7 2021 (305)

ENTREPRENEURSHIP, ECONOMY and LAW

A monthly scientific-practical law journal has been issued since January 1, 1996

ACADEMICIAN F.H. BURCHAK SCIENTIFIC RESEARCH INSTITUTE OF PRIVATE LAW AND ENTREPRENEURSHIP OF NALS OF UKRAINE

HELVETICA PUBLISHING HOUSE

Monument to the Magdeburg Rights in Kyiv is on the cover

THEORY OF STATE AND LAW

INTERNATIONAL LAW

Co-founders:
Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine
Garantia Ltd., Gestors Attorneys' Association

ISSN 2663-5313 (print)
ISSN 2663-5321 (online)

Based on the Order of the Ministry of Science and Education of Ukraine № 409 (annex 1) dated 17.03.2020, the journal is included in the list of professional publications of the "B" category (081 "Law", 293 "International Law")

The journal is indexed in the international scientometric databases Index Copernicus International (the Republic of Poland)

The articles are checked for plagiarism using the software StrikePlagiarism.com developed by the Polish company Plagiat.pl.

Certificate of the state registration of the print media: KV 15779-425 ІПР dated 02.11.2009

The journal is recommended for printing and distributing over the Internet by the Academic Council of Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine (Minutes No. 7 dated 28.07.2021)

Official web-site: pgp-journal.kiev.ua

Passed for printing 29.07.2021. Format 70×108 1/16. Offset paper.
Offset printing. Conventional printed sheet 9,1. Published sheets 12,03.
Print run – 255 copies. Order No. 0921/320
Publisher: Publishing House "Helvetica"
6/1 Inglezi St., Odesa, 65101
Certificate of publishing business entity ДК № 6424 dated 04.10.2018

Certificate of the state registration of the print media
Series KB No. 15779-4251 ПР dated 02.11.2009
Postal address of the editorial office: 7-B Nazarivska St., office 4, Kyiv, 01032
Tel./fax (044) 513-33-16.

7
2021 (305)

Щомісячний науково-практичний
юридичний журнал видається
з 1 січня 1996 р.

ПІДПРИЄМНИЦТВО, ГОСПОДАРСТВО І ПРАВО

НАУКОВО-ДОСЛІДНИЙ ІНСТИТУТ ПРИВАТНОГО ПРАВА І ПІДПРИЄМНИЦТВА
ІМ. АКАДЕМІКА Ф. Г. БУРЧАКА НАПрН УКРАЇНИ

ЦИВІЛЬНЕ ПРАВО І ПРОЦЕС

ГОСПОДАРСЬКЕ ПРАВО І ПРОЦЕС

АДМІНІСТРАТИВНЕ ПРАВО І ПРОЦЕС

ГЕЛЬВЕТИКА
ВИДАВНИЧИЙ ДІМ

На першій *сторінці обкладинки* – пам'ятник Магдебурзькому праву в м. Києві

ІНФОРМАЦІЙНЕ ПРАВО

ТЕОРІЯ ДЕРЖАВИ І ПРАВА

КРИМІНАЛЬНИЙ ПРОЦЕС

МІЖНАРОДНЕ ПРАВО

Співзасновники:
Науково-дослідний інститут приватного права і підприємництва ім. академіка Ф. Г. Бурчака Національної академії правових наук України, ТОВ «Гарантія», Адвокатське об'єднання «Gestors»
ISSN 2663-5313 (print)
ISSN 2663-5321 (online)
На підставі Наказу Міністерства освіти та науки України № 409 від 17.03.2020 р. (Додаток 1) журнал внесений до переліку фахових видань категорії "Б" у галузі юридичних наук (081 "Право", 293 "Міжнародне право")
Журнал включено до міжнародної наукометричної бази Index Copernicus International (Республіка Польща)

Статті у виданні перевірені на наявність плагіату за допомогою програмного забезпечення StrikePlagiarism.com від польської компанії Plagiat.pl

Свідоцтво про державну реєстрацію друкованого засобу масової інформації серія КВ № 15779-4251ПР від 02.11.2009 р.
Журнал рекомендовано до друку та поширення через мережу Internet вченою радою Науково-дослідного інституту приватного права і підприємництва ім. академіка Ф. Г. Бурчака НАПрН України (Протокол № 7 від 28.07.2021 року)
Офіційний сайт: pgp-journal.kiev.ua

Підписано до друку 29.07.2021. Формат 70x108 1/16. Папір офсетний.
Друк офсетний. Ум. друк. арк. 9,1. Обл.-вид. арк. 12,03.
Тираж – 255. Замовлення № 0921/320
Видавець: Видавничий дім «Гельветика»,
65101, м. Одеса, вул. Інглезі, 6/1
Свідоцтво суб'єкта видавничої справи ДК № 6424 від 04.10.2018 р.

Свідоцтво про державну реєстрацію друкованого засобу масової інформації серія КВ № 15779-4251 ПР від 02.11.2009 р.
Поштова адреса редакції: 01032, м. Київ, вул. Назарівська, 7-Б, оф. 4.
Тел./факс (044) 513-33-16.

UDC 347.4
DOI https://doi.org/10.32849/2663-5313/2021.7.01

Yuriy Opanashchuk,
External Postgraduate Student, F. G. Burchak "Scientific Research Institute of Private Law and Business of Nationality Academy of Law Sciences of Ukraine", 23-a, Raievskoho street, Kyiv, Ukraine, postal code 01042
***ORCID:** orcid.org/0000-0003-3381-9410*

Opanashchuk, Yuriy (2021). Consequences of non-compliance with the requirements for notarization of transactions concluded by one of the spouses. Entrepreneurship, Economy and Law, 7, 5–10.

CONSEQUENCES OF NON-COMPLIANCE WITH THE REQUIREMENTS FOR NOTARIZATION OF TRANSACTIONS CONCLUDED BY ONE OF THE SPOUSES

Abstract. Domestic economic, social, and political reforms of recent decades have been designed to transform the available system of social relations qualitatively, including proper regulation of the conclusion of the transactions that require notarization, specifically of ones that are concluded by one of the family members. ***The purpose of the article*** is to conduct a comprehensive analysis of the key controversial or inconsistent aspects of the legal regulation of notarization of transactions concluded by one of the spouses. ***The methodology*** of the research is based on the system of general scientific and specialized legal methods. In particular, the author has applied systems analysis, synthesis, deduction, induction, generalization, comparative-legal method, and formal-legal approach. ***Results.*** Research findings involve a novel approach to determine the ways to overcome incoherence amidst the complexity of the institution under consideration, which seamlessly encompasses the elements of civil and matrimonial nature; therefore, it should be concurrently regulated by the rules of civil and family law of our state. ***Conclusions.*** The results of this study indicate the relevance of a proposal to reverse the situation in which a marriage contract certified by a notary before the formal marriage does not enter into force de jure but leads to the emergence, change, or termination of the property rights to certain assets of the other spouse. The author believes that the mentioned legal collapse can be optimized by granting a marriage contract legal force from the moment of its notarization regardless of the official registration of marriage. In the author's profound conviction, which has been substantiated in this study, it is the above approach that can assist in resolving longstanding legislative controversy and simplifying the procedure for ensuing civil law consequences for the conclusion of transactions, which are not certified by a notary, by one of the spouses, even if they are in a de facto marriage.

Key words: notarial system, transaction, contract, spouses, notarization.

1. Introduction

More than thirty years ago, our state embarked on a path of comprehensive reforms in the structure and essence of the entire social relations; therefore, modern Ukraine keeps its smooth progress, the vector of which is set by the focus on generally recognized principles and regulations of international legislation. In this context, the institution of family and marriage, which is one of the most conservative by its nature and doesn't tolerate novelties due to deeply-rooted superstitious beliefs and local traditions of particular regions, was also subject to alterations both in implementation and legal regulation. The abovementioned fact is distinctively illustrated by matrimonial relations regulating particularities of the notarization of transactions of one of the spouses, even if relations are not formalized.

Keeping in mind the age-long past of the relations under consideration, one can assert their systemically important nature confirmed by the centuries-old genesis of matrimonial relations, which had been originally controlled by customs and, over time, shaped the system of legal regulation at the level of codified law branch. However, despite the massive extension, law enforcement practice in the property relations of spouses

shows that many issues are handled casually; this sort of situation needs an immediate engagement of the consolidated efforts of theorists and legal practitioners.

Analysis of recent research and publications. The contributions of domestic scientists give favorable consideration to the legal institution under analysis, which is one of the most important in the science of civil law. Over the years, individual aspects of the notarization of transactions concluded by one of the spouses were examined by T. V. Bodnar, N. D. Vintoniak, N. Ya. Diachkova, S. Kozlov, I. M. Percheklii, Yu. O. Pylypenko, V. M. Solovetska, F. A. Turchyn, T. Ye. Kharytonova, V. V. Sharovarova. At the same time, a great deal of the scientific publications devoted to the specific area doesn't depreciate the relevance of this paper because many theoretical and practical issues are still controversial since legal doctrine is in its infancy that affects statutory regulation of particular relations. The mentioned gaps have established the logic of the material statement in this article that allows grading from the most common problems to the most complicated and inconsistent ones.

The purpose of the research involves conducting a comprehensive analysis of the core controversial or inconsistent aspects of legal regulation of the notarization of transactions concluded by one of the spouses. The author has formulated and gradually performed the following scientific research tasks to achieve the outlined purpose:

– to analyze and elucidate fundamental statutory provisions regulating civil law consequences of non-implementation of notarization of transactions concluded by one of the spouses, who are in registered or de facto marriage;

– to determine the point of acquisition of the rights and obligations under the marriage contract signed before marriage registration to clarify primary effects of non-compliance with notarization of transactions concluded by one of the spouses;

– to define features of notarization of transactions concluded by de facto spouses.

Statement of basic research material. The critical importance of the issues under study is once more reinforced by the fact that some transactions, which at first glance are not associated with matrimonial legal relations, shall be certified by a notary given the necessity to observe and protect the interests of other family members. In particular, to certify transactions arising from marital relations of the families, which have kids or minor children (Banasevych et al., 2021). In T. Ye. Kharytonova's opinion, which the author completely shares, the beforementioned practice is an additional guarantee for protecting the property rights of the youngest and least protected family members (Kharytonova, 2018, p. 58). The above is also peculiar to corporate relations. Thus, when certifying a share purchase agreement in the charter capital of a company, a notary checks for spousal consent in case of share acquisition using assets of joint tenancy to identify the property's legal status. As V. I. Krat and M. O. Bozhok rightly note, if one of the spouses gains a share in the charter capital of the company, a notary requires spousal consent to purchase using joint financial resources (Krat, Bozhok, 2017, pp. 4–10). On the other hand, an agreement on the alienation of corporate rights by one of the spouses shall also be certified by a notary; however, as N. D. Vintoniak accurately states, the legislator doesn't provide for the relevant individual rule. In the scientist's opinion, in case of notarization of an agreement on the alienation of corporate rights, the spouse who will act as an acquiring party under the agreement based on joint matrimonial property shall get a spousal consent form certified by a notary (Vintoniak, 2019, p. 45).

Even a last will and testament as a unilateral transaction made by one of the spouses requires more focused attention at the moment of notarization than other similar legal relations. According to Yu. O. Zaika's conclusions, the last will form is subject to more strict requirements than other civil law transactions: the last will as a transaction comes into effect after the party's death (Zaika, 2004, p. 73).

2. Statutory regulation

In the context of statutory regulation of the issues under study, para. 4.2, Chapter 1, Section II of the Order of the Ministry of Justice of Ukraine № 296/5 as of 22.02.2012 "On the Approval of the Procedure for Performing Notarial Acts by Notaries of Ukraine" (hereinafter referred to as "Procedure") asserts that when certifying transactions in the disposal of community property, a notary requires a written spousal consent if a document verifying the proprietary right was issued in the name of one of the spouses (Poriadok vchynennia notarialnykh dij, 2017).

The analysis of the rules of art. 65 of the Family Code of Ukraine (the FC of Ukraine) demonstrates that the legislator specified the types of transactions that prescribe spousal consent: a transaction that is beyond petty daily one; transactions related to valuable objects; transactions requiring notarization and (or) public registration. Theorists extended this list by

including a set of related and interconnected legal relations, e. g. corporate. In the words of N. D. Vintoniak, in case of contributing corporate property to a legal entity's charter capital by one of the spouses as an investment during the registration of a corporation, it is believed that objects of community property are transferred to the charter capital by mutual agreement of spouses. In other words, there is a presumption of spousal consent. Any actions of one of the spouses towards the disposal of joint tenancy means from the date of marriage registration are considered to be committed with the consent of the other spouse, including the deposit of joint tenancy means as an investment in the corporate's charter capital (Vintoniak, 2019, p. 45).

At the same time, a transaction related to property disposal can be certified by a notary without spousal consent in the following cases:

– a wife/a husband possesses separate property (article 57 of the Code); according to sub-para. 4.5, para. 4, chapter 1 of Section II of the Procedure of Facts' Checking, a notary makes a note in a transaction copy, which is attached to the files of the notarial case, with reference to requisites of specific documents if the documents are not attached to the transaction copy;

– a transferor – unmarried woman/man, widow/widower; according to sub-para. 4.6, para. 4, Chapter 1 of Section II of the Procedure, when a notary certifies transactions in property alienation on behalf of an unmarried person (unmarried woman/man, widow/widower), a transferor files an application saying that property that is the subject matter of this transaction is not joint tenancy. The notary discloses the application to the other party under the transaction and mentions this fact throughout the text. The transferer shall personally submit such an application; in case of conducting a transaction by proxy, a representative does the above if the transferor has authorized him/her to file the application confirming his/her (transferor's) private ownership on behalf of the transferor;

– property acquired by either spouse when living apart from his/her spouse due to the de facto termination of a marriage. To confirm that property was acquired by either spouse when living apart from the other due to the de facto termination of a marriage, one shall provide a copy of the effective court decision recognizing private ownership of one of the spouses that is the subject matter of the agreement (sub-para. 4.7, para. 4, Chapter 1 of Section II of the Procedure).

Thus, according to para. 2, art. 65 of the FC of Ukraine, a failure to provide consent by one of the spouses is the sole reason to hold a transaction invalid. As T. V. Bodnar generalizes, a lack of spousal consent should be considered as the sole reason to hold the agreement on property disposal, that is joint tenancy, concluded by one of the spouses invalid (Bodnar, 2017, p. 81). Moreover, the author shares N. D. Vintoniak's opinion that receipt of a notarized form of spousal consent to enter into agreements verifies that the agreement is to be concluded upon spousal consent, and each of them is informed about the transfer of joint property to corporate charter capital. Receipt of a notarized spousal notice form is the guarantee for reducing the practice of declaring such agreements invalid through judicial procedures (Vintoniak, 2019, pp. 45–46). Other scientists develop these suggestions. Thus, N. Ya. Diachkova and F. A. Turchyn mark that a notice giving consent is a mere juridical fact which doesn't result in creating new rights and obligations of neither party. In this scenario, joint tenancy is regarded as an inseparable item, and a joint-tenant gives his/her consent to alienate a share of proprietary interest in the whole item (Diachkova, Turchyn, 2015, p. 163).

Moreover, legitimacy of such a transaction can be adjudicated, and thus, according to V. M. Solovetska, judgment is a document certifying the origin under certain circumstances of the ownership right of community property which was the separate property of a wife, a husband. For instance, in practice, there are situations when the separate property of one of the spouses keeps its value, or its cost essentially boosts due to the very joint endeavors of both spouses (Solovetska, 2014, pp. 51–52).

3. A point of the origin of rights and obligations under a marriage contract concluded before marriage registration

The fundamental problem discussed by scientists and practitioners in the context of the issue under study is the origin of rights and obligations under a marriage contract, which an engaged couple concludes and gets it notarized BEFORE (the author's notes) the official registration of a marriage. According to para. 1, art. 95 of the FC of Ukraine, if a marriage contract is concluded before marriage registration, it goes into effect on the day of marriage registration, i. e. the contract isn't effective before marriage registration. Therefore, para. 3, art. 334 of the Civil Code of Ukraine mandatorily enshrines that the acquirer gains the ownership right by the contract, that is subject to notarization, since the moment of such notarization.

However, the FC of Ukraine doesn't include any special rules which specify the moment of acquisition of the proprietary right under the spousal agreement. Consequently, there is a long-standing situation, which hasn't long changed at the legislative level, when a notarized marriage contract concluded before marriage registration (pursuant to the FC of Ukraine) doesn't go into effect but results in the acquisition of the property right by one of the spouses (pursuant to the Civil Code of Ukraine). It stands to reason that the mentioned controversy must be eliminated. To handle the situation, V. V. Sharovarova proposes to enshrine a more flexible rule in para. 3, art. 334 of the Civil Code of Ukraine: the title to the property under a contract subject to notarization shall arise since the moment of such notarization, unless otherwise provided by law (Sharovarova, 2017, pp. 122–123). There is an obvious need to qualitatively update the text of current civil laws regulating relations under study through improving the basic approaches to understanding and implementation of challenging areas concerning the non-compliance with the requirements of notarization of transactions concluded by one of the spouses. It is noteworthy that many prominent scientists of our state support the necessity to optimize prevailing civil acts. In particular, S. O. Pohribnyi and O. O. Kot stress that the specification of priority directions for improving civil laws should ensure the most decisive answers to current demands of law-enforcement practice, which the most recent edition of civil legislation lacks (Pohribnyi, Kot, 2021, p. 113).

At the same time, S. A. Kozlov proposes to update the Civil Code of Ukraine with a special rule: under a marriage contract concluded before marriage registration, the right of ownership doesn't arise since notarization but since marriage registration and entry of a marriage contract into force (Kozlov, 2007). This proposal doesn't contradict the proposal supported by the author but enhances it and adds complexity and consistency of legal influence on relations under study.

Moreover, the potential way out comprises the conclusion of a marriage contract that permits de jure or future spouses to specify expectations about the marriage, outline the character of their future relationships and interaction with others, a circle of contacts, predominant activities, etc. As V. V. Sharovarova generalizes, such provisions are included in a marriage contract to motivate the proper behavior of spouses within marriage, not their compulsory execution in the future (Sharovarova, 2017, p. 123).

4. Notarization of the transactions of persons who are in a de facto marriage

The moment of concluding a transaction, which requires notarization, by persons who have a de facto relationship deserves to be highlighted. On the one hand, the institution of de facto marital relations has been functioning in domestic legislation for almost 20 years (since 2004); however, formally specified relationships are beyond the legal pale that is unacceptable because laws shall consider social trends and keep up-to-date, especially when a blanket prevalence of de facto relationship needs enhanced protection of all parties involved. Moreover, case law of using art. 74 of the FC of Ukraine demonstrates ambiguousness of approaches to settle disputes resulting from the mentioned category of legal relations. In particular, this article of the FC of Ukraine stipulates that whenever a woman and a man live together as an unmarried couple, the property they acquired while living together belongs to them as community property unless otherwise provided by their written agreement. This property is covered by the provisions of the Family Code of Ukraine (namely Chapter 8 of the Family Code of Ukraine "Right of spouses to marital property"). In the view of Yu. O. Pylypenko, the above conveys that compared to a registered marriage in which the title to property acquired within marriage emerges automatically (by law), and joint tenancy of de facto spouses emerges either as a result of the agreement's conclusion or due to the judgment on the recognition of property acquired while living together as joint tenancy – subsequently, the provisions of Chapter 8 of the FC of Ukraine can be applied to that sort of property (Pylypenko, 2015, p. 195).

De facto marital relations undoubtedly should be regarded as a complex institution regulated by the rules of family and civil law. Therefore, statutory regulation of all circumstances related to the relevant social phenomenon also should be exercised through a harmonious engagement of mutually reinforcing rules of both law branches.

5. Conclusions

Summarizing the abovementioned, the author considers it necessary to stress that the family and marital relationships are a mutually agreed system of social factors which crucially determine the state of society and prospect for its progressive development, continuity of generations, and legal protection of every individual. This is explained by the fact that the status of modern families is both an outcome and trigger of many processes currently taking place in society. Every family

undergoes a strong influence of all active factors of social dynamics and simultaneously produces these determinants. However, it is possible to implement extensive human-centric capacity peculiar to all property relations which arise from marital and family relations upon the condition of adequate statutory regulation of all spheres of legal relations between the members of one family and involving the third parties when concluding transactions which shall be notarized.

Given the complexity of the institution under study that smoothly encompasses the elements of civil and marriage-family nature, the author ascertains it should be concurrently regulated by the rules of civil and family laws of our state, which a priori can't contradict each other. Consequently, it is worth reversing the situation in which a marriage contract certified by a notary before the formal marriage does not enter into force de jure but leads to the emergence, change, or termination of property rights to certain assets of the other spouse. The author believes that the mentioned legal collapse can be optimized by granting a marriage contract legal force from the moment of its notarization regardless of the official registration of marriage. In the author's profound conviction, which has been substantiated in the present study, it is the above approach that can assist in resolving longstanding legislative controversy and simplifying the procedure for ensuing civil law consequences for the conclusion of transactions, which are not certified by a notary, by one of the spouses, even if they are in de facto marriage.

References:

Banasevych, I.I., Heints, R.M., Lohvinova, M.V., Oliinyk, O.S. (2021). Osoblyvosti pravovoho stanovyshcha subiektiv tsyvilnoho prava [Features of the legal status of subjects of civil law]. *Journal of the National Academy of Legal Sciences of Ukraine*, issue 28, no. 2 (in Ukrainian).

Bodnar, T.V. (2017). Vidsutnist zghody yak pidstava vyznannia pravochyniv nediisnymy u simeinomu pravi Ukrainy [Lack of consent as a ground for invalidating transactions in family law of Ukraine]. *Problemy tsyvilnoho prava ta protsesu: tezy dop. Uchasnykiv nauk.-prakt. konf., prysviach. cvitlii pamiati O.A. Pushkina*, 19–20 trav. Kharkiv: KhNUVS (in Ukrainian).

Diachkova, N.Ya., Turchyn, F.A. (2015). Zghoda odnoho z podruzhzhia na vchynennia pravochyniv shchodo spilnoho maina [Consent of one of the spouses to enter into transactions for joint property]. *Pravo i bezpeka*, no. 2(57) (in Ukrainian).

Kharytonova, T.Ye., Percheklii, I.M. (2018). Osoblyvosti notarialnoho posvidchennia pravochyniv za uchastiu malolitnikh ta nepovnolitnikh ditei [Features of notarization of transactions involving minors and minor children]. *Chasopys tsyvilistyky*, no. 29 (in Ukrainian).

Kozlov, S. (2007). Shliubnyi dohovir: prahmatyzm chy neobkhidnist [Marriage contract: pragmatism or necessity]. *Pravovyi tyzhden: Yurydychna hazeta,* no. 48(69). Retrieved from: http://www.yur-gazeta.com/oarticle/1425 (in Ukrainian).

Krat, V.I., Bozhok, M.O. (2017). Metodychni rekomendatsii shchodo posvidchennia dohovoriv kupivli-prodazhu chastky v statutnomu kapitali tovarystva z obmezhenoiu vidpovidalnistiu [Methodical recommendations on certification of purchase and sale agreements of shares in the authorized capital of a limited liability company]. Kyiv: Notarialna palata Ukrainy (in Ukrainian).

Pohribnyi, S.O., Kot, O.O. (2021). Onovlennia Tsyvilnoho kodeksu Ukrainy yak zaporuka efektyvnoi vzaiemodii derzhavy ta suspilstva [Updating the Civil Code of Ukraine as a guarantee of effective interaction between the state and society]. *Journal of the National Academy of Legal Sciences of Ukraine*, issue 28, no. 1 (in Ukrainian).

Pro zatverdzhennia poriadku vchynennia notarialnykh dii notariusamy Ukrainy [About the statement of the order of commission of notarial actions by notaries of Ukraine], Nakaz Ministerstva yustytsii Ukrainy № 296/5 vid 22.02.2012. Retrieved from: https://zakon.rada.gov.ua/laws/show/z0282-12#Text (in Ukrainian).

Pylypenko, Yu.O. (2015). Shchodo praktyky ukladannia dohovoriv ipoteky faktychnym podruzhzhiam [Regarding the practice of concluding mortgage agreements with de facto spouses]. *Piati yurydychni dysputy pamiati Ye. V. Vaskovskoho* (in Ukrainian).

Simeinyi kodeks Ukrainy [Family Code of Ukraine], Zakon № 2947-III vid 10.01.2002. Retrieved from: https://zakon.rada.gov.ua/laws/show/2947-14#Text (in Ukrainian).

Solovetska, V.M. (2014). Posvidchennia pravochyniv shchodo rozporiadzhennia mainom, yake ye spilnoiu sumisnoiu vlasnistiu podruzhzhia [Certificate of transactions for the disposal of property that is the joint property of the spouses]. *Biuleten Ministerstva yustytsii Ukrainy* (in Ukrainian).

Sharovarova, V.V. (2017). Osoblyvosti notarialnoho posvidchennia shliubnoho dohovoru v Ukraini [Features of notarization of marriage contract in Ukraine]. *Pravova derzhava*, no. 26 (in Ukrainian).

Vintoniak, N.D. (2019). Nabuttia korporatyvnykh prav odnym iz podruzhzhia [Acquisition of corporate rights by one of the spouses]. *Chasopys tsyvilistyky*, issue 33 (in Ukrainian).

Zaika, Yu.O. (2004). Forma zapovitu yak umova yoho diisnosti [The form of the will as a condition of its validity]. *Visnyk Khmelnytskoho instytutu rehionalnoho upravlinnia ta prava*, no. 1–2 (in Ukrainian).

Юрій Опанащук,
здобувач, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. М. Раєвського, 23-а, Київ, Україна, індекс 01042, y_opanashchuk@ukr.net
ORCID: *orcid.org/0000-0003-3381-9410*

НАСЛІДКИ НЕДОТРИМАННЯ ВИМОГ НОТАРІАЛЬНОГО ПОСВІДЧЕННЯ ПРАВОЧИНІВ, УКЛАДЕНИХ ОДНИМ ІЗ ПОДРУЖЖЯ

Анотація. Економічні, соціальні та політичні реформи останніх десятиліть у нашій країні покликані якісно трансформувати наявну систему суспільних відносин, що охоплює й належну регламентацію вчинення правочинів, які потребують нотаріального посвідчення, а особливо тих із них, котрі укладаються одним із членів сім'ї. ***Мета*** дослідження полягає в тому, щоб здійснити всебічний аналіз основних суперечливих чи неузгоджених аспектів правового регулювання питань нотаріального посвідчення правочинів, укладених одним із подружжя. ***Методологічна основа*** дослідження ґрунтується на системі загальнонаукових і спеціально-юридичних методів. Зокрема, використані методи системного аналізу, синтезу, дедукції, індукції, узагальнення, порівняльно-правовий метод, формально-юридичний метод. ***Результати.*** У підсумку проведеного дослідження вперше сформульовано підхід до окреслення шляхів подолання неузгодженості в контексті саме комплексності досліджуваного інституту, що органічно поєднує в собі елементи цивільно-правового та шлюбно-сімейного характеру, а тому має паралельно регламентуватися нормами як цивільного, так і сімейного законодавства нашої держави. ***Висновки.*** Як результати проведеного дослідження варто виділити пропозицію кардинально змінити ситуацію, за якої шлюбний договір, посвідчений нотаріусом до офіційного укладення шлюбу, формально не набуває чинності, проте призводить до виникнення, зміни чи припинення права власності на певні види майна в іншого з подружжя. На нашу думку, оптимізувати цей правовий колапс можна лише шляхом надання юридичної сили такому шлюбному договору з моменту нотаріального посвідчення незалежно від факту офіційної реєстрації шлюбу. У представленому дослідженні аргументовано обґрунтовано, що саме такий підхід спроможний нарешті подолати багаторічну законодавчу колізію та спростити саму процедуру настання цивільно-правових наслідків щодо вчинення нотаріально непосвідчених правочинів одним із подружжя, навіть якщо вони перебувають у фактичних шлюбних відносинах.

Ключові слова: нотаріат, правочин, договір, подружжя, нотаріальне посвідчення.

The article was submitted 05.07.2021
The article was revised 28.07.2021
The article was accepted 18.08.2021

UDC 347.1
DOI https://doi.org/10.32849/2663-5313/2021.7.02

Rimma Rimarchuk,
PhD in Law, Associate Professor, Associate Professor at the Department of Civil Law and Procedure, Institute of Law, Psychology and Innovative Education of the Lviv Polytechnic National University, 1, Knyazya Romanas street, Lviv, Ukraine, postal code 79000, Rimma2@ukr.net
ORCID: *orcid.org/0000-0002-4411-6860*

Rimarchuk, Rimma (2021). System of international protection of minorities. Entrepreneurship, Economy and Law, 7, 11–17.

SYSTEM OF INTERNATIONAL PROTECTION OF MINORITIES

Abstract. ***Purpose.*** The protection of minorities is part of the protection of human rights, and its specific nature requires a substantial discussion and elaboration. The differences between groups in society make the differences between the majority and the minority obvious. This raises a number of questions, such as which groups have the same rights as a minority. Despite existing treaties at the universal and regional levels, the protection of minorities is not entirely satisfactory and leave a great deal to be desired. Each particular situation and each and every conflict needs special attention and in-depth analysis of the historical, political and social background. Approaching solely the issue of national treatment of minorities, it should be noted that most of the new constitutions of Central and Eastern European countries declare the superiority of international obligations over national laws. This is an important principle when considering the status of national minorities and the system of their protection in different countries of the region. All these constitutions deal with the status of minorities, mostly referring to the fundamental rights of non-discrimination and protection of the identity of minorities living in the country. The basic principles are stipulated in the Constitution, while further special measures are enshrined in law (rights to education, language rights, rights in the field of political participation and freedom of religion). Based on the constitutional framework, national legislation strongly reflects the spirit of the constitution. Therefore, the status of ethnic and national minorities is described. ***Research methods.*** The work is performed on the basis of general scientific and special methods of scientific knowledge. ***Results.*** The major UN legislative instruments in the field of protection of minorities are analyzed. To solve the problems of protection of national minorities, coordinated actions of international organizations are needed to implement the norms of protection of fundamental rights and freedoms of people. ***Conclusions.*** There are two different legal systems that define the rights of minorities. The first deals with the regulation of minority rights by a general law, the second deals with minority issues through specific acts, such as a language law, law on education or a law on local self-government. Laws on national minorities strengthen the universally recognized rights of international minorities, adapting them to the special needs of minorities living in the country at question. In addition, these laws generally establish a special regime for the protection of minorities in the form of a certain type of minority self-government.

Key words: national minorities, protection of rights, international legislation, international organizations, state policy, ethnic conflicts.

1. Introduction

The Constitution has a significant impact on the entire legal system in this area, and even more so it strongly influences the attitude of the administration to the application and implementation of legislation in this regard. Laws on national minorities strengthen the universally recognized rights of international minorities, adapting them to the special needs of minorities living in the country at question. In addition, these laws generally establish a special regime for the protection of minorities in the form of a certain type of minority self-government.

In a nowadays world, following the progress in the sphere of the promotion of human rights and particularly in the field of minority protection, we can assume that European and international community in the era of globalization operate on the basis of shared, common values and essential principles of the protection of human rights. Particularly, in the European legal order, these values are recognized from the Organization for Security and Co-operation in Europe to the legal documents and mechanisms of Council of Europe. As it is stated in 1990 in the Charter of Paris for New Europe (Charter of Paris for

a New Europe, 1990) the rights of persons belonging to national minorities must be fully respected as part of universal human rights. The promotion of tolerance and pluralism is also an important part of these shared values.

The protection of minorities is the part of the protection of human rights and concerning its specific nature this issue has to be discussed and developed deeply. The differences between groups in a society make apparent the differences between majority and minorities. Here arise a number of questions, for instance, which groups possess which rights as a minority. In spite of the existing treaties on the universal and regional level the protection of minorities is not completely satisfactory and leaves much to be desired. Each situation and each conflict needs special attention and in depth analyze of the historical, political and social background.

2. Major sources of international law related to the rights of minorities

A major source of international minority right's law, and international human rights law in general, is international treaties. Unlike customary norms, treaty norms of course apply only to those states, which have consented to be bound by them. As it will be revealed later by the brief overview of standards, several instruments on minority rights are of a non-legally binding nature, although this is not to say that they are legally irrelevant. In addition to their important moral and political force, they indeed help to shape the content of international law standards, as is vividly illustrated, *inter alia*, by the incorporation as legal obligation of major soft law texts in the recent bilateral regimes. In general, they can be used by a variety of state and non-state actors, including national courts and NGO's, as a useful tool for advancing the minority rights discourse in conjunction with norms deriving from traditional sources of international law (as far as they are applicable to a given country), and persuading governments to comply with the relevant standards through appropriate domestic laws and practices.

Actually, for the first time when the matter of the protection of minority rights was addressed as a separate official issue (Roth, 1992, p. 83–117) by the implication of establishing Covenant was the proposal of Gyula Horn, Hungary's Minister of Foreign Affairs. He addressed the 44th General Assembly of the United Nations, stating that: "Our age is still offering numerous regrettable examples by curtailing the rights of national, racial or religious majorities or minorities. In our view the time has come that the UN should live up to its task with the result that the protection of minorities will be guaranteed with new, up-to-date international rules. Such rules could take the place of the treaties for minority protection, which once existed, but due to political circumstances were later abandoned" (Roth, 1992, p. 83).

Previous efforts suffered a failure, as in case, for example, of the draft Covenant Ekstrand, Masani and Meneses-Pallares in 1951. Even more recently, the draft paper submitted by a non-governmental organization – the Minority Rights Group in London – by Dr. Felix Ermacora and colleagues in Vienna in 1979. The work went so far as to make recommendations to elaborate upon the declaration. As the Special Rapporteur of the Sub-Commission Francesco Capotorti expressed (Capotorti, 1979), the declaration can be called upon to throw light on the various implications of article 27 (ICCPR) and to specify the measures needed for the observance of the rights recognized by the article. So there is no need to replace article 27 by a broader and differently conceived rule.

Therefore, Commission adopted articles dealing with non-discrimination of minorities, freedom of the attack upon the existence of their rights, promotion of their cultures and identity, and freedom of expression and communication, domestically and internationally. Thus, Commission avoided the issue of the definition of "minorities", leaving its designation to the merely state's affairs.

Moreover, while talking about the system of international protection of minority rights, we can also consider for the observance of the bilateral regimes via respective legal documents. For instance, Treaty of Osimo between Italy and Yugoslavia of 1975. The Treaty deals with the issue of Yugoslav and Italian ethnic groups living in the region of Trieste. It recognizes the right of equality concerning professional and economic activities, taxation and social insurance, provides for special protective measures as regards primary and secondary education, cultural, social and sports activities. Regarding the linguistic matters every minority is entitled to its own press in native language, the possibility of using the minority language in official relations with administrative and judicial authorities, the translation of official documents. Generally speaking the Treaty is called upon to ensure the free cultural development of both minorities.

The 1976 Austrian State Treaty provides for the members of Slovene and Croatian minorities in Austria specific minority rights, such as the right to elementary instruction in their mother tongue and to a proportional number of their own secondary schools in their own language. Their languages are accepted as the official ones in administrative and judicial

districts inhabited by members of the minorities. Conclusively the language and culture of each ethnic group are to be respected by the State.

The legal status of German and Danish minorities was regulated by two parallel declarations as a result from the negotiations between the Federal Republic of Germany and Denmark. The Declaration provides that every citizen and every member of the respective minority, regardless of the language used, shall enjoy all rights and liberties accorded to all human beings. Furthermore, explicitly recognized were the following rights to use the minority's language, to establish minority schools, the proportional representation of committees of local government and the recognition of special interests of each group in maintaining religious, cultural and professional relations with its neighboring country.

During the following period, rather beneficiary in the direction of international legal protection was the contribution of the World Conference to Combat Racism and Racial Discrimination in 1978. Its final report estimated the action taken by the UN bodies in the field of minorities as appropriate and enhancing with future successful expectations. Besides, even more hopeful and so to say significant was the situation of minorities in Concluding Document of the CSCE Follow-up Meeting in Vienna of 1989. It contained several provisions on this topic and 35 Participating States were to implement by adoption of the domestic legislation. The document (Major CSCE/OSCE Documents 1973–1997) refers to such matters, for example, as culture and language, which should be promoted as less widely used and suffer fair treatment. The participating states will ensure that persons belonging to national minorities or regional cultures on their territories can maintain and develop their own culture in all its aspects, including language, literature and religion; and that they can preserve their cultural and historical monuments and objects. Although it is not a binding treaty, the support of the two super-powers and a large number of the leading States should be valued highly.

Another illustrative example (Catala, 2002, p. 167–168) is the Resolution 40/144 from 13 of December 1985, adopted by the General Assembly of UN regarding the question of human rights of the persons, not citizens of the state where they reside. On the one hand, this document in art. 4 states that "the foreigners must observe the law of the state of residence or they must respect the internal customs and habits". On the other hand, it is recognized in art. 5 that the foreigners preserve their "right to language, culture and traditions of their own". It obviously leads us to the conclusion that the newly formed minorities are recognized as part of minority groups and as a consequence are accorded with the rights of minorities as they are. The newly formed minorities, fact that is important to bear in mind, do not include all types of peoples. For instance, migrant workers cannot be perceived as minorities, despite being in non-dominant position, as to the fact they do not possess any cultural or linguistic connection with each other, that has to be a basis for the recognition of common cultural, linguistic or religious identity.

Since the problem of minorities have become apparent and acute, even to say more threatening, both for the rights of individual members of the minority group and also for the internal harmony within countries and for international peace between them, it became relevant and substantial to take some measures. Especially, with the regard to the developments in 1989 which took place in Central and Eastern Europe as the result of collapse of Communist domination.

In 1989 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted special rapporteur Asbjorn Eide with the task of carrying out a study on possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities (Pentassuglia, 2002, p. 304). The final report, submitted in 1993, highlights the need for constructive national arrangements for minorities based on international human rights standards, within the framework of a broad conflict-prevention strategy (an update to this study is being prepared following a request from the sub-commission, now renamed "Sub-Commission on the Promotion and Protection of Human Rights"; UN Sub-Commission on Human Rights Resolution 2001/9: paragraph 9). The 1993 report was particularly influential in leading to the establishment in 1995 of the UN Working Group on Minorities. The working group reviews the implementation of the 1992 UN declaration, promotes dialogue between minorities and governments, and recommends measures, which may serve to defuse minority tensions.

The UN High Commissioner for Human Rights also provides a focus on minority issues in connection with the above purposes, and in the context of multilateral or bilateral programs of technical assistance and advisory services, while other general UN human rights procedures provide further opportunities for bringing up matters affecting minorities. The work of both the UN Working Group and the High Commissioner for Human Rights

is inspired by the experience of the OSCE High Commissioner on National Minorities, acting since 1993 as an institution for "preventive diplomacy".

In 2005 the High Commissioner for Human Rights appointed an Independent Expert on Minority Issues (Hadden, 2007, p. 85), who has identified four broad areas of concern in relation to minorities: protecting the existence of minorities, their rights to enjoy own cultural identities and reject forced assimilation, ensuring effective non-discrimination and equality, effective participation of members of minorities in public life.

3. On the guarantees of the right to religion

The Declaration on Religious Intolerance (UN Declarations on religious intolerance, Resolution Adopted by the General Assembly 36/55) contributed in no lesser manner into the international establishment, recognition and development of the protection of minorities in 1981. It states that everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching. However, it imposes some limitations to the execution of these rights, which can be subject to the restrictions, if they are prescribed by the law and breach public order, security, health and moral together with the rights and freedoms of others. The Document also declares that the discrimination between human beings on various grounds, which apparently includes the case of minorities, constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. The States are called upon adoption necessary measures to combat such kinds of cases.

Following the subject of religious intolerance, we should also refer to other aspects of this issue (Little, 2002, p. 33–50). First of all, it is necessary to make a brief overview of what is called religious minority. There exist two types of it: "belief groups" and "ethno-religious groups". In contemporary society we can refer to the notion of belief groups in cases such as "sects" or "cults". By contrast, ethno religious groups consist of members, bound together by loyalty to common ethnic origins, including religious identity, but interwoven with language, physical (or racial) characteristics. Membership is achieved rather by birth than by consent, as in the first group. For instance, Tibetan Buddihsts and Uighur Muslims in China, or Greek Catholic minority in Poland and Ukraine.

As a consequence, we can define few kinds of guarantees that grant religious human rights:

1. The right to freedom of religion and its manifestation or exercise. (ICCPR, Art. 18, UDHR, Art. 2,18, UN Declaration on the Elimination of all forms of intolerance or discrimination based on religion or belief, Art. 1).

2. The right to equality or freedom from discrimination "based on religion and belief" (UDHR Art. 2, 7, ICCPR Art. 2.1, 26, DEID Art. 2).

3. The right of members of ethnic, religious and linguistic minorities' to profess and practice their religion or belief, to enjoy their culture, and to use their language (ICCPR Art. 27).

4. The right of individuals, including members of minorities, to be free of becoming the target of any "advocacy of <...> religious hatred that constitutes incitement to discrimination, hostility or violence" (ICCPR Art. 20).

Besides the abovementioned documents, the "belief-oriented" rights are mentioned in Copenhagen Document of the OSCE, especially Art. 30–40. One of the burning issues I would like to accentuate on, is the limitations that governments can permissibly impose upon the 'manifestation' or outward expression of a religion or belief. Under art. 18.3 of the ICCPR and art. 1.3 of DEID, governments are entitled to restrict the behavior of the members of religious groups so long as the restrictions are "prescribed by law and are necessary to protect public safety, order, health or morals" as well as "the fundamental rights and freedoms of others". In its official commentary, the Human Rights Commission held a statement that governments may not abridge religious practices for purposes such as national security, that are not enumerated in the text of the documents, nor may they impose restrictions on the basis of principles derived from only one religion or other tradition (General Comment № 22 (ICCPR art. 18) HRC, 1997, p. 462). In this way the Committee makes emphasis on the application of art. 18, which is not limited regarding the traditional religions, but therefore expresses its concern regarding the application and tendency to discrimination towards the newly established religious minorities, being subjects of hostility by a predominant religious community.

Beyond that the Committee has criticized individual governments for the over-broad application of art. 18.3 of ICCPR as to the limitation clause. It held that the government of Egypt had misapplied the limitation provision to the community of Bahai'I, since they "do not present an objective threat to public order".

On regional level (Boerefijn, Goldschmidt, 2007, p. 185), European governments and intellectuals should pay more attention to the interests of minorities, including Islamic immigrants in Europe. As states Ms. Ebadi, the human rights lawyer who was awarded the Nobel Peace Prize in 2003, groups of people who present Islam as synonymous with terrorism create clash of civilizations. Practicing human rights can contribute to ending the disrespect for non-European cultures. People have to step back from the standardized point of religious, as well as any other, minority group seeing as a threat to the predominant society, and put forward the paramount implications of human rights mechanisms and guarantees.

As we can observe from the very historical roots (Uitz, 2007, p. 85–87), for at least two centuries prior to their destruction, German Jews debated, whether they should assimilate into Christian society, just as some Muslims in Europe and North America today are educated in madrasas, so some Jews were educated in Talmudic schools. In the 19th century Karl Marx advised Jews to eschew their religious and community allegiances: "Man, as an adherent of a particular religion, finds himself in conflict with his citizenship and with other men as members with their community <...> Religion <...> is no longer the essence of the community, but the essence of difference <...>. The perfect Christian State is the atheistic democratic state, the state which relegates religion to a place among the other elements of civil society" (Marx, 1997, p. 192–193).

In the 21 century the new religious minority in Europe and North America is Islam. When non-Muslim Europeans and North Americans think of contemporary threats to human security, they usually worry about random attacks by Muslim extremists. One of the results from these new threats against human security is the fear of Muslim immigrants. There arises a question, weather it is possible to integrate them, not to assimilate, in the old-fashioned way, which implies that they must give up their own cultures, religions, customs and beliefs to conform directly to the culture, religion and customs of the older, more dominant segment of citizens.

Rhoda E. Howard-Hassmann examines the issue of human security and multiculturalism in Canada, with a special focus on the extent to which liberal democracies must accommodate practices of minority religions (Howard-Hassmann, 1999, p. 523–537). The prior question is how to integrate new immigrants into Western societies, while allowing them to retain their own identity and culture. She discusses these questions in light of the points, where Muslims, and other, Canadians have asked for accommodation of their religious beliefs.

In case of Canada, it is officially multicultural since 1971 year. The provision about preservation and enhancement of multicultural heritage of Canadians is contained both in Canada's Charter for Rights and Freedoms and Multiculturalism Act. However multiculturalism does not apply to serious ethnic and racial problems in Canada, as for example the alienation of young black males and separatism in Quebec. At the time the policy was first enunciated by then-Prime Minister Pierre Elliott Trudeau, it was also meant to appease various ethnic groups of European origin as a response to Quebec nationalism. Trudeau believed that individual civil and political rights should always take precedence over group or collective rights. Canada is not a multicultural. It is rather a society, in which citizens, as individuals or groups, are encouraged to practice a diverse set of religions or ceremonies, eat such food they prefer, speak their own languages and otherwise retain certain aspects of their culture from their ancestors. The culture they retain is symbolic and fragmented; it is integrated with the larger Canadian culture.

