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CIVIL LAW REGULATION OF INFORMATION TECHNOLOGY (IT) CONTRACTS

Abstract. ***The purpose*** is to analyze and substantiate the expediency of settling legal relations arising in the IT sphere by means of the contract, definition of the legal nature of the specified type of contracts.

Research methods. The work is based on general scientific and special methods of scientific knowledge.

Result. Taking into account these methods, the article considers the current problems of civil law regulation of information technology contracts. The concept of "information technology" and its substantive components are considered. It is determined that the development of the IT sphere stimulated a noticeable change in public relations. As a result, there is an urgent need to create an appropriate mechanism for legal regulation. It is established that the most effective way of such regulation is the conclusion of a relevant agreement. The author also analyzes the legal nature of these agreements. The analysis of judicial practice is carried out, and it is determined that courts characterize IT contracts differently. Examples of judgments of the Supreme Court, whic\h contain conclusions on the content and legal nature of IT contracts, are given. The bills regulating the performance of labor functions remotely are analyzed. The research studies the legislation on creating an environment that will stimulate the development of the digital economy in Ukraine. The legal regulation of concluding contracts in digitalization is considered.

Conclusions. The author concludes that the transformation of traditional spheres of public activity has occurred due to the application of innovative technologies. Therefore, an IT contract should be recognized as a type of contract that regulates public relations in the intellectual and information sphere. The conclusion of such an agreement is the most appropriate way to settle the relevant type of legal relations. At the same time, the specified type of the contract, considering its features, must be statutory consolidated in the provisions of the Civil Code of Ukraine.

Key words: civil law regulation, information technology, provision of services, IT contracts, judicial practice.

1. Introduction

The development of the digital economy in Ukraine contributes to the emergence and expansion of new models of legal relations. Innovative technologies create a new reality that requires the adaptation of almost all legal institutions. To realize human capacity in such conditions, there is an obvious need to create a clear framework of legal regulation. In the scientific literature, the concept of "information technology" means a set of interdependent information processes (Firsova, 2013).

Moreover, the international literature states that information technologies (IT) cover any form of technology, that is, any equipment or technique used by a company, institution, or any other organization that systematizes and processes data. This process includes computational, household devices, telecommunications technologies, as well as consumer electronic means of use and broadcasting as it becomes increasingly digital. The rapid development of information technology began in the mid-1960s. Over the past decades, technology has spread to virtually every area of society and has almost inextricably linked the areas of public life: industry, education, medicine, science, professional telecommuting, entertainment, and business (Grauer, 2001).

In these circumstances, it seems that the contract is the most effective form of legal consolidation of the desired economic content of the parties.

2. Determination of the essence of the IT contract in civil law and scientific doctrine

Article 6 of the Civil Code of Ukraine stipulates that the parties have the right to enter into an agreement that is not provided for by acts of civil law but meets its general

principles, the so-called "unnamed contracts". An important condition for concluding this type of contract is the agreement of the parties on its subject (Civil Code of Ukraine, 2003).

In particular, it is also determined that the parties have the right to settle in the contract, which is provided by acts of civil law, their relations, which are not regulated by these acts, namely to conclude a "named contract" taking into account the subject of such a contract.

In the author's opinion, the specifics of the application of the principles of legal regulation peculiar to IT include the presumption of transparency and reliability of information, its effective use, which is the object of legal relations. The legal relations arising in the field of information technology are characterized by specific features.

It should be noted that free modeling of IT contracts does not always minimize the risks for each party. Despite the dispositive nature of these contracts, their interpretation, amendments and additions are often difficult because they set a precedent.

Nowadays, the only legal nature of the contract, which would regulate IT legal relations, remains uncertain. The application of the Commercial Code of Ukraine or the Civil Code of Ukraine does not directly determine the specifics of the essential conditions necessary to regulate the creation or use of various objects of the IT sector.

K. Yefremova considers the content of Internet relations and emphasizes that their regulation is an important area of work of lawyers. It is necessary to clearly define the basic concepts of these relations, ways to regulate them, to pay attention to their subjective composition (Yefremova, 2014, p. 8).

N. Kuchakovska notes that the current legislation does not have a single approach to the concept of a contract form. According to the scientist, the form of the contract is a way to reflect the mutual will of the parties to the contract towards its content on the appropriate media. The scientist considers the procedure for concluding electronic contracts by agreeing and sending them via the Internet and states that the current legislation needs to be improved in the research area (Kuchakovska, 2016, p. 64).

Simson O.E. rightly says that most companies operate in different countries, therefore, this format of work significantly affects the execution of legal relations. These specifics are clearly reflected in the agreements concluded between such entities. The scientist points to the fact that the IT law of Ukraine is still developing and also has its own features that follow from the state of the IT market. In Ukraine, the IT industry ranks third in terms of exports. Almost 54% of customers are the United States, which accounts for more than half of the global IT services market (Simson, 2017).

I. Koval holds that the legal form of contractual relations within the framework of attracting exclusive rights to innovation should create conditions for reducing risks in intellectual property relations. At the same time, the scientist emphasizes the need for legislative regulation, as well as functional and specialized legal framework (Koval, 2015, p. 52).

K. Kustovska, analyzing the legal nature of the information technology contract, marks that it is a kind of a contract for work and labor. It is reasonable to think that an important prerequisite for the final desired outcome is the proper and timely execution of contractual relations in the field of production of information outputs, the proper implementation of each party's obligations (Kustovska, 2017, p. 35).

3. Judicial practice of the application of IT contracts

Analyzing the case law, one can repeatedly find the conclusions of the courts on the mixed nature of contracts in this area.

For example, in case № 910/2683/19, the defendant and the plaintiff concluded a contract under which one party undertook to provide comprehensive creative, informational, digital, advertising, marketing, promotions services, services for design development and functional content of the website, supply of software, as well as provide other services related to the promotion of the brand, product and services on the Internet defined by this agreement, and the other party undertook to accept and timely pay for services / works / software security (Supreme Court ruling, June 2020).

The courts of first and appellate instance resumed that the concluded agreement is mixed by its legal nature and contains elements of agreements for the provision of services, contracting, production and transfer of intellectual property rights, etc. At the same time, the Supreme Court found unreasonable and disregarded the applicant's allegation that the courts of previous instances, in violation of Article 236 part 4 of the Commercial Procedural Code of Ukraine, had failed to take into account the Supreme Court's findings as of October 2, 2012 in Case 23/236 on the application of part 4 of Article 822 of the Civil Code of Ukraine, as the contract has no features of a construction contract.

Thus, if the parties have erroneously incorrectly named or chosen the type of contract, then to settle the legal relations arising between them, the legal classification of the contract,

in fact, is carried out by the courts during the judicial settlement of the dispute between the parties.

To implement an effective management of intellectual property in the digital space, on April 15, 2021, the Verkhovna Rada adopted in first reading the draft Law "On Stimulating the Development of the Digital Economy in Ukraine" № 4303 (hereinafter referred to as "the Law № 4303") (Draft Law № 4303, 2020).

As defined in the explanatory note, the purpose of the bill is to form an advanced digital economy in Ukraine in the coming years and increase the share of high-tech products and services in Ukraine's total GDP (gross domestic product) to 10 percent.

The provisions of the bill propose to create Diia City – an environment (ecosystem) that will stimulate the progress of the digital economy, developments in advanced technologies with high added value, and the formation of the knowledge economy.

The legislator determines the option of choosing a contractual form of employment contract in the registration of employment relations between residents of Diia City and their employees, which solves a number of problematic issues of employment and performance of their direct functions.

Thus, according to statistics provided by the State Labor Service, the largest number of violations in the field of employment are committed by IT companies. To avoid the conclusion of employment contracts, companies use circumvention of the law. For example, they conclude contracts with natural persons-entrepreneurs, which allow the actual admission to work of employees without concluding an employment contract, keeping shadow tax documentation and hiding the real amount of wages (Lukash, 2019, p. 81).

Thus, the need for the adoption of this bill is noticed in the objective need to create an independent legal direction, using traditional institutions of private and public law not limited to the classical concepts of civil doctrine.

It should be highlighted that as a result of the development of digital economy, which is also called IT – network economy, the concept of "virtual organization" is increasingly used in the information society. O.V. Bignyak defines it as "the adaptation of business to the conditions of the post-industrial society that exists in the realities of the digital environment, when the leaders of organizations begin to understand that business will develop only when the organization is strongly connected with modern technologies, including the Internet" (Bignyak, 2018).

After the active transition of employees of all types to remote work, which was caused by the consequences of the spread of respiratory disease COVID-19, there was a need to take measures to regulate labor relations.

Many international companies, such as Microsoft, Apple, Google, consider the remote form of work as prospects for the development of labor relations in general (Clayton, 2021).

However, Ukrainian legislation is still at the initial stage of the development of statutory regulation of such legal relations.

Therefore, in 2020, the bill "On Amendments to Certain Legislative Acts to Improve the Legal Regulation of Telework" was registered. Based on the content of the explanatory note, the main purpose of the adoption of the law is to reform the old legislation, adopted in 1995, in the context of digitalization. This bill came into force on February 4, 2021 (Law of Ukraine № 1213-IX).

With regard to the legal regulation of the conclusion of contracts, it should be noted that the draft Law № 4303 conceptually new interprets the institution of compensation and recovery of damages for improper performance of the contract.

The legislator proposes to use such a concept as "assurance" with the introduction of a relevant article in the Civil Code of Ukraine, referring to the ineffectiveness of the current rule on the legal consequences of an agreement in which one party misled the other party on material circumstances. Thus, the draft determines the possibility for the parties to agree on a list of assurances provided regarding the circumstances and relevant to the conclusion, performance or termination of such an agreement.

Analyzing the outlined issues, it should be noted that the assurance should be understood as written guarantees of compliance with the actual circumstances that are essential to the contract. In fact, assurance is a mechanism for preventing risks by the parties.

At the same time, the provisions of this bill provide for the non-obligation to prove all the constituent elements of a civil violation. The option of payment of compensation is determined on the model of the English institute of indemnity, the essence of which is that one party to the contract may oblige the other party to pay compensation in the event of contractual circumstances not related to breach of obligations. Compensation is paid regardless of the intent and fault of the person who undertakes to pay the compensation.

This position is not entirely consistent with established case law and civil law provisions.

The Supreme Court in the case № 759/2997/17-ts considering the issue of imposing a penalty for late fulfillment of obligations under the contract for the provision of services for the development and implementation of Internet-oriented software, concluded that the courts should assess the arguments of the executor guilt in his actions, as well as the agreement of the parties on non-fulfillment of obligations regardless of the deadlines (Supreme Court ruling, March 2020).

Thus, in the opinion of the Supreme Court, the appellate court unreasonably rejected the arguments of the defendant to establish the circumstances relevant to the proper resolution of this case, in particular the absence of his guilt in non-performance of the service contract and unreasonable penalty.

The provisions of the mentioned draft also provide for the avoidance of unjustified reduction of compensation in court, unless the party proves that it did not intend to increase the damages. In such cases, the courts must rely on the evidence base to promote compliance with the principles of fair trial.

A separate problem, in the author's opinion, is the recognition of electronic documents (electronic contracts) as court evidence. At present, there is no proper legal regulation in the procedural codes, which would detail the fundamental possibility of using such evidence.

The exercise of the rights of the parties significantly depends on the legal nature of the contract in terms of its voluntary or legally binding nature. The Draft Law № 4303 will ensure the conditions for the conclusion and proper fulfillment of IT contractual obligations, protect the rights of the parties to the contract in the introduction of innovative technologies in private law relations.

The scientific literature contains numerous scientific positions that an important tool for legal regulation of the IT market is the creation of an effective regulatory framework that will promote the development of the Ukrainian market of information technology. Thus, the specified legal regulation should include provisions on protection of intellectual property rights, antitrust policy, regulate fair competition, determine industry standards. In addition, it is essential to take measures to combat cybercrime and trafficking in information technology. These measures should be aimed at promoting the advancement of the IT market and information society, as well as the implementation of international agreements in national law (Lytvyn, 2011, p. 83).

4. Conclusions

Given the above, the author concludes that in Ukraine, the digital economy has begun to develop rapidly, resulting in new models of legal relations. Thanks to the use of innovative technologies, the transformation of traditional spheres of public activity has taken place. This requires the adaptation of almost all branches of law to such a process. Thus, there is an obvious need to create a clear mechanism of legal regulation not similar to other, new areas of legal relations.

In our opinion, an IT contract should be recognized as a type of contracts that regulates public relations in the intellectual and information sphere. An IT contract is an agreement between a customer and a contractor to provide services or perform work in the field of information technology. The definition of intellectual property rights transferred under this agreement is crucial in its content. The peculiarity of such contracts lies in the fact that it can be concluded even through a mobile application.

Entering into an IT contract is the most appropriate way to settle legal relations arising due to the provision of relevant services and performance of work. At the same time, this type of agreement, given its features, should have a clear legislative enshrinement in the provisions of the Civil Code of Ukraine, which will determine its legal nature and regulate the procedure for concluding and terminating.

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ЦИВІЛЬНО-ПРАВОВЕ РЕГУЛЮВАННЯ ДОГОВОРІВ У СФЕРІ ІНФОРМАЦІЙНИХ ТЕХНОЛОГІЙ (IT)

Анотація. ***Метою статті*** є аналіз та обґрунтування доцільності врегулювання правовідносин, що виникають у сфері інформаційних технологій (IT), за допомогою договору та визначення правової природи цього виду договорів.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. З огляду на зазначені методи у статті розглядаються актуальні проблеми цивільно-правового регулювання договорів, що укладаються у сфері інформаційних технологій. Розглянуто поняття «інформаційні технології» та його змістові складники. Визначено, що в результаті розвитку IT-сфери відбулася помітна зміна суспільних правовідносин, унаслідок чого виникла

нагальна необхідність створення відповідного механізму правового регулювання. Констатовано, що найефективнішим способом такого регулювання є укладення відповідного договору. Автором також проаналізовано правову природу вказаних договорів. Проведено аналіз судової практики та визначено, що суди по-різному характеризують договори у сфері ІТ-технологій. Наведено приклади судових рішень Верховного Суду, у яких містяться висновки щодо змісту і правової природи ІТ-договорів. Проаналізовано законопроєкти, що регулюють виконання трудових функцій дистанційно. Приділено увагу вивченню законодавства щодо створення середовища, яке стимулюватиме розвиток цифрової економіки в Україні. Розглянуто правове регулювання укладення договорів в умовах діджиталізації.

Висновки. Унаслідок дослідження обґрунтовано, що в результаті застосування інноваційних технологій відбулася трансформація традиційних сфер суспільної діяльності. Тому ІТ-договір варто визнати як вид договорів, що регулюють суспільні відносини в інтелектуальній та інформаційній сфері. Укладення такого договору є найдоречнішим способом урегулювання зазначених правовідносин. Водночас цей вид договору, з огляду на його особливості, повинен мати чітке законодавче закріплення в положеннях Цивільного кодексу України.

Ключові слова: цивільно-правове регулювання, інформаційні технології, надання послуг, ІТ-договори, судова практика.

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AN INVESTMENT CONTRACT IN THE PRIVATE LAW OF UKRAINE

Abstract. The ***purpose of the article*** is to conduct a detailed consideration of the nature of an investment contract as a private-law construction and specify particularities of its generic definition in the system of civil law contracts.

Research methods. When developing the paper, the authors relied on general scientific and special methods of scientific cognition. Analysis and synthesis helped identify elements and particularities of an investment contract as a private-law construction, consider it through the prism of civil-law contracts, and provide a promising outlook of its application as a regulator of private law relations. The methods of classification and systematization used in the research allowed generalizing doctrine and the current legislation of Ukraine, eliciting challenges of interpreting the nature of an investment contract through its subject.

Results. The article conducted a detailed consideration of different approaches to the nature of an investment contract available in doctrine. Consequently, they were conditionally divided into public-law and private-law concepts interpreting an investment contract. It was established that the latter approach is top-priority in modern science and practice. The thesis relies on a criterion of the contract's subject matter – investments as capital expenditure. The latter means action. This action is legitimate, initiative – the outcome of a free expression of the will and focused on achieving a legal result. Being an initiative, lawful act of a person's free expression of the will, capital expenditure is conducted on the basis of the discretionary nature of civil-law regulation. The social and economic effect as a result of capital expenditure allows interpreting it as widely as possible. Thus, to attribute an investment contract to a particular type seems debatable from the perspective of the complexity of its separation from related contractual structures.

Conclusions. An investment contract is immanently characterized by the private-law nature driven by its legitimate essence as a free, initiative, lawful act focused on the dynamics of civil relations and governed by the mechanisms of dispositive legal regulation. The analysis of legal regulations does not allow limiting it to a specific range of subjects that may act as investors. An investment contract is a through concept by nature, and the presence of its special features does not negate the affiliation of a particular contractual structure to some type in another system of classifications established by law or doctrine.

Key words: contract, investment, private law, transaction, investment contract.

1. Introduction

Despite the intense development of modern social relations in all their manifestations driven by global integration processes, the convergence of legal systems, digitalization, the basic structures underlying the legal regulation of these relations remain the same. In particular, this is about contract design. The above-mentioned confirms universality, the flexibility of such design, which, based on the principles of dispositive contractual regulation of relations, tends to get through all those socio-economic

and legal transformations taking place in society. The most effective applicability of the contract as a form of regulation of social relations is manifested in doctrinal developments of the contract as a source of civil contract law. Nowadays, the interpretation of the contract as an act of individual lawmaking is ubiquitous in domestic science and practice.

The use of contractual construction to regulate different spheres of public relations determines the generation of a large variety of contracts, which are marked by their inherent legal characteristics and specifics of the subject, object, and content. At the same time, the development of social, economic, and legal conditions in society also determines the availability of such contractual structures, which are difficult to distinguish from each other.

These two trends in designing different types of contracts in society ascertain the static demand in the doctrine and practice of developments on the nature of such contracts, the problem of their correlation or differentiation. Studies of the nature of an investment contract are among the above scientific and applied problems. The contractual construction is characterized by the drives for growing relevance in the modern context, as the intensification of investment attractiveness of states is becoming almost the top-priority area of their strategy and tactics.

The issues of contract law and some of its aspects have been studied by a cohort of prominent modern scientists: T.V. Blashchuk, A.H. Biriukova, T.V. Bodnar, M.I. Brahinskyi, O.A. Belianevych, S.M. Berveno, V.A. Vasylieva, A.B. Hryniak, S.D. Hrynko, N.Yu. Holubieva, O.V. Dzera, I.R. Kalaur, V.M. Kossak, V.V. Luts, V.V. Rieznikova, N.V. Fedorchenko, O.S. Yavorska, O.Yu. Cherniak (Dyminska), Zh.L. Chorna, and others. Specialized scientific investigations of subject investment contracts have been carried out by the following scientists: O.M. Antypova, V.V. Kafarskyi, O.R. Kibenko, V.M. Kossak, O.E. Simson, O.M. Chaban, and others. However, different approaches to the interpretation of the nature of an investment contract and its attributes keep actualizing scientific inquiry in the relevant legal dimension. Given the above, ***the purpose of the scientific article*** is to conduct a detailed examination of the nature of an investment contract as a private-law construction and specify particularities of its generic definition in the system of civil law contracts.

2. Private law nature of the structure of an investment contract

Modern doctrine is full of different approaches to the nature of the contractual structure under study, the maximum generalization of which allows the authors to conditionally divide them into supporters of public-law and private-law essence of an investment contract. It is worth noting that interpreting it as private-law, in particular, civil contract, is more common. For example, V.V. Kafarskyi regards an investment contract as a transaction between two or more persons, under which the parties establish rights and obligations for a defined period within the relations between the parties regarding investment of all types of property and intellectual assets in objects of business and other activities to generate profit or a social effect (Kafarskyi, 2006, p. 106). O.M. Chaban in his research also concludes that an investment contract is an independent type of civil contract, which focuses on investing in investment object, emphasizing that it is required to exclude the possibility of applying civil acts concerning other civil contracts to the relations it regulates (Chaban, 2013, p. 3). Leading scientists of commercial law also define an investment contract through the concept of a civil contract and transaction. Thus, O.M. Vinnyk interprets an investment contract as the contract of property-organizational nature concluded by an investor or his authorized representative with other parties, which stipulate the implementation of practical actions to provide specific investments for an object defined by the contract which have to produce a socio-economic effect expected by the investor (Vinnyk, 2009, p. 68). O.Ye. Simson defines the concept of an investment contract as a joint venture agreement, or any other civil agreement under which one party (investor) transfers property, property rights and/or other valuables, which have a market value, in possession or for use to the other party (investment recipient), and the investment recipient, in exchange, undertakes to pay the investor a share of the profit (income), specified by the contract, of business in the form of periodic payments or one-time payment (Simson, 2000, p. 222).

Therefore, the consideration of the main legal features of such contracts should be carried out by relying on the criterion that identifies the generic attribution of any contract – the subject-matter of the contract. Thus, according to para. 1 of Art. 638 of the Civil Code of Ukraine, the subject-matter of the contract is an absolutely essential condition for any type of contract (Zelisko et al., 2019, p. 916). In terms of specifying the subject matter of any contract, it should be emphasized in view of the availability of different concepts. As already mentioned, the essence of an investment contract is capital expenditure, which by its

legal nature, is the action of legal entities. The very actions of legal entities in most cases are the basis for the origin of relevant legal relations. The acts of external conduct of people are a subject of legal regulation (Vasilieva, 2006, p. 161). Therefore, since there is no legally defined subject matter of an investment contract, it would be appropriate to proceed from the fundamental concept in the area under study – "investment". Its nature determines the legal characteristics of an investment contract.

3. Capital expenditure as the subject matter of an investment contract

According to art. 1 of the Law of Ukraine "On Investment Activity", investments are all types of property and intellectual values invested in objects of entrepreneurial and other activities, which generate profit (income) and/or social and environmental effects (Zakon "Pro investytsiynu diialnist", 1991). Thus, one can invest anything (except for the restrictions prescribed by current legislation) in anything, as the Law does not limit investment only to entrepreneurial activities. Both the social and economic effect as a result of investment expenditure allows it to be interpreted as broadly as possible. Consequently, from the perspective of the external form, investment expenditure can be manifested in any civil contract (Zelisko, 2021). This conclusion is confirmed by para. 2 of Art. 5 of the Law, under which investors can act as depositors, creditors, buyers, as well as perform the functions of any participant in investment activities.

The very essence of the definition of investment is limited to the etymological origin of this concept – investment expenditure. When transferring this concept to the legal realm, it is obvious that capital expenditure means an action. This action is legitimate, proactive – the outcome of a free expression of the will, and focused on achieving a legal result. These features correspond to Art. 202 of the Civil Code of Ukraine, which states that a transaction shall be an action of a person aimed at acquiring, changing or terminating civil rights and obligations. In O.A. Pidopryhora's opinion, the legitimacy of actions aimed at achieving a particular legal result (the emergence, change or termination of rights and obligations) initially reveals the nature of the transaction (Pidopryhora, 1995, p. 215). Thus, investment expenditure as the essence of an investment contract is fully consistent with the structure of the transaction. Being an initiative, lawful act of a person's free expression of the will, capital expenditure is conducted on the basis of the discretionary nature of civil-law regulation, which, inter alia, is manifested in legal equality, freedom of expression, and property independence of participants in legal relations.

In science, there are positions according to which the involvement of public-law entities in the investment contract establishes the public-law nature of the investment contract. The authors believe that the applicability of the above dispositive legal regulatory mechanisms to the investment contract is one of the arguments, which indicate that the participation of a public entity in the contract under study does not affect the private-law nature of the investment contract. If such contractual relations are regulated by legal equality and free will of their participants, then public-law entities realize their so-called "private legal capacity" acting legally equal to other participants in civil relations. In this regard, it is worth supporting available in the literature developments of the so-called dual legal capacity of public-law entities (in particular, the conceptual developments by O.O. Pervomaiskyi) (Pervomayskyi, 2003, p. 8; Klymenko, 2006, p. 9). The state realizes its public legal capacity by establishing rules for regulating relations in society. However, when entering into property and non-property relations, the state acts within its private legal capacity and is legally equal to other participants in relations. Therefore, the participation of public-law entities in the investment contract does not transform its private-law nature.

According to the provisions of the Civil Code of Ukraine (p. 4 of Art. 11), an administrative act may be the basis for the emergence of private law relations, but it causes the dynamics of civil relations rather than administrative ones as public. As O.S. Yoffe, the classic of civil law, rightly notes, the body committing an administrative act aimed at establishing civil law relations never becomes a party to the legal relations. The contract is concluded by subjects of civil law (Yoffe, 2004, p. 109). According to V.V. Vasilieva, in contrast to an administrative act, transactions are made to generate exclusively civil effects, while administrative acts also generate the occurrence of administrative effects (Vasilieva, 2016, p. 45). Thus, the statutory and practice-based option of the origin of civil relations pursuant to an administrative legal act cannot be a ground for doubts in the private law nature of the investment contract as a transaction.

There is no doubt, the main subject-matter of regulation of the investment contract with its legal nature is property relations. At the same time, its feature entails the inclusion of a significant segment of the so-called organizational relations in its regulatory scope. The complex nature of investment relations, which mediates the process of capital expenditure,

is reflected in organizational relations. Those that have an organizational nature seems to be an undoubted characteristic of civil relations today. In particular, R.A. Maydanyk elucidates the nature of civil organizational relations as jural relations of a legal procedure focused on the emergence and adjustment of actions of participants in organized legal relations following the rights and obligations that constitute the essence of these relations (Maydanyk, 2012, p. 106–107). Thus, supporting the fact that organizational relations are immanently peculiar to investment contracts and, at the same time, one can present another argument in favor of the private-law nature of the investment contract.

Among the potential factors that may provoke attempts to interpret the investment contract as public-law, the authors stress its distinct focus on meeting the public interest of the state and society as a whole. It appears that the category of interest in terms of the differentiation of private-law or public-law nature of the investment contract cannot be an independent and unconditional criterion. In the modern context, there are such areas of public relations in which the coherence of public and private interests is so strong that it is difficult to separate them from each other for sure. This feature is most prominent in the realm of the issue under consideration. The very definition of the subject-matter of the investment contract as capital expenditure, the purpose of which is to make a profit or achieve other social and economic effects, proves the above. Thus, even if it concerns the satisfaction of private interest of an individual under capital expenditure, it is beyond controversy that separate capital expenditure is an activating factor for the state economy. In the very context of capital expenditure, it becomes clear the dominant role of private interest in specifying and affecting the public interests of society as a whole. Therefore, the design of an investment contract, remaining private-law by its nature, is distinguished by the maximum impact on the satisfaction of public interests.

4. Generic characteristics of an investment contract

Both social and economic effect as a result of capital expenditure allows it to be interpreted as broadly as possible. From the perspective of the external form, capital expenditure can be manifested in any civil contract. The conclusion is supported by para. 2 of Art. 5 of the Law, investors can act as depositors, creditors, buyers and perform the functions of any participant in investment activities.

Given the above, it seems debatable to attribute an investment contract to the specific type of contract given the complexity of its separation from related contractual structures.

The mentioned feature of investment contracts is rendered in the scientific developments. R.B. Shyshka emphasizes that this is a collective concept for a group of contracts that mediate legal relations between participants in the investment process using the provisions of investment law (Shyshka, 2014, p. 117). Indeed, one can discuss the existence of so-called "integrated" contracts which also comprise investment contracts in addition to foreign economic, business, consumer or commecial (Vasilieva, 2016, p. 130). This concept embraces a range of long-known and relatively new, even unnamed, contracts which lay groundwork for investments. It likely refers to the characteristic algorithm of such contracts following their purpose and scope than a special subtype or even type (Shyshka, 2014, p. 118).

Thus, based on the characteristics of the subject-matter of investment contracts – capital expenditure, they can be manifested in any civil-law contracts focused on achieving social or economic effect by investing material benefits in the object of any activity.

5. Conclusions

By relying on the above, the authors hold that an investment contract as an act of investing is immanently characterized by private-law nature driven by its legal nature as a free, proactive, lawful act aimed at the dynamics of civil relations and governed by mechanisms of dispositive legal regulation. The latter are manifested in the established categories of legal equality, freedom of expression and property independence, which are unconditional for the doctrine of civil law.

The analysis of legal regulations does not allow limiting it to any type of activity (entrepreneurial or non-entrepreneurial) or a certain range of entities that can act as an investor. An investment contract is a through concept in its essence, and the presence of its features does not negate the attribution of a particular contractual structure to some type in another system of classifications established by law or doctrine.

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ІНВЕСТИЦІЙНИЙ ДОГОВІР У ПРИВАТНОМУ ПРАВІ УКРАЇНИ

Анотація. ***Метою статті*** є комплексний розгляд природи інвестиційного договору як приватноправової конструкції та окреслення особливостей його видового визначення в системі цивільно-правових договорів.

Методи дослідження. Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання. За допомогою методів аналізу та синтезу виявлено ознаки й особливості інвестиційного договору як приватноправової конструкції, здійснено розгляд його крізь площину системи цивільно-правових договорів та окреслено перспективність його застосування як регулятора приватних відносин. Використані в дослідженні методи класифікації й систематизації дали змогу провести узагальнення доктрини та чинного законодавства України, виявити основні проблеми трактування природи інвестиційного договору через поняття його предмета.

Результати. У статті розглянуто всебічно представлені в доктрині різні підходи до природи інвестиційного договору, за результатами чого умовно поділено їх на публічно-правові та приватноправові концепції трактування інвестиційного договору. Констатовано, що саме останній підхід є пріоритетним у сучасній науці і практиці. В основу обґрунтування наведеної тези покладено критерій предмета договору – інвестиції як капіталовкладення. Останнє за своїм змістовим навантаженням є дією. І ця дія є правомірною, ініціативною – є результатом вільного волевиявлення особи та спрямована на досягнення правового результату. Як ініціативний, правомірний акт вільного волевиявлення особи, капіталовкладення здійснюється на основі диспозитивності цивільно-правового регулювання. Соціальний та економічний ефект як результат капіталовкладення дає змогу максимально широко його трактувати. Таким чином, віднесення інвестиційного договору суто до якогось виду договору видається дискусійним із позиції складності його відмежування від суміжних договірних конструкцій.

Висновки. Для інвестиційного договору іманентно характерна приватноправова природа, зумовлена його правочинною сутністю як вільного, ініціативного, правомірного акта, спрямованого на динаміку цивільних правовідносин та регульованого за допомогою механізмів диспозитивного правового регулювання. Аналіз законодавчих норм не дає змоги обмежити його певним колом суб'єктів, які можуть бути інвесторами. Інвестиційний договір є наскрізним за своєю суттю поняттям, і наявність його спеціальних ознак не нівелює належність певної договірної конструкції до якогось виду в іншій системі класифікацій, усталених у законодавстві чи доктрині.

Ключові слова: договір, інвестиція, приватне право, правочин, інвестиційний договір.

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SQUEEZE-OUT: INTRODUCTION EXPEDIENCY AND FAIR VALUE CHALLENGE

Abstract. ***The purpose of the article*** is to substantiate the legality of the squeeze-out procedure given legal opinions about the constitutionality of regulations on the compulsory sale of the shares of minority shareholders and the determination of their fair value.

Research methods. The contribution is based on general scientific and special methods of scientific cognition.

Results. The author analyzed the procedure for exercising squeeze-out, elucidated legal approaches to establishing the constitutionality of provisions covering squeeze-out, outlined legislative approaches to compulsory expropriation. The author also identified a range of problems of a fair value of the stock traded under squeeze-out and offered ways to improve the issue under consideration at the legislative level.

Conclusions. It is argued that the right to compulsory expropriation may be established by the Constitution of Ukraine, the Civil Code of Ukraine, and special laws; the squeeze-out procedure is set under authority and in the manner consolidated in the Law of Ukraine "On Joint-Stock Companies". In addition, the Law contains a guarantee for full compensation for stock value under the relevant terms. The shortcoming of the current legislation is zero guarantees for the protection of the monitory shareholder's rights, whose shares are bought out, which should be specified in the very procedure. It is manifested in the lack of proper control over squeeze-out compliance that, in turn, causes the determination of an unfair market price of shares, which are compulsorily bought out. Therefore, there should be statutory provisions for special control of the court or the National Securities and Stock Market Commission to ensure a transparent squeeze-out and determination of a fair value of the stock.

Key words: squeeze-out, owner of dominant controlling stake, fair price, minority shareholders, public interest, property, ownership.

1. Introduction

Over the last few years, the efficiency of a market economy has required addressing a strategic task – to ensure the quality of laws. Permanent legal reforms with frequent alterations in the content of legislative rules and legal procedures in different areas of legal relations without a sound legal doctrine do not do good for society (Tertyshnyk, 2019). In particular, rules of corporate legislation are subject to drastic changes. It is driven by the execution of the state's task – to bring domestic legislation in line with European standards. Each of the implemented changes needs to be discussed and analyzed, and if available gaps or conflicts – a high-quality solution to the existing shortcoming. Therefore, the issue of introducing squeeze-out (the procedure of mandatory sale of shares by minority shareholders at the request of majority shareholders) into corporate law was not ignored.

Analyzing the definition of squeeze-out in national law, the legislator has chosen a broader approach – covered by this procedure all joint-stock companies, not only those whose shares are traded on the regulated securities market – than one set out in the standards of EU Directive 2004/25/ЄС as of April 21, 2004. Instead, a squeeze-out threshold was chosen higher than 90 percent, which is the minimum under the Directive (Shvydka, Lohvynenko, 2021, p. 315).

