criminal law cycle or its separate science – "criminal policy".

The formulation of strategic objectives of the sciences of the criminal law cycle provides an opportunity to identify (based on the criminal law classification of criminal offences by object) the following types of criminal policy in the field and/or against it: 1) the foundations of national security; 2) life and health of a person; 3) the will, honour and dignity of a person; 4) sexual freedom and sexual integrity of a person; 5) electoral, labour and other personal rights and freedoms of human and citizen; 6) property; 7) economic activity; 8) the environment; 9) public safety; 10) production safety; 11) traffic safety and transport operation; 12) public order and morality; 13) circulation of narcotic drugs, psychotropic substances, their analogues or precursors and public health; 14) protection of state secrets, inviolability of state borders, provision of conscription and mobilisation; 15) the authority of public authorities, local governments and associations of citizens; 16) use of electronic computers (computers), systems and computer networks and telecommunication networks; 17) official activity and professional activity related to the provision of public services; 18) justice; 19) the established procedure for military service; 20) peace, security of mankind and international law and order. Depending on the importance of a particular area for a state and society, criminal policy may extend to

other areas. Thus, V.I. Borisov, P.L. Fris and N.A. Savinov proposed to consider criminal law policy in the areas of information security and anti-corruption [6; 36]. It is clear that such a proposal is successful because it allows focusing on a broader or narrower field of activity and can be transferred to criminal policy in general, and not just its type.

CONCLUSIONS

Thus, the structure of criminal policy and its classification into types provides an opportunity to consider in more detail the strategic counteraction to criminal offences by means of public and state influence on the systemic reform of criminal justice and its bodies in the long run. Establishing common approaches to understanding criminal policy among scientists in the field of science of the criminal law cycle will provide an opportunity to form it as a science or intersectoral and interdisciplinary institution with an appropriate structure. The division of criminal policy into types allowed indicating the relationship between criminal law, criminal executive, criminal procedural, criminological, international criminal policy and criminalistics strategy with their generic concept – criminal policy. It is also important to consider them in unity, which will form strategies, programs, plans and algorithms in combating criminal offences, achieve goals and meet the objectives of these regulations.

Establishing the structure of criminal policy and determining its classifications will also allow forming strategies and plans to combat criminal offences in certain (specific) areas. Such an approach to combating criminal offences at the level of strategic influence on the criminal environment will make it possible to effectively implement the tasks facing the criminal justice authorities in the timeframe that will be specified in these regulations. A possible generalised approach to the formation of criminal policy in certain areas is to propose its classification based on criminal law classification of criminal offences by object (according to the sections of the Special Part of the Criminal Code of Ukraine). At the same time, there is a tendency to study criminal law policy in narrower or broader areas of combating criminal offences. In the author's opinion, such an approach can be transferred to criminal policy in general, which will allow comprehensive and local counteraction to criminal offences at the law-making and law-enforcement levels.

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Suggested Citation: Shepitko, M.V. (2020). To the problem of structure and classifications of criminal policy formation. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 282-293.

Submitted: 25/08/2020
Revised: 21/10/2020
Accepted: 06/12/2020

Journal of the National Academy of Legal Sciences of Ukraine

Volume 27, Issue 4
2020

Responsible for the release of *O. V. Petryshyn*

Desktop publishing *O. Fedoseeva*

Signed to the print with the original layout 20.12.2020.
Mind. print. ark. 18,1. Acc. publ. ark. 15,0.

The publisher the Right of National Academy of legal Sciences of Ukraine and the Yaroslav Mudryi National Law University
61002, 80A Chernyshevskaya Street, Kharkiv, Ukraine
Tel/Fax: (057) 716-45-53
Website: www.pravo-izdat.com.ua
e-mail for authors: verstka@pravo-izdat.com.ua
e-mail for orders: sales@pravo-izdat.com.ua

Certificate of registration of the subject of publishing in the state register of publishers, manufacturers and distributors of publishing products series DK No. 4219 dated 01.12.2011

Вісник Національної академії правових наук України

Том 27, № 4
2020

(Англійською мовою)

Відповідальний за випуск *О. В. Петришин*

Комп'ютерна верстка *О. А. Федосєєвої*

Підписано до друку з оригінал-макета 20.12.2020.
Ум. друк. арк. 18,1. Обл.-вид. арк. 15,0.

Видавництво «Право» Національної академії правових наук України
та Національного юридичного університету імені Ярослава Мудрого
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E-mail для замовлень: sales@pravo-izdat.com.ua

Свідоцтво про внесення суб'єкта видавничої справи
до державного реєстру видавців, виготівників і розповсюджувачів
видавничої продукції — серія ДК № 4219 від 01.12.2011 р.