One of the cases concerns the question whether and to what extent the universities should provide for prayer space. Some universities have argued that almost all Canadian universities are public places and are not oblige to provide for any prayer space to any religious group. However, such an approach will make serious obstacles, as to fact that places, where students can worship, marry, hold funerals will be removed. Providing prayer space for Muslims does not violate human rights of others.

She also states, that in Canada there is a "thin" dominant culture, a unicultural secular liberalism, based in part on a social values of respect for diversity, multiculturalism, non-discrimination and equality. R. E. Howard-Hassmann argues that human rights trump custom and that human security may not be undermined by any individual or group that thinks its religion, beliefs or customs are superior than others.

Another case, which Titia Loenen deals with, is the fear of Islam that exists in Dutch society and other European countries. She describes the change in attitude of Dutch people, who were traditionally regarded to be a tolerant nation towards cultural and religious minorities. Nowadays it can be seen the growing hostility towards Islam and Muslim minorities, resulting in a plea for a much more strictly secular public sphere. When in 1960, 1970's the population of Netherlands changed as a result of immigration,

Government policy was aimed at facilitating integration of immigrants while allowing them to preserve their own identities, accommodating cultural and religious pluralism.

Multiculturalist sympathies have declined since the middle of 1990's resulting in more emphasis on assimilation, which raises a number of human rights issues. First of all here should be stressed the importance of the right to freedom of religion, which can be derived from the practice of ECHR – right to equality and non-discrimination on the ground of religion demand maximum accommodation of religious pluralism, also in a public sphere. Besides, religious pluralism cannot be unlimited when it affects the human rights of others. International human rights norms accord priority of equal rights of women over religious freedom. Another limitation was set out by the European Court in judgment in Refah Partisi v. Turkey, which implies that strong forms of religious pluralism, which would create separate legal regimes for religious groups were incompatible with the European Convention.

Other issue which Loenen examines is an issue of head scarfs. She criticizes the European Court's judgment on a case Dahlab and Sahin (Evans, 2006, p. 52), in which it allows the prohibition by the state of wearing a head scarfs in a public school and state university. She argues that the head scarf does not necessarily represent an inferior position of woman and it does not imply that the woman concerned lacks an open and neutral attitude. She declines the presumption of the Court, that wearing a head scarf constitutes a threat to public order. Finally, she concludes, that policies of assimilation of immigrant groups are problematic from a human rights' prospective, and that a policy of accommodation of a generous pluralism is preferable.

4. Conclusions

The main assumption as to the religious minorities and religious freedom is the prior importance of the international character of human rights. In such a sensitive area as this, nations must increasingly interact, share experience and where possible, engage in multilateral efforts.

There are two different legal systems that define the rights of minorities. The first deals with the regulation of minority rights by a general law, the second deals with minority issues through specific acts, such as a language law, law on education or a law on local self-government. Laws on national minorities strengthen the universally recognized rights of international minorities, adapting them to the special needs of minorities living in the country at question. In addition, these laws generally establish a special regime for the protection of minorities in the form of a certain type of minority self-government.

References:

Boerefijn, I., Goldschmidt, J. (2007). Human rights in the polder: human rights and security in public and private sphere. *Intersentia*, p. 185 (in English).

Capotorti, F. (1979). Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. UN, Doc E/C № 4/Sub.2/384/Rev.1(1979), reprinted as UN Publ. E.78.XIV.i., at 617 (in English).

Catala, A. H. (2002). La (in)tolerancia en el estado de derecho. Valencia: Diputacio de Castello, p. 167–168 (in Spanish).

Charter of Paris for a New Europe (1990). Retrieved from: http://www.osce.org/mc/39516 (in English).

Evans, C. (2006). The "Islamic Scarf" in the European Court of Human Rights. *Melbourne Journal of International Law*, no. 7(1), pp. 52 (in English).

General Comment (1997). № 22 (ICCPR art. 18) HRC, 48 session July 20, 1993, sec. 8, p. xx-xxiii. *Freedom of religion and belief: A world report* / K. Boyle and J. Sheen (eds.). London; New York: Routledge, p. 462 (in English).

Hadden, T. (2007). The UN working group on Minorities. *International Journal on minority and group rights*, no. 14, pp. 85 (in English).

Howard-Hassmann, R. E. (1999). Canadian as an ethnic category: implications for multiculturalism and national unity. *Canadian Public Policy*, vol. 24, no. 5, pp. 523–537 (in English).

Little, D. (2002). Religious minorities and religious freedom: an overview, published in Peter G. Danchin and Elizabeth A. Cole, Protecting the hr of relig min in Eastern Europe. Columbia University Press, p. 33–50 (in English).

Major CSCE/OSCE Documents (1973–1997). Concluding document of Vienna Meeting. Retrieved from: http://www.osceprag.cz/docs/chronos.htm (in English).

Marx, K. (1997). On the Jewish question. *Ishay M. R. The human rights reader: mayor political essays, speeches and documents from the Bible to the present*. New York: Routledge, p. 192–193 (in English).

Pentassuglia, G. (2002). International concern for minorities. *Pentassuglia G. Minorities in international law: an introductory study* , European Centre for Minority Issues, vol. 1, pp. 25–32 (in English).

Roth, S. (1992). Toward a minority Convention: its need and content. *Tabory M., Dinstein Y. The protection of minorities and human rights*. London: Nijhoff Publishers, pp. 83–117 (in English).

Uitz, R. (2007). Freedom of religion. Council of Europe Publisher, p. 85–87 (in English).

UN Declarations on religious intolerance: Resolution Adopted by the General Assembly № 36/55. Retrieved from: http://www.religioustolerance.org/un_dec.htm (in English).

Римма Римарчук,
кандидат юридичних наук, доцент, доцент кафедри цивільного права та процесу, Інститут права, психології та інноваційної освіти Національного університету «Львівська політехніка», вул. Князя Романа, 1, Львів, Україна, індекс 79000, Rimma2@ukr.net
ORCID: *orcid.org/0000-0002-4411-6860*

СИСТЕМА МІЖНАРОДНО-ПРАВОВОГО ЗАХИСТУ МЕНШИН

Анотація. ***Мета.*** Захист меншин є частиною захисту прав людини, тому питання його конкретного характеру має бути глибоко обговорене й розроблене. Різниця між групами суспільства робить очевидними відмінності в житті більшості та меншин. При цьому виникає низка питань, наприклад питання про те, які групи мають такі права, як меншість. Незважаючи на наявні договори на універсальному й регіональному рівнях, захист меншин не є повністю задовільним. Кожна ситуація та кожен конфлікт потребують особливої уваги і глибокого аналізу історичного, політичного й соціального фону. Розглядаючи питання лише національного поводження з меншинами, варто зазначити, що більшість нових конституцій держав Центральної та Східної Європи декларують перевагу міжнародних зобов'язань над національними законами. Це важливий принцип у розгляді статусу національних меншин та системи їх захисту в різних державах регіону. У всіх цих конституціях торкаються питання статусу меншин, здебільшого посилаючись на основні права недискримінації та захисту особистості меншин, які проживають у країні. Основні принципи закріплені в конституціях, тоді як подальші спеціальні заходи делегуються законодавству (зокрема, питання права на освіту, мовних прав, прав у сфері політичної участі, свободи віросповідання). З огляду на конституційні рамки національне законодавство сильно відображає дух конституції. Тому описується статус етнічних і національних меншин. ***Методи дослідження.*** Робота виконана на підставі загальнонаукових та спеціальних методів наукового пізнання. ***Результати.*** Проаналізовано основні законодавчі інструменти ООН у сфері захисту меншин. Для вирішення проблем захисту національних меншин необхідна злагоджена дія міжнародних організацій щодо втілення в життя норм захисту основних прав і свобод народів. ***Висновки.*** Є дві різні правові системи, які визначають права меншин. Перша з них стосується регулювання прав меншин шляхом загального закону, а друга розглядає питання меншин через конкретні акти, наприклад мовний закон, закон про освіту або закон про місцеве самоврядування. Закони про національні меншини підсилюють загальновизнані права міжнародних меншин, пристосовують їх до особливих потреб меншин, які проживають у відповідній країні. Крім того, ці закони здебільшого встановлюють особливий режим захисту меншин у формі певного типу самоврядування меншин.

Ключові слова: національні меншини, захист прав, міжнародне законодавство, міжнародні організації, державна політика, етнічні конфлікти.

The article was submitted 13.07.2021
The article was revised 04.08.2021
The article was accepted 23.08.2021

UDC 349:61
DOI https://doi.org/10.32849/2663-5313/2021.7.03

Olha Rossylna,
PhD in Law, Managing Partner, Clinic for Personalized Diagnostics and Therapy Design "ONCOTHERANOSTICS", 45, Vasylkivska street, Kyiv, Ukraine, postal code 03022, rossylna@gmail.com
ORCID: *orcid.org/0000-0002-1648-6063*

Rossylna, Olha (2021). Biobanking in oncology as an element of personalized medicine: legal interaction aspects. Entrepreneurship, Economy and Law, 7, 18–21.

BIOBANKING IN ONCOLOGY AS AN ELEMENT OF PERSONALIZED MEDICINE: LEGAL INTERACTION ASPECTS

Abstract. ***Purpose.*** The modern scientific and medical community has made significant progress in its development over the last century. Unfortunately, domestic healthcare legislation is not developing so fast. Therefore, the purpose of the article is to highlight the main areas of reforms of the national biobanking laws, conduct research and analyze the relevant relations, impact and legal mechanisms of interaction between personalized medicine and biobanking. ***Research methods.*** The paper relies on general research and special methods of scientific cognition. ***Results.*** The basic issues of interaction between biobanking and personalized medicine have been analyzed. The concept of biobanking as an economic activity has been defined. The article pays special attention to the justification of the urgent public need to improve health legislation, in particular, to regulate activities related to human biological material. The author has determined the significance, value and necessity of legalizing biobanking in clear, unified and transparent legal field. It has been proved that one should highlight key legal points taking into account the protection of intellectual property rights to medical data. This is associated with the shift of a focus from the strategy centered on samples to the strategy that is primarily oriented to relevant data. The article has studied different models of biobanking funding and substantiated the feasibility of implementing an entrepreneurial model in Ukraine within the conditions provided by the laws on public-private partnership. ***Conclusions.*** In the context of rapid scientific development, large-scale research projects should pay due attention to the legal regulation of biobanking as an activity that leads to the integrated studies of personalized medicine. At this time, the legislator faces some challenges, the settlement of which will result in unshadowing and standardization of activities that are directly related to human biological material. Therefore, it has a range of risks and involves many stakeholders who have public and private interests in the mentioned activity.

Key words: biobanking, personalized medicine, biological material, medical law, international medical law, intellectual property right to medical data, public-private partnership in healthcare.

1. Introduction

It is evident that biobanking is an underestimated research topic. This is a tool that can contribute to implementing various projects: from the creation of more fine-grained genetic tests to the discovery of drugs and new viruses. The science of biobanking is very comprehensive and diversified as it covers the collections of plant, animal, and human samples. To achieve the purposes set in this research, the author has focused on the very human biobanking. Any biomedical issues should be considered holistically given not only legal but also socio-economic and moral-ethical elements of the regulation of relevant social relations.

The concept "biobank" generally means large, organized collections of well-characterized tissue samples, such as surgical biopsy (fresh frozen or in paraffin blocks), blood, serum samples, diverse cell lines and DNA – everything is thoroughly collected for research purposes (Parodi, 2015). Biobanking, in its turn, is an activity on sampling, technical processing and proper storage of biomaterial samples according to international standards for their further use for large-scale research purposes, in particular, in personalized medicine.

Personalized medicine is an efficient scientific and hi-tech approach to the healthcare system. Personalized medicine is a field of modern medicine that uses targeted diagnostic and therapeutic approaches. For common understanding, the essence of personalized medicine is somewhat simplified to the fact

that a human being, not a disease, is central to treatment and medical mastery. Nowadays, there are about 75 thousand genetic testing products on the market compared to less than 66 thousand in 2016 (Waltz, Konski, 2020). Such availability of different genetic tests intensifies the need for additional requirements for patients' data protection.

2. Statutory regulation of biobanking in the context of personalized medicine

High-quality progress in the health system can take place only as a result of large-scale research projects. Clinical research in personalized medicine is based on the analysis of biomaterial samples along with clinical data. Thus, as associative links between these two elements are often weak, qualitative research requires plenty of samples and accurate clinical data. Moreover, biobanks are one of the core platforms for international and inter-disciplinary cooperation acting as a "key driver" for biomarkers (diagnostics) of the next generation and drug discovery (Hasan, 2012).

Personalized medicine and biobanking as two legal categories have something in common, as follows:

1) both are regarded in terms of one of the backbone branches of public administration – health care;

2) in the practical aspects of implementation, they deal with biological material (biological samples);

3) they are widely used in Ukraine and have considerable international experience of realization of social relations regulated by statutory acts on personalized medicine and biobanking;

4) none of them has well-defined legal regulation under the current legislation of Ukraine.

As early as 2009, Time Magazine added biobanking to the list of top 10 ideas changing the world right now. However, it is essential to note that back then, some European countries already had laws governing social relations on the creation and use of biobanks. For instance, the Act on Biobanks went into effect in Iceland in 2001; since then, the Human Genes Research Act has been in force in Estonia, as well as the Act on the Medical Use of Human Organs and Tissues in Finland; the Human Genome Research Law – in Latvia since 2002; the Biobanks Law and Biobanks in Medical Care Act – in Norway and Sweden, respectively, since 2003; the Act of the Hungarian Parliament on the protection of human genetic data and the regulation of human genetic studies, research and biobanks – since 2008. In 2011, Switzerland adopted the Human Research Act, and Finland approved the Biobank Law in 2012 (Morr, 2005).

It is worth mentioning that a logical process primarily involves shaping a particular circle of social relations, which is subsequently edged with statutory regulation. The process of the system and unified statutory regulation in personalized medicine (including biobanking) is somewhat delaying in Ukraine. The Resolution of the Cabinet of Ministers of Ukraine, which approved Licensing conditions for economic activities of banks of umbilical cord blood and other tissues and human cells, is one of the key normative-legal acts in this field (On approval of Licensing conditions for economic activities of banks of umbilical cord blood and other tissues and human cells according to the list approved by the Ministry of Health, 2016). This document doesn't have the definition of "biobanking", but it contains a similar one that can be used to trace some elements and logical focus of legislator's ideas, as follows: the activity of the umbilical cord blood bank is the economic activity on processing, labeling (coding), preservation, testing (examination), storage, provision (sale) and/or clinical use of products and/or drugs based on cord blood, other human tissues and cells.

In view of the aforesaid, the statutory regulation of biobanking, as one of the high-priority elements of personalized medicine, should be precise and transparent at all its stages:

– collection of biomaterial samples;

– processing – manufacturing of products and/or drugs based on human tissues and cells;

– proper storage of samples;

– provision with necessary clinical data.

Thus, the author states that biobanking in the context of current legislation is an economic activity in the health system that is exercised by licensed economic entities for processing, labeling (coding), preservation, testing (examination), storage, provision (sale) and/or clinical use of products and/or drugs based on human biomaterials and related clinical data.

One of the most critical elements of biobanking is information – biological and medical (clinical) data on a biological sample. Such data are a basic driving precondition that is associated with the promotion by personalized medicine specialists of the development of modern biobanks. It is personalized medicine that guides modern biobanking and changes its focus from the strategy which is centered on samples to the strategy which is primarily oriented to relevant data.

The latest generation of biobanking is often linked with biological data kept in the electronic medical systems. In addition to the access to biological samples, the owners of such databases can also propose access to validated medical

records, genetic data and extremely specific demographic information of a patient (Hasan, 2012). Biobanks will play a key role in switching to personalized medicine as they have the potential that geneticists search, record and analyze phenotypic information concerning a large number of patients as part of "the real world" (Roden, 2008; Hinrichsen, 2007; Lieu, 2007).

Specialists also warn of the danger of that sort of access to data because it can complicate carrying out duties and expectations of all users and owners, including scientists, research sponsors, companies and organizations maintaining coordination and development of science (Scott, 2012). The situation requires great joint efforts of regulatory bodies, scientific community, patient's groups and organizations, IPR specialists, lawyers, experts in the relevant field, and other stakeholders.

3. Funding models of biobanking

Keeping in mind the lack of a system statutory mechanism of biobanking realization, in particular, for clinical oncological research, and a dire need for developing a legal environment, it is incumbent to analyze another backbone element, i. e., a financing model of biobanking, in the absence of which the implementation of activities is impossible. For instance, Herbert Gottweis & George Lauss distinguish three different types:

– an entrepreneurial model of biobanking, which is often reflected in a public-private partnership between commercial organizations and government institutions;

– a bio-social model in which active groups of patients promote, finance and assist in biobank's creating and functioning;

– a model of public biobank according to which a biobank is mainly maintained and supported at the expense of taxpayers and non-profit research organizations (Gottweis, 2012).

Ukraine has all the reasons to run the so-called entrepreneurial model of biobanking financing. Regardless of the name, it is evident that the model grants public institutions a strong role: it refers to the situations when high-status healthcare research institutions are the managers of biobanks. Pursuant to Art. 4 of the Law of Ukraine "On State-Private Partnership" (On State-Private Partnership, 2010), healthcare is one of the spheres of application of such a partnership mechanism between the state and private partners. Despite the intense discussion of the forms of partnership implementation, the relevant agreements are concluded once in a while and implemented even less. As reported by the Investment Department of the Ministry of Economy of Ukraine, 192 PPP contracts have been concluded dated January 1, 2021, among which 39 are being executed (only 2 contracts in health care: in Kyiv and Lviv regions) (Status of PPP implementation in Ukraine, 2021). Thus, lagging progress in concluding and implementing PPP projects is associated with a high level of corruption risks for investors and imperfect legislation.

4. Conclusions

Given the above, the author has specified key challenges which should be kept in mind when developing a legal framework regulating social relations in biobanking, as follows:

1) standardization of activities in the biobanking realm to take part in the international large-scale research projects;

2) harmonizing all processes (from the collection of biomaterial samples to their adequate storage);

3) consideration of ethical aspects when collecting samples and respective clinical data (GDRP), as well as during their transfer to other subjects;

4) protection of intellectual property rights to medical data.

References:

Cabinet of Ministers of Ukraine (2016). Pro zatverdzhennia Litsenziinykh umov provadzhennia hospodarskoi diialnosti bankiv pupovynnoi krovi, inshykh tkanyn i klityn liudyny zgidno z perelikom, zatverdzhenym Ministerstvom okhorony zdorovia: Postanova Kabinetu Ministriv Ukraiiny vid 2 bereznia 2016 № 286 [On approval of Licensing conditions for economic activities of banks of umbilical cord blood and other tissues and human cells according to the list approved by the Ministry of Health: Resolution of Cabinet of Ministers of Ukraine March 2, 2016, no. 286]. Retrieved from: https://zakon.rada.gov.ua/laws/show/286-2016-%D0%BF (in Ukrainian).

Gottweis, H., Lauss G. (2012). Biobank governance: heterogenous modes of ordering and democratization. *J. Community Genet*., vol. 3(2), pp. 61–71 (in English).

Hasan, S. (2012). The increasing role of biobanks in personalized medicine. *Sanguine Blog*. Retrieved from: https://blog.sanguinebio.com/the-increasing-role-of-biobanks-in-personalized-medicine (in English).

Hinrichsen, V. L., Kruskal, B., O'Brien, M. A., Lieu, T. A., Platt, R. (2007). Using electronic medical records to enhance detection and reporting of vaccine adverse events. J. *Am. Med. Inform. Assoc*., no. 14(6), pp. 731–735 (in English).

Lieu, T. A., Kulldorff, M., Davis, R. L. et al. (2007). Real-time vaccine safety surveillance for the early detection of adverse events. *Med. Care*, 45(10 Suppl. 2), pp. 89–95 (in English).

Morr, U. (2005). Zul ssigkeit von Biobanken aus verfassungsrechtlicher Sicht (Recht und Medizin, Band 77). Peter Lang GmbH, InternationalerVerlag der Wissenschaften, p. 187 (in German).

Parks, A. (2009). Biobanks – 10 ideas changing the world right now. *Time Magazine*, 12 March, no. 173(11). Retrieved from: http://content.time.com/time/specials/packages/article/0,28804,1884779_1884782_1884766,00.html (in English).

Parodi, B. (2015). Biobanks: A definition. *Ethics, Law and Governance of Biobanking* / D. Mascalzoni (ed.). Dordrecht: The International Library of Ethics, Law and Technology 14, Springer Science and Business Media. DOI: 10.1007/978-94-017-9573-9 (in English).

Roden, D. M., Pulley, J. M., Basford, M. A. et al. (2008). Development of a large-scale de-identified DNA biobank to enable personalized medicine. *Clin. Pharmacol. Ther.*, no. 84(3), pp. 362–369 (in English).

Scott, C. T., Caulfield, T., Borgelt, E., Illes, J. (2012). Personal medicine – the new banking crisis. *Nat. Biotechnol.*, no. 30(2), pp.141–142 (in English).

Stan zdiisnennia DPP v Ukraini [Status of PPP implementation in Ukraine] (2021). Retrieved from: https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=9fc90c5e-2f7b-44b2-8bf1-1ffb7ee1be26&title=StanZdiisnenniaDppVUkraini&isSpecial=true (in Ukrainian).

Verkhovna Rada Ukrainy (2010). Pro derzhavno-pryvatne partnerstvo: Zakon Ukrainy vid 1 lypnia 2010 № 2404-VI [On State-Private Partnership: Law of Ukraine, July 1, 2010]. Retrieved from: https://zakon.rada.gov.ua/laws/show/2404-17#Text (in Ukrainian).

Waltz, J. A., Konski, A. F. (2020). Episode 12: Personalized Medicine, the Health Care of the Future. *Health Care Law Today, Personalized Medicine Bulletin*. Retrieved from: https://www.foley.com/en/insights/publications/2020/08/personalized-medicine-health-care-of-the-future (in English).

Ольга Россильна,
кандидат юридичних наук, керуючий партнер, Клініка персоналізованого дизайну діагностики і терапії «ОНКОТЕРАНОСТИКА», вул. Васильківська, 45, Київ, Україна, індекс 03022, rossylna@gmail.com
ORCID: *orcid.org/0000-0002-1648-6063*

БІОБАНКІНГ В ОНКОЛОГІЇ ЯК ЕЛЕМЕНТ ПЕРСОНАЛІЗОВАНОЇ МЕДИЦИНИ: ПРАВОВІ АСПЕКТИ ВЗАЄМОДІЇ

Анотація. ***Мета.*** Сучасна наукова й медична спільнота зробила значний ривок у своєму розвитку впродовж останнього століття. На жаль, не такими швидкими темпами розвивається вітчизняне законодавство в галузі охорони здоров'я. Тому метою статті є виокремлення основних напрямів реформування національного законодавства у сфері біобанкінгу, проведення дослідження та аналіз зв'язку, впливу і правових механізмів взаємодії персоналізованої медицини та біобанкінгу. ***Методи дослідження.*** Робота виконана на підставі загальнонаукових і спеціальних методів наукового пізнання. ***Результати.*** Проаналізовано базові питання взаємодії біобанкінгу та персоналізованої медицини. Визначено поняття біобанкінгу як господарської діяльності. Особлива увага у статті приділяється обґрунтуванню гострої суспільної необхідності у вдосконаленні законодавства у сфері охорони здоров'я, зокрема, з метою врегулювання діяльності, пов'язаної з біологічним матеріалом людини. З'ясовано значення, цінність і необхідність легалізації біобанкінгу в чіткому, уніфікованому й прозорому правовому полі. Доведено, що юридичні акценти мають бути розставлені з урахуванням захисту прав інтелектуальної власності на медичні дані. Це пов'язано зі зміщенням фокусу зі стратегії, у центрі якої перебувають зразки, на стратегію, яка першочергово спрямовується на відповідні дані. Досліджено різні моделі фінансування біобанкінгу та доведено можливість реалізації в Україні підприємницької моделі в межах умов, передбачених законодавством про державно-приватне партнерство. ***Висновки.*** В умовах стрімкого наукового розвитку й у межах масштабних дослідницьких проєктів належне місце має бути відведене правовому регулюванню біобанкінгу як діяльності, яка зумовлює комплексні дослідження у сфері персоналізованої медицини. Наразі перед законодавцем постає низка викликів, урегулювання яких приведе, зокрема, до детінізації та стандартизації діяльності, що безпосередньо пов'язана з біологічним матеріалом людини. А тому зазначена сфера має низку ризиків та охоплює багато стейкхолдерів, які мають як публічні, так і приватні інтереси в такій діяльності.

Ключові слова: біобанкінг, персоналізована медицина, біологічний матеріал, медичне право, міжнародне медичне право, право інтелектуальної власності на медичні дані, державно-приватне партнерство у сфері охорони здоров'я.

The article was submitted 12.07.2021
The article was revised 02.08.2021
The article was accepted 23.08.2021

UDC 341.63
DOI https://doi.org/10.32849/2663-5313/2021.7.04

Kateryna Spyrydonova,
Postgraduate Student at the Department of Commercial Law and Procedure, Institute of Law of Taras Shevchenko National University of Kyiv, Head, Law Firm "BOSSOM GROUP", 146, Zhylianska street, Kyiv, Ukraine, postal code 01033, k.spyrydonova@bossomgroup.com
ORCID: *orcid.org/0000-0003-0139-7583*

Spyrydonova, Kateryna (2021). Competence of international commercial arbitration. Entrepreneurship, Economy and Law, 7, 22–28.

COMPETENCE OF INTERNATIONAL COMMERCIAL ARBITRATION

Abstract. ***The purpose of the article*** is to analyze the norms of international legislation and current legislation of Ukraine on the competence of international commercial arbitration, scientific literature and publications to study the available doctrinal approaches to the competence of international commercial arbitration, its legal nature, content and correlation with such related categories as "jurisdiction", "admissibility", "arbitrability". ***Research methods.*** The paper is based on general scientific and special methods of scientific cognition: analysis, synthesis, formal-legal, system-structural, and comparative-legal methods. Results**.** The author has specified the relevance of the issue under study taking into account the trends towards extending a range of issues which can be submitted to international commercial arbitration, analyzed the rules of international legislation and current legislation of Ukraine in terms of the availability of the definition of the concept "competence of international commercial arbitration", studied basic doctrinal approaches to the determination of competence, and analyzed the correlation of such concepts as "competence", "jurisdiction", "arbitrability", "admissibility", and "exclusive jurisdiction". ***Conclusions.*** The concept "competence of international commercial arbitration" is currently quite ambiguous given the lack of a statutory and unified doctrinal approach to its definition. At the same time, the statutory use of such concepts as "competence" and "jurisdiction" allows stating that the study of the mentioned issues is relevant and needs the engagement of scientists to avoid interpretation collisions in practice. In the author's opinion, thorough differentiation between the above institutions allows avoiding interpretation collisions in legislative rules. In addition, the study of the arbitrability of disputes, including the correlation of arbitrability and competence as well as a range of disputes which can be submitted to international commercial arbitration, appears urgent.

Key words: arbitrability, arbitration clause, accessibility, competence, jurisdiction, exclusive jurisdiction.

1. Introduction

The study of the competence of international commercial arbitration is one of the most topical issues of both science and practice. The identification of availability or lack of competence of international arbitration is a milestone stage in recognizing an agency which is entitled to settle a dispute arisen between the parties. The reference of statutory norms to the concept "competence", while there is no statutory or unified doctrinal definition, can become a reason for erroneous interpretation of procedural rules and regulations that, in its turn, can result in considering cases by an unauthorized body.

According to the National Economic Strategy until 2030 approved by the Resolution of the Cabinet of Ministers of Ukraine dated March 3, 2021, № 179, one of the tasks under the strategic goal "To guarantee fair justice in Ukraine which is based on the rule of law, protection of rights and freedoms of man, physical and legal entities" is to improve the laws on international arbitration and procedural codes for a broader support of international courts, courts of arbitration and arbitrations by state courts. The Action Program of the Cabinet of Ministers of Ukraine approved by the Resolution № 471 dated June 12, 2020, also marks the need to enhance a role of alternate dispute resolutions, i. e., the implementation of effective systems of mediation and arbitration courts (third-party arbitration). In previous Programs, the government repeatedly emphasized that the formation of the operating system of arbitration courts will unload the judiciary system and raise the level of confidence in justice actors.

The amendments to procedural codes, which were made during the 2017 reform, resulted in the specification of:

– a range of disputes which can be submitted to international arbitration;

– a range of disputes which cannot be submitted to international arbitration;

– a range of disputes the individual civil aspects of which can be submitted to internal commercial arbitration (due to the lack of statutory definition of the concept "civil aspect of a dispute" – the mentioned issue needs a separate study).

The initiative of the Cabinet of Ministers of Ukraine represented in the Draft Law № 5347 "On amending some legislative acts of Ukraine on improving arbitration activities" confirms further extension of a range of disputes which can be submitted to international arbitration; given the above, the issue under consideration is of great relevance.

The following scientists delt with the subject are of the present article: O.N. Astanina, L.F. Vynokurova, O.S. Danylevych, M.A. Dubrovina, S.A. Kurochkin, B.R. Karabelnikov, T.S. Kyselova, S.O. Kurochkin, M.V. Kuptsova, K.K. Lebediev, L.A. Lunts, A.I. Minina, Yu.D. Prytyka, O.Yu. Skvortsov, T.V. Slipachuk, H.A. Tsirat, K.A. Chudinovskykh et al.

2. Statutory definition of the concept "competence of international commercial arbitration"

The competence of international commercial arbitration is currently one of the most topical taking into account the trends towards extending a range of cases which can be submitted to international commercial arbitration. The study of the term "competence" from the scientific and practical viewpoint and the analysis of its correlation with such concepts as "jurisdiction", "accessibility" and "arbitrability" are of both scientific and practical importance. At the same time, there is no statutory and unified doctrinal definition of the concept "competence of international commercial arbitration" to this date.

In international laws, the term "competence" is used in the UNCITRAL Model Law on International Commercial Arbitration, but there is no a definition in the Model Law.

In Ukrainian legislation, section IV of the Law of Ukraine "On International Commercial Arbitration" covers the competence matters – it regulates the procedure for ascertaining by the arbitral tribunal of the availability or lack of its competence to arbitrate in a dispute.

The Commercial Procedure Code of Ukraine also mentions the competence of international arbitration. Art. 175 of the CPC appoints that a reason for refusal to initiate proceedings is an award of international commercial arbitration adopted within its competence in Ukraine towards a dispute between the same parties on the same subject-matter and on the same basis, except when the court refused to issue an executive document on judgement enforcement. In other words, the availability of the competence of international commercial arbitration is a decisive criterion when dealing with admissibility of its involvement in considering a particular case.

Regulations and Rules of the international arbitral institutions also refer to the term "competence". Thus, for instance, art. 23 of Arbitration Rules of the London Court of International Arbitration (as amended on October 1, 2014) points at the competence and authority of the arbitral tribunal. It is worthy of note that the term "competence" is used in the official Russian translation, while the English-language version of the LCIA Arbitration Rules includes the term "Jurisdiction". The competence of the arbitral court is also covered by article 24 of Arbitration Rules and Mediation Rules (the VIAC Rules of Arbitration (Vienna Rules) and the VIAC Rules of Mediation). Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce uses the term "jurisdiction", not "competence".

Moreover, understanding and univocal interpretation of the concept "competence" has significant practical value given that justification of the competence of the International Commercial Arbitration Court is one of the necessary elements of a request for arbitration under the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce. In addition, article 3 of the Rules fixes a list of disputes which fall within the competence of the ICAC at UCC. It is also important to mention that the Rules were amended on November 1, 2020: the authority of the International Commercial Arbitration Court was extended, and thus, competence covers the disputes arising from:

– concession agreements;

– relations related to the exercise and protection of property rights or other real rights, including intellectual property rights;

– corporate relations, including disputes between the participants (founders, shareholders, members) of a corporate entity, or between a legal entity and its participant (founder, shareholder, member);

– agreements on shares, land parcels, other corporate rights or securities.

3. Doctrinal definitions of the concept "competence of international commercial arbitration"

Scientists put forward different approaches to the doctrinal definitions of the concept "competence".

Some scientists understand the competence of international commercial arbitration as a set

of their powers for settling disputes on merits as well as powers for running case hearing, which guarantee meeting the requirements for a fair procedure (Voronov, 2018, pp. 227).

H. A. Tsirat defines "competence" generally and properly. Generally, competence of the third-party arbitration court is encompassed by the fact whether it is authorized to consider particular matters when dealing with a dispute per se; properly, competence means is encompassed by the fact whether arbitral panel is authorized, based on the will of the disputing parties indicated in an arbitration agreement, to consider a particular dispute and whether the dispute falls under the conditions of the arbitration agreement (Tsirat, 2002, pp. 49–50).

Yu. K. Osipov regards competence as a range of statutory authoritative powers of the court which are concurrently its obligations. F. P. Yeliseikin considers competence as a legal phenomenon the structure of which embraces the matters of authority and title (Kovalenko, 2016, pp. 129).

According to the author of this article, competence can be deemed in two aspects. On the one hand, it is about competence of international commercial arbitration as a general category which comprises:

– a range of disputes which can be considered by international commercial arbitration;

– rights and obligations of the arbitration court when dealing with disputes.

On the other hand, the competence issue obligatorily emerges in relation to every individual dispute, and therefore, it also includes:

– reasons for the origin of competence of international commercial arbitration;

– the power of the arbitration court to deal with a matter of availability or lack of its competence to resolve a specific dispute.

4. The correlation of "competence" with other concepts

It is worth paying attention to the correlation of "competence" and "subject-matter jurisdiction", "arbitrability" and "jurisdiction".

The correlation between "competence" and "subject-matter jurisdiction" is most studied in scientific literature.

O. Yu. Skvortsov states that the concept "competence" is wider than the concept "subject-matter jurisdiction" as competence of a competent body involves not only considering legal disputes but also settling other matters. The scientist notes that the institution of subject-matter jurisdiction is one of the institutions which define and fix the competence of the arbitration courts (Skvortsov, 2005).

M. A. Dubrovina expresses the opinion that the term "subject-matter" is applied only to the determination of object competence of state judicial authorities and proposes to use the term "admissibility" in relation to the arbitration courts (Voronov, 2018, p. 33).

M. A. Karpyshev also shares the above position stating that the term "subject-matter jurisdiction" is used to establish object competence of state judicial authorities, subject-matter jurisdiction is directly fixed by the law. The author also specifies that the term "subject-matter jurisdiction" is not commensurate with the competence of international arbitration for which the use of the term "admissibility" or "arbitrability" is more precise (Karpyshev, 2017).

T. V. Slipachuk draws attention to the fact that the institution of subject-matter jurisdiction is not applicable regarding the third-party arbitration courts in its classical form as one of its essential features is "admissibility" of conventional submission of a dispute to the specific third-party arbitration court (Slipachuk, 2010, p. 134).

The opinion of H. V. Sevastianov merits attention: he believes that object competence of the third-party arbitration court doesn't compete with subject-matter jurisdiction of state courts but is fundamentally concurrent or alternate jurisdiction that calls in doubt the use of general distributing mechanism in the form of jurisdiction over cases for non-state solution of cases (Sevastianov, 2013, p. 107).

V. V. Yeromin holds that in the context of subject-matter jurisdiction, one should assume that it exclusively refers to state courts (Yeromin, 2019, p. 101).

Other scientists call into doubt the theory that the term "subject-matter jurisdiction" only touches upon state judicial authorities and reckon that admissibility as a legal category outlines a range of disputes which can be subject to conventional subject-matter jurisdiction under the law (Yeromin, 2019, p. 101).

K. A. Chudynovskykh adheres to the same position by extending boundaries of the institution of subject-matter jurisdiction and attributing to it the powers of both juridical and executive authorities and alternate (non-state) jurisdictional bodies. The scientist notes that the law may appoint subject-matter jurisdiction of particular cases to other state or non-state bodies. At the same time, an appeal to a non-state jurisdictional body to resolve a case under its jurisdiction usually depends on the will of the person concerned or the consent of the parties to the dispute, i.e., subject-matter jurisdiction of non-judicial bodies has an alternative (contractual) nature (Chudynovskykh, 2004, p. 52).

According to V. Ya. Muziukin, subject-matter jurisdiction covers entirely subject powers of a body, and another part of its competence consists of functional powers. The scientist believes that the concept of competence is wider than the concept of subject-matter jurisdiction (Sevastianov, 2013, p. 87).

As for case law, when studying the issues of jurisdiction over cases and admissibility of cases, the Supreme Economic Court of Ukraine defined subject-matter jurisdiction as a statutory set of powers of commercial courts towards considering cases, which fall under their competence, in the Resolution of the Plenum of the Supreme Economic Court of Ukraine № 10 dated 24.10.2011 "On some issues of jurisdiction over cases and admissibility of cases in commercial courts".

At the same time, it is important to mention that after the new version of the procedural codes was shared in 2017, the concept "subject-matter jurisdiction" was substituted with the concept "jurisdiction", so the correlation between the concepts "competence" and "jurisdiction" needs further consideration.

Section 2 of the Commercial Procedure Code of Ukraine encompasses the jurisdiction matters, but there is no its definition in the law.

The ICAS jurisdiction is discussed in the Regulations on the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Appendix № 1 to the Law of Ukraine "On International Commercial Arbitration"): paragraph 3 states that International Commercial Arbitration Court also considers disputes fallen into its jurisdiction under the international agreements of Ukraine. In addition, article 3 of the Rules of ICAC at UCCI provides a list of reserved disputes. In other words, "competence" and "jurisdiction" are applied to the International commercial arbitration and, in fact, are equated, as they are used to characterize the powers of the arbitration court to consider a particular range of disputes which it can consider.

As for case law, the Grand Chamber of the Supreme Court of Ukraine marks in its decisions many times that court jurisdiction is the law institution which is aimed at differentiating competence of different branches of the judiciary system and various types of procedures – civil, criminal, commercial, and administrative. Thus, as one can see jurisdiction and competence are neither identified nor regarded as unlike law institutions.

Most scientists assert that "jurisdiction" is a narrower concept. Thus, in N. M. Bessarab's opinion, "competence" is divided into functional, object and territorial. At the same time, the scientist marks that the very object competence of the court regarding the consideration of legal disputes and settlement of other legal matters is its jurisdiction. K. V. Husarov, in his turn, specifies that competence is a broader concept, since it primarily defines the court's functions while executing justice. According to the scientist, jurisdiction is an element of competence and authoritative powers of the court to consider and solve cases that also involves the institution of admissibility, as a component (Lymar, 2017).

The author of the present article believes "competence" and "jurisdiction" of the international commercial arbitration court can't be equated, as well as it is impossible to uniquely identify which concept is broader and which is narrower, because none of these institutions fully includes another institution. International court of arbitration can be discussed only in terms of object and subject jurisdiction, while the system of state courts falls under territorial and instance jurisdiction. In regard to competence, submission of certain disputes to the ICAC is one of the components of its competence along with such a component as the will of the parties to refer the matter to arbitration.

Another legal category that is to some extent related to the category of competence is arbitrability.

As for today, the law and science don't have a unified definition of the concept "arbitrability". Some scholars suggest considering arbitrability in a broad and narrow sense. In a narrow sense, arbitrability is understood as a category of disputes admissible for consideration by international commercial arbitration. In a broad sense, arbitrability encompasses the issues related to the validity of arbitrage transaction.

Yu. D. Prytyka states that "arbitrability" is the correspondence of a dispute arisen between the parties with a category of disputes which can be a subject-matter of the settlement by arbitration based on law that is used during dispute resolution (Kovalenko, 2017, p. 30).

The concept of arbitrability is also widely studied by foreign scholars. For instance, M.A. Karpyshev indicates that the term "arbitrability" is used to refer to disputes that can be considered on the merits and resolved by the thord-party arbitration courts and international commercial arbitrations (Karpyshev, 2017). O. Yu. Skvortsov defines arbitrability as a feature of the dispute that allows it to be a subject-matter of arbitration (Skvortsov, 2005, p. 99). V. V. Yeromin identifies arbitrability as the correspondence of a dispute submitted to arbitration (third-party arbitration court) or international commercial arbitration (arbitration tribunal) based on an arbitration

agreement (arbitration clause) with categories of the disputes which can be considered by such a court by law and/or point in discussion as civil, competence of the court and validity of the arbitrtion agreement (arbitration clause). In the scientist's opinion, arbitrability consists of the correspondence of a category of disputes which can be submitted to arbitration, court competence and validity of the arbitration agreement (Yeromin, 2019, p. 100). Therefore, court competence is actually regarded as one of the components of the term "arbitrability" along with such a component as the existence and validity of the arbitration agreement (Chudynovskykh, 2004, p. 35).

S. A. Kurochkin states that arbitrability is a general condition for recognizing competence of arbitral panel to deal with specific cases. Yu. A. Skvortsov indicates that the institution of arbitrability is applied to determine the object competence of third-party arbitration courts (Chudynovskykh, 2004, p. 35).

Some scientists discuss dispute arbitrability (an option for a dispute to become subject-matter of arbitration) as an objective form of arbitration competence, while a subjective form of competence which identifies the availability and scope of powers of arbitrators towards a particular dispute submitted to their consideration (Bilak, 2019; Prytyka, 2019; Spektor, 2019; Khomenko, 2019, p. 229).

The author of the present article reckons that the concepts "competence" and "arbitrability" partially meet in the following context: objective arbitrability specifies those types of disputes which may be a subject-matter of an arbitration agreement, and the competence of the arbitration court, among other aspects, indicates that its powers are extended only to those disputes which may be considered by that sort of court. Therefore, the concepts "arbitrability" and "competence" can't be equated given that arbitrability concerns characteristics of the very dispute (including whether it is subjected to the consideration of arbitration court and whether there is the relevant duly completed will of the parties), and "competence" characterizes the powers and functions of international arbitration court. However, the concepts under study meet in the part that touches upon the specification of a range of disputes which can be settled by the ICAC.

6. Conclusions

Summarizing and generalizing the above, one can conclude that the concepts "competence of international commercial arbitration are currently ambiguous taking into account the lack of statutory and unified doctrinal approach to its definition. At the same time, the statutory use of such terms as "competence" and "jurisdiction" allows highlighting that the studies of the specific topic are relevant and require the attention of scientists to avoid collisions when interpreting them in practice. The author believes that a detailed differentiation of the mentioned institutions assists in eliminating controversies while interpreting statutory rules.

In addition, the study of arbitrability of disputes, incl. in terms of examining a range of disputes which can be submitted to international arbitration, remains topical.

References:

Abesadze, S.A., Andreieva, T.K., Anurov, V.N. (2018). Mezhdunarodnii kommercheskii arbitrazh [International commercial arbitration]. Saint Petersburg: Redaktsiia zhurnala "Treteiskii sud"; Moscow: Statut (in Russian).

Arbitrazhnyj reglament Arbitrazhnogo instytutu Torgovoi palaty m. Stokgolma [Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017)] (2017). *sccinstitute.com*. Retrieved from: https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf (in Ukrainian).

Arbitrazhnyj Reglament Londonskogo mizhnarodnogo tretejskogo sudu [LCIA Arbitration Rules (2014)] (2014). *www.lcia.org*. Retrieved from: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Translations (in English).

Arbitrazhnyj reglament ta Reglament z mediacii (Videnski pravyla ta Videnskyj reglament z mediacii) [Arbitration Rules and Mediation Rules (Vienna Rules and Vienna Mediation Rules)] (2018). *viac.eu*. Retrieved from: https://viac.eu/images/documents/vienna_rules/АРБІТРАЖНИЙ_РЕГЛАМЕНТ_ТА_РЕГЛАМЕНТ_З_МЕДІАЦІЇ.pdf (in Ukrainian).

Bilak, M.Ya., Prytyka, Yu.D., Spektor, O.M., Homenko M.M. (2019). Alternatyvni sposoby vyrishennja sporiv [Alternative dispute resolution]. Kharkiv: Pravo (in Ukrainian).

Chudinovskih, K.A. (2004). Podvedomstvennost' v sisteme grazhdanskogo i arbitrazhnogo processual'nogo prava [Jurisdiction in the system of civil and arbitration procedural law]. Saint Petersburg: Legal Center Press (in Russian).

Eremin, V.V. (2019). Podhody k opredeleniju arbitrabel'nosti: sootnoshenie arbitrabel'nosti, podvedomstvennosti i kompetencii [Approaches to Determining Arbitrability: Relationship between Arbitrability, Subordination and Competence]. *Aktual'nye problemy rossijskogo prava – Actual problems of Russian law*, no. 8(105), pp. 95–107 (in Russian).

Gospodarskyj procesualnyj kodeks Ukrainy [Commercial Procedural Code of Ukraine] (1992). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/1798-12#Text (in Ukrainian).

Karpyshev, M.A. (2017). Dopustimost' mezhdunarodnogo arbitrazhnogo razbiratel'stva (arbitrabel'nost' kommercheskih sporov) v Rossii i Japonii [The validity of international arbitration (arbitrability of commercial disputes) in Russia and Japan]. Retrieved from: https://cyberleninka.ru/article/n/dopustimost-mezhdunarodnogo-arbitrazhnogo-razbiratelstva-arbitrabilnost-kommercheskih-sporov-v-rossii-i-yaponii/viewer (in Russian).