As it is known, corporate relations are in rapid evolution, hence becoming more complicated. Therefore, they require proper regulation. Juridical facts in the mechanism of legal regulation of corporate relations have all the features of traditional specific differentiation of juridical facts (Zhornokui,

Slipchenko, 2020, p. 39). According to legal consequences, there are such juridical facts that establish the right; change the right; exercise the right; terminate the right. The availability of the latter leads to the termination of legal relations. Such juridical facts include legal actions related to the squeeze-out procedure.

As the procedure of selling shares through squeeze-out is associated with the compulsory termination of corporate relations of a minority shareholder with the company, the corporate community faces a range of issues concerning the legality of making the relevant amendments to legislation, compliance with the Constitution, imperfection of the proposed mechanism of mandatory alienation of shares (a lack of proper control over the procedure by regulatory authorities; the challenge of determining fair value for shares; a lack of specific ways to protect the rights of minority shareholders, etc.).

The squeeze-out procedure was elucidated in the scientific works by L.M. Bielkin, Yu.M. Zhornokui, A.V. Kostruba, O.V. Kolohoida, L.D. Rudenko, V.M. Tertyshnyk, T.I. Shvydka and other. However, guarantees for the exercise and protection of the rights of minority participants during the compulsory buying out of their shares remain unresolved in terms of legislation.

The purpose of the article is to analyze squeeze-out given legal opinions about the constitutionality of regulations of the compulsory sale of the shares of minority shareholders at the request of the owner of the dominant controlling stake and about legal approaches to determining the fair value of redeemable shares.

The study highlights important scientific and applied issues concerning the legitimacy of the squeeze-out procedure and compliance with the principle of social necessity and justice in case of execution. Keeping in mind the research purpose, the author used methods, which generally allowed establishing the relevant lines: analysis and synthesis, systems analysis, induction and deduction, formal-legal and comparative-legal method, etc. Thus, the structural and functional analysis made it possible to describe the legal procedure for squeeze-out, determine necessary elements of a public irrevocable demand and the method of calculation of the fair price of redeemable shares. Systems analysis and synthesis elucidated the inner nature and impact of the squeeze-out procedure on the rights and interests of minority interests, as well as the lack of adequate guarantees for the exercise and protection of their rights in case of violation.

2. Legal procedure for exercising squeeze-out

The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Increasing the Level of Corporate Governance in Joint-Stock Companies" № 1983-VIII as of March 23, 2017 amended the Law of Ukraine "On Joint-Stock Companies" and updated Arts. 65-1–65-5, which touch upon squeeze-out. In particular, Art. 65-2 of the Law envisages the procedure for the mandatory sale of shares by shareholders at the request of a person (persons acting in concert) who is the owner of the dominant controlling interest. Therefore, the owner of the dominant controlling interest is a person (persons acting in concert) who owns 95 and more percent of the ordinary shares of the joint-stock company. Persons acting in concert are natural and/or legal persons who rely on the agreement, which they have concluded and coordinate their actions to achieve a common goal (Verkhovna Rada of Ukraine, 2008).

According to the regulations, the owner of the dominant controlling stake, the applicant of demand, is obliged to notify the National Securities and Stock Market Commission of the acquisition of title within the next working day from the date of acquisition of title to shares. The joint-stock company is also obliged to publish the relevant notice on the JSC website and in the database of the person who carries out the presentation of regulated information on behalf of capital market participants. Since that moment, the owner of the dominant controlling interest acquires the right to appeal to the company and its shareholders, who jointly hold 5 or less percent of ordinary shares, with a public irrevocable demand for buyout. The term for submitting a public irrevocable demand is 90 days after sending the relevant notification to the National Securities and Stock Market Commission, joint-stock company, and capital market (Verkhovna Rada of Ukraine, 2008).

Along with the submission of a public irrevocable claim to the company, it is sent a copy of the agreement concluded between the applicant and the banking institution in which the escrow account is opened. In order to realize the public irrevocable demand, the applicant pays shareholders the share price by transferring the sums of money to the banking institution in which the applicant has opened an escrow account. In this case, the company and minority shareholders are obliged to sell their shares unconditionally. The beneficiaries of such an account are the shareholders who sell the shares or their heirs, successors, and other persons who have the right to receive funds by law.

The Central Securities Depository (hereinafter – CSD) also posts a public irrevocable demand on its website, imposes restrictions on share transactions within the depository system, and provides depository institutions, the accounts of which hold shares, with a copy of the public irrevocable demand and a certified copy of the escrow agreement. Within three working days from the date of receipt of the relevant notice, the CSD shall compile a list of company shareholders and send it to the company. When the applicant has transferred funds to the escrow account within three working days of the day of receipt of the relevant information, the CSD lifts the restriction on share transactions in the depository system and ensures that depository institutions transfer share rights from the accounts of their owners – minority shareholders – to the applicant's account.

As for the joint-stock company, from receipt of the notice of acquisition of the controlling interest by the owner, the company is obliged to send a copy of the public irrevocable demand and the escrow agreement to each shareholder whose shares are bought out, make a list of persons who sell the shares, indicating the amount to be paid by the applicant in favor of each shareholder, provide the list of such shareholders to the banking institution in which the escrow account is opened. Upon receiving information on the transfer of the specific sums of money from the applicant for the shares of minority shareholders, the company is obliged to notify the CSD within the next business day. The applicant reimburses for JSC expenses related to the execution of the squeeze-out procedure.

The banking institution, which has opened the escrow account, shall, within three years, transfer funds to the banking accounts of shareholders, whose shares are bought out, or pay the fixed funds in cash. In order to receive funds, the shareholders must apply to the banking institution and receive them in non-cash or cash form.

The squeeze-out procedure, introduced through amending the Law of Ukraine "On Joint-Stock Companies", is specified to improve the efficiency of corporate governance in companies. The proposals are one of the directions of European integration processes to bring domestic corporate law in line with EU acquis and the recommendations of the EU Directives.

However, the corporate community met the innovation under consideration with a mixed reception which necessitated the appeal to the Constitutional Court of Ukraine to explain of whether squeeze-out complies with the constitutional provisions of Ukraine. Thus, the subject of the right to a constitutional petition – 47 people's deputies of Ukraine – appealed to the Constitutional Court of Ukraine with a request concerning the compliance of the provisions of Art. 65-2 of the Law of Ukraine "On Joint-Stock Companies" with the Constitution of Ukraine (constitutionality).

One of the arguments in favor of such an appeal was the fact that the expropriation of private property objects stipulated by para. 5 of Art. 41 of the Constitution of Ukraine may be applied only as an exception for the reasons of social necessity, on the grounds of and in the order established by the law, and on terms of advance and complete compensation of their value (Verkhovna Rada of Ukraine, 1996). In this regard, the question came up: can squeeze-out be considered a reasonable ground for the expropriation of shares, which, taking into account the provisions of para. 5 of Art. 41 of the Constitution of Ukraine, can occur as an exception for reasons of public necessity?

In addition, the constitutional petition refers to Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as of 1950, stating that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (Council of Europe, 1952).

Given the above, the subjects of the right to a constitutional petition noted that the expropriation of shareholders' shares through squeeze-out is permissible in the public interest for the legitimate social purpose with observance of the principle of justice and balance of interests without putting a heavy burden on the dispossessed party. However, according to the subjects, the minority shareholder is a weak party in economic terms of corporate relations. Squeeze-out leads to mandatory, independent of the will of the minority shareholder, termination of his rights. The interest of the majority shareholder in reducing the administrative costs of holding shareholders' meetings, minimizing the risks of corporate blackmail on the part of minority shareholders, depriving the company of "dormant shareholders" is not the public interest, but the violation of the right to private ownership of one person in favor of another (Constitutional Court of Ukraine, 2019a).

However, having considered the constitutional petition, the Grand Chamber of the Constitutional Court of Ukraine adopted a ruling as of October 10, 2019, which refused to initiate constitutional proceedings for

lack of valid grounds (Constitutional Court of Ukraine, 2019b).

If one directly turns to the analysis of current legislation, it is worth mentioning the following. According to Art. 8 of the Constitution of Ukraine, the rule of law is recognized and operates in Ukraine. The Constitution of Ukraine has the highest legal force. Laws and other regulations are adopted by relying on the Constitution of Ukraine and shall comply with it. At the same time, according to Art. 1 of the Civil Code of Ukraine, civil laws govern personal non-property and property relations (civil relations) based on legal equality, free will, and property independence of their participants. Pursuant to Art. 4 of the Civil Code of Ukraine, the Constitution of Ukraine is at the core of the civil legislation of Ukraine. The Civil Code of Ukraine is the principal act of the civil legislation of Ukraine. Other laws of Ukraine, which are adopted in line with the Constitution of Ukraine and the Code Civil, are civil acts as well (Verkhovna Rada of Ukraine, 2003). The above shows that property relations that arise, change, or are terminated from the right to own property are regulated by the Civil Code of Ukraine and special laws adopted on the ground of the Constitution of Ukraine.

According to para. 2, Article 3 of the Civil Code of Ukraine, the general principles of civil laws comprise the inadmissibility of expropriation except as provided in the Constitution of Ukraine and the law. Moreover, according to para. 1 of Art. 12 and para. 1 of Art. 13 of the Civil Code of Ukraine, a person shall exercise his civil rights freely, at his own discretion. A person shall exercise his civil rights within limits specified by the agreement or civil law acts (Verkhovna Rada of Ukraine, 2003). Thus, a person exercises his rights freely, at his own discretion, except for the grounds established by law.

Pursuant to Art. 41 of the Constitution of Ukraine, everyone shall have the right to own, use, or dispose of his property and the results of his intellectual or creative activities. No one shall be unlawfully deprived of the right to ownership. The right to private property shall be inviolable (Verkhovna Rada of Ukraine, 1996). These provisions are reflected in the Civil Code of Ukraine. According to Art. 316, para. 1 of Art. 319 of the Code, ownership right shall be the right of an individual to an object (property) that he/she enjoys in compliance with the effective legislation on his/her own will irrespective of the will of the third parties. The owner owns, uses, disposes of his property at his own discretion. According to paras. 1, 2 of Art. 321 of the Civil Code of Ukraine, the right of ownership is inviolable No one can be illegally deprived of this right or restricted in its exercise. The person may be deprived of the ownership right or restricted in their exercise only in cases and in the manner prescribed by the law (Verkhovna Rada of Ukraine, 2003).

By relying on the above legislative provisions, the author concludes the following: 1) the owner freely, at his own discretion, owns, uses, and disposes of his property; 2) the owner exercises the right of ownership within limits set by the law; 3) the owner may be restricted in the right of ownership or deprived of the right of ownership only under the law; 4) the property owner has the right to reimbursement for the value of property in case of restricting his right to property or forced deprivation of property.

Given that the right to expropriation can be determined by the Constitution of Ukraine, the Civil Code of Ukraine and special laws, the squeeze-out procedure is defined on the ground of and in the manner prescribed by the Law of Ukraine "On Joint-Stock Companies". The Law specifies the grounds for applying squeeze-out, the procedure for its implementation and the guarantee for full reimbursement of the stock value on the terms set by the law.

In addition, keeping in mind Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the legal realm concludes that the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Regarding the application of the squeeze-out procedure for reasons of public necessity, it is worth noting the following. In 2017, Ukraine implemented the requirements of Directive 2004/25/ЄС of the European Parliament and of the Council of April 21, 2004 on takeover bids making general squeeze-out recommendations in the European Union. In particular, Arts. 15, 16 provide for the right of mandatory sale (squeeze-out) at the fair price of shares of minority shareholders if the person owns or acquires following acceptance of the bid of at least 90% of the voting rights in the offeree company. Member States may set a higher threshold that may not, however, be higher than 95% of the capital carrying voting rights. According to domestic law, the squeeze-out procedure provides for the right of the person (persons acting in concert), who became the owner of 95 or more percent of shares, to conduct a mandatory buyout from minority

shareholders (European Union, 2004). Thus, the interest threshold has been raised – it allows the owner of the dominant controlling to exercise squeeze-out under domestic law meeting European standards on the threshold of voting rights (the stock of shares).

It should be noted that similar arguments are found in the Judgment of the Grand Chamber of the Supreme Court as of November 24, 2020. It states that Partnership and co-operation agreement between the European communities and their member states and Ukraine was concluded on June 14, 1994. The agreement provided for the approximation of the current and prospective legislation of Ukraine with the legislation of the Community. The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, was signed on March 21, 2014 and ratified on September 16, 2014. The Agreement is an integral part of Ukrainian law. Annex XXXIV to Chapter 13 of the Agreement stipulates that Ukraine undertakes to gradually approximate its legislation to EU acquis in terms of the establishment and operation of companies, corporate governance, accounting and auditing within time limits set by the Annex. The annex also contains the Directive on takeover bids (Supreme Court, 2020).

Therefore, public interests in the sustainable operation and development of joint-stock companies have contributed to the state's introduction of the relevant statutory regulation that ensures workplaces and settled taxes in the state, advancement of the investment attractiveness of joint-stock companies, reduction of corporate conflicts, raiding, etc. This requires an appropriate level of corporate governance and minimization of related costs necessary, in particular, to maintain the infrastructure associated with the convening of general company meetings or the exercise of shareholders' other rights and powers (Supreme Court, 2020). The author believes that the above arguments are fair enough and confirm the legality of the squeeze-out procedure as defined by the Law of Ukraine "On Joint-Stock Companies". Therefore, squeeze-out may be in the public interests.

3. Fair value challenge

Upon acquisition of the dominant controlling stake, the owner – demand applicant – is obliged to send a notice to the National Securities and Stock Market Commission, the Central Securities Depository directly and/or through the company, post it on the JSC website and the stock exchange. The applicant then formulates a public irrevocable demand, which is sent to shareholders and the company. The public irrevocable demand must contain information about the applicant, the purchase price of shares with an indication that the payment for shares is made exclusively in cash, as well as the procedure for setting price, the banking institution in which the escrow account is opened, the joint-stock company, a depository in which the applicant has opened securities account and his account details, the procedure for implementing demand. The public irrevocable demand shall be signed by the applicant.

Although the general procedure and requirements for a public irrevocable demand are set by the law, the application highlights the problem of determining the fair price of the mandatory share sale. Para. 5 of Art. 65-2 of the Law of Ukraine "On Joint-Stock Companies" states that a price is set as the highest of the following: 1) the highest share price under which the applicant, his affiliates, or third parties acting in concert with him bought company stock in 12 months preceding the acquisition date of the dominant controlling interest, including the acquisition date; 2) the highest price under which the mentioned persons indirectly acquired ownership of company stock during 12 months preceding the date of acquisition of the dominant controlling stake, including the date of acquisition, provided that the value of shares owned directly or indirectly by the legal entity is not less than 90% of total assets following the latest annual financial statements; 3) the market value of the company stock set as of the last working day preceding the day when the applicant acquires the controlling company stock (Verkhovna Rada of Ukraine, 2008).

In a joint stock company, the market value of shares is determined under the requirements of para. 2 of Art. 43 of the Law of Ukraine "On Joint-Stock Companies". Thus, the market value of shares, which are not traded on organized capital markets, is determined in accordance with the legislation on the appraisal of property, property rights and professional appraisal activity, and the market value of shares traded on organized capital markets – as the average rate ensuing from regular securities trading on the relevant organized capital market and calculated by the market operator for the last three months of their circulation preceding the day when the market value of securities is determined. If the above procedure does not facilitate determining the market value of shares traded on organized capital markets, it is determined following the legislation on the appraisal of property,

property rights and professional appraisal activities (Verkhovna Rada of Ukraine, 2008). The decision of the National Commission on Securities and Stock Market "On Determining the Market Value of Securities" first enshrined the proposed options for determining the market value of shares (National Securities and Stock Market Commission, 2016).

Therefore, to set the fair price of a block of shares in the squeeze-out procedure, it is necessary to establish the market value of the company stock. This requires calculations to establish the highest price resulting from the value of a block of shares grounded on the ratio of the value of shares determined by relying on para. 5 of Art. 65-2 of the Law of Ukraine "On Joint Stock Companies" given para. 2 of Art. 8 of the same Law. In other words, the statutory order for determining the purchase price of shares for the relevant procedure envisages choosing the highest rate of the three options set in these rules. The highest rate is the purchase price of shares. At the same time, since share transactions are not carried out on a competitive basis in the domestic organized capital market stock, the more popular approach to determining the fair price of shares in the squeeze-out procedure involves referring to the legislation on the appraisal of property, property rights and professional appraisal activity.

Art. 65-5 of Ukraine "On Joint-Stock Companies" states that the charter of a private joint stock company in case of its creation as well as the decision of the general meeting of JSC shareholders to amend the company's charter adopted by more than 95% of shareholders may fix that the requirements of Arts. 65-2 and 65-3 of the Law do not apply to the company or apply with exceptions or peculiarities to be determined by the company's charter (Verkhovna Rada of Ukraine, 2008). As the shares of a private joint stock company are not alienated on organized capital markets, it is obvious that the fair price for shares in the squeeze-out procedure is determined in accordance with the legislation on the appraisal of property, property rights and professional appraisal activity.

With regard to the above provision, it is expressed the opinion that entitling a joint-stock company to independently decide on the terms and conditions of application of the law, in particular, on guarantees of minority rights, can be considered a violation of the principle of equal protection of all subjects of property rights (Shvydka, Lohvynenko, 2021, p. 315). The author believes this comment is reasonable because the squeeze-out procedure determines the price in a public irrevocable demand, which is submitted for obligatory acceptance by a minority shareholder; in the context of buying out, there is no freedom to determine price or recalculate it by a minority shareholder. In addition, the analysis of laws shows that the National Securities and Stock Market Commission or other external supervisory authorities are not involved in the procedure of mandatory sale of shares by a minority shareholder and thus, the shareholder can protect his rights exclusively in court and after the actual conclusion and execution of the sale contract under the squeeze-out procedure.

Therefore, in the above-mentioned constitutional petition, the legal subjects, who appealed to the Constitutional Court of Ukraine, state that the laws of Ukraine do not specify specific requirements for appraisers and the mechanism (way and method) of appraising the market value of shares. This causes inconsistency in the assessment of the market value of shares with the fair market value of the shares in order to apply the squeeze-out procedure. The introduction of the Directive 2004/25/ЄС into domestic legislation should be preceded by the development and approval of the Regulation on the valuation of the market value of shares for the implementation of share buyback procedures defined by the Law of Ukraine "On Joint-Stock Companies". These Regulations should stipulate requirements for property appraisers (for example, companies, the income of which exceeds UAH 500 million for the previous reporting year, must be appraised by the Big Four – PricewaterhouseCoopers, Deloitte Touche Tohmatsu, Ernst & Young, KPMG), assessment methods and techniques, the responsibility of assessors for providing unreliable information (Constitutional Court of Ukraine, 2019a).

If one refers to the analysis of the Directive 2004/25/ЄС as of April 21, 2004, the following should be noted in this regard. Para. 4 of Art. 5 states that the highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid shall be regarded as the equitable price. The Directive also provides for the possibility of raising or lowering the maximum price by the supervisory authorities of Member States that requires determining a list of probable circumstances that will facilitate this process. For example, if the highest price was set by agreement between the purchaser and a seller, if the market prices of the securities in question have been manipulated, if market prices in general or certain market prices in particular have been affected by exceptional occurrences,

or in order to enable a firm in difficulty to be rescued. They may also determine the criteria to be applied in such cases, for example, the average market value over a particular period, the break-up value of the company or other objective criteria generally used in financial analysis. In the form of compensation, the bidder may offer securities, cash or a combination of both. In addition, para. 5 of Art. 15 of the Directive notes that Member States shall ensure that a fair price is guaranteed. That price shall take the same form as the consideration offered in the bid or shall be in cash (European Union, 2004).

International Financial Reporting Standard 13 sets out the criteria for determining fair value, namely: a) defines fair value; b) sets out in a single IFRS a framework for measuring fair value; c) requires disclosures about fair value measurements. Fair value is a market-based measurement, not an entity-specific measurement. For some assets and liabilities, observable market transactions or market information might be available. For other assets and liabilities, observable market transactions and market information might not be available. However, the objective of fair value measurement in both cases is the same – to estimate the price at which an orderly transaction to sell the asset or to transfer the liability would take place between market participants at the measurement date under current market conditions (i. e., an exit price at the measurement date from the perspective of a market participant that holds the asset or owes the liability) (International Accounting Standards Board, 2013).

Based on the above provisions, it is worth pointing out that, on the one hand, the current legislation lacks a specific method of valuing company stock redeemable on the capital market or outside it voluntarily or compulsorily. However, on the other hand, the legislator has granted the stock company's supervisory board, which is responsible for the clarity and transparency of the procedure, considerable powers to monitor the determination of a fair price. Moreover, many practicing appraisers note that the legislation on the valuation of property and property rights envisages approaches that should and have to be applied in the valuation of shares. The crucial thing is to choose an acceptable model when choosing a valuation method because the choice of an unsuitable valuation model can lead to overestimation or underestimation of business that, in particular, is conditioned by the company's performance peculiarities, negative market conditions, and incorrect wording of valuation goal. There are three widely used valuation methods: the market approach, the cost approach, and the revenue approach.

Arts. 12, 13 of the Law of Ukraine "On the Appraisal of Property, Property Rights and Professional Appraisal Activity in Ukraine" stipulate that property valuation findings are elucidated in the property valuation report, which specifies procedures and the used legal framework for property valuation. In addition, it is drawn up an appraisal report, which is a document that contains conclusions on the property value and confirms performed property valuation procedures. A review of the appraisal report (appraisal act) may be conducted at the request of the person using the property appraisal and its findings for decision-making (Verkhovna Rada of Ukraine, 2001).

According to the National Standard № 1 "General principles of the appraisal of property and property rights" № 1440 (sub-paras. 35, 36, 37, 38, 40), property appraisal is carried out using methodological approaches, valuation methods that are elements of methodological approaches or the outcome of combining several methodological approaches, as well as evaluation procedures. As a rule, an appraiser applies several methodological approaches that best meet the purpose of the appraisal, the type of value if available reliable information sources for its implementation. The following basic methodological approaches are used to appraise property: cost, income, comparative. Particularities of applying the cost (real estate) approach are established for the valuation of objects in the form of integral property complexes and in the form of financial interests, which include shares (Cabinet of Ministers of Ukraine, 2003). The above provisions show that in conducting the valuation of shares, the appraiser must apply the cost approach individually or in combination with other approaches, taking into account market conditions, efficiency of company performance, completeness of initial data on the company's operations and its assets, etc.

As for the challenge of determining the fair price of shares in the squeeze-out procedure, the fact of the matter is that there is a likelihood of unfair practice of the owner of the dominant controlling stake, a lack of influence of the minority shareholder on determining the price of shares upon their alienation without his will and a lack of special control over the determination procedure before depriving the minority shareholder of the right of ownership of shares. Therefore, the Resolution of the Grand Chamber of the Supreme Court as of November 24, 2020 states that in case

of minority shareholders' appeal of the procedure of forced alienation of their shares under Art. 65-2 of the Law of Ukraine "On Joint-Stock Companies", the court must establish: 1) whether this procedure was conducted in accordance with the law; 2) whether it was carried out for a legitimate purpose, namely, whether the motives of the majority shareholders were in the public interest when implementing this procedure; 3) whether the value of share buyback offered to minority shareholders is fair, and whether the criterion of proportionality of interference with the plaintiff's rights is met (Supreme Court, 2020).

The criteria of the expediency of the squeeze-out procedure are consistent with the standpoint of the European Court of Human Rights, which developed three criteria for the compatibility of interference with the right of a person to the peaceful enjoyment of possession with the guarantees of Art. 1 of the First Protocol, namely: 1) whether the interference is lawful; 2) whether it pursues a "social", "public" interest; 3) whether such a measure (interference with the right to the peaceful enjoyment of possession) is proportionate to the objectives set. In the case of violation of the right to the peaceful enjoyment of possession by at least one of these criteria, the European Court of Human Rights notes a violation.

The Grand Chamber of the Supreme Court of Ukraine, referring to Protocol № 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, also marks that when performing squeeze-out, the price should be both market and fair. The Supreme Court holds that the cost valuation method (as single, or among others), which follows from the legislation on the appraisal of property, property rights and professional appraisal activity in Ukraine, should be used in calculating the fair (market) value of shares in terms of squeeze-out. When applying the cost approach, the fair (market) price of one ordinary share of the company should be determined in the package of 100% of the authorized capital by the formula: "market value of the company's net assets divided by total ordinary company stock" (Supreme Court, 2021).

Thus, as you can see, the application practice and case law have already developed some criteria and formulas for determining the fair price of shares in the squeeze-out procedure. However, it is emphasized that there is no adequate control over the observance of the legality principle during the squeeze-out procedure.

Thus, in Ukraine, squeeze-out shares are evaluated by an appraiser appointed by the issuer without the obligatory participation of an additional reviewer or a state disinterested arbitrator from the state (regulator or court). That does not mean that any stock valuation ordered by the issuer is a priori unfair, but such a procedure does not sufficiently protect against valuation misuse. Foreign case law shows that each occasion of unfair valuation should be considered within a specific buyout procedure (Ihonin, Shmatov, 2019). Therefore, in order to improve the squeeze-out procedure in the national legislation, it is proposed to amend the powers of the National Securities and Stock Market Commission in the part of reviewing the appraiser's report and acceptance of complaints from minority participants in case of the violation of proportionality and sufficiency criteria (Shvydka, Lokhvynenko, 2021, p. 317). However, the question of what minority shareholders should do in the case of a negative review remains open (Bielkin, 2018).

4. Conclusions

The Law of Ukraine "On Joint-Stock Companies" consolidates the right to the mandatory buyout at the request of the owner of the dominant controlling stake. The squeeze-out procedure does not contradict the constitutional provisions on the inviolability of property rights, as it is defined on the grounds of and under the procedure established by law. The drawback of the current legislation is the lack of guarantees to protect the rights of the minority shareholder, whose shares are redeemed, which should be envisaged in this procedure that is primarily manifested in the absence of proper control over its observance. Thus, to conduct a transparent squeeze-out and determine the fair price of redeemable shares, it is necessary to introduce statutory provisions on specific control within this procedure on the part of the court or the National Commission on Securities and Stock Market.

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SQUEEZE-OUT: ДОЦІЛЬНІСТЬ ЗАПРОВАДЖЕННЯ ТА ПРОБЛЕМА СПРАВЕДЛИВОЇ ОЦІНКИ

Анотація. ***Метою статті*** є обґрунтування законності процедури squeeze-out з урахуванням правових позицій щодо конституційності нормативних положень процедури обов'язкового продажу пакета акцій міноритарних акціонерів та визначення справедливої ціни за акції.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. Проаналізовано порядок здійснення squeeze-out, розглянуто правові підходи до визначення конституційності положень, що розкривають процедуру squeeze-out, та окреслено законодавчі підходи до примусового позбавлення права власності особи. Також розкрито проблему справедливої оцінки пакета акцій, який викуповується, за процедурою squeeze-out та запропоновано шляхи вдосконалення зазначеного питання на законодавчому рівні.

Висновки. Аргументовано, що право на примусове позбавлення права власності може встановлюватися Конституцією України, Цивільним кодексом України та спеціальними законами. Процедура squeeze-out є такою, що визначається на підставі й у порядку, що закріплені в Законі України «Про акціонерні товариства». Крім того, у цьому ж законі прописано гарантію повного відшкодування вартості акцій на умовах, що ним визначені. Недоліком чинного законодавства є відсутність гарантій захисту прав міноритарного акціонера, акції якого викуповуються, що мають бути передбачені саме в цій процедурі. Це проявляється у відсутності належного контролю за дотриманням squeeze-out, що своєю чергою зумовлює можливість визначення несправедливої ринкової вартості акцій, які продаються, в обов'язковому порядку. Тому для прозорого проведення squeeze-out та визначення справедливої ціни акцій, які викуповуються, на законодавчому рівні варто запровадити положення про спеціальний контроль із боку суду або Національної комісії із цінних паперів та фондового ринку за цією процедурою.

Ключові слова: squeeze-out, власник домінуючого контрольного пакета акцій, справедлива ціна, міноритарні акціонери, суспільний інтерес, майно, право власності.

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THE RIGHT OF THE NATURAL PERSON TO INDIVIDUALITY

Abstract. ***The purpose*** of the research is to substantiate the need for statutory consolidation of the human right to intellectual freedom as an integral component of the right of a natural person to individuality.

Research methods. The contribution was developed by relying on the following methods of scientific cognition: analysis, synthesis, logical semantics, the method of studying information sources, as well as formal-logical, dialectical, retrospective, prognostic methods.

Results. The article studied theoretical approaches to the analysis of the history of the human right to individuality and individual freedom available in scientific and philosophical thoughts. The authors paid attention to the understanding of the concept of individual freedom and its significance in the modern world. The research showed that the maintenance of a good condition of human affairs and thus harmony of civilized life in the modern era primarily involves establishing and protecting human individuality from mental and emotional captivity and hence establishing and protecting the scope of individual consciousness independent of the control of the majority, even in the form of a public opinion. It was proved that "the interest of the majority" per se without its civilized "fertilization" with the idea of the absolute value of human personality is at least not identical, rather opposite to the "harmony of civilized life". The authors demonstrate that an unjustified "invasion" of the will of the majority in the realm of individual freedom and the actual suppression of the human right to individuality, which become possible due to the lack of effective legal and social safeguards against the public will, are often the consequences of the collision between individual and group rights in modern societies. The significance of intellectual freedoms for mass societies was studied. Particularities of intellectual life in the democratic epoch were clarified. The authors drew attention to modern threats to freedom of thought. It was highlighted the need to develop and protect the intellectual freedom of an individual.

Conclusions. According to the results of the study, the following conclusions about the harmonization of human individuality with social solidarity are substantiated: 1) it is proposed to admit that incorrect, exaggerated understanding and application of a noble idea of human solidarity may lead to the crisis of human individuality in modern civilization; 2) this crisis may be manifested, in particular, in impediments affecting the desire to have and support one's cultural identity and in restraining the very desire; 3) it is proposed to admit that intellectual freedoms and intellectual life in modern mass societies are gaining specific attention and, at the same time, are in danger; 4) it is proposed to add para. 3 to art. 300

of the Civil Code of Ukraine and present it in the version as follows: "A natural person shall have the right to intellectual freedom – the right to the development of conscious attitude to oneself and the world, the implementation of personal creative initiative, intellectual development, incl. through discussion. A natural person shall be free from judgments, concepts, feelings, and prejudices of others' opinion, as long as it does not harm others". The authors hold that human individuality is incomplete in today's context without promoting intellectual freedom.

Key words: individuality, individual freedom, public opinion, "tyranny of the majority", culture, mass society, intellectual freedom.

1. Introduction

Every person shall have the right to free development of his personality, provided that the rights and freedoms of other persons are not thus violated (art. 23 of the Constitution of Ukraine). The "individuality" concept as an object of the relevant right is conveyed by the legislator as the intangible personal benefit of an individual, which includes a set of his mental properties, characteristics, life and professional experience, that distinguishes him from other individuals. Individuality consists of many particularities of a natural person related to his national, cultural, religious, linguistic, and other kinds of identity (Dzera et al., 2019, p. 442). At the same time, originality is the personal identity, the realization of own belonging to a particular social group or community. It is usually expressed in the subject's appearance. Individuality, in turn, is manifested in language, behavior, religious affiliation, worldview, attitude to others, communication style, character traits, temperament, habits, priority interests, cognitive processes, abilities, individual activity style, etc. Individuality is exclusively personal, intangible, social benefit. Moreover, external anatomic features are not considered by the concept (Spasybo-Fatieieva, 2021, p. 712).

The right to individuality implies that a natural entity: a) has own identity, i. e., he is recognized as a holder of the intangible personal benefit. The right to preserve one's national, cultural, religious, linguistic originality, which is guaranteed by art. 2 of article 300 of the Civil Code of Ukraine and art. 11 of the Constitution of Ukraine, is close in its meaning; b) uses personal identity, i. e., to choose any possible form and way to display his individuality unless they are prohibited by the law and contradict the moral principles of society (para. 2 of article 300 of the Civil Code of Ukraine); c) creates and changes his individuality; d) requires protection in case of any violation of the right to individuality. The protection of the right is carried out on the grounds of and in the manner prescribed in section 3 and articles 275–280, 1166–1168 of the Civil Code of Ukraine (Dzera et al., 2019, p. 443).

The European Court of Human Rights holds it inadmissible to ignore the aspirations of a person (a community) to have and maintain his cultural identity, even if the majority of society no longer keeps up traditions due to the influence of progress and personal choice; ethnic (national) identity is an essential aspect of a person's private life (Spasybo-Fatieieva, 2021, p. 713). The person can join national groups, adhere to certain traditions, wear national, cultural, and religious symbols, develop culture, communicate in a particular language, create works, etc. (Spasybo-Fatieieva, 2021, p. 714).

The following authors studied the regulation of intangible personal rights related to the human right to individuality: O.S. Hyliaka, Yu.O. Zaika, A.O. Kodynets, O.V. Kokhanovska, N.S. Kuznietsova, O.O. Kulinich, N.V. Kushakova-Kostytska, R.A. Maidanyk, O.V. Petryshyn, O.O. Posykaliuk, S.O. Slipchenko, R.O. Stefanchuk, Ye.O. Kharytonov, O.I. Kharytonova and other (Kharytonov, Kharytonova, 2018; Kodynets, 2016; Kokhanovska, 2006; Kokhanovska, 2020; Kulinich, 2016; Kushakova-Kostytska, 2018; Kuznietsova et al., 2013; Petryshyn, Hyliaka, 2021; Posykaliuk, 2012; Slipchenko, 2013; Stefanchuk, 2007; Stefanchuk, 2010; Zaika et al., 2021).