Kovalenko, I. (2016). Teoretychni ta praktychni aspekty pryntsypu "kompetentsiia-kompetentsii" mizhnarodnoho komertsiinoho arbitrazhu [Theoretical and practical aspects of the principle of "competence-competence" of international commercial arbitration]. *Visegrad Journal on Human Rights*, vol. 4/2, pp. 128–132 (in Ukrainian).

Kovalenko, I. (2017). Ponjattja ta vydy arbitrabilnosti v teorii mizhnarodnogo komercijnogo arbitrazhu [Concepts and types of arbitrability in the theory of international commercial arbitration]. *Pidpryjemnyctvo, gospodarstvo i parvo – Entrepreneurship, economy and law*, no. 1, pp. 29–33 (in Ukrainian).

Lymar, I.V. (2017). Konstytucijni zasady jurysdykcii cyvilnyh sudiv [Constitutional principles of jurisdiction of civil courts]. *Teorija i praktyka pravoznavstva – Theory and practice of jurisprudence*, no. 1. Retrieved from: https://core.ac.uk/download/pdf/230566697.pdf (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy "Pro zatverdzhennja Nacionalnoi ekonomichnoi strategii na period do 2030 roku" vid 03 bereznja 2021 r. № 170 [Resolution of the Cabinet of Ministers of Ukraine "On approval of the National Economic Strategy for the period up to 2030" from March 3, 2021 № 170]. (2021). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/179-2021-%D0%BF#n25 (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy "Pro zatverdzhennja Programy dijalnosti Kabinetu Ministriv Ukrainy" vid 12 chervnja 2020 r. № 471 [Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Program of Activities of the Cabinet of Ministers of Ukraine" of June 12, 2020 № 471]. (2020). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/471-2020-%D0%BF#Text (in Ukrainian).

Postanova Plenumu Vyshhogo gospodarskogo sudu Ukrainy № 10 "Pro dejaki pytannja pidvidomchosti i pidsudnosti sprav gospodarskym sudam" [Resolution of the Plenum of the Supreme Commercial Court of Ukraine № 10 "On some issues of jurisdiction and jurisdiction of commercial courts"] (2011). *Visnyk gospodarskogo sudochynstva – Bulletin of commercial litigation*, no. 6 (in Ukrainian).

Proekt Zakonu "Pro vnesennja zmin do dejakyh zakonodavchyh aktiv Ukrainy shhodo vdoskonalennja dijalnosti arbitrazhiv" № 5347 vid 08.04.2021 roku [Draft Law "On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Arbitration Activities" № 5347 dated April 8, 2021]. (2021). *iportal.rada.gov.ua*. Retrieved from: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71614 (in Ukrainian).

Reglament Mizhnarodnogo komercijnogo arbitrazhnogo sudu pry Torgovo-promyslovij palati Ukrainy (zi zminamy, shho nabraly chynnosti z 1 lystopada 2020 roku) [Rules of Procedure of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (as amended, effective from November 1, 2020)] (2020). *icac.org.ua*. Retrieved from: https://icac.org.ua/wp content/uploads/Reglament_UA_2020_print_1603953966.pdf (in Ukrainian).

Sevastianov, G.V. (2013). Pravovaja priroda tretejskogo razbiratel'stva i kompetencija tretejskogo suda v sfere nedvizhimosti [The legal nature of the arbitration proceedings and the competence of the arbitration court in the field of real estate]. *Candidate's thesis*. Moscow: IGP RAS (in Russian).

Skvortsov, O.Yu. (2005). Treteiskoie razbiratelstvo predprinimatelskikh sporov v Rossii: problem, tendentsii, perspektivy [Arbitration Proceedings of Business Disputes in Russia: Problems, Trends, Prospects]. Moscow: Volters Kluver. Retrieved from: https://cyberleninka.ru/article/n/2006-04-031-skvortsov-o-yu-treteyskoe-razbiratelstvo-predprinimatelskih-sporov-v-rossii-problemy-tendentsii-perspektivy-m-volters-kluver (in Russian).

Slipachuk, T.V. (2010). Arbitrabil'nost' mezhdunarodnyh kommercheskih sporov v Ukraine [Arbitrability of international commercial disputes in Ukraine]. *Vestnik mezhdunarodnogo kommercheskogo arbitrazha – International Commercial Arbitration Bulletin*, no. 1, pp. 133–142 (in Russian).

Tsirat, H.A. (2002). Mizhnarodnyi komertsiinyi arbitrazh [International commercial arbitration]. Kyiv: Istyna (in Ukrainian).

Typovyj zakon JuNSITRAL pro mizhnarodnyj torgovyj arbitrazh [UNCITRAL Model Law on International Commercial Arbitration] (1985). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/995_879#Text (in Ukrainian).

Voronov, K.M. (2018). Pryncyp "kompetencii-kompetencii" v mizhnarodnomu komercijnomu arbitrazhi [The principle of "competence-competence" in international commercial arbitration]. *Candidate's thesis*. Kharkiv: VN KhNU Karazina (in Ukrainian).

Zakon Ukrainy "Pro mizhnarodnyj komercijnyj arbitrazh" [Law of Ukraine "On International Commercial Arbitration"] (1994). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/4002-12#Text (in Ukrainian).

Катерина Спиридонова,
аспірант кафедри господарського права та господарського процесу, Інститут права Київського національного університету імені Тараса Шевченка, голова, Адвокатське об'єднання «БОССОМ ГРУП», вул. Жилянська, 146, Київ, Україна, індекс 01033, k.spyrydonova@bossomgroup.com
ORCID: *orcid.org/0000-0003-0139-7583*

КОМПЕТЕНЦІЯ МІЖНАРОДНОГО КОМЕРЦІЙНОГО АРБІТРАЖУ

Анотація. ***Метою статті*** є аналіз норм міжнародного законодавства та чинного законодавства України щодо компетенції міжнародного комерційного арбітражу, аналіз наукової літератури й публікацій із метою дослідження наявних доктринальних підходів щодо компетенції міжнародного комерційного арбітражу, її правової природи, змісту та співвідношення з такими суміжними категоріями, як «підвідомчість», «юрисдикція», «допустимість», «арбітрабельність». ***Методи дослідження.*** Робота виконана на підставі загальнонаукових і спеціальних методів наукового пізнання, наприклад методу аналізу й синтезу, формально-юридичного, формально-логічного, системно-структурного та порівняльно-правового методів. ***Результати.*** Визначено актуальність обраної теми з огляду на тенденції щодо розширення кола питань, які можуть бути передані на розгляд міжнародного комерційного арбітражу. Проаналізовано норми міжнародного законодавства та законодавства України стосовно наявності визначення поняття «компетенція Міжнародного комерційного арбітражу». Досліджено основні доктринальні підходи до визначення компетенції та проаналізовано співвідношення таких понять, як «компетенція», «підвідомчість», «арбітрабельність», «допустимість», «виключна підсудність». **Висновки.** Поняття «компетенція Міжнародного комерційного арбітражу» нині є неоднозначним з огляду на відсутність законодавчого та єдиного доктринального підходу до його визначення. Водночас використання в законодавстві термінів «компетенція» та «юрисдикція» дає змогу говорити про те, що дослідження цієї теми є актуальним і потребує уваги з боку науковців задля уникнення колізій у трактуванні зазначених понять на практиці. На нашу думку, детальне розмежування вказаних інститутів дасть змогу уникнути колізійних трактувань законодавчих норм. Крім того, актуальним залишається дослідження арбітрабельності спорів, зокрема щодо співвідношення арбітрабельності та компетенції, а також дослідження кола спорів, які можуть бути передані на розгляд до міжнародного комерційного арбітражу.

Ключові слова: арбітрабельність, арбітражна угода, допустимість, компетенція, підвідомчість, юрисдикція, виключна підсудність.

The article was submitted 05.07.2021
The article was revised 26.07.2021
The article was accepted 16.08.2021

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2021.7.05

Andrii Beikun,
Candidate of Legal Sciences, Associate Professor, Associate Professor at the Department of State Security, Kyiv Faculty of the National Academy of the National Guard of Ukraine, 7, Heroiv Oborony street, Kyiv, Ukraine, postal code 02000, AndriiBeikun@ukr.net
ORCID: *orcid.org/0000-0002-4895-1361*

Viktoriia Pryimak,
Candidate of Historical Sciences, Lecturer at the Department of State Security, Kyiv Faculty of the National Academy of the National Guard of Ukraine, 7, Heroiv Oborony street, Kyiv, Ukraine, postal code 02000, ViktoriiaPryimak@ukr.net
ORCID: *orcid.org/0000-0002-2962-1113*

Beikun, Andrii, Pryimak, Viktoriia (2021). Legal and regulatory basis for security and defence sector operation: conceptual approach. Entrepreneurship, Economy and Law, 7, 29–34.

LEGAL AND REGULATORY BASIS FOR SECURITY AND DEFENCE SECTOR OPERATION: CONCEPTUAL APPROACH

Abstract. ***The purpose*** of the article is to analyse the essence and legal and regulatory basis for the operation of the security and defence sector of Ukraine. ***Results.*** The authors analyse the essence and legal and regulatory basis for the operation of the security and defence sector of Ukraine through identifying the content of the operation of the security and defence sector, considering the scientific literature review, the essence and basic principles of the operation of the relevant concept in the legal and regulatory aspect, giving specific concepts as the example, as well as make proposals to optimize, from the authors' perspective, the work of the respective area. The authors argue that the concept of "security and defence sector" is understood as a comprehensive security and legal category, which includes not only a list of entities performing such activities but also organizational and legal, procedural and other principles of their operation. With regard to the definition, the essence of the operation of the security and defence sector is proved to require creating conditions to effectively prevent military attack and organise political (diplomatic) economic and armed response to possible aggression against Ukraine at any time and under any circumstances. ***Conclusions.*** It is justified that the legislative framework for the security and defence sector of Ukraine in general and the operation of individual subjects of security and defence of Ukraine, in particular, consists of: the Law of Ukraine "On the National Security and Defence Council of Ukraine" which defines the basis of the performance of the NSDC and forms its operation as an efficient and effective advisory body headed by the President of Ukraine; the Law of Ukraine "On Defence of Ukraine", establishing the principles of defence of Ukraine, as well as the powers of state authorities in the field of defence; the Law of Ukraine "On the Armed Forces of Ukraine", regulating the functions, the personnel of the Armed Forces of Ukraine, the legal basis for their organization, activities, deployment, command and control, management; the Law of Ukraine "On the Security Service of Ukraine", providing for the mechanism for the protection of state sovereignty, the constitutional order and territorial integrity of Ukraine as the key mission of the Security Service of Ukraine, one of the main actors in ensuring the security and defence of Ukraine.

Key words: security, defence, principles, laws of Ukraine, National Security and Defence Council of Ukraine, Security Service of Ukraine, Armed Forces of Ukraine.

1. Introduction

Relevance of the topic. The proper operation of the security and defence of Ukraine in the context of the armed aggression of the Russian Federation and other contemporary challenges is a priority task to be studied by both scientists and practitioners.

The State, as a social construction, is obliged to make every effort to ensure its territorial integrity and the inviolability of the state border, as well as take steps to ensure the realization of all human and citizen rights and freedoms provided for in the Constitution and laws of Ukraine.

The security and defence sector, its system of functioning, the list of bodies constituting it, the scope of rights, duties and powers are an effective mechanism for counteracting both

external intrusion and internal subversive conflicts that systematically threaten human and citizen rights and freedoms, as well as territorial integrity. That is why the study of problematic issues in this area is a matter of priority.

However, taking into account the specificities of the regulation of the operation of the security and defence sector of Ukraine, the scattering of the legal and regulatory basis, its systemic and generalized fragmentation into many different elements and areas in various branches of the legislation of Ukraine, in our opinion, the first priority is the analysis of the existing, most significant legal regulations on the functioning of individual institutions (bodies) in the sector of the security and defence of Ukraine.

Literature review. The relevant area in the science of administrative law and other fundamental branches is studied by: M. Butenko, V. Doronin, K. Dmytrenko, V. Kalashnykov, N. Kulak, P. Ledovskyi, M. Marchenko, N. Oharkov, V. Pylypchuk, S. Poliakov, S. Ponomarov, A. Khvorostiankin, M. Tsvik et al.; however, the issue of systematization and development of comprehensive recommendations to optimize the performance of the sector still remains topical.

The purpose of the article is to analyse the essence and legal and regulatory basis for the operation of the security and defence sector of Ukraine, while **the tasks** are: to identify the content of the operation of the security and defence sector, considering the scientific literature review; to determine the essence and basic principles of the operation of the relevant concept in the legal and regulatory aspect, giving specific concepts as the example; to prove proposals to optimize, from the author's perspective, the work of the respective area.

The focus of the study is social relations in the field of the operation of the security and defence sector.

The subject of the study is the legal and regulatory basis for the operation of the security and defence sector institutions.

Material statement. First of all, the above-mentioned requires focussing on the fact that the issue of the legal and regulatory framework for any concept of law is a priority, since it is the adoption of the relevant instrument in the manner provided for by Ukrainian legislation gives it legal force, without which any, even doctrinal, provision has a null and void status.

However, in our opinion, the definition of the concept "security and defence sector" as well as its content is extremely important.

For instance, according to the author of the military encyclopaedic dictionary N. Ogarkov, up to now, the concepts officially used in this sector have been and are "the field of national security and defence", "the field of military security", "the military sphere", "the military organization of the State", etc. They are used in various legal and regulatory instruments and are still valid today. Although, the concept of "security sector" is applied increasingly, including in the context of the implementation of the adopted Strategy of National Security of Ukraine. Unfortunately, many scientific sources interpret the concept expansively, attempting to cover the entire national security system of the State, or to replace this concept with another, or to reduce it to only one sphere (military) or structural component (subject of military security) (Ogarkov, 1984, p. 50). The definition primarily underlines that the concept of "security and defence sector" is understood as a comprehensive security and legal category, which includes not only a list of entities performing such activities but also organizational and legal, procedural and other principles of their operation.

Moreover, with regard to the interpretation of the concept "security and defence sector", the most fundamental is the definition provided in the thesis by S. Ponomarov, who suggests considering the security sector of Ukraine as a set of State authorities and organizations responsible for the security of the individual, society and the State. According to the main types of security established in the Ukrainian State, the author proposes to distinguish three basic elements of the security sector: 1) personal security of citizens, public order, etc., ensured by the law enforcement bodies; 2) national security ensured by the special services; 3) military security ensured by the Military Organization of Ukraine. The author proves that the relations with regard to state regulation of the security and defence sector are subject to administrative provisions, as they arise between subjects of public authority, are governed by administrative law and are of managerial, law enforcement and public service nature (Ponomarov, 2018).

The legislation stipulates that the current state of the components of the security and defence sector does not facilitate a guaranteed response to current threats to the national security of Ukraine (Military Security Strategy of Ukraine, 2001).

According to scientific estimates, in addition to the legislation, the legal regime of the national security and defence is much broader in the regulation of public relations, in particular: strategic planning in the field of national security and defence; state defence, economic and military-industrial

support for defence activities; counteracting the intelligence and subversive activities of foreign states and organizations using non-military or "hybrid" methods (a combination of military, political, information, economic, energy and other components) to achieve certain objectives; measures to obtain important information outside the State and the influence on other states' public policy on Ukraine; temporary restrictive measures in situations that threaten the security of the State; and measures to counter terrorist and extremist manifestations; protection of the state border and the legal regime of military security (Pylypchuk & Doronin, 2018).

With regard to the definition of the essence of the operation of the security and defence sector, the following should be stated: scientists argue, and we underline that the most important requirement is to create conditions to effectively prevent military attack and to organise political (diplomatic) economic and armed response to possible aggression against Ukraine at any time and under any circumstances.

At the same time, the essence of the legal and regulatory framework, supported by the intermediate conclusion, can be formed by the analysis of existing legal regulations, that is legislation of Ukraine.

According to Article 17 of the Constitution of Ukraine, the protection of the sovereignty and territorial integrity of Ukraine shall be the most important function of the State and a matter of concern for all the Ukrainian people. The defence of Ukraine and protection of its sovereignty, territorial integrity and inviolability shall be entrusted to the Armed Forces of Ukraine. Ensuring the security of the State and protecting the State borders of Ukraine shall be entrusted to respective military formations and law enforcement bodies of the State, whose organisation and operational procedure shall be determined by law (Constitution of Ukraine, 1996).

Moreover, the legal and regulatory framework for the security and defence sector of Ukraine, in our opinion, consists of important elements such as:

2. The Law of Ukraine "On the National Security and Defence Council of Ukraine"

According to the legislation of Ukraine, the National Security and Defence Council of Ukraine (hereinafter – NSDC) is the coordinating body for national security and defence under the Constitution of Ukraine (On the National Security and Defence Council of Ukraine, 1998; Dmytrenko 2013).

The scientists emphasise that the solution to the problems of ensuring the national security of any State is impossible without the functioning of a special body, mandate of which is to coordinate the activities of all public authorities in the field of national security. In Ukraine, such a body is the NSDC which is responsible, according to Article 4 (Competence of the National Security and Defence Council of Ukraine) of the Law of Ukraine "On the National Security and Defence Council of Ukraine", for submission of proposals for the implementation of the principles of domestic and foreign policy on national security and defence to the President of Ukraine, and coordination and ongoing monitoring of the activities of the executive authorities in this field (On the National Security and Defence Council of Ukraine, 1998; Dmytrenko, 2013).

Therefore, a structural analysis of the relevant Law of Ukraine makes it possible to substantiate the position that the NSDC is an efficient and effective advisory body headed by the President of Ukraine, whose decisions are implemented by decrees of the President of Ukraine and have substantial legal force.

Moreover, over recent years, this body has been effective due to the development of a monitoring policy with regard to both the security and defence sectors and individual actors of these policies. In addition, NSDC's active sanctions policy allows it, within the limits of its powers, to perform a preventive and deterrent function in the field of the security and defence of Ukraine.

3. The Law of Ukraine "On Defence of Ukraine"

This Law establishes, first of all, the principles for the defence of Ukraine, as well as the powers of public authorities, the fundamental functions and tasks of military command bodies, local State administrations, local self-government bodies, the duties of enterprises, institutions, organizations, officials, rights and obligations of Ukrainian citizens in the field of defence (On Defence of Ukraine, 1991).

At the same time, Section III of the Law establishes that the territorial defence of Ukraine is a system of military and special measures carried out during the specific period in order to: perform protection and defence of the State border; ensure conditions for the reliable functioning of the public authorities, military command bodies, strategic (operational) deployment of troops (forces), protection and defence of important installations and communications, combating sabotage and intelligence forces, other armed formations of the aggressor and anti-state illegally formed armed formations; maintenance of the legal regime of martial law.

In addition, the law provides for that the Armed Forces of Ukraine, other military

formations formed in accordance with the laws of Ukraine, the National Police, subdivisions of the State Special Transport Service, the State Special Communication and Information Protection Service of Ukraine and relevant law enforcement agencies are involved in the performance of the missions of territorial defence within the limits of their powers (On Defence of Ukraine, 1991).

Therefore, it is essential to draw attention to the importance and ensuring of State's institutional capacity to resist any encroachment on the security of Ukraine that becomes possible due to determining the actors of security and defence, who exercise their powers in a given direction. In addition, such entities are evidently grouped into primary (the Armed Forces of Ukraine) and secondary (that is, those involved by the Armed Forces of Ukraine in the territorial defence of Ukraine), such as the National Police, the State Special Transport Service and others. We believe that this list primarily includes the Security Service of Ukraine and the National Guard of Ukraine.

4. The Law of Ukraine "On the Armed Forces of Ukraine"

The Law of Ukraine regulates that, bearing in mind the need to ensure its own security and defence, being aware of responsibility in maintaining international stability as sovereign and independent, democratic, social, legal state, it has the Armed Forces of Ukraine with the necessary level of readiness and combat capability. This Law provides for the functions, personnel of the Armed Forces of Ukraine, the legal basis for their organization, performance, deployment, command and control, management (On the Armed Forces of Ukraine, 1991).

In accordance with article 1 (functions of the Armed Forces of Ukraine) of the Law, the Armed Forces of Ukraine is a military formation to which the Constitution of Ukraine entrusts the defence of Ukraine and the protection of its sovereignty, territorial integrity and inviolability. The Armed Forces of Ukraine ensure deterrence and repulse of armed aggression against Ukraine and protection of the airspace of the State and the underwater space within the territorial sea of Ukraine.

In addition, the current legislation of Ukraine, including the Law of Ukraine "On the Armed Forces of Ukraine", determines that the Armed Forces of Ukraine may be involved in: the measures of the legal regime of martial law and emergency; strengthening the protection of the State border of Ukraine and the exclusive (maritime) economic zone, the continental shelf of Ukraine and their legal establishment; eliminating natural and man-made emergencies; rendering military assistance to other States, as well as participate in international military cooperation and international peacekeeping operations on the basis of international treaties of Ukraine and in the manner and under the conditions defined by the legislation of Ukraine (On the Armed Forces of Ukraine, 1991).

Therefore, it should be emphasized not only on the institutional function of the Armed Forces of Ukraine in providing the security and defence Ukraine but also on the specific powers of the Armed Forces of Ukraine such as measures to enhance the defence capability of the country, ensuring the proper operation of the security and defence sector of Ukraine as well as others.

5. The Law of Ukraine "On the Security Service of Ukraine"

According to article 2 (Missions of the Security Service of Ukraine) of the relevant Law of Ukraine, the Security Service of Ukraine is entrusted, within its legal competence, with the protection of state sovereignty, the constitutional order and territorial integrity, the economic, scientific, technical and defence potential of Ukraine, the legitimate interests of the State and the rights of citizens against the intelligence and subversive activities of foreign special services and interference attempted by certain organizations; and protection of state secrets (On the Security Service of Ukraine, 1992).

Furthermore, national scholars emphasize that the Security Service of Ukraine, as a public authority, implements public and state tasks to ensure personal security of both individual citizens, including assistance in their rights and interests, and the global interests of the State and society, such as economic, political, social, information and etc. The activities of the Security Service of Ukraine and its agencies are, first, preventive and, secondly, aimed at detecting and suppressing criminal activities. In order to achieve its objectives, the SSU requires modernization in all aspects of its activities. A new approach is needed to determine the administrative and legal status of the body in general and its employees in particular, as well as to update methods, forms and means of operation of the public authority (Ledovskyi, 2016).

Therefore, it should be noted that the Security Service of Ukraine is the key agency in the security and defence system of Ukraine, which ensures the detection and suppression of criminal activities, attempting to violate the territorial integrity and other bases of national security of Ukraine.

6. Conclusions

Thus, the analysis of scientific perspectives, as well as the study of the legal and regulatory framework, permits establishing a position towards some key provisions within the purpose of the article. The legal and regulatory framework for the security and defence sector is governed by the State in legal and regulatory instruments, which establish the basis for the functioning of subjects, as well as the organizational and legal basis for their functioning and interaction in the performance of the missions of ensuring the security and defence of the State. In addition, the legal and regulatory basis of the operation of the security and defence sector is covered by many legal regulations of different jurisdictions, indicating the complexity of this sector of public policy. In our opinion, the Laws of Ukraine regulating the activities of other law enforcement agencies ensuring the operation of the security and defence sector of Ukraine require further study.

References:

Dmytrenko, E.S. (2013). Problemni pytannia realizatsii povnovazhen RNBO Ukrainy yak subiekta informatsiinykh vidnosyn [Problematic issues of realization of the powers of the National Security and Defense Council of Ukraine as a subject of information relations]. *Informatsiina bezpeka liudyny, suspilstva, derzhavy*, no. 3(13), pp. 30–33 [in Ukrainian].

Zakon Ukrainy Pro Zbroini Syly Ukrainy: pryiniatyi 6 hrudnia 1991 roku № 1934-XII [Law of Ukraine on the Armed Forces of Ukraine from December 6 1991, № 1934-XII]. (1991). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/1934-12#Text [in Ukrainian].

Zakon Ukrainy Pro oboronu Ukrainy: pryiniatyi 6 hrudnia 1991 roku № 1932-XII [Law of Ukraine on Defence of Ukraine from December 6 1991, № 1932-XII]. (1991). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/1932-12#Text [in Ukrainian].

Zakon Ukrainy Pro Radu natsionalnoi bezpeky i oborony Ukrainy: pryiniatyi 5 bereznia 1998 roku № 183/98-VR [Law of Ukraine on the National Security and Defence Council of Ukraine from March 5 1998, № 35]. (1998). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2469-19#Text [in Ukrainian].

Zakon Ukrainy Pro Sluzhbu bezpeky Ukrainy: pryiniatyi 25 bereznia 1992 roku № 2229-XII [Law of Ukraine on the Security Service of Ukraine from 25 1992, № 2229-XII. (1992). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2229-12#Text [in Ukrainian].

Konstytutsiia Ukrainy, pryiniata 28 chervnia 1996 roku [Constitution of Ukraine from June 28 1996]. (2018, April 11). Kyiv: vyd-vo PALYVODA [in Ukrainian].

Ledovskyi, P.K. (2016). Aktualni aspekty diialnosti Sluzhby bezpeky Ukrainy [Current aspects of the Security Service of Ukraine]. *Nashe parvo – Our right,* no. 1, pp. 62–65 [in Ukrainian].

Ogarkov, N.V. (ed.). (1984). Voennyi entciklopedicheskii slovar [Military encyclopedic dictionary]. Moscow: Voenizdat [in Russian].

Pylypchuk, V.H., & Doronin, V.M. (2018). Pravo natsionalnoi bezpeky ta viiskove pravo: teoretychni ta prykladni zasady stanovlennia i rozvytku v Ukraini [National security law and military law: theoretical and applied principles of formation and development in Ukraine]. *Informatsiia i parvo – Information and law,* no. 2(25), pp. 62–72 [in Ukrainian].

Ponomarov, S.P. (2018). Administratyvno-proavove zabezpechennia diialnosti sektoru bezpeky i oborony Ukrainy [Administrative and legal support of the security and defense sector of Ukraine]: *Doctor's thesis*. Dnipro: DDUVS [in Ukrainian].

Ukaz Prezydenta Ukrainy Pro stratehiiu viiskovoi bezpeky Ukrainy: pryiniatyi 25 bereznia 2021 roku № 121/2021 [Decree of the President of Ukraine on the strategy of military security of Ukraine from March 25 2021, № 121/2021]. (2021). *president.gov.ua* Retrieved from https://www.president.gov.ua/documents/1212021-37661 [in Ukrainian].

Андрій Бейкун,
кандидат юридичних наук, доцент, доцент кафедри з забезпечення державної безпеки, Київський факультет Національної академії Національної гвардії України, вулиця Героїв Оборони, 7, Київ, Україна, індекс 02000, AndriiBeikun@ukr.net
ORCID: *0000-0002-4895-1361*

Вікторія Приймак,
кандидат історичних наук, викладач кафедри з забезпечення державної безпеки, Київський факультет Національної академії Національної гвардії України, вулиця Героїв Оборони, 7, Київ, Україна, індекс 02000, ViktoriiaPryimak@ukr.net
ORCID: *orcid.org/0000-0002-2962-1113*

НОРМАТИВНО-ПРАВОВІ ОСНОВИ ФУНКЦІОНУВАННЯ СЕКТОРУ БЕЗПЕКИ І ОБОРОНИ: ІНСТИТУЦІЙНИЙ ПІДХІД

Анотація. ***Метою*** статті є аналіз сутності та нормативно-правового підґрунтя функціонування сектору безпеки й оборони України. ***Результати.*** Автором здійснено аналіз сутності та нормативно-правового підґрунтя функціонування сектору безпеки та оборони України шляхом визначення змісту його функціонування з урахуванням наукових думок учених, сутності й основних підвалин функціонування відповідного інституту в нормативно-правовому аспекті з наведенням як прикладу конкретних інституцій. Також обґрунтовано пропозиції, які, на думку автора, оптимізують роботу відповідного напряму. Автором аргументовано, що поняття «сектор безпеки і оборони» розуміється як комплексна безпеково-юридична категорія, що включає в себе не лише перелік суб'єктів, які здійснюють таку діяльність, а й організаційно-правові, процесуальні та інші засади їх функціонування. Щодо визначення сутності функціонування сектору безпеки та оборони аргументовано, що найважливішим є створення таких умов, які уможливлять ефективне запобігання воєнному нападу та сприятимуть організації політичної (дипломатичної), економічної, збройної відсічі можливої агресії проти України в будь-який час і за будь-яких обставин. ***Висновки.*** Обґрунтовано, що законодавчий базис сектору безпеки та оборони України загалом і функціонування окремих суб'єктів забезпечення безпеки й оборони України складається з таких актів: Закону України «Про Раду національної безпеки і оборони України», що визначає засади роботи Ради національної безпеки і оборони України та формує її роботу як дієвого й ефективного дорадчого органу, що очолюється Президентом України; Закону України «Про оборону України», що встановлює засади оборони України, а також повноваження органів державної влади у сфері оборони; Закону України «Про Збройні Сили України», котрий регламентує функції, склад Збройних Сил України, правові засади їх організації, діяльності та дислокації, керівництво й управління ними; Закону України «Про Службу безпеки України», що визначає механізм захисту державного суверенітету, конституційного ладу, територіальної цілісності України як основне завдання Служби безпеки України – одного з основних суб'єктів забезпечення безпеки та оборони України.

Ключові слова: безпека, оборона, засади, закони України, Рада національної безпеки і оборони України, Служба безпеки України, Збройні Сили України.

The article was submitted 15.07.2021
The article was revised 03.08.2021
The article was accepted 23.08.2021

UDC 342.95: 502.7
DOI https://doi.org/10.32849/2663-5313/2021.7.06

Yana Zelinska,
PhD in Law, Assistant at the Department of Administrative Law, Yaroslav Mudryi National Law University, 77, Pushkinska street, Kharkiv, Ukraine, postal code 61024, yanazelinskaya04@gmail.com
ORCID: orcid.org/0000-0003-3097-9080

Viktoriia Spasenko,
PhD in Law, Assistant at the Department of Administrative Law, Yaroslav Mudryi National Law University, 77, Pushkinska street, Kharkiv, Ukraine, postal code 61024, v_spasenko@ukr.net
ORCID: orcid.org/0000-0002-3260-2001

Zelinska, Yana, Spasenko, Viktoriia (2021). Non-compliance with the requirements for subsoil protection: issues of administrative liability. Entrepreneurship, Economy and Law, 7, 35–41.

NON-COMPLIANCE WITH THE REQUIREMENTS FOR SUBSOIL PROTECTION: ISSUES OF ADMINISTRATIVE LIABILITY

Abstract. ***The purpose*** of the research is to analyze the issues of bringing persons to administrative liability for non-compliance with the requirements for subsoil protection. ***Research methods.*** The paper is based on general scientific and special methods of scientific cognition. ***Results.*** The authors have analyzed the particularities of distinguishing administrative liability from criminal one violating the requirements for subsoil protection. It has been emphasized that administrative misdemeanors differ from criminal offences by a lack of the intention to inflict serious harm to protected social relations. This difference is manifested in all elements of unlawful acts of both types: an object, actus reus, a subject, mens rea. The article has made a comprehensive analysis of the elements of an administrative offence for violating the requirements for subsoil protection. It has been found out that taking into account the body of an administrative offence under art. 57 of the Code of Ukraine on Administrative Offenses, i. e., blanket elements, one should refer to normative legal acts which regulate a complex of social relations in the subsoil realm and determine specific elements of administrative offences. The research has established that the breach of requirements for subsoil protection involves violating the performance of mining activity. The authors highlight that there is legal liability for the disturbance of mining activity. In particular, persons guilty of breaching mining laws are brought to disciplinary, administrative, civil and criminal liability under the laws of Ukraine. The article has studied administrative liability for the above offences. Mining offences mean the execution of mining works without technical documents (projects, work descriptions) approved under the established procedure or violation of their requirements. ***Conclusions.*** The research concludes that bringing to administrative liability for non-compliance with regulations on the protection of subsurface resources arises when one infracts the Subsoil Code of Ukraine and the Mining Law of Ukraine, in particular, violations in mining works, i. e., the execution of mining works without approved technical documents (projects, work descriptions etc.) or breach of their requirements.

Key words: administrative liability, administrative offences, elements of administrative offences, criminal liability, violation of requirements for subsoil protection, environmental protection.

1. Introduction

The Constitution of Ukraine defines the right to an environment that is safe for life and health, and to compensation for damages caused by violation of this right as one of the most fundamental constitutional rights of a man and citizen. At the same time, case law is an individual form and system of actions to protect and safeguard the rights, freedoms and legitimate interests of a person, which have legal consequences, in particular, in the environmental sphere. In addition, it is crucial to turn attention to the fact that in practice, the issue of differentiation between violations of the rules of protection/use of subsoil resources (Article 240 of the Criminal Code of Ukraine) (Criminal Code of Ukraine, 2001) and other components of administrative offenses, including the breach of subsoil protection requirements (Article 57 of the Code of Ukraine on Administrative Offenses (hereinafter – CAO) (Code of Ukraine on Administrative Offenses, 1984), is often raised. Bringing a person to

administrative liability for violations in the field of subsoil protection has a social function. Thus, O. Uliutina notes that a significant social value of the administrative liability is a disciplinary feature, as the existing law and order is restored or compensated by the actions of authorized state bodies in social relations. Moreover, an offender has the opportunity to assess his/her actions in a relatively short time, which is peculiar to administrative procedure. In the context of environmental protection and nature management, administrative liability makes it possible to ensure compliance with environmental requirements necessary to guarantee the security of man and society and the entire state (Ulyutina, 2011, p. 10).

The purpose of the research is to analyze the issue of bringing persons to administrative liability for violating subsoil protection requirements, taking into account doctrinal approaches and regulatory framework. **Research methodology.** To study the issue of bringing persons to administrative liability for violating the requirements for subsoil protection, complete the task of separating administrative and criminal liability for violating the requirements for subsoil protection, the authors have used a set of general scientific and special methods. In particular, the dialectical method has been applied during the analysis of connections between the development of scientific ideas and modification of terms for bringing to administrative liability. Thus, the dialectical method has been applied during the analysis of relations between the evolution of scholarly views and modification of conditions of bringing to administrative liability. The systems approach has contributed to establishing the system of bodies related to the procedure of bringing to administrative liability. The logical method has assisted in identifying the features that are inherent in an administrative offense. The comparative law method has been used to distinguish administrative liability from criminal one.

Analysis of recent research and publications. The works of the following scientists hold pride of place among the studies devoted to the issue under consideration: V. Averianova, I. Aristova, A. Berlach, Yu. Bytiak, V. Bilous, I. Borodin, Ye. Dodin, L. Kovalenko, T. Kolomoiets, V. Kolpakov, T. Matselyk, N. Nyzhnyk, V. Ortynskyi, O. Ostapenko, S. Pietkov, O. Uliutina et al. However, there are controversial points that require further research.

2. Differentiation between administrative and criminal liability

It is inconceivable that the development trend of administrative science takes place without the comprehensive approach to distinguishing features of administrative liability in any sphere. The above is justified by a clear division of administrative and criminal liability. It is worth paying attention to the fact that under para. 2, art. 9 of the CAO, administrative liability for offenses enshrined in the CAO arises if these offences, by their nature, don't involve criminal liability by the law (Code of Ukraine on Administrative Offenses, 1984). In other words, such a law category as the degree of social harm or social danger of a committed action is the main criterion for distinguishing criminal and administrative offenses. At the same time, it is also essential to keep in mind a quantitative factor (frequency, offense repetition). Moreover, administrative misdemeanors differ from criminal offenses by a lack of the intention to inflict serious harm to protected social relations. This difference is manifested in all elements of unlawful acts of both types: an object, actus reus, a subject, mens rea. According to Yu. P. Bytiak, art. 9 of CAO and art. 11 of the Criminal Code of Ukraine directly indicate the guilt (action's guiltiness) of an offender. Given the necessity to prove the offender's guilt, there appears a need to manage the issue of recognition or non-recognition of an administrative offense as a socially dangerous act since such an element as a social danger of the administrative offense is not officially enshrined in legislation, but the science of administrative and criminal law singles it out (Bytiak, 2020, p. 90).

3. Elements of an administrative offense

The main legal category which is peculiar to an administrative offense is its set of elements. In this context, it is incumbent to analyze a set of elements of an administrative offense under art. 57 of CAO. It is worth mentioning that social relations in the field of environmental protection and natural resource use are an object of unlawful attempts to violate the established rules about subsoil protection (p. 1, art. 240 of the CC of Ukraine), established rules of subsoil use (p. 2, art. 240 of the CC of Ukraine) and requirements for subsoil protection (art. 57 of CAO). However, one observes a greater disarrangement of social relations in committing a punishable criminal offense, as opposed to an administrative misdemeanor.

Characterizing an object of the offense specified in art. 57 of CAO, it is important to note that it is represented by social relations arising in the field of subsoil protection. A statutory basis for the regulation of mining relations in Ukraine consists of the Constitution of Ukraine, the Law of Ukraine "On Environment Protection, the Subsoil Code of Ukraine" and other relevant legislative acts of Ukraine. In addition to laws, mining relations

are harmonized by other normative legal acts, as follows: 1) inter-branch and branch security rules which contain norms for performing safe mining activity; 2) interbranch and branch rules for technical operations prescribing the requirements and standards for effective, safe, and environmentally-friendly performance of mining activity, industrial organization and management; 3) unified blasting safety regulations which establish the procedure for storage, transportation, and use of explosives during the mining operation (Kozyakov, 2014, p. 296).

In terms of the above, one should refer to paragraph 1 of article 13 of the Code of Ukraine of Subsoil which ascertains that subsoil users are enterprises, institutions, organizations, citizens of Ukraine, foreigners and stateless persons, and foreign legal entities. Subsoil resources are given for use, in particular, to extract minerals (para. 1, art. 14 of the Code of Ukraine of Subsoil) (Code of Ukraine of Subsoil, 1994). According to para. 2 of Art. 24 of the Code of Ukraine of Subsoil, users of subsoil resources shall use them under an intended purpose; guarantee the fulness of geological study, rational and complex exploitation, and conservation of subsoil resources; maintain the safety of people, property, and the environment; restore land parcels disturbed while using subsoil resources to a condition suitable for their further use in social production; provide and disclose information on national and local taxes and fees, other payments, and production (economic) activities necessary to guarantee transparency in the extractive industries according the procedure approved by the Cabinet of Ministers of Ukraine; fulfill other requirements for subsoil use established by the legislation of Ukraine and product distribution agreement.

Analyzing the physical element of an administrative offense, one should highlight the following: physical elements of non-compliance with the requirements for subsoil protection include: 1) unauthorized building on sites of commercial mineral occurrence, breach of subsoil protection rules and requirements for environmental protection, buildings and facilities from the harmful effects of activities associated with the use of subsurface resources, destruction or damage of observation regime wells on groundwater, as well as surveying and geodetic signs; 2) selective mining of ample areas of deposits that leads to unjustified losses of balance reserves of minerals, excessive losses and excessive impoverishment of minerals during extraction, damage to mineral deposits, and other violations of the requirements for rational use of their reserves; 3) a loss of surveying documentation, breach of requirements for bringing mine workings and boreholes, which are liquidated or conserved, into a condition ensuring public safety, as well as requirements for the preservation of deposits, mine workings and boreholes during conservation; 4) infringement of specific conditions of a special permit for subsurface use as long as it is not associated with generating large-scale income. At the same time, the generation of large-scale income occurs when its amount is three hundred times more than non-taxable minimum incomes.

The mental element (mens rea) of an administrative offense is also of importance. Both citizens and officials can be the mental element of the offense. Thus, according to para. 2.3 of the Instruction on registration of materials on administrative offenses and imposition of administrative penalties by Ukrainian Geological Survey approved by the Order of the Ministry of Ecology and Natural Resources of Ukraine № 347 dated 14 August 2013 (hereinafter "Instruction"), if non-compliance with subsoil laws committed by officials of enterprises, institutions, and organizations, their structural or separate subdivisions regardless of ownership and business profiles is revealed, it is drawn up a protocol with respect to a person who has infringed subsoil laws; if such a person cannot be identified – with respect to an official who is liable for the state of subsoil use at this enterprise (institution, organization), and if such a person is not appointed – with respect to the head of the enterprise, institution, or organization (On approval of the Instruction on registration by the State Service of Geology and Subsoil of Ukraine of materials on administrative offenses and imposition of administrative penalties, 2013).

As it is known, mens rea consists of the mental attitude of a person towards his/her illegal activity and its effects in the form of intent and negligence. In particular, intent's presence can be discussed in the case when an offender realized the illegal nature of his/her actions or inactivity, foresaw its harmful consequences, and wished them to occur (direct intent) or deliberately assumed the occurrence of such consequences (indirect intent).

The offender's actions are regarded as negligent, if a person, who committed illegal action, foresaw the possibility of harmful consequences of his actions and inactivity but carelessly relied on their prevention (self-confidence) or did not provide for the occurrence of such consequences, although, he had to and could have foreseen

them (negligence). Therefore, the mental element of an administrative offense involves committing the mentioned act both with intent and negligence.

It is worth paying attention to the classification of the elements of an administrative offense as provided for by art. 57 of CAO: nature of damage caused by the administrative offense – formally and materially defined; according to the subject of the administrative offense – mixed, i. e., there are features of both non-special (general) (a sane person who has reached the age of 16) and special subject (an official); according to the internal structure – alternative elements, as the article's disposition specifies several actions; according to the construction – with blanket elements; according to the degree of social harm – qualified elements.

There should be three reasons to bring a person to administrative liability: 1) a statutory reason – the availability of a legal rule that prescribes an administrative offense and accountability for its commission; 2) a factual reason– the commitment of an unlawful, guilty act by a person that envisages administrative liability pursuant to the law; 3) a procedural reason – an order (or a decision) of the body of administrative jurisdiction on the imposition of an administrative penalty.

Taking into account the construction of an administrative offense prescribed by art. 57 of CAO, namely blanket elements, one should refer to normative legal acts which regulate a range of social relations in the field of subsurface resources and establish specific features of administrative offenses. Thus, the tasks of the Soil Code of Ukraine are to regulate mining relations to meet the demands for mineral raw materials and other needs for public production, subsoil protection, guaranteeing the security of people, property, natural environment, as well as the safeguard of the rights and legitimate interests of enterprises, establishments, organizations, and citizens when using subsurface resources (art. 2).

According to para. 1, article 4 of the Subsoil Code of Ukraine, subsurface resources are exclusive ownership of the Ukrainian people and are granted only for use. Agreements or actions violating the subsurface title of the Ukrainian people directly or indirectly are invalid. The Ukrainian people exercise the subsurface title through the Verkhovna Rada of Ukraine, the Verkhovna Rada of the Autonomous Republic of Crimea, and local councils (Code of Ukraine of Subsoil, 1994).

4. Public administration in the field of protection of subsurface resources

Analyzing the provision of para. 1, article 11 of the Subsoil Code of Ukraine, it should be emphasized that public administration in the field of geological study, use and protection of subsurface resources is carried out by the Cabinet of Ministers of Ukraine, a central executive body which ensures the formation of state policy on natural environment protection, a central executive body which exercises state policy on the geological study and rational subsurface use, a central executive body which exercises state policy on labor protection, government agencies of the Autonomous Republic of Crimea, local executive authorities, other state authorities, and local self-government bodies under the legislation of Ukraine.

When referring to the powers of central executive authorities in the mentioned field, it is interesting to note that Ukrainian Geological Survey (Derzhheonadra) is a central executive body the activities of which are controlled and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Ecology and Natural Resources, who implements state policy on the geological survey and rational subsurface use (para. 1 of the Regulations on Ukrainian Geological Survey approved by the Order of the Cabinet of Ministers of Ukraine № 1174 dated December 30, 2015) (On approval of the Regulations on the State Service of Geology and Subsoil of Ukraine, 1995). At the same time, it is worth noting that the history of the Ukrainian Geological Survey went through several stages during Ukraine's independence: 1) for the first time in Ukrainian history, Regulations on the State Committee of Geology and Subsoil of Ukraine were approved on September 2, 1991; 2) new Regulations on the State Committee of Geology and Subsoil of Ukraine were approved on 01.04.1996; 3) on March 13, 199, the State Committee of Geology and Subsoil of Ukraine was reorganized into the Committee of Ukraine on Geology and Subsoil Use; 4) on March 30, 2002, the Committee of Ukraine on Geology and Subsoil Use was reorganized into Ukrainian Geological Survey and integrated in the Ministry of Ecology and Natural Resources, to which it subordinated; 5) State Geological Service was liquidated on April 14, 2004; 6) State Geological Service, which became a government authority and operated as the part of the Ministry of Ecology and Natural Recourses, to which it subordinated, was renewed on September 24, 2005; 7) on April 6, 2011, it was established Ukrainian Geological Survey, which is coordinated by the Cabinet of Ministers of Ukraine through the Ministry of Ecology and Natural Resources (Leonova, 2013, p. 77).

Under paragraphs 9,10,11 of the above Regulations of Derzhheonadra of Ukraine

(On approval of the Regulations on the State Service of Geology and Subsoil of Ukraine, 1995), it is authorized to issue a special permit for subsurface use (including the use of oil-gas bearing resources) according to the established procedure; to suspend and revoke the validity of special permits for subsurface use (including the use of oil-gas bearing resources) in the prescribed manner, to resume their validity in case of suspension; to carry out the re-issuance of special permits for subsurface use (including the use of oil-gas bearing resources), to amend them and issue duplicate copies, extend the validity of special permits for subsurface use (including the use of oil-gas bearing resources). In particular, the breach of requirements for the protection of subsoil resources by citizens and officials leads to bringing the mentioned persons to administrative liability.