However, the domestic science of civil law has not yet paid proper attention to the consistency of the growing social solidarity with the human right to individuality. This fact triggers the need to settle a complex of important scientific and practical tasks:

– to examine approaches to the understanding of individual freedom and its significance;

– to study consequences of a collision between individual and group rights;

– to elucidate the significance of intellectual freedoms in mass societies.

The purpose of the article is to substantiate the need for statutory consolidation of the human right to intellectual freedom as an integral component of the right of a natural person to individuality.

Modern scientists have touched upon some aspects of the issue under consideration. In particular, there are studies devoted to honor and dignity following laws of the countries of Continental Europe (Zaika, 2017).

However, the realm of the human right to individuality contains issues which must be thoroughly analyzed. The article covers the issues as follows:

– study of theoretical approaches to the analysis of the history of the human right to individuality and individual freedom available in scientific and philosophical thoughts;

– clarification of the correctness of the statement about groundless identification of the concepts of "harmony of civilized life" and "the interest of the majority";

– identification of possible modern threats to the human right to individuality;

– study of particularities of intellectual life in the democratic epoch.

Using the method of scientific analysis, the authors sought to divide the research object into components and elucidate its features and connections with other elements in the system by relying on its components. Synthesis was applied to unite previously separated parts into a coherent whole. Logical semantics was used to elicit the significance of the framework of concepts and categories involved in the research and its interpretation. According to the method of studying information sources, the authors analyzed scientific contributions devoted to the right of a natural person to individuality in domestic and international legal science. The Aristotelian method facilitated the harmonization of major components of the study of the right of a natural person to individuality with the laws of formal logic. The dialectical method facilitated identifying the evolution of legal theory and practice in exercising the right of a natural person to individuality. The retrospective method was applied to study the historical development of the right of a natural person to individuality and its becoming as a legal category. The prognostic approach helped develop the recommendations for improving domestic civil laws to ensure their compliance with the need to reconcile growing social solidarity with the human right to individuality.

2. The history of individual freedom

There are inviolable and immutable laws of social life, which determine the preservation and evolution of public life: they are eternal per se and in their inner meaning; however, these empirical laws may be violated and are often violated that result in the fall or, at best, paralysis, weakening, and disease of society. It is precisely the laws that have always been meant in the doctrine of "natural law". Pursuant to the laws, man has a firm benchmark of what must be true, something towards which he must direct and adapt his aspirations. Man is a free being; he is free to choose his life path as he sees fit. He may make mistakes, and then he perishes; he may obey the requirements of truth, laws established not by his will but by the source of the highest truth, and then he asserts and strengthens his life (Frank, 1992, p. 34). All human rights eventually arise from the only "inherent right": the right to demand to be given the opportunity to fulfill his duty (Frank, 1992, p. 109). The object "towards which every human being must ceaselessly direct his efforts is the individuality of power and development"; for this there are two requisites, "freedom, and variety of situations"; from the union of these arise "individual vigour and manifold diversity", which combine themselves in "originality" (Von Humboldt, as cited in (Mill, 2001, p. 54)). Additional individual rights arising from the principle of freedom and personal identity are indirectly established in the obligation to protect individual freedom as a legitimate, i. e., obligatory, beginning of human life (Frank, 1992, p. 109).

However, what does it mean to say that a right is fundamental, and according to what standards of importance or urgency is it so judged? (Weston, 2021).

To answer the above question, the authors refer to the history of the human right to individual freedom.

The ancient world could differentiate between "natural", internally authoritative, divine in its origin law and positive law, originating from state power or a conditional agreement between people, but the difference between law and morality in our sense of these concepts was unknown in that period (Frank, 1992, p. 82). Morality was undistinguished from religion and politics from morals; and in religion, morality, and politics there was only one legislator and one authority (Dalberg-Acton, 1949, p. 45). "In this period of history, it is necessary to be endowed with an unstoppable genius to not be assimilated" (Hennequin, as cited in (Guyau, 1900, p. 70)). The influence of the social environment for most great geniuses ceased to be predetermining in largely civilized societies, like Athens in the times of the Sophists, imperial Rome (Guyau, 1900, p. 71). Freedom arose in the Middle Ages (Fedotov, 2004, p. 103). Freedom under discussion is social freedom, which is based on two truths. The former is the absolute value of an individual ("soul"), which cannot be sacrificed for any collective – the people, the state, or the Church. The latter is the freedom to choose the path – between verity and falsity, good and evil (Fedotov, 2004, p. 110).

In the modern world, the greater size of political communities, and, above all, the separation between spiritual and temporal

authority (which placed the direction of men's consciences in other hands than those which controlled their worldly affairs), prevented an interference by law in the details of private life (Mill, 2001, pp. 16–17). As Lord Acton put it, "with the decline of coercion the claim of Conscience rose, and the ground abandoned by the inquisitor was gained by the individual" (Dalberg-Acton, 1921, p. 31). As an individual becomes a part of a social whole, more modified and more widespread, the better organization of which will require few moral sacrifices on the part of citizens, the latter will be able to preserve their personal qualities more easily without being forced to acquire extreme strength to withstand extreme social pressures. Hence, it follows the progression of individuality and personal freedom, which has lasted since ancient times (Guyau, 1900, p. 70).

In this context, the following question may arise: what are individuality and personal freedom?

Evil Ramovich suggested "understanding individuality in the sense of a subjective mouthpiece of the combination of internal characteristics and those internal conditions under which a human being transforms into a consciously and peculiarly responsive person" (Ramovich, 1903, p. 10). J.S. Mill brilliantly analyzed the phenomenon of personal liberty: "the region of human liberty comprises, first, the inward domain of consciousness; demanding liberty of conscience; liberty of thought and feeling; absolute freedom of opinion and sentiment. The liberty of expressing and publishing opinions belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived" (Mill, 2001, pp. 15–16).

The conscious shift of the system of rights towards individualistic elements took place in the 18th century when the famous doctrine of natural law finally matured. It stated that everyone has the right to enjoy common goods which had previously belonged to the elite (Ramovich, 1903, pp. 168–169). Equality is in generosity, not in a lack of legal rights (Fedotov, 2004, p. 105). A person was granted the rights in the light of the very fact of his birth (Ramovich, 1903, p. 169). The optimistic vision became a common prerequisite: a free struggle of the elements within an individual and society led to harmony or promotion of creative energies. During two or three generations, a life lived up to these hopes (Fedotov, 2004, p. 112).

At the beginning of the 18th century, "personal liberty" turned into the intelligentsia's slogan; it was supposed to fill the emptiness of the concept of the highest good and change the old ideals. However, having changed these ideals, liberty could not replace them. Individual liberty cannot be a goal guiding a person's life. It is only a means, although necessary, but for the best achievement of other goals. Liberty itself does not harmonize the mutual relations of group members, does not provide an individual with any definite idea of good and evil, does not do a painting of the desired future in view of which we could choose the right path for applying our creative instincts. The freedom of spirit nourishes our creativity just till one must achieve it; however, having achieved freedom, people subsequently miss a guiding principle. Decadence began in a long while. The truths discovered by science and wealth accumulated by the industry had no longer delightful. Human contributions seemed to be drowning in the abyss of aimlessness. In terms of short-term personal existence, progress products were not worth the efforts invested. It was not of public interest to work without bearing in mind that it contributes to the happiness and improvement of future generations. The lack of an ideal discouraged people from struggling and working and made them feel redundant. It caused despondency and skepticism, prostration and poor creativity, glum views on society and social progress (Ramovich, 1903, pp. 312–313).

The 19th century lost the power and need to create and construct. Man lost himself in the mass of objects. Even such a natural phenomenon as the struggle for existence, following the spirit of the times, could be considered the norm for human history. Man lost his faith in the power of personality (Barth, 1902, p. 345).

In the last quarter of the 19th century European thought became a prey to self-doubt and the fear of decadence (Barzun, 2021). The basis of Decadence – bitter regret for the loss of a world of moral and political absolutes, and middle-class fears of supersession in a society where the power of the masses (as workers, voters, purchasers, and consumers)

is slowly but inexorably on the increase (Robinson, Birkett, 2021). The impulse of Realism had generated the middlebrow, while the evolution of industrial democracy had generated the mass man (Barzun, 2021). The increasing influence of public opinion on the conduct of affairs was yet another new factor which had to be taken into account (Montgomery, 1968, p. 411). As Stendhal put it earlier "the tyranny of public opinion (and what public opinion!) is as stupid in the little towns of France as in the United States of America" (Stendhal, 1916, p. 4). It seemed as if all noble thought and true emotion had been suffocated (Barzun, 2021).

Society, which had lost its shrines, inevitably lost its inner peace (Trubetskoy, 1919, p. 14). The fierce struggle for existence did not contribute to the development of personality but, on the contrary, broke it (Barth, 1902, pp. 345–346). Freedom from sin and personal responsibility, the loss of the hateful and sick "the self" attracts the European soul (Fedotov, 2004, p. 159).

The Western world lost its sense of identity was still full of strength (Fedotov, 2004, p. 160). From under the despair and decadence, the scattered retreats and the violent nihilism, human strength was trying to reshape the civilization that all found so unsatisfactory (Barzun, 2021). A new chapter is a renewal through violence (Fedotov, 2004, p. 161). In opposition to the mainstreams, the revolt of the minority awakened. The doctrines of the superhuman and master morality, down to the misconceptions of theoretical anarchism, became understandable only against the backdrop of the era seeking to proclaim the peremptory right of the majority (Jellinek, 1906, p. 47).

What has been called the politics of cultural despair fastened on a great many saviours as the new hope – monarchy, "integral nationalism", a new aristocracy, technocracy, the proletariat, a corporate state, or the mystic unity of "blood" and "race". In all these creeds the thirst for the ideal is evident; together they formed a new utopianism, of which the later fruits are quite other than those predicted: Soviet and Chinese communism, Italian fascism, German National Socialism. As the 19th century passed into the 20th, all the violent rival energies seeking an ideal found an unexpected outlet. The occasion for battle was the Dreyfus affair. Its cultural suggestiveness is apparent: on one side, the ideal of justice and the regard for the individual as an end in himself; on the other, the social or collective ideal (Barzun, 2021).

B.H. Weston argued that "individualist-collectivist debate was especially evident during the period of the Cold War" (Weston, 2021). In 1991 the Leninist experiment had failed as definitively as that of the fascists a generation earlier (Brogan, 2021). The notion of liberty, a shield that safeguards the individual – alone and in association with others – against the abuse of political authority is the core value. Western liberal conception of human rights is sometimes romanticized as a triumph of the individualism over glorification of the state (Weston, 2021). Yet Western democracy faces other problems that may prove too big for it to solve (Brogan, 2021).

The study of theoretical approaches to the analysis of the history of the human right to individuality and individual freedom available in scientific and philosophical doctrines helps us to understand the concept of individual freedom and its significance better. It is worth supporting the statements found in literature about the nature of personal freedom and the consequences of misuse of this good.

As one author put it "the lack of a new universal ideal in society – individual freedom was mistaken for that – was naturally accompanied <...> by the confusion of minds" (Ramovich, 1903, p. 325). The possession of a clear and definite ideal of society seems dangerous to its possessors (Creighton, 1949, p. 371). Freedom is the primary obligation of an individual as a general and supreme condition for performing all his other obligations; thus, being an obligation, it becomes the right because the right is an absolute claim to the performance of the obligation (Frank, 1992, p. 115).

Lord Acton put it: "By liberty I mean the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion" (Dalberg-Acton, 1949, p. 32).

Personal liberty has a functional value, not self-sufficient (Frank, 1992, p. 142). Man is not the highest being in the world. He is not the endpoint the world gravitates to, but the middle stage of global recovery. Therefore, it turns out that it is impossible to stop at the middle stage (Trubetskoy, 1919, p. 21).

Freedom, after all, is not merely emancipation, meaning the liberation or relaxation or absence of rules imposed on people by society, church, or state, by religion or government, by the tyranny of a ruler, by a minority, or by a majority. Freedom means the capacity to know something about oneself, and the consequent practice or at least the desire to live according to limits imposed on oneself rather than by external powers. This appetite for freedom is not extinct, not even in today's world; but the present "cultural" atmosphere provides something very different, indeed

contrary to its proper nourishment (Lukacs, 2005, p. 222).

Thus, despite the eventually declared triumph of individualism as a defining feature of our time, the issue of a proper understanding of personal freedom is still relevant. As the history of mankind shows, a misunderstanding of the phenomenon by masses threatens civilization with serious social diseases and catastrophes. The authors propose to support the standpoint expressed in literature, which states that the personal freedom of man is primarily essential as a fundamental means assisting him to achieve other goals, among which the development of human individuality is almost the most important. The very advantage of individualism over the glorification of the state may not be enough to allow human individuality to progress freely.

What threats to the proper nourishment of individual freedom does the current "cultural" atmosphere pose? The authors refer to opinions on the so-called "Tyranny of the Majority" expressed in literature to answer this question.

3. "The Tyranny of the Majority"

Lord Salisbury put it: "Free institutions, carried beyond the point which the culture of the nation justifies, cease to produce freedom. There is the freedom that makes every man free; and there is the freedom, so-called, which makes every man the slave of the majority" (as cited in (Lukacs, 2005, p. 225)). Prince E.N. Trubetskoy argued: "There are two <...> concepts of democracy <...> one establishes democracy on the rule of force. Such an understanding of democracy is incompatible with freedom. If people's power is the supreme source of all norms prevailing in co-existence, then <...> life, freedom, and property of man entirely depend on the whim of the majority <...> democracy degenerates into massive despotism. Another concept <...> takes the recognition of the absolute value of the human being as the basis of democracy... it excludes the possibility of bringing an individual down to the level of means and guarantees his freedom, regardless of whether he is a representative of the majority or minority" (Trubetskoy, 1918, pp. 9–10).

The fear of "majority tyranny" was a common theme in the 17th century and later, even among those who were sympathetic to democracy. Given the opportunity, it was argued, a majority would surely trample on the fundamental rights of minorities (Dahl, 2021).

The authors try to find out whether something like that can happen in modern society, and if so, under what circumstances it can become a reality. Thus, the authors refer to some opinions on the harmonization of social solidarity with the personal freedom of man.

As one writer put it, "without being able to degenerate into arbitrariness that would disrupt the harmony of civilized life (i. e., the interest of the majority), the freedom of each individual is automatically limited by the interaction of freedoms of all others and therefore settled – not without struggle and hesitation – by an equal distribution of rights and responsibilities" (Ramovich, 1903, p. 256).

Are "harmony of civilized life" and "interest of the majority" always identical concepts? Is such identification legitimate in general? From our point of view, the above concept of social harmony is controversial enough. The following question is also important in this context:

What happens when individual and group rights collide? (Weston, 2021).

Let's look for ways to solve this problem. Let's consider the circumstances under which, when individual and group rights collide, literature prefers the latter. It seems that the below statements cannot be refuted.

The very essence of society implies that every society has power or authority, i. e., an agency which subordinates all, or at least the overwhelming majority, and ensures the unity of co-existence; that in society there are some general rules imposing obligations on its participants, etc. (Frank, 1992, p. 32). Every society is obliged to use force for the suppression of certain overt actions, and the time between expedient and inexpedient compulsion, will be drawn differently by different persons (Ritchie, 1891, p. 138).

Thus, as we see, the degree of legitimate predominance of group rights over individual ones is a very subjective indicator, which is set in literature. How to find the optimal ratio between growing, according to some researchers, social solidarity and the human right to individuality? It is obvious that there is no moment to talk about some universal formula in this realm.

Society is apt to make mistakes, to number the patriot or the saint among transgressors. But the individual is apt to make mistakes also, and there have been martyrs for bad causes. The limits of justifiable compromise cannot be laid down in any hard and fast apriori rules (Ritchie, 1891, p. 140–141).

In an ideal scenario, a civilized state shall have a developed and social mechanism of settling "disputes" between personal and group rights that should assist in establishing "the favorite right", individual or group, in each particular case. However, there is a critical factor that can largely upset the balance which must exist not only between

social solidarity and individual freedom but also between group rights and the human right to individuality. The following ideas should be taken into account.

There is in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation; and this encroachment is not one of the evils which tend spontaneously to disappear, but, on the contrary, to grow more and more formidable (Mill, 2001, p. 17). Society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences (Mill, 2001, p. 57). The highest goal of empirical state-public life is the good and the interests of society as a whole, its self-preservation and strengthening, and the conduct of its members should be dedicated to its achievement; society acts and is experienced as a kind of "earthly God" (Frank, 1992, p. 110).

The following should be kept in mind.

Whatever crushes individuality is despotism, by whatever name it may be called, and whether it professes to be enforcing the will of God or the injunctions of men (Mill, 2001, p. 59). Reflecting persons perceived that when society is itself the tyrant – society collectively over the separate individuals who compose it – its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries (Mill, 2001, p. 9). Aristotle knew that it is more difficult to be free than not to be free. That political freedom does not exhaust the meaning of freedom ought also to be obvious. Tocqueville noted something related to The Tyranny of the Majority: that a man may be free to express his personal opinions but that against the massive power of "public opinion" (let alone popular sentiment) he was helpless, condemned to a kind of loneliness that was worse than solitude (Lukacs, 2005, p. 130). Tocqueville taught that upon democracy, a public opinion mercilessly stifles every contradictive view and that it takes much more courage to resist the "voice of the people", vox populi, than the order of the autocrat (Jellinek, 1906, p. 46).

Protection, therefore, against the tyranny of the magistrate is not enough. There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism (Mill, 2001, p. 9).

Consequently, in our opinion, the maintenance of a good condition of human affairs and hence the harmony of a civilized co-existence in the modern age primarily involves protecting human individuality from mental and emotional captivity and thus establishing and protecting the scope of individual consciousness independent of the control of the majority, even in the form of a public opinion. It is the way – not serving the interests of the majority at any cost – that results in finding the best compromise between growing social solidarity and the human right to individuality.

It is worth drawing attention to some particularities of modern civilization which may under certain circumstances cause the crisis of human individuality under certain circumstances. This entails threats which are driven by faulty, exaggerated understanding and application of the grand conception of human solidarity. In order to clarify the above, the authors resort to the relevant ideas found in the literature.

When scientists and politicians are asked about power limits, the majority answer as follows: minority rights are equal in scope to individual rights. The existence of legally recognized rights of an individual acts as an insurmountable obstacle to the will of the majority. An individual and thus the minority shall possess the right of protest against all attempts of the majority to invade an area that is out of its jurisdiction (Jellinek, 1906, p. 27). Minority rights will be even more crucial to the distant future than to modern life – moreover, in relation to all areas of public life. Modern society is embraced by an increasingly evolving process of democratization. One can happily welcome this progress, one can be afraid of it, but no force in the world is able to retard this spontaneous historical process for a long time (Jellinek, 1906, p. 44). Personal freedom leads to the equality of individuals, and the striving for it has already become universal (Ramovich, 1903, p. 325). In one place, it is faster, in another – slower; cultural nations are marching towards universal leveling (Jellinek, 1906, p. 44). Equality entails conditions requiring cooperation and solidarity (Ramovich, 1903, p. 325). In an increasingly interdependent global community, any human rights orientation that does not support the widest possible shaping and sharing of values or capabilities among all human beings is likely to provoke widespread skepticism (Weston, 2021).

The division of mankind threatens it with destruction (Sakharov, 1968). In a world increasingly knit together by trade and communications technology, it seems ever more unlikely that the single nation-state can

on its own successfully handle the universal enemies of poverty, hunger, disease, natural disaster, and war or other violence (Brogan, 2021). International unity is not a luxury, not a dream of idealists, but a life-and-death issue (Fedotov, 2004, p. 173). Having lost the form of a baseless dream or abstract conclusion, solidarity will undoubtedly prove to be an urgent need for humanity (Ramovich, 1903, p. 325).

The more the democratization of society progresses, the more the rule of the majority principle spreads. The more the idea of universal human solidarity suppresses the individual, the less boundaries are recognized by the will of the ruling majority in relation to the individual. It masks is a terrible danger for the entire civilization (Jellinek, 1906, p. 45). "Civilization" and "culture" are coming to be antithetical terms. Some of the most disinterested solicitude for civilization is apt to be, consciously or unconsciously, inimical to culture (Leavis, 1948, p. 164).

Whatever role coercion, external pressure plays in public life, after all, a participant in the public is a person, a spontaneously acting individual will. It is the only engine of public life, and everything else in society is a transmission mechanism in relation to it (Frank, 1992, p. 115). One can feel like an integral part and, at the same time, the bearer of the only specific individual whole – a specific family, the specific people, a specific church. The true "we" is as individual as "I" and "you". In this context, humanitarianism replaces a living feeling and a specific intrinsic relation with a powerless abstract principle (Frank, 1992, pp. 61–62).

The most urgent social need involves providing a person with such a scope that would be free from the influence of the state and society and within which the person would not be obliged to obey any majority. Nothing can be more merciless and relentless, nothing can be more hostile to the most elementary rights of the individual, nothing can so hate and despise everything great and genuine as a democratic majority (Jellinek, 1906, p. 45, 47).

J. Ortega y Gasset, in "The Revolt of the Masses", invented the phrase of "modern Mass Man". J. Ortega y Gasset wrote about the masses made up by men whose opinions and ideas, whose physical and, more important, mental behavior may be unoriginal, middling, crude. A majority, like an aristocratic minority, or like a monarch, may be right or wrong; and when it is wrong, to change it or its consequences may be long, arduous, for a while seeming hopeless (Lukacs, 2005, p. 175–176).

Thus, in the authors' opinion, the above review allows making definitive conclusions that "the interest of the majority" per se without its civilized "fertilization" with the idea of an absolute value of human personality is at least not identical, rather opposite to the "harmony of civilized life". One can hold that an unjustified "invasion" of the public will in the realm of individual freedom and the actual suppression of the human right to individuality, which become possible due to the lack of effective legal and social safeguards against the public will, are often the consequences of the collision between individual and group rights in modern societies. It is also essential to pose questions on objectively available obstacles to the implementation of such an important and integral part of the human right to individuality as the aspiration to have and support one's cultural identity as well on hindering the development of the very aspiration which originates from modern civilization. Does it deplete modern threats to the right to individuality?

4. The significance of intellectual liberties in mass societies

More important is the question how much (if any) of intellectual liberties matter in mass societies (Lukacs, 2005, p. 130).

In order to study the relevant issue and determine the place and significance of intellectual freedom of man, which we consider as one of the dimensions of his freedom, the structure of the right to individuality requires studying existing scientific and philosophical approaches to theoretical analysis of the phenomenon under consideration and challenges to its existence in the modern world.

Intellectual freedom is essential to human society – freedom to obtain and distribute information, freedom for open-minded and unfearing debate and freedom from pressure by officialdom and prejudices (Sakharov, 1968). Widely shared experiences and freedoms of the public always need updating and renewing with freshness and new ideas (Guyau, 1900, p. 433). Everything new actually begins with nothing in that mysterious deepest center of the personality, which we call freedom. After being conceived and gradually shaping in the depths of the individual spirit, in the creative personal initiative, the new is subsequently perceived by the social environment, penetrates it, and becomes consolidated in it (Frank, 1992, p. 126).

But freedom of thought is under a threat in modern society (Sakharov, 1968). *In* "Was ist Aufklärung?" I. Kant drew a vital distinction between the public and private use of one's

reason (Treasure, 2021). In 1784 I. Kant wrote: "A high degree of civil freedom seems advantageous to a people's intellectual freedom, yet also sets up insuperable barriers to it. Conversely, a lesser degree of civil freedom gives intellectual freedom enough room to expand to its fullest extent" (as cited in (Treasure, 2021)). Stendhal argued that "the factors which are essential if art is to flourish are often diametrically opposed to those which are indispensable if a nation is to be happy. <...> Should we not <...> suppose this dispiriting cheerlessness <...> to be the necessary price and consequence of liberty?" (Stendhal, 1959, p. 400, 445).

To clarify the above, the authors consider the following statements.

At all times of each new great thought, each idea, which subsequently shook the whole world, had to make its way, not without difficulty and danger, contrary to the resistance of the ruling forces. Democratic society resists a hundred times stronger than any other (Jellinek, 1906, p. 46).

Let us consider one of the examples that most vividly illustrates the situation in which a person's individuality in the realm of intellectual freedom may concede to social solidarity; moreover, a person may be directly required to sacrifice his individuality in favor of group rights. Let's speculate whether such an approach can be justified by any supreme goal.

It seems that the despotism of vox populi never influences the person so imperatively as in terms of the formation of aesthetic judgments. Our enthusiasm is landed in us without our knowledge (Tarde, 1895, p. 43). At any given moment in society, there must be a lot of such judgments ready to become *concepts* and then aesthetic *feelings*, often erroneous prejudices which the artist – creator – must always consider; if he attempts to attack these beliefs bluntly, risking to be foundered on them – or even if he does not bother to agree them with new judgments of taste that he intends to make admitted – then he finds himself disregarding (***neglecting***) his social mission of enrichment not reduction, strengthening not weakening *the links of social faith*, which is the common goal of logic, both social and aesthetic, and a feature of their relationship (Tarde, 1895, p. 44).

However, does not the declared social mission come at a price? Does the person, who seeks to protect a particular scope of individual consciousness from one that he regards as encroachment, have the right not to succumb to social pressure, even in the form of public opinion? Can resistance to the will of the majority in the specific realm be considered anti-social behavior? What features of modern intellectual life cause a natural decrease in the intellectual freedom of man, which is discussed by some researchers? The questions need to be covered in detail.

Actually, each individual is aware of himself as the absolute beginning; "I" is the very point where an absolute being reaches self-consciousness; it perceives the whole empirical world, including society, as an environment and means for self-fulfillment and therefore can never come to terms with its position as a means or a body of public good. Consciousness is not identical with gross egoism (Frank, 1992, p. 110).

If culture should be understood as a conscious attitude to oneself and the world – it seems that culture cannot be defined differently – it is obvious that increasing hypertrophy of the conscious beginning within each individual inevitably accompanies cultural progress (Gershenzon, 1915, p. 51). If there is a firmly established course for the development of culture, then this is the course of an ever-greater mind expansion, a line of mental growth, ever-greater destruction of stupidity (Müller-Lyer, 1925, p. 257).

As M. Kundera put it, "in the modern world of technology and mass media, the prospects for culture were not bright" (Kundera, 1984, p. 36). Modern technology and mass psychology constantly suggest new possibilities of managing the norms of behavior, the strivings and convictions of masses of people. Civilization is imperiled by stupefaction from the narcotic of "mass culture" (Sakharov, 1968).

Here Tocqueville is again pertinent. He believed, and wrote, that ideas, indeed intellectual life, in the democratic age move, and will move, very slowly. His contemporaries believed that with the rise of democracy ideas would gather speed, sometimes dangerously so: that the awakened populations would force the political and social to swing to extremes, perhaps from one extreme to the other. Tocqueville recognized the very opposite. He wrote not only that the monstrous accumulating weight of public opinion might lead to (or even constitute) a tyranny of the majority, but that it actually slows down the movement of ideas, dependent as those are on their acceptability by large masses of people. He foresaw the considerable and often dangerous condition of democratic stagnation, in intellectual as well as in political life (Lukacs, 2005, pp. 178–179).

In our opinion, both above standpoints about intellectual life in the democratic epoch are accurate and do not exclude each other. The below statements justify our approach.

In the part where the principle of preserving the old is so comprehensive and intense that it begins to absorb and suppress the freedom of personal initiative and creative construction, the very fundamental principle of society – spiritual life – begins to fade away: since life per se is a relentless flow of becoming, a creative impulse, an influx of new forces and contents into the human experience of being continuously generated in the depths of a free spirit. When the influx is delayed and weakens or stops, the protection itself loses its meaning because there is no real material for it; the commencement of protection, the continuity of living being turns into the ossification of empty forms. However, everything ossified, paralyzed, deprived of an influx of living spiritual blood inevitably falls apart; on the other hand, the delayed flow of spiritual creativity, without finding its direct embodiment, becomes a destructive whirlpool of rebellion, a force internally poisoned by its painful distortion, transforming it from a creative element into a destructive element. Protection similarly becomes destruction (Frank, 1992, pp. 126–127).

We hold the following words are relevant today.

Nowadays, virtually all countries of the Western world are characterized by a dangerous tendency to erode the foundations of the political center, when the extreme right-wingers attack the principles of liberal democracy, and extreme left-wingers – the principles of the market economy (Kasparov, 2020). In many countries, nationalism, nativism, and xenophobia still distort voters' judgments in matters of foreign policy, as greed misleads them over economic policy. Class conflicts have been muted rather than resolved. Demagogues abound as much as they did in ancient Athens (Brogan, 2021). Now there is such ideological and mental chaos that people have quit recognizing threats. They do not understand what poses a threat. It is a common feature to the whole democratic world. (Pomorski, 2019). The economic system of the Western world has become less flexible, less efficient, less dynamic, and less innovative than it was. Thus, against the backdrop of these processes, it is appeared generations which have poor knowledge of history (historical knowledge is undervalued) and find demagogic slogans very attractive (Kasparov, 2020). The common absence of concern for what is happening is not to be explained by erudition or philosophy. It is itself a symptom (Leavis, 1948, p. 145). Democracy is becoming more elite, the matter of a limited number of people, while the Internet, social networks give something that was called direct democracy when every populist can, through mechanisms and algorithms, address literally every person and promise him what he wants or what he has imagined. Does this mean that the role of intellectuals, who have somehow affected society in old communication relations, is now disappearing due to new communication links, the Internet, and social networks? (Pomorski, 2019). According to psychologists, the World Wide Web is deprived of the essence of intellectuality, "I understand" in Latin. Awareness, even as an "intelligent product", will not transform a consumer of the all-encompassing Internet into an intelligent person (Drahan, 2000). As F.R. Leavis put it earlier "the modern is exposed to a concourse of signals so bewildering in their variety and number that, unless he is especially gifted or especially favoured, he can hardly begin to discriminate" (Leavis, 1948, p. 158). In fact, there is a danger that "net culture", after becoming public through eliminating differences, will become a nightmare of civilization (Drahan, 2000).

In this context, the question arises: what should be contrasted with the considered crisis phenomena, which characterize the intellectual life in the epoch of modern democracy and technologies? To answer the question, it is primarily essential to find out the guide which a modern person should have to properly assess the current state of affairs in the realm of intellectual freedom.

Even an imperfect system is better than a lack of any system. The truth may be revealed based on developments, even if erroneous rather than based on a real mess (Müller-Lyer, 1925, p. 43). We have no thread through the enormous intricacy and complexity of modern politics except the idea of progress towards more perfect and assured freedom (Dalberg-Acton, 1921, p. 202).

As one author put it "we should focus <...> on how we can learn to be selective in what we see and learn how social media truly works" (Grant, 2021). No one in the world has yet invented vaccination against algorithms on social networks (Pomorski, 2019).

However, we believe that a way out exists.

There are sudden abrupt transitions from complete immobility and inertia to spontaneous rebellion. There is only one salvation from this evil – the development of a conscious individual (Trubetskoy, 1918, p. 43). Furthermore, we must not forget that discussion itself is one of the most important means of education (Ritchie, 1891, pp. 138–139). The right of spreading one's opinions implies certain legal and constitutional securities and a certain condition of public sentiment. Without explicitly recognized legal safeguards

public sentiment is a somewhat fickle protector of liberty. Outbursts of fear, fanaticism, and intolerance are only too possible (Ritchie, 1891, p. 137).

Thus, it is imperative to statutorily consolidate the right to intellectual right as an integrated part of the human right to individuality. The authors propose formulating the statutory definition of the right of a natural person to intellectual freedom: "A natural person has the right to intellectual freedom – the right to the development of a conscious attitude to oneself and the world, the implementation of personal creative initiative, mental growth, incl. through discussions. A natural person is free to judgments, concepts, feelings, and prejudices of surrounding opinion until it does not harm others".

5. Conclusions

The authors hold that the following measures may assist in addressing the issues associated with the growing social solidarity with the human right to individuality:

– it is proposed to highlight that studying theoretical approaches to the analysis of the history of the human right to individuality and individual freedom available in scientific and philosophical thoughts can contribute to a better understanding of individual freedom and its significance in the modern world;

– it is proposed to state that despite the eventually declared triumph of individualism as a defining feature of our time, the issue of a proper understanding of personal freedom is still relevant. As the history of mankind shows, a misunderstanding of the phenomenon by masses threatens civilization with serious social diseases and catastrophes;

– it is proposed to support the standpoint found in the literature under which personal human freedom is primarily important as a fundamental means for the achievement of other goals, among which the advancement of human individuality is a priority;

– it is proposed to admit the very advantage of individualism over the glorification of the state is insufficient that human individuality can make continuous progress;

– it is proposed to declare that "the interest of the majority" per se without its civilized "fertilization" with the idea of an absolute value of human personality is at least not identical, rather opposite to the "harmony of civilized life";

– it is proposed to understand that an unjustified "invasion" of the public will in the realm of individual freedom and the actual suppression of the human right to individuality, which become possible due to the lack of effective legal and social safeguards against the public will, are often the consequences of the collision between individual and group rights in modern societies;

– it is proposed to declare that faulty, hypertrophied understanding and application of the grand conception of human solidarity may cause the crisis of human individuality in modern civilization; the crisis may be manifested, inter alia, in obstacles to the aspiration to have and support one's cultural identity and in hindering the very development of that sort of the aspiration;

– it is proposed to recognize that intellectual freedoms and intellectual life in modern mass societies are becoming relevant and, at the same time, are under specific threat;

– it is proposed to add para. 3 to art. 300 of the Civil Code of Ukraine and present it in the version as follows: "A natural person shall have the right to intellectual freedom – the right to the advancement of conscious attitude to oneself and the world, the implementation of personal creative initiative, intellectual development, incl. through discussion. A natural person shall be free from judgments, concepts, feelings, and prejudices of others' opinion, as long as it does not harm others". The authors hold that human individuality is incomplete in the modern world without promoting intellectual freedom.

The authors believe that further study of the human right to individuality is essential to respond to a range of challenges, namely: harmonization of interests of the individual and the state in terms of the circulation and processing of personal information; identification of the ratio between the tangible form of the intangible good and intangible good as it is; finding the optimal correlation between intellectual property rights and the interests of society in the free use of information that is the object of intellectual property right; striking a balance between the right to privacy and the right to seek, receive, impart and disseminate information.

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ПРАВО ФІЗИЧНОЇ ОСОБИ НА ІНДИВІДУАЛЬНІСТЬ

Анотація. ***Метою*** роботи є обґрунтування необхідності законодавчого закріплення права людини на інтелектуальну свободу як невід'ємної складової частини права фізичної особи на індивідуальність.

Методи дослідження. Роботу виконано на підставі таких методів наукового пізнання, як науковий аналіз, синтез, вивчення інформаційних джерел, логіко-семантичний, формально-логічний, діалектичний, ретроспективний, прогностичний методи.

Результати. У роботі вивчено теоретичні підходи до аналізу історії права людини на індивідуальність та індивідуальну свободу, наявні в науковій і філософській думці. Приділено увагу розумінню поняття індивідуальної свободи та її значення в сучасному світі. Дослідження показало, що підтримання суспільного добробуту (*a good condition of human affairs*), а отже, і гармонії цивілізованого побуту, нині полягає насамперед у захисті людської індивідуальності від розумової та емоційної несвободи, а також у встановленні й охороні обсягу індивідуальної свідомості, що не підвладний волі більшості, навіть у формі громадської думки. Доведено, що «інтерес більшості», узятий сам по собі, без цивілізуючого «запліднення» його ідеєю безумовної цінності людської особистості, щонайменше не тотожний, якщо не протилежний «гармонії цивілізованого побуту». Показано, що наслідками зіткнення індивідуальних і групових прав у сучасних суспільствах часто стають невиправдане «вторгнення» волі більшості в царину індивідуальної свободи та фактичне придушення права людини на індивідуальність, які стають можливими через відсутність дієвих правових і суспільних запобіжників на шляху волі мас. Вивчено питання значущості інтелектуальної свободи в масових суспільствах. З'ясовано особливості інтелектуального життя в демократичну епоху.

Приділено увагу загрозам свободі думки, які існують у сучасну епоху. Вказано на необхідність розвитку та захисту інтелектуальної свободи людини.

Висновки. За результатами проведеного дослідження обґрунтовано такі висновки щодо гармонізації індивідуальності людини із суспільною солідарністю: 1) пропонується визнати, що неправильне, гіпертрофоване розуміння й застосування шляхетної ідеї людської солідарності може призводити до кризи індивідуальності людини в сучасній цивілізації; 2) ця криза може проявлятися, зокрема, у виникненні перешкод для реалізації прагнення мати та підтримувати свою культурну самобутність, а також у стримуванні самого розвитку цього прагнення; 3) пропонується визнати, що інтелектуальні свободи та інтелектуальне життя в сучасних масових суспільствах набувають особливої ваги й водночас перебувають під особливою загрозою; 4) до ст. 300 Цивільного кодексу України пропонується додати нову ч. 3, яку необхідно викласти в такій редакції: «Фізична особа має право на інтелектуальну свободу – право на розвиток свідомого ставлення до себе та до світу, на реалізацію творчої особистої ініціативи, на розумове зростання, зокрема й шляхом дискусії. Фізична особа є вільною від суджень, понять, почуттів та упереджень оточення, доки вона не заподіює шкоду іншим». Ми вважаємо, що без особливого сприяння інтелектуальній свободі в сучасному світі індивідуальність людини є неповною.

Ключові слова: індивідуальність, індивідуальна свобода, громадська думка, «тиранія більшості», культура, масове суспільство, інтелектуальна свобода.

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INVALID TRANSACTIONS IN PRIVATE LAW DOCTRINE

Abstract. ***Purpose.*** This article studies legal features of invalid transactions in private law doctrine. The author explores different approaches to determining the place of invalid transactions in the system of legal facts. Particular attention is paid to the separation of invalid transactions from torts, as well as the study of the relations between transactions and invalid transactions. The works of the founders of the doctrine of pandects are highlighted. The genesis of the doctrines of invalid transactions and their place in the doctrine of private law of Ukraine is discussed.

Research methods. Scientific investigations have focused broadly on the analysis of the relevant literature. The author has used a number of general and special methods of scientific cognition. Thus, logical, quantitative, comparative, historical and sociological methods have been used.

Results. The article analyses the invalidity of transactions in the context of the doctrine of private law. The author compares invalid transactions with other legal categories: transactions, torts, and legal facts. The author draws conclusions about the place of invalid transactions in the system of legal facts and determines their legal nature.

Conclusions. Based on the study, the author establishes the legal nature of invalid transactions. In particular, the paper concludes about the inadmissibility of identifying invalid transactions and torts. A distinction should also be made between invalid transactions as a category contrary to the provisions of private law and other legal facts that do not meet the requirements of public law. At the same time, there is no reason to talk about any special nature of invalid transactions. The application of the notion of invalidity to a certain legal category does not change the legal nature of a legal fact but means that the rule of law does not recognize the ability to create legal consequences that are typical of "normal" legal facts. Invalid transactions cannot create their own, specific legal consequences, because trust under such a transaction takes place within the framework of the construction of restitution.

Key words: invalid transactions, private law doctrine, distinguishing between transactions and torts, void and voidable transactions.

1. Introduction

In the doctrine of private law, an important place is occupied by the study of the legal nature of legal facts, especially those that are components of private law tools for regulating public relations (Tatsiy et al., 2017). This thesis is especially relevant to invalid transactions, because their place in the system of legal facts was the subject of numerous scientific discussions. In this regard, V. Tarkhov noted that the concept of invalid transactions is contradictory in terms of logic, and transactions are always a legal action and therefore, transactions cannot be invalid (Tarhov, 1997).

This issue has been the subject of many scientific contributions: D. Genkin, Yu. Gambarov, H. Dernburg, V. Isakov, A. Kosruba, O. Kot, I. Novitskiy, I. Peretersky, N. Rabinovich, V. Ryasentsev, I. Spasybo-Fatieieva, F. Heifetz, V. Shakhmatov, S. Ernst, S. Raschke, S. Medina, B. Windscheid, and others.

The analysis of scientific researches allows highlighting some points of view concerning the legal nature of invalid transactions.

2. Invalid transactions as civil offenses

Lawyers use different terms – "offenses", "wrongful acts", "illegal acts", "torts", but they are united by the emphasis on such a feature of an invalid transaction as non-compliance with legal requirements.

One of the founders of this concept was I. Peretersky, who pointed out that an action is not a transaction if it creates legal consequences, but not those that the participants had in mind (Goykhbarg, Pereterskiy,1929).

F. Kheifets stated in this regard that an invalid transaction should be classified as a civil offense (Kheifets, 2007). V. Shakhmatov singled out the category of "unprohibited actions" as intermediate between legality and illegality that reflects the non-compliance of the subject's behaviour with statutory requirements, which the state both does not approve and does not consider illegal. Such actions create socially undesirable consequences. At the same time, the researcher singled out the composition of the illegal transaction as part of the offense. V. Shakhmatov actually equated illegal transactions and torts, which led to the application of provisions on torts – composition, aggravating features, etc. In conclusion, the researcher pointed out the requirement for the subjects of illegal transactions guilt in the form of direct intent or negligence (Shakhmatov, 1967).

I. Matveyev marked that the court's decision which declares the transaction invalid, and the application of the consequences of its invalidity according to their guilty counterparties imposes the civil liability on them (Matveyev, 2002).

I. Spasybo-Fatieieva notes that entering into transactions which have some defects is an abnormal legal phenomenon to which the law should respond in some way. The scientist believes that the concept of invalid transactions was introduced for the above purpose and deals with transactions with some defects of will, subject composition, form, content, which does not meet the requirements specified in Art. 203 of the Civil Code of Ukraine (Spasybo-Fatieieva, 2007).

Similar vision has O. Kot. The scientist substantiates his own point of view by the fact that the norms of law in all cases directly indicate the illegality of invalid transactions. At the same time, O. Kot says that illegality does not always mean an offense: the issue of causing harm by making an invalid transaction and the option of compensating it by applying the consequences of the invalidity of the transaction is the Achilles tendon of the concept, which interprets an invalid transaction as a civil offense. However, such cases, according to the author, are rather exceptions (Kot, 2009).

It seems that this latter is a weak point of such a vision. In fact, it is extremely difficult to "fit" all invalid transactions in the Procrustean bed of torts. Even transactions violating public order are controversial. Thus, is it possible at all, for example, to say that a transaction concluded with the violation of the requirements for its notarization is an offense? It is hardly appropriate even to propose such a question (Hameau et al., 2016).

The recognition of invalid transactions as offenses in the context of the doctrine of private law has serious effects: in deciding on the invalidity of a particular transaction, one should establish the composition of the civil offense. In this regard, O. Kot rightly notes that the court, considering the dispute over the claim for invalidation, does not investigate (and should not investigate!) the issue of the subjective attitude of the parties to their actions, which are qualified by the court as invalid transaction (Kot, 2009).

There is no doubt that it is necessary to distinguish between obvious torts, which only outwardly resemble transactions (for example, an agreement on tax evasion, fees (mandatory payments) within the meaning of Art. 212 of the Criminal Code of Ukraine) and on the other hand, transactions that are invalid, but which are clearly not torts. Minor's transactions are also difficult to recognize as offenses, because they do not have the fault of at least one party.

It draws attention that part 2 of Art. 216 of the Civil Code provides for the possibility of compensation for property and moral damage, which, at first glance, indicates the illegal nature of the invalid transaction. However, at the same time, the legislator does not mention compensation for damage caused by an invalid transaction, but compensation for damage "in connection with the commission of an invalid transaction", which is fundamentally different. It should be noted that the Civil Code of Ukraine uses different terms in this regard.

Thus, the Civil Code of Ukraine further marks compensation of the losses caused by the entering into invalid transaction (part 4 of item 221 of the Civil Code) that is already obviously closer to the losses caused by the transaction. Part 4 of Art. 226 of the Civil Code deals with compensation for non-pecuniary damage, but it does not specify what exactly it is caused (apparently, by concluding a transaction with an incapable person). Finally, Part 2 of Art. 227 of the Civil Code directly speaks of causing moral damage by the transaction. Part 2 of Art. 229 of the Civil Code provides for compensation for damages caused by error of the person in the transaction, part 2 of Art. 230 of the Civil Code, part 2 of Art. 231 of the Civil Code, part 2 of Art. 232 of the Civil Code, part 2 of Art. 233 of the Civil Code – damages and non-pecuniary damage caused entering into the transaction. Accordingly, it is difficult to follow a single approach. Undoubtedly, damage may be caused during the conclusion and execution of the transaction, but it is challenging to determine from the text of the Civil Code whether it is caused directly

by the transaction (action) or other acts of conduct (influence on the expression of will, malicious agreement). Two things can be said for sure. First, the legislator assumes the possibility of causing harm directly by the transaction, but this is not noticed as a rule. Secondly, one can conclude that an invalid transaction creates legal consequences, which allows us to unambiguously attribute it to the system of legal facts.

It is important to keep in mind the cases when an invalid transaction violates the requirements of public law. For example, the parties entered into an agreement to evade taxes, fees (mandatory payments), as provided for in Art. 212 of the Criminal Code of Ukraine. In this case, such an agreement will really no longer be a transaction, but a criminal act. However, its legal nature is due not to the prescriptions of civil but criminal law.

3. Invalid transactions are transactions

One of the founders of this approach is considered to be Yu. Gambarov, who attributed invalid transactions to transactions because they cause liability for damages and therefore, "cannot be attributed to facts that have no legal existence" (Gambarov, 1911). V. Shakhmatov, who once noted that not only valid transactions are aimed at establishing, changing or terminating civil rights and obligations – every action that has such a direction, the law recognizes as the transaction (Shakhmatov, 1966). Accordingly, the emphasis is on the focus on achieving legal consequences, rather than on the real, actual achievement.

D. Genkin also considered invalid transactions to be transactions. According to the researcher, the transaction as a legal fact, in contrast to the tort, is characterized by the presence of an action (will) aimed at establishing, changing or terminating civil relations, while in a tort the person who committed it does not want the occurrence of certain legal consequences. The fact of concluding a transaction does not turn it into a tort if there is no result in the legal consequences to which the parties sought to achieve. Legality or illegality is not a necessary element of the transaction as a legal fact, but determines only certain consequences of the transaction (Genkin, 1947).

I. Samoshchenko noted that an offense differs from an invalid transaction, in particular, in the fact that the offense is always a guilty act, while the invalidity of transactions is often established by relying on one objective basis – non-compliance with the law (Samoshchenko, 1963). I. Novitskiy had similar views using the term "illegal transaction", noting that it has some legal consequences, but these consequences are different from those desired by the parties (Novitskiy, 1954). V. Ryasentsev had the same opinion, pointing out that it is impossible to identify the actual composition of the transaction with its consequences and such proposals are not justified by factual considerations (Ryasentsev, 1974).

This point of view is still actively supported today. Thus, among modern researchers, such views are held by A. Kostruba, who notes that an invalid transaction is an action that is not similar to the model defined by law. However, since the Civil Code is guided by the general permissive principle, i. e. everything is allowed that is not expressly prohibited by law, it turns out that in the absence of a real and directly established prohibition not to perform certain actions (for example, not to comply with the transaction form), the latter are legitimate or at least those that are not clearly regulated by law.

In understanding of the invalidity of the transaction A. Kostruba proposes to focus in the direction of the will, because by concluding a transaction the legislator understands the expression of the subject of civil turnover of his will, i. e. the expression of will. If the expression of will is aimed at establishing, changing or terminating civil rights and obligations, then such expression is necessarily recognized as a transaction (Kostruba, 2012).

V. Kucher holds a close position pointing out that civil offenses should include only those insignificant transactions that contain all the elements of a civil offense, as well as objectively illegal insignificant transactions (Kucher, 2004). Obviously, all other invalid transactions should be recognized as transactions.

In our opinion, one should agree with such vision. Indeed, it can be considered that the conclusion of a contract in violation of the law on notarization in itself causes something negative to its participants? Of course, we can talk about the violation of the relevant provisions of the law, but the very fact of such a conclusion does not mean the existence of specific damage.

In this context, it is worth referring to the experience of classical German jurisprudence. Thus, Bernhard Windscheid (this eminent jurist is the author of several fundamental works, among which are "The Doctrine of the Invalidity of Deeds in the Napoleonic Code" of 1847, and "Will and Expression of Will" of 1878) equated the invalidity of the deed to his non-existence (non-existence). In his apt words, an invalid transaction is "a body without a soul, but nevertheless a body" (Medina, 2015; Scalise, 2019).

Among modern researchers, the author cites the opinion of Professor Martiny Stefanie Raschke, who notes that insignificant transactions exist as acts, but do not lead to the desired legal consequences. However, they can lead to other consequences, such as paying a damage (Raschke, 2008).

4. Invalid transactions as some special legal acts

In the literature, one can identify another point of view on the nature of invalid transactions, the proponents of which insist on their specific legal nature, a special place in the system of legal facts. This also includes attempts to find in invalid transactions both features of both transactions and illegal actions.

Thus, V. Isakov attributed invalid transactions to special "defective" legal facts (Isakov, 1984). N. Rabinovich believed that an invalid transaction is a transaction in its content, form, direction, but at the same time is an offense, but an offense of a special order, in a broad sense (Rabinovich, 1960).

Quite conditionally, this includes the position of M. Agarkov, who noted that the expression of will of an incapable citizen, or one who did not realize the nature of their actions, as well as the expression of will of the parties without the intention to generate legal consequences are legally indifferent actions. Accordingly, they are not illegal because they do not violate the law. However, they cannot be considered legitimate, as they do not create legal consequences (Agarkov, 1946).

In this context, the following should be stated. The concept of invalidity is used not only in relation to the transaction. Only the Civil Code uses "invalidity" in relation to more than ten categories – rights, certificates, acts, marriage, adoption, decisions of legal entities. And if one raises the issue that an invalid transaction has a fundamentally different legal nature than a valid one, and thus, one should talk about a different nature of all other invalid rights, acts, decisions, and so on. However, according to the author, an invalid right remains a right, an invalid decision – a decision. The issue is different – the current system of law deprives these phenomena of legal force, does not recognize them as legally significant and does not establish their protection. In addition, the recognition of the role of any special legal significance in invalid transactions will lead to the dispersion of the system of legal facts and is unlikely to have any scientific and practical value.

It is also worth mentioning the view that invalid transactions are not legal facts at all. Today, this view is not common in the literature, the main argument of its supporters is that the legislator "deprives" invalid transactions of the option to create legal consequences. The founder is D. Meyer, who believed that illegal transactions are not recognized as valid, and therefore, they are not existing (Meyer, 2000).

Heinrich Dernburg had a similar vision. In his in work "Pandects" as of 1884, he distinguished between the non-existence and invalidity of the transaction. The deed exists only when all its essential elements are observed. If one of the required elements is missing, it is only the visibility of the transaction. Since "being" and "non-being" are mutually exclusive concepts, invalidity leads to non-existence. Accordingly, absolutely invalid (insignificant) transactions are completely absent, non-existent (Medina, 2015).

Among modern researchers, Professor Stefan Ernst (Germany) points out that the void transactions are invalid from the beginning; this means that they do not exist (Ernst, 2013).

This concept is opposed, first of all, by the fact that, although invalid transactions do not create the legal consequences to which they are intended, this does not preclude the possibility of other consequences, first of all, the obligation to compensate the damage.

5. Conclusions

The invalidity of the transaction does not mean a fundamental change in the legal nature of this legal fact. It is the issue of deprivation of this act of legal force and option of judicial protection of the relevant rights. However, invalid transactions are transactions. In addition, this conclusion can be extended to other legal facts to which the category of invalidity applies.

Based on the study, the author established the legal nature of invalid transactions. In particular, the author concluded about the inadmissibility of identifying invalid transactions and torts. A distinction should also be made between invalid transactions as a category contrary to the provisions of private law and other legal facts that do not meet the requirements of public law. At the same time, there is no reason to talk about any special nature of invalid transactions. The application of the notion of invalidity to a particular legal category does not change the legal nature of a legal fact, but means that the rule of law does not recognize the option to create legal consequences that are typical of "normal" legal facts. Invalid transactions cannot create their own, specific legal consequences, because trust under such a transaction takes place within the framework of the construction of restitution.

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НЕДІЙСНІ ПРАВОЧИНИ В ДОКТРИНІ ПРИВАТНОГО ПРАВА

Анотація. ***Мета.*** У статті досліджуються особливості недійсних правочинів у доктрині приватного права. Автор розглядає різні підходи до визначення місця недійсних правочинів у системі юридичних фактів. Особливу увагу приділено відмежуванню недійсних правочинів від деліктів, а також дослідженню співвідношення правочинів і недійсних правочинів. Автор провів аналіз праць основоположників учення про пандекти. Досліджено генезис доктрин про недійсні правочини та їх місце в доктрині приватного права України.

Методи дослідження. Наукове дослідження сфокусоване на емпіричному аналізі наукових робіт у цій сфері. Автор використав низку загальних і спеціальних методів наукового дослідження. Для цього використовувалися логічний, кількісний, порівняльний, історичний та соціологічний методи.

Результати. У статті аналізується недійсність правочинів у контексті доктрини приватного права. Недійсні правочини автор порівнював з іншими юридичними категоріями: правочинами, деліктами та іншими юридичними фактами. Зроблено висновки про місце недійсних правочинів у системі юридичних фактів та визначено їхню юридичну природу.

Висновки. На основі проведеного дослідження автором встановлено правову природу недійсних правочинів. Зокрема, зроблено висновки про неприпустимість ототожнення недійсних правочинів та деліктів. Варто також розрізняти недійсні правочини як категорію, що суперечить положенням приватного права, та інші юридичні факти, які не відповідають вимогам публічного права. Водночас немає підстав говорити про якийсь особливий характер недійсних правочинів. Застосування поняття недійсності до певної юридичної категорії не змінює юридичну природу юридичного факту, а означає, що правопорядок не визнає здатність створювати юридичні наслідки, характерні для «звичайних» юридичних фактів. Недійсні правочини не здатні створити власні, конкретні правові наслідки, оскільки повернення отриманого за таким правочином відбувається в межах конструкції реституції.

Ключові слова: недійсні правочини, доктрина приватного права, розмежування правочинів і деліктів, нікчемні та оспорювані правочини.

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THE CONCEPT OF JUDICIAL LAWMAKING AND ITS LIMITS IN CIVIL PROCEEDINGS OF UKRAINE

Abstract. The ***purpose of this article*** is to consider the most controversial and poorly studied concept – judicial lawmaking and its limits in the civil procedural law of Ukraine. Although the concept of judicial lawmaking is not enshrined in the Civil Procedural Code of Ukraine as revised in 2017, the grounds for such law enforcement actions are specified by the Grand Chamber of the Supreme Court. These grounds are proxy and related to "exclusive legal problems" that make it possible to "ensure the development of law and the formation of a unified law enforcement practice" (as stated in para. 5 of Art. 403 of the Civil Procedural Code of Ukraine). Moreover, it is judicial lawmaking that underlies judicial precedents. Referring to these grounds, it is possible to hold that Ukraine has taken the first step towards the introduction of case law into justice. Today, such a step plays a triple role: a) to provide safety measures for the legislator against the possibility of legislative gaps; b) to shape a single law enforcement practice; c) to develop law. Thus, Ukraine is gradually straying from Soviet normativism and tends towards the practice of living justice, when legal positions, legal analogies, judicial lawmaking take place in the consideration of a particular case. The convergence of common law and continental law is evolving steadily in Ukraine due to the shift of that sort of methodological approach. This trend is observed not only in Ukraine but also in Estonia, Latvia, Lithuania, and Georgia. Thus, in the medium term, the legislator and, subsequently, the scientific doctrine will have to recognize the existence of judicial lawmaking, which is the basis of judicial precedents which should be recognized as a source of law. Therefore, the issue of judicial lawmaking will gain a new impetus in further research.

Research methods. The contribution is based on the complex application of general scientific and special methods of research and cognition. In this context, the systemic-functional method allowed studying judicial lawmaking and its limits as a procedural law phenomenon, which is the fundamental principle of the formation of future case law in civil proceedings of Ukraine. The historical method was used to clarify the previous historical conditions that became the basis for the emergence and development of judicial lawmaking and, subsequently, influenced the establishment of some legal traditions. The dialectical method allowed elucidating the unity and contradictions of the process in judicial lawmaking, which made it possible to build a holistic system of ideas about the substantive and legal essence of such a phenomenon as judicial lawmaking and its limits.

Results. The paper proves that judicial lawmaking as a procedural law category is an integral part of court precedents, the application of which in overcoming legislative gaps is an inevitable issue today. This means that the legislator is gradually forgoing the postulates of continental law in civil proceedings, and hence procedural law, by directing towards common law.

Conclusions. The court, being an independent branch of state power, is designed to resolve various legal disputes between individuals and legal entities, as well as the state, thus eliminating tensions in public relations. Although the court does not create the law, it finds some legislative gaps (cracks) or outdated legislation while hearing court cases. Consequently, it is forced to overcome such legislative challenges by creating new legal formulas, concepts or provisions, which on the one hand develop law, and on the other – form a single law enforcement practice. Thus, judicial lawmaking encourages today's doctrinal research to start not from theory to practice, but on the contrary – from practice to research theory of some provisions or concepts. This trend is peculiar not only to Ukraine but also to the European doctrine of the international case law of the European Court of Human Rights. At the same time, judicial lawmaking is not a limitless concept. It takes place whenever and where it is necessary to secure the legislator against legislative complications or inconsistencies. In this part, there is a list of conditions specified in this work which objectively restrict judicial lawmaking.

Key words: judicial lawmaking, limits of judicial lawmaking, legislative gaps (cracks).

1. Introduction

Judicial lawmaking as a procedural law category always takes place in that part where legislative inconsistencies or legislative gaps (cracks) in both substantive and procedural law are manifested in considering civil cases. This trend occurs against the background of many economic and legal reforms requiring extensive law-making activity, which focuses on immediate legislative support of such reforms that causes objective stylistic and textual errors, legislative gaps (cracks). This appears at the stage of the court hearing of civil disputes.

Since courts are not entitled to deny a person justice due to a lack of legislation, its undue reliance on cases, or disputability, the courts are bound to settle a dispute between the parties by relying on the most accurate legal qualification of contentious relations. In this regard, courts often face challenges in their work. The above is driven by the extremely rapid scientific and technological development, which also contributes to the rapid development of social relations in all spheres of human life that entails the accelerated obsolescence of substantive law and the lack of new legal rules, encouraging the court to judicial lawmaking under particular legal conditions that always accompany such a process.

Judicial lawmaking and its features have been covered in research by such specialists as Ya. Romaniuk (2016), N. Stetsyk (2019), P. Komar (2020), S. Zapara (2021), I. Kravchenko (2021), O. Dashkovska (2021), and Yu. Riabchenko (2021). Other priority studies somehow have addressed judicial lawmaking and its limits.

2. Historical and legal analysis of the institute of judicial lawmaking

The court as a universal state legal institute resolves all existing civil disputes in the state, regardless of whether they are statutory regulated or not. The system-wide approach to justice is inherent in the judicial systems of all world countries, and Ukraine is no exception. Another question is, what procedural tradition of civil law disputes has historically developed in a particular state? What do such traditions have in common, and is there a process of their gradual convergence in today's realities? These and other issues have been repeatedly discussed in studies by both young and prominent scholars. However, given their extensionality, complexity, judicial lawmaking and its boundaries, they have been ignored due to new features emerging during such studies.

Society and the judiciary first encountered judicial lawmaking in medieval England, where the royal crown courts, because of the incompetence of royal power, were forced to combine state legislation and local well-established customs through their law-making in considering civil disputes. Thus, specific legal formulas, which were further used in the legal mechanism for litigation, were created. The legal formulas (legal positions) were applied as legal "patterns" to similar disputes, and if they coincided, the case was considered by analogy. Time after time, courts traditionally referred to the legal positions already tested by the court by treating them as laws. Consequently, the doctrinal formula "stare decisis", which means "to stand by things decided", gradually crystallized the justice of England (Carner, 1995, p. 953).

That gave rise to the emergence of case law in England. It was called the Anglo-Saxon legal family in the countries where it spread. At the same time, it was called common (Bernkhem, 1999, p. 54), living (Shevchuk, 2007, p. 24), or natural (Marchuk, Nikolaieva, 2004, p. 81), and judicial law (Shevchuk, 2007, p. 24) as it is based on judicial lawmaking, which today is considered a separate procedural category.

As for Soviet Ukraine, the state kept a tight rein on courts, because the court was not recognized as authority obeying not the law but proletarian expediency grounded on the principle of socialist legality. That sort of legality hinged on the force of dogma, cult of the leader, and forceful interference of the state in all civil-law relations. Thus, the characteristic feature of continental law is the availability of the sustainable case law that does not rely on judicial lawmaking, which allows stepping back from legal positions of the past, but on the exclusive interpretive law enforcement of outdated legal rules. Until recent times, the Plenum of the Supreme Court of Ukraine has acted as the classic moderator of this methodology. There is no doubt the Plenum was not a court authority, but its "guiding explanations" were binding on the lower courts, although they had the status of legal recommendations.

3. Judicial lawmaking as a way to fill legislative gaps (cracks)

It is beyond argument that the concept "judicial lawmaking" is more a legal fiction, as the court does not create law. The court interprets it both within the framework of the substantive legal essence of a particular rule of law and legal principles, common grounds of substantive law, and its objectives to develop new legal formulas. Therefore, the court fills legislative gaps between legal rules due to substantive and legal disparity between them, or when the content of a particular law rule is stylistically, and accordingly

legally, inconsistent with the general essence of the law ensuing in a legal gap in the substantive and legal essence of such rules. This means that in the presence of legislative gaps (cracks), the court shapes a new legal understanding of both individual concepts, which are peculiar to legal relations in dispute, and provisions that justify the grounds for filling such gaps. Moreover, based on exclusive, logical-legal thinking and interpretive methods, the court creates legal formulas for "general principles of substantive law and the principles of law and its institutions" (Kaptsova, 2021, p. 94), the principles of morality and social values to resolve the dispute on the one hand and fill legislative gaps (cracks) on the other.

At the same time, judicial lawmaking, its algorithm, and justification techniques for filling legislative gaps (cracks) in consideration of civil cases in courts of general jurisdiction allow developing both individual law branches and law in general. Thus, on the one hand, judicial lawmaking can be considered as a source for the development of the theory of law and on the other, as a way to form a unified law enforcement practice. It is the basis on which a new development course of both substantive and procedural law is being formed in Ukraine. The course follows the formula: not from theory to practice, but from practice to theory. Although law has historically performed long-term tasks, it, like any hypercomplex system, has some inaccuracies, inconsistencies, which justice later identifies and eliminates. This process is called filling legislative gaps (cracks), which the court identifies when considering the case on merits. The reasons for the emergence of legislative gaps (cracks) lie in the legislative process. The legislator always discusses and adopts each legal rule separately in a bid to anticipate all possible directions of the development of public relations. However, regardless of such meticulous work, courts deal with extra-statutory cases in the practical dimension of law enforcement practice.

4. Judicial lawmaking in the field of judicial reform

Judicial reform, which has been launched in Ukraine, depends today not only on the judiciary's upgrade but also on the adoption of new approaches in law enforcement practice, which regards judicial lawmaking as a process of filling legislative gaps (cracks) in the law enforcement practice of civil procedure.

All of these things are the grounds that motivate the court to judicial lawmaking, which acts as legal insurance of the legislator against legislative gaps (cracks) or untimely modifications, additions, or clarifications of outdated legislation. At the same time, this is not only about the legislator. This refers to quite rapid development of social relations stipulated by constant innovations in the economy, technology, property, finance and information spheres, as well as innovations in human behavior.

The above tendencies are peculiar today both to Ukraine and continental Europe where, as well as in Ukraine, the classic concept of legal positivism – justice was limited to the content of the legal rule– prevailed for a long time. Consequently, courts mechanically applied the "text of a law that excluded any creative role of judges" (Koziubra, 2016, pp. 38–48).

One might jump to the conclusion that the legislator will expand the source base of procedural laws and thus recognize the law-making practice of the Supreme Court as a source of law; and as well as in European countries, there will be a shift from the positivist theory of law to common law since it allows law and its theoretical positions to develop. For the sake of justice, it should be noted that the legislator indirectly admits the existence of judicial lawmaking as a growth area of our justice if there is "an exclusive legal problem" in order "to develop law and form a unified law enforcement practice" (para. 5 of Art. 403 of the Civil Procedural Code of Ukraine). This can be understood as the legislator set about paying attention to natural law and its component – judicial lawmaking, which is always in close contact with reality (Van Caeudem, 1992, p. 170). Thus, one currently can state that the judgments of the Supreme Court, under their binding legal positions, de facto act as judicial precedents, because "in choosing and applying legal rules to the disputed legal relations, the court has regard to the conclusions about the application of the relevant legal rules set out in the judgments of the Supreme Court" (para. 4 of Art. 263 of Civil Procedural Code of Ukraine).

What is "judicial lawmaking" as a procedural category? This question provokes a range of scientific discussions, and the first question in this discussion is as follows: what branch of the judiciary is entitled to administering lawmaking? Some scientists, incl. A. Norkin, B. Malyshev, and M. Yasynok, believe that courts of all instances are entitled to judicial lawmaking, as courts of all levels "are prohibited from refusing to consider the case on the grounds of absence, incompleteness, inconsistency of the legislation governing disputed relations" (para. 10 of Art. 10 of the Civil Procedural Code of Ukraine). The article's author supports the above position, but he understands that the legal formulas specified by the court in filling legislative gaps (cracks) are definitive since

they can be changed or repealed on appeal or in cassation. However, the courts of all instances have the relevant right, albeit indirectly.

Another group of scholars, M. Marchenko, O. Popov, S. Kyvchuk, believe that the Supreme Court should be the only subject of judicial lawmaking in our country, because following para. 5 of Art. 403 of the Civil Procedural Code of Ukraine, only the Supreme Court is authorized to ensure the development of law to form a single law enforcement practice in the presence of an exceptional legal problem. The beforementioned means that the very Supreme Court has the right to judicial lawmaking and thus, the formation of new legal concepts, which allow filling legislative gaps (crack) that are noticed in the current legislation during the trial of civil cases. There is no doubt that the Supreme Court, as the highest judicial body, should have the right to judicial lawmaking, thus developing law from its practice to theory.