According to art. 43 of the Subsoil Code of Ukraine, national cadaster of deposits and occurrence of minerals contains data about each deposit included in the State Fund of Mineral Deposits, quantity and quality of mineral reserves and available components, mining-engineering, hydrogeological and other conditions of field development and its geological and economic assessment, as well as each manifestation of minerals (Code of Ukraine of Subsoil, 1994).

The State Fund of Mineral Deposits of Ukraine was established following the Order of the Cabinet of Ministers № 150 dated 02.03.1993 "On the State Fund of Mineral Deposits of Ukraine", and Ukrainian Geological Service of Ukraine was entitled to form the Fund (para. 1 of the Order).

According to para. 4 of the Resolution of the Cabinet of Ministers of Ukraine № 75 dated 31.01.1995 "On the Approval of the Procedure for State Recording of Deposits, Reserves and Minerals Occurrence" (hereinafter "Order № 75 dated 31.01.1995), all deposits of commercial minerals, including man-made ones, with reserves assessed as industrial compose the state fund of mineral deposits (hereinafter "state fund"), and all preliminary evaluated minerals – the fund's reserve. The accounting system of assets of the state fund comprises data of the national cadastre of deposits and occurrences of mineral resources (hereinafter "state cadastre") and state register of mineral reserves (hereinafter "state register"), as well as state and branch reports of the enterprises and organizations conducting exploration of deposits, including man-made ones, mining and mineral processing (On approval of the Procedure for state accounting of deposits, reserves and manifestations of minerals, 2015).

The application of art. 57 of the CAO correlates with art. 56 of the Subsoil Code, which outlines the basic requirements for the protection of subsoil resources. Thus, the basic requirements for the protection of subsoil resources involve: ensuring a detailed and comprehensive geological study of subsoil resources; maintaining the statutory order for granting subsoil resources for use and preventing unauthorized subsoil use; rational extraction and use of mineral reserves and available components; preventing the unfavorable impact of activities related to subsoil use on the conservation of mineral reserves, mining, and boreholes, which are operated or preserved, as well as underground structures; preserving mineral deposits from flooding, water intrusion, fires, and other factors that affect the quality of minerals and industrial value of deposits or complicate their exploitation; preventing unreasonable and unauthorized building on areas of commercial mineral occurrence and meeting the statutory procedure for the use of the relevant areas for other purposes; preventing pollution of subsurface resources in case of underground storage of oil, gas, and other substances and materials, disposal of harmful substances and industrial waste, and waste water disposal; compliance with other requirements provided by the legislation on environmental protection (Code of Ukraine of Subsoil, 1994).

By relying on art. 19 of the Mining Code of Ukraine, which establishes the mining procedure, one can specify the mining procedure. Therefore, mining activity is performed based on a special permit (license) for subsurface use issued under the law. Mining activity is carried out under the projects and certificates developed and approved following safety rules, maintenance rules, unified rules for blasting safety. Projects and certificates shall have the "Emergency Shutdown" section. In case of factual or predicted changes of mining-and-geological (production) conditions, mining works are suspended up to the adjustment and re-approval in the prescribed manner of projects and certificates. Projects and certificates are disclosed to the staff of mining enterprises as set outlined in the security rules. A corporate plan for the development of mining work is annually examined and approved by mining authorities (Mining Law of Ukraine, 1999).

In this regard, it should be pointed out that the breach of the mining procedure provides for legal liability. Thus, art. 49 of the Mining Law consolidates liability for violation of mining laws. Consequently, persons guilty of the violation of mining laws are brought to disciplinary, administrative, civil, and legal liability under the laws of Ukraine. Mining offenses encompass

the performance of mining works without technical documentation (projects, certificates, etc.) approved in the established procedure or with the violation of their requirements.

5. Conclusions

As the result of scientific analysis, the authors have drawn the following conclusions about bringing persons to administrative liability for the violation of requirements for the protection of subsurface resources.

1. Administrative liability is one of the most efficient tools for counteracting administrative offenses in the field of subsoil protection.

2. The differentiation between criminal and legal offenses in the field of subsoil protection is based on a law category, which is manifested in the degree of social harm or danger of the committed action; at the same time, it is necessary to keep in mind the quantitative factor (frequency, offence repetition).

3. The qualification of an act under art. 57 of the CAO is possible if there are elements of an administrative offense. In particular, bringing to administrative liability under para. 1, art. 57 of the CAO, i. e., non-compliance with the rules for subsoil protection, takes place if one violates art. 56 of the Subsoil Code of Ukraine and art. 19 of the Mining Code of Ukraine, in particular, mining abuses – the performance of mining works without technical documentation (projects, certificates, etc.) approved in the established procedure or with the violation of their requirements.

References:

Bytiak, Yu.P. (2020) Administratyvna vidpovidalnist ta administratyvne pravoporushennia [Administrative liability and administrative offense]. *Problemy zakonnosti – Problems of legality,* 151, 87–100. DOI: 10.21564/2414-990x.151.214830 (in Ukrainian).

Kodeks Ukrainy pro administratyvni pravoporushennia [Code of Ukraine on Administrative Offenses] (1984, December 7). *Vidomosti Verkhovnoyi Rady USSR – Bulletin of Verkhovna Rada of USSR*. Kyiv: Parlam. vyd-vo (in Ukrainian).

Kodeks Ukrainy pro nadra [Code of Ukraine of Subsoil] (1994 July 27). *Vidomosti Verkhovnoyi Rady Ukrayiny – Bulletin of Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo (in Ukrainian).

Kryminalnyi kodeks Ukrainy [Criminal Code of Ukraine] (2001, April 5). *Vidomosti Verkhovnoyi Rady Ukrayiny. – Bulletin of Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo (in Ukrainian).

Kozyakov, I.M. (2014) Porushennia pravyl okhorony abo vykorystannia nadr: problemy blanketnoi konstruktsii na faktychnoho skladu statti 240 Kryminalnoho kodeksu Ukrainy [Violation of the rules of protection or use of subsoil: problems of blanket construction on the actual composition of Article 240 of the Criminal Code of Ukraine]. *Universytetski naukovi zapysky – University scientific notes,* 2(50), 291–300 (in Ukrainian).

Leonova, O.V. (2013) Systema orhaniv derzhavnoho upravlinnia sferoiu nadrokorystuvannia Ukrainy: shliakh rozvytku za roky nezalezhnosti [The system of public administration in the field of subsoil use in Ukraine: the path of development over the years of independence]. *Pravo i suspilstvo – Law and society,* 1, 72–80 (in Ukrainian).

Hirnychyi zakon Ukrainy [Mining Law of Ukraine] (1999 October 6) № 127-XIV. *Vidomosti Verkhovnoyi Rady Ukrayiny. – Bulletin of Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo (in Ukrainian).

Pro zatverdzhennia Instruktsii z oformlennia Derzhavnoiu sluzhboiu heolohii ta nadr Ukrainy materialiv pro administratyvni pravoporushennia ta nakladennia administratyvnykh stiahnen: nakaz Ministerstva ekolohii ta pryrodnykh resursiv Ukrainy [On approval of the Instruction on registration by the State Service of Geology and Subsoil of Ukraine of materials on administrative offenses and imposition of administrative penalties: order of the Ministry of Ecology and natural resources of Ukraine] 14.08.2013 № 347. *Ofitsiinyi visnyk Ukrainy. – Official bulletin of Ukraine* (in Ukrainian).

Pro zatverdzhennia Polozhennia pro Derzhavnu sluzhbu heolohii ta nadr Ukrainy: postanova Kabinetu Ministriv Ukrainy [On approval of the Regulations on the State Service of Geology and Subsoil of Ukraine: Resolution of the Cabinet of Ministers of Ukraine] of January 31, 1995 № 75. Retrieved from: https://zakon.rada.gov.ua/laws/show/75-95-%D0%BF (in Ukrainian).

Pro zatverdzhennia Poriadku derzhavnoho obliku rodovyshch, zapasiv i proiaviv korysnykh kopalyn: postanova Kabinetu Ministriv Ukrainy [On approval of the Procedure for state accounting of deposits, reserves and manifestations of minerals: Resolution of the Cabinet of Ministers of Ukraine] of December 30, 2015 № 1174. *Ofitsiinyi visnyk Ukrainy – Official bulletin of Ukraine* (in Ukrainian).

Ulyutina, O.A. (2011) Administratyvno-pravovi zasady okhorony navkolyshnoho pryrodnoho seredovyshcha ta pryrodokorystuvannia [Administrative and legal principles of environmental protection and nature management]. *Extended abstract of candidate's thesis.* Kiev: Nat. University of Bioresources and Nature Management of Ukraine (in Ukrainian).

Яна Зелінська,
кандидат юридичних наук, асистент кафедри адміністративного права, Національний юридичний університет імені Ярослава Мудрого, вулиця Пушкінська, 77, Харків, Україна, індекс 61024, yanazelinskaya04@gmail.com
ORCID: *orcid.org/0000-0003-3097-9080*

Вікторія Спасенко,
кандидат юридичних наук, асистент кафедри адміністративного права, Національний юридичний університет імені Ярослава Мудрого, вулиця Пушкінська, 77, Харків, Україна, індекс 61024, v_spasenko@ukr.net
ORCID: *orcid.org/0000-0002-3260-2001*

ПОРУШЕННЯ ВИМОГ ЩОДО ОХОРОНИ НАДР: ПРОБЛЕМА ПРИТЯГНЕННЯ ДО АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ

Анотація. ***Метою статті*** є аналіз проблем притягнення до адміністративної відповідальності осіб за порушення вимог щодо охорони надр. ***Методи дослідження.*** Роботу виконано на основі загальнонаукових та спеціальних методів наукового пізнання. ***Результати.*** Авторами проаналізовано особливості розмежування адміністративної та кримінальної відповідальності за порушення вимог щодо охорони надр. Акцентується увага на тому, що адміністративні проступки відрізняються від кримінальних правопорушень відсутністю завдання значної шкоди охоронюваним суспільним відносинам. Ця різниця проявляється в усіх ознаках протиправних діянь обох видів: об'єкті, об'єктивній стороні, суб'єкті, суб'єктивній стороні. У статті зроблено детальний аналіз складу адміністративного правопорушення за порушення вимог щодо охорони надр. З'ясовано, що з огляду на конструкцію адміністративного правопорушення, передбаченого ст. 57 Кодексу України про адміністративні правопорушення, а саме бланкетний склад, варто звернутися до нормативно-правових актів, які регулюють сукупність суспільних відносин у сфері надр та встановлюють конкретні ознаки адміністративних правопорушень. Визначено, що порушення вимог щодо охорони надр включає й порушення порядку проведення гірничих робіт. Автори наголошують на тому, що за порушення порядку проведення гірничих робіт передбачена юридична відповідальність. Зокрема, особи, винні в порушенні гірничого законодавства, притягуються до дисциплінарної, адміністративної, цивільно-правової, кримінальної відповідальності відповідно до законів України. У статті досліджено адміністративну відповідальність за вищезазначене порушення. Правопорушеннями у сфері проведення гірничих робіт є проведення гірничих робіт без затвердженої в установленому порядку технічної документації (проєктів, паспортів тощо) або з порушенням їхніх вимог. ***Висновки.*** У статті зроблено висновок, що притягнення до адміністративної відповідальності за невиконання правил охорони надр має місце в разі порушення Кодексу України про надра, а також Гірничого закону України, зокрема в разі порушення у сфері проведення гірничих робіт, а саме проведення гірничих робіт без затвердженої в установленому порядку технічної документації (проєктів, паспортів тощо) або з порушенням їхніх вимог.

Ключові слова: адміністративна відповідальність, адміністративні правопорушення, склад адміністративного правопорушення, кримінальна відповідальність, порушення вимог щодо охорони надр, охорона навколишнього середовища.

The article was submitted 25.06.2021
The article was revised 15.07.2021
The article was accepted 05.08.2021

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2021.7.07

Vladyslav Pinchuk,
Postgraduate Student at the Department of Police Law, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, VladyslavPinchuk@ukr.net
ORCID: *orcid.org/0000-0002-2170-0838*

Pinchuk, Vladyslav (2021). The service of district police officers in the system of administrative and jurisdictional actors. Entrepreneurship, Economy and Law, 7, 42–46.

THE SERVICE OF DISTRICT POLICE OFFICERS IN THE SYSTEM OF ADMINISTRATIVE AND JURISDICTIONAL ACTORS

Abstract. ***The purpose*** of the article is to determine the position of service of district police officers in the system of administrative and jurisdictional activity. In order to define the service of district police officers in the system of administrative jurisdiction actors, the article analyses the components of the conceptual and categorical framework of the research, clarifies the essence of the activity of district police inspectors of the National Police to determine their place in the system of administrative and jurisdictional actors, and puts forward general theoretical proposals to optimize the functioning of this institution. ***Results.*** The author argues that administrative and jurisdictional activities of district police officers of the National Police of Ukraine are a procedure defined by the current legislation for the consideration of administrative offences by district police officers without recourse to the courts. However, literature review reveals that any administrative activity of these subjects is jurisdictional if it involves the decision-making by a certain subject individually, but this standpoint, is partially disproven in the course of the study. In addition, the article studies the legal basis for the functioning of the concept and related branches and proves that the units of district police officers are considered as administrative and jurisdictional actors that makes it possible to conduct further scientific research in this area, as well as more comprehensive interpretation of the essence of their role and place. ***Conclusions.*** It is determined and further reasoned that at least 50% of powers of district police officers of the National Police of Ukraine are administrative and jurisdictional. The article justifies that the powers of district police officers of the National Police of Ukraine have been mainly regulated by departmental legal regulations. The before mentioned confirms the broad and grounded regulatory and legal framework of this issue at all levels of domestic legislation that, from the author's perspective, positively influences the regulation of the relevant law branch.

Key words: administrative activities, jurisdiction, administrative and jurisdictional activities, offences, police.

1. Introduction

Relevance of the topic. The activities of the National Police of Ukraine, both in general and in a fragmented manner, raise many questions from civil society in general and individual citizens, in particular. For this very reason, the author has chosen the issue of optimizing the performance of this body as a fragmented problem, which has a negative impact on the rights and freedoms of individuals and citizens.

At the same time, the implementation by the National Police of administrative and jurisdictional activities, carried out mainly by units of district police officers, is one of the most conceptual and meaningful. Therefore, it is necessary, first of all, to clarify the role and place of police district officers in the system of administrative and jurisdictional actors.

The above and other facts demonstrate that the role and place of the district police officers of the National Police of Ukraine in the mechanism of administrative and jurisdictional activities require a substantial study.

The purpose of the article is to define the place of the service of district police officers in the system of administrative jurisdictional actors. In turn, the aim makes it possible to outline the list of **tasks**, as follows: general description of the components of the conceptual and categorical framework of the research, clarification of the content of the performance of district police inspectors of the National Police of Ukraine in order to determine their place in the system of administrative and jurisdictional

actors, statement of general theoretical proposals to optimize the functioning of this institution.

2. Activities of the National Police of Ukraine

According to many scholars, administrative and jurisdictional activities of the National Police of Ukraine are a procedure defined and regulated by the current legislation for the consideration of administrative offences by authorized police officers without recourse to the courts that involves several actors, requires decision-making and liability before a court recourse and other grounds.

Moreover, there are other ideas. For example, I. Panov in his study considers administrative and jurisdictional activities of district police inspectors as a specific form of their administrative activities regulated by administrative law and related to the consideration and adjudication on the merits regarding cases on administrative offences under their jurisdiction, as well as to the performance of other administrative and jurisdictional actions of a providing nature (Panov, 2005).

Reference sources reveal that jurisdiction as an autonomous activity in general and administrative and jurisdictional activities in particular are characterized both by y its inherent features and the functions through which such activities are carried out. The content of administrative jurisdiction consists of the activities on realization of its functions carried out in the prescribed forms and methods (Volokitenko, 2018). It should be emphasized that the concept of "jurisdiction" is considered by scientists as the exercise of powers in a certain territory and specific geographical area.

However, the issue of defining the role and place of the service of district police officers in the system of administrative and jurisdictional actors still remains controversial. In our view, some of its aspects require more in-depth study.

For instance, a district police officer is a police official charged with the tasks of the service of district police officers and granted authority by law (Bass, 2016, p. 33).

Furthermore, A. Kurovska underlines that it is district police officers who play a decisive role in the detection and prevention of crimes committed. This is due to the fact that district police officers are the closest to the population, often familiar with a large number of people from a district trusted, their faces are familiar (Kurovska, 2017). It is necessary to focus on the most decisive characteristic of the legal status of the district police officer, that is, the proximity of the police officer directly to the social environment that permits implementing administrative and jurisdictional activities most easily.

As it is mentioned above, the uniqueness of the very institution and the responsibilities assigned to the respective units dictate the need for the proper legal and regulatory framework. However, the Law of Ukraine "On the National Police" does not define a district police officer, or a unit of district police officers, as a separate unit, because, the police include: 1) Criminal police; 2) Patrol police; 3) Pretrial investigative services; 4) Police Security; 5) Special Police; 6) Special Police Force (On the National Police, 2015).

In addition, the units of district police officers are considered as administrative and jurisdictional actors that makes it possible to conduct further scientific research in this area, and more comprehensive interpretation of the essence of their role and place. Scientists and practitioners argue that the content of functions as a constituent element of the legal status of district police officers reveals that at least 50% of powers of district police officers of the National Police of Ukraine are administrative and jurisdictional.

According to Article 23 of the Law of Ukraine "On the National Police", in terms of the implementation of administrative and jurisdictional activities, the police are entrusted with: detection and suppression of administrative offences, proceedings in cases of administrative offences, consideration thereof is responsibility of the police as prescribed by law; making decisions on the imposition of administrative penalties and enforcing them in cases provided for by law, etc. Moreover, a police officer, within the limits of statutory powers, independently makes decisions and incurs disciplinary or criminal liability for his/her unlawful acts or omissions (On the National Police, 2015).

Moreover, A. Kubaienko emphasises that the police may consider complaints both against the actions of police officers and against actions or omissions of other subjects if they violate someone's rights, freedoms or legitimate interests. Therefore, the administrative and jurisdictional activities of the police are reflected in types of proceedings such as: cases of administrative offences, disciplinary cases and complaints from citizens (Kubaienko, 2017).

Therefore, it is necessary to study in detail district police officers' powers prescribed by the legislation of Ukraine and evaluate their content and essence in order to clarify the role and place of a district police officer in the system of administrative and jurisdictional actors.

3. Legal status of the district police officers of the National Police of Ukraine

Furthermore, it should be noted that the legal status of the district police officers

of the National Police of Ukraine is first and foremost enshrined in the laws of Ukraine and has been considerably expanded in departmental regulations. This proves a significant function in the field of human rights protection by district police officers not only through implementing the administrative and jurisdictional component but also while exercising other powers.

The legislation of Ukraine grants district police officers of the National Police of Ukraine, during the performance of their assigned tasks, the following powers:

1) to demand persons to present his/her ID and other documents in cases provided for by Article 32 of the Law of Ukraine "On the National Police";

2) to interview persons in cases provided for by Article 33 of the Law of Ukraine "On the National Police";

3) to apply the measures provided for in articles 30 and 31 of the Law of Ukraine "On the National Police";

4) to detain suspects of a criminal or administrative offence, bringing such persons to a police station or police unit;

5) in cases prescribed by law, in order to carry proceedings on administrative offences, to decide on administrative penalties and enforce them;

6) under article 38 of the Law "On the National Police", to enter a person's premises or other possession without a reasoned court decision in cases of emergency;

7) to take measures to monitor compliance with the restrictions established by the Law of Ukraine "On Administrative Supervision over Persons Released From Prisons" ("On approval of the Instruction on the organization of activities of district police officers, 2017);

8) to monitor the compliance of natural and legal persons with the rules and regulations governing the storage and use of firearms, special means, explosives and ammunition subject to the authorization system, as well as to inspect directly the places where they are kept in order to verify compliance with the rules of treatment and the rules of use;

9) to apply police coercive measures in cases and manner prescribed by the Law of Ukraine "On the National Police";

10) to implement preventive police measures provided for in article 31 of the Law of Ukraine "On the National Police" to obtain and verify information on the involvement of persons residing in a designated district in the commission of criminal or other offences;

11) to engage patrol police's response units to assist in the detention and delivery of offenders, to execute court rulings on bringing witnesses and suspects before the court and, where necessary, in coordination with the head of the patrol police of the territorial (separate) police unit;

12) to verify the arrival of released persons to their place of residence in accordance with the procedure established by law and specified in article 20 of the Law of Ukraine "On the Social Adaptation of Persons Serving or Having Served a Sentence of Restraint or Imprisonment for a Specified Term" (On the National Police, 2015);

13) to take measures in cooperation with the children's affairs service of the regional, Kyiv and Sevastopol City State Administrations, district, district State Administrations in Kyiv and Sevastopol cities to identify a child, his/her place of residence, and information on the parents or persons acting in their stead or other relatives, their place of residence (stay) if the child is reported to be without parental care (On approval of the Instruction on the organization of activity of district police officers, 2017).

Therefore, the analysis of the powers and review of ones related to administrative jurisdiction permits the author to establish the role and place of district police officers of the National Police of Ukraine in the system of administrative and jurisdictional actors.

Consequently, the application of the measures provided for in articles 30 and 31 of the Law of Ukraine "On the National Police", such as the detention of suspects in the commission of a criminal or administrative offence, the delivery of such persons to a police station or unit, proceedings on administrative offences, the decision to impose administrative sanctions and their enforcement, can be characterized as full or partially substantive administrative jurisdiction powers of a district police officer of the National Police of Ukraine.

In the author's opinion, they may be considered as such, first and foremost, due to a range of intrinsic features deriving from the very concept described above. They are as follows: coherence with the consideration and solution of cases on administrative offences under their jurisdiction; the performance of administrative and jurisdictional actions of a guaranteeing nature.

4. Conclusions

Therefore, the analysis of the approaches to the understanding of the concept of administrative and jurisdictional activities, its essence and meaning in the activities of district police officers of the National Police of Ukraine, as well as highlighting the role and place of this service in the system of administrative jurisdictional actors as a whole, permits the author to make some short conclusions.

It is concluded that the administrative and jurisdictional activities of the units of district police officers of the National Police of Ukraine are a procedure defined by the current legislation for the consideration of administrative offences by district police officers without recourse to the courts. However, some scholars underline that any administrative activity of these subjects is jurisdictional if it involves individual decision-making by a certain subject.

The powers of district police officers of the National Police of Ukraine have been mainly regulated in departmental legal regulations. It confirms the broad and grounded framework of this issue at all levels of domestic legislation that, from the author's perspective, has positively influences the regulation of the relevant law branch.

References:

Bass, V.O. (2016). Administratyvno-pravovyi status dilnychnoho ofitsera politsii v Ukraini: problemni pytannia [Administrative and legal status of a district police officer in Ukraine: problematic issues]. *Vseukrainska naukovo-praktychna konferentsiia "Natsionalna politsiia Donechchyny: problemy stanovlennia ta stratehiia rozvytku – 2016" – All-Ukrainian scientific-practical conference "Donetsk National Police: problems of formation and development strategy"*. Mariupol: Donetskii yurydychnyi in-t, pp. 32–34 (in Ukrainian).

Volokitenko, I.O. (2018). Orhanizatsiino-pravovi osnovy diialnosti pidrozdiliv preventyvnoi sluzhby natsionalnoi politsii Ukrainy [Organizational and legal bases of activity of divisions of preventive service of national police of Ukraine]. *Yurydychnyi naukovyi elektronnyi zhurnal – Legal scientific electronic journal,* 4. Retrieved from: http://www.lsej.org.ua/4_2018/51.pdf (in Ukrainian).

Kubaienko, A.V. (2017). Teoretyko-prykladni pytannia administratyvno-yurysdyktsiinoi diialnosti politseiskykh [Theoretical and applied issues of administrative and jurisdictional activities of police officers]. *Pivdennoukrainskyi pravnychyi chasopys – South Ukrainian Law Journal,* 1, pp. 75–78 (in Ukrainian).

Kurovska, O.O. (2017). Kryminolohichne znachennia ta normatyvno-pravove zabezpechennia diialnosti dilnychnykh ofitseriv politsii [Criminological significance and normative-legal support of the activity of district police officers]. *Proceedings from MIIM '17: Odeski yurydychni chytannia – Odessa legal readings.* Odesa: Vydavnychyi dim "Helvetyka", pp. 293–296 (in Ukrainian).

Panov, I.O. (2005). Administratyvno-yurysdyktsiina diialnist dilnychnoho inspektora militsii [Administrative and jurisdictional activities of the district police inspector]. *Extended abstract of candidate's thesis.* Kharkiv: Kharkivskyi natsionalnyi universytet vnutrishnikh sprav (in Ukrainian).

Pro zatverdzhennia Instruktsii z orhanizatsii diialnosti dilnychnykh ofitseriv politsii: nakaz Ministerstva vnutrishnikh sprav Ukrainy [On approval of the Instruction on the organization of activity of district police officers: order of the Ministry of Internal Affairs of Ukraine] (2017). *rada.gov.ua.* Retrieved from: https://zakon.rada.gov.ua/laws/show/z1041-17#Text [in Ukrainian].

Pro Natsionalnu politsiiu: Zakon Ukrainy [On the National Police: Law of Ukraine] (2015). *rada.gov.ua.* Retrieved from: https://zakon.rada.gov.ua/laws/show/580-19#Text (in Ukrainian).

Владислав Пінчук,
ад'юнкт кафедри поліцейського права, Національна академія внутрішніх справ, пл. Солом'янська, 1, Київ, Україна, індекс 03035, VladyslavPinchuk@ukr.net
ORCID: *orcid.org/0000-0002-2170-0838*

МІСЦЕ СЛУЖБИ ДІЛЬНИЧНИХ ОФІЦЕРІВ ПОЛІЦІЇ В СИСТЕМІ СУБ'ЄКТІВ АДМІНІСТРАТИВНО-ЮРИСДИКЦІЙНОЇ ДІЯЛЬНОСТІ

Анотація. ***Метою статті*** є визначення місця служби дільничних офіцерів поліції в системі суб'єктів адміністративно-юрисдикційної діяльності. Для визначення місця служби дільничних офіцерів поліції в системі суб'єктів адміністративно-юрисдикційної діяльності було проаналізовано компоненти понятійно-категоріального апарату дослідження, встановлено зміст діяльності служби дільничних інспекторів поліції Національної поліції України для визначення їх місця в системі адміністративно-юрисдикційної діяльності, сформовано загальнотеоретичні пропозиції щодо оптимізації функціонування цього інституту. ***Результати.*** Автором аргументується, що адміністративно-юрисдикційною діяльністю підрозділів дільничних офіцерів поліції Національної поліції України є визначена в чинному законодавстві процедура розгляду адміністративних правопорушень дільничними без звернення до суду. Також досліджено позиції деяких учених, котрі підкреслюють, що будь-яка адміністративна діяльність вказаних суб'єктів є юрисдикційною, якщо вона пов'язана з прийняттям визначеним суб'єктом рішення одноособово. У процесі дослідження цю позицію частково спростовано. Водночас у статті опрацьовано нормативно-правове підґрунтя функціонування відповідного інституту та суміжних йому галузей. Встановлено, що в науці підрозділи дільничних офіцерів поліції розглядають як суб'єкт адміністративно-юрисдикційної діяльності,

що дає змогу проводити наукові розвідки в цьому напрямі, а також більш детально розтлумачувати сутність їхньої ролі й місця. ***Висновки.*** Визначено та додатково аргументовано, що якнайменше 50% визначених повноважень дільничних офіцерів поліції Національної поліції України мають адміністративно-юрисдикційний характер. У статті доведено, що унормування повноважень дільничних офіцерів поліції Національної поліції України відбувалося здебільшого у відомчих нормативно-правових актах, що свідчить про широку та ґрунтовну унормованість цього питання на всіх рівнях вітчизняного законодавства. На нашу думку, це виключно позитивно впливає на регулювання відповідної галузі права.

Ключові слова: адміністративна діяльність, юрисдикція, адміністративно-юрисдикційна діяльність, правопорушення, поліція.

The article was submitted 15.07.2021
The article was revised 04.08.2021
The article was accepted 23.08.2021

UDC 351.741:342.7
DOI https://doi.org/10.32849/2663-5313/2021.7.08

Andrii Tanko,
PhD in Law, Postdoctoral Student at the Department of Organization of Educational and Scientific Training, Kharkiv National University of Internal Affairs, 27, Lev Landau avenue, Kharkiv, Ukraine, postal code 61000, Andriitanko@ukr.net
ORCID: *orcid.org/0000-0001-8425-2202*

Tanko, Andrii (2021). Cooperation between the police and the population as the way to ensure human rights and freedoms in civil society: a concept and methodology. Entrepreneurship, Economy and Law, 7, 47–55.

COOPERATION BETWEEN THE POLICE AND THE POPULATION AS THE WAY TO ENSURE HUMAN RIGHTS AND FREEDOMS IN CIVIL SOCIETY: A CONCEPT AND METHODOLOGY

Abstract. ***The purpose*** of the article is to analyse the provisions of legal regulations and experience of the organization of cooperation between the police and the population aimed at ensuring the rights and freedoms of citizens, highlighting interaction forms in the system "police – people – community" widespread in Ukraine. ***Results.*** The article considers the key provisions of the concept of Community Policing as the basis for cooperation between the police and the population of Ukraine; reveals the importance of cooperation between the police and the population in the aspect of the consolidation of efforts of the State and the community to create favourable conditions for citizens to realize their rights and freedoms; covers mass forms of cooperation in the system "police – people – community" common in Ukraine. By relying on the analysis of normative documents and works of legal researchers, the legislative basis and administrative-legal public regulatory mechanisms for the police activities (public accountability) as a result and conditions of effective interaction of this state body with the community are highlighted. The importance of administrative and legal means that determine the powers of the police to interact with the population in the field of the rights and freedoms of citizens is described. The trend toward increasing the administrative responsibility of police officers to the police service recipients is explained. ***Conclusions.*** The scientific novelty of study results is that based on the modern achievements of Ukrainian and international legal science, first of all, administrative law, the study of the experience of cooperation between police bodies and the population in the field of rights and freedoms of citizens in Ukraine and countries of the world, the author carries out a comprehensive administrative study of the coverage of the essence and organization of widespread forms of cooperation between the police and the population; adds more insight to the problem of the place and role of the police in the protection of citizens' rights in the local community; examines the specific features of means of protection of citizens' rights to receive high-quality police services; proves the necessity of improvement of mass forms of organization of police work with the population in the context of ensuring human rights and freedoms.

Key words: human rights and freedoms, community, National Police bodies, widespread forms of interaction with the population.

1. Introduction

The need to promote the implementation of the leading provisions of the Constitution of Ukraine, according to which human rights and freedoms and their guarantees determine the content and direction of the state policy development, requires all official institutions, first of all, law enforcement bodies, to effectively restructure their activities on the basis of legality and law and order, the rule of law and equal access of all citizens to their rights and freedoms in society.

Democratic trends in the country's development, consistent use of the world standards for human rights protection, and Ukraine's intention to become a full-fledged participant of the world legal community actualizes the issue of finding new forms of cooperation between law enforcement bodies of the state and the population, the introduction of which becomes particularly relevant amidst the elaboration of a new model of police activities in Ukraine that tend to European democratic analogues.

According to foreign scientists, the idea that community residents are key players responsible for the welfare of entire society is a cornerstone of building new approaches to modern police activities in democratic societies, where people actively cooperate with the police to support public order (Nalla, Me ko, Modic, 2018, pp. 271–272). Thus, in Ukraine, despite the fact that the legal protection is implemented by the public authorities specially created for the protection of human rights and freedoms, among which the leading one is the National Police, now public administrations and territorial communities, public organizations, individual citizens are also full actors working in close cooperation with law enforcement agencies locally.

Research trends of improvement of relations in the system "police – community – people" in the countries of the world are in active progress now. For instance, Mary Fern T. Malone and Lucia Dammert emphasize that "community-oriented policing" is usually more popular, although detailed studies of its effectiveness remain under discussion (Malone, Dammert, 2020). Indeed, such an approach to the development of police activities is based on deep study of local conditions, consideration of the mentality of the population, and therefore, is too variable to borrow it in a pure form from the practice of one state to another. Thus, the issue of building optimal strategies of police interaction with the population arises as one of the acute research problems, which is worth a deep study both in the context of the analysis of world practices and the introduction of the new concept of law-enforcement in Ukraine.

It should be emphasized that the new practice of interaction of police officers with the community has been gradually forming in Ukraine since the approval of the Law of Ukraine "On the National Police" (On the National Police, 2015) stating that the main goal of the police is to ensure human rights and freedoms, protect the interests of society and the state, combat crime and support the national security of Ukraine. Article 5 of the Law determines that the police cooperate not only with the official bodies of law and order and other public authorities but also with local self-government bodies. Article 11 of the Law refers to interaction with the population on the basis of partnership, highlights the necessity to direct police activities towards the real needs of people, taking into account the specifics of the region and problems of territorial communities, raise the level of trust of the population as the key criterion of assessment of the effectiveness of police bodies (On the National Police, 2015). The Law outlines ways and mechanisms of cooperation between the police and the community which, given the mentioned innovative approach, requires further elaboration and development of ways and mechanisms of implementing into practice of the National Police of Ukraine.

In the light of the above, it is relevant to consider the police and the community as a powerful cluster of ensuring human rights in Ukraine, to study comprehensively and develop mass forms of such interaction, which keep significant educational impact on the consciousness and conduct of the population, positive change of priorities and conditions in the regions in terms of human rights and freedoms, reduction of cases of illegal conduct in the public, growth of the level of legal consciousness of the population, etc.

Analysis of recent research and publications. The issue of rights and freedoms of citizens and ensuring their implementation in the performance of the National Police are under focus of the works by V. Averianov, O. Bandurka, D. Bakhrakh, O. Bezpalova, E. Bezsmertnyi, Ye. Bytiak, A. Vasyliev, I. Holosnichenko, S. Honcharuk, E. Dodin, M. Yeropkin, V. Zakharov, V. Zui, L. Koval, O. Ostapenko, I. Pakhomov, V. Petkov, O. Serohin, Y. Shemshuchenko, V. Shkarupa et al.

The need to update the main approaches and forms of law enforcement in the field of human rights and freedoms, in particular, based on strengthening interaction with man and community, is studied by many authors (V. Harashchuk, M. Hurkovskyi, S. Husarov, O. Dzhafarova, Z. Kisil, I. Kyrychenko, A. Klochko, O. Kliuiev, V. Kolpakov, A. Komziuk, M. Kornienko, V. Olefir, V. Oluiko, V. Ortynskyi, V. Ryzhykh, A. Rumiantseva-Kozovnyk, O. Sokolenko, A. Starodubtsev, I. Surai, S. Shatrava et al.), who emphasize the need to revise the existing view on the methodology of professional communication between law enforcement and the community.

Nowadays, the interaction of the police with the community and citizens is also one of the most relevant and interesting areas of research, developed by O. Balynska, R. Blahuta, L. Humeniuk, I. Kazanchuk, V. Kovalenko, Z. Kovalchuk, O. Kovbych, S. Komissarov et al.

The comprehensive literature review confirms that the problem under study remains inexhaustible amid ongoing reform of the activities of law-enforcement bodies of Ukraine, approximation of their activities to European requirements, search for new effective forms of cooperation with the community and an individual.

The purpose and tasks of the research. The purpose of the study is to analyse the provisions of legislative documents and experience of the organization of cooperation between

the police and the population aimed at ensuring the rights and freedoms of citizens, highlighting mass forms of interaction in the system "police – people – community".

In view of the above, the tasks of the article are as follows:

– to highlight the key provisions of the Community Policing concept as the basis for cooperation between the police and the population of Ukraine;

– to reveal the importance of cooperation between the police and the population in order to create conditions in society and the community that contribute to the realization of citizens' rights and freedoms;

– to cover the legislative framework and administrative and legal regulatory public mechanisms for the police (public accountability) as a result and conditions of effective interaction of this State body with the community;

– to clarify the importance of administrative and legal means, which determine the powers of the police in the field of protection of the rights and freedoms of citizens, to explain the trend of increase of administrative responsibility of police officers to the recipients of police services;

– to analyse mass forms of cooperation between the police and the population in order to increase the level of optimization of the police activities with regard to the protection of public order and ensuring the rights and freedoms of citizens.

The scientific novelty of the research is that based on the modern achievements of Ukrainian and international legal science, first of all, administrative law, the study of the experience of cooperation between police bodies and the population in the field of rights and freedoms of citizens in Ukraine and countries of the world, the author carries out a comprehensive administrative study of the coverage of the essence and organization of widespread forms of cooperation between the police and the population; adds more insight to the problem of the place and role of the police in the protection of citizens' rights in the local community; examines the specific features of means of protection of citizens' rights to receive high-quality police services; proves the necessity of improvement of mass forms of organization of police work with the population in the context of ensuring human rights and freedoms.

Basic material statement. The position of Ukraine as the rule-of-law state stipulates that the recognition and consolidation of each human right (or group of homogeneous rights) must be accompanied by the establishment of all elements of the legal mechanism of their provision: legal procedures of realization, legal means of defence and protection (Ulianov, 2002, pp. 9–10). In other words, the state, which recognizes itself as the rule-of-law state, should take care not only of the statutory consolidation of the legal framework for the protection of human rights and freedoms but also of the development of concrete effective mechanisms for the protection of citizens' rights, forms and means of interaction of state law enforcement bodies with local administrations, community, individual citizens for joint support of public order.

One of the important ways of establishing a real law order in the country, based on the consideration of the needs of the population in legal protection, is the orientation of the activities of police bodies on close cooperation with local communities and citizens (*Community Policing*). Community Policing is a modern comprehensive social and legal phenomenon, a concept that indicates the principles of partnership between the police and the population, moreover free translation from English can be interpreted as the police friendly (congenial) to the community. Sometimes this term is interpreted as a democratic or popular police, which, in our opinion, reflects its meaning somewhat blurry. Thus, it should be noted that foreign scientific contributions reveal democratic police as a multidimensional, multi-level and discussion concept based on political ideology (Malone, Dammert, 2020), which requires certain clarifications. According to our opinion, the essence of the Community Policing concept is that the police base their work, first of all, focusing on the needs of the community to establish public order and improve security in the microsociety at the place of residence of citizens, taking into account the opinion of specific people who are actually consumers of legal services.

It is essential to emphasize that the strategy of police cooperation with the community is not an autonomous program of actions or an individual police initiative. As a leading methodological approach to organization of activities of territorial police units, Community Policing involves constant communication of territorial police bodies with the population and local authorities with the purpose of creation of general safe space within the region (Site of the Institute of Peace and Understanding, 2020). It is a common holistic approach to the daily work of local police bodies, a principle and a guideline for the development of human rights and freedoms activities, which consists in the concentration

of police on the interests of local residents – specific police service recipients, priority of their opinion on issues of public order organization in a particular region, city, village.

In Europe, the path to building democratic relations between the police and citizens was long and gradual, while Ukraine, which established a democratic regime and assumed legal international responsibilities, should recreate this path in a few decades. Domestic law-enforcement bodies, whose activities are still marked by the totalitarian past and recent history of participation in resolving internal conflicts, eliminating civil disorderly conduct, and establishing democracy have taken a central role in combating crime and maintaining a high level of human rights and freedoms, that is the current policy issue in all regions of Ukraine. This context of Ukraine's democratic transition to a new model of law-enforcement activities based on the priority of ensuring human rights and freedoms cannot fail to face significant legal and practical disputes and public challenges, as it provides for the search for an answer to radical questions: how to fundamentally change, democratize the police, influence the attitude of society to this law-enforcement body? How can the new police build new relations with the community?

2. Law of Ukraine "On the National Police"

Applying a formal and legal method that ensures proper interpretation and appropriate comment to the norms governing the process of establishing relations between the police and the community, first of all in the field of ensuring the rights and freedoms of citizens, we refer to the provisions of the Law of Ukraine "On the National Police". The Law states the main priorities of police cooperation with the population: the activities of police is carried out in close cooperation and interaction with the population, territorial communities and public associations on the basis *of partnership* and is aimed at meeting their needs; planning and organization of the service activities of police bodies and departments take into account the specifics of the region and the problems of territorial communities (On the National Police, 2015). It should be underlined that among the provisions of the Law the most important in the field of ensuring human rights and freedoms is the fact that the level of confidence of the population in the police becomes the criterion for assessing the effectiveness of the police (art. 11) (On the National Police, 2015). It should be noted that the last provision is interpreted in administrative-legal and public discourse as the accountability of the National Police to the public.

The new democratic approach to planning and determining the effectiveness of the police performance, prescribed by the legislation of our country, determines its accountability to a number of structures at different levels of control, which, according to foreign scientists Christopher E. Stone and Heather H. Ward, distinguishes democratic police from police governed by other regimes. The advantage of this approach to administrative and legal regulation of law enforcement bodies, according to the researchers, is that they do not have a single accountability structure, rather, decentralized structures operate at the internal, State and social levels. As a rule, these structures assess the degree of police responsibility for providing public safety or police conduct; better coordination and stronger linkages of these structures assure more robust and effective accountability of the police and coordinated work in the community (Stone, Ward, 2000, pp. 11–12).

The real functioning of the public regulatory mechanisms for the police performance (public accountability) ensures the maintenance of legality and law order, as it is based on the establishment of feedback directly from the recipients of police services, listening to their opinion, taking into account the needs, implementing ideas and projects created directly in the community.

In this regard, it is important to emphasize the need to develop administrative and legal means that clearly regulate and limit the powers of the police to ensure the rights and freedoms of citizens, increase the administrative responsibility of police officers to police service recipients.

According to O. Ulianov, the process of ensuring human rights and freedoms is effective only when they are combined with means of protection, i. e. legal instruments of renewal, "restoration" of violated rights and bringing to justice the persons guilty of these violations. The domestic scientist argues that without such "equipment" law enforcement means in many cases do not work and do not reach their goal. That is why it is a duty of the state to ensure that on the one hand, these specific means are effective, on the other hand, they should not affect the rights and interests of citizens. Accordingly, the concept of administrative reform has originally provided for that the executive authority, realizing the purpose of a democratic, social legal state, creates proper conditions for the realization of the rights and freedoms of citizens, and also provides them with a wide range of public, including administrative, services (Ulianov, 2002, pp. 9–10).

Today, the actual practice of the National Police represents a significant diversity of different, first of all, mass forms of cooperation between the police and the population, which provides for improvement of optimization of the police activities in the protection of public order and ensuring the rights and freedoms of citizens.

Scientific sources mark that a wide range of forms of cooperation between the police and the community and citizens in the field of human rights and freedoms depends on the number of tasks and areas of activities of this service (Hurkovskyi, Yesimov, 2016, pp. 173–174). In view of this, the author states that the forms of police activities are very different. However, according to the national scientist A. Rumiantseva-Kozovnyk, forms of police activities are characterized by a clear regularity and unity of the administrative and legal regulatory mechanism, since the activities of these bodies concerning human rights tasks are within the limits of only those forms, which are established by the law (Rumiantseva-Kozovnyk, 2014, pp. 117–118).

The main principles concerning the choice of forms of interaction between police officers and the community are outlined in the Law of Ukraine "On the National Police". For example, article 89 contains legislative provisions for the creation and implementation of such a form of police work as joint public relations projects. In particular, it is noted that the police interact with the public through the preparation and implementation of joint projects, programs and measures in three areas: to meet the needs of the population and improve the effectiveness of implementation of tasks by the police; to identify and resolve problems related to police activities and promote the use of modern methods to increase efficiency and effectiveness of such activities; to support programs of legal education, to promote legal knowledge in educational institutions, mass media and publishing activities (On the National Police, 2015).

It should be noted that international, Ukrainian and regional projects on increase of the level of protection of human rights and freedoms have a significant influence on the choice of forms of cooperation with the population by law enforcement officers. For instance, among such legal novels, there are well-known international law enforcement programs for police interaction with the population ("Neighbourhood watch", "Stop an offender", "Public patrol", "Administrative Assistance", "Cold cases teams", "Assistance to victims of offenses", etc.).

Some of these projects have already gained public interest in the regions of Ukraine. Forms of police interaction with the population, provided by the "neighbourhood watch" program, ensure active participation of the unified residents of separate houses or territories, which in cooperation with police representatives and other public authorities and local government promote the improvement of common security and are engaged in prevention of crime and vandalism within the limits of a specific territory (Ring Neighbours Community Guidelines, n.d.). Such activities, which provide for both indirect preventive forms of work with the population (spreading of the visibility, explanations and warnings for possible offenders, etc.), and direct cooperation with public activists, is successfully implemented in different cities of Ukraine (Vinnytsia, Kremenchuk, Lutsk, Rivne, Sumy, Khmelnytskyi, Chernivtsi, etc.). In the aspect of administrative and legal regulatory framework for police activities, additional forms of work by the National Police are realized, e.g., conferences, seminars, round tables, workshops, etc.