5. Judicial lawmaking of the European Court of Human Rights and its particularities

If one compares the approach of the Supreme Court in judicial lawmaking with the case-law of the European Court of Human Rights, which often relies on the lawmaking process, one can point out that such lawmaking is grounded on an expanded interpretation of the European Convention on Human Rights (hereinafter – the Convention). The peculiarity of such interpretation, which usually moves to judicial lawmaking, is that the European Court has to go beyond the substantive and legal essence of the Convention because its rules are abstract, and therefore not specific, as set out in a synthetical form. As a result, the European Court of Human Rights notes that its judgments are not judicial precedents. At the same time, it concurrently admits that its law-making is compulsory, as neither the Convention nor its protocols are of a clarification nature. Such an approach to the statement of the Convention's rules relies on factual circumstances, as the European Court is not bound by the national law of the European Union. Consequently, when considering cases of protection of individual rights, freedoms and interests, the court should manage to interpret the Convention extensively. It acts so in the practical dimension because the Convention does not consolidate a set of concepts concerning, for example, housing (case "Prokopovich v. Russia", judgment as of November 18, 2004) (European Court of Human Rights, 2004), reasonable terms (case "Zimmermann and Steiner v. Switzerland", judgment as of June 20, 1983) (European Court of Human Rights, 1983), property (case "Marx v. Belgium", judgment as April 27, 1979) (Fulei, 2008, p. 43). etc. Consequently, in order to overcome legislative gaps, the European Court, driven by the law-making process, goes beyond the substantive and legal scope of the conventional rules and thus directly forms and enshrines the relevant concepts in its judgments. Such decisions are recognized both in continental law and common law of Ukraine. For these reasons, the European Court in its judgments gradually combines both common and continental law generating such a procedural synthesis in which, along with the classics of continental law, European case law is formed incl. its: a) lawmaking; b) unification; c) recurrence; d) a single law enforcement practice: e) a single growth area of European law.

Thus, an obvious fact is that in considering civil cases, each court in its procedural work always somewhat deals with judicial lawmaking, as social development constantly needs new legal concepts, provisions, and therefore, the advancement of science – the renewal of judicial practice corresponds to the conditions of social development in which they are formed. The paradox of law is that law regulates social relations, but it cannot anticipate them.

6. Judicial lawmaking and its limits

There is no doubt that the right to judicial lawmaking is not a court's permission for infinity, illogicality, and unreasonableness. Judicial lawmaking shall always have some limits stipulated by particular conditions, and it is conditions that create law-making restrictions. Therefore, judicial lawmaking is only practicable to:

a) legal relations that have already accomplished their active function and passed into the stage of disputed stagnation and thus, have become the subject of litigation;

b) judicial lawmaking can take place only within the procedural form of court hearings and can never take place outside;

c) judicial lawmaking may be carried out only by a court which considers the case on the merits on appeal or in cassation;

d) judicial lawmaking may not go beyond those legal relations that are considered by the court;

e) judicial lawmaking may not take place in that part which contains legal rules governing the disputed legal relations;

f) judicial lawmaking cannot occur towards the matter in dispute, which is excluded from civil circulation;

g) judicial lawmaking cannot occur in the presence of legislative prohibitions.

7. Conclusions

The court, being an independent branch of state power, is designed to resolve various

legal disputes between individuals and legal entities and the state, thus eliminating tension in public relations.

Although the court does not create law, it identifies some legislative gaps (cracks) or outdated legislation while considering court cases. Consequently, it is forced to respond to such legislative challenges by creating new legal formulas, concepts, or provisions, which on the one hand, advance the law and on the other – shape a single law enforcement practice. Thus, judicial lawmaking encourages today's doctrinal research to act not from theory to practice, but on the contrary – from practice to the theory of study of particular provisions or concepts. This trend is peculiar to Ukraine and the European doctrine of the international case-law of the European Court of Human Rights.

At the same time, judicial lawmaking is not a limitless concept. It takes place whenever and where it is necessary to secure the legislator against legislative complications or inconsistencies. In this part, there is a list of conditions specified in this work, which objectively restrict judicial lawmaking.

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ПОНЯТТЯ СУДОВОЇ ПРАВОТВОРЧОСТІ ТА ЇЇ МЕЖ У ЦИВІЛЬНОМУ СУДОЧИНСТВІ УКРАЇНИ

Анотація. ***Мета роботи*** полягає в дослідженні дуже дискусійного й малодослідженого поняття судової правотворчості та її меж у цивільному процесуальному праві України. Незважаючи на те, що поняття судової правотворчості в Цивільному процесуальному кодексі України (у редакції 2017 р.) не має свого нормативного закріплення, проте підстави для таких правотворчих дій на рівні Великої Палати Верховного Суду все ж зазначені. І хоча ці підстави мають опосередкований зміст та стосуються «виключних правових проблем», що дають можливість забезпечити «розвиток права

та формування єдиної правозастосовної практики» (як зазначено в ч. 5 ст. 403 Цивільного процесуального кодексу України), проте саме така опосередкованість відкриває шлях до судової правотворчості. Окреслений підхід до судової правотворчості лежить в основі судових прецедентів. З огляду на зазначені підстави можна говорити про те, що в Україні зроблено перший крок до впровадження у правосуддя прецедентного права. Сьогодні цей крок відіграє потрійну роль: а) страхує законодавця на випадок законодавчих прогалин; б) формує єдину правозастосовну практику; в) розвиває право. Таким чином, Україна поступово відходить від радянського нормативізму та приходить до практики живого правосуддя, коли правові позиції, правові аналогії, судова правотворчість мають місце під час безпосереднього розгляду конкретної судової справи. Саме завдяки змінам цього методологічного підходу в Україні поступово відбувається зближення загального й континентального права. Така тенденція має місце не лише в Україні, а й в Естонії, Латвії, Литві, Грузії. Таким чином, уже в середньостроковій перспективі законодавець, а отже, і наукова доктрина будуть змушені визнати наявність у правосудді судової правотворчості, що є основою судових прецедентів, які необхідно буде визнавати джерелом права, а відтак питання судової правотворчості отримає новий імпульс у подальшому науковому дослідженні.

Методи дослідження. Роботу виконано на підставі комплексного застосування загальнонаукових і спеціальних методів дослідження й пізнання. Так, системно-функціональний метод дав змогу дослідити судову правотворчість і її межі як процесуально-правове явище, яке є фундаментальною основою формування майбутнього прецедентного права в цивільному судочинстві України. Історичний метод застосовувався для з'ясування тих історичних умов, які стали підставами для виникнення й розвитку судової правотворчості та надалі вплинули на формування певних правових традицій. Діалектичний метод дав можливість розкрити єдність і суперечливість процесу у сфері судової правотворчості, що дало змогу скласти цілісну систему уявлень щодо змістовно-правової суті такого явища, як судова правотворчість, і її меж.

Результати. У роботі доведено, що судова правотворчість як процесуально-правова категорія є невід'ємною складовою частиною судових прецедентів, застосування яких у питаннях подолання законодавчих прогалин є на сьогодні невідворотним питанням. Це означає, що законодавець поступово відходить від постулатів континентального права в цивільному судочинстві та спрямовує свої погляди (а отже, і процесуальне законодавство) у напрямі загального права.

Висновки. Суд, як самостійна гілка державної влади, покликаний урегульовувати різноспрямовані правові спори між фізичними та юридичними особами, а також між ними й державою. У такий спосіб він усуває напругу в суспільних відносинах. Незважаючи на те, що суд не творить право, під час розгляду судових справ він виявляє ті чи інші законодавчі прогалини (щілини) або застаріле законодавство, а тому вимушений долати такі законодавчі негаразди за рахунок створення нових правових формул, понять чи положень, які, з одного боку, розвивають право, а з іншого – формують єдину правозастосовну практику. Таким чином, судова правотворчість спонукає до здійснення сьогоднішніх доктринальних досліджень тих чи інших положень або понять у напрямі не від теорії до практики, а навпаки – від практики до теорії. Ця тенденція характерна не лише для України, а й для європейської доктрини у сфері міжнародної судової практики Європейського суду з прав людини. Водночас судова правотворчість не є безмежним поняттям. Воно має місце лише там і тоді, коли виникає необхідність страхування законодавця від законодавчих ускладнень чи неузгодженості. Щодо цього є цілий перелік умов, зазначених у представленій роботі, які об'єктивно обмежують судову правотворчість.

Ключові слова: судова правотворчість, межі судової правотворчості, законодавчі прогалини (щілини).

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CITIZENS OF UKRAINE AS SUBJECTS OF SPECIAL ECONOMIC AND OTHER RESTRICTIVE MEASURES (SANCTIONS) IMPOSED BY THE UKRAINIAN STATE

Abstract. ***The purpose*** of the article is to establish legal grounds and feasibility of the imposition of special economic and other restrictive measures (sanctions) on citizens of Ukraine, as well as related guarantees of ensuring their rights, freedoms and interests.

Research methods. The contribution is developed on the basis of general scientific and special methods of scientific cognition.

Results. The author considered the validity of introducing special economic and other restrictive measures (sanctions) as the mechanism of state policy and requirements for ensuring the legitimacy of their imposition on citizens of Ukraine.

Conclusions. Special economic and other restrictive measures (sanctions) may be imposed on citizens of Ukraine only if they are entities conducting terrorist activities. That fact shall be confirmed by a court judgment adopted in the manner established by the Criminal Procedure Code of Ukraine or the Code of Administrative Proceeding of Ukraine. "Court authorization" is a generally recognized requirement to guarantee compliance with the rule of law in contentious legal relations. The procedure for administrative control through making a decision by the National Security and Defense Council of Ukraine, which the President of Ukraine puts into effect, as well as the right to the follow-up judicial control, cannot secure an alternative to the mentioned guarantees. Sanctions are measures of state coercion that are imposed on a person when implementing state policy through establishing additional conditions for economic and financial activities in Ukraine. Alternate and general formulation of sanctions in the National Security and Defense Council of Ukraine enforcement decision, which the President of Ukraine puts into effect, does not mean an illegal interference in rights, freedoms, and interests of persons who are subject to it; a sanction will be further realized in a particular context, ensuring the adjustment of the sanctions regime to an individual situation.

Key words: sovereignty, state coercion, judicial authorization, terrorist activity, restriction of rights, freedoms and interests.

1. Introduction

The current political and social situation of the armed aggression of the Russian Federation against Ukraine in the form of a "hybrid war" has led to real physical threats to sovereignty and national security. This requires adequate feedback from the state apparatus to meet and protect the state and its citizens, their rights and freedoms, from the relevant threats. The application of special economic and other restrictive measures (sanctions) following the Law of Ukraine "On Sanctions" dated August 14, 2014 № 1644-VII (hereinafter – the Law № 1644-VII) is an element of the new reality of the legal regime of public administration.

The form of restrictive measures chosen by the Ukrainian statutory model widely defines a range of actors subjected to their imposition (para. 2 of Art. 1 and Art. 3 of the Law № 1644-VII). Given the essence of these measures, it inevitably raises the issue of the legitimacy of interference in the rights, freedoms, and interests of sanctions' addressees. The mechanism of sanctions is traditionally considered in the dimension of the evolution of reprisals in public international law. However,

the last years of their application for combating the globalized challenges of international crime and terrorism changed the vector of their application from interstate sovereign relations to the state level – a person of private law.

The study of the current status of the application of sanctions in Ukraine shows the same approach – special economic and other restrictive measures are mainly regarded as operational ways to protect national interests, national security, sovereignty and territorial integrity of Ukraine, counter-terrorist activity, and prevent violations, restore the violated rights, freedoms, and legitimate interests of citizens of Ukraine, society and the state against legal entities and individuals regardless of the extent of state sovereignty over them.

It should be noted that the rapid application of the relevant institution during 2018–2021 took place in the absence of comprehensive studies on the procedure for applying sanctions in its regulatory version. Instead, the study of the ontological nature of international legal sanctions has long been the subject of scientific and practical interest of leading international (O. Elagab, J. Crawford, K. Tomuschat) and domestic and Eastern European experts (V.A. Vasylenko, D.B. Levin, I.I. Lukashuk, Yu.V. Maniichuk, K.V. Manuilova, V.I. Menzhynskyi, S.V. Chernychenko, A.L. Cherniavskyi).

The consequence of using the mechanism of special economic and other restrictive measures (sanctions) is the emergence of a new category of disputes in case law appealing the decrees of the President of Ukraine, which implement the relevant measures. Thus, the lack of sufficient theoretical basis causes significant practical problems of an adequate settlement of the issue of synergies between public interests and compliance with the guarantees of the legal status of individuals in this mechanism, especially if it concerns their application to legal entities and individuals, who are residents of Ukraine, and the choice of extraordinary restrictive measures instead of ordinary coercive measures in public administration.

The ***purpose of this article*** is to establish the legal validity and justification of the imposition of special economic and other restrictive measures (sanctions) on citizens of Ukraine, as well as guarantees of ensuring related rights, freedoms and interests.

2. Institutionalization of special economic and other restrictive measures (sanctions) in the legislation of Ukraine

The wording of Art. 1 of the Constitution of Ukraine, which primarily characterizes Ukraine as a sovereign and independent state and its status as democratic, social and legal, indicates the consequent relations between the need to ensure sovereignty and independence within the State for further execution of its obligations to guarantee democracy, establish and protect human rights and freedoms as an element of law and order that secures the implementation of the constitutional principle of the social and rule-of-law state (para. 4 of the reasoning part of the Judgement of the Constitutional Court of Ukraine dated December 22, 2010 № 23-рп/2010). Therefore, para. 1 of Art. 17 of the Constitution of Ukraine stipulates that protecting the sovereignty and territorial integrity of Ukraine and ensuring its economic and information security shall be the most important function of the State and a matter of concern for all the Ukrainian people.

It is the Parliament in Ukraine that is entitled to represent the whole Ukrainian nation – the citizens of Ukraine of all nationalities – and act on their behalf, and thus, it is a representative body of state power (point 4, sub-para. 2.1, para. 2 of the reasoning part of the Opinion of the Constitutional Court of Ukraine (Grand Chamber) dated December 16, 2019 № 8-в/2019).

Despite the lack of direct reference in the Constitution of Ukraine to the mechanism of special economic and other restrictive measures (sanctions), the laws of Ukraine may also regulate other issues, the solution of which does not fall within the competence of other public authorities or local self-government bodies under the Constitution of Ukraine. This follows from para. 2 of Art. 85 of the Constitution of Ukraine.

Pursuant to point 17, para. 1 of Art. 92 of the Constitution of Ukraine, only laws of Ukraine shall determine the fundamentals of national security, the formation of the Armed Forces of Ukraine, and ensuring public order.

Special economic and other restrictive measures (sanctions) are "internally illegal" but justified by the purpose and grounds for their application, countermeasures" (Alland, 2002, pp. 1221–1222) and, at the same time, coercive measures as an element of the method of functioning of international law, one of the means of formally legal implementation of law (Lukashuk, 2005, p. 401). Consequently, they acquire the characteristics of universally recognized elements of the state and international policy focused on protecting national interests and ensuring the security of the individual, society and states from external and internal threats.

Acting upon the representative mandate and keeping in mind the preconditions

specified in the Preamble of Law № 1644-VII, the Verkhovna Rada of Ukraine statutorily set the legal regime of applying special economic and other restrictive measures (sanctions) in Ukraine and thus legalized them as an instrument of public policy.

The procedure, established by the Law

№ 1644-VII, for applying special economic and other restrictive measures (sanctions) prescribed by the decision of the National Security and Defense Council of Ukraine (hereinafter – NSDC), which the decree of the President of Ukraine puts into effect, also corresponds to the constitutional tasks and powers of the NSDC and the President of Ukraine; the latter ensures the independence, national security, and legal succession of the State (para. 1 of Art. 106 of the Constitution of Ukraine).

The Constitutional Court of Ukraine holds that the provisions of the Constitution of Ukraine, which outline the scope and essence of the powers of the President of Ukraine and the Verkhovna Rada of Ukraine, can be specified only at the level of Ukrainian laws. However, that kind of specification cannot lead to distortion of the provisions of the Constitution of Ukraine or go beyond it (point 5, sub-para. 2.2, para. 2 of the reasoning part of the Decision of the Constitutional Court of Ukraine (Grand Chamber) dated September 16, 2020 № 11-p/2020).

At the same time, in point 6, sub-para. 2.1, para. 2 of the reasoning part of the Decision of the Constitutional Court of Ukraine of February 25, 2009 № 5-рп/2009, the body of constitutional jurisdiction concluded that the systematic analysis of the Constitution of Ukraine gives grounds to believe that the Verkhovna Rada of Ukraine, the President of Ukraine, and the Cabinet of Ministers Ukraine have individual constitutional powers in the area of national security and defense, and only the President of Ukraine has the constitutional authority to exercise leadership in the mentioned areas. It means that the President of Ukraine guides the activity of subjects of national security and defense of the state while exercising such leadership.

Thus, the decrees of the President of Ukraine, which put in effect the NSDC decisions on the application of special economic and other restrictive measures (sanctions) adopted within the powers provided by the Constitution of Ukraine and in the form of competence exercise, which is enshrined in para. 3 of Art. 106 of the Constitution of Ukraine, are binding on all entities under the jurisdiction of Ukraine.

3. Legal nature of special economic and other restrictive measures (sanctions) in the legislation of Ukraine and their clearness

The legal basis of special economic or other restrictive measures (sanctions) applied by the states against threats to sovereignty and a constitutional order relies on Art. 41 of the UN Charter: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

The theory of international law interprets economic sanctions as a measure of lawful coercion (Tomushat, 1994; Lukashuk, 2005) or through the prism of legitimate countermeasures (Cherniavsyi, 2017). However, according to the standards of international law, such coercion is the outcome of an illegal act, the nature of which should be grounded on international law, not the national law of the state; the application of such measures should not create conditions for violating fundamental tenets of international law or human rights and freedoms; the sole purpose of sanctions is to restore the victim's legitimate rights and interests and restore the status quo ante, including compensation for pecuniary damage (Crouford, 1999, pp. 436–439). Thus, the vector of their action is always directed outwards and must compensate for the limited influence of the state on the violator that is not under its internal sovereign jurisdiction.

A systems study of the provisions of the Law № 1644-VII allows one to assert that special economic and other restrictive measures (sanctions) are law-enforcement in their nature, have a restrictive coercive effect on the violator. However, compared to the measures of ordinary legal responsibility, which has the punishment for the act as its primary purpose, listed in Art. 4 of the Law № 1644-VII, special economic and other restrictive measures (sanctions) are ones designed to prevent and put an end to threats, in response to which they are applied in the decisions or actions of subjects.

The personal and sectoral sanctions listed in the Law № 1644-VII, in their effects, are temporary measures of operational influence on the conduct of participants by imposing special restrictions under the framework of public policy in some areas (economic, financial, infrastructure, diplomatic, environmental, trade, cultural, etc.). They are intended to point out the violation, eliminate opportunities for keeping illegal activities and causing major

damage to protected legal relations before remedying the situation, avoid potential use of resources and capabilities through the state mechanism to harm its protected fundamental values. There is no doubt that they are adversarial to the rights and interests of addressees that highlights their essence.

With the application of special economic and other restrictive measures (sanctions) to persons under private law, the issue of assessing the legality of the intervention arises in each case. Moreover, given the nature of sanctions, it is necessary to refer to the similar practice of the Constitutional Court of Ukraine. The Court holds that one should distinguish the concept of "restriction of fundamental rights and freedoms" from the concept of "fixation of the limits of the essence of rights and freedoms" adopted in lawmaking through applying legal methods (techniques) recognizing such practice admissible if additional standardization of the right's enjoyment by the special legislation aims not to narrow the scope of rights and freedoms but to specify the content and regulation of procedural issues and outline the general limits of the fundamental rights (point 2, para. 10 of the reasoning part of the Decision of the Constitutional Court of Ukraine dated June 12, 2007 № 2-рп/2007).

In this aspect, a good part of special restrictive measures applied to a particular person (personal sanctions) is characterized by the establishment of additional conditions for economic and financial activities in Ukraine, the use of state resources owned by the Ukrainian people to prevent their use to the detriment of the people, state or universally recognized values of the world law and order. They do not restrict the rights completely as measures of responsibility. However, the state, represented by authorized bodies, has changed approaches to the procedure for exercising rights, freedoms, and interests of an individual to ensure the public interest, which is manifested in the statutory purpose of sanctions.

Alternate and general wording of sanctions in the regulatory prescriptions of Art. 4 of the Law № 1644-VII, as well as their word-for-word reproduction in a law enforcement decision, does not indicate unlawful interference with the rights, freedoms, and interests of persons subject to its application because such a sanction will be further implemented under specific conditions of disputed legal relations (for example, on the ratio of the validity term of sanctions and the validity term of a specific suspended license) to adjust the sanctions regime to the individual situation of the person.

If the imposition of specific special economic or other restrictive measures results in the restriction of certain rights, freedoms and interests of the individual, it should be noted that threats to national interests, national security, sovereignty, and territorial integrity of the state, terrorist activity are a universal statutory criterion for the lawful application of the restrictions with regard to the provisions of the Constitution of Ukraine, acts of international law on the protection of human rights and freedoms, the practice of human rights jurisdiction in Europe and the world to the extent of derogation from international obligations in this area required by the severity of the situation and granted that such measures do not conflict with its other obligations under international law (Art. 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms). The Resolution of the Verkhovna Rada of Ukraine dated May 21, 2015 № 462-VIII approved the Statement of the Verkhovna Rada of Ukraine "On the Derogation of Ukraine from certain Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms".

The essential content of the application of sanctions in the legislation of Ukraine deserves special attention; some of them are detailed by the Resolution of the Board of the National Bank of Ukraine dated October 1, 2015 № 654 "On Ensuring the Implementation and Monitoring of the Effectiveness of Personal Special Economic and Other Restrictive Measures (Sanctions)". The study of this act allows predicting order and consequences of the sanctions' application in the financial sector which concurrently regulates the operation of the state apparatus and eliminates objections about the vagueness and uncertainty of regulation.

4. Guarantees of the lawful imposition of special economic and other restrictive measures (sanctions) on citizens of Ukraine

The introduction of the mechanism of personal (targeted) sanctions in international practice has arisen the issue of ensuring respect for the rights of individuals subjected to sanctions. As a general rule, it is agreed that the rights restricted by sanctions are not absolute, and public interests justify such interferences (as discussed in previous sections of the article). Therefore, a more important task for the entity imposing sanctions is to ensure compliance with the procedure for applying sanctions. The procedure includes: a proper notification stating the reasons for the application of sanctions; ample evidence to justify sanctions; hearing; an option of reviewing the decision on the application of sanctions by an independent court (Chachko, 2019, p. 157).

Following the case law of the European Court of Human Rights, the assessment of the expediency of interference with guaranteed human rights and freedoms is based on the study of whether it is conducted under the law, whether it meets the legitimate aim, and whether it is necessary for a democratic society. (sub-paras. 42–46 of the Judgments in the case "Klass and Others v. Germany" dated September 6, 1978).

The legitimate restriction of constitutional rights and freedoms of man and citizen should be understood as the possibility of state intervention set by the Constitution of Ukraine, which meets the rule of law, necessity, expediency and proportionality in a democratic society, in the scope of constitutional rights and freedoms of man and citizen using legal remedies. The restriction's purpose is to protect fundamental values in society, which include inter alia life, human freedom and dignity, public health and morality, national security, public order (point 2, para. 6 of the reasoning part of the Decision of the Constitutional Court of Ukraine dated July 12, 2019 № 5-p(I)/2019).

The expression "under the law" in terms of setting restrictions on human rights and freedoms to combat terrorism requires, first, that the disputed measure has relevant grounds in national law; it also concerns the quality of the law in question, requiring that it be consistent with the rule of law and be available to the mentioned persons, who must also be able to foresee its consequences (see, inter alia, Kruslin v. France, 24 April 1990, § 27, Series A № 176-A; Huvig, cited above, § 26; Lambert v. France, 24 August 1998, § 23, Reports 1998 V; Perry v. the United Kingdom, № 63737/00, § 45, ECHR 2003 IX (extracts), Dumitru Popescu v. Romania (№ 2), № 71525/01, § 61, 26 April 2007, Association for European Integration, cited above, § 71, and Liberty, cited above, § 59).

In the issues affecting fundamental rights, the expression of the executive's discretion in the field of national security in terms of unlimited power will contradict the rule of law, one of the fundamental principles of a democratic society enshrined in the Convention. Therefore, the law shall specify the scope of any such discretion given to the competent authorities and the way of its implementation with sufficient clarity, keeping in mind the legitimate aim of the relevant preventive measure, to provide the person with adequate protection against arbitrary interference (see Roman Zakharov, cited above, § 247) (sub-paras. 59, 62, 65 of the Judgment in the case "Szabó and Vissy v. Hungary" dated January 12, 2016 (application № 37138/14)).

Assessing the level of legitimacy of interference with rights and freedoms of an individual in the context of judicial evaluation of compliance with their guarantees, since the 80s of the twentieth century, the European Court of Human Rights has pointed out that one of the significant factors subjected to consideration is the level reached in recent years by terrorism in Europe as a threat, countering which requires the application of restrictive measures. Democratic societies face the threat of highly sophisticated forms of espionage and terrorism. Consequently, in order to counter such threats effectively, the state must be able to take extraordinary countermeasures against subversives. The Court notes that in determining the conditions which activate a system of the relevant measures, the state legislative branch exercises the discretionary right (cf., mutatis mutandis, Judgment in the case of De Wilde, Ooms and Versyp v. Belgium dated June 18, 1971, Series A, № 12, pp. 45–46, § 93; and in the case of Golder dated February 21, 1975, Series A, § 18, pp. 21–22, § 45; cf., in relation to Article 10 § 2, Judgment in the case of Engel and Others dated June 8, 1976, Series A № 22, pp. 41–42, § 100, and in the case of Handyside dated December 7, 1976, Series A, № 24, p. 22, § 48).

At the same time, the Court emphasizes this does not mean that the State is granted unlimited discretion to take extraordinary measures. The assessment of their legitimacy is relative: it depends on all circumstances of the case, i. e., nature, scale, and duration of potential measures, the grounds necessary to issue an order to apply the measures; it depends on the authorities empowered to authorize, implement and control such measures and on the legal remedy prescribed by the national law (paras. 48–50 of the Judgment in the case "Klass and Others v. Germany" dated September 6, 1978).

In this context, a well-defined determination of the subjective feature of the application of state coercive measures is one of the priority tasks.

Examining the range of addressees subjected to personal special restrictive measures (sanctions), one draws attention to the fact that under the system application of the provisions of para. 2 of Art. 1, para.1 of Art. 3, para. 3 of Art. 5 of the Law № 1644-VII, this international law institute is implemented in the current legislation of Ukraine in terms of its application, firstly, to a foreign legal entity, a legal entity under the control of a foreign legal entity or non-resident individual, foreigners, stateless persons (it follows generally accepted principles of international law) and, secondly,

to entities conducting terrorist activities without imposing any restrictions based on nationality or residence of such persons. Thus, a legal entity-resident of Ukraine and a natural person-citizen of Ukraine may be subjected to special economic and other restrictive measures (sanctions) under the Law № 1644-VII only in terms of recognizing them as terrorist entities.

If no one has the right to challenge the state's discretion to protect its sovereignty by applying such an extraordinary mechanism as sanctions, then the resolution of the issue of waiving sanctions in the national legal system in favor of international coercion is one of the aspects of assessing the legitimacy of restrictions of rights, freedoms, and interests through special restrictive measures; especially if the substantial and procedural level of guarantees in the latter case is significantly lower for the legal status of the person. At the same time, it is obvious that this cannot be justified by the recommendations on establishing international cooperation and supporting the actions of the world community in combating the global phenomenon (Barash, 2017) because both the source of decisions and the addressee of the consequences are within single sovereignty.

In the context of the above stipulations about ensuring legal certainty and hence limiting the discretion of law enforcement, imperative prescriptions do not allow specifying the addressees of sanctions in an expanded interpretation of the regulatory prescription. The specification of an addressee is inextricably linked with the normative content of the understanding of the concept of "terrorism" and "terrorist activity" (item 2, Art. 1 of the Law of Ukraine "On Combating Terrorism" dated March 20, 2003 № 638-IV (hereinafter – the Law № 638-IV)) and the legislative definition of "national security", "national interests" and threats to national security of Ukraine formulated under the Law (sub-paras. 6, 9, 10, para. 1, Art. 1 of the Law of Ukraine "On National Security of Ukraine" dated June 21, 2018 № 2469-VIII (hereinafter – the Law № 2469-VIII)), which are affected by terrorism.

Assessing the elucidation of these features in applying to an individual, the European Court of Human Rights recalls that even in the field of covert surveillance, where predictability is of particular concern, the concepts of the danger of terrorist acts and the need for rescue operations are clear enough to comply with the law. For the Court, the requirement of "predictability" of the law does cross a line to compel States to enact legislation that specifies all potential situations that may entail a decision to initiate a covert surveillance operation. In fact, the mention of a terrorist threat or rescue operation can be regarded as providing citizens with the necessary indication (compare and contrast Iordachi and Others, cited above, § 46). At the same time, for the Court, nothing in the text of the relevant legislation indicates that the concept of "terrorist acts" used in section 7/E (1) a) (ad) of the Police Act does not coincide with the similarly defined crime, which is found the Criminal Code. (see para. 16 above) (para. 65 of the Judgment in the case "Szabó and Vissy v. Hungary" dated January 12, 2016 (application № 37138/14)).

The Criminal Code of Ukraine in Arts. 258–258-5, as in the cited case of Hungary, criminalizes the manifestations of terrorist activity, which determines the need to ensure standards of protection of a citizen of Ukraine from a criminal charge in resolving the justification of imposing special restrictive measures against him/her as a terrorist based on the presumption of innocence under para. 1 of Art. 62 of the Constitution of Ukraine.

Thus, terrorism and terrorist activity are legal categories, not political ones. Accordingly, they should be assessed by relying only on the mentioned feature (outside of political activity), evidence, or intelligence information about terrorist activities and meet the "reasonable suspicion" standard (Judgment in the case "O'Hara v. the United Kingdom" dated October 16, 2001, application № 37555/97).

In addition to criminal law qualification, a person's involvement in terrorist activities in Ukraine may be confirmed by a court in administrative proceedings (Art. 284 of the Code of Administrative Proceedings of Ukraine) at the request of the Security Service of Ukraine pursuant to Art. 11-1 of the Law № 638-IV for inclusion/exclusion in/from the relevant sanctions lists, including the list of persons connected with terrorist activities or in respect of whom international sanctions have been applied.

Preliminary availability of a court decision about the establishment of the fact of a person's involvement in terrorism or the grounds for inclusion in the relevant list (so-called "judicial authorization") is a sufficient guarantee of the national system of protection of individual rights in case of their further restrictions in applying special restrictive measure based on the decisions; in terms of the application of sanctions, it reduces the NSDC decision to the selection of those measures, according to Art. 4 of the Law № 1644-VII, which meet the requirements of ensuring the purpose of their application to the person.

However, if the NSDC of Ukraine, by its decision to apply special economic and other restrictive measures (sanctions), pre-qualifies the actions of a person as one involved in terrorist activities, the NSDC of Ukraine, together with the President of Ukraine, acts as "the court" in disputable legal relations to assess the guarantees of human rights (see, e. g., sub-paras. 87–91 of the Judgment in the case of "Oleksandr Volkov v. Ukraine" dated January 9, 2013, application № 21722/11).

The distribution of powers between the political executive and the judiciary has become increasingly important in its practice (see the Judgment in the case of Stafford v. the United Kingdom (proceeding in execution), application № 46295/99, § 78, ECHR 2002-IV). At the same time, neither Article 6 nor any other provision of the Convention requires States to adhere to any theoretical constitutional concepts regarding the permissible limits of interaction between the branches of government (see the Judgment in the case of Kleyn and Others v. the Netherlands (proceeding in execution), applications № 39343/98, № 39651/98, № 43147/98 and № 46664/99, § 193, ECHR 2003-VI).

Instead, the activity of the National Security and Defense Council of Ukraine apparently does not correspond to the characteristics of a "fair and impartial court" as defined in para. 1 of Art. 6 of the Convention, as it is a body under the President of Ukraine that coordinates and controls the activity of executive power bodies in the area of national security and defence; the President of Ukraine forms the personal membership of the National Security and Defense Council of Ukraine (Art. 107 of the Constitution of Ukraine). Thus, the NSDC, depending on the President of Ukraine as the head of state, helps him implement the principles of domestic and foreign policy on national security and defense and coordinates executive bodies' relevant activities in peacetime (incl., the Security Service of Ukraine, the data of which contribute to the decision on the application of sanctions). Therefore, it has neither functional nor institutional independence and impartiality to settle the issue of addressing sanctions; it is directly interested in taking measures to improve prevention and combating threats to national interests and national security in terms of its competence and functions in the state apparatus.

A lack of preliminary judicial authorization to interfere in the rights, freedoms, and interests of individuals due to the application of extraordinary measures to combat global threats is a particular problem (Judgment in the case "Szabó and Vissy v. Hungary" dated January 12, 2016, application № 37138/14, pp. 73–78). Other forms of control by law enforcement agencies and officials, which are elements of the law enforcement system and have wide powers to apply countermeasures in the fight against terrorism, are mainly political – they are incompetent in providing the adequate assessment of urgency about the objectives and means considered. Although the Court agrees with the functional arguments that such individuals and bodies are better adapted to authorization than judges, it is not convinced of this when it comes to analyzing objectives and means in terms of urgency.