3. Information and educational work is the Internet and media

An important form of cooperation with the community is information and educational work on the Internet and media. The analysis of these information resources shows that today mass forms of work with the population are quite diverse and popular. For example, the Information Portal of the Sumy City Administration (Interaction between the police and the community, 2016) conveys mass forms and regional initiatives carried out in 2019–2020 in the context of the cooperation of police bodies with the population, city authorities, heads of condominium and representatives of public organizations, namely:

– round table for the police and community on the topic "Neighbourhood Watch";

– "Lesson of tolerance: Disability and society" was realized for patrol police officers;

– public counselling with the participation of representatives of city authorities, patrol police, utility companies, public organizations, active citizens and mass media to increase pedestrian safety;

– functional training under the Community Policing program for police officers of tactical and operational response;

– meeting of schoolchildren with employees of patrol police within the framework of the "POLiS" project (Police and Society);

– the legal quiz "Constitution – Your Rights and Duties", which provided for joint street work of patrol police officers and local social workers to inform the population about human

rights and duties, as well as the need to address to the relevant institutions in case of violation of constitutional rights.

Such events, which are inexhaustible, are held in all regions of Ukraine, taking into account regional specificity and needs of local population.

It is obvious that such mass forms of police work with the population, as well as the wide publication of their results, contribute to establishing trust between the police and the community, gaining respect by law enforcement officers and recognition by the police service recipients, forming a positive image of the National Police in society.

Today, the key issue is the organization of the whole variety of existing forms of interaction between police bodies and the community. In science, different, though not deprived of unity, perspectives on classification of forms of activities of the National Police as a whole exist. For example, depending on the purpose of such activities, they are law applying, organizational, educational, law-enforcement forms of activities of the police concerning human and citizen rights and freedoms (Hurkovskyi, Yesimov, 2016, pp. 173–174). According to the nature of the activities, the forms of the police work on administrative and legal provision of public security is grouped into: forms of participation in the formation of state policy in the field of public security and order; forms of preventive activities; forms of proceedings in cases of administrative offenses; forms of protection activities; forms of control activities (Batrachenko, 2016, pp. 7–9).

For practical realization of cooperation between the police and society on the basis of partnership, domestic researchers I. Kravchenko, B. Lohvynenko suggest the following review of promising forms:

– "Public Asset" is a complex form of educational work of employees of territorial police units, which includes educational trainings on human rights and freedoms for activists-representatives of condominium, multi-apartment buildings, settlements, villages, districts, and their further meetings with residents, distribution of handouts on personal and neighbouring security;

– "Announcements" – dissemination by police officers of expanded information on meetings between the police and local residents on prevention of theft, drug use, juvenile offenses, etc.;

– "Presentations" – distribution of visual materials on acute social topics and police activities in public places by public activists;

– "Volunteers-registrars" – engagement of public activists to the primary reception of citizens in territorial units of police;

– "Joint patrols" – joint police patrol together with citizens on the territory of service;

– "Reporting support" – public activists assistance in preparation and holding of public discussions (rural meetings, reports on police activities);

– "Driver courses" – short-term courses for car owners' activists to organize patrols in remote areas and provide timely reporting of violations;

– "Messenger" – use of telecommunication services to exchange instant messages with the police;

– "Interaction with the leaders of the ATC" – cooperation for equipping local police stations, advisory units for citizens;

– "Public eye" – short-term courses for public assets to organize public security surveillance;

– "School police officer" – nmeasures in educational institutions to prevent offences by minors;

– "Pensioner" – lectures and courses for older people on prevention of basic methods of frauds (Lohvynenko, Kravchenko, 2018, pp. 14–15).

In the author's opinion, the above classification corresponds better to the issues raised. Moreover, in the aspect of the study of forms of interaction of the police with the community, consideration of a target group as a systemic component, which is covered by one or another form of work, is the most productive, although not irrefutable, given the complexity, complication and multi-object nature of most forms. Keeping in mind this fact, the author suggests a more generalized classification of mass forms of interaction between the National Police and the community: forms of organizational and functional interaction with local authorities; forms of preparation of volunteer community and active citizens; forms of work at the place of residence of citizens; mass forms of educational work with the population; forms of communicative and organizational training of police officers etc. It should be noted that this list shouldn't be regarded as exhaustive, because the relevant direction of police work is extremely productive and constantly developing.

The author also supports the grouping of forms of interaction between police officers and the community according to the Law of Ukraine "On the National Police" (On the National Police, 2015) that outlines the areas of joint projects, programs and measures with the public: forms aimed at satisfying the needs of the population; forms of public control over police activities; forms of legal education, the dissemination of legal

knowledge in educational institutions, mass media and publishing activities.

Analysing the diversity of the forms of police work with the population in the field of law enforcement activities with regard to human rights and freedoms , the author argues that the mass events that have been thoroughly prepared and masterfully conducted are an effective form of educational work, the application of which contributes to the creation and popularization of the partnership perspective on police work in the community, formation of the community's positive attitude to the police activities, development of intention to increase legal knowledge, to obtain practical skills on their application in professional and everyday situations in the microenvironment.

Covering the organizational and methodological aspect of the police performance, the author states that the effectiveness of the mass event is achieved by adherence to an algorithm of its joint preparation in the community, which provides: definition of the purpose of the event, considering the needs of the population in legal protection and a promising creative preparation of the mass event in accordance with these needs; clarification of the form of the mass event (training, quest, quiz, lecture, course, festival, exhibition, action, flash-mob, show of forum-theatre, etc.); coordination of the topic, form and plan of the event with the local administration and all public actors involved in the event; creation of a scenario, which engages necessarily public activists; selection of resources for the event, one of which is maximum involvement of volunteers in preparation and holding of the event. Thus, representatives of the community can be involved not only in carrying out of measures, but also in their planning and preparation, which allows to immerse them in the atmosphere of work of the police, to join in law-enforcement issues, to strengthen their motivation to civil activities in ensuring human rights and freedoms in the local community.

4. Community Policing

Summing up the results of the study of spreading mass forms of cooperation with the population in the context of ensuring human rights and freedoms in the civil society, the author emphasizes that these forms provide the most effective cluster interaction in the system "police – people – community". This interaction shapes the ground of the modern concept of police performance restructuring, that is, Community Policing as the basis for police cooperation with the population of Ukraine.

Community Policing is a general holistic approach to the daily work of local police bodies based on systematic interaction of territorial police bodies with the population and local authorities to create a safe space for life, to focus police activities on community needs, to focus police on the interests of police service recipients, priorities of their opinion on issues of organization of public order in a particular region, city, village.

Cooperation of police bodies with the population is a significant factor in creation of conditions in society and the community, which contribute to the rights and freedoms of citizens, increase efficiency and effectiveness of police activities. An important principle of such work is the existence of public regulatory mechanism for the police performance (public accountability), which today has a fixed legislative basis and develops in the direction of practical development of effective administrative and legal mechanisms of accountability of the police to the public, which clearly identifies the police powers in the field of protection of the rights and freedoms of citizens, ensures an increase of administrative responsibility of police officers to police service recipients.

The analysis of the mass forms of cooperation between the police and the population today shows their high efficiency in the aspect of ensuring the interaction of police bodies with the population, as well as a significant diversity. In general, the forms can be grouped into: forms of organizational and functional interaction with local authorities; forms of preparation of volunteer community and active citizens; forms of work at the place of residence of citizens; mass forms of educational work with the population; forms of communicative and organizational training of police officers etc.

The most common in the organization of interaction with the population in the field of ensuring human rights and freedoms is engagement of the public asset and volunteers to practical socially significant activities in the community (law enforcement, popularizing, educational), which can be in the form of volunteer law enforcement actions, charitable work in legal advisory centres, participation in various human rights and educational activities. Involvement of community representatives in such work ensures practical learning and personal integration of rules of compliance with legal provisions both during direct participation in forms of cooperation with the police, and in everyday life, promotes a sense of personal responsibility for security in the microenvironment.

5. Conclusions

Today, an important promising area of scientific and practical work, in our opinion, is the review of experience of carrying out

such forms of intensification of cooperation between the police and the public, as measures to increase the authority of the police and trust of the population in it; improvement of communication and general culture of police personnel; assistance in objective informing of the population about the activities of law enforcement officials by means of mass media; forms of provision of direct dialog between the police and the population (public associations, trade unions, associations, organizations, enterprises) during personal meetings of citizens with heads of departments, police officers, which provide law and order on a specific territory; mass forms of active preventive, educational, enlightening work among different segments of the population in order to prevent crime.

References:

Batrachenko, O.V. (2016). Formy pravookhoronnoi diialnosti Natsionalnoi politsii shchodo zabezpechennia publichnoi bezpeky ta poriadku v derzhavi Forms of law enforcement activities of the National Police to ensure public safety and order in the country]. *Filosofiia prava – Philosophy of law*, no. 2, pp. 5–10 (in Ukrainian).

Hurkovskyi, M.P., Yesimov, S.S. (2016). Osnovni formy ta metody diialnosti politsii u sferi zabezpechennia liudyny ta hromadianyna Ukrainy [Basic forms and methods of police activity in the field of providing people and citizens of Ukraine]. *Naukovyi visnyk Lvivskoho derzhavnoho universytetu vnutrishnikh sprav – Scientific Bulletin of Lviv State University of Internal Affairs*, no. 4, pp. 171–186 (in Ukrainian).

Lohvynenko, B.O., Kravchenko, I.S. (2018). *Vzaiemodiia politsii ta suspilstva na zasadakh partnerstva v diialnosti pidrozdiliv preventyvnoi diialnosti [Interaction of the police and society on the basis of partnership in the activities of preventive units].* Dnipro: Dniprop. derzh. un-t vnutr. sprav (in Ukrainian).

Malone, M., Dammert, L. (2020). The police and the public: policing practices and public trust in Latin America. *Policing and Society*, vol. 30, iss. 10. Retrieved from: https://www.tandfonline.com/doi/full/10.1080/10439463.2020.1744600?scroll=top&needAccess=true (in English).

Nalla M., Me ko G., Modic, M. (2018). Assessing police–community relationships: is there a gap in perceptions between police officers and residents? *Policing and Society*, vol. 28, iss. 3, pp. 271–290 (in English).

Pro Natsionalnu politsiiu: Zakon Ukrainy [On the National Police: Law of Ukraine]. (2015). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/580-19#Text (in Ukrainian).

Ring Neighbors Community Guidelines. *Support Center. What to Know*. Retrieved from: https://support.ring.com/hc/en-us/articles/115004851266-Ring-Neighbors-Community-Guidelines (in English).

Rumiantseva-Kozovnyk, A.V. (2014). Formy ta metody administratyvnoi diialnosti orhaniv vnutrishnikh sprav z okhorony prav dytyny [Forms and methods of administrative activity of internal affairs bodies for the protection of children's rights]. *Yevropeiski perspektyvy – European perspectives*, no. 3, pp. 116–122 (in Ukrainian).

Sait "Instytut myru i porozuminnia" [Site of the Institute of Peace and Understanding]. 2020. *https://cop.org.ua*. Retrieved from: https://cop.org.ua/ua/community-policing/shcho-take-community-policing (in Ukrainian).

Stone, C.E., Ward, H.H. (2000). Democratic policing: A framework for action. *Policing and Society*, vol. 10, iss. 1, pp. 11–45 (in English).

Ulianov, O.I. (2002). Administratyvno-pravovyi zakhyst militsiieiu prav hromadian u sferi hromadskoho poriadku [Administrative and legal protection by the police of the rights of citizens in the field of public order]. *Extended abstract of candidate's thesis*. Kharkiv: Nats. un-t vnutr. sprav (in Ukrainian).

Vzaiemodiia politsii ta hromady [Interaction between the police and the community] (2016). *Informatsiinyi portal Sumskoi miskoi administratsii – Information portal of Sumy city administration*. Retrieved from: https://smr.gov.ua/uk/2016-03-14-08-10-17/vzaiemodiia-politsii-ta-hromady.html (in Ukrainian).

Андрій Танько,
кандидат юридичних наук, докторант відділу організації освітньо-наукової підготовки, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, Andriitanko@ukr.net
ORCID: *orcid.org/0000-0001-8425-2202*

СПІВПРАЦЯ ОРГАНІВ ПОЛІЦІЇ З НАСЕЛЕННЯМ ЯК ШЛЯХ ЗАБЕЗПЕЧЕННЯ ПРАВ І СВОБОД ЛЮДИНИ В УМОВАХ ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА: КОНЦЕПЦІЯ ТА МЕТОДОЛОГІЯ

Анотація. ***Мета*** дослідження полягає в аналізі положень законодавчих документів і досвіду організації співпраці органів поліції та населення, спрямованої на забезпечення прав і свобод громадян, а також висвітлення на цій основі поширених в Україні масових форм взаємодії в системі «поліція – людина – громада». ***Результати.*** У статті розглянуто ключові положення концепції

Community Policing як основи співпраці поліції з населенням України. Розкрито значення взаємодії органів поліції з населенням в аспекті поєднання зусиль держави та громади для створення сприятливих умов для реалізації громадянами своїх прав і свобод. Висвітлено поширені в Україні масові форми взаємодії в системі «поліція – людина – громада». На основі аналізу нормативних документів та праць дослідників у галузі юридичної науки висвітлено законодавче підґрунтя й адміністративно-правові механізми громадського регулювання діяльності поліції (підзвітність громаді) як результату та умови ефективної взаємодії цього державного органу з громадою. Охарактеризовано значення адміністративно-правових засобів, які визначають повноваження поліції щодо взаємодії з населенням у сфері захисту прав і свобод громадян. Пояснено тенденцію щодо зростання адміністративної відповідальності працівників поліції перед отримувачами поліцейських послуг. ***Висновки.*** Наукова новизна результатів репрезентованого у статті дослідження полягає в тому, що на основі сучасних досягнень української й міжнародної правової науки, насамперед адміністративного права, та на підставі вивчення накопиченого в Україні і країнах світу досвіду співпраці органів поліції з населенням у сфері реалізації прав і свобод громадян здійснено комплексне дослідження в галузі адміністративного права щодо висвітлення суті й упорядкування масових форм співпраці поліції з населенням. Також поглиблено розуміння місця й ролі поліції у справі захисту прав громадян у місцевій громаді, вивчено специфіку засобів захисту прав громадян на отримання якісних поліцейських послуг. Доведено необхідність удосконалення масових форм організації роботи поліції з населенням у справі забезпечення прав і свобод людини.

Ключові слова: права і свободи людини, громада, органи Національної поліції, масові форми взаємодії з населенням.

The article was submitted 15.07.2021
The article was revised 03.08.2021
The article was accepted 23.08.2021

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2021.7.09

Serhii Shkliar,
Doctor of Law, Associate Professor, Leading Researcher, Scientific Institute of Public Law, 2a, H. Kirpy street, Kyiv, Ukraine, postal code 03035, Shkliar_Serhii@ukr.net
ORCID: *orcid.org/0000-0003-2351-0161*

Shkliar, Serhii (2021). Improvement of administrative and legal regulation of control over compliance with legislation on protection of economic competition: foreign experience. Entrepreneurship, Economy and Law, 7, 56–61.

IMPROVEMENT OF ADMINISTRATIVE AND LEGAL REGULATION OF CONTROL OVER COMPLIANCE WITH LEGISLATION ON PROTECTION OF ECONOMIC COMPETITION: FOREIGN EXPERIENCE

Abstract. The issues of identifying peculiarities, methods and means, as well as the state regulatory framework for economic processes (including relations of economic competition) cannot be considered as an exclusive problem of the national economy and the system of public administration of Ukraine. The issue is global and, as a result, is subject to different solutions in each country. Despite the availability of different approaches and disagreements in the understanding of the role of the state in the administrative and legal regulation of relations of economic competition, there are some common global trends in the construction of systems of protection of economic competition, including the system of control over compliance with legislation on protection of economic competition. The international community and some developed countries of the world have relevant experience in the administrative and legal regulation of specificities of control over compliance with legislation on protection of economic competition, the advanced and progressive ideas of which should be taken into account by Ukraine for successful implementation of domestic policy measures in this sphere. ***The purpose*** of the article is to make proposals for improving administrative and legal regulation of control over compliance with the legislation on protection of economic competition taking into account the experience of foreign countries. ***Results.*** The article proves that the study of the foreign experience of administrative and legal regulation of control over compliance with the legislation on protection of economic competition. The progressive trends of the administrative and legal regulation of control over compliance with the legislation on the protection of economic competition in France, the United States of America and Germany are considered. ***Conclusions.*** The positive features of the domestic administrative and legal regulation of control in this field are underlined, and some features are compared with the above-stated countries. The author highlights the principles of foreign experience in the organization of the administrative regulatory mechanism for control over compliance with legislation on protection of economic competition, which should be adopted in Ukraine.

Key words: protection of economic competition, foreign experience, unfair competition, consumer rights protection, responsibility, monopoly, fight against corruption.

1. Introduction

The issues of identifying peculiarities, methods and means, as well as the state regulatory framework for economic processes (including relations of economic competition) cannot be considered as an exclusive problem of the national economy and the system of public administration of Ukraine. The issue is global and, as a result, is subject to different solutions in each country.

Despite the availability of different approaches and disagreements in the understanding of the role of the state in the administrative and legal regulation of relations of economic competition, in there are some common global trends in the construction of systems of protection of economic competition, including the system of control over compliance with legislation on protection of economic competition. The international community and some developed countries of the world have relevant experience in administrative and legal regulation of peculiarities of control over compliance with legislation on protection of economic competition, the advanced and progressive ideas of which should be taken into account by Ukraine for successful implementation of domestic policy measures in this sphere.

Analysis of recent research and publications. The development of ways and methods of improving administrative and legal regulation of control over compliance with the legislation on protection of economic competition is covered by the contributions of the following scientists: O.M. Vinnyk, O.O. Bakalinska, O.V. Bezukh, V.E. Belianevych, V.V. Bordeniuk, V.P. Dakhno, O.I. Zavada, V.K. Mamutov, O.I. Melnychenko, O.O. Pletnova, N.O. Saniakhmetova, V.S. Shcherbyna and others.

Previously unresolved problems. Nowadays, there is a lack of studies of administrative and legal regulation of control over compliance with legislation on protection of economic competition taking into account experience of foreign countries.

The purpose of the article is to form proposals for improving administrative and legal regulation of control over compliance with the legislation on protection of economic competition taking into account the experience of foreign countries.

Main material statement. First of all, attention should be paid to the standpoint by B.V. Derevianko and S.A. Parashchuk, who differentiate 4 trends of the formation of legislation on protection against unfair competition. Countries with the legislation of the first trend are countries where the prosecution of unfair competition is based on the general provisions of Civil Tort Law. France, Italy and the Netherlands are among such countries. In general, France is considered the historical homeland of the concept "unfair competition" (Parashchuk, 2002, 5–6). The notion of unfair competition was fixed in the Paris Convention for the Protection of Industrial Property of March 20, 1883 (RT II 1994, 4/5, 19) (hereinafter – the Paris Convention) (Paris Convention for the Protection of Industrial Property, 1990). Countries with the legislation of the second trend are countries in which protection against unfair competition is carried using both general provisions of civil law and provisions of special, economic or trade, legislation. Such countries include Great Britain, Ireland, Belgium. The countries of the third trend of legislation are countries that have adopted special (economic or trade) legislation regulating protection against unfair competition. They include Germany, Austria, Switzerland, Spain. In some countries of the fourth trend of legislation against unfair competition, such as the United States, Japan, Canada, regulatory mechanisms against unfair competition are part of anti-trust legislation, as unfair competition is seen as one of the elements of monopoly. Within the framework of the legislation on combating monopoly, specific elements of offenses characterized as unfair competition (Parashchuk, 2002; Derevianko, 2014) are identified.

2. United States of America

The world practice of competition regulation was launched in 1890, when the Sherman Antitrust Act was adopted in the USA. The Sherman Act provided that the trusts that monopolized industry markets should be replaced with decentralized, managed, competing enterprises. This Act prohibited monopolization of any trade sector and provided for a list of penalties that could be applied to monopolists, from monetary fines to criminal liability. In particular, paragraph 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Paragraph 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof (Kolisnychenko, 2004, pp. 74–75). According to the Sherman Act, both the Ministry of Justice and the parties affected by the commerce monopolies could sue them. Firms, deemed guilty of a felony, could be liquidated by the decision of the court; also, court orders prohibiting those types of activities that were considered illegal by the Act could be issued. However, the first court interpretations of the Sherman Act revealed serious doubts about its effectiveness, as it became clear that it was necessary to formulate more precise anti-trust moods of the government. Even basic concepts such as "trust", "monopolization or monopolization attempt", "monopolistic union", "trade restriction" were not defined. This Act was not perfect. Given this, in 1914, the U.S. Congress adopted the Clayton Act and the Federal Trade Commission Act. The first of them banned price discrimination, that is, to discriminate in price between different purchasers, provided that the differences in prices are not caused by different costs; the other one envisaged the creation of a commission for implementation. The following paragraphs of the Clayton Act were called to strengthen and clarify the meaning of the Sherman Act: Paragraph 2 states illegality of price discrimination of purchasers when such discrimination is not due to the difference in costs. Paragraph 3 prohibits exclusive (or "forced") agreements, under which the manufacturer would sell some

goods to the purchaser only on the condition that the latter purchases other commodities of the same seller, and not of its competitors. Paragraph 7 prohibits the acquisition by one corporation of stock of another if this may weaken competition. Paragraph 8 prohibits the formation of the Board of Directors when the head of one firm is also a member of the board of a competing firm – in large corporations, where the result would be a decrease in competition (Semiuelson, Nordhauz, 1998, p. 271).

In 1936, this Act was supplemented by the Robinson-Patman Act, which prohibited purchasers to agree to pre-discrimination prices. In 1950, the Congress additionally adopted the Celler-Kefauver Act which prohibited the acquisition of shares or property of another firm with negative consequences for "any commercial line". As a result, all horizontal and vertical mergers and mergers of conglomerates were subject to antitrust laws. U.S. antitrust laws also provided for certain exceptions to the application. Thus, the Sherman and Clayton Acts did not apply to trade unions' activities in the field of strike, to farm cooperatives in case of their sale of agricultural products, etc. All of these acts regulate competition in the US for almost 100 years, still being in force (Kolisnychenko, 2004, pp. 74–75).

Modern antitrust laws are implemented by specially established bodies, in particular, in the USA – the Federal Trade Commission (created on the basis of the Federal Trade Commission Act of 1914) and the Antitrust Department of Justice. The main objective of the antitrust laws is to restrict monopolies and their power, to create a competitive environment, and to support small businesses. The strictest antimonopoly Law controls the associations of enterprises that produce similar goods and services, which leads to monopolization of the industry. The methods of implementation of antitrust laws in the USA are liquidation of the firm, it happens for monopolization of more than 60% of any goods or services, as well as high taxation of monopoly profits, control of prices of monopolists, their disaggregation, etc. (Mochernyi, Usatenko, Chebotar, 2001, p. 150). U.S. antitrust laws are more stringent than those in other countries and are broader in scope. In fact, it does not clearly interpret what is allowed and what is not, creating only a basis for broad powers of the Department of Justice, the Federal Trade Commission and courts to interpret them and apply them in practice (Pindaik, Rubinfeld, 1996, p. 330).

Therefore, it should be noted that the indisputable attainment of the United States legal system is the launching of anti-monopoly and laws on control over compliance with the legislation on protection of economic competition. The positive point is that the legislation has recognized and established that any actions aimed at distortion or violation of economic competition in the market are not only a manifestation of the peculiarities of market competition and deviation in the development of perfect competition, but also a serious violation of market laws, fair trade habits, that is why they are prohibited by law, and society is protected from such violations by force of State-compulsion. Furthermore, it is essential to mark that the U.S. antitrust laws have established an institution similar to the functions and tasks of the Antimonopoly Committee of Ukraine – the Federal Trade Commission, which means common systems and approaches to controlling the protection of economic competition in both States. However, the author notes that other peculiarities of U.S. legislation on protection of economic competition are different from the legislation of Ukraine. In particular, too strict measures and actions of responsibility for violation of legislation on protection of economic competition, providing opportunities for expanded interpretation of antitrust legislation by judicial bodies, as well as control bodies. Such specificities cannot be adopted and adapted in the legislation of Ukraine in view of the national legal system and legal consciousness, which define the necessity of clear and detailed formulation of the articles' dispositions, unambiguous understanding of the regulatory legal provisions.

3. Federal Republic of Germany

The Federal Republic of Germany is one of those countries where the legislation on combating unfair competition, in particular, illegal use of business reputation is developed separately from other legal regulations. In the Federal Republic of Germany, an independent antimonopoly (cartel) law arose only in the second half of the 20th century with the adoption of the Law on cartels of 1957. German lawyers distinguish anti-monopoly legislation aimed at restricting free competition through cartels or coordinated actions by competitors, and legislation that prevents unfair competition. It appeared much earlier than the antitrust law (the Act Against Unfair Competition of 1909) and protects fair competition between entrepreneurs. Both branches of legislation (antimonopoly law and law against unfair competition law) are defined in the Federal Republic of Germany in one term – "competition law". On June 8, 2004, the German Act against Unfair Competition came into force (Finger, 2019). The special feature of the new Act is that the definition

of fundamental terms used in the Act is contained in the Civil Code of the Federal Republic of Germany (Bürgerliches Gesetzbuch, BGB). Instead of the "Gute Sitten" concept, the new law uses the notion of "injustice" in accordance with EU legislation. According to the new Act, misleading advertising is prohibited (§ 5 UWG), comparative advertising is regulated (§ 6 UWG). One of the main violations in the Federal Republic of Germany is the attack on business reputation. It is unfair and is expressed in a dismissive attitude or defamation of goods, services, actions or commercial circumstances of a competitor. Clause 4(8) UWG prohibits the statement or dissemination of facts about the goods, services or business of a competitor, which can cause harm to the business or the owner (Finger, 2019; Derevianko, 2014).

The emphasis not only on combating violations of economic competition, but also on preventing such violations is a rather progressive and worthy of following specificity of legislation of the Federal Republic of Germany on protection of economic competition. It should be noted that in comparison with Ukrainian legislation in the field of protection of economic competition, the legislation of Germany focuses more on description in detail of those actions of economic entities, which are qualified as unfair competition, as well as protection of business reputation on the market. Therefore, the legislation of Ukraine in this field needs to be reviewed and clarified in view of similar trends in German legislation.

4. Conclusions

Summarizing the above-mentioned experience of foreign countries with developed economies in terms of the introduction and development of their national systems of control over compliance with legislation on protection of economic competition, it is worth stating that in general, Ukrainian legislation on control over compliance with the legislation on protection of economic competition, as compared to the legislation of foreign countries under study, is rather progressive, reflects and strengthens similar principles and fundamentals of the world community in the field of protection of economic competition (prohibition or limitation of monopoly, prohibition of anti-competitive coordinated actions, regulation and control of concentration of economic entities, regulation of prices in sectors of natural monopolies, etc.). It should also be noted that the role of the judiciary in the implementation of the policy of control over compliance with the legislation on protection of economic competition (France, the USA and other countries), which in this field not only apply legal provisions and bring offenders to justice but also officially interpret the laws on protection of economic competition, providing for the establishment of a common practice of legal understanding and application in this field. In the auhtor's opinion, radical methods and measures to control compliance with the legislation on protection of economic competition developed and operating in the USA are not relevant for application in Ukraine. The experience of administrative and legal regulation of control over compliance with legislation on protection of economic competition of the countries of Europe is more appropriate to Ukrainian system of law and the form of government, because the monopoly is not prohibited but regulated in its manifestations in order to prevent infringement of rights of other economic entities, consumers, other participants of market relations. However, administrative and legal regulation of the control over compliance with the legislation on protection of economic competition in Ukraine is similar to the U.S. legal regulatory framework in the context that, in both states, control over compliance with the legislation on protection of economic competition develops as a separate branch of the legal regulatory mechanism, violations of the legislation on protection of economic competition are separate elements of offenses subject to criminal, administrative and other liability.

Despite the sufficient advancement of administrative and legal regulation of control over compliance with the legislation on protection of economic competition in Ukraine, some progressive ideas of international experience of the regulatory framework in this field should be taken into account:

– Fight against corruption. The mentioned experience is the most relevant to control over compliance with legislation on protection of economic competition in public procurement, as well as during the control over compliance with the legislation on protection of economic competition by the bodies of the Antimonopoly Committee of Ukraine, overcoming possible cases of unequal and subjective approach to the participants of the case on violation of the legislation on protection of economic competition;

– Enhancement of liability for violation of legislation on protection against unfair competition and improvement of the administrative and legal regulatory mechanism in this field should be realized through the means of a more precise formulation of dispositions of articles and, accordingly, of elements of offenses;

– Opportunities for effective implementation of the powers of the Antimonopoly Committee of Ukraine concerning market research,

determination of limits of the commodity market, as well as the status, including monopoly (dominant), of economic entities on this market and to make, as a result of such monitoring, appropriate decisions (orders);

– Protection of consumer rights in the field of protection of economic competition by introducing additional violations to the list of violations of the legislation on protection of economic competition: any violation of the right of the consumer to freedom of choice of products during the sale of the products; violation of freedom of the will and/or freedom of expression of the consumer in any way during the sale of the products; the price of products determined in an improper manner.

References:

Derevianko, B.V. (2014). Shchodo tendentsii formuvannia zakonodavstva pro zakhyst vid nedobrosovisnoi konkurentsii [Regarding the trends in the formation of legislation on protection against unfair competition]. *Pravo i suspilstvo – Law and society*, no. 3, pp. 103–109 (in Ukrainian).

Finger, M., Schmieder, S. (2019). The New Law Against Unfair Competition: An Assessment. Retrieved from: https://www.cambridge.org/core/journals/german-law-journal/article/new-law-against-unfair-competition-an-assessment/9BFE391BC16B30506BA7C0353B4FA5C3 (in English).

Kolisnychenko, I.O. (2004). Svitovyi dosvid derzhavnoho rehuliuvannia konkurentnykh vidnosyn ta obmezhennia monopolizmu [World experience of state regulation of competitive relations and restriction of monopoly]. *Problemy ratsionalnoho vykorystannia sotsialno-ekonomichnoho ta pryrodno-resursnoho potentsialu rehionu – Problems of rational use of socio-economic and natural resource potential of the region*, no. 1–2, pp. 155–163 (in Ukrainian).

Mochernyi, S.V., Usatenko, O.A., Chebotar, S.I. (2001). *Osnovy pidpryiemnytskoi diialnosti [Basics of entrepreneurial activity]*. Kyiv: Vydavnychyi tsentr "Akademiia" (in Ukrainian).

Parashchuk, S.A. (2002). *Konkurentnoe pravo (pravovoe regulirovanie konkurentcii i monopolii) [Competition law (legal regulation of competition and monopoly)]*. Moscow: Gorodetc (in Russian).

Paryzka konventsiia pro okhoronu promyslovoi vlasnosti vid 20 bereznia 1883 roku [Paris Convention for the Protection of Industrial Property from March 20 1883]. (1990). *Zibrannia chynnykh mizhnarodnykh dohovoriv Ukrainy – Collection of current international agreements of Ukraine*, no. 1 (in Ukrainian).

Pindaik, R.S., Rubinfeld, D.L. (1996). *Mikroekonomika [Microeconomics]*. Kyiv: Osnovy (in Ukrainian).

Semiuelson, P.A., Nordhauz, V.D. (1998). Mikroekonomika [Microeconomics] / transl. From English S. Panchyshyna. Kyiv: Osnovy (in Ukrainian).

Сергій Шкляр,
доктор юридичних наук, доцент, провідний науковий співробітник, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2а, Київ, Україна, індекс 03035, Shkliar_Serhii@ukr.net
ORCID: *orcid.org/0000-0003-2351-0161*

УДОСКОНАЛЕННЯ АДМІНІСТРАТИВНО-ПРАВОВОГО РЕГУЛЮВАННЯ КОНТРОЛЮ ЗА ДОДЕРЖАННЯМ ЗАКОНОДАВСТВА ПРО ЗАХИСТ ЕКОНОМІЧНОЇ КОНКУРЕНЦІЇ: ДОСВІД ЗАРУБІЖНИХ КРАЇН

Анотація. Проблема визначення особливостей, методів і засобів, а також меж державного регулювання економічних процесів не може бути віднесена виключно до проблем національної економіки й системи публічного адміністрування України. Зазначене питання має глобальний, загальносвітовий характер та, як наслідок, підлягає вирішенню в кожній країні по-різному. Попри існування різних підходів і розбіжностей у розумінні ролі держави в адміністративно-правовому регулюванні відносин економічної конкуренції, у світі є окремі спільні тенденції в побудові системи захисту економічної конкуренції, зокрема й системи контролю за дотриманням законодавства про захист економічної конкуренції. Міжнародна спільнота та окремі розвинені держави світу виробили відповідний досвід адміністративно-правового регулювання особливостей контролю за дотриманням законодавства про захист економічної конкуренції, передові та прогресивні ідеї якого повинна врахувати й Україна для успішного проведення заходів внутрішньої політики в досліджуваній сфері. ***Метою статті*** є формування пропозицій щодо вдосконалення адміністративно-правового регулювання контролю за додержанням законодавства про захист економічної конкуренції з урахуванням досвіду зарубіжних країн. ***Результати.*** У статті обґрунтовано необхідність вивчення досвіду зарубіжних країн у сфері адміністративно-правового регулювання контролю за додержанням законодавства про захист економічної конкуренції. Розглянуто прогресивні тенденції здійснення адміністративно-правового регулювання контролю за додержанням законодавства про захист економічної конкуренції таких країн, як Франція, Сполучені Штати Америки та Німеччина.

Висновки. Визначено позитивні риси вітчизняного нормативно-правового регулювання контролю в досліджуваній сфері, порівняно окремі його особливості зі станом розв'язання зазначеного питання в наведених вище країнах. Автором окреслено засади зарубіжного досвіду організації адміністративно-правового регулювання контролю за додержанням законодавства про захист економічної конкуренції, які варто перейняти Україні, та запропоновано шляхи їх запозичення.

Ключові слова: захист економічної конкуренції, зарубіжний досвід, недобросовісна конкуренція, захист прав споживачів, відповідальність, монополія, боротьба з корупцією.

The article was submitted 15.07.2021
The article was revised 05.08.2021
The article was accepted 23.08.2021

UDC 340: 004
DOI https://doi.org/10.32849/2663-5313/2021.7.10

Tetiana Mikhailina,
Doctor of Law, Professor, Professor at the Department of Theory, History of State and Law and Philosophy of Law, Vasyl' Stus Donetsk National University, 21, 600-richchia street, Vinnytsia, Ukraine, postal code 21021, mihaylina@donnu.edu.ua
ORCID: *orcid.org/0000-0002-1129-2470*

Yurii Hotsuliak,
Doctor of Law, Associate Professor, Acting Head of the Department of Theory, History of State and Law and Philosophy of Law, Vasyl' Stus Donetsk National University, 21, 600-richchia street, Vinnytsia, Ukraine, postal code 21021, y.hotsulyak@donnu.edu.ua
ORCID: *orcid.org/0000-0001-6765-4592*

Andriy Hel,
PhD in Law, Associate Professor, Associate Professor at the Department of Forensic Medicine and Law, National Pirogov Memorial Medical University, 56, Pirogova street, Vinnytsia, Ukraine, postal code 21018 apgel1956@gmail.com
ORCID: *orcid.org/0000-0003-2612-4530*

Mikhailina, Tetiana, Hotsuliak, Yurii, Hel, Andriy (2021). Protection of the rights of subjects of information legal relations from violations on the Internet. Entrepreneurship, Economy and Law, 7, 62–68.

PROTECTION OF THE RIGHTS OF SUBJECTS OF INFORMATION LEGAL RELATIONS FROM VIOLATIONS ON THE INTERNET

Abstract. ***The purpose*** of the scientific article is a theoretical and applied analysis of protecting the rights of subjects of information legal relations from violations on the Internet, as well as making suggestions for eliminating individual problems. ***Research methods.*** Research methodology consists of a complex of general scientific and special methods of data acquisition, as follows: systems approach, cybernetic and synergetic methods, formal legal method, legal comparativism, and observation as the common sociological method. ***Results.*** It is noted that peculiarities of the Internet environment create significant risks to human rights violations, so they should be in state focus. This forms the basis for the solid support of the need to regulate Internet legal relations emphasizing the guarantee and protection of the participants' rights without resorting to Internet paternalism, which impedes the technological development of the state or puts major segments of relations in the shade. ***Conclusions.*** The authors propose to change the terminological approaches and apply the phrase "protection of the rights from Internet violations" or "protection of the rights from violations on the Internet" instead of "protection of the rights on the Internet", which mediates both the scientific side of the problem and the exclusively practical side of such protective legal relations. The article substantiates a viewpoint on the necessity to enshrine in law the obligation for transnational information companies to have an official representative office in Ukraine. The above would provide additional opportunities to protect the rights of subjects of information legal relations, incl. by litigation. At the same time, it is supported legislative initiatives on taxation of multinational information companies in Ukraine, which is now a global trend. The authors have elucidated that strict state control over the information space is possible and widely implemented in totalitarian (authoritarian) regimes, but is not tolerated by democratic societies. Self-protection measures are being strengthened within information systems, including at the corporate level. If one uses financial levers, then the means of a financial liability are most acceptable, taking into account the profits of information giants.

Key words: human rights protection, information legal relations, subjects of information relations, offenses, legal liability, legal regulation, digital society.

1. Introduction

According to the worldwide trend, our country is heading to informatization – these days, according to quarantine measures caused by the COVID-19 pandemic as well – that inevitably transforms a living and business

environment and will turn the best part of habitual acts into a distance mode. This trend seems to be kept even after the quarantine's termination. Thus, the information society is no longer just a set of information technologies inuring to the benefit of humanity (Mikhailina, 2016, p. 167), it has escalated into a synergetic mechanism, almost an organism developing under its own, sometimes very specific, laws. Moreover, the adoption of strategic documents like the Concept for the Development of the Digital Economy and Society of Ukraine for 2018–2020 and approval of the Action Plan for its implementation dated January 17, 2018, № 67-p (Kontseptsia, 2018) is undoubtedly a significant and necessary step. However, the abovementioned strategic directions for the development of the digital society risk remaining declarative without actual upgrade of Internet security and advancement of protection and defense of the rights of subjects of information legal relations, including intellectual property rights and personal data of persons. Those who not only communicate using information technologies but also conduct business via the Internet are particularly vulnerable. Therefore, the issue under study is definitely relevant nowadays and will gain momentum in the long run.

The purpose of the scientific article is a theoretical and applied analysis of protecting the rights of subjects of information legal relations from violations on the Internet, as well as making suggestions for eliminating individual problems.

Research methodology is a complex of general scientific and special methods of data acquisition, as follows: systems approach (since information technologies can and must be considered under the systems theory), cybernetic and synergetic methods (given that regulation and self-regulation processes of the above systems influence the peculiarity of an environment and opportunities for the rights' protection), formal legal method (in light of the fact that the quality of legal drafting methodology and the adequacy of legal remedies essentially stipulate the option of effective protection and defense of human rights) legal comparativism (to find out international best practices and analyze ways for their borrowing), and observation as the common sociological method.

2. Theoretical and terminological issues of the defense and protection of rights from violations on the Internet

The theoretical protection of rights in information relations consists of several dimensions. The former is the very opportunity and necessity to defend and protect the rights of persons from offences on the Internet (or, on the contrary, the lack of them) which took the shape of two diametrically opposite tendencies, between the extreme points of which there are many intermediate ones. As A. Kostenko emphasizes, cyber-libertarianism and Internet paternalism are paradigms developed due to the controversial consideration of the powers of public authorities to control the Internet environment and its subjects. Freedom and safety are fundamental values represented by the paradigms, the degree of implementation of which practically relies on balance. Internet rights of a man are highly dependent on the solution of this problem. Internet rights, by their nature, are more realized through the prism of freedom, and Internet statism and Internet paternalism are the greatest threat to them. However, on the other hand, it must be recognized that a full-fledged availability of Internet rights and their use also requires sufficient Internet security (Kostenko, 2019, p. 63). Therefore, it is essential to search for a balance between the extreme points of libertarianism and statism, that is reasonable not only for information legal relations, to achieve sufficient security in the technical environment where people spend a large percentage of their life. A well-structured approach can guarantee zero-restraint of technical progress and, in addition to that, protection of human rights.

The expediency of the above thesis is supported by such scientists as O. Petryshyn and O. Hyliaka who state that "the sphere of digital relations is described by signs of virtuality and cross-border nature, requires special attention to the sphere of fundamental human rights from the standpoint of their provision, taking into account the special properties of this environment, where subjects and objects very often act as a kind of "simulation", and the limits of the exercise of individual rights and interference in them are not always unambiguously identified" (Petryshyn, Hyliaka, 2021, p. 16). In other words, the listed particularities of the Internet environment create significant risks of human rights violations, so they should be in state focus. This forms the basis for the solid support of the need to regulate Internet legal relations emphasizing the guarantee and protection of the participants' rights without resorting to Internet paternalism, which impedes the technological development of the state or puts major segments of relations in the shade.

Another dimension of the issue under study is heterogeneity or even ambiguity of the established conceptual framework. The analysis of scientific literature permits ascertaining the terminological phrases

"protection of the rights on the Internet" (Atamanova, 2014, p. 8; Kapitsa, Rassomahina, Shakhbazian, 2012, p. 130; Kuts, Ivanov, 2018, p. 616–617; Ianytska, Ambrush, Koval, 2019, pp. 147–148) and "information security on the Internet" are conventional in the relevant sphere. If the phrase "information security on the Internet" seems fairly admissible because that sort of security can be carried out not only by legal but also technical, organizational means, which do ensure the protection of information resources directly on the Internet, and "protection of rights on the Internet" raises some questions.

In accordance with the law, the protection of the violated right is implemented in particular forms and order. The methods of protecting one's rights is accurately regulated by normative legal acts. However, the analysis of such forms, methods, and order highlights that the protection of rights doesn't take place on the Internet, while there are misconducts in the information environment. As for the protection of the rights of information legal relations, solely self-defense (which is ineffective enough in a virtual environment) can be realized directly on the Internet. Thus, as one can see that the use of the phrase "protection of the rights on the Internet" is totally erroneous, unjustified and doesn't render procedural essence. Recent scientific publications have made careful attempts to give up on the established terminology, and it has appeared a low number of phrases like "protection of the rights from violations on the Internet" (web-fix.org) that are essentially much closer to the facts of such cases. In this regard, the authors propose to change the terminological approaches and apply the phrase "protection of the rights from Internet violations" or "protection of the rights from violations on the Internet" that mediates both the scientific side of the problem and the practical side of such protective legal relations.

3. Issues of the parties of information legal relations and their influence on the protection of human rights

Nowadays, legal doctrine and practical recommendations are characterized by many recommendations on technical terms of the protection of the rights on the Internet (including the way one can identify the website's owner, what one should regard as electronic evidence etc.). However, in practice, there emerges a good deal of violations of the rights of the participants of legal relations on the Internet when these pieces of advice may not come in handy at all due to fundamental infeasibility to protect one's violated right by litigation in Ukraine. The point at issue is the violations of the rights, for instance, on Facebook. It is quite evident that such violations are numerous (they embrace an illegal use of copyright works, violations of data confidentiality, unlawful distribution of advertising, unreasoned blocking of ads managers etc.), but the only security tool today is a complaint about malpractice submitted to Facebook customer service which, upon the results of the examination, either blocks a page (content) that is under appeal or doesn't. It is often very difficult to influence a decision of the staff of the company's customer service through communication. It is also difficult to influence a particular decision if, on the contrary, an erroneous blocking of a page or ads manager happened.

When it comes to the protection of the rights violated on social media, its application is impossible since there is no a Facebook office in Ukraine (https://thepage.ua). Thus, only pretrial protection is available for Ukrainian users. Moreover, if a page (group) is blocked, first, an offender is not prohibited to create similar groups in the future and, second, it stands to reason that the recovery of costs due to the rights' violation is not regarded (Mikhailina, 2020, pp. 151–152).

A statutory obligation of transnational information companies to have a representative office in Ukraine could become a solution in this case. This would ensure additional opportunities for the rights' protection of the subjects of information legal relations, incl. by litigation. The beforementioned viewpoint appears in the scientific discourse from time to time. Therefore, H. Fedyniak asserts that "as transnational companies locate their manufacturing facilities in the states the legal systems of which allow them to gain the highest income, national legislation of host countries or international treaties should provide for a norm which would make it possible to exercise the country's right to base a transnational company if it largely contributes to protecting one that ancient Romans called "summum bonum" (the highest good). The author further specifies the highest good in this context means human rights (Fedyniak, 2019, p. 170). This is extremely relevant to transnational information giants because the risks of violating human rights by both these companies and participants of legal relations within such a system are incalculable.

The Ukrainian legislator, at least for now, has introduced a tax for transnational information companies. Before that, in addition to the lack of an official representation office of information relations under study, there was another problem: the country's budget

received less than due from the activities of such companies in Ukraine. The critical comments of the Ukrainian League of Industrialists and Entrepreneurs on the above initiative claiming that "the Ukrainian version of "Google tax" (the law № 4184) is the most radical and raises concerns about whether attempts to raise funds for the budget don't cause significant embarrassment for small and medium businesses. The so-called "Google tax" (generally on transnational IT companies) has been available in the EU long now. It has been facing a storm of discussions in Europe, as well as in the United States, and some adjustments in company pricing policy. It is worth mentioning that in the European context, it refers to 2-3-5%, on average, not 20%". Thus, the Ukrainian offer is the most rigorous (www.fixygen.ua). However, criticism turned to be hasty because, in July 2021, G7 leaders agreed to introduce a global digital tax. Apple, Google, Amazon, Facebook and other corporations are obliged to make monetary contributions to the budgets of the countries where they render their digital services. The G7 countries have reached a history-making agreement: global IT companies are subject to additional taxes at a rate of at least 15%. This fact means that large corporations, such as Apple, Google, Amazon or Facebook, pay taxes to the treasury not only of the country of incorporation but also other countries where they officially provide their services, making a profit. The new tax reform will terminate the practice of registering companies in offshore zones or countries with lower levels of taxation (https://psm7.com/uk). Thus, Ukraine is leaning towards the world trend in the realm of taxing transnational information companies; hence, the above initiative is fully supported.

4. Efficient tools of protection and defense of the rights of subjects of information legal relations

In recognizing the most optimal means of the protection and defense of the rights of subjects of information relations, the issue of a balance between freedom of information, zero censorship and concurrent observance of basic human rights and freedoms is updated.

At the same time, one reveals various controversial points of means as follows: legal, social, technical, corporate, and others. Thus, in 2020, Donald Trump wanted ByteDance to get rid of US assets related to TikTok. The US president reasoned that there were threats to national security. The document prohibits ByteDance (TikTok owner – editor's alteration) to purchase musical.ly. In his decree, Trump gave the company 90 days to give up all assets and get rid of personal data of users that had been collected in the United States through TikTok or musical.ly. As reported earlier, Microsoft suspended negotiations on buying a stake of the US TikTok division from the Chinese company ByteDance. The ground was the negative attitude of US President D. Trump towards TikTok (https://ua.news/ua).

The response was not slow in coming. On January 10, 2021, 12 social media apps and platforms banned Donald Trump due to disorders in Washington and Capitol riot dated January 6th, namely: Facebook, Twitter, Google, Spotify, Snapchat, Instagram, Shopify, Reddit, Twitch, YouTube, TikTok, and Pinterest. Social media officials banned the accounts of the 45th president of the United States, accusing him of inciting violence and spreading false information (https://suspilne.media). It seems that such banning is not only an outcome of the riot but also of D. Trump's consistent struggle against media and freedom of speech that results in a natural response of a democratic society and the mechanisms of synergetic development of information systems.

In other words, strict and "manual" government control over information space with a technical component is possible and widely realized within totalitarian (authoritarian) regimes but is not tolerated by democratic societies. Information system strengthen the measures of self-protection of rights, incl. at the corporate level.

If one uses financial levers, then financial liability measures are thoroughly acceptable, taking into account the profits of information giants, inclusive and effective prevention of human rights violation on the Internet. The above fact is confirmed by international practice. In August 2020, a class action lawsuit was filed with the Court of California in Redwood City accusing Facebook of illegal collecting and using the biometric information of as many as 100 million Instagram users. Moreover, according to the lawsuit, the users were not informed and didn't provide their consent, and the company was profiting. If the company's guilt is proven, it could be forced to pay between $ 1 000 and $ 5 000 for each victim. The lawsuit concerns collecting data to develop a facial recognition technology. It would seem the app automatically scans the faces of the people pictured in photos in correspondence, even if they don't use Instagram and, therefore, have never had the opportunity to provide their consent (https://bykvu.com). The Hungarian Competition Authority fined Facebook $4 million. They state that the company misled its users in Hungary by claiming the use of its services was free. However, the Hungarian authority believes that despite people didn't

pay a use fee, they "paid" by Facebook collection and use of their personal data. Using that information, Facebook sold advertising opportunities to its clients (https://hromadske.ua). The Italian Competition Authority (Autorit Garante della Concorrenza e del Mercato, the AGCM) fined Facebook 7 million euros for failing to comply with a previous order related to improper use of its subscribers' data. The fine was imposed for "non-compliance with the order to stop mishandling users' data and publish a statement about error fixing, under the authority's demand". The order was issued in November, 2018: the body determined that at the registration stage, Facebook had had to warn users that they would collect data about their activity for commercial purposes, in fact, in exchange for the free use of the app. According to the authority, users had not been informed properly and the issues of data required for service personalization – comfortable interaction with others on social media – and data collected for targeted advertising had not been clearly distinguished. The competition watchdog fined the company 5 million euros and ordered to give up on such a practice and publish a statement on the Italian page of the company, as well as disseminate it among all Italian Facebook users (www.pravda.com.ua). Based on the above, one can conclude that financial levers (financial liability) along with measures of administrative liability can become the most effective in counteracting the violation of the rights of subjects of information legal relations on the Internet.

In the context of effectiveness of types and forms of protection, the judicial remedy has turned to best-performing in world practice. However, in this regard, it is essential to advance the identification mechanism for users of the information environment to catch violators and make transnational information companies subjects of protected legal relations through the obligation to have a representative office in Ukraine.

5. Conclusions

Taking into account the conducted analysis, the authors have concluded that peculiarities of the Internet environment create significant risks to violating human rights, and thus, they must be in the state focus. This forms the basis for the solid support of the need to regulate Internet legal relations emphasizing the guarantee and protection of the participants' rights without resorting to Internet paternalism, which impedes the technological development of the country or puts major segments of relations in the shade.

It is proposed to change the terminological approaches in the relevant sphere and apply the phrase "protection of the rights from Internet violations" or "protection of the rights from violations on the Internet" instead of "protection of the rights on the Internet", which mediates both the scientific side of the problem and the practical side of such protective legal relations.

The article substantiates a viewpoint on the necessity to enshrine in law the obligation for transnational information companies to have an official representative office in Ukraine. This would guarantee additional options for the protection of the rights of subjects of information legal relations, in particular, through judicial procedures. At the same time, legislative initiatives on taxation of multinational media companies in Ukraine are supported, that is now a global trend.

It has been established that strict state control over the information space is widely implemented in totalitarian (authoritarian) regimes but is not tolerated by democratic societies. Self-protection means are being strengthened within information systems, including at the corporate level. If one uses financial levers, then financial liability measures are the most acceptable.

References:

Atamanova, Yu.Ie. (2014). Zakhyst prav intelektualnoi vlasnosti u merezhi Internet: svitovyi dosvid ta vitchyzniani perspektyvy [Protection of intellectual property rights on the internet: world experience and domestic prospects]. *Pravo ta innovatsii*, no. 3(7), pp. 7–14 (in Ukrainian).

Facebook oshtrafovali v Vengrii na $4 mln [Facebook was fined $4 million in Hungary]. (2019). *hromadske.ua*. Retrieved from: https://hromadske.ua/ru/posts/facebook-oshtrafovali-v-vengrii-na-dollar4-mln (in Russian).

Fedyniak, H.S. (2019). Yurysdyktsiia derzhav stosovno transnatsionalnykh korporatsii [Jurisdiction of states over transnational corporations]. *Pravova derzhava*, no. 33, pp. 168–171. DOI: https://doi.org/10.18524/2411-2054.2019.33.162067 (in Ukrainian).

Instagram grozit shtraf do $500 mlrd za nezakonnyj sbor biometricheskih dannyh pol'zovatelej [Instagram faces a fine of up to $500 billion for illegally collecting biometric data of users] (2020). *bykvu.com*. Retrieved from: https://bykvu.com/ru/bukvy/instagram-grozit-shtraf-do-500-mlrd-za-nezakonnyj-sbor-biometricheskih-dannyh-polzovatelej/ (in Russian).

Kapitsa, Yu.M., Rassomakhina, O.A., Shakhbazian, K.S. (2012). Spetsialni mekhanizmy zakhystu avtorskoho prava i sumizhnykh prav u merezhi Internet [Special mechanisms for the protection of copyright and related rights on the Internet]. *Informatsiia i pravo*,, no. 3(6), pp. 129–140 (in Ukrainian).

Kontseptsia rozvytku tsyfrovoi ekonomiky ta suspilstva Ukrainy na 2018–2020 roky ta zatverdzhennia planu zakhodiv shchodo yii realizatsii [Concepts for the development of the digital economy and society of Ukraine for 2018–2020 and approval of the action plan for its implementation]: January 17, 2018, № 67-p. *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/67-2018-%D1%80#Text (in Ukrainian).

Kostenko, A.A. (2019). Internet libertarianism and internet etatism in the context of the internet rights of a person. *Journal of the National Academy of Legal Sciences of Ukraine*, vol. 26, no. 1, pp. 62–75. DOI: 10.31359/1993-0909-2019-26-1-62 (in English).

Kuts, D.F., Ivanov, A.M. (2018). Problemy okhorony i zakhystu prav intelektualnoi vlasnosti v Interneti [Problems of protection of intellectual property rights on the Internet]. *Molodyi vchenyi,* no. 5(57), pp. 616–619 (in Ukrainian).

Mikhailina, T. (2020). Okremi problemni aspekty pravovoho zakhystu obiektiv prav intelektualnoi vlasnosti vid porushen u merezhi Internet [Some problematic aspects of legal protection of intellectual property rights objects from violations on the Internet]. *Problemy yurydychnoi vidpovidalnosti za porushennia prav u sferi intelektualnoi vlasnosti (sektsiia 2)*: Materialy Mizhnarodnoi naukovo-praktychnoi konferentsii "Internet-mist KYIV – DNIPRO" ("Upravlinnia proektamy. efektyvne vykorystannia rezultativ naukovykh doslidzhen ta obiektiv intelektualnoi vlasnosti"). Kyiv, pp. 150–153 (in Ukrainian).

Mikhailina, T. (2016). Rol informatsiinoho suspilstva u formuvanni pravosvidomosti [The role of the information society in legal awareness formation]. *Economic and Law Paradigm of Modern Society*, no. 2, pp. 166–171 (in Ukrainian).

Ministry krain-chleniv G7 domovylysia pro vvedennia hlobalnoho tsyfrovoho podatku [G7 Member Ministers Agree to Introduce a Global Digital Tax]. (2021). *psm7.com*. Retrieved from: https://psm7.com/uk/legislation/ministry-stran-chlenov-g7-dogovorilis-o-vvedenii-globalnogo-naloga-na-texnogigantov.html (in Ukrainian).

Petryshyn, O.V., Hyliaka, O.S. (2021). Human rights in the digital age: challenges, threats and prospects. *Journal of the National Academy of Legal Sciences of Ukraine*, vol. 28, iss. 1, pp. 15–23. DOI: 10.37635/jnalsu.28(1).2021.15-23 (in English).

Reklamodavtsi proty Facebook i Google: chomu hroshi letiat u trubu [Advertisers vs Facebook and Google: why money goes down the drain] (2021). *thepage.ua*. Retrieved from: https://thepage.ua/ua/it/reklamodavci-proti-facebook-i-google-chomu-groshi-letyat-u-trubu (in Ukrainian).

Tramp obmezhyv robotu TikTok novym ukazom [Trump restricts TikTok operation with new executive order] (2020). *ua.news*. Retrieved from: https://ua.news/ua/tramp-ogranichil-rabotu-tiktok-novym-ukazom/ (in Ukrainian).

Trampa zablokuvaly bilshe desiatka sotsmerezh i platform [Trump was blocked by more than a dozen social networks and platforms] (2021). *suspilne.media*. Retrieved from: https://suspilne.media/94805-trampa-zablokuvali-bilse-desatka-socmerez-i-platform/ (in Ukrainian).

Ukrainskij variant "naloga na Google" mozhet povlech znachitel'nye neudobstva dlya potrebitelej malogo i srednego biznesa [The Ukrainian version of the "Google tax" may entail significant inconveniences for consumers of small and medium-sized businesses] (2021). *www.fixygen.ua*. Retrieved from: www.fixygen.ua/news/20210606/ukrainskij-variant.html (in Russian).

V Italii Facebook oshtrafovali na 7 mln evro za obrashchenie s dannymi pol'zovatelej [Facebook was fined 7 million euros for handling user data in Italy] (2021). *www.pravda.com*. Retrieved from: www.pravda.com.ua/rus/news/2021/02/17/7283761/ (in Russian).

Yanytska, O.L., Ambrush, H.L., Koval, O.M. (2019). Deiaki problemy zakhystu avtorskykh prav u merezhi Internet [Some problems of copyright protection on the Internet]. *Yurydychnyi naukovyi elektronnyi zhurnal*, no. 6, pp. 147–150 (in Ukrainian).

Zakhyst prav vid Internet-porushen: sudova praktyka [Protection of rights from Internet violations: judicial practice]. (n.d.). *web-fix.org*. Retrieved from: https://web-fix.org (in Ukrainian).

Тетяна Міхайліна,
доктор юридичних наук, професор, професор кафедри теорії, історії держави і права та філософії права, Донецький національний університет імені Василя Стуса, вул. 600-річчя, 21, Вінниця, Україна, індекс 21021, mihaylina@donnu.edu.ua
ORCID: *orcid.org/0000-0002-1129-2470*

Юрій Гоцуляк,
доктор юридичних наук, доцент, в. о. завідувача кафедри теорії, історії держави і права та філософії права, Донецький національний університет імені Василя Стуса, вул. 600-річчя, 21, Вінниця, Україна, індекс 21021, y.hotsulyak@donnu.edu.ua
ORCID: *orcid.org/0000-0001-6765-4592*

Андрій Гель,
кандидат юридичних наук, доцент, доцент кафедри судової медицини та права, Вінницький національний медичний університет імені М. І. Пирогова, вул. Пирогова, 56, Вінниця, Україна, індекс 21018, apgel1956@gmail.com
ORCID: *orcid.org/0000-0003-2612-4530*

ЗАХИСТ ПРАВ СУБ'ЄКТІВ ІНФОРМАЦІЙНИХ ПРАВОВІДНОСИН ВІД ПОРУШЕНЬ У МЕРЕЖІ ІНТЕРНЕТ

Анотація. ***Метою*** статті є теоретико-прикладний аналіз проблематики захисту прав суб'єктів інформаційних правовідносин від порушень у мережі Інтернет, а також внесення пропозицій щодо усунення окремих проблем. ***Методи дослідження.*** Методологія роботи являє собою комплекс загальнонаукових і спеціальних способів отримання даних, зокрема системного, кібернетичного та синергетичного методів, формально-юридичного методу, методу правової компаративістики, а також методу спостереження як елементарного соціологічного методу. ***Результати.*** Наголошується на тому, що особливості інтернет-середовища створюють значні ризики порушення прав людини, тому повинні перебувати у фокусі держави. Це дає підстави для однозначної підтримки позиції щодо необхідності регуляції інтернет-правовідносин, а також для акценту на гарантованості й захищеності прав учасників, проте без звернення до інтернет-патерналізму, який створює перешкоди для технологічного розвитку держави або переводить значні сегменти відносин у тінь. ***Висновки.*** Пропонується змінити термінологічні підходи в досліджуваній сфері та застосовувати словосполучення «захист прав від інтернет-порушень» або «захист прав від порушень у мережі Інтернет» замість «захист прав у мережі Інтернет», що опосередковує не лише науковий бік проблеми, а й суто практичну сторону таких охоронних правовідносин. Обґрунтовується позиція щодо необхідності законодавчого закріплення обов'язку для транснаціональних інформаційних компаній мати офіційне представництво в Україні. Це забезпечило би додаткові можливості для захисту суб'єктами інформаційних правовідносин своїх прав, зокрема, у судовому порядку. Водночас підтримуються законодавчі ініціативи щодо питання оподаткування інформаційних транснаціональних компаній в Україні, що наразі є загальносвітовим трендом. Виявлено, що жорстке державне управління інформаційним простором є можливим і широко реалізується в тоталітарних (авторитарних) режимах, при цьому для суспільств демократичних воно є неприйнятним. В інформаційних системах підсилюються заходи самозахисту прав, зокрема й на корпоративному рівні. Якщо ж використовувати фінансові важелі, то найбільш прийнятними є заходи матеріальної відповідальності.

Ключові слова: захист прав людини, інформаційні правовідносини, суб'єкти інформаційних відносин, правопорушення, юридична відповідальність, правове регулювання, digital-суспільство.

The article was submitted 15.07.2021
The article was revised 05.08.2021
The article was accepted 26.08.2021

UDC 340.151:334.726
DOI https://doi.org/10.32849/2663-5313/2021.7.11

Bogdan Derevyanko,
Doctor of Law, Professor, Chief Scientific Researcher at the Department of Legal Support of Market Economy, F. G. Burchak "Scientific Research Institute of Private Law and Business of Nationality Academy of Law Sciences of Ukraine", 23-a, Raievskoho street, Kyiv, Ukraine, postal code 02000, ndippp@adamant.net
ORCID: *orcid.org/0000-0001-7408-8285*

Olha Turkot,
PhD in Law, acting Associate Professor at the Department of Law, Lviv National Agrarian University, 1, V. Velykoho street, Dubliany, Lviv region, Ukraine, postal code 80381
ORCID: *orcid.org/0000-0003-4505-3096*

Derevyanko, Bogdan, Turkot, Olha (2021). The genesis of corporate relations in Ancient Rome and their impact on Ukrainian legislation. Entrepreneurship, Economy and Law, 7, 69–77.

THE GENESIS OF CORPORATE RELATIONS IN ANCIENT ROME AND THEIR IMPACT ON UKRAINIAN LEGISLATION

Abstract. Based on the analysis of the available information on the legal relations between various legal subjects of Ancient Rome, ***the purpose*** of the research is to prove the absence or presence of corporate relations and determine the degree of influence of these relations in Ancient Rome on contemporary Ukrainian legislation. ***Research methods.*** The paper is developed through applying general research and special methods of scientific cognition. ***Results.*** Economic activity is carried out by economic entities and their associations. Economic relations arise as a result of entering into legal relations with other economic entities. They are realized by concluding, changing, and terminating contracts. Corporate relations are components of economic relations since they are associated with the implementation of economic activities by special economic entities. Corporate relations in the world appeared in ancient states and were primarily formed in Ancient Rome. Roman law was the first in the official history of humankind to distinguish between private and public law. Corporate relations, as well as economic relations in general, combine private and public interests. Therefore, in some legal circles, there is an opinion about the absence, even as a complex area, of corporate law and the absence of such legal subjects both in ancient Rome and today. The paper shows that such opinions are inaccurate since the association of entrepreneurs based on geographic, professional, target, and other characteristics (guilds, municipalities, workshops, unions, companies, societies, associations, etc.) appeared, spread, and received recognition by the state. ***Conclusions.*** The principles of their activities, which are still applied today in corporate law of Ukraine and many countries worldwide, were formed in Ancient Rome. This indicates a significant influence of the corporate relations of Ancient Rome on contemporary Ukrainian law and legislation. The societas publicanorum, recognized as the prototype of modern joint-stock companies, was formed based on the general authorization principle during the Republic and based on a special authorization principle during the Empire era. In the latter case, the Senate granted the permission, which, in modern terms, performed the functions of registration, licensing, control and supervision. The positive aspect of Ancient Roman law and legislation is a wide choice of organizational and legal forms for potential participants of corporate structures.

Key words: corporate relations, Roman law, Ancient Rome, corporate law, economic entities, economic activities, joint-stock companies.

1. Introduction

The law of Ancient Rome laid the foundations for the contemporary law of many states in the world. The system of Roman law is considered one of the oldest and definitely the most developed one. This system has incorporated the best achievements of previous legal systems of various states and peoples, and states and peoples who lived simultaneously with the Romans – Etruscans, Babylonians, Egyptians, Persians, Greeks, Jews, Carthaginians, Gauls, Celts, Scythians, Sarmatians, etc. This was achieved due to the high level of development of culture and science and, consequently, intellectual legal scholars who could qualitatively analyze

other legal systems and implement their best achievements into the system of their own law.

The achievements of Roman law include the division of law into "private" and "public". Law branches and individual relations and legal institutions designed to protect the rights and interests of the state were classified as "public law"; and industries, relations, and legal institutions, the main task of which was to ensure the implementation and protection of the interests of an individual – a citizen, a subject, a foreigner or even a slave (to a lesser extent than others) – were classified as "private law". The Roman jurist Ulpian consolidated this division with the wording "Public law is that which refers to the provisions of the Roman state; private law benefits individuals" (Derevianko, 2020, p. 246). Among the Ukrainian areas of contemporary law, civil law borrowed most from the law of Ancient Rome. Thus, Roman private law is often equated exclusively with civil law. It is a trend among contemporary lawyers to apply many legal norms formulated by the lawyers of Ancient Rome. In response to this, academician V. Mamutov repeatedly emphasized that after the progressive division of law into "private" and "public" two thousand years ago, the law has changed significantly. This means that the stereotypes of two thousand years ago cannot be effective today. Inter alia, the academician noted that it became clear to many lawyers that attempts to solve economic problems from the standpoint of a private law concept were unsuccessful since this concept is inadequate to modern economics (Mamutov, 2009, p. 93; Derevianko, 2013, p. 78).

The rigid division of law branches in ancient Rome into private and public law has formed and consolidated the idea that there cannot be branches of law in which private and public interests are of approximately the same importance. Today, some lawyers consider the areas of economic, environmental, entrepreneurial, agrarian, corporate law and many others to be such "complex" or "hybrid" areas. Many lawyers ignore the presence of corporate relations and, accordingly, the presence of corporate subjects among the legal subjects of Ancient Rome – prototypes of modern economic societies and associations of enterprises. Therefore, it is urgent to conduct research to confirm or refute this statement, and in case of refutation – to determine the degree of influence of corporate relations in Ancient Rome on contemporary Ukrainian legislation.

Literature review. The formation and development of legal relations between various subjects of private and public law in Ancient Rome was the subject of research of many Ukrainian scientists, as follows: I. Babych (Babych, 2007, pp. 164–169), I. Babchenko (Babchenko, 2020, pp. 131–134), V. Bek (Bek, 1950), N. Bondar (Bondar, 2014, pp. 4–13), S. Hrynko (Hrynko, 2007, pp. 90–96; Hrynko, 2009, pp. 169–172; Hrynko, 2012), A. Huzhva (Huzhva, 2011), V. Hutieva (Hutieva, 2003), O. Kutateladze (Kutateladze, 2006), Ya. Marushchak (Marushchak, 2016, pp. 29–31), S. Pietkov (Pietkov, 2011, pp. 756–770), O. Pidopryhora (Pidopryhora, 1997; Pidopryhora, Kharytonov, 2003), R. Stefanchuk (Stefanchuk, 2004, pp. 113–118), H. Trofanchuk (Trofanchuk, 2006), Ye. Kharytonov (Pidopryhora, Kharytonov, 2003) and others. Many Ukrainian researchers studied the genesis of corporate relations and corporate governance, as follows: O. Belianevych (Belianevych, 2017), N. Butryn-Boka (Butryn-Boka, 2015, pp. 84–88), O. Vinnyk (Vinnyk, 2008, pp. 118–125; Vinnyk, 2010; Vinnyk, 2012), O. Harahonych (Harahonych, 2013, pp. 24–28; Harahonych, 2014, pp. 104–105; Harahonych, 2015, pp. 53–62; Harahonych, 2019; Harahonych, 2014, 344 p.), S. Hrudnytska (Mamutov, 1994, pp. 46–50; Hrudnytska, 1998, pp. 115–118; Hrudnytska, 1998, pp. 40–42; Hrudnytska, 2004, pp. 3–7; Derevianko, 2005; Harahonych, 2014, 344 p.), Yu. Zhornokui (Zhornokui, 2012, pp. 70–75; Zhornokui, 2015, pp. 31–36), O. Kibenko (Kibenko, 2001; Kibenko, 2006), I. Kravets (Kravets, 2011, pp. 41–44), V. Kravchuk (Kravchuk, 2005; Kravchuk, 2009), O. Krupchan (Krupchan, 2004, pp. 71–79), I. Lukach (Lukach, 2008; Lukach, 2010, pp. 46–51; Lukach, 2016), O. Pereverziev (Pereverziev, 2004), A. Smitiukh (Smitiukh, 2015, pp. 81–86; Smitiukh, 2017; Smitiukh, 2018), A. Sorochenko (Sorochenko, 2015), V. Shcherbyna (Shcherbyna V., 2008, 264 p.; Shcherbyna V., 2008, pp. 222–235), O. Shcherbyna (Shcherbyna O., 2001) and others. However, even though a great deal of Ukrainian lawyers studied the aspects of the formation of legal relations in Ancient Rome, as well as the peculiarities and patterns of the formation of corporate relations in modern Ukraine, the issues of the formation of corporate relations in Ancient Rome and their influence on contemporary Ukrainian legislation remain poorly studied.

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

Purpose. Based on the analysis of the available information on the legal relations between various legal subjects of Ancient Rome, the purpose of the article is to prove the absence or presence of corporate relations and, in the second case, determine the degree

of influence of these relations in Ancient Rome on contemporary Ukrainian legislation.

2. Process of formation of corporate relations in Ancient Rome

Associations, which were organized and existed solely by the will of the persons who were part of them, arose in the middle of the second millennium BC in the ancient states of Mesopotamia in the field of maritime trade. Agricultural and industrial associations, distinguished by the opportunity to participate freely, were known to Ancient China, the Assyrian and Phoenician states, and Ancient Greece (Pohribnyi, 2008, p. 16). There were no modern means of communication and means of air and other high-speed transport between states in those days. However, international contacts were concluded on a daily basis. The ancient Roman merchants paved the Great Silk Road and established contacts between Ancient Rome and China. Scientists note that such associations were the first manifestations of corporate governance, which will receive state recognition over time and be significantly specified to distinguish between corporations and other types of economic activity (Batryn, Semchyk, 2010, p. 311). The states that existed on the territory of Ancient Rome (Monarchy, Republic, and Empire) actively borrowed, as already mentioned, all the advantages known to them in production, its organization and regulation, and management.

Nebava notes that the process of formation of corporate relations began in the states of Ancient Greece. There was a sufficiently developed maritime communication, which required the investment of significant financial and human resources. This, in turn, became possible due to the application of the collective cooperation. Corporate forms of economic activity, known to entrepreneurs in Ancient Greece, did not go unnoticed and were in demand in Ancient Rome. Studies show that at first these were unions for religious purposes (sodalitates, colleg appariorum), which, pursuant to the laws of the XII tables, were given the right to create statutes for themselves, provided that they did not contradict the law, and trade unions of artisans (fabrorum, pistorum). During the Republic, they were joined by corporations of ministers under magistrates (colleg appariorum), an association of mutual aid (Nebava, 2004, p. 31). It should be emphasized that the formation (one might say, restoration) of entrepreneurial associations on a professional basis in medieval Europe, particularly in Kievan Rus, and later in the Grand Duchy of Lithuania Commonwealth, occurred similarly. The Ancient Roman associations of mutual assistance served as an example for the formation of forerunners of insurance companies by the Chumaks (professional traders in salt, fish, grain, and other goods in the Ukrainian lands) from the beginning of the 15th to the end of the 19th century, and from the beginning of the 19th – the prototype of mutual aid funds, formed in the big cities of the Ukrainian lands, which were part of the Russian and Austro-Hungarian empires.

The beginnings of the first corporate organizations (strustur) that were formed in Ancient Rome lost their significance during the fall of the Roman state. Still, the experience and business traditions accumulated by that time were preserved and adopted by the peoples that appeared after the collapse of the great empire (Nebava, 2004, p. 31). As shown above, Ukraine also did not stand aside. First in Kievan Rus, and later within other states, various associations of enterprises were actively formed and continue to develop and improve in terms of sectoral, territorial, and other characteristics.

Kudria confirms that the first mentions of unions and associations are found already in the annals of the ancient Greeks, Assyrians, and Phoenicians. They were a kind of society with the participation of merchants and their borrowers, created for maritime trade. Roman law mentions the contractual partnership called societies, the corporate-type organization universitas corpus, and the societas publicanorum (vecigalium) as a mixed form of societas and universitas. In the ancient world, and especially in the Roman Empire, the foundations of the process of corporatization in the modern sense were laid (Kudria, 2015, p. 18). In other words, ancient Roman law distinguished at least three types of associations: 1) formed based on an agreement between its participants without full registration as a subject (i. e., as a prototype of a modern contractual association without the status of a legal entity, for example, based on a simple partnership agreement); 2) based on rules or law with registration (i. e., as a prototype of a modern association with the status of a legal entity); 3) mixed, which provided for partial registration, and partially acted based on an agreement between the participants. A symbiosis like a contemporary limited society with its full participants and contributors could be formed. In this case, the association could be formed and fully registered, and later based on an agreement "semi-officially" include other participants in its composition.

3. Prototype of corporate law and corporate structures in Ancient Rome

A fairly significant positive influence on the development of corporate relations in Ancient Rome was provided by contract law,

which consolidated new relations arising in economic life. The developed treaty system met the interests of Roman merchants in both domestic and foreign trade. In contract law, more than in any area of private law, the ability of Roman lawyers was reflected, without formally departing from the conservatism that characterized Roman national law, to define new interests and, thus, not only not to hinder the development of the economy, but also to stimulate it and promote it (Babych, 2007, p. 164).

Babchenko points out that it was in Roman private law that an important step was taken towards creating and further developing the first terminological designations for corporate structures, and therefore corporate law (Babchenko, 2020, p. 132). Thus, the prototype of contemporary corporate law appeared precisely in Ancient Rome, while earlier states had only some of its fragments. Although the researcher does not dispute the role of Ancient Greece, from which, due to continuity, corporate forms of doing business passed to Ancient Rome, and already there, within the limits of private law, they were expanded, deepened, and legitimized within the prototype of modern corporate law (Babchenko, 2020, p. 133–134).

Marushchak notes that in Rome there were private associations called universitas. These included unions or corporations that united persons of the same profession: bakers (collegia pistorum), artisans (collegia fabrorum), seafarers (collegia navicularіorum), etc. Further, the number of such associations grew. Burial societies (collegia funeraticia) arose to provide funds for the burial of their members. Since the classical period of Roman law, the common property of the universitas belonged to the corporation and not to its members. Then, the independence of appearing in court was, by analogy with municipalities, extended to private corporations (Marushchak, 2016, p. 29). The formation of such associations, the expansion of their form and types were directly dependent on the growth of the welfare of society and the state. With the emergence of a surplus product, historical development reached a qualitatively new level, and the possibility of achieving a significant economic effect began to appear only as a result of the development of intensive integration processes. Due to such integration in the economic sphere, there emerged various municipalities, workshops, unions, companies, cooperatives, societies, unions, corporations, and other associations (groups, concerns, holdings, etc.), which had different legal statuses, different organizational structures, differed in spheres, goals, scope of activity, etc., but at the same time had the main common feature – the unification of various business entities and/or participants in economic relations to achieve the main goal of the activity (Hrudnytska, 2004, p. 3). Already in Ancient Rome, it became obvious to manufacturers that high results can be achieved in cooperation. The unification of the first individual entrepreneurs, and then of enterprises on a professional basis, determined the direction of development of the world economy, social and political life since many of these associations over time were transformed into political parties, official or secret public organizations with goals that went beyond expanding the production of this product and ensuring its quality. For example, we can recall at least the professional associations of builders, which after the Middle Ages were called "freemasons" and subsequently went into the "shadow", making even the facts of their existence secret. A significant number of such official or secret organizations are also widespread in Ukraine.

4. Prototype of modern joint-stock companies in Ancient Rome

In addition to the prototype of modern associations of enterprises and public organizations, Roman law initiated the invention and legitimation of prototypes of economic societies, including joint-stock companies. The development of the economy and social relations in Ancient Rome led to gradual changes in the requirements for the prototypes of the joint-stock company and other economic societies. At the time of Republican Rome, when these formations were beginning to appear, and the state professed a partially democratic or liberal style of leadership, for the formation of such entities, the organization of their management, the entry and exit of participants, the main thing was their desire. The activities of such corporate entities had to be within the existing norms in the legislation and comply with the principle "everything that is not prohibited by law is allowed". Thus, the general permissive principle influenced the processes of formation and activity. Later, during Imperial Rome, the state became more developed, and the emperors demanded more and more income. At that time, the formation of the prototype of a joint-stock company or other economic society was carried out only with the direct permission of the Senate, and officials controlled the activities. It is possible to paraphrase the well-known special authorization principle "only that which is directly permitted by law is permitted" due to the replacement of the word "law" with the word "Senate". There is nothing strange

or unusual about this. Any state (including contemporary Ukraine), simultaneously with development, tries to control the income of citizens (subjects) maximally and business entities and their associations, tries to maximize the efficiency of tax collection, and, if possible, introduce new types of taxes. It is impossible to give an unambiguously positive or negative assessment of these phenomena since they are objective. The diversity in the choice of the forms of subjects and their associations should be positively assessed. The Senate, subject to the availability of prospects for itself or the state, could allow the formation of any entity or their association of a new type.

The prototype of the joint-stock company, mentioned in the previous paragraph, appeared at the end of the era of Republican Rome based on the societas publicanorium. The organizational structure of societas publicanorium corresponded to modern forms of JSC management. The unions created at that time were the prototype of modern legal subjects, which members at the legislative level were endowed with some rights, including the right to approve their own charters, which, in fact, meant the ability to independently regulate internal relations at the local level while simultaneously observing the requirements of the law (Povazhnyj, 2001, p. 29). Today, the principles of building the activities of corporate entities, laid down at the turn of the old and new era (in particular, in terms of the content of their statutory documents, organization of management, entry, and exit of participants, organization of protection of property interests, etc.) are found in the law and legislation of many countries of the world, including Ukraine. These principles have undergone a certain transformation, having been filtered through time and space. After the fall of Ancient Rome and the decline of culture and science, the achievements of Roman lawyers were largely forgotten or abandoned, or prohibited. However, production and trade did not disappear, and merchants resumed integration processes. Ukrainian researchers give an example of combining wealthy Novgorod merchants from the time of Kievan Rus into societies that at that time were called "sotni" ("hundreds"). To obtain the status of a member of this society, it was necessary to make an entrance fee, which was up to fifty hryvnias in silver and a certain amount of canvas (Zadyhajlo, Kibenko, Nazarova, 2003, p. 34). In the following centuries, the organization of joint work of the Chumak associations, as mentioned above, was relatively simple but convenient and perfect. This can be partly explained by the presence of contacts between them and not only representatives of the Turkic tribes and peoples, who advanced in the context of organizing and carrying out industrial and commercial activities, but also by representatives of European states and peoples, who at that time actively adopted the Roman rights. In the European states of that time, associations of manufacturers and trade guilds were actively formed due to the vigorous activity of which, among other things, customary law received the form of codified acts for internal application, and later, full-fledged normative legal acts.

5. Conclusions

Based on the analysis of the available information on legal relations between various subjects of law of various ancient states and Ancient Rome, it can be concluded that corporate relations arose and occurred long before the appearance of Ancient Rome (in Babylon, Assyria, Phenicia, the states of Mesopotamia, Greece, etc.). However, it was in the states of Ancient Rome that they took shape, received recognition by the state, and found consolidation in legal customs and regulatory legal acts. The first associations of entrepreneurs – corporations in ancient Rome were created based on private property; the constituent document of such associations was the charter. There were provisions on a corporate type organization, a contractual partnership, and societas publicanorium (a prototype of a modern joint-stock company), known as separate organizational and legal forms of economic entities in Roman law. The formation of such companies during the Roman Republic was carried out based on the general permissive principle. During the Roman Empire, it was necessary to obtain special permission from the Senate. In Roman law, the still well-known and operating principles of corporate structures were formulated concerning the procedure for the formation, management, property support of activities, the definition of the legal regime of property of business entities, representation of the company's interests in court, entry and exit from the membership, etc. Therefore, the degree of influence of these relations in Ancient Rome on contemporary Ukrainian legislation is quite high. Significant positive aspects in the organization of corporate relations in Ancient Rome were the ability to choose the organizational and legal form of association within the framework of the general authorization principle in the time of the Republic, subject to compliance with existing norms and rules and within the framework of the special authorization principle in the time of the Empire, when the Senate in most cases granted permission; as well as recognition as the main source of law, in particular the prototype of modern corporate law, a normative legal act. It is clear that the conducted research is quite general

and superficial. Modern legal science requires more in-depth research that would allow either to find previously unknown legal institutions in the law of Ancient Rome or to modernize well-known ancient Roman legal relations and institutions to meet the requirements of modernity, which should be aimed at future scientific research.

References:

Babchenko, I.Ye. (2020). Istorychni peredumovy poiavy korporatsii ta korporatyvnykh pravovidnosyn u krainakh Yevropy [Historical preconditions for the emergence of corporations and corporate legal relations in European countries]. *Innovatsiini naukovi doslidzhennia: teoriia, metodolohiia, praktyka: Materialy IV Mizhnarodnoi naukovo-praktychnoi konferentsii (Kyiv, 28–29 February 2020)* / HO "Instytut innovatsiinoi osvity"; Naukovo-navchalnyi tsentr prykladnoi informatyky NAN Ukrainy. Kyiv: HO "Instytut innovatsiinoi osvity", pp. 131–134 (in Ukrainian).

Babych, I.H. (2007). Zasoby zabezpechennia zoboviazan u rymskomu pravi y u suchasnomu zoboviazalnomu pravi Ukrainy [Means of securing obligations in Roman law and in modern law of obligations of Ukraine]. *Aktualni problemy derzhavy i prava*, no. 33, pp. 164–169 (in Ukrainian).

Batryn, S.V., Semchyk, V.I. (2010). Stanovlennia korporatyvnoho hospodariuvannia: postrymskyi period [Formation of corporate management: the post-Roman period]. *Derzhava i pravo*, no. 50, pp. 310–316 (in Ukrainian).

Bek, V.A. (1950). Recepciya rimskogo prava v Zapadnoj Evrope [Reception of Roman law in Western Europe]: dis. ... kand. yurid. nauk. Lvov, 309 p. (in Russian).

Belianevych, O.A., Miahkyi, A.V. (2017). Korporatyvne upravlinnia za zakonodavstvom Ukrainy: teoretyko-prykladni problemy: monohrafiia [Corporate Governance for Ukrainian Legislation: Theoretical and Applied Problems: Monograph]. Kyiv: NDI pryvatnoho prava i pidpryiemnytstva imeni akademika F.H. Burchaka NAPrN Ukrainy, 320 p. (in Ukrainian).

Bondar, N.A. (2014). Istoryko-pravovi zasady retseptsii rymskoho pryvatnoho prava v pravovii systemi Polshchi [Historical and legal principles of the reception of Roman private law in the legal system of Poland]. *Aktualni pytannia publichnoho ta pryvatnoho prava*, no. 1, pp. 4–13 (in Ukrainian).

Butryn-Boka, N.S. (2015). Poniattia "korporatyvne pravo" ta "korporatyvni prava" u zakonodavstvi Ukrainy [The concept of "corporate law" and "corporate rights" in the legislation of Ukraine]. *Naukovyi visnyk Khersonskoho derzhavnoho universytetu. Seriia "Yurydychni nauky"*, no. 3, vol. 1, pp. 84–88 (in Ukrainian).

Derevianko, B. (2020). Mirkuvannia pro neobkhidnist zaprovadzhennia kontseptsii rozvytku "pryvatnoho prava" ta vyznachennia yii nazvy i zmistu [Considerations on the need to introduce the "private law" development concept and determining its name and content]. *Pidpryiemnytstvo, hospodarstvo i pravo*, no. 4, pp. 245–250 (in Ukrainian).

Derevianko, B.V. (2013). Posluhy u sferi osvity: pravove rehuliuvannia: monohrafiia [Education services: legal regulation: monograph]; MVS Ukrainy, Donetskyi yurydychnyi instytut. Donetsk: Vydavnychyi dim "Kalmius", 387 p. (in Ukrainian).

Derevianko, B.V., Hrudnytska, S.M. (2005). Derzhavne rehuliuvannia funktsionuvannia promyslovo-finansovykh hrup u sferi pidpryiemnytskoi diialnosti: monohrafiia [State regulation of the functioning of industrial and financial groups in the field of entrepreneurial activity: monograph] / ed. M.K. Haliantych. Kyiv: Naukovo-doslidnyi instytut pryvatnoho prava i pidpryiemnytstva, 176 p. (in Ukrainian).

Grudnickaya, S. (1998). Hozyajstvennoe obshchestvo i hozyajstvennoe ob'edinenie [Economic company and economic association]. *Yuridicheskij vestnik,* no. 3, pp. 115–118 (in Russian).

Harahonych, O.V. (2015). Adaptatsiia korporatyvnoho zakonodavstva Ukrainy do prava YeS [Adaptation of Ukrainian corporate legislation to EU law]. *Chasopys tsyvilnoho i kryminalnoho sudochynstva,* no. 2(23), pp. 53–62 (in Ukrainian).

Harahonych, O.V. (2014). Ekonomichna bezpeka korporatyvnykh pidpryiemstv: pravovyi analiz aktualnykh problem [Economic security of corporate enterprises: legal analysis of current issues]. *Porivnialno-analitychne pravo,* no. 1, pp. 104–105 (in Ukrainian).

Harahonych, O.V. (2019). Hospodarska pravosubiektnist aktsionernykh tovarystv: problemy teorii i praktyky: monohrafiia [Economic legal personality of joint-stock companies: problems of theory and practice: monograph]. Kyiv: In-t ekonomiko-pravovykh doslidzhen, NAN Ukrainy, 406 p. (in Ukrainian).

Harahonych, O.V. (2013). Poniattia ta predmet korporatyvnoho prava [The concept and subject of corporate law]. *Naukovyi visnyk UzhNU. Seriia pravo*, no. 22, part 2, vol. 2, pp. 24–28 (in Ukrainian).

Hrudnytska, S. (1998). Shchodo pytannia pro napriamy rozvytku zakonodavstva pro obiednannia [On the question of the directions of development of the legislation on association]. *Pravo Ukrainy,* no. 11, pp. 40–42 (in Ukrainian).

Hrudnytska, S.M., Derevianko, B.V. (2004). Ekonomiko-pravovi pytannia formuvannia ta diialnosti promyslovo-finansovykh hrup (istorychnyi aspekt) [Economic and legal issues of formation and activity of industrial and financial groups (historical aspect)]. *Pidpryiemnytstvo, hospodarstvo i pravo,* no. 6, pp. 3–7 (in Ukrainian).

Hrynko, S.D. (2012). Deliktni zoboviazannia rymskoho pryvatnoho prava: poniattia, systema, retseptsiia: monohrafiia [Tort obligations of Roman private law: concept, system, reception: monograph] / S.D. Hrynko; za nauk. red. Ye.O. Kharytonova. Khmelnytskyi: Vydavnytstvo Khmelnytskoho universytetu upravlinnia ta prava, 724 p. (in Ukrainian).

Hrynko, S.D. (2007). Dyhesty Yustyniana yak dzherelo rymskoho pryvatnoho prava [Digests of Justinian as a source of Roman private law]. *Universytetski naukovi zapysky: Chasopys Khmelnytskoho universytetu upravlinnia ta prava*, no. 1, pp. 90–96 (in Ukrainian).

Hrynko, S.D. (2009). Zahalni zasady deliktnoho prava Frantsii, Nimechchyny ta Ukrainy: porivnialno-pravovyi analiz [General principles of tort law in France, Germany and Ukraine: a comparative legal analysis]. *Pryvatne pravo i pidpryiemnytstvo. Zbirnyk naukovykh prats*, iss. 8 / eds.: O.D. Krupchan et al. Kyiv: Naukovo-doslidnyi instytut pryvatnoho prava i pidpryiemnytstva Akademii pravovykh nauk Ukrainy, pp. 169–172 (in Ukrainian).

Hutieva, V.V. (2003). Emfitevzys u rymskomu pravi ta yoho retseptsiia u pravi Ukrainy [Emphyteusis in Roman law and its reception in the law of Ukraine]: avtoref. dys. na zdobuttia nauk. stupenia kand. yuryd. nauk. Lviv, 21 p. (in Ukrainian).

Huzhva, A.M. (2011). Interes u dohovirnykh zoboviazanniakh za rymskym pravom i suchasnym tsyvilnym pravom Ukrainy [Interest in contractual obligations under Roman law and modern civil law of Ukraine]: avtoref. dys. na zdobuttia nauk. stupenia kand. yuryd. nauk. Kharkiv, 18 p. (in Ukrainian).

Kibenko, E.R. (2001). Korporativnoe pravo Ukrainy: ucheb. posob. [Corporate law of Ukraine: textbook]. Harkov: Espada, 288 p. (in Russian).

Kibenko, O.R. (2006). Suchasnyi stan ta perspektyvy pravovoho rehuliuvannia korporatyvnykh vidnosyn: porivnialno-pravovyi analiz prava YeS, Velykobrytanii ta Ukrainy [Current state and future trends of legal regulation of corporate relationships: a comparative legal analysis of the law of EU, the Great Britain and Ukraine]: dys. ... d-ra yuryd. nauk. Kharkiv, 526 p. (in Ukrainian).

Korporatyvne pravo: navch. posib. [Corporate law: textbook] / O.V. Harahonych, S.M. Hrudnytska, E.E. Bekirova, Yu.M. Bysaha ta in.; eds.: O.V. Harahonych, S.M. Hrudnytska. Kyiv: Slovo, 344 p. (in Ukrainian).

Kravchuk, V.M. (2005). Korporatyvne pravo. Naukovo-praktychnyi komentar zakonodavstva ta sudovoi praktyky [Corporate law. Scientific and practical commentary on legislation and case law]. Kyiv: Istyna, 720 p. (in Ukrainian).

Kravchuk, V.M. (2009). Prypynennia korporatyvnykh pravovidnosyn v hospodarskykh tovarystvakh: monohrafiia [Termination of corporate legal relations in business associations: monograph]. Lviv: Krai, 464 p. (in Ukrainian).

Kravets, I.M. (2011). Oznaky hospodarskykh ob iednan yak tsentriv hospodarskykh system [Signs of economic associations as centers of economic systems]. *Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa Shevchenka,* no. 88, pp. 41–44 (in Ukrainian).

Krupchan, O. (2004). Publichni i pryvatni zasady v korporatyvnomu pravi Ukrainy: pravovi pytannia [Public and private principles in corporate law of Ukraine: legal issues]. *Visnyk Akademii pravovykh nauk Ukrainy,* no. 2(37), pp. 71–79 (in Ukrainian).

Kudria, Ya.V. (2015). Rozvytok korporatsii: zasady, tendentsii, instrumentarii: monohrafiia [Development of corporations: principles, tendencies, tools: monograph]. Lviv: DU "Instytut rehionalnykh doslidzhen imeni M.I. Dolishnoho NAN Ukrainy", 188 p. (in Ukrainian).

Kutateladze, O.D. (2006). Pidstavy vynyknennia zoboviazan za rymskym pryvatnym pravom i suchasnym tsyvilnym zakonodavstvom Ukrainy [The legal grounds of a rise of obligations in roman private law and modern Ukrainian civil legislation]: avtoref. dys. na zdobuttia nauk. stupenia kand. yuryd. nauk. Odesa, 19 p. (in Ukrainian).

Lukach, I. (2010). Klasyfikatsiia zasobiv rehuliuiuchoho vplyvu derzhavy na zdiisnennia korporatyvnykh prav [Classification of means of regulatory influence of the state on the exercise of corporate rights]. *Visnyk Kyivskoho natsionalnoho universytetu imeni Tarasa Shevchenka. Yurydychni nauky,* no. 93, pp. 46–51 (in Ukrainian).

Lukach, I.V. (2016). Hospodarsko-pravove rehuliuvannia korporatyvnykh vidnosyn v Ukraini: teoretychni problem [Economic and legal regulation of corporate relations in Ukraine: theoretical problems]: dys. ... d-ra yuryd. nauk. Kyiv, 474 p. (in Ukrainian).

Lukach, I.V. (2008). Pravove polozhennia kholdynhovykh kompanii: monohrafiia [Legal status of holding companies: monograph]. Kyiv: Yurinkom Inter, 240 p. (in Ukrainian).

Mamutov, V. (2009). Posylennia publichnykh zasad u pravovomu rehuliuvanni hospodarskoi diialnosti [Strengthening public principles in the legal regulation of economic activity]. *Pravo Ukrainy,* no. 9, pp. 83–94 (in Ukrainian).

Mamutov, V.K., Grudnickaya, S.N. (1994). Korporaciya: pravovoj status, otlichitel'nye osobennosti [Corporation: legal status, distinctive features]. *Ekonomika Ukrainy,* no. 2, pp. 46–50 (in Russian).

Marushchak, Ya.S. (2016). Zarodzhennia osnov korporatyvnoho prava v Rymskii Imperii [Origin of the foundations of corporate law in the Roman Empire]. *Rymske pravo yak pidgruntia suchasnoho prava Yevropy: mater. Mizhnar. nauk.-prakt. konf. Rymske pravo i suchasnist» : aktualna problema (Odesa, 27 May 2016).* Odesa, pp. 29–31 (in Ukrainian).

Nebava, M.I. (2004). Teoriia korporatyvnoho upravlinnia: vuzlovi pytannia: navch. posibnyk [Theory of corporate governance: key issues: textbook]. Kyiv: Tsentr navch. lit-ry, 295 p. (in Ukrainian).

Pereverziev, O.M. (2004). Hospodarsko-pravove zabezpechennia korporatyvnoho kontroliu v aktsionernykh tovarystvakh [Economic and legal support of corporate control in joint stock companies]: avtoref. dys. na zdobuttia nauk. stupenia kand. yuryd. nauk. Donetsk, 20 p. (in Ukrainian).

Pidopryhora, O.A. (1997). Osnovy rymskoho pryvatnoho prava: Pidruchnyk dlia studentiv yuryd. vuziv ta fakultetiv [Fundamentals of Roman private law: textbook]. Kyiv: Venturi, 336 p. (in Ukrainian).

Pidopryhora, O.A., Kharytonov, Ye.O. (2003). Rymske pravo: pidruchnyk [Roman Law: textbook]. Kyiv: Yurinkom Inter, 512 p. (in Ukrainian).

Pietkov, S.V. (2011). Rymske pravo yak osnova dlia pobudovy suchasnoi efektyvnoi publichno-pravovoi modeli vidnosyn mizh vladoiu ta hromadianynom: pytannia yurydychnoi deliktolohii [Roman law as a basis for building a modern effective public law model of relations between government and the citizen: the issue of legal tort]. *Forum prava,* no. 1, pp. 756–770 (in Ukrainian).

Pohribnyi, D.I. (2008). Korporatyvni prava derzhavy: poniattia, pidstavy vynyknennia, mekhanizm realizatsii [Corporate rights of the state: concepts, bases of origin, mechanism of realization]: dys. ... kand. yuryd. nauk. Kharkiv, 210 p. (in Ukrainian).

Povazhnyj, A.S. (2001). Ponyatie "korporativnoe upravlenie": analiz razlichnyh podhodov [The concept of "corporate governance": analysis of different approaches]. *Ekonomika: problemy teorii ta praktyky*, no. 99, pp. 29–35 (in Russian).

Shcherbina, V.S. (2008). Korporativnye otnosheniya kak predmet pravovogo regulirovaniya [Corporate relations as a subject of legal regulation]. *Al'manah civilistiki,* no. 1, pp. 222–235 (in Russian).

Shcherbyna, O.V. (2001). Pravove stanovyshche aktsioneriv za zakonodavstvom Ukrainy [Legal status of shareholders under the legislation of Ukraine]. Kyiv: Yurinkom Inter, 160 p. (in Ukrainian).

Shcherbyna, V.S. (2008). Subiekty hospodarskoho prava: monohrafiia [Subjects of economic law: monograph]. Kyiv: Yurinkom Inter, 264 p. (in Ukrainian).

Smitiukh, A.V. (2017). Korporatyvne pravo u skhemakh: navch. posib [Corporate law in schemes: textbook]. Odesa: ONU im. I.I. Mechnykova, 322 p. (in Ukrainian).

Smitiukh, A.V. (2018). Korporatyvni prava ta korporatyvni pai (chastky): teoretyko-pravovi aspekty: monohrafiia [Corporate rights and corporate shares (shares): theoretical and legal aspects: monograph]. Odesa: Feniks, 662 p. (in Ukrainian).

Smitiukh, A.V. (2015). Shchodo vyznachennia poniattia korporatyvnykh prav uchasnyka hospodarskoho tovarystva [Regarding the definition of the concept of corporate rights of a participant in a business partnership]. *Pravova derzhava,* no. 20, pp. 81–86 (in Ukrainian).

Sorochenko, A.V. (2015). Korporatyvni prava ta oboviazky: hospodarsko-pravovyi aspect [Corporate rights and responsibilities: economic and legal aspect]: dys. ... kand. yuryd. nauk. Kyiv, 204 p. (in Ukrainian).

Stefanchuk, R.O. (2004). Injuria v rymskomu pravi yak istoryko-pravova peredumova rehuliuvannia i okhorony osobystykh nemainovykh vidnosyn v suchasnomu tsyvilnomu pravi [Injuria in Roman law as a historical and legal prerequisite for the regulation and protection of personal non-property relations in modern civil law]. *Aktualni problemy derzhavy i prava,* no. 23, pp. 113–118 (in Ukrainian).

Trofanchuk, H.I. (2006). Rymske pryvatne pravo [Roman private law]. Kyiv: Atika, 248 p. (in Ukrainian).

Vinnyk, O.M. (2012). Korporatyvna forma derzhavno-pryvatnoho partnerstva: problemy pravovoho zabezpechennia na tli zarubizhnoho dosvidu [The corporate form of public-private partnership: problems of legal provision against the background of international experience]. Sumy: MakDen (in Ukrainian).

Vinnyk, O.M. (2008). Deiaki aspekty vdoskonalennia pravovoho rehuliuvannia korporatyvnykh vidnosyn [Some aspects of improving the legal regulation of corporate relations]. *Visnyk hospodarskoho sudochynstva,* no. 1, pp. 118–125 (in Ukrainian).

Vinnyk, O.M. (2010). Problemy pravovoho rehuliuvannia korporatyvnykh i partnerskykh vidnosyn: monohrafiia [Problems of legal regulation of corporate and partnership relations: monograph]. Kyiv: NDI pryvatnoho prava ta pidpryiemnytstva NAPrN Ukrainy, 166 p. (in Ukrainian).

Zadyhajlo, D.V., Kibenko, Ye.R., Nazarova, G.V. (2003). Korporativnoe upravlenie: ucheb. posobie [Corporate governance: textbook]. Kharkov: Espada, 688 p. (in Russian).

Zhornokui, Yu. (2012). Korporatyvnyi oboviazok aktsionera [Corporate responsibility of the shareholder]. *Yurydychnyi visnyk,* no. 2, pp. 70–75 (in Ukrainian).

Zhornokui, Yu.M. (2015). "Subiektyvne korporatyvne pravo" vs. "sekundarne pravo": et pro contra ["Subjective corporate law" vs. "secondary law": et pro contra]. *Pravo ta innovatsii,* no. 4(12), pp. 31–36 (in Ukrainian).

Богдан Деревянко,
доктор юридичних наук, професор, головний науковий співробітник відділу правового забезпечення ринкової економіки, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. Раєвського, 23-а, Київ, Україна, індекс 02000, ndippp@adamant.net
ORCID: *orcid.org/0000-0001-7408-8285*

Ольга Туркот,
кандидат юридичних наук, в. о. доцента кафедри права, Львівський національний аграрний університет, вул. В. Великого, 1, Дубляни, Львівська область, Україна, індекс 80381, ta_oli@ukr.net
ORCID: *orcid.org/0000-0003-4505-3096*

ГЕНЕЗИС ТА ВПЛИВ НА УКРАЇНСЬКЕ ЗАКОНОДАВСТВО КОРПОРАТИВНИХ ВІДНОСИН У СТАРОДАВНЬОМУ РИМІ

Анотація. ***Мета статті*** – на основі аналізу наявної інформації про правовідносини між різними суб'єктами права Стародавнього Риму довести наявність корпоративних відносин, а також визначити ступінь впливу цих відносин у Стародавньому Римі на сучасне українське законодавство. ***Методи дослідження.*** Статтю підготовлено на основі застосування загальнонаукових і спеціальних методів наукового пізнання. ***Результати.*** Господарську діяльність здійснюють суб'єкти господарювання та їх об'єднання. Унаслідок вступу у правовідносини з іншими суб'єктами господарювання виникають господарські відносини, що здійснюється через укладання, зміну та припинення договорів. Корпоративні відносини є складниками господарських відносин, оскільки пов'язані зі здійсненням господарської діяльності особливими суб'єктами господарювання. Корпоративні відносини у світі з'явилися ще в прадавніх державах та первинно сформувалися у Стародавньому Римі. У праві Стародавнього Риму, згідно з даними офіційної історії людства, уперше відбувся поділ права на приватне та публічне. Корпоративні відносини, як і господарські відносини загалом, об'єднують у собі приватні й публічні інтереси. Через це в окремих юридичних колах панує думка про відсутність корпоративного права навіть як комплексної галузі, а також про відсутність суб'єктів такого права як у Стародавньому Римі, так і сьогодні. У статті показано, що такі погляди є неточними, оскільки об'єднання підприємців за географічною, професійною, цільовою й іншими ознаками (гільдії, муніципії, цехи, унії, компанії, товариства, спілки, асоціації тощо) з'явилися, поширилися та отримали визнання в державі. ***Висновки.*** У часи Стародавнього Риму сформувалися принципи діяльності об'єднань підприємців, що застосовуються й нині в корпоративному праві України та багатьох держав світу. Це свідчить про наявність значного впливу корпоративних відносин Стародавнього Риму на сучасне українське право та законодавство. Об'єднання публікантів, що визнаються прототипом сучасних акціонерних товариств, утворювалися на основі загальнодозвільного принципу в часи Римської республіки та на основі спеціально-дозвільного принципу в часи Римської імперії. У другому випадку дозвіл надавав Сенат, який, говорячи сучасною мовою, виконував функції з реєстрації, ліцензування, контролю та нагляду. Позитивом давньоримського права й законодавства визнано наявність широкого вибору потенційними учасниками корпоративних структур організаційно-правових форм таких структур.

Ключові слова: корпоративні відносини, римське право, Стародавній Рим, корпоративне право, суб'єкти господарювання, господарська діяльність, акціонерні товариства.

The article was submitted 07.07.2021
The article was revised 05.08.2021
The article was accepted 26.08.2021

UDC 343.8
DOI https://doi.org/10.32849/2663-5313/2021.7.12

Yan Streliuk,
PhD in Law, External Doctoral Student at the Department of Law Enforcement and Anti-Corruption Activities, Interregional Academy of Personnel Management, 2, Frometivska street, Kyiv, Ukraine, postal code 03039, StreliukYan@ukr.net
ORCID: *orcid.org/0000-0002-4209-2017*

Streliuk, Yan (2021). Conceptual principles of general social prevention of criminal offenses in closed penal institutions in Ukraine. Entrepreneurship, Economy and Law, 7, 78–84.

CONCEPTUAL PRINCIPLES OF GENERAL SOCIAL PREVENTION OF CRIMINAL OFFENSES IN CLOSED PENAL INSTITUTIONS IN UKRAINE

Abstract. ***The purpose*** of the article is to outline the range of issues relevant to Ukraine concerning the implementation of general social measures by state authorities and local self-government bodies, public organizations, etc. for preventing criminal offenses and express an original opinion on certain ways of their solution. ***Results.*** The article reveals the challenging issues of studying general social prevention of criminal offenses in closed penal institutions in Ukraine. It analyses domestic scientific perspectives on general social prevention of criminal offenses in closed penal institutions of the State Penitentiary Service of Ukraine. The author identifies the subjects of general social prevention of criminal offenses in closed penal institutions in Ukraine, as follows: the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine and other public authorities, local self-government bodies, other subjects preventing criminal offenses (the Prosecutor's office, court, the police, the Security Service of Ukraine). ***Conclusions.*** The author put forward a set of actions to improve the system of general social prevention of criminal offenses in closed penal institutions: 1) it involves overall, not partial, financing of the penitentiary system of Ukraine from the State Budget of Ukraine, especially in the part of creation of European conditions of execution and service of punishment in the form of deprivation of liberty provided for by the relevant Law of Ukraine; 2) overhaul of the CPI with replacement, maintenance of engineering and technical and other means of security, supervision, in particular, using the latest technologies; 3) the construction of new and reconstruction of existing pre-trial detention centers and penal institutions according to international standards (individual chamber or no more than two defendants, full video surveillance of these persons at all objects of living, strict criminal and legal measures for attempts of delivery (transfer, transportation, sending, etc.) of prohibited items to places of imprisonment); 4) the creation of appropriate conditions for ensuring effective social protection of personnel of the State Penitentiary Service of Ukraine, including through providing fair salaries sufficient to attract and maintain penal bodies and institutions; 5) adoption by the Verkhovna Rada of Ukraine of the Law of Ukraine "On the Penitentiary System of Ukraine" which shall provide for the creation of appropriate legal, organizational and other conditions for effective public control over criminal executive activities in Ukraine, improving the effectiveness of control over the execution of sentences by the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, other state executive authorities, the results of which should be brought to the public in the prescribed manner.

Key words: general social, prevention, criminal offense, closed penal institution, subjects.

1. Introduction

Problem statement. The application of measures of general social prevention of criminal offenses in closed penal institutions (hereinafter – the CPI). is an important issue regarding the implementation of the Strategy for reforming judicial system and proceedings and related legal institutions for 2015–2020 (approved by the Decree of the President of Ukraine № 276/2015 as of May 20, 2015) (On the Strategy for reforming judicial system and proceedings and related legal institutions) and the Concept of reforming (development) of the penitentiary system of Ukraine (approved by the Order 654-r of the Cabinet of Ministers of Ukraine as of September 13, 2017) (On approval of the Concept of reforming (development) of the penitentiary system of Ukraine, 2017).

Analysis of recent research and publications. Problems of general social prevention of criminal offenses in

the CPI in Ukraine have been studied by the following scientists: L.V. Bahrii-Shakhmatov, O.M. Bandurka, V.S. Batyrhareieva, I.H. Bohatyrov, A.I. Bohatyrov, V.V. Vasylevych, V.O. Hlushkov, V.V. Holina, B.M. Holovkin, V.K. Hryshchuk, O.M. Humin, I.M. Danshyn, T.A. Denysova, O.M. Dzhuzha, V.M. Dromin, A.P. Zakaliuk, V.V. Kovalenko, O.H. Kolb, I.O. Kolb, I.M. Kopotun, O.M. Kostenko, Ya.Yu. Likhovytskyi, O.M. Lytvak, O.M. Lytvynov, S.S. Miroshnychenko, Yu.V. Orlov, M.S. Puzyrov, A.Kh. Stepaniuk, B.M. Trubnykov, V.O. Tuliakov, I.S. Yakovets, V.I. Shakun, O.O. Shkuta et al.

It should be noted that such measures are aimed at the comprehensive solution of the issues of functioning of the penitentiary system of Ukraine and search for adequate responses to criminal offenses in the CPI. Because of this, the author advocates the opinion of the Italian criminologist Cesare Bekkaria: "It is better to prevent crimes than to punish them" (Bekkaria, 2014, p. 222).

Scientific perspectives, ideas, opinions and provisions published and realized by domestic scientists in monographs, textbooks, educational manuals in the relevant field are a significant basis for the study of the general social prevention of criminal law in the CPI of Ukraine.

However, despite the considerable number of works devoted to the prevention of criminal offenses in penal institutions, there are problems and difficulties in their practical realization that, in the author's opinion, deepens the discussion of this issue.

The purpose of the article is to outline the range of issues relevant to Ukraine concerning the implementation of the general social measures by the state authorities and local self-government bodies, public organizations, etc. for preventing criminal offenses and express an original opinion on certain ways of their solution.

2. Prevention of crime as a kind of social activities

Given that penitentiary crime is a variety of common crime, its prevention in the CPI refers to general social, special criminological and individual measures of prevention.

For instance, this was the focus of works by domestic scientists O.H. Kolb, A.V. Kyryliuk, M.S. Puzyrov, who studied the prevention of crimes among the defendants in the penal institutions and argued that a comprehensive approach to the prevention of criminal offenses among the defendants should be developed in all the chains of the penitentiary system (Dzhuzha, Vasylevych, Cherniei, Cherniavskyi, 2020, p. 563).

At the same time, according to academician A.P. Zakaliuk, prevention of crime as a kind of social activity belongs to such important areas of the latter as social control and social prevention. Therefore, the scientist argues that this variety has its own specific subject and its particular purpose, namely: the subject is activities concerning deterrent of the action of the crime determinants, first of all, its causes and favourable conditions, to limit, neutralize and, if possible, eliminate their actions. He believes that this determines functional community and meaningful connection of all elements of prevention activities: its scope, nature, goals, subjects, objects, etc., one of which is the general social prevention of crime (Zakaliuk, 2007, p. 323).

Therefore, taking into account the ideas of A.P. Zakaliuk and other domestic scientists-criminologists, in particular: V.V. Holina, B.M. Golovkin, M.Y. Valuiska (Holina, Holovkin, Valuiska, 2014, p. 143); O.D. Kolb, A.V. Kyryliuk, M.S. Puzyrov (Dzhuzha, Vasylevych, Cherniei, Cherniavskyi, 2020, p. 563), A.I. Bohatyrov (Bohatyrov, 2019, p. 321), the general social prevention of criminal offenses in closed penal institutions should be interpreted as a set of state and non-state measures of legal, organizational, technical, financial and other nature, which are realized by the relevant subjects of preventive activities and aimed at deterring criminal offenses in closed penal institutions.

Moreover, the identification of the reasons and conditions for criminal offenses in the CPI and the necessity to activate scientific research on this issue are evidenced by the empirical materials collected in the course of this study. For instance, the response to the question whether criminal offenses in CPI can be prevented at the general social level (of state, society, its groups, etc.) was positive by 28% of the total number of interviewed convicted persons in these institutions, was disagreement by 43%, and the rest expressed the frequency of such prevention. For its part, 45% of the staff of the CPI answered this question positively, 5% did not agree only, and every second interviewee said about the relative importance of measures of general social prevention.

Therefore, domestic literature review reveals that the general social prevention of criminal offenses in the CPI should be considered as one of the most important aspects of social policy, i. e. social reaction of the state and society to crime (Holina, Holovkin, Valuiska, 2014, pp. 144). This position is also supported by domestic criminologists O.M. Dzhuzha, E.M. Moiseiev, V.V. Vasylevych, who believe that the measures of this kind of prevention are aimed at positive influence on formation of the person of all members of society (Dzhuzha, Moiseiev, Vasylevych, 2001, p. 62).

Taking into account the approaches developed in criminology to the phenomenon under study, it should be noted that now Ukraine has a range of subjects that somehow carry out measures of general social prevention of criminal offenses in the CPI; however, it is still early to argue that their activities are systematic. Ukrainian scientists O.M. Bandurka and L.M. Davidenko advocate the above position and state that further development and improvement of the system of subjects of crime counteraction require determination of their competence, rights and duties, establishment of communication channels between them; organization of interaction; legal support (Bandurka, Davidenko, 2003, p. 105).

The practical component of these issues is under focus of the publication "Seven circles of hell of the penitentiary system" by S. Kolesnyk and Ye. Yenin. It highlights the current state of affairs in execution and serving a sentence in the form of imprisonment for a certain term in Ukraine. In particular, according to the results of special studies in the field of execution of sentences in 2019, the administration fully controls the situation only in 30 out of 150 penitentiary institutions, and in other cases, such management is formal because the institutions are governed not by legal rules but primarily by the rules of the criminal environment (so-called criminal subculture). In such CPIs, the sentenced are subject to the "thief's duty" in which means of payment include prohibited items, products and substances (money, drugs, alcohol etc.) (Kolesnyk, Yenin, 2019, p. 105).

The above is confirmed by the results of this study and is the outcome of the inconsistent preventive activities of the administration and staff of the CPI, and the low efficiency of the use of options of general social prevention of crimes. As for the measures of general social prevention of criminal offenses in the CPI, attention should be paid to state programs, strategies, concepts, etc., developed at the level of the parliament, the President of Ukraine, the Cabinet of Ministers of Ukraine and central state executive authorities.

Nowadays, the direct statutory act regulating the essence of prevention of criminal offenses in the CPI is the Concept of reforming (development) of the penitentiary system of Ukraine (On approval of the Concept of reforming (development) of the penitentiary system of Ukraine, 2017). In particular, Section 1 of this Concept states that the penitentiary system existing in the country requires structural reform, one of the tasks of which is to develop legislation on functioning of pre-trial detention centres and enforcement agencies in accordance with the legislation of the European Union, which has a direct relation to the issues under consideration.

In view of the above, an important step is to strengthen the Concept's objective – the further reform of the penitentiary system of Ukraine for the undeniable observance of human and civil rights and humanization of the penal mechanism, establishing conformity between the tasks and functions of such bodies, on the one hand, structure and their number, on the other, and financing, on the third, since the system has been funded in the amount of 40% of the need (Section II of the Concept) (On approval of the Concept of reforming (development) of penitentiary system of Ukraine, 2017).

Consequently, the physical infrastructure of the operating penal institutions (113 correctional facilities, 12 pre-trial detention centres and 6 training facilities) is outdated: most buildings and constructions are far from perfect, and some are in in a critical condition, that is why conditions of detention of convicted and imprisoned persons are not provided. Thus, this fact increases the probability of entry of prohibited objects, products and substances into the place of deprivation of liberty, and also reduces the effectiveness of prevention in this area (Section III of the Concept). In addition, the level of technical equipment of pre-trial detention centres and penal institutions with means of security (more than 90% of available complexes of technical means of perimeter security and 33% of other types of engineering and technical means of security and supervision of these establishments are in unsatisfactory technical condition due to multiple exceeding the service life limit, moral and physical expiry (Section III of the Concept) (On approval of the Concept of reforming (development) of penitentiary system of Ukraine, 2017).

These circumstances are determinants that facilitate the criminal offenses in the CPI. Therefore, it is quite obvious that the current national legislation of Ukraine (annual State Budgets, Tax Code of Ukraine, etc.) should be modified in the part of penitentiary. Nevertheless, given the current state of penitentiary and recurrent crime and the problem of counteracting so-called "code-bound thieves" (On Amendments to Certain Legislative Acts of Ukraine Concerning Liability for Crimes Committed by the Criminal Community, 2020) in Ukraine, and an ineffective regulatory mechanism for this issue in the Law of Ukraine "On National Security of Ukraine", the author supports the proposal by K.H. Makhnitska regarding the need to supplement part 2 of article 12 "Security and Defence Sector Composition" of this Law with the such a body as the State

Penitentiary Service of Ukraine (Makhnitska, 2021, p. 137).

With regard to other measures of general social prevention of criminal offenses in the CPI, they are also mentioned in the Law of Ukraine "On Protection of Public Morality" (part 1, art. 1) which defines the concept of "public morality" as a system of ethical norms formed in society on the basis of traditional spiritual and cultural values, ideas about good, honour, dignity, public duty, conscience, justice (On the protection of public morality, 2003). Unfortunately, in the relevant legal regulation, the legislator did not prescribe the harmful nature of the influence of criminal subculture on the population and prevention measures on this issue. Although, the negative influence of subculture affects the moral foundations of society, especially those relating to children and youth.

According to the practice and findings of special scientific research, having found oneself in detention facilities, a person faces such a phenomenon as "the second life". K.V. Muraviov argues that this phenomenon is an informal system of self-organization of convicted persons, which has been forming over decades. That is why, self-organization, like any other system, includes role and social stratification of members, availability of particular rules of conduct (laws, customs, traditions), as well as the punitive system (in case of rules' violation) (Muraviov, 2000, p. 151).

3. National strategie in the field of human rights, combating crime and national security of Ukraine

However, this study proves that at the state (general social) level, the issue of prevention of influence on public morality, public order and public safety of criminal subculture has not become relevant and practically significant. This conclusion relies on the analysis of modern national strategies in the field of human rights, combating crime and national security of Ukraine. First of all, the National Human Rights Strategy recently adopted by the Presidential Decree is aimed at uniting society in terms of the realization of values of human rights and freedoms, which are guaranteed and protected on the basis of equality and non-discrimination principles (On the National Strategy for Human Rights, 2021), but does not fully cover the issues in this field.

At the same time, it should be positively noted that this Strategy defines the issue of improper conditions of detainment of persons, who are in pretrial detention facility or penal institutions, non-provision of proper medical care to such persons, as well as a lack of effective legal protection (para. 4, § 2) (On the National Strategy for Human Rights, 2021). This issue has never been raised during the consideration of the prevention and counteraction to the tortures, cruel, inhuman or degrading treatment or punishment.

Such irresponsibility has led to the fact that at present, according to Section III of the Concept of reforming (development) of penitentiary system of Ukraine, buildings of the operating pre-trial detention centres have been constructed more than 200 years ago (pre-trial detention institutions compose 12% of the total); from 100 to 200 years ago (58%); from 50 to 100 years ago (14%); from 10 to 50 years (14%) (On approval of the Concept of reforming (development) of penitentiary system of Ukraine, 2017). In the author's opinion, the definition of this one at such level will definitely have a positive impact on the situation and there are sincere hopes that the above provisions will be implemented.

It should be noted that due to the fact that the Ministry of Justice of Ukraine implements the public policy in the field of execution of sentences and probation (part 1, art. 11 of the PC of Ukraine), but it is not a law enforcement body, law enforcement reform can only be discussed in terms of bodies and institutions, which directly execute criminal sentences under article 50 of the CC of Ukraine.

The staff turnover in the State Penitentiary Service of Ukraine has a negative impact on the effectiveness of the implementation of preventive social measures in this area due to low salaries of the staff of the CPI, low level of social protection of working persons and pensioners of the State Penitentiary Service.

Analysed the content of the provisions of the Law of Ukraine "On the Execution of Judgments and the Application of the Case-Law of the European Court of Human Rights", one can state with confidence about the international control over the observance of human and citizen rights and in the field of execution of sentences of Ukraine.

The activities of the relevant subjects are recognized today as a separate chain of social measures to prevent criminal offenses in the CPI. The activities in this area are regulated by the legal instruments issued by:

a) the Verkhovna Rada of Ukraine, which is empowered by section IV of the Constitution of Ukraine (art. 85) and the Regulations of the Verkhovna Rada of Ukraine to adopt laws (para. 3, art. 85), approve the State Budget of Ukraine and supervise its execution (para. 4, art. 85), establish the principles of domestic (para. 5, art. 85) and take other actions

concerning, in particular, the legal and regulatory mechanism of execution of sentences of Ukraine (Constitution of Ukraine, 1996);

b) the President of Ukraine, who is empowered by Section V of the Basic Law, in particular, art. 106, to approve relevant legal regulations (Concepts, strategies, etc.), including ones relating to the execution of sentences (Constitution of Ukraine, 1996);

c) the Cabinet of Ministers of Ukraine, the powers of which are enshrined in Section VI of the Constitution of Ukraine (art. 116), as well as in the Law of Ukraine "On the Cabinet of Ministers of Ukraine" (On the Cabinet of Ministers of Ukraine, 2014);

d) other state executive authorities (local public administrations of different levels) (On local state administrations, 1999);

e) local self-government bodies (On Local Self-Government in Ukraine, 1997);

f) other subjects of crime prevention, including ones related to subjects of special and criminological prevention of crimes.

4. Conclusions

To sum up the findings of the study of general social measures for preventing criminal offenses in the CPI, the author highlights the following:

1) overall, not partial, financing of the penitentiary system of Ukraine from the State Budget of Ukraine, taking into account that other sources do not provide urgent needs of the CPI, especially in the part of the creation of European conditions of execution and service of punishment in the form of deprivation of liberty;

2) overhaul of the CPI with replacement, maintenance of engineering-technical and other means of security, supervision, in particular, using the latest technologies as provided by art. 103 of the PC of Ukraine;

3) construction of new and reconstruction of existing pre-trial detention centres and penal institutions according to international standards (individual or dual cell; full video surveillance of these persons at all sites, strict criminal-legal measures for attempts of delivery (transfer, transportation, sending, etc.) of prohibited items to places of imprisonment);

4) creation of appropriate conditions for ensuring effective social protection of personnel of the SPS of Ukraine, including by paying them as professional workers with a status that civil society can respect, as mentioned in para. 76 of the European Prison Rules, whose salaries shall be adequate to attract and maintain bodies and penal institutions (para. 79.1 of these rules);

5) adoption by the Verkhovna Rada of Ukraine of the Law of Ukraine "On the Penitentiary System of Ukraine", which shall provide for the creation of appropriate legal, organizational and other conditions for effective public control over penal activities in Ukraine, improving the effectiveness of control over the execution of sentences by the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, other state executive authorities, the results of which should be brought to the public in the prescribed manner.

References:

Bandurka, A.M., Davidenko, L.M. (2003). *Prestupnost v Ukraine: prichiny i protivodeistvie [Crime in Ukraine: causes and counteraction].* Kharkov: Osnova (in Russian).

Bekkaria, Ch. (2014). *O prestupleniiakh i nakazaniiakh [About crimes and punishments].* Kiev (in Russian).

Bohatyrov, A.I. (2019). *Antykryminohennyi vplyv na zlochynnist u mistsiakh nesvobody Ukrainy [Anti-criminogenic impact on crime in places of detention in Ukraine].* Kherson: Helvetyka (in Ukrainian).

Dzhuzha, O.M., Moiseiev, Ye.M., Vasylevych, V.V. (2001). *Kryminolohiia [Criminology].* Kyiv: Atika (in Ukrainian).

Dzhuzha, O.M., Vasylevych, V.V., Cherniei, V.V., Cherniavskyi, S.S. *Kryminolohiia [Criminology].* Kyiv: Maslakova (in Ukrainian).

Holina, V.V., Holovkin, B.M., Valuiska, M.Yu. (2014). *Kryminolohiia [Criminology].* Kharkiv: Pravo (in Ukrainian).

Kolesnyk, S., Yenin, Ye. (2019). Sim kil pekla penitentsiarnoi systemy [Seven circles from the penitentiary system]. *Dzerkalo tyzhnia. Ukraina – Mirror of the week. Ukraine*. Retrieved from: https://zn.ua/ukr/internal/sim-kil-pekla-penitenciarnoyi-sistemi-333623_.html (in Ukrainian).

Konstytutsiia Ukrainy: Zakon Ukrainy [Constitution of Ukraine: Law of Ukraine] (1996). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text (in Ukrainian).

Makhnitska, K.H. (2021). Kryminalno-vykonavchi zasady zapobihannia potrapianniu do zasudzhenykh, pozbavlenykh voli, zaboronenykh predmetiv [Criminal-executive principles of prevention of getting to convicts, imprisoned, forbidden subjects]. *Candidate's thesis.* Kyiv (in Ukrainian).

Muraviov, K.V. (2000). "Areshtantska spilnota" yak suspilno-psykholohichnyi fenomen u mistsiakh pozbavlennia voli ["Prison community" as a socio-psychological phenomenon in places of imprisonment]. *Problemy penitentsiarnoi teorii i praktyky – Problems of penitentiary theory and practice,* no. 5, pp. 151–157 (in Ukrainian).

Pro Kabinet Ministriv Ukrainy: Zakon Ukrainy [On the Cabinet of Ministers of Ukraine: Law of Ukraine] (2014). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/794-18#Text (in Ukrainian).

Pro mistseve samovriaduvannia v Ukraini: Zakon Ukrainy [On local self-government in Ukraine: Law of Ukraine] (1997). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/280/97-вр#Text (in Ukrainian).

Pro mistsevi derzhavni administratsii: Zakon Ukrainy [On local state administrations: Law of Ukraine] (1999). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/586-14#Text (in Ukrainian).

Pro natsionalnu bezpeku Ukrainy: Zakon Ukrainy [On National Security of Ukraine: Law of Ukraine] (2018). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/2469-19#Text (in Ukrainian).

Pro Natsionalnu stratehiiu u sferi prav liudyny: Ukaz Prezydenta Ukrainy [On the National Strategy for Human Rights: Decree of the President of Ukraine] (2021). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/119/2021#Text (in Ukrainian).

Pro skhvalennia Kontseptsii reformuvannia (rozvytku) penitentsiarnoi systemy Ukrainy: Rozporiadzhennia Kabinetu Ministriv Ukrainy [On approval of the Concept of reforming (development) of the penitentiary system of Ukraine: Order of the Cabinet of Ministers of Ukraine] (2017). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/654-2017-р#Text (in Ukrainian).

Pro Stratehiiu reformuvannia sudoustroiu, sudochynstva ta sumizhnykh pravovykh instytutiv na 2015–2020 roky: Ukaz Prezydenta Ukrainy [On the Strategy for reforming judicial system and proceedings and related legal institutions for 2015–2020: Decree of the President of Ukraine] (2015). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/276/2015#Text (in Ukrainian).

Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vidpovidalnosti za zlochyny, vchyneni zlochynnoiu spilnotoiu: Zakon Ukrainy [On Amendments to Certain Legislative Acts of Ukraine Concerning Liability for Crimes Committed by the Criminal Community: Law of Ukraine] (2020). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/671-20#Text (in Ukrainian).

Pro zakhyst suspilnoi morali: Zakon Ukrainy [On the protection of public morality: the Law of Ukraine] (2003). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/1296-15#Text (in Ukrainian).

Zakaliuk, A.P. (2007). *Kurs suchasnoi ukrainskoi kryminolohii: teoriia i praktyka [Course of modern Ukrainian criminology: theory and practice]*, vols. 1–3. Kyiv: In Yure (in Ukrainian).

Ян Стрелюк,
кандидат юридичних наук, здобувач кафедри правоохоронної та антикорупційної діяльності, Міжрегіональна Академія управління персонало», вулиця Фрометівська, 2, Київ, Україна, індекс 03039, StreliukYan@ukr.net
***ORCID:** orcid.org/0000-0002-4209-2017*

КОНЦЕПТУАЛЬНІ ЗАСАДИ ЗАГАЛЬНОСОЦІАЛЬНОГО ЗАПОБІГАННЯ КРИМІНАЛЬНИМ ПРАВОПОРУШЕННЯМ У КРИМІНАЛЬНО-ВИКОНАВЧИХ УСТАНОВАХ ЗАКРИТОГО ТИПУ В УКРАЇНІ

Анотація. ***Метою статті*** є окреслення кола актуальних для України питань, пов'язаних із реалізацією органами державної влади й місцевого самоврядування, громадськими організаціями тощо загальносоціальних заходів запобігання кримінальним правопорушенням, а також виклад власної думки стосовно окремих шляхів вирішення зазначених питань. ***Результати.*** Статтю присвячено проблемним питанням дослідження загальносоціального запобігання кримінальним правопорушенням у кримінально-виконавчих установах закритого типу в Україні. Проаналізовано наукові позиції вітчизняних учених стосовно загальносоціального запобігання кримінальним правопорушенням у кримінально-виконавчих установах закритого типу Державної кримінально-виконавчої служби України. Виокремлено суб'єктів загальносоціального запобігання кримінальним правопорушенням у кримінально-виконавчих установах закритого типу в Україні, з-поміж яких головними є Верховна Рада України, Президент України, Кабінет Міністрів України та інші органи державної влади, органи місцевого самоврядування, інші суб'єкти запобігання кримінальним правопорушенням (прокуратура, суд, поліція, Служба безпеки України). ***Висновки.*** Запропоновано численні заходи для поліпшення системи загальносоціального запобігання кримінальним правопорушенням у кримінально-виконавчих установах закритого типу: 1) повне, а не часткове фінансування пенітенціарної системи України з Державного бюджету України, зокрема, у частині створення європейських умов виконання та відбування покарання у вигляді позбавлення волі, що передбачено відповідним законом; 2) проведення капітального ремонту установ із заміною чи переобладнанням інженерно-технічних та інших засобів охорони й нагляду, зокрема, з використанням новітніх технологій; 3) побудову нових і реконструкцію існуючих слідчих ізоляторів та установ виконання покарань згідно з міжнародними стандартами (покамерне одиничне або тримання не більше двох засуджених, повне відеоспостереження за цими особами на всіх об'єктах життєдіяльності, суворі заходи кримінально-правового характеру за спроби постачання (проносу, провозу,

пересилання тощо) заборонених предметів у місця позбавлення волі); 4) створення належних умов щодо забезпечення ефективного соціального захисту персоналу Державної кримінально-виконавчої служби України, зокрема й шляхом встановлення заробітної плати цих осіб на рівні, що має бути достатнім для їх залучення та утримання органів та установ виконання покарань; 5) прийняття Верховною Радою України Закону України «Про пенітенціарну систему України», у якому необхідно передбачити створення належних правових, організаційних та інших умов для здійснення ефективного громадського контролю за кримінально-виконавчою діяльністю в Україні, підвищення ефективності контролю за сферою виконання покарань в Україні з боку Верховної Ради України, Президента України, Кабінету Міністрів України та інших органів державної виконавчої влади, результати якого мають бути доведені в установленому порядку до суспільства.

Ключові слова: загальносоціальний, запобігання, кримінальне правопорушення, кримінально-виконавча установа закритого типу, суб'єкти.

The article was submitted 15.07.2021
The article was revised 04.08.2021
The article was accepted 24.08.2021

UDC 343.137.32
DOI https://doi.org/10.32849/2663-5313/2021.7.13

Oleksandr Vereshchak,
Postgraduate Student at the Department of Criminal Procedure, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, oleksandr.vereshchak.int@gmail.com
ORCID: *orcid.org/0000-0003-3895-7337*

Vereshchak, Oleksandr (2021). International practice of criminal proceedings in the form of in absentia. Entrepreneurship, Economy and Law, 7, 85–90.

INTERNATIONAL PRACTICE OF CRIMINAL PROCEEDINGS IN THE FORM OF IN ABSENTIA

Abstract. ***The purpose*** of the article is to generalize international law and current criminal procedure legislation, the practice of its application and special literature, as well as to highlight the main issues regarding the implementation of a special pre-trial investigation of criminal proceedings. ***Methodologically,*** the paper relies on the dialectical method of cognition, general methods of analysis and synthesis, induction and deduction, analogies and comparisons, systems approach in the analysis of legal relations and legal documents, formal logical and comparative legal methods of interpreting law used both at theoretical and empirical levels. ***Results.*** Based on the criminal procedural legislation of Ukraine and foreign states, international legal acts, the practice of the European Court of Human Rights, and the current state of development of criminal procedural law, the article conducted a comparative study of the legal regulation of pre-trial investigation in the absence of a suspect (in absentia) in accordance with the criminal procedural legislation of Ukraine and European countries, which includes new and improved scientific conclusions and provisions. It is analyzed the development of European legislation on pre-trial investigation in the absence of a suspect as a component of criminal proceedings in absentia and the possibilities of approximation of Ukrainian criminal procedure legislation in the absence of a suspect (in absentia) to European standards based on the best components of European Union law, case law of the European Court of Human Rights, in particular on the implementation of the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. The article analyzes common and distinctive features of special pre-trial investigation in Ukraine and European countries, as well as the specifics of law enforcement with separation of areas of concern of different countries, and the expediency of statutory borrowings of legal norms from criminal proceedings of European countries into criminal procedural law. Attention is drawn to the process of legislative changes that the institution of special pre-trial investigation has undergone recently, in particular, in the context of compliance with the analyzed provisions of European and Commonwealth of Independent States' legislation, and common and distinctive features in trends towards legislative regulation of in absentia proceedings in Ukraine and other countries. ***Conclusions.*** Despite the fact that the general practice of using the institute of special pre-trial investigation corresponds to the norms of international legal documents and is close in principles to the experience of foreign states, there is a need for some legislative and methodological improvement taking into account the examples studied in the article.

Key words: special pre-trial investigation, absence of a suspect, trial in absentia, criminal procedural legislation of Ukraine and European countries, experience of trial in absentia in European countries.

1. Introduction

The introduction and expansion of the use of the institution of special pre-trial investigation in Ukraine should take into account the provisions of basic international legal acts in the field of criminal justice in absentia, as well as the best practices of the Council of Europe Member States and the Commonwealth of Independent States.

In October 2014, the Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine concerning the inevitability of punishment for certain crimes against the fundamentals of national security, public security and corruption crimes" was signed. The purpose of this law is to ensure the principle of inevitability of punishment in cases where the suspect (accused), being outside Ukraine, hides from the investigation and court, evading criminal liability, and to increase the effectiveness of investigations of crimes against national security and public safety, as well as ensuring the confiscation of property for their commission. The proposed changes were due to the lack of a procedure in in the legislation in force at that time to prosecute persons who evade

coming to the pre-trial investigation or court. The existence of such gaps leads in practice to the impossibility of ensuring the implementation of the principle of inevitability of criminal punishment and adequately protect the public interests of the state and the rights of victims of criminal offenses.

A special pre-trial investigation (in absentia) is carried out against one or more suspects in accordance with the general rules of pre-trial investigation provided by the CPC of Ukraine.

A special pre-trial investigation is exercised on the basis of a decision of an investigating judge in criminal proceedings concerning a limited list of crimes (crimes against the fundamentals of national security – Articles 109–114; crimes against public security – Articles 255–258-5; crimes against peace, security of mankind and international law – Articles 436–447; crimes against human life and health – Articles 115, 116, 118, part 2 of Article 121, part 2 of Article 127; crimes against the will, honor and dignity of a person – parts 2 and 3 of Article 146, Article 146-1, Article 147; crimes against property – part 2–5 of Article 191 (in case of official's abuse of his official position); commercial crimes – Article 209; crimes against public authorities, public formations – Article 348; crimes in the sphere of official and professional activity – Articles 364–365-2, Articles 368–370; crimes against justice – Article 379, 400; crimes of servicemen – Article 408) in respect of a suspect, other than a minor, who is hiding from the investigation and court in the temporarily occupied territory of Ukraine, in the territory of the state recognized by the Verkhovna Rada of Ukraine as an aggressor state, in order to evade criminal responsibility and/or declared internationally wanted.

Special pre-trial investigation of other crimes is not allowed, except when the crimes were committed by persons hiding from the investigation and court in the temporarily occupied territory of Ukraine, the state recognized by the Verkhovna Rada of Ukraine as an aggressor state to avoid criminal liability and/or they are internationally wanted and are being investigated in the same criminal proceedings as the offenses set forth in part 2 of Article 297-1 of the CPC, and the release of materials concerning them may adversely affect the completeness of the pre-trial investigation and trial.

If several persons are notified of a suspicion in criminal proceedings, the investigator, prosecutor has the right to apply to the investigating judge with a request to conduct a special pre-trial investigation only in respect of those suspects in respect of whom there are grounds envisaged by part 2 of Article 297-1; in respect of other suspects, further pre-trial investigation in the same criminal proceedings will be carried out in accordance with the general rules provided by the CPC of Ukraine (Criminal Procedure Code of Ukraine, 2021).

The study of individual challenging issues related to the special pre-trial investigation is relevant and necessary as this institution can be considered new. Thus, it needs improving and borrowing practical experience from other countries. The scientific works of Yu. Azarov, D. Alekseev-Protsiuk, A. Barabash, V. Drozd, O. Kuchynska, L. Loboyko, V. Maliarenko, M. Markusha, M. Mykheenko, O. Nahorniuk-Danyliuk, V. Nor, R. Piestsov, P. Pylypchuk, D. Pysmenny, O. Tatarov, S. Shmalenia and others are devoted to specific issues concerning the special pre-trial investigation.

2. Compliance of the institute of special pre-trial investigation in Ukraine with international legal acts

Introduction of pre-trial investigation in absentia into the domestic criminal proceedings generally corresponds to the norms of international legal acts.

In law enforcement activities, there are often cases when the tasks of criminal proceedings, which are defined in Article 2 of the CPC of Ukraine, are not implemented due to the evasion of a person from coming to the pre-trial investigation or court that makes it impossible to prosecute and, consequently, violates the principles of criminal proceedings on the inevitability of criminal punishment, rule of law, equality before the law and court and others.

Reducing the time and simplification of criminal proceedings is one of the main trends in the development of criminal procedural law in Western countries, which was formed due to the growing number of criminal proceedings in courts and inconveniences arising from the length of proceedings.

The introduction of the institute of special pre-trial investigation of criminal offenses has long become a necessity in the context of approximation of Ukrainian criminal procedure legislation to the norms of the Convention for the Protection of Human Rights and Fundamental Freedoms. According to world practice, trials in absentia are used in some countries – members of the Council of Europe and the CIS. At the same time, this type of proceedings is aimed at implementing the principle of inevitability of criminal liability for a committed crime.

In addition, even the 1960 CPC provided for the possibility of considering a case in the absence of the defendant, if the latter was outside Ukraine and evaded appearing in court (Part 1 of Article 262).

Introduction of trial in absentia into domestic criminal proceedings generally corresponds to the norms of international legal

acts. Thus, the provisions of paragraph 9 (a) of Section 3 of Recommendation № R (87) 18 of the Committee of Ministers of the Council of Europe require Member States to consider and allow the courts of first instance to hear cases and make decisions in the absence of the accused, provided that the latter is duly informed of the date of the hearing and of his right to legal or other representation.

The rules on criminal proceedings in absentia are also consistent with the content of Resolution № 75 (11) of the Committee of Ministers of the Council of Europe on the criteria governing proceedings in the absence of the accused.

3. Comparison with the experience of the Council of Europe and the Commonwealth of Independent States

Some experience of implementing the institute of special pre-trial investigation in France, the Netherlands, Denmark, Estonia, Moldova, Russia, Bulgaria and Lithuania can be taken into consideration during further amendments of its provisions in Ukraine.

The institute of trial in absentia has long been operating in such countries as France, Switzerland, Denmark, Estonia, Russia, Great Britain and many others where it has proven its effectiveness and expediency.

For example, the French CPC stipulates that trial in absentia is possible towards any person who is duly summoned to court but does not appear at the appointed time, in minor cases, in cases of crimes and offenses.

The Netherlands also provides for criminal proceedings in the absence of a defendant. The defendant is not required to be present at the trial. In case of his non-appearance, the court, having established the fact of his proper notification, considers the criminal case in absentia. The same practice takes place when the defendant notifies of his non-appearance and requests a postponement of the trial, when he maintains the defense in writing and even when he does not appear in court for reasons beyond his control. A convict who has been sentenced in absentia has the right to appeal against it by filing a protest. In this case, the same court reconsiders the case and renders a new verdict.

In Danish criminal proceedings, the accused is not obliged to appear in court at all. In case of non-appearance of the defendant, the defense counsel is allowed to represent his interests, if the reasons for such absence are valid.

According to Part 2 of Article 269 of the CPC of Estonia, as an exception, the trial of a criminal case may be conducted without the participation of the accused, if he:

– is removed from the courtroom for violation of the court procedure;

– is outside the country and evades appearing in court, and trial in the absence of the accused is possible;

– has brought himself, after questioning in court, to a state which precludes his participation in the hearing, and trial in his absence is possible;

– the delivery of the accused is complicated and he agrees to participate in the trial in audiovisual form.

This institution is relatively "young" in the CIS countries, the implementation practice of which was directly studied by the author.

In particular, according to Article 321 of the CPC of Moldova, the consideration of the case in the absence of the defendant may be carried out if: the defendant evades appearing in court; the defendant, who is being held in custody, refuses to appear before the court for consideration of the case and such refusal is confirmed by his defense counsel; it is a matter of committing minor crimes and the defendant expressed a wish for the trial to be held in his absence.

According to the CPC of the Russian Federation, a trial in the absence of a defendant is also possible if in a criminal case of a crime of small or medium gravity, the defendant initiates a motion for its consideration in his absence. The consideration of serious and especially serious crimes is possible only in exceptional cases: if the defendant is outside of Russia and (or) evades appearing in court, and if the person has not been prosecuted in a foreign country in this criminal case (Tatarov, 2015).

Among the European states prescribing a pre-trial investigation in the absence of a suspect or accused, which has common features with the criminal proceedings under the CPC of Ukraine, one can mark the Republic of Bulgaria, the Republic of Lithuania, and the Czech Republic.

The criminal proceedings of Bulgaria and Ukraine, despite their peculiarities, have one thing in common – the availability of a pre-trial investigation in absentia and the mandatory participation of counsel in such proceedings that makes it possible to compare them by examining their differences.

A comparative analysis of the criminal procedure legislation of the Republic of Lithuania and Ukraine allows the author to identify the following features: crimes which include pre-trial investigation in absentia are not identical but are similar in a separate part (in particular, crimes against humanity, war crimes and crimes related to terrorism); in accordance with the CPC of the Republic of Lithuania, the investigating judge, unlike the CPC of Ukraine, does not make a separate procedural decision to conduct a pre-trial investigation in the absence of the suspect but, in certain cases, decides to recognize a person as a suspect; defense counsel participates in the pre-trial investigation in absentia following the CPC under study; in

accordance with the CPC of the Republic of Lithuania, pre-trial investigation in absentia, in contrast to the CPC of Ukraine, cannot be carried out if the suspect is not in the territory of the state or the whereabouts of the suspect are not known at all; the procedure for notifying a person who is in hiding or whose whereabouts are unknown has significant differences; during the pre-trial investigation in absentia, the suspect, under the CPC of the Republic of Lithuania compared to the CPC of Ukraine, is notified of the completion of the pre-trial investigation and is sent an indictment, including by mail and in the order of international cooperation.

5. Analysis of the case law of the European Court of Human Rights in the application of the procedure in absentia in different countries

Taking into account the practice and positions of the European Court of Human Rights when amending the current legislation prevents non-compliance with the guarantees of a fair criminal procedure under the in absentia procedure.

Amendments to Ukrainian law are an important step in ensuring that the case is properly investigated in absentia and heard in court. This will prevent or significantly reduce the defendants' appeal to the European Court of Human Rights, the practice of which the author considers hereafter.

The European Court of Human Rights allows the possibility of criminal proceedings in absentia provided that the rights and freedoms established by the Convention are ensured. In particular, in the decision "Da Lus Dominges Ferreira v. Belgium", the ECHR stated that a court hearing in the absence of a defendant does not in itself constitute a violation of Article 6 of the Convention. At the same time, denial of access to justice occurs when a person convicted in absentia cannot obtain a new court decision on the validity of the accusation on factual and legal grounds after it has been implemented, unless it has been established that this person has waived his/her right for defense and appearance in court (Information resource "Practice of the European Court of Human Rights. Ukrainian aspect").

The ECHR also recognized violation of Article 6 of the Convention in the case "Somogyi v. Italy". The decision notes that although this is not explicitly stated in § 1 of Article 6, the subject and purpose of the Article in general provides for the right of the accused to participate in the trial. Even more, paragraphs "c", "d" and "e" § 1 of Article 6 guarantee everyone accused of committing a criminal offense the opportunity to defend themselves personally, interrogate witnesses and receive free assistance from an interpreter.

According to the position of the ECHR, violation of at least one of the principles (to be informed about the accusation; to be represented by a defense counsel; to participate in the case; to a new trial, to waive his right to be present at the trial) leads to non-compliance with guarantees of fair criminal proceedings under the procedure "in absentia".

Therefore, when making further changes and additions to the current legislation, the author considers necessary to pay more attention to the practice and positions of the ECHR which, in turn, will contribute to the proper implementation of criminal proceedings, as well as prevent non-compliance with the guarantees of a fair criminal procedure under the "in absentia" procedure.

6. Conclusions

Despite the fact that the general practice of using the institute of special pre-trial investigation corresponds to the norms of international legal documents and is close in principles to the experience of foreign states, there is a need for some legislative and methodological improvement taking into account the examples studied in the article.

Summarizing the above mentioned, the author highlights that the procedural legislation of foreign countries envisages the procedure of a trial in absentia without the participation of the suspect or accused. It is important that they are provided with procedural guarantees for the defense and appeal of both court decisions and decisions of pre-trial investigation bodies.

Today, pre-trial investigation in absentia has a short practice of its application in our country, but legislators continue to make changes to the current CPC of Ukraine. The Verkhovna Rada of Ukraine once again provided an opportunity for the legal community to actively participate in heated discussions on innovations in the national legal space. This time, the law on absentee conviction became the hot-bottom topic of public and professional discussion. On April 27, 2021, the Parliament voted for the draft law № 2164 "On amendments to the Criminal Procedure Code to improve certain provisions due to the implementation of a special pre-trial investigation".

Therefore, the author hopes that these and other changes will further facilitate the implementation of criminal proceedings under the "in absentia" procedure in Ukraine and meet the best European standards.

In each case, the special procedure of criminal proceedings in the absence of the accused is a complex process of observing the "balance of interests of the state and the accused". Both representatives of the judiciary and law enforcement agencies and the entire legal community of Ukraine should try to achieve such a balance and overcome possible risks, because the respect of human and civil rights and strengthening Ukraine's image as the rule-of-law state depends on all stakeholders (Zakirova, 2021, p. 14).

References:

Kodeks kryminalnyi protsesualnyi vid 13.04.2012 № 4651-VI zi zminamy ta dopovnenniamy vid 01.07.2021 [Criminal Procedure Code of Ukraine: Law of Ukraine of April 13. 2012 with changes and additions as of 01.07.2021]. *ips.ligazakon.net*. Retrieved from: https://ips.ligazakon.net/document/t124651?an=1 (in Ukrainian).

Koly zaochne zasudzhennia porushuie pravo na spravedlyvyi sud [When a conviction in absentia violates the right to a fair trial] *echr.com.ua*. Retrieved from: https://www.echr.com.ua/koli-zaochne-zasudzhennya-porushuye-pravo-na-spravedlivij-sud/ (in Ukrainian).

Tatarov, O. (2015). Zaochnyy rozhlyad ochyma Yevropy [Correspondence examination through the eyes of Europe]. *zib.com.ua*. Retrieved from: https://zib.com.ua/ua/print/114635-7_vimog_espl_do_zaochnogo_provadzhennya.html (in Ukrainian).

Zakirova, S. (2021). Kryminal ne provadzhennya za protseduroyu «in absentia»: ukrayins ki novatsiyi ta mizhnarodnyy dosvid [Criminal proceedings under the "in absentia" procedure: Ukrainian innovations and international experience]. *Hromads ka dumka pro pravotvorennya – Public opinion on lawmaking, 9 (214)* (in Ukrainian).

Олександр Верещак,
аспірант кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, oleksandr.vereshchak.int@gmail.com
ORCID: *orcid.org/0000-0003-3895-7337*

МІЖНАРОДНА ПРАКТИКА ЗДІЙСНЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ У ФОРМІ IN ABSENTIA

Анотація. ***Метою роботи*** є узагальнення міжнародного законодавства, чинного вітчизняного кримінального процесуального законодавства та практики його застосування, а також спеціальної літератури щодо здійснення спеціального досудового розслідування кримінального провадження. Методологічно робота заснована на діалектичному методі пізнання, на загальних прийомах аналізу й синтезу, індукції та дедукції, на виявленні аналогій і проведенні порівнянь, на системному підході в аналізі правових відносин та юридичних документів, на формально-логічному й порівняльно-правовому методах тлумачення права, використовуваних як на теоретичному, так і на емпіричному рівнях. ***Результати.*** На основі кримінального процесуального законодавства України та іноземних держав, міжнародних правових актів, практики Європейського суду з прав людини, аналізу сучасного стану розвитку кримінального процесуального права у статті проведено порівняльне дослідження правового регулювання процедури досудового розслідування за відсутності підозрюваного (in absentia) згідно з кримінальним процесуальним законодавством України та країн Європи, що включає нові й удосконалені наукові висновки та положення. Проаналізовано розвиток законодавства країн Європи щодо досудового розслідування за відсутності підозрюваного як складової частини кримінального провадження in absentia та з'ясовано можливості наближення українського кримінального процесуального законодавства за відсутності підозрюваного (in absentia) до європейських стандартів на основі кращих складників розвитку права Європейського Союзу, практики Європейського суду з прав людини, зокрема, щодо виконання положень Конвенції про захист прав людини і основоположних свобод. Охарактеризовано спільні й відмінні риси здійснення спеціального досудового розслідування в Україні та країнах Європи, а також специфіку правозастосування, виокремлено актуальні проблемні питання для різних країн, а також розглянуто доцільність нормативних запозичень у вітчизняний кримінальний процесуальний закон правових норм із кримінальних процесів країн Європи. Звернено увагу на процес законодавчих змін, яких зазнає інститут спеціального досудового розслідування впродовж останнього часу, зокрема, у контексті відповідності проаналізованих положень законодавству країн Європи та Співдружності Незалежних Держав, а також щодо спільних і відмінних рис у тенденціях стосовно законодавчого унормування заочного провадження в Україні та інших країнах. ***Висновки.*** Незважаючи на те, що загальна практика застосування інституту спеціального досудового розслідування відповідає нормам міжнародно-правових документів та за принципами близька до досвіду іноземних держав, є потреба в певному законодавчому й методичному вдосконаленні з урахуванням досліджених у статті прикладів.

Ключові слова: спеціальне досудове розслідування, відсутність підозрюваного, заочне кримінальне провадження, кримінальне процесуальне законодавство України та країн Європи, досвід заочного кримінального провадження країн Європи.

The article was submitted 15.07.2021
The article was revised 06.08.2021
The article was accepted 23.08.2021

UDC 343.1
DOI https://doi.org/10.32849/2663-5313/2021.7.14

Oleh Tarasenko,
PhD in Law, Associate Professor, Associate Professor at the Department of Operational and Investigative Activities, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, OlehTarasenko@ukr.net
ORCID: *orcid.org/0000-0002-3179-0143*

Oleksandr Striltsiv,
PhD in Law, Senior Researcher, Commissioner for Anti-Corruption Activities, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, OleksandrStriltsiv@ukr.net
ORCID: *orcid.org/0000-0002-8324-3053*

Tarasenko, Oleh, Striltsiv, Oleksandr (2021). The need for legal regulation of the introduction of computer intervention as a new investigative measure of operational units. Entrepreneurship, Economy and Law, 7, 90–97.

THE NEED FOR LEGAL REGULATION OF THE INTRODUCTION OF COMPUTER INTERVENTION AS A NEW INVESTIGATIVE MEASURE OF OPERATIONAL UNITS

Abstract. The relevance of the article is determined by the spread of crime on the Internet, which is the most dynamic group of socially dangerous acts, the most advanced in both the world and Ukraine, and gaining the most dangerous momentum. This is caused by the spread of automation, informatization and computerization of all sectors of life, the development of science, the rapid expansion of information technologies. Moreover, negative aspects are increasing, for example, information technologies are used for unlawful purposes, as a result, qualitative and quantitative changes occur in cybercrime, which is now more professional, organized and sophisticated. ***Results.*** The article reveals the lack of statutory powers of the operational units of the National Police to perform missions regarding detection and prevention of criminal offenses committed on the Internet, including stopping the spread and termination of prohibited and restricted content, as well as recording the traces in case of commission of a criminal offense. ***Conclusions.*** The determined means of termination and restricting of the prohibited or restricted content in social media and video hosting permits concluding that a new investigative measure, such as a computer intervention, is required. The authors make proposals to the Law of Ukraine "On Operational and Investigative Activities" regarding the regulatory mechanism for the suggested new investigative measure. It is underlined that the above measures shall be carried out by operational units of the National Police of Ukraine without the decryption of account and the IP address affiliation to the law enforcement agency or persons working in it. It is concluded that currently no defined grounds exist in the legal regulations to stop the distribution and termination of prohibited content, including by operational units. This deters law enforcement agencies from legal activities aimed at preventing and combating criminal offenses committed on the Internet. Therefore, it is proposed to introduce an investigative measure such as a computer intervention, thanks to which operational units of the National Police of Ukraine can carry out measures on covert detection, prevention of criminal offense, and also to record the traces in case of its commission.

Key words: computer intervention, investigative measure, prohibited content, operational units, criminal offenses, Internet.

1. Introduction

The relevance of the topic. The spread of crime on the Internet is the most dynamic group of socially dangerous acts, the most advanced both in the world and Ukraine, and gaining the most dangerous momentum. This is caused by the spread of automation, informatization and computerization of all sectors of life, the development of science, the rapid expansion of information technologies.

Moreover, negative aspects are growing, for example, information technologies are used for unlawful purposes, as a result, qualitative and quantitative changes occur in cybercrime, which is now more professional, organized and sophisticated. For example, in 2020, more

than 33 thousand appeals (messages) of citizens concerning fraudulent actions against them on the Internet were submitted to cyber police units of the National Police of Ukraine (Official site of the Cyberpolice of Ukraine, 2021), and according to the Ukrainian Interbank Association of Members of EMA Payment Systems (Official site of the Ukrainian Interbank Association of Members of EMA Payment Systems, 2021), the Internet-network permitted fraudsters to "earn" UAH 252 million only in our country. Illegal activities promote the spread of prohibited or restricted content (hereinafter – prohibited content) on the Internet, which, according to O.M. Striltsiv, Yu.Yu. Orlov, V.V. Kryzhna, O.V. Maksymenko (Striltsiv, Kryzhna, Maksymenko, 2014), can be used in the following areas:

a) illegal purchase and/or sale of items and substances prohibited for free circulation:

– illegal purchase and/or sale of items and substances prohibited for free circulation (illegal purchase of firearms, ammunition or explosives (art. 263 of the CC of Ukraine); purchase of radioactive materials (art. 265 of the CC of Ukraine); illegal purchase or sale of narcotic drugs, psychotropic substances or their analogues (art. 307 of the CC of Ukraine); illegal purchase, transfer or sale of equipment for the manufacture of narcotic drugs, psychotropic substances or their analogues (art. 313 of the CC of Ukraine); sale of forged documents for obtaining narcotic drugs, psychotropic substances or precursors (art. 318 of the CC of Ukraine); illegal purchase or sale of poisonous or potent substances or poisonous or potent drugs (art. 321 of the CC of Ukraine); sale of counterfeit medicines (art. 321^1 of the CC of Ukraine);

b) placement on the Internet of prohibited information about:

– state or other secret protected by law: espionage (art. 114 of the CC of Ukraine), a hospital secret (art. 145 of the CC of Ukraine), secret ballot (art. 159 of the CC of Ukraine), the secret of adoption (art. 168 of the CC of Ukraine), commercial secret (art. 232 of the CC of Ukraine), State secrets (art. 328 of the CC of Ukraine), with limited access, stored in electronic computing machines (computers), automated systems, computer networks or on the media (art. 361^2 of the CC of Ukraine), safety measures concerning the person taken under protection (art. 381 of the CC of Ukraine), the data of pre-trial investigation and inquiry (art. 387 of the CC of Ukraine), the information of military nature, which is the state secret (art. 422 of the CC of Ukraine);

– fraudulent reports on threats to the security of citizens, on destruction or damage to property (art. 259 of the CC of Ukraine), calls for actions aimed at violent change or overthrowing the constitutional order, or for seizure of the State power (art. 109 of the CC of Ukraine), calls for actions that threaten public order (art. 295 the CC of Ukraine);

– pornographic objects and images (art. 301 of the CC of Ukraine); works promoting the cult of violence and cruelty, racial, national or religious intolerance and discrimination (art. 300 of the CC of Ukraine);

– violations of the equality of citizens depending on their race, nationality, religious beliefs, disability and other characteristics (art. 161 of the CC of Ukraine) (Striltsiv, Kryzhna, Maksymenko, 2014).

Basic material statement. The analysis of the practice of the operational units of the National Police against the spread of prohibited content permits stating that the objects of the most common placement of such content are social media Instagram and Telegram. This is due to the fact that these networks facilitate to create large groups, to provide personal communication in private chat with certain participants by means of moderation, to register under any name (a username), to search for a person by a username, to guarantee confidentiality of communication, such as non-displayed phone number, to redirect video and photo content, to use the functions of self-destruction of the message after its reading by the interlocutor, as well as the functions of self-destruction of the account, if it has not been used during the chosen period (1 month, 3 months, half year, year).

Such social media as Facebook, Twitter and YouTube video hosting are used for illegal purposes most rarely. This is due to the stricter policy of their administrators for the content circulation.

Regarding social media such as VK (Vkontakte) and OK (Odnoklassniki), Ukraine has restrictions on their application in accordance with the Decree of the President of Ukraine № 133/2017 of May 17, 2017 (On the application of personal, special, economic and other restrictive measures (sanctions), 2017).

However, Ukrainian legislation does not even empower either law enforcement agencies, or operators and telecommunication providers who provide Internet access services, to perform actions on limitation, termination of granting or prohibition of providing telecommunication services and use of telecommunication networks of public use in case of detection of prohibited content. Only clause 9 of part 1 of Article 38 of the Law of Ukraine "On Telecommunications" (On Telecommunications, 2003) adds

to the rights of operators, providers of telecommunications an opportunity to disconnect them, on the basis of the decision of the court, from final equipment, if it is used by the Subscriber for illegal actions or actions threatening the interests of State security. According to paragraph 18 of part 1 of article 39 the above-mentioned Law, the responsibilities of telecommunications operators and providers providing Internet access services include to restrict access, on the grounds of the court's decision, of its subscribers to resources through which child pornography is distributed.

2. Activities of the National Police of Ukraine

Legal regulations on the activities of the National Police of Ukraine do not grant its units with the rights and powers to remove or prevent access to prohibited content. Only paragraph 3 of part 1 of Article 25 of the Law of Ukraine "On the National Police" (On the National Police, 2015), among the powers of the police in the field of information and analytical support, indicates that the police *"carries out information and search work, information and analytical work"*. However, the legislation does not provide for what further to do with the revealed information. Similarly, the Law of Ukraine "On operational and investigative activities" of 18 February 1992 № 2135-XII (On operational and investigative activities, 1992) lacks the rights and powers of operational police units aimed at removing or preventing access to content.

The analysis of other legal regulations on the procedure of removal or making access to content placed on the Internet impossible proves that only article 52^1 of the Law of Ukraine "On Copyright and Related Rights" (On Copyright and Related Rights, 1993) defines the procedure for termination and prevention of infringement of copyright and/or related rights by using of audio-visual works, music works, computer programs, video fences, phonograms, programs of broadcasting on the Internet. However, according to the Law, only the copyright proprietor is granted with this right to contact the owner of the web-site (web page) through a lawyer with the application to terminate copyright infringement and/or related rights on the Internet or local network, and, accordingly, employees of operational units of the National Police of Ukraine in case of copyright infringement cannot personally require the owners of a web-site, multi-regional platform, local network, server to remove or make access impossible to electronic (digital) information that violates copyright and/or related rights, or to hyperlink to such information on the Internet or local network.

Even restricting of access to resources on the Internet and prohibiting of the distribution of the content provided by established individuals or entities, using the provisions of paragraph 9 of part 1 of article 4 of the Law of Ukraine "On sanctions" № 1644-VII (On Sanctions, 2014), may be applied only to individuals and legal entities for *"limiting or stopping the provision of telecommunication services and the use of telecommunication networks of public use"*. Moreover, the grounds to apply these sanctions are:

1) the actions of a foreign state, a foreign legal or natural person, other entities that create real and/or potential threats to national interests, national security, sovereignty and territorial integrity of Ukraine, promote terrorist activity and/or violate human and civil rights and freedoms, the interests of society and the State, result in the occupation of territory, exportation or limitation of ownership, property loss, deterrence of sustainable economic development, full realization of rights and freedoms by citizens of Ukraine;

2) Resolutions of the General Assembly and the United Nations Security Council;

3) Decisions and Regulations of the Council of the European Union;

4) violations of the Universal Declaration of Human Rights, the United Nations Charter;

5) commission by a foreign State, a foreign legal entity, a legal entity that is under the control of a foreign legal entity or a non-resident individual, a foreigner, a stateless person, as well as terrorist actors, acts referred to in paragraph 1 in relation to another foreign State, citizens or legal entities of the latter.

Thus, operational units of the National Police of Ukraine have no legally defined rights to remove or prevent access to such prohibited content.

However, the study of the policy on functioning of social media, rules and conditions of their use enable to form the following areas of activities of operational units of the National Police of Ukraine for prevention and counteraction of criminal offenses of this scope, in accordance with the regulations and rules developed for such cases by social media and video hosting.

3. Remove or prevent access to the content of certain social media and video hosting

We will focus on ways to remove or prevent access to the content of certain social media and video hosting, which can be introduced by operational units of the National Police of Ukraine.

"Telegram". The reason for removal or denying access to the prohibited content of the social media "Telegram"

(https://telegramfag.ru/kak-pozhalovatsya-v-telegramme)isdisseminationofinformationabout drug sales, pornography, and violence. Taking into account the specificities of the software of this social media, specialists of the cyber police faculty of Kharkiv National University of Internal Affairs have developed an instrument for termination of telegram channels used for illegal sale of narcotic drugs, psychotropic substances and precursors, namely free chat-bot in the messenger of Telegram "StopNarkotik I Mriya" (https://t.me/stopdrugsbot). The purpose of creating a chat-bot "StopNarkotik I Mriya" is to provide assistance in uniting the efforts of citizens in terminating electronic addresses of users, bots and chats, which are used by criminals to promote the use of narcotic drugs and psychotropic substances and their illegal sale.

From the moment of presentation on September 19, 2019 till March 2021, more than 30 thousand people, users of Telegram, have seen the chat-bot, of which 3,6 thousand users have expressed desire to regularly help terminate e-mail addresses of sellers of narcotic drugs and psychotropic substances. As of March 2021, during the chat-bot period, users sent to check: 4 769 images; 7 318 addresses at Telegram; 1 600 web-site addresses. To date, 214 addresses at Telegram, which were used by criminals for the illegal distribution of narcotic drugs, psychotropic substances and precursors, including six operating in temporarily occupied territory of Donetsk and Luhansk regions, have been terminated with the help of citizens (Website of the Multimedia Platform of Foreign Broadcasting of Ukraine "Ukrinform", 2020).

Chat bot "StopNarkotik I Mriya" is able:

1) to receive from concerned citizens:

– photos of "graffiti" (inscriptions), which mark usernames (so-called Internet link) at "Telegram", through which illicit sale of narcotic drugs, psychotropic substances and precursors is carried out, with indication of GPS-coordinates or physical address where they have been found;

– addresses at Telegram messenger and web-sites through which illicit sales of narcotic drugs, psychotropic substances and precursors are carried out;

– addresses of places of illegal sale of narcotic drugs, psychotropic substances and precursors in inhabited localities;

2) to involve citizens in:

– termination of the address in Telegram messenger by sending complaints to the administration of the messenger with information about the addresses through which illicit sale of narcotic drugs, psychotropic substances and precursors is carried out;

– deactivation (colouring) of "graffiti" (inscriptions) with a username in "Telegram", through which illicit sale of narcotic drugs, psychotropic substances and precursors is carried out.

Chat bot offers newcomers to read the instruction before beginning the interaction, which requires to select the operating system on which Telegram is installed. The menu provides an opportunity to disable the address in Telegram, where the instruction can be used to complain about the Internet address where drugs may be sold. The "Statistics" link enables to get the numbers regarding the addresses that is terminated, the number of users, and so on.

There is also a function of "Add a Store", where you can use the instruction to report the real place of illicit sale of narcotic drugs, psychotropic substances and precursors in a certain locality, or a separate site, which is involved in such illegal activities.

Then the positive experience of using the chat-bot "StopNarkotik I Mriya" in prevention of illegal drug trafficking, promoted its use in other areas, in particular: termination of the e-mail address, which were used to commit other crimes: for the alleged sale of forged banknotes of Ukraine of various nominal value; the use of confidential information for unauthorized withdrawal of funds from bank payment cards through fake chat-bots of the State bank; placement of fake news and messages on behalf of public institutions, political figures, well-known public figures; dissemination of false and confidential information about women and others (Website of the Ministry of Internal Affairs of Ukraine, 2020).

Instagram. Employees of the social media Instagram in case of violation of the official rules and conditions of use of this social media established by developers and managers of this social media, shall have the right to terminate the content through the support service. The grounds that allow employees of operational units of the National Police of Ukraine to create complaints for negligent account holders are:

– copyright infringement: use of logos and symbols of famous brands, other people's photos and texts (all images uploaded to the user account must be either his/her or permitted by the author). If a user wants to share a someone else's picture, he/she must mark the author in the photo (provided he/she has an account on Instagram) and write his/her name in the description. If the user uses the image for commercial purposes, he/she will need to obtain permission from the author (Site "Mydovidka", https://mydovidka.com/instagram/yak-napisati-v-instagram-skargu-yak-poskarzhitisya-na-foto-i-profil-shhob-

jogo-zablokuvali-skilki-potribno-skarg-shhob-zablokuvali);

– publication of an image and video of obscene content (erotica, pornography, violence, propaganda of anorexia, suicide, manifestation of hatred and aggression, intolerance (racism, homophobia and sexism), promotion of illicit sale of firearms and narcotic drugs, psychotropic substances and precursors, as well as photos of such substances, etc.);

– placement of obscene vocabulary, insults, threats, etc.;

– sending a spam about the offers to become a participant of financial operations or to get a free product or discount;

– the user of social media under 13 years (according to the rules of social media, to registration and to publish content can only users who is already 13 years old);

– the personal account has been broken by frauds without possibility of recovery;

– the page publishes personal and confidential information about other users;

– different IP addresses and devices (Site "Kagutech", https://ukr.kagutech.com/3897557-blocked-account-in-quotinstagramquot-the-reasons-ways-to-unlock; Site "Mydovidka", https://mydovidka.com/instagram/yak-poskarzhitisya-na-storinku-v-instagrame-shhob-zablokuvali-nazavzhdihttps://mydovidka.com/instagram/yak-poskarzhitisya-na-storinku-v-instagrame-shhob-zablokuvali-nazavzhdi).

There are three types of account lockout on Instagram:

– permanent (account will be disabled forever);

– temporary (account can be terminated for 24 hours), as a rule is used to prohibit messages from a subscriber, the holder of the account cannot leave the likes, add comments, post a photo caption and send the direct message.

– partially temporary (the account may be terminated from 3 to 24 hours or certain restrictions are imposed, for example, the ban to monitor several users).

The number of complaints that lead to the account termination or sanctions on Instagram is ten. The temporary warning termination of the account takes place after the first complaint on the user page. However, all applications should have grounds, such as: an example from publications, descriptions or comments, preferably in addition to the complaint to attach a screenshot of the factual violation. A complaint regarding a photo can be submitted via a special form on the website www.help.instagram.com or via a mobile application. In order to lock a person who is not in the subscription or in the subscribers, one should find the page through the search. This requires a nickname typed in a string or use a URL. When you move to someone else's profile, you need to do the same as with a friendly page. As a rule, technical support responds within one day to complaints (Sait "Vidpoviday.com", http://vidpoviday.com/iak-zablokuvaty-chuzhyj-instagram-akkaunt-cherez-telefon-abo-kompiuter; Sait "Insta-helper", https://insta-helper.com/ua/jak-poskarzhitisja-na-akkaunt-v-instagram-i-jak/).

YouTube. This video hosting has imposed very strict requirements on content placed on channels and user accounts, which must comply with the rules of this community and terms of use. For example, the grounds for termination of a channel or account by employees of operational units of the National Police of Ukraine may be repeated violation of community rules or conditions of use in connection with placement of unacceptable content, which includes:

– offensive, hateful and/or aggressive videos or comments;

– video with explicit sexual content with minors and content that sexually exploited minors; depiction of genitals, breasts or buttocks (dressed or not dressed) for the purpose of sexual pleasure; pornography or images of sexual acts, sex organs or fetishes for sexual gratification on any surface (such as video, text, audio, images) (Sait "Youtube", https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#community-guidelines);

– creating a channel that copies a profile, background, or general appearance of another channel in a way that makes it similar to another channel;

– impersonation: the content that looks, as if someone else publishes it, as well as the channel settings, using the name and image of a certain person, and then pretending that the person publishes the content on the channel or posting comments on other channels from that person;

– offering of monetary gifts, "get-rich-quick" schemes or pyramid schemes (sending of money without material product in the pyramid structure);

– misleading voters about the time, place, means or eligibility requirements for voting, or false claims that could materially discourage voting;

– interference with democratic processes, for example, obstructing or interrupting voting procedures;

– distribution of false information, the disclosure of which may interfere with democratic processes, such as elections;

– the content that features prolonged name calling or malicious insults (such as

racial slurs) based on someone's intrinsic attributes, challenges that pose an imminent risk of physical injury; pranks that lead victims to fear imminent serious physical danger, or that create serious emotional distress in minors; instructions to kill or harm (for example, giving instructions to build a bomb meant to injure or kill others); abuse and creation of drugs that can (mostly) lead to physical addiction; promoting or glorification of violent tragedies such as school shootings; showing how to steal tangible goods or promoting dishonest behaviour; demonstrating how to use computers or information technology with the intent to steal credentials, compromise personal data or cause serious harm to others, for example (but not limited to) hacking into social media accounts; how to use apps, websites, or other information technology to gain unauthorized free access to audio content, audiovisual content, full video games, software, or streaming services that normally require payment; promoting dangerous remedies or cures;

– content promoting violence or hatred against individuals or groups based on any of the following attributes: age, caste, disability, ethnicity, gender identity and expression, nationality, race, immigration status, religion, sex, sexual orientation, veteran status;

– violent or gory content intended to shock or disgust viewers, or content that encourages others to commit violent acts, such as minor fights, terrorist attacks, street fights, physical attacks, sexual assaults, immolation, tortures, corpses, protest or riots, robbery, medical procedures or other similar scenarios;

– the content if it aims to directly sell, link to, or facilitate access to any of certain regulated goods and services listed below: alcohol, bank account passwords, stolen credit cards or other financial information; counterfeit documents or currency; controlled narcotics and other drugs; explosives, organs, endangered species, or parts of endangered species, firearms and certain firearms accessories, nicotine, including products of vaping, gambling sites on the Internet, not yet reviewed by Google or YouTube, pharmaceuticals without a prescription, sex or escort services, unlicensed medical services, human smuggling;

– the content related to the sale of firearms and accessories to it, as well as instructions how to assemble firearms and their components (Sait "Youtube", https://support.google.com/youtube/answer/2802168?hl=uk).

Depending on the type of violation of YouTube channel usage rules, a user channel can be fully disabled, access to certain video may be removed, Google account or access of Google account to the service in general or to its part for a certain period (for example, up to 90 days) can be terminated (Sait "Youtube", https://www.youtube.com/t/terms).

Facebook. Facebook administration terminates accounts of users who violate official site rules. Facebook as well as other social media have certain conditions for using the capacity. The person who registers his/her account (page) agrees with the established rules, so he/she is obliged to fulfil them. In addition, such person confirms his/her agreement to terminate the page in case of violations. The grounds for the content termination on Facebook by employees of the operative units of the National Police of Ukraine are:

– a real risk of physical harm or direct threat to public security;

– presence of conditional threats of terrorists and other persons who committed violence;

– the involvement of a person in a criminal organization or in committing crimes such as terrorism, organized hatred, mass murder (including attempt) or serial murder, human trafficking, organized violence or criminal activities;

– encouragement certain criminal or harmful actions directed against people, companies, property or animals, as well as organization and promotion of such actions or recognition of their commission;

– publication by private individuals or producers, even official, of information about the circulation of narcotic drugs, psychotropic substances, precursors, as well as medical (psychotropic) drugs, firearms, their parts and ammunition, except for cases of advertising of firearms on condition of compliance with all applicable laws and legal provisions;

– fraud against other users to seize money or property (Sait "Facebook", https://uk-ua.facebook.com/terms).

Depending on the type and gravity of violation of Facebook rules, the account may be terminated completely or for a certain period – from a day to several months.

At the same time, the termination of prohibited accounts by operational units of the National Police of Ukraine requires solving problems, such as:

– the legality of the creation and use of anonymous accounts (accounting records) by operational units of the National Police of Ukraine, enabling with encryption of affiliation to the law-enforcement body to detect and prevent criminal offenses, including the termination of spreading and disabling prohibited content, and also to record the traces in case of such criminal offense;

– the above measures shall be carried out by operational units of the National Police of Ukraine without the decryption of account and the IP address affiliation to the law enforcement agency or persons working in it.

Therefore, today, it is required to introduce and legislate an investigative measure, such as a computer intervention, enabling operational units of the National Police of Ukraine to

implement effectively the measures to prevent and combat crime committed on the Internet.

4. Conclusions

To conclude, no defined grounds currently exist in the legal regulations to stop the distribution and termination of prohibited content, including by operational units. This deters law enforcement agencies from legal activities aimed at preventing and combating criminal offenses committed on the Internet. Therefore, it is proposed to introduce an investigative measure such as a computer intervention, thanks to which operational units of the National Police of Ukraine can carry out measures on covert detection, prevention of criminal offense, and also to record the traces in case of its commission. The above should find its reflection by adding paragraph 72 to part 1 of Article 8 of the Law of Ukraine "On operational and investigative activities", which should be stated as follows: "to conduct computer interference to detect and prevent criminal offenses, including stopping the spread and termination of prohibited and restricted content, and to record the traces in case of commission of a criminal".

References:

Ofitsiinyi sait Kiberpolitsii Ukrainy [Official site of the Cyberpolice of Ukraine] (2021). *cyberpolice.gov.ua*. Retrieved from: https://cyberpolice.gov.ua/news/u--roczi-do-kiberpolicziyi-nadijshlo-ponad--tysyach-zvernen-shhodo-shaxrajstva-v-interneti-8412/ (in Ukrainian).

Ofitsiinyi sait Ukrainskoi mizhbankivskoi asotsiatsiia chleniv platizhnykh system YeMA [Official site of the Ukrainian Interbank Association of Members of EMA Payment Systems] (2021). *ema.com.ua*. Retrieved from: https://www.ema.com.ua/business/antifraud-hub/mobilecheck/ (in Ukrainian).

Pro avtorske pravo i sumizhni prava: Zakon Ukrainy vid 23 hrudnia 1993 r. № 3792-XII [On Copyright and Related Rights: Law of Ukraine of December 23 1993 № 3792-XII] (1993). *zakon2.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/3792-12#Text (in Ukrainian).

Pro Natsionalnu politsiiu: Zakon Ukrainy vid 2 lypnia 2015 r. [On the National Police: Law of Ukraine of July 2 2015] (2015). *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 40–41, art. 379 (in Ukrainian).

Pro operatyvno-rozshukovu diialnist: Zakon Ukrainy vid 18 liutoho 1992 r. № 2135-XII [On operational and investigative activities: Law of Ukraine of February 18 1992 № 2135-XII] (1992). *zakon2.rada.gov.ua*. Retrieved from: http://zakon2.rada.gov.ua/laws/show/2135-12 (in Ukrainian).

Pro sanktsii: Zakon Ukrainy vid 14 serpnia 2014 roku № 1644-VII [On Sanctions: Law of Ukraine of August 14 2014 № 1644-VII] (2014). *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 40, art. 2018 (in Ukrainian).

Pro telekomunikatsii: Zakon Ukrainy vid 18 lystopada 2003 r. № 1280-IV [On Telecommunications: Law of Ukraine of November 18 2003 № 1280-IV] (2015). *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 40–41, art. 379 (in Ukrainian).

Pro zastosuvannia personalnykh, spetsialnykh, ekonomichnykh ta inshykh obmezhuvalnykh zakhodiv (sanktsii): Ukaz Prezydenta Ukrainy vid 17 travnia 2017 r. № 133/2017 [On the application of personal, special, economic and other restrictive measures (sanctions): Decree of the President of Ukraine of May 17 2017 № 133/2017] (2017). *president.gov.ua* Retrieved from: https://www.president.gov.ua/documents/1332017-21850 (in Ukrainian).

Sait "Facebook" [Website "Facebook"]. *facebook.com*. Retrieved from: https://uk-ua.facebook.com/terms (in Ukrainian).

Sait "Insta-helper" [Website "Insta-helper"]. *insta-helper.com*. Retrieved from: https://insta-helper.com/ua/jak-poskarzhitisja-na-akkaunt-v-instagram-i-jak/ (in Ukrainian).

Sait "Kagutech" [Website "Kagutech"]. *kagutech.com*. Retrieved from: https://ukr.kagutech.com/3897557-blocked-account-in-quotinstagramquot-the-reasons-ways-to-unlock (in Ukrainian).

Sait "Ministerstva vnutrishnikh sprav Ukrainy" [Website of the Ministry of Internal Affairs of Ukraine] (2020). *mvs.gov.ua*. Retrieved from: https://osvita.mvs.gov.ua/news/pidsumki-roboti-chat-botu-stopnarkotik-za-rik (in Ukrainian).

Sait "Mydovidka" [Website "Mydovidka"]. *mydovidka.com*. Retrieved from: https://mydovidka.com/instagram/yak-napisati-v-instagram-skargu-yak-poskarzhitisya-na-foto-i-profil-shhob-jogo-zablokuvali-skilki-potribno-skarg-shhob-zablokuvali (in Ukrainian).

Sait "Mydovidka" [Website "Mydovidka"]. *mydovidka.com*. Retrieved from: https://mydovidka.com/instagram/yak-poskarzhitisya-na-storinku-v-instagrame-shhob-zablokuvali-nazavzhdihttps://mydovidka.com/instagram/yak-poskarzhitisya-na-storinku-v-instagrame-shhob-zablokuvali-nazavzhdi (in Ukrainian).

Sait "Telegram" [Website "Telegram"]. *telegram.org*. Retrieved from: https://telegramfag.ru/kak-pozhalovatsya-v-telegramme (in Russian).

Sait "Telegram" [Website "Telegram"]. *telegram.org*. Retrieved from: https://t.me/stopdrugsbot (in Russian).

Sait "Vidpoviday.com" [Website "Vidpoviday.com"]. *vidpoviday.com*. Retrieved from: http://vidpoviday.com/iak-zablokuvaty-chuzhyj-instagram-akkaunt-cherez-telefon-abo-kompiuter (in Ukrainian).

Sait "Youtube" [Website "Youtube"]. *youtube.com*. Retrieved from: https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#community-guidelines (in Ukrainian).

Sait "Youtube" [Website "Youtube"]. *youtube.com*. Retrieved from: https://support.google.com/youtube/answer/2802168?hl=uk (in Ukrainian).

Sait "Youtube" [Website "Youtube"]. *youtube.com*. Retrieved from: https://www.youtube.com/t/terms (in Ukrainian).

Sait Multymediinoi platformy inomovlennia Ukrainy "Ukrinform" [Website of the Multimedia Platform of Foreign Broadcasting of Ukraine "Ukrinform"] (2020). *ukrinform.ua*. Retrieved from: https://www.ukrinform.ua/rubric-society/2857277-catbot-u-telegram-dopomig-zablokuvati-vze-ponad-300-narkoadres.html (in Ukrainian).

Striltsiv, O.M., Kryzhna, V.V., Maksymenko, O.V. (2014). *Osoblyvosti rozsliduvannia kryminalnykh pravoporushen, poviazanykh iz rozpovsiudzhenniam u merezhi Internet zaboronenoho kontentu [Features of the investigation of criminal offenses related to the distribution of prohibited content on the Internet]*. Kyiv: Nats. akad. vnutr. sprav (in Ukrainian).

Олег Тарасенко,
кандидат юридичних наук, доцент, доцент кафедри оперативно-розшукової діяльності, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, OlehTarasenko@ukr.net
ORCID: *orcid.org/0000-0002-3179-0143*

Олександр Стрільців,
кандидат юридичних наук, старший науковий співробітник, уповноважений з антикорупційної діяльності, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, OleksandrStriltsiv@ukr.net
ORCID: *orcid.org/0000-0002-8324-3053*

НЕОБХІДНІСТЬ ПРАВОВОГО ВРЕГУЛЮВАННЯ ВПРОВАДЖЕННЯ КОМП'ЮТЕРНОГО ВТРУЧАННЯ ЯК НОВОГО ОПЕРАТИВНО-РОЗШУКОВОГО ЗАХОДУ ОПЕРАТИВНИХ ПІДРОЗДІЛІВ

Анотація. ***Актуальність статті*** полягає в тому, що поширення злочинності в мережі Інтернет – найбільш динамічна на сьогодні група суспільно