As for a body empowered to authorize restrictive measures, a non-judicial body may comply with the Convention (see, for example, Klass and Others, cited above, § 51; Weber and Saravia, cited above, § 115; and Kennedy, cited above, § 31), if this body is sufficiently independent of the executive branch (see Roman Zakharov, cited above, § 258). However, the political nature of authorization and control increases the risk of abuse. The Court recalls that the rule of law means, inter alia, that the interference of executive bodies in human rights shall be subject to effective control, which must be enshrined by litigation. If there is no other way, judicial control at least provides the best guarantees of independence, impartiality and proper procedure. In a realm where abuse seems potentially easy to commit in individual cases and where it can have serious consequences for a democratic society, it is advisable to entrust a judge with supervision (see Klass and Others, cited above, § 55 and § 56). The Court recalls that in the case of Dumitru Popescu (cited above, §§ 70–73), it has expressed an opinion that either a body granting the interception authorization should be independent, or there should be control over the authorizing body by a judge or an independent agency. Accordingly, in this context, control of an independent body – usually a judge with specific experience, should be the rule, and reserve methods should be the exception, ensuring close supervision (see Klass and Others, cited above, § 42 and § 55). The ex-ante authorization of such a measure is not an absolute requirement per se, as this may balance shortcomings of authorization in the part which has thorough post factum juridical supervision (see Kennedy, cited above, § 167). From the Court's perspective, the control of a politically responsible member of the executive branch does not provide adequate guarantees.

Post factum judicial control, by granting the right to appeal against the court decisions, actions, or omissions of public authorities, officials, and officers in the field of national security and defense (Art. 9 of the Law № 2469-VIII), is not an efficient alternative, given that even the invalidation of the relevant decision of the NSDC of Ukraine on the application of special restrictive measures and its abolition does not restore rights, freedoms or interests limited during the restrictions.

Moreover, such control is currently carried out only when a person brings the matter before the court when appealing the relevant decisions. In fact, it causes the transfer of responsibility for proving the legality/illegality of coercive measures from the power entity to the person.

5. Conclusions

Special economic and other restrictive measures (sanctions) may be applied to citizens of Ukraine only if they are entities involved in terrorist activities. This fact must be confirmed by a court decision adopted following the procedure established by the Criminal Procedure Code of Ukraine or the Code of Administrative Procedure of Ukraine.

As the application of coercive measures to citizens of Ukraine and legal entities-residents in Ukraine relies on the recognition of their involvement in criminal activities, judicial authorization during the application of such restrictive measures is a universally recognized requirement to ensure compliance with the rule of law in disputes. The administrative procedure of control through the decision of the NSDC of Ukraine, which is put in force by the decree of the President of Ukraine, as well as the right to follow-up judicial control of its legality, cannot provide an alternative to the above guarantees.

Sanctions are the measures of state coercion applied to a person while implementing state policy by establishing additional conditions for economic and financial activities in Ukraine, using state resources owned by the Ukrainian people to prevent their exploitation to the detriment of the people, state or universally recognized values of the world law and order. Not all of them are means restricting rights, but the state, represented by authorized bodies, is changing approaches to exercising individual rights to ensure the relevant public interest, which is manifested in the statutory purpose of sanctions. Sanctions are not measures of the legal responsibility of an individual.

Pursuant to Art. 4 of the Law № 1644-VII, alternate and general wording of sanctions by reproducing them in the law enforcement decision of the NSDC, which is put into effect by the decree of the President of Ukraine, does not indicate unlawful interference with the rights, freedoms and interests of persons subjected to their application; such a sanction is further implemented under specific conditions of the disputed legal relations, ensuring the adaptation of the sanctions regime to a particular situation of a person.

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ГРОМАДЯНИ УКРАЇНИ ЯК СУБ'ЄКТИ ЗАСТОСУВАННЯ СПЕЦІАЛЬНИХ ЕКОНОМІЧНИХ ТА ІНШИХ ОБМЕЖУВАЛЬНИХ ЗАХОДІВ (САНКЦІЙ) ІЗ БОКУ УКРАЇНСЬКОЇ ДЕРЖАВИ

Анотація. ***Мета статті*** – встановити правові підстави та обґрунтувати доцільність застосування спеціальних економічних та інших обмежувальних заходів (санкцій) до громадян України, а також пов'язані із цим гарантії забезпечення їхніх прав, свобод та інтересів.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. Розглянуто питання конституційності запровадження спеціальних економічних та інших обмежувальних заходів (санкцій) як механізму державної політики, а також вимоги щодо забезпечення правомірності їх застосування до громадян України.

Висновки. Спеціальні економічні та інші обмежувальні заходи (санкції) можуть застосовуватися до громадян України лише в тому разі, якщо вони є суб'єктами, які здійснюють терористичну діяльність. Це має бути підтверджене судовим рішенням, прийнятим у порядку, встановленому Кримінальним процесуальним кодексом України або Кодексом адміністративного судочинства України. «Судова авторизація» є загальновизнаною вимогою гарантування дотримання принципу верховенства права у спірних правовідносинах. Адміністративний порядок контролю шляхом прийняття рішення Ради національної безпеки і оборони України, яке вводиться в дію указом Президента України, а також право на подальший судовий контроль не здатні забезпечити альтернативу зазначених гарантій. Санкції є заходами державного примусу, які застосовуються до особи у процесі здійснення державної політики шляхом встановлення додаткових умов режиму економічної та фінансової діяльності на території України. Санкції не є заходами юридичної відповідальності особи. Альтернативне та загальне формулювання санкцій у правозастосовному рішенні Ради національної безпеки і оборони України, яке вводиться в дію указом Президента України, не свідчить саме по собі про протиправне втручання у сферу прав, свобод та інтересів осіб, до яких воно застосоване, оскільки надалі така санкція підлягатиме реалізації відповідно до конкретних умов із забезпеченням адаптації режиму санкцій до індивідуальної ситуації.

Ключові слова: суверенітет, державний примус, судова авторизація, терористична діяльність, обмеження прав, свобод та інтересів.

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PUBLIC INSTITUTE OF ENVIRONMENTAL IMPACT ASSESSMENT

Abstract. ***Purpose***. The article deals with the study of the legal regulation of environmental impact assessment, and the express purpose is to substantiate the relevant administrative institute.

Research methods. Research methodology is stipulated by the article's purpose, and thus, both general and special methods of scientific cognition are used. The contribution involves addressing and studying the entities and subject of environmental impact assessment, the assessment procedure, as well as legal liability for the violation of statutory requirements. This structure of the study allows achieving the objectives set by the authors.

Results. The study of the legal regulation of environmental impact assessment allowed the authors to conclude that public-law institute is a set of rules specifying the entities and subject of impact assessment, the procedure for impact assessment, powers of authorized bodies and the rights and obligations of economic entities, appeals and control in the field of impact assessment. In particular, the entities entering into relevant legal relations are the Ministry of Environmental Protection and Natural Resource, regional, city Kyiv and Sevastopol state administrations, and their ecology and natural resources departments. The Law of Ukraine "On Environmental Impact Assessment" imperatively regulates the impact procedure, and all its stages are rendered in the Unified National Environmental Impact Assessment Registry to ensure transparency and public access. Criteria for specifying planned activities, the procedure for submitting comments, suggestions, conducting public hearings, financing of public discussion are imperatively regulated by the law and bylaws.

Conclusions. All mentioned in the article give grounds to argue about the formation and establishment of a new public-law institute of environmental impact assessment. It regulates public relations arising in assessing the adverse effects of the planned activity on the environment and human health, the development of measures designed to prevent, avert, avoid, reduce, eliminate such effects, and ensure the increase of positive influence.

Key words: impact assessment, environment, natural environment, planned activity, ecological expertise.

1. Introduction

The Constitution of Ukraine guarantees everyone the right to an environment that is safe for life and health. Everyone shall be guaranteed the right of free access to information about the environmental situation, the quality of foodstuffs and consumer goods, as well as the right to disseminate such information. At the same time, the Basic Law obliges everyone not to harm nature and compensate for the damage caused.

The ratified international acts determine the statutory regulation of environmental impact assessment: the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) ratified by the Law of Ukraine № 832-XIV dated 06.07.1999; Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) ratified by the Law of Ukraine

№ 534-XIV dated 19.03.1999; Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (SEA Protocol) ratified by the Law of Ukraine № 562-VIII dated 01.07.2015; Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part (UA-EU Association Agreement) ratified by the Law of Ukraine № 1678-VII dated 16.09.2014.

Branch laws, including administrative ones, elucidate and specify the relevant provisions of the Constitution and international acts. In particular, it also concerns the assessment of the adverse effects of the planned activity on the environment and human health, the development of measures designed to prevent, avert, avoid, reduce, eliminate such effects, as well as ensure the increase of positive influence. Therefore, the purpose of the article is to substantiate an individual public institute of environmental impact assessment within the framework of administrative law.

2. Entities and subject of impact assessment

At present, the obligation to assess environmental impact is one of the root principles of environmental protection under the provisions of the Law of Ukraine "On Environmental Protection". Environmental impact assessment is also one of the environmental protection tools (Malysheva et al., 2018). The immediate and obvious goal of assessment is to inform economic entities about the potential environmental implications of their actions, but environmental impact assessment is increasingly promoted in the broader context of sustainable development and its initial content – as a contribution to more sustainable forms of development (Jay et al., 2007).

In decision-making on economic activity, the special law "On Environmental Impact Assessment" № 2059-VIII dated 23.05.2017 regulates legal and organizational frameworks of environmental impact assessment focused on preventing environmental damage, maintaining environmental safety, environmental protection, rational use, and restoration of natural resources. However, the development of the relevant legislation has come a long way (Eremeeva, 2017). According to statutory provisions, the mentioned law de facto substituted the law "On Ecological Expertise" (case № 580/1078/19). The new legal institute of environmental impact assessment is more complex in content and procedure than the state environmental expertise (which it superseded); it covers a broader range of participants (Sydor, 2018, p. 145) and provides for detailed regulation of public debates and sanctions for violations of the legislation on environmental impact assessment. It sufficiently regulated the rights and obligations of individuals and the powers of authorities that became the blueprint for the progress of the relevant case law (Kovalenko, 2019; Digest of the case law of the Supreme Court, 2019).

As for the case law, the Digest of the practice of the Supreme Court in disputes arising in terms of environmental protection and environmental rights (Digest of the case law of the Supreme Court, 2019) attributes disputes over environmental impact assessment to a separate group of cases. This is primarily stipulated by the high risk of negative implications while implementing potential environmentally unfriendly activities and the mandatory consideration of findings such implications with the necessary and direct participation of the public.

The Law "On Environmental Impact Assessment" defines the following range of participants in legal relations: 1) a business entity or public authorities, local self-government bodies, which are customers of planned activities and thus, their legal status is equated to business entities; 2) government entities: the authorized central body, authorized territorial bodies, other executive bodies, local self-government bodies; 3) the public; 4) the country of origin and the affected country.

The authorized central body is a central executive body, which ensures the formation and implementation of state policy on environmental protection – the Ministry of Environmental Protection and Natural Resources of Ukraine. Authorized territorial bodies are oblast, city Kyiv and Sevastopol state administrations: relevant units (departments) for ecology and natural resources, executive body for ecology and natural resources of the Autonomous Republic of Crimea.

The public is defined as one or more natural or legal persons, their associations, organizations, or groups. According to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ratified by Ukraine, "the public" means one or more natural or legal persons, their associations, organizations or groups performing under national legislation or practice; "the public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and

meeting any requirements under national law shall be deemed to have an interest. The case law shows that the conventional definition is also taken into account by the courts when considering the relevant category of cases (case № 640/21828/18).

The Ministry of Environmental Protection and Natural Resources of Ukraine coordinates and provides environmental impact assessment and reports on environmental impact assessment. It also maintains the Unified National Environmental Impact Assessment Registry, the procedure for which is determined by the Decree of the Cabinet of Ministers of Ukraine № 1026 dated 13.12.2017. Information available on the website of the Unified National Environmental Impact Assessment Registry is open, and free access is via the Internet (Register of environmental impact assessment).

According to the Law "On Environmental Impact Assessment", there are two categories of activities and facilities, the initiation of which may have a significant impact on the environment and is subject to impact assessment:

1) oil and gas refineries, thermal power plants, and other facilities for the production of electricity, steam and hot water, nuclear power plants, metallurgical enterprises, chemical industry, construction of facilities (airports, aerodromes, highways, automobile roads, main railway lines of general use, hydraulic constructions, waste management, dams, quarries, surface mining operations, and other similar industries;

2) individual types and high production capacities in agriculture, forestry and water management, mining industry, energy industry, mineral processing, food industry, textile, leather, woodworking, and some infrastructure projects.

However, scientific literature contains viewpoints on the improper identification of the scope of environmental impact assessment and offers options for specifying the lists of activities which are subject to mandatory environmental impact assessment to improve its statutory regulation (Erofeev, 2021; Tretiak, 2016).

Impact assessment is obligatory to the planned activity, i. e., the activity which is being planned, before rendering the decision to carry out the activity, as its implementation is devoid of any meaning after taking such a decision. As a general rule, an assessment cannot be conducted towards activities which are already in progress. An exception comprises expansion and alterations, including revision or updating of the conditions of the planned activity established (approved) by the decision to carry out the planned activity or extension of its implementation, reconstruction, technical re-equipment, overhaul, reorientation of activities and facilities which are subjected to obligatory assessment.

In addition to statutory provisions, the Government Resolution "On Criteria for Determining Planned Activities Not Subject to Environmental Impact Assessment" № 1010 dated 13.12.2017, exercises the regulation of the scope of impact assessment.

3. Approval of environmental impact assessment

The statutory procedure of environmental impact assessment consists of several stages: 1) business entity's sharing informing with the authorized territorial body about the intention to carry out the planned activity; 2) the publication of a notice of planned activities subject to environmental impact assessment; 3) the announcement of the beginning of a public discussion of the impact assessment report; 4) ensuring that the business entity drafts an environmental impact assessment report; 5) the business entity's submission of a drafted report on environmental impact assessment and announcement of the beginning of its public discussion; 6) a public discussion in the process of environmental impact assessment; 7) the issuance of an opinion on environmental impact assessment by the authorized central or territorial body (Aleksyeyeva, 2018).

To gain transparency and public access, each of these stages is elucidated in the Unified Environmental Impact Assessment Registry. A registration file, involving the following components, is created in the registry: a notification of the planned activities subjected to environmental impact assessment; the request of the business entity to offer all essential requirements for the scope of examination; all public comments and suggestions on the planned activity, examination scope to be included in the report on environmental impact assessment; comments and suggestions of the authorized body; the announcement of the beginning of a public discussion of the environmental impact assessment report; environmental impact assessment report; a report on public discussion; information on the decision to carry out the planned activity; other documents related to the planned activity submitted by the business entity.

The business entity informs the authorized territorial body about the intention to carry out the planned activity and assess its environmental impact through submitting a notification. The authority records it into the Unified Environmental Impact Assessment Registry;

during the next 20 working days, the public may provide the authorized territorial body with comments and suggestions on the planned activity, examination scope, and the level of information specification to be included in the environmental impact assessment report.

The business entity submits the environmental impact assessment report signed by its authors and the announcement of the beginning of report public to the authorized territorial body, and the latter enters the relevant report in the Unified Environmental Impact Assessment Registry, which keeps it throughout the planned activity, but not less than five years from the date of receipt of the decision to carry out the planned activity.

During environmental impact assessment, the public should be provided with timely, adequate, and efficient information in order to identify, collect, and take into account comments and suggestions from the public on planned activities. The public is free to submit any comments or suggestions which, in its opinion, relate to the planned activity without the need to justify them. Comments and suggestions may be submitted in writing, including in electronic form (in the manner prescribed by Article 7 of the Law of Ukraine "On Environmental Impact Assessment") and orally during public hearings, which are regulated by the Government Resolution on the Procedure for Conducting Public Hearings during Environmental Impact Assessment № 989 dated 13.12.2017.

A public discussion is funded by the business entity, and the amount of the charge is determined by the Order of the Ministry of Ecology and Natural Resources of Ukraine № 182 dated 30.05.2018. The charge covers expert services of members of expert commissions for environmental impact assessment, the organization of public hearings (rent of premises for public hearings, technical support of public hearings, business trips, the printing of materials, services of a public hearing organizer, etc.) and conducting a public discussion following the procedure of transboundary impact assessments, other costs related to the deduction of Ministry of Environmental Protection and Natural Resources of Ukraine. The report on the public discussion is entered into the Unified National Environmental Impact Assessment Registry together with the statement on the environmental impact assessment.

The conclusion of environmental impact assessment determines admissibility or justifies the inadmissibility of the planned activity and lays down the environmental conditions for its implementation. The conclusion of environmental impact assessment and ecological conditions for conducting the planned activity are mandatory. Article 9 of the Law of Ukraine "On Environmental Impact Assessment" defines its content. The conclusion of environmental impact assessment, other decisions, actions, or omissions of public authorities or local governments may be challenged by any natural or legal person in court.

4. Liability for the violation of laws on environmental impact assessment

Persons guilty of violating laws on environmental impact assessment are held liable for disciplinary, administrative, civil, or criminal liability. Violations of environmental impact assessment mean the provision of knowingly false or incomplete information on the environmental impact of the planned activities; the violation of the established procedure for environmental impact assessment; failure to consider the findings of environmental impact assessment when deciding on the planned activities; the preparation of a knowingly false report on environmental impact assessment or a knowingly false conclusion on environmental impact assessment; illegal interference in the preparation and issuance of an opinion on environmental impact assessment; the implementation of the planned activities subject to environmental impact assessment without conducting such assessment and obtaining a decision on the planned activities; non-compliance during economic activities of the operation of facilities and other interventions into the natural environment and landscapes with ecological conditions defined in the conclusion on environmental impact assessment, the decision to carry out planned activities and projects of construction, expansion, reshaping, liquidation of facilities, other interventions in the environment and landscapes, changes in these activities, or extension of terms (article 15 of the Law of Ukraine "On Environmental Impact Assessment", article 68 of the Law of Ukraine "On Environmental Protection").

According to article 91-5 of the Code of Ukraine on Administrative Offences, administrative liability means the provision of knowingly false or incomplete information on the environmental impact of planned activities, the violation of statutory requirements for environmental impact assessment, including the procedure for informing the public and conducting a public discussion and taking into account its results, as well as non-compliance during economic activity with the ecological conditions provided for in the conclusion on the environmental impact

assessment, the decision on the planned activities and construction projects, expansion, reshaping, liquidation (dismantling) of facilities, other interventions in the environment and landscapes, as well as changes in this activity or extension of its terms.

Article 1729-2 of the Code of Ukraine on Administrative Offenses "Violation of Laws on Environmental Impact Assessment" in the chapter "Administrative offenses related to corruption" provides for the body of offenses, which can be violated only by officials. According to its provisions, administrative liability means the violation of the procedure and deadlines for environmental impact assessment, interference in the preparation and issuance of an opinion on environmental impact assessment or a decision to take into account the findings of transboundary environmental impact assessment, the refusal of a legally authorized territorial body, legally authorized central executive body to issue the conclusion on environmental impact assessment on grounds not established by law.

Another group of administrative offenses in this area comprises ones that are related to the violation of the right to information (Komarnytskyi, 2020). This refers to Article 212-3 "Violation of the Right to Information and the Right to Appeal" of Chapter 15 "Administrative offenses encroaching on the established management order".

Moreover, article 16 of the Law "On Environmental Impact Assessment" additionally sets such sanctions as temporary prohibition and cessation of the operation of enterprises or individual industries, as well as violations that may be grounds for the application of each of the sanctions. At the same time, the Supreme Administrative Court expressed the legal position that the response measure in the form of a complete cessation of works is an exceptional measure, the choice of which is possible if the identified violations pose a threat to life and/or health. In choosing such a response measure, the plaintiff as an authority and the court, respectively, must have regard to the principle of proportionality of the response measure to those violations that occurred and those that remained unsettled at the time of trial, as well as a guarantee of a fair balance between defendant's interests and the public interests (case № 807/1410/17). Thus, recourse to the court with claims to the business entity through suspending works shall be carried out in compliance with the principle of legal certainty following the provisions of Article 2 of SAC and after the expiration of the voluntary compliance with the order (case № 804/3983/18). Otherwise, the application of response measures, as an exceptional measure, by litigation is applied to all business entities that have been inspected and have violations that, in the opinion of the specially authorized body, pose a real threat to human life and/or health (case № 420/5235/18).

5. Conclusions

Therefore, the individual public-law institute is being formed in domestic legislation – the institute of environmental impact assessment, which may either occupy a separate place in special administrative law or become a part of natural resource law (Bilash, Karabin, 2021). The subject of the regulation of the institute of environmental impact assessment is public relations arising in assessing the adverse effects of planned activities on the environment and human health, developing measures to prevent, avert, avoid, reduce, and eliminate such effects, and enhance positive impacts. The institute's tasks are to regulate the procedure of environmental impact assessment clearly and properly that ensures openness and transparency, accessibility and public participation in decision-making, an approximation to EU acquis, and compliance with international agreements.

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ПУБЛІЧНО-ПРАВОВИЙ ІНСТИТУТ ОЦІНКИ ВПЛИВУ НА ДОВКІЛЛЯ

Анотація. ***Мета.*** Статтю присвячено дослідженню питань правового регулювання оцінки впливу на довкілля, а безпосередньою метою є обґрунтування відповідного окремого адміністративно-правового інституту.

Методи дослідження. Методологія дослідження зумовлена метою роботи, тому використовуються як загальнонаукові, так і спеціальні методи наукового пізнання. Зміст дослідження полягає в опрацюванні та вивченні суб'єктів і предмета оцінки впливу на довкілля, власне процедури оцінки, а також юридичної відповідальності за порушення встановлених законодавчих вимог. Така структура дослідження дає змогу досягти завдань, що поставлені авторами.

Результати. Проведене дослідження правового регулювання оцінки впливу на довкілля дало змогу дійти висновку, що сукупність норм, які визначають суб'єктів і предмет оцінки впливу, процедуру проведення оцінки впливу, повноваження уповноважених органів та права й обов'язки господарюючих суб'єктів, оскарження та контроль у сфері оцінки впливу, є публічно-правовим інститутом. Зокрема, суб'єктами, які вступають у відповідні правовідносини, є Міністерство захисту довкілля та природних ресурсів України, а також обласні, міські Київська й Севастопольська державні адміністрації та їх підрозділи з питань екології і природних ресурсів. Процедура оцінки впливу імперативно регламентована Законом України «Про оцінку впливу на довкілля», для забезпечення прозорості та доступу громадськості всі її етапи знаходять відображення в Єдиному реєстрі з оцінки впливу на довкілля. Критерії визначення планованої діяльності, порядок подання зауважень і пропозицій, проведення громадських слухань, фінансування громадського обговорення врегульовано імперативно законом та підзаконними актами.

Висновки. Усе викладене у статті в комплексі дає підстави говорити про формування та становлення нового публічно-правового інституту оцінки впливу на довкілля, предметом регулювання якого є суспільні відносини, що виникають у сфері оцінки негативних наслідків планованої діяльності для довкілля і здоров'я людини, а також розроблення заходів, спрямованих на запобігання, відвернення, уникнення, зменшення та усунення такого впливу, і забезпечення посилення позитивного впливу.

Ключові слова: оцінка впливу, довкілля, навколишнє природне середовище, планована діяльність, екологічна експертиза.

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ADMINISTRATIVE INSTRUMENTS FOR ACTIVITIES OF PUBLIC ADMINISTRATION IN LOCAL DEVELOPMENT IN UKRAINE

Abstract. The ***purpose of the article*** is to establish administrative instruments for the activities of public administration in local development in Ukraine.

Results. The article studies legal regulations and theoretical developments concerning the concept and elements of administrative instruments of the activities of public administration in local development in Ukraine. It is established that the administrative instruments of the activities of public administration in local development can be classic forms of administrative activity and specific methods of their implementation. The author argues that the main instrument for public administration of local development in Ukraine is an administrative provision, or more precisely, their totality in a specific regulation, the most recent of which is represented by the legal regulatory framework that logically integrates all the principles, rules and procedures that are essential for the efficiency and effectiveness of a particular public administration. The study concludes that the instrument of implementation of public administration of local development in Ukraine and the instruments of activities of public administration implementing the mechanism for state power and service implementation of public authority in local communities are different legal phenomena, while the instruments of its implementation are concrete administrative actions of authorized public administrators of local development.

Conclusions. Therefore, the administrative instruments for the activities of public administration in local development in Ukraine are the interrelated set of external expressions of the activities of the public administrators (forms) and the ways of their influence on legal relations (methods) in respect of local development administration, which contribute to the implementation of specific actions, goals and strategies for local development, settlement of local issues, and meeting the legitimate needs of society in the democratization process.

Key words: administrative legal instruments, local development, public administration, activities, forms, methods, administrative provision.

1. Introduction

The processes of political transformation in the State, the establishment of a new State structure and a new system of local self-government have required new views on the already existing forms and methods of public administration of local development in Ukraine. Although the legal science pays sufficient attention to the study of the fundamental principles of the functioning of local development, the issues of organizational legal forms and methods of work of public administration on local development in Ukraine remain largely neglected by scientists, despite the increasing scope of issues being solved by the local authority (Shpak, 2013, pp. 58–62).

The development of regional self-government, impact of decentralization on the development of the State and territorial communities, improvement of the organizational and methodological principles of administration of local and regional development and some related public administration issues have been studied by scientists such as: V. Averianov, M. Azhazha, O. Altunina, A. Artemenko, O. Batanov, I. Bezena, Yu. Bytiak, K. Blishchuk, O. Bobrovska, I. Bovsunivska, H. Vasylchenko, Yu. Vorobiov, P. Vorona, V. Voronkova, O. Yevsiukova, N. Yeremenko, Ya. Zhovnirchyk, O. Zahorodnyuk, O. Zamrii, O. Zvizdai, A. Zienina-Bilichenko, P. Klymenko, M. Kovalenko, M. Kovaliv, A. Kozhyna, K. Kolesnykova, N. Kolisnichenko, N. Komar, I. Kostenok, V. Kostytskyi, V. Kruhlov, S. Maistro, Yu. Napalkina, D. Nekhaichuk, O. Nyzhnyk, O. Remeniak, S. Rudeichuk,

L. Sameliuk, O. Svitovyi, I. Semyhulina, S. Serohin, M. Sydor, and others. However, from the perspective under concern, the issue has not been addressed in their scientific research.

The ***purpose of the article*** is to establish administrative instruments for the activities of public administration in local development in Ukraine.

2. Particularities of public administration

Generally, the instruments of the activity of public administration in local development in Ukraine are a set of ways of exercising their competence. However, literature review reveals a lack of unified, well-established scientific approaches to the issue of administrative instruments of public administration activities in the field of local development in Ukraine (Shpak, 2013, pp. 58–62).

In particular, contemporary academic standpoints state that public administration instruments include the forms and methods of administrative activities of public administration (Halunko et al., 2018, p. 143). Thus, some scientific perspectives should be analysed to formulate the essence of the forms of activities. For example, Yu. Starilov defines forms of administration as externally expressed and legally formalized actions of an administration body (or an official) within its competence and with legal effects defined by law (Starilov, 2002). The scientist argues that the forms of public administration are characterised as follows: they are set out in a legal regulation; they are of a State-power nature; they are subsidiary due to the by-law nature of the powers of administration and its officials; the forms of public administration are executive and administrative. According to the scientist, the forms of public administration are used by the executive authorities, that is, the administrative bodies of public authority. Specific forms of public administration include the issuance of legal regulations, non-legislative (individual) legal regulations, conclusion of contracts, other legally significant acts on the basis of a law or on the basis of an issued administrative legal regulation, organizational actions, logistical actions (Starilov, 2002, p. 212).

According to V. Bila, the legal form of public administration is an objectivation, structured in accordance with the established legal procedure, in the administrative law of the expression of the will of the authorized person to perform functions of public administration of the subject, which gives rise to legal effects in substantive and procedural matters. The above-mentioned effects arise in accordance with the scope, legal force and legal content of the power dictates defined by the competence of the person expressing the will and by the stage of the administrative-legal regulatory mechanism (Bila, 2020, p. 4).

Referring directly to the concept of "instruments of administrative activity", I. Paterylo comprehensively determines that the replacement of the category of "forms of State administration" with the concept of "instruments of activities of public administration" is now necessary and timely; these are the totality of means used by public administrators to regulate public relations arising in public administration (Paterylo, 2013, p. 289).

More systematically, V. Halunko defines the instrument of public administration as an external expression of the homogeneous in its legal nature groups of administrative actions by public administrators, carried out in strict compliance with the competence defined by law, with a view to achieving the result required for public administration (Halunko et al., 2018, p. 143).

Moreover, from our perspective, the main instrument for public administration of the local development in Ukraine is an administrative provision, or more precisely, their totality in a specific regulation, the most recent of which is represented by the legal regulatory framework that logically integrates all the principles, rules and procedures that are essential for the efficiency and effectiveness of a particular public administration.

We are convinced that the instrument of implementation of public administration of local development in Ukraine and the instruments of activities of public administration implementing the mechanism for State power and service implementation of public authority in local communities, are different legal phenomena. For example, one of the instruments of public administration of local development in Ukraine is the State Strategy for Regional Development (currently approved for 2021–2027 by the Resolution 695 of the Cabinet of Ministers of 5 August 2020), while the instruments of its implementation are concrete administrative actions (forms and methods) of authorized public administrators of local development.

Nevertheless, in the administrative law study, forms of public administration are forms of administrative activity of public administration grouped into: issuance of administrative regulations (issuing by-laws and individual administrative regulations); concluding administrative agreements; performing other legally significant administrative actions; logistical operations (Halunko et al., 2018, p. 143).

In fact, the issuance of individual administrative regulations is the most common way of exercising administrative powers by public administration bodies; without their issuance, no more or less important case in this field can be resolved. The issuance of individual administrative regulations is close to the regulatory, but not identical. The difference is that individual administrative regulations establish, modify or terminate specific administrative legal relations. In contrast with regulatory ones, they address specific actors in administrative relations and are terminated after the exercise of the rights and obligations established therein (Halunko et al., 2018, p. 135).

V. Bila studies the category of individual regulation of public administration and highlights the following main features:

1) it is the expression of the will of the public administrator to exercise own competence in respect of a specific situation, the person, the property, the object of the material world and the legal regime. In contrast with a legal regulation, an individual regulation of public administration is not always a decision and is not always of a managerial nature;

2) it is powerful, that is, binding, supported by legal means, including the possibility to use administrative coercive measures and legal liability;

3) it has special legal effects, such as the ability to bring about changes in the administrative and legal status of a person, the legal regime of property, the object, the territory and the situation. The difference between a legal regulation and an individual regulation of public administration is not only in the legal content, the functions performed and the modifications of the legal effects, but also in the scope of the latter. While a legal regulation of public administration may directly change the provisions of other branches of law, an individual regulation of public administration always causes changes in the administrative and legal status of a person, so indirectly influences one's ability to exercise rights and perform duties in other legal relations;

4) it expresses the state of the art in the functions of public administration, as it is exhausted by the execution of the prescriptions therein (Bila, 2020, p. 284).

The adoption of regulations by bodies and officials of local self-government is a legal form of the exercise of their own powers and powers delegated by the State. Legal regulations of local self-government differ in form, content, legal force, legal properties, action in time and space, procedure and grounds for adoption. The purpose of the classification is to identify the specificities of the groups of the regulations in question, which is important in their issuance. A proper classification orders a rather complex and comprehensive system of legal regulations of local self-government, enables to identify objective trends and patterns in the development of this system and to better understand the legal nature of these regulations, to establish clear control over their implementation, ensures a proper scientific approach in the systematization of these regulations, that is, contributes to the improvement of the legal forms of activity of bodies (officials) of local self-government (Kalynovska, 2009, pp. 219–224; Kovalenko, 1997, p. 3).

Individual regulations include the municipal legal regulation as a temporary official legal instrument adopted by the territorial community, a body or an official of local self-government within their own or delegated powers, in the manner and form prescribed by the Constitution, the laws of Ukraine, the Statute of the territorial community and the regulations of the Local Council, aimed at establishing, amending, supplementing (revising) or cancelling legally binding regulations intended for repeated application in the territory concerned. The system of municipal legal regulations is a complex and comprehensive set which, in terms of scope and composition, does not coincide with the general system of sources of Ukrainian law. The two systems overlap. The intersection point is the municipal legal regulations and regulations adopted within the scope of delegated powers, combined with the form of law such as legal regulations as well as regulatory contracts. The rules of conduct in the legal regulations of local self-government, although not originating from the State, but of State power character, since they exercise municipal power. The latter is an expression of the people's power, one of the foundations of the constitutional order of Ukraine. Therefore, in the provisions of local self-government regulations there is not only "power of authority" of local self-government, but also the authority, power of municipal authority as special public authority under the unified system of people's power (Petryshyna, 2012).

Therefore, the issuance of individual administrative regulations as a form of administrative activity of a public administrator of local development is law application of specific individual prescriptions of a public administrator, the legal content thereof is the creation, modification and termination of internal administrative legal relations, temporary or definite.

The collective issuance of regulatory and individual administrative regulations by

the public administrators of local development is the exercise of the will of the public administrator during his or her term of office of a general or specific individual nature, which define specific local development activities, goals and plans related to finance, infrastructure development, involvement of entrepreneurs, investors, business projects, improvement of the quality of services at the local level, addressing other local issues and different needs of the territorial community.

With regard to administrative contracts, an administrative contract is a public agreement between two or more subjects of administrative law, one of which is always a public administrator. The features of an administrative contract are: 1) subjectivity – mandatory participation of the public administrator; 2) a subject matter – its content is the rights and obligations of the parties arising from the managerial functions of the public administrator (Halunko et al., 2018, p. 137).

3. Particularities of relations of public administration

Public administration bodies always enter into contractual relations for the purpose of realizing a public interest, while the delimitation of administrative and economic contracts are the effects of performing the obligations assumed by the unauthorised entity. If such effects achieve a socially significant result, the contract is an administrative one if the effect of the contract is to meet economic needs of public administration body and to generate profits for the economic entity, it is economic (Bila, 2020, pp. 264–265).

Thus, administrative contracts are a rather common form of administrative activity of public administrators of local development in Ukraine, which is concluded between two administrative actors in different forms (agreement, memorandum, protocol) and contain powers in respect of joint legal measures of activity, partnership, solution of obligations in the public-legal field of local development.

The next legal form is organizational actions. These include various activities aimed at improving the work of public administration personnel, advancing the organization of work and executive discipline, and implementing good practices and state-of-the-art technologies. At the same time, they can be used to influence social structures and citizens. These actions have no direct legal effect. Such actions may include various instructions, meetings, seminars, meetings, conferences, practical assistance, dissemination of good practices, monitoring activities, and the study of public opinion, measures to introduce the latest achievements of science and technology (Kolpakov, 2012, pp. 102–103).

Since the actions constituting the content of the organizational form of the activity do not necessarily have to be enshrined in the law, the organizational and legal form of the activity is often identified in the legal literature. In particular, according to the Law of Ukraine on Local Self-Government, the organizational legal forms of the activities of local self-government bodies may be: sessions; separate and general meetings of the permanent commissions, sub-commissions and working groups; meeting of the presidium of the oblast, district councils; meeting of provisional monitoring committees; personal work of the Chairman of the Council, the Secretary, the Deputy Chairmen of the Council, the Executive Committee of the Council, the work of the deputies in the electoral districts, the participation of the Chairman of the Council or the deputies in the general meeting of citizens in their place of residence; participation of deputies with the right to advisory vote in meetings of other local councils and their bodies and self-organization bodies; reports of the rural, township and city head to the territorial community; and reports of deputies to the electorate (Verkhovna Rada of Ukraine, 1997; Kaminska, 2010, p. 101).

At the same time, the list of organizational forms of work of local self-government bodies cannot be exhaustive. Community life is so multifaceted that new organizational forms of local government are constantly being sought to improve their functioning, so the legal and regulatory consolidation of the list of organizational forms of their work cannot hinder the further development of local self-government (Shpak, 2013, pp. 58–62; Semko, 2011, p. 55).

The implementation of organizational actions is structured, systematic form of activity of public administrators of local development (proceedings, conferences, sessions, meetings, etc.) determining the internal organization of their functioning for the exercise of the powers, tasks and functions of public administration in the field of administration of local development.

The focus should also be on the performance of logistical operations, which in most cases are auxiliary. They serve functioning of the entire public sector. These operations are aimed at an enabling environment for the performance of administrative functions by the actors concerned. Logistical operations include the preparation of materials for organizational activities, office management, the preparation of certificates, reports, documents, etc. The role and importance of logistical operations

cannot be underestimated. Administration is highly dependent on them (Kolpakov, 2012, pp. 102–103).

According to V. Halunko, logistic operations determine the provision by public administration of collection, storage and processing of information, use of technical means, logistical working conditions, etc. They play a auxiliary role in the system of administrative activities of public administrators (Halunko et al., 2018, p. 138, 143). These include actions that directly make a new legal provision, alter existing legal relations or become a necessary condition for legal effects, whether or not they are intended to do so. Examples of such actions include registration, documentation, taking an oath of office, enforcement of administrative sanctions, enforcement of coercive measures without the prior issuance of such regulations (for example, the use of firearms as a last resort) (Halunko et al., 2018, p. 138; Ivanyshchuk, 2014, p. 47).

Therefore, logistical operations, as forms of activity of public administration of local development in Ukraine, play a statutory role in legalizing legal relations in resolving local issues.

The above actions of public administration of local development are classical forms of their administrative activities, but special forms, such as those of the Ministry of Community and Territorial Development, should also be taken into account and, according to O. Pieshyi, be grouped into: 1) legal (legally significant) forms of activity: law-making (inter-departmental and departmental), law application (certification of legal facts, resolution of legal conflicts and bringing perpetrators to justice), constituent, monitoring and supervising, interpretation activities; 2) organizational forms: administrative and economic (logistical support for the Ministry's activities), organizational and prescriptive activities (staffing and operational management of the Ministry); 3) information: public disclosure of the Ministry's activities (press conferences, press releases, information stands, the official website) and responses to citizens' communications and information requests regarding access to public information; 4) communication: communication between the Ministry and other public administration bodies and exchange of information within a unified electronic document flow information system (Pieshyi, 2019). The Ministry of Community and Territorial Development, in carrying out its tasks, cooperates with other State bodies, subsidiary bodies and services established by the President of Ukraine, temporary advisory, consultative and other subsidiary bodies, formed by the Cabinet of Ministers of Ukraine, bodies for local self-government, citizens' associations, public unions, trade unions and employers' organizations, the relevant bodies of foreign States and international organizations, as well as enterprises, institutions, organizations (communication form) (Pieshyi, 2019).

Thus, a scientist O. Pieshyi vividly demonstrates the interrelation of the category of form and method of activity of public administration, which should be considered inseparably (Pieshyi, 2019). The legal literature review reveals that if the form of public administration performance can be rather clearly demonstrated, as well as its legal content and main function, its methods are less legally regulated. However, there are some difficulties in understanding the category of method, with its identifying in contrast with the form of public administration, as well as with the legal regulatory method. The most well-founded view is that methods of public administration are applied by authorised actors of administrative law (public administration), where the form is primary to the method. It shows that specific actions of public administration are carried out through their incorporation, for example, into a legal regulation entailing legal effects. On the contrary, the method enables to see the nature of the relationship between the subject and the object of the influence. It necessarily finds expression in the form of public administration. That is, if there were no form of public administration, the methods of public administration would have been meaningless. For example, how can administrative sanctions be applied or a natural or legal person licensed without documenting such actions, that is, without adopting a legal regulation of public administration? Therefore, the method of public administration is inextricably linked to its forms (Kovalenko, 2012, p. 278; Kuzmenko, 2018, p. 74).

4. Conclusions

To sum up the consideration of the issues of local development instruments, the author makes the following conclusions.

The main instrument for public administration of local development in Ukraine is an administrative provision, or more precisely, their totality in a specific regulation, the most recent of which is represented by the legal regulatory framework that logically integrates all the principles, rules and procedures that are essential for the efficiency and effectiveness of a particular public administration. The instrument of implementation of public administration of local development in Ukraine and the instruments of activities of public administration implementing the mechanism for State power and service implementation of public authority in local communities, are different legal phenomena. For example, one of the instruments of public administration of local development in Ukraine is the State

Strategy for Regional Development (currently approved for 2021–2027 by the Resolution of the Cabinet of Ministers of 5 August 2020 № 695), while the instruments of its implementation are concrete administrative actions of authorized public administrators of local development, such as:

– the issuance of individual administrative regulations as a form of administrative activity of a public administrator of local development is law application of specific individual prescriptions of a public administrator, the legal content thereof is the creation, modification and termination of internal administrative legal relations, temporary or definite. The collective issuance of regulatory and individual administrative regulations by the public administrators of local development is the exercise of the will of the public administrator during his or her term of office of a general or specific individual nature, which define specific local development activities, goals and plans related to finance, infrastructure development, involvement of entrepreneurs, investors, business projects, improvement of the quality of services at the local level, addressing other local issues and different needs of the territorial community;

– the administrative contracts are a rather common form of administrative activity of public administrators of local development in Ukraine, which are the concluded between two administrative actors in different forms (agreement, memorandum, protocol) and contain powers in respect of joint legal measures of activity, partnership, solution of obligations in the public-legal field of local development;

– the implementation of organizational actions is structured, systematic forms of activities of public administrators of local development (proceedings, conferences, sessions, meetings, etc.) determining the internal organization of their functioning for the exercise of the powers, tasks and functions of public administration in the field of administration of local development;

– logistical operations, as forms of activity of public administration of local development in Ukraine, play a statutory role in legalizing legal relations in resolving local issues.

Therefore, the administrative instruments for the activities of public administration of local development in Ukraine are the interrelated set of external expressions of the activities of the public administrators (forms) and the ways in which they influence legal relations (methods) in respect of local development administration, which contribute to specific local development actions, goals and strategies, to addressing local issues and to meeting the legitimate needs of society in the democratization process.

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АДМІНІСТРАТИВНИЙ ІНСТРУМЕНТАРІЙ ДІЯЛЬНОСТІ ПУБЛІЧНОЇ АДМІНІСТРАЦІЇ У СФЕРІ МІСЦЕВОГО РОЗВИТКУ В УКРАЇНІ

Анотація. ***Метою статті*** є з'ясування адміністративного інструментарію діяльності публічної адміністрації у сфері місцевого розвитку в Україні.

Результати. У статті досліджено нормативно-правові акти та теоретичні доробки щодо поняття, елементів адміністративного інструментарію діяльності публічної адміністрації у сфері місцевого розвитку України. Визначено, що адміністративний інструментарій діяльності публічної адміністрації у сфері місцевого розвитку представлений класичними формами адміністративної діяльності та специфічними методами їх реалізації. Автором доведено, що основним інструментом публічного адміністрування місцевого розвитку в Україні є адміністративно-правова норма, а точніше, сукупність норм у певному акті. Останні представлені законодавчо-нормативною базою, що логічно об'єднує всі принципи, правила та процедури, дотримання яких є необхідною умовою ефективності й результативності конкретної адміністративної діяльності публічної адміністрації. У роботі зроблено висновок про те, що інструмент реалізації публічного адміністрування місцевого розвитку в Україні та інструменти діяльності публічної адміністрації, яка реалізовує механізм утілення державно-владної та сервісної реалізації публічної влади на місцях, є різними правовими явищами, а інструментами її реалізації слугують конкретні адміністративні дії уповноважених суб'єктів публічної адміністрації місцевого рівня.

Висновки. Таким чином, адміністративні інструменти діяльності публічної адміністрації у сфері місцевого розвитку в Україні – це взаємозалежна сукупність зовнішнього вираження діяльності суб'єктів публічної адміністрації (форм) і способів їх впливу на правовідносини (методів) щодо адміністрування місцевого розвитку, завдяки яким реалізуються конкретні заходи, цілі та стратегії місцевого розвитку, розв'язуються питання місцевого значення та задовольняються законні потреби громади у процесі демократизації.

Ключові слова: адміністративно-правовий інструментарій, місцевий розвиток, публічна адміністрація, діяльність, форми, методи, адміністративно-правова норма.

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LAW AND IDEOLOGY: THE ESSENTIAL UNITY

Abstract. The article is devoted to the study of legal ideology as a separate legal category and values of modern society through the understanding of the categories "law" and "ideology", their interrelation in society. ***The purpose*** of the article is to determine the essential unity of these categories and issues related to the organization of the ideological and legal sphere of modern society.

Research methods. The research is based on general scientific and special methods of scientific cognition.

Results. It is substantiated that the ideology of the society of the XXI century is filled with the values reflected through the system of legal ideas, and law acquires growing ideological content. The mechanism for the implementation of modern ideology is closely connected with law, and such connection is caused by legal, democratic character of modern statehood the basis of which is the political and legal system grounded on compromise, the contract, and consensus. In addition, there is an increasing role of legal discourse in the ideological sphere of society, which solves the problems of legitimacy of state power and the existing socio-political order, and therefore, legal ideology becomes more important in the ideological sphere of modern society.

The article provides the division of types of ideology, as follows: metaphysical type, dialectical type, and modern type of ideology.

The author conducts the analysis of the functioning of law as a general measure of interconnection of all social phenomena, which regulates relations at all social levels: multinational, intergovernmental, local, and all spheres of social life: legal, economic, social-political, spiritual, family etc., and ideology, which a product of the spiritual life of people and subjected to the influence of law. The impact of law on legal ideology, which contain objective and subjective conditions, is characterized.

Conclusions. It is proved that law functions as a general measure of the interaction of all social phenomena; it regulates relations at all levels of the social system (interstate, domestic, local), as well as in all spheres of public life (legal, economic, socio-political, spiritual, family, etc.). Ideology, as a product of people's spiritual life, cannot but feel the influence of law. The essential unity of law and ideology lies in the set of ideological ideas in a certain period of time, which are necessarily expressed in law and always take the form of law.

Key words: law, ideology, essential unity, legal system, political system.

1. Introduction

Society and the state, law and political institutions are evolving together with the ideological sphere of modern society. According to the author, it is essential to adhere to several theoretical dimensions while studying the category of "ideology" in the modern dimension:

– first, ideology has always accompanied the socialization of society and accompanies it as a necessary process of constructing ideas about reality. In this context, ideology is considered as a set of particular social influence aimed at its "conservation" and reproduction; such influence is possible only in the presence of a specific type of consciousness and conscious action. In R.A. Yuryev's opinion, such consciousness can be considered either as a consciousness that has been subjected to a kind of "manipulation", or as the consciousness of a "manipulator" (Yuryev, 2004, pp. 71–72). The scientist argues that the consciousness of the "manipulator" is also a product of social practices;

– second, ideology arises in a particular period of the development of society, depends on many factors, including the peculiarities of the historical evolution of society, the nature of the state-power dimension of society, the option of affecting the ideology of moral and traditional principles of society.

The complex nature of the content, structure and essence of ideology and law, the polistructural nature of their functional purpose and a special place in reforming modern society determine the diversity of doctrinal views on ideology and law that conditions the possibility of identifying certain areas (levels) of the study. Modern doctrinal studies of the phenomenon of ideology and law are carried out at the following levels:

– structural level (V.S. Lisovy, A.I. Klimenko, M.A. Reisner) specifies relations between ideology, consciousness and law;

– level of "reflection" (K. Mannheim, M.K. Mamardashvili) of ideology, as a philosophical problem, which studies it since the emergence of society; thus, the very historical and philosophical explication of the phenomenon of ideology is derived from the objective structures of social relations and historical process;

– practical level (L.A. Voitov, S.G. Kara-Murza) characterizes ideology as a means of solving practical problems which primarily concern not the negative interpretations of "ideology" associated with the mechanisms of power and coercion, but the integrative function of ideology which, in a pragmatic aspect, allows involving individuals in effective socio-practical interactions.

The purpose of the article is to identify the features of the doctrinal understanding of ideology and law, the possibilities and conditions of optimal ideological and legal support of the needs of modern society. Achieving this goal requires the solution of the following research tasks: a) determination of the main characteristics of law and ideology in terms of their modern doctrinal perception; b) clarification of the importance of ideology to various spheres of modern society; c) establishment of the unity between the categories "law" and "ideology" through the category "essence".

2. Transformation of the ideological and legal sphere of society

Modernity is characterized by a new qualitative component – the speed of data transfer, which is a much more important characteristic than the data themselves. Thought becomes short, superficial, unstable, but pervasive and fast. Human knowledge is not seen as a system but as a bright part of the mosaic, and the bearer of such knowledge does not feel discomfort, moving from one part to another with amazing speed, and does not even have time to comprehend his existence.

Z. Bauman substantiates the idea that the intensive movement of people, fund, information is an essential feature of modern society (Bauman, 2008, p. 78), which affects both the political structures and thinking of each person, including in the legal and ideological dimensions. Consequently, the transformation of the ideological and legal sphere of society happens. The scientist emphasizes that many features of thinking customary for people are due to the past social environment, which considered the spatial characteristics as the most important. Such atavisms in the legal sphere include a total political and legal ideology that has a religious or quasi-religious character (Bauman, 2008, p. 79).

Modern researchers pay attention to the existence of spatio-temporal characteristics of law and legal reality. J.L. Bergel, studying the problem of the environment of law, one of the aspects of measuring this environment calls space and time (Bergel, 2000, p. 195). E. Toffler and Z. Bauman draw attention to the important characteristics of modern society associated with changes in the ratio of social space and social time (Bauman, 2008, p. 100).

The growing role of time and the decreasing importance of space lead to the fact that in the political and legal sphere, ideology as a complex, relatively static structure is substituted by the technology of situational manipulation of public consciousness and human needs, which does not seem to need an ideology.

A.I. Klymenko supports this theory as really true, assuming that modern man does not need to understand what is happening in the formed "worldview" (Klymenko, 2016, p. 35). The scientist stresses that the "death" of ideology and its replacement by the manipulation technique does not happen instantly (Klymenko, 2016, p. 36).

J. Baudrillard argues that society observed as metaphysical (systemic) static ideological images of reality, establishing a political and legal ideal by often resorting to religious suprarational argumentation, was gradually replaced in the human mind with increasing importance of temporarily – dynamic characteristics of reality by dialectical ideology, which takes into account the dynamics and assumes the ideal at some time distance, some "bright future" (Baudrillard, 2006, p. 74).

J. Habermas, contrasting the ideology of traditional myth, notes that ideology always comes from a scientific standpoint and we can not talk about pre-bourgeois ideologies (Habermas, 2007, p. 44). Habermas's theory contains a philosophical view of ideology, which is identified with a dialectical ideological system that opposes metaphysical ideological systems. The theory of ideology of traditional myth, proposed by the scientist, contains

the idea of progress, which is qualitatively new in relation to the traditional idea of "return of the lost paradise" and is a victory of time over space. The image of the "holy place" gives way to the image of the "Holy stream of time", the understanding of life as a result is replaced by the attitude to life as a process (Baudrillard, 2006, p. 46).

The standpoint of A.I. Klymenko is scientifically sound: he argues that in modern society, there is a relatively new socio-political system that can undertake the whole ideological burden – a system of legal ideology. The scientist substantiates that the ideology of modern states can be characterized as legal. Legal ideology may contain quasi-legal (religious, moral, and others) elements – it depends on the method of substantiation (legitimacy) of the state (Klymenko, 2016, p. 31).

According to many experts, the perception of ideology as a universal idea or worldview that reflects a single system of views or a particular social order ("Russian idea", "capitalism", "communism", etc.) is anachronistic and ineffective (Reisner, 2008, p. 65). M.A. Reisner proves that the postmodernist interpretation of ideology paints a picture of the disintegration of a unified order into many fragments (Reisner, 2008, p. 38). A. Toffler substantiates the concept of the crisis of ideology and determines that such terms as "communist ideology", "capitalist ideology" no longer fit into modern scientific theories and definitions (Toffler, 2004, p. 48).

Taking into account the abovementioned, there are difficulties with the modern definition of ideology. Each historical period is characterized by a special understanding of this problem. Therefore, the theoretical and methodological analysis of the category of ideology, which is carried out in this section, must begin with the conceptualization of the concept of ideology.

The concept of "ideology" in legal, philosophical, sociological, political, and other areas is characterized by different approaches to its definition (Klymenko, 2016, p. 39).

In the modern reference literature, ideology (from the Greek – representation and logos – word, doctrine, knowledge) is defined as a system of views and ideas which interprets and asseses human attitudes towards reality and each other, social problems and conflicts, and contais goals (programs) of social and legal activities aimed at consolidating or changing (developing) these social relations (Marushchak, 2020, p. 100).

Any ideology by its nature and to a large extent is a political phenomenon designed to solve some problems in society, namely: the legitimacy of a certain order and justification of the unity of politically organized society, because the existence of ideology loses meaning outside the politically organized society. The scientific literature contains two opposing views on the relations between ideology and law.

The first view is to study the relations between ideology and law as ideological, where ideology is a higher and basic way of thinking than law.

There is the second (opposite) view, which corresponds to the academic tradition and understands ideology as one of the types of possible relations of ideology and law, along with which other types of relations are formulated. In such relations, the law itself is recognized as an ideology and a system of higher spiritual values, which is more or less realized by current legislation and the state. Law, in this regard, is understood as a natural law that exists above the rules of law, which only give it a certain verbal legal form, which only expresses the idea of law. This view, according to M.M. Kazantseva, explores the relationship between ideology and law with the help of "metaideotheory" (Kazantsev, 2010, p. 48). This theory, according to the scientist, classifies ideology, distinguishing:

a) ideologies of truth, or substantive ideologies, which are divided into ideologies of transcendent truth, is religious ideologies and ideologies of corporate or party truth, which take the form of class ideologies;

b) ideologies of relations develop into law itself, passing through the stages of ideology of law, legal ideology and ideology of legality and legality;

c) ideologies of action through teleology find meaning in the ideology of pragmatism, implemented through various programs and plans for national development, doctrines and concepts of improving social practice, national economy, society, state. Ideologies of action are related to law, they follow from it, because they begin and end with lawful action, or, conversely, declare themselves as criminal ideologies of extremism. And when such an ideology becomes dominant, it abolishes the law and laws in force in the state. In this case, the ideology of action is aimed, ultimately, any of the ideologies, each seeks to become an ideology of action, and therefore the ideology of pragmatism expresses a certain stage of maturity of the nation and state;

d) ideologies of qualities are associated with the practice of accumulating exceptional subjective qualities and values, including the qualities of the individual, state institutions, legislative and law enforcement practice in courts and in the executive branch, where the quality of legality and law play an exclusive and primary role. This ideology,

based on the ideology of transcendent truth and the divine origin of law, for many centuries created from the original party or corporation of invaders – the national aristocracy, which created a nation-state and nation in parallel with the people's involvement in civilization, education of citizens. However, this process is accompanied by contempt for values, decline in morality and decline of personal moral and ethical qualities, defamation of freedom, rights and justice, their replacement by law and formal legality with contempt for human rights, freedom, equality and the establishment of a cult of power as the dominant spirituality.

All researchers-ideologists unanimously determine the historical stage of development of ideology and law through the dominance of one phenomenon over another and vice versa. Scholars identify periods when ideology exists at such levels of awareness as law, religion, ideology of pragmatism and targeted programming of national (state) development – in others (Kazantsev, 2010, p. 50).

In H.M. Markovich's opinion, ideology plays a fundamental role in shaping state legal policy. According to the researcher, the modern rule of law puts man, his rights and freedoms in the central place, which serve as a starting point for further legal transformations. The existence of a state legal ideology promotes consistent and effective reformism (Markovich, 2021, p. 54).

3. Types of ideology

Modern scientific sources contain a division of types of ideology in accordance with the method of research, among which there are metaphysical type, dialectical type and modern type of ideology (Klymenko, 2016, p. 47).

The metaphysical type of ideology is total and, in political terms, it is characterized by the emergence of ideocratic and theocratic states with a strong total ideology, usually of religious content.

The dialectical type of ideology is no longer total, but permeates all spheres of human life. It is still strongly connected with the worldview system. This type of ideology is characteristic of rationalized states (Reisner, 2008, p. 118), acting not as "oracles" of ideology, not as theocracy, but as a kind of "pedagogical institutions" that broadcast "scientific ideology".

The modern type of ideology observed in the developed countries of the West is a "minimal" legal ideology, i. e., such a rational ideology, which in general, the most important moments, in terms of the needs of modern politically organized society, offers a fairly simple system of values. Modern ideology is legal with almost "exhausted" content, the main place in which is occupied by legal dogma (what is formally defined and enshrined in legal law) (Alekseev, 2006, p. 67), on the one hand, and the axiomatics of legal consciousness of society – on the other. This type of ideology is a kind of "minimum of ideology" and in principle meaningless. The content of the "minimal" legal ideology is the law or "legal beliefs" (Gurvich, 2004, p. 88), that is, legal ideas, by definition, are simplified and superficial, relating only to issues of socially significant behavior of the individual. But, as he emphasizes

According to S.S. Alekseev, the presence of a "minimal" legal ideology does not mean minimizing the ideological factor in modern life. The scientist argues that any, even minor changes in the minimum ideology entail very serious consequences for society (for example, if we draw an analogy with fresh water, the insufficient amount of which does not indicate a decrease in its significance, but rather vice versa) (Alekseev, 2006, p. 78).

The modern type of ideology – legal ideology, frees up space for manipulation of people's consciousness and increases the variability of such manipulation, while maintaining a minimum set of politically significant values and ideals on which man is focused. Under such conditions, the individual, breaking out of the slavery of total ideology, falls into the direct slavery of their material needs, emotions and passions (remaining alone with themselves) (Gurvich, 2004, p. 67).

G. Marcuse argues that a person can become a robot who does not think about anything but what he is directly dealing with and that allows him to meet their immediate needs and sublimated interests (Marcuse, 1994, p. 71).

Most modern scholars emphasize that the "current state" has no ideology other than the "minimal" legal, and this statement gives many scholars the opportunity to talk about the lack of ideology in such states, or even put forward the concept of deideologization (Alekseev, 2006, p. 113).

4. The influence of law on ideology

Modern scientific thought is based not only on the views of scientists and researchers, but also on the conclusions of legal practitioners who hold that the characteristics of a particular legal system is important legal ideology and this is due to the ideological component that exists in modern law and affects it.

Law functions as a general measure of interaction of all social phenomena, it regulates relations at all levels of the social system: interstate, domestic, local, as well as in all spheres of public life: legal, economic, socio-political, spiritual, family and others. And ideology, being a product of the spiritual life of people, can not help but feel the influence of law.

According to A.I. Klymenko, the process of the influence of law on legal ideology includes

both objective conditions and subjective factors. The objective side of this process, according to the researcher, is the impact on the legal ideology of existence, i. e. legal information is learned as a result of practical activities, communication with other people. From the subjective point of view – the law affects the legal ideology through legal training, education, propaganda (Klymenko, 2016, p. 36).

S.S. Alekseev notes that the law within the ideological orientation should play an educational role. The scientist emphasizes that with the help of law, the state can assert and strengthen the fundamental foundations of society, cultivating in people a sense of justice and goodness, which raises the problem of legal and moral education. S.S. Alekseev substantiates the creation in society of requirements for respect for the law, providing guarantees of compliance with the rule of law. The researcher concludes that the main task of the state in the process of forming the legal ideology of the individual is not only to replenish his legal knowledge, but also to increase the level of human consciousness, which should be guided not only by narrow personal interests but also the interests of society. in general. The scientist justifies that the state, exercising ideological and legal influence on human consciousness, forms in it not only legal but also moral ideology (Alekseev, 2006, p. 90).

Thus, law can influence ideology both directly (purposefully) and indirectly (not purposefully). The direct influence of law is the assimilation by the individual of aggregate, theoretically generalized legal beliefs through legal education and training. The indirect influence of law is that a person's legal ideas are formed individually in the process of influencing the social environment.

5. The essential unity of the categories of "law" and "ideology"

The essential unity of the categories "law" and "ideology" expresses the basic and decisive commonality in these categories, which is due to the deep, necessary and internal connections and development trends in modern society. The category "essence" is inextricably linked with the categories of law and ideology as independent phenomena. However, the essence is always hidden behind the phenomena and acts as the inner meaning of the phenomena of law and ideology, which is hidden from direct perception. The philosophy of idealism endows the essential unity of law and ideology with a spiritual, ideal meaning, considering it primary in relation to the material world. Dialectical materialism, in contrast to idealism, considers the essence of law and ideology in dialectical unity as stages of the movement of knowledge of these categories, proving that both law and ideology are phenomena that express some side of the essence, and the essence is always manifested in specific objects or processes (Cassen, 2009, p. 111).

Philosophers argue that the essence can change, develop in accordance with the general laws of development of the material world. Thus, E. Coret states that the essence is an intrinsically constitutive principle of the finite, through the limitation and separation of it from other meanings of existence, constructing its certainty. The essence of the categories of law and ideology, according to the scientist, is the negative principle, the principle of restriction: through the relative denial of other meanings of these categories, which, on the one hand, negatively limits, distinguishes this finite being from others; and on the other hand, due to the certain nature of each negation, positively gives to this finite being certainty of content, the semantic form of this finite being. Due to the negativity of the restriction of these categories, their single essence realizes the positivity of the essential and semantic images of the end result, which is specifically defined. Due to the essential unity of these categories, the ultimate essence is the emergence of the relative from the absolute as the finite from the infinite being (Coret, 1998, p. 124).

Exploring this issue using logic, the category "essence" is an integral category of "quality", without which the existence of these categories is impossible. The unity of the essence of law and ideology can be traced through the direct definition of these categories. V. Solovyov proved that law as a spiritual ideology, as a social phenomenon, contains ideological significance. Ideology as a philosophy of law that reveals the spiritual origins of the rule of law, organically linked to the categories of morality. Legal ideology evaluatively determines the content of normative-legal regulators, their expediency, cultivating human legal feelings, its legal psychology, substantiate the legal expediency of a certain vector of social development and guarantee the normal course of human life.

Thus, the essential unity of law and ideology is that the set of ideological ideas in a certain period of time is necessarily expressed in law and always takes the form of law.

6. Conclusions

Leeping in mind the above, the author concludes the following:

– modern conditions of the development of society pose a threat to the creation of global information space, the domination of which is based on the manipulation of consciousness;

– the law of modern society is increasingly becoming an ideology;

– normative feature of law gives way to ideology and an axiomatics of public legal consciousness emerges as a response to the formation of a "legal ideology";

– the essential unity of law and ideology is to strive to legitimize the only correct understanding of some phenomena and processes through rational (law) and irrational (ideology) value-affective means.

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ПРАВО ТА ІДЕОЛОГІЯ: СУТНІСНА ЄДНІСТЬ

Анотація. Статтю присвячено дослідженню проблеми правової ідеології як окремої правової категорії та цінностей сучасного суспільства через осмислення категорій «право» та «ідеологія», їх співвідношення в суспільстві. ***Метою статті*** є визначення сутнісної єдності цих категорій і питань, пов'язаних з організацією ідеологічно-правової сфери сучасного суспільства.

Методи дослідження. Дослідження ґрунтується на загальнонаукових і спеціальних методах наукового пізнання.

Результати. Обґрунтовано, що ідеологія суспільства XXI століття наповнюється цінностями, відображеними через систему правових ідей, а право набуває дедалі більшого ідеологічного змісту. Механізм реалізації сучасної ідеології тісно пов'язаний із правом, і такий зв'язок зумовлений правовим, демократичним характером сучасної державності, основою якої є політико-правова система, заснована на компромісі, договорі та консенсусі. Крім того, в ідеологічній сфері суспільства

зростає роль правового дискурсу, який вирішує проблеми легітимності державної влади та наявного суспільно-політичного ладу, а отже, в ідеологічній сфері сучасного суспільства правова ідеологія набуває дедалі більшого значення.

У статті здійснено поділ типів ідеології, серед яких – метафізичний тип, діалектичний тип та сучасний тип ідеології.

Здійснено аналіз функціонування права як загальної міри взаємодії всіх соціальних явищ, що регулює відносини на всіх рівнях соціальної системи (міждержавному, внутрішньодержавному, локальному) та у всіх сферах суспільного життя (правовій, економічній, соціально-політичній, духовній, сімейно-побутовій тощо), а також ідеології, яка є продуктом духовного життя людей та не може не відчувати на собі вплив права. Охарактеризовано процес впливу права на правову ідеологію, що містить як об'єктивні, так і суб'єктивні умови.

Висновки. Доведено, що право функціонує як загальна міра взаємодії всіх соціальних явищ; воно регулює відносини на всіх рівнях суспільної системи (міждержавному, побутовому, місцевому), а також у всіх сферах суспільного життя (правовій, економічній, соціально-політичній, духовній, сімейній тощо). Ідеологія, як продукт духовного життя людей, не може не відчувати вплив права. Істотна єдність права та ідеології полягає в сукупності ідеологічних уявлень у певний проміжок часу, які обов'язково виражаються у праві та завжди набувають форми права.

Ключові слова: право, ідеологія, сутнісна єдність, правова система, політична система.

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HISTORICAL DEVELOPMENT OF THE PROCEDURAL FORM OF THE COMPLETION OF A PRE-TRIAL INVESTIGATION IN UKRAINE

Abstract. ***The purpose of the article*** is to determine the historical stages of the procedural form of the completion of a pre-trial investigation on the territory of modern Ukraine.

Research methods. The paper is executed by applying the general scientific, historical, comparative, legal and dialectical methods of scientific knowledge.

Results. Historical and legal analysis of the procedural design of the completion of a pre-trial investigation in modern Ukraine has been carried out. The way of formation and historical development of the legal form of the indictment act is presented.

Conclusions. As a result of the study, three main historical stages of formation and development of the procedural design of the end of pre-trial investigation in Ukraine were identified: pre-revolutionary, Soviet and modern. The pre-revolutionary stage covers the time from Kievan Rus to the last years of the Russian Empire. The 1864 judicial reform made most significant changes in the procedural design of the completion of a pre-trial investigation in the pre-revolutionary period. This reform formally defined the duty of the prosecutor to draw up closing indictment in the form of an indictment act. The Soviet stage includes the period from the beginning of the establishment of Soviet government as a result of the civil war of 1917–1922 until the collapse of the USSR in 1991. Initially, the Soviet stage was characterized by the collapse of the achievements of the judicial reform of 1864. However, after the first codification of Soviet law, it was marked by the creation of a legal form of the closing indictment, which lasted with changes for almost a century. There are four most important legal acts of the Soviet stage: 1) Decree of the All-Russian Central Executive Committee "About the Court»" as of March 7, 1918; 2) Criminal Procedure Code of the USSR as of September 13, 1922, which introduced a legal form of closing indictment, consisting of descriptive and operative parts; 3) Criminal Procedure Code of the USSR as of July 20, 1927; 4) Criminal Procedure Code of Ukraine as of December 28, 1960. The current stage of formation and development of the legal form of the completion of a pre-trial investigation has begun with independence of Ukraine in 1991 and continues to this day. At this stage, the former Soviet legislation was adapted to the new socio-political realities, and eventually the new Criminal Procedure Code of Ukraine was adopted on April 13, 2012, which replaced the closing indictment with the indictment act.

Key words: criminal proceedings, criminal procedure legal relations, pre-trial investigation, criminal prosecution, report list, indictment act, closing indictment.

1. Introduction

Any concepts and phenomena of objective reality go their own way of formation and development, which occurs in accordance with the basic laws of dialectics as the fundamental logic of the existence and functioning of such concepts and phenomena. A pre-trial investigation and its procedural form, which under the current criminal procedural legislation of Ukraine is expressed in such legal document as an indictment act, are not exceptions. However, long before the appearance of the modern indictment act on the territory of contemporary Ukraine, related forms of the completion of a pre-trial investigation were used, the study of which requires special attention.

The modern form of the indictment act as the final procedural document of the pre-trial investigation stage reflects a long historical path and the accumulated experience of procedural formation of the completion of the pre-trial investigation on the territory of Ukraine. The very concept of modern indictment act is given in part four of Article 110 of the current Criminal

Procedure Code of Ukraine, being described as a procedural decision in which the prosecutor brings charges of a criminal offense and which ends the pre-trial investigation.

The closest to the current indictment act, both in terms of the time of appearance and its content, is the form of the closing indictment, known since the Soviet period. The latter is almost unanimously understood by experts in the field of criminal procedure as a procedural document containing the accusation formulated in the case, defining the limits of the trial, as well as the system and analysis of evidence and focusing the procedural decision of the competent authorities and officials on the possibility of sending a criminal case to the court to consider it on its merits. At the same time, no direct comparison was made between indictment act and the closing indictment.

In this case, it is noteworthy that if the indictment act is legally defined through the category of "procedural decision", then in relation to the closing indictment, the term "procedural document" is used. This difference indicates a shift in emphasis in the context of the form and content of the procedural form of the completion of a pre-trial investigation: if the Soviet legislator adhered to the classical logic of transition from the external form to the internal content, then in the current criminal procedural legislation of Ukraine there is a regulation from content to form, where the latter occupies dominant place. Undoubtedly, this leaves its imprint on the peculiarities of law enforcement both at the stage of pre-trial investigation and during judicial consideration of criminal cases. Thus, the relevance of the study is supported by the need for a better understanding of the nature and essence of the modern indictment act by all participants of the criminal process.

Many scientists, in particular Ya.A. Grishin, T.A. Gumerov, N.A. Yakubovich and others, have devoted their works to the study of the historical and modern forms of the completion of a pre-trial investigation. At the same time, a comprehensive study with the identification of the historical stages of the procedural form of the completion of the pre-trial investigation was not carried out. With this in mind, the ***purpose of this article*** is to conduct an analysis using general scientific, historical, comparative, legal and dialectical methods of scientific knowledge for determination of the historical stages of the procedural form of the completion of the pre-trial investigation on the territory of modern Ukraine, while the specific tasks of the research include the periodization of the main historical stages in the development of the legal form of the final document of the pre-trial investigation, the identification of the features of each such stage and the overview of historical roots of the modern indictment act.

2. Criterion for identifying individual stages in the development of the indictment concept

The section reveals the key features of the legal form of the indictment as the main criterion for identifying the historical stages of the indictment's development on the territory of modern Ukraine.

Even long before the appearance of the terms "indictment act" and "closing indictment" and their legal consolidation in codified acts of criminal procedure legislation of Ukraine, positive law and its subsequent enforcement faced the gradual formation of certain substantive key signs that symbolized the end of the stage of the pre-trial investigation. T.A. Gumerov justly notes: "Like any other legal institution, the indictment and the problems of its drafting are rooted in the depths of centuries, transforming and changing depending on the characteristics of a particular state, its legal structure, form of government and political regime" (Gumerov, 2011, p. 4).

It is also important that as a result of the historical and legal analysis of the procedural formation of the completion of the pre-trial investigation, it becomes possible not only to consider the final individual procedural documents and decisions of the investigation, but also to highlight the corresponding historical stages of their existence. Such stages on the territory of modern Ukraine can be considered: 1) the pre-revolutionary stage, covering the time from Kievan Rus to the last years of the existence of the Russian Empire; 2) the Soviet stage, including the period from the beginning of the establishment of Soviet power as a result of the civil war of 1917–1922 and until the collapse of the USSR in 1991; 3) the modern stage, which started at the moment when Ukraine gained independence in 1991 and continues to this day. Each of these stages is characterized by its own individual features of legal regulation of the end of the pre-trial investigation and the approach to determining the form and content of the main effective legal document that specifies the essence of the official charge and the boundaries of the subsequent trial.

3. The pre-revolutionary stage of the development of a procedural form of the completion of a pre-trial investigation (10th–20th centuries)

The section reveals the features of the first stage in formation of the legal form of the indictment on the territory of modern Ukraine, covering the period from the 10th to the 20th centuries.

The pre-revolutionary stage is the longest, and the establishment of the institutions of the court and pre-trial investigation goes back to the time of the formation of statehood on the territory of modern Ukraine. In particular, based on the content of the Russian-Byzantine agreement of 911, it can be concluded that society already then renounced arbitrariness and demanded an official trial of criminals. At the same time, due to the lack of parchment and the poor development of written office work in Kievan Rus, there were no documentary forms of pre-trial investigation (Gumerov, 2011, p. 8). At the beginning of the 11th century, Russkaya Pravda consolidated the first ancient procedural forms of a pre-trial investigation in the form of persecution of the trace and vault (Tikhomirov, 1953, pp. 87–112).

The time of feudal fragmentation in Russia was characterized by the accumulation of a variety of procedural forms of pre-trial activities, and the appearance of such documents as the oath (for parties, the governor of the prince, witnesses), summons, letter of delivery of the defendant, bill of indictment. Their legal regulation was carried out on the basis of veche legislation, in particular, the Pskov Judicial Charter of 1397. The development of these procedural forms continued in the Code of Laws of Ivan III of 1497 – a normative legal act, which was a set of laws of the Russian state, created with the aim of systematizing the norms of law existing at that time. Its article 16 enshrined such a legal form as a report list, which, at the same time, acted as an indictment and a protocol of the court session, in which the court, which is also the investigative body, brought charges against the suspect and made a decision itself. The decision was not recorded in the report list, but was formalized by a legal letter, which was drawn up by a special official – a deacon or clerk (Gumerov, 2011, pp. 11–12). In turn, Articles 4 and 5 of the Code of Law of Ivan IV of 1550 additionally introduced criminal prosecution of an official for incorrect presentation (distortion) of the report list. Thus, the increased requirements of the society to the procedural registration of the pre-trial investigation were consolidated and the prerequisites were created for the formation of a form of indictment with the further improvement of legislation.

The appearance of a procedural document as close as possible to the indictment is evidenced by Article 4 of the Decree of Peter I "On the Form of the Court" of November 5, 1723. In accordance with the norm enshrined in it, "before the trial (except for these cases: treason, villainy, or words contrary to the Imperial Majesty and His Majesty's surname and revolt), it is necessary to give a list to the defendant with the items submitted from the petitioners, in order to lead to acquittal, thus, calling the defendant before the court, and to give the list to him; on which to mark all judging the number in which to stand before the court" (Gumerov, 2011, p. 17).

The most significant changes in the procedural formation of the completion of the pre-trial investigation in the pre-revolutionary time were brought by the Judicial Reform of 1864. This reform, in addition to the introduction of a clear system of courts, the same for all parts of the Russian Empire, the adoption of new judicial charters that enshrined the democratic principles of legal proceedings, the introduction of the institutions of justices of the peace, attorneys at law (advocacy) and the jury, officially determined the duty of the prosecutor to draw up the closing indictment in the form of the indictment act. This was directly enshrined in Article 519 of the Charter of Criminal Proceedings of November 20, 1864, in accordance to which the indictment must include the following data: 1) an event containing signs of a criminal act; 2) the time and place of the commission of this criminal act, as far as is known; 3) the title, name, patronymic and surname or nickname of the accused; 4) the nature of the evidence collected in the case against the accused; 5) definition according to the law: to which particular crime the signs of the act in question correspond. According to article 521 of the Charter, the prosecutor attaches to the indictment act a list of persons who, in his opinion, should be summoned to the judicial investigation. In 1864, immediately after the adoption of the Charter of criminal proceedings, P.I. Lyublinskiy noted: "This Charter must be considered as a law addressed to citizens, about the rights that are given to them to protect from the arbitrariness of the state and judicial authorities, and not only as a set of prescriptions for judicial authorities on the forms of legal process" (Lyublinskiy, 1906, p. 11). This important achievement actually ended the pre-revolutionary stage in the development of the procedural form of the end of the pre-trial investigation.

4. The Soviet stage of the development of a procedural form of the completion of a pre-trial investigation (1918–1991)

The section reveals the features of the second stage in formation of the legal form of the indictment on the territory of modern Ukraine, covering the period from the beginning of formation till the collapse of the Soviet Union.

The next, Soviet stage began in the difficult times of the Civil War and at first took place against the background of the collapse

of the achievements of the Judicial Reform of 1864, however, after the first codification of Soviet legislation, it was marked by the creation of a legal form of the closing indictment, which existed with appropriate changes for almost century.

Four most important normative legal acts of this stage should be highlighted: 1) Decree of the All-Russian Central Executive Committee "On the Court" dated March 7, 1918 № 2, in accordance with Article 22 of "which in criminal cases, the indictment act is replaced by a resolution of the investigative commission on trial. If such by a district people's court was found to be insufficiently substantiated, then it depends on it to return the case to the commission of inquiry for further investigation or to entrust it to one of the members of the court" (All-Russian Central Executive Committee, 1918); 2) the Criminal Procedure Code of the Ukrainian SSR of September 13, 1922, which introduced the legal form of the closing indictment, consisting of descriptive and operative parts (All-Ukrainian Central Executive Committee, 1922); 3) the Criminal Procedure Code of the Ukrainian SSR of July 20, 1927, the articles of which in a new way regulated the activities of the preliminary investigation bodies, the prosecutor's office and the court, in particular, expanded the rights of investigators and prosecutors to close criminal cases in the absence of corpus delicti; 4) Criminal Procedure Code of Ukraine of December 28, 1960 № 1001-05, which, with amendments, continued to operate for the first twenty years after the collapse of the Soviet Union (Verkhovna Rada of the Ukrainian SSR, 1961).

5. The modern stage of the development of a procedural form of the completion of a pre-trial investigation (since 1991 – to this day)

The section reveals the key features and achievements of the third stage in formation of the legal form of the indictment, covering the period from the adoption of independence by the Ukrainian parliament on August 24, 1991 to the present day.

The modern stage in the development of the procedural form of the completion of the pre-trial investigation began when Ukraine gained its independence – in 1991. At first, this stage was characterized by the adaptation of the former Soviet legislation to the new socio-political realities, the approval of Ukraine as a full-fledged member of the international community, including the signing and ratification of the European Convention on Human Rights and its protocols with the subsequent implementation of the convention into the national legal order of Ukraine.

The key event of the current stage became the adoption of the Criminal Procedure Code of April 13, 2012 № 4651-VI, which, among other things, replaced the legal form of the closing indictment with the legal form of the indictment act with the rejection of the structural division into descriptive and operative parts, but with a clear regulation of the list of data that is subject to mandatory inclusion in the indictment act (Verkhovna Rada of Ukraine, 2013).

6. Conclusions

As a result of the study, three main historical stages of formation and development of the procedural design of the end of pre-trial investigation in Ukraine were identified: pre-revolutionary, Soviet and modern. The pre-revolutionary stage covers the time from Kievan Rus to the last years of the Russian Empire. The most significant changes in the procedural design of the completion of pre-trial investigation in the pre-revolutionary period were brought by the judicial reform of 1864. This reform formally defined the duty of the prosecutor to draw up closing indictment in the form of an indictment act. The Soviet stage includes the period from the beginning of the establishment of soviet government as a result of the civil war of 1917–1922 until the collapse of the USSR in 1991. Initially, the Soviet stage was characterized by the collapse of the achievements of the judicial reform of 1864, but after the first codification of soviet law was marked by the creation of a legal form of the closing indictment, which lasted with changes for almost a century. There are four most important legal acts of the soviet stage: 1) Decree of the All-Russian Central Executive Committee "About the Court" of March 7, 1918; 2) Criminal Procedure Code of the USSR of September 13, 1922, which introduced a legal form of closing indictment, consisting of descriptive and operative parts; 3) Criminal Procedure Code of the USSR of July 20, 1927; 4) Criminal Procedure Code of Ukraine of December 28, 1960. The current stage of formation and development of the legal form of the completion of a pre-trial investigation has begun with independence of Ukraine in 1991 and continues to this day. At this stage, the former Soviet legislation was adapted to the new socio-political realities, and eventually, the new Criminal Procedure Code of Ukraine, which replaced the closing indictment with the indictment act, was adopted on April 13, 2012.

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ІСТОРИЧНИЙ РОЗВИТОК ПРОЦЕСУАЛЬНОЇ ФОРМИ ЗАКІНЧЕННЯ ДОСУДОВОГО СЛІДСТВА В УКРАЇНІ

Анотація. ***Метою статті*** є визначення історичних етапів процесуальної форми закінчення досудового розслідування на теренах сучасної України.

Методи дослідження. Статтю виконано із застосуванням загальнонаукових та спеціальних методів наукового пізнання.

Результати. Проведено історико-правовий аналіз процесуального оформлення закінчення досудового слідства на території сучасної України. Представлено шлях формування та історичний розвиток правової форми обвинувального акта.

Висновки. Унаслідок проведеного дослідження визначено три основні історичні етапи становлення й розвитку процесуального оформлення закінчення досудового слідства в Україні:

дореволюційний, радянський та сучасний. Дореволюційний етап охоплює час від Київської Русі до останніх років існування Російської імперії. Найбільш значущі зміни у процесуальне оформлення закінчення досудового слідства в дореволюційний період привнесла судова реформа 1864 р., якою було офіційно визначено обов'язок прокурора скласти обвинувальний висновок у формі обвинувального акта. Радянський етап включає період із початку встановлення радянської влади як результату громадянської війни 1917–1922 рр. до розпаду СРСР у 1991 р. Спочатку радянський етап проходив на тлі згортання досягнень судової реформи 1864 р., однак після першої кодифікації радянського законодавства ознаменувався створенням правової форми обвинувального висновку, що проіснувала з відповідними змінами майже століття. Названо чотири найбільш важливі нормативно-правові акти радянського етапу: 1) Декрет Всеросійського центрального виконавчого комітету «Про суд» від 7 березня 1918 р.; 2) Кримінально-процесуальний кодекс УСРР від 13 вересня 1922 р., який запровадив правову форму обвинувального висновку, що складалася з описової та резолютивної частин; 3) Кримінально-процесуальний кодекс УСРР від 20 липня 1927 р.; 4) Кримінально-процесуальний кодекс України від 28 грудня 1960 р. Сучасний етап становлення й розвитку правової форми закінчення досудового слідства розпочався з моменту здобуття Україною незалежності в 1991 р. та триває донині. На цьому етапі відбулася адаптація колишнього радянського законодавства до нових суспільно-політичних реалій, а також був прийнятий Кримінальний процесуальний кодекс України від 13 квітня 2012 р., який змінив правову форму обвинувального висновку на правову форму обвинувального акта.

Ключові слова: кримінальне провадження, кримінально-процесуальні правовідносини, досудове слідство, кримінальне обвинувачення, доповідний список, обвинувальний акт, обвинувальний висновок.

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POLICE AVIATION IN UKRAINE

Abstract. ***The purpose of the research*** is to describe the stages of creation and development of police aviation in Ukraine, cover basic concepts and terms, determine the directions of its further advancement.

Research methods. The paper is executed by applying general research and special methods of scientific cognition.

Results. The basic approaches to understanding "police aviation" in Ukraine, its origin and development are analyzed, and its role for effective detection and investigation of crimes is proved. The research establishes that during the restructuring of the economy of the newly created Ukrainian state, after the collapse of the Soviet Union, the aviation industry in law enforcement declined. Only in 2017, the first steps towards the reconstruction of the former police aviation, or rather, the creation of new police aviation in Ukraine, have begun. With the support of the Ministry of Internal Affairs, in 2020, the National Police established the Department of Air and Water Police equipped with specialized helicopters of domestic and European standard and unmanned aerial vehicles designed to perform a wide range of tasks in law enforcement, medical and other public activities. Since 2019, the National Police has trained external operators of unmanned aerial vehicles and improved the skills of police officers who use Class I unmanned aerial vehicles to perform police tasks. In November 2020, Ukrainian State Air Traffic Services Enterprise handed over to the National Police of Ukraine the Kanev (Pekari) Helicopter Platform heliport located in Cherkasy Oblast and suitable for all types of helicopters weighing up to 13 tons, which meet the technical characteristics of Class 1 or Class 2 and are certified by Category A or Small Rotorcraft, by visual and instrument flight rules. At the initiative of the Ministry of Internal Affairs and the Ministry of Health, a Single Aeromedical Space has been created in 2021.

Conclusions. However, despite significant gains, police aviation is still in its infancy and needs to be essentially developed and implemented in the National Police of Ukraine.

Key words: unmanned aircraft, police helicopter, external operator of unmanned aerial vehicle, Unified System of Aviation Security and Civil Protection of the Ministry of Internal Affairs, police aviation.

1. Introduction

The earliest recorded use of an unmanned aerial vehicle (hereinafter – UAV) occurred in July 1849. Oddly enough, it happened in the military realm when Austrian troops floated unmanned balloons in Venice, which was under siege, for its bombing (State Aviation Museum of the National Aviation University). In due course, with the rapid development of science in electricity and radio, other industries, drone-type devices became more widespread and were used as a means of performing tasks that are unattainable or dangerous to humans. An unmanned device could be any vehicle (including maritime, aerial, railway, etc.). Before using remote-controlled naval anti-surface ship torpedoes, they were also guided by divers or suicide pilots. With the development of new information technologies, the automation of almost all spheres of our life, robotics, unmanned vehicles (devices) have evolved into a device sized from a space station to a matchbox. Today, our children play with one that originated as a means of destroying the enemy's manpower and infrastructure. Many of us even do not realize how deeply UAVs have penetrated our lives. Anyone can buy a UAV in a modern gadget store or even a toy

store and use it for one's own, and unfortunately not always legitimate, purposes. We cannot ignore the fact that, as well as several centuries ago, unmanned devices are used as a weapon both by state armed forces and armed criminal groups, petty offenders, etc. Unfortunately, there are currently no thorough scientific studies in the area concerned that could be implemented in combating crime. This issue has been considered by Ye.I. Bakutin, V.V. Bilous, Yu.V. Hnusov, V.A. Korshenko, S.M. Lozova, V.K. Myronenko, M.V. Mordvyntsev, S.I. Perlin, V.A. Svitlychnyi V.V. Chumak and other.

Therefore, a scientific assessment of the status, capabilities, and development prospects of the involvement of UAVs in the National Police of Ukraine becomes relevant and essential for further practical use. According to the authors, as never before, it is high time to "arm" state law enforcement agencies with UAVs to allow them to perform their tasks and functions vested by the state. This concerns both ensuring public security and peace across Ukraine as well as guarantees of the constitutional rights of its citizens.

2. Police aviation: basic approaches to understanding

Unfortunately, during the 30-year history of independent Ukraine, the use of aircraft in the official activity, later the National Police, has not become widespread. Helicopters of other bodies of the Ministry of Internal Affairs (hereinafter – MIA) or the Armed Forces of Ukraine, usually the Mi-8 variants, have been often used in critical and resonant situations. By comparison, in European countries and the United States, the police have long had their own air units to support ground operations, maintain fire accompaniment, rapid transfer of forces and supplies, transportation of victims and wounded, keep surveillance and reconnaissance, etc.

During the Soviet era, law enforcement agencies had some aviation assets, such as Mi-2, for the needs of the State Automobile Inspectorate, etc. However, after the breakup of the Soviet Union, the young state Ukraine had more important tasks of reforming and establishing a democratic system. Therefore, police aviation has long been ignored, including due to a lack of funds – especially in those days when 10 liters of gasoline per day were allocated for task vehicle of the district police station. What kind of aviation could be discussed under such conditions?

It was not until 2017 that the Order of the National Police of Ukraine dated July 21, 2017 № 744 "On Institutional and Staffing Changes in the National Police" established the Department of Air and Water Police in the structure of the Central Police Office. The main tasks of the Department embrace organization, coordination, methodological support and control of official activities of police units on the water and provision of the units of the National Police of Ukraine with air support.

In 2018, the Ukrainian Interior Minister, Arsen Avakov, and the Minister for Europe and Foreign Affairs of France, Jean-Yves Le Drian, signed a government-to-government memorandum of intent on bilateral cooperation. Within the framework of the memorandum, the MIA of Ukraine procured French H125, H145 and H225 helicopters to equip the State Emergency Service, the National Guard, the National Police and the State Border Guard Service of Ukraine. The main tasks of the helicopter units comprise rescue operations, support of public security, criminal investigations, anti-terrorist and special missions, protection of state borders, and road safety (Today's newspaper, 2018).

It is interesting to note that the word "helicopter" is often considered synonymous with the word "vertolit". According to explanatory dictionaries, a vertolit is: 1) a helicopter, a rotor-winged aircraft; an aircraft heavier-than-air, which can rise into the air without running and land vertically, as well as stay in one position in the air (Yaremenko, Slipushko, 2001, p. 182); 2) from the Greek. Helix – spiral, whirl; pteron – wing – helicopter (Petrov, 1989, p. 117).

The media language has almost quit using the word vertolit by replacing it with a helicopter (English: helicopter; the opposite substitution in the course of consistent purism in modern Croatian: vrtolet instead of a helicopter) and a hvyntokryl (rotor-winged aircraft) (although the word is considered a Ukrainian unit, it was borrowed from the Russian language during the Soviet era ("vintokryl") but with another meaning– an aircraft with the characteristics of both a helicopter and an airplane) (Taranenko, 2008, p. 162).

As practice shows, linguistics is not an exact science. Authors of explanatory dictionaries are sometimes conditionally divided into groups and assert their point of view by relying on their knowledge. There are cases when a borrowed word is so popular among the population that, over time, it becomes conventional and correct in a particular area. However, the views of linguists concur in the issue under consideration. They suggest differentiating terms *helicopter* (implicit differential feature – "lack of wings") and *hvyntokryl (rotor-winged aircraft)* (differential feature – "wing").

The term of hvyntokryl is synonymous with a combined helicopter (synonymization based on the common features of "wing" and "propeller"). The terms of helicopter and vertolit are considered absolute synonyms (synonymization based on the feature "propeller") (Khalinovska, 2013, p. 63). Thus, you can use both "helicopter" and "vertolit" – they mean the same thing.

3. Admission to operation (adoption) in the bodies and units of the National Police of Ukraine of unmanned aerial vehicles

After the beginning of the armed conflict in eastern Ukraine, the Armed Forces of Ukraine and the Ministry of Internal Affairs of Ukraine have widely used combat aircraft, in addition to ground combat equipment. Air umbrella and support in some combat situations are much needed and indispensable. However, any war implies human and equipment losses, and unfortunately, such losses occurred. Combat aircraft and helicopters became the prey of enemy air combat means, and thus the airspace of some areas of hostilities was closed to further use of air force.

As the state could not afford further losses of pilots and fairly expensive aircraft, the number of flights was reduced. At the same time, land forces could not be deprived of aerial reconnaissance. Civilian volunteers, who had had the experience of controlling UAVs in peacetime, came to the rescue. Using serial quadcopters and DIY-model aircraft, they began to modify and equip them following the needs of combat conditions. Most often, vehicles were equipped with surveillance cameras with additional functions of infrared and night vision to locate enemy forces. UAVs could hover in the air for hours, move at low altitudes, be inconspicuous due to their small size and a tricky target for small arms.

Under paragraph 23 of Article 1 of the Air Code of Ukraine, an unmanned aerial vehicle is an aircraft designed to accomplish flight without a pilot on board, which is controlled and manipulated via a special control station unit located out of the aircraft (Verkhovna Rada of Ukraine, 2011, p. 536).

The best practices of using UAVs in the area of the Joint Forces Operation have drawn the attention of executives of the Armed Forces of Ukraine and the Ministry of Internal Affairs. Nowadays, the issue of providing military and law enforcement units with UAVs is addressed within public procurement.

The advantages of UAVs over manned aircraft are apparent: they can be small in size, up to several centimeters – they are difficult to shoot down; they can fly at maximally low altitudes; visually inconspicuous; have a low noise level of engines and propellers; can monitor a target from a distance of one kilometer; mobile (launch is carried out from any point with an area of 10 centimeters); can perform tasks in both controlled and offline modes; can be equipped with both internal and electric combustion engines; economical in construction, cost price, and operation (due to the small size and lack of space and equipment for the pilot); zero human losses come before everything; depending on the model, they are easy manageable (controlled from a smartphone); can carry a combat payload similar to aircraft, have jet propulsion, and be controlled remotely thousands of miles away, etc.

However, this does not mean that the era of manned aircraft has come to an end. On the contrary, it appeared a gap in the activity of the armed forces and law enforcement agencies, and UAVs filled the niche promptly. As before, there is still a need to transport people, bulky cargo, conduct high-rise assembly and disassembly under emergency recovery, rescue operations in mountainous and under extreme weather and temperature conditions. In other words, the need for the pilot's presence remains in all cases, which require "surgical" accuracy and mastery, immediate response, fast decision-making, full situation awareness, contact with crew members and passengers, the ability to handle an on-site emergency, etc. The impact of the human factor on the situation, especially the failure of machinery and its equipment, should never be excluded.

Technologies are making progress. With the advent of drones, the means to combat them originated, in particular, means for suppressing and intercepting the control signal of the device. However, it is worth mentioning that similar systems began to be used on manned combat aircraft as a means of radar combat (attack and defense) with other aircraft. They are used to deactivate control, navigation, and other tracking systems that make the plane or helicopter sitting a target – it is a guaranteed loss for a drone. In a manned aircraft, the pilot can, at least, maintain explicit control of the situation and aircraft operation.

In other words, the authors emphasize that manned and unmanned aerial vehicles are different classes of aviation equipment, which are designed to address a narrow and, in particular cases, related range of missions of the armed forces and law enforcement agencies, and cannot substitute for each other in full.

The Order of the National Police of Ukraine dated February 27, 2019 № 196 "On Release to Service (Service Introduction) in Bodies and Units of the National Police of Ukraine of Unmanned Aerial Vehicles" authorized

the Department of Air and Water Police to be a body governing unmanned aviation of the National Police of Ukraine.

In 2020, in order to ensure the operation of the Unified System of Aviation Security and Civil Protection of MIA of Ukraine, the State Institution "Lviv Specialized Center for Training of Police Officers" was renamed in the State Institution "National Police Center of Air Support of Ukraine" by the Order of Head of the National Police of Ukraine, Police General of the third rank Ihor Klymenko dated June 17, 2020 № 470.

In the same year, the Order of the National Police of Ukraine dated 19.06.2020 № 482 "On Amendments to the Structure of the National Police" established and integrated the "Department of Air and Aviation Police" into the Structure of the National Police approved on November 6, 2015.

According to the Order of the Ministry of Defense of Ukraine № 2-2015, the Order of the Ministry of Defense of Ukraine № 367-2015, after theoretical retraining, internship and control test, the Order of the Department of Water and Air Police dated August 16, 2019 № 17 admitted employees of the Department of Aviation of Unmanned Aerial Vehicle of the National Police Ukraine to the management of flights of I-class UAVs from the work area of flight manager.

Having acquired all the necessary documents, the Department for the first time in the National Police of Ukraine began a training course for external operators of UAVs, as well as advanced training of police officers who use Class I unmanned aerial systems to perform police tasks, based on developed and approved training programs for level I qualification. Police officers' training was held in the State Institution "Lviv Specialized Police Training Center". Police officers, who completed the program, received certificates and flight books (National Police of Ukraine, 2019).

A UAV external pilot is an individual who is authorized by an operator to perform the necessary duties of operating a UAV flight and who manipulates the relevant flight controls in the air (Ministry of Defense of Ukraine, 2015).

On July 13, 2020, the State Institution "National Police Center of Air Support of Ukraine" was established in Lviv Specialized Police Training Center.

In November 2020, Ukrainian State Air Traffic Services Enterprise (hereinafter – UkSATSE), which is a base of the national Air Navigation System and the Joint Civil-Military Air Traffic Management System of Ukraine and affiliates with the Ministry of Infrastructure of Ukraine, gratuitously handed over to the National Police of Ukraine the Kanev (Pekari) Helicopter Platform heliport located in Cherkasy Oblast. It is suitable for all types of helicopters weighing up to 13 tons, which meet the technical characteristics of Class 1 or Class 2 and are certified by Category A or Small Rotorcraft, by visual and instrument flight rules (UkSATSE, 2020).

As part of the development of the Unified System of Aviation Security and Civil Protection of MIA in 2020, in addition to granted Airbus helicopters H145, our technical experts were re-trained in Airbus Helicopters Deutschland and obtained certificates of instructors, pilots and 4 engineers of the National Police (Cherkasy Regional State Administration, 2021).

Moreover, at the initiative of the Ministry of Internal Affairs and the Ministry of Health, a Single Aeromedical Space was created in 2021. It provides for the integration of the aeromedical evacuation system and air transportation of anatomical materials of recipients. On April 1, in Lviv region (there are 7 region: Lviv, Zakarpattia, Ivano-Frankivsk, Volyn, Rivne, Ternopil and Chernivtsi), the MIA aviation took up the permanent duty. On May 1, the same duty was introduced in Kyiv region (Kyiv, Vinnytsia, Zhytomyr, Kirovohrad, Poltava, Sumy, Chernihiv oblasts and the city of Kyiv). Now, Cherkasy and the east of the country are joining a Single Aeromedical Space. There are plans to establish such points across the country by the fall. In addition to the flight crew, medics will constantly be on duty at the bases. Young pilots, who have already passed or are undergoing training, will navigate helicopters and aircraft of the Aviation Security System of the Ministry of Internal Affairs.

4. Conclusions

Thus, the authors draw attention to the fact that police aviation has already originated in Ukraine and begun to take "its first steps" in fulfilling the tasks of the National Police, the Ministry of Internal Affairs, and other government agencies, including, the Ministry of Health. The police aircraft fleet is not yet fully equipped, and not all departments in regional centers have air support. However, this is just the beginning of the history of Ukrainian police aviation. We hope, in the next few years, all district police departments of Ukraine will be equipped with UAVs and relevant units, and every main department, depending on the population, will have a minimum of one helicopter for air support. In addition to significant improvement of police efficiency, this is required by today's realities and the rapid development of world technology. Therefore, the National Police should not lag, as it is the principal law enforcement body of Ukraine.

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ПОЛІЦЕЙСЬКА АВІАЦІЯ В УКРАЇНІ

Анотація. ***Метою статті*** є висвітлення етапів створення та розвитку поліцейської авіації в Україні, а також розкриття основних понять і термінів, визначення напряму подальшої її розбудови.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. Проаналізовано основні підходи до розуміння «поліцейської авіації» в Україні, її зародження й розвитку, доведено її роль в ефективному розкритті та розслідуванні злочинів. Встановлено, що в часи перебудови економіки новоствореної української держави (після розпаду Радянського Союзу) авіаційна галузь у правоохоронній діяльності переживала занепад. З'ясовано, що лише у 2017 р. почали робити перші кроки в напрямі створення поліцейської авіації в Україні. За підтримки Міністерства внутрішніх справ України у 2020 р. в Національній поліції України створено Управління авіації та поліції на воді, укомплектоване спеціалізованими вертольотами вітчизняного та європейського зразка, а також безпілотними літальними комплексами, призначеними для виконання широко спектру завдань у правоохоронній, медичній та інших сферах забезпечення державної діяльності. З 2019 р. Національна поліція України готує зовнішніх операторів безпілотних літальних апаратів, а також підвищує кваліфікацію співробітників підрозділів поліції, які використовують безпілотні авіаційні комплекси I класу для виконання поліцейських завдань. У листопаді 2019 р. «Украероруx» передав Національній поліції України вертодром «Гелікоптерна площадка Канев (Пекарі)», розташований у Черкаській області та придатний до виконання польотів усіх типів гелікоптерів масою до 13 т, що відповідають технічним характеристикам «Клас 1» або «Клас 2» та сертифіковані за Category A або B Small Rotorcraft, за правилами візуальних польотів і правилами польотів за приладами. За ініціативи Міністерства внутрішніх справ України та Міністерства охорони здоров'я України у 2021 р. створено Єдиний аеромедичний простір.

Висновки. Проте, незважаючи на значні здобутки, поліцейська авіація поки що перебуває на початковому етапі свого розвитку та потребує суттєвої розбудови і впровадження в діяльність Національної поліції України.

Ключові слова: безпілотне повітряне судно, поліцейський вертоліт, зовнішній оператор безпілотного літального апарату, Єдина система авіаційної безпеки та цивільного захисту Міністерства внутрішніх справ, поліцейська авіація.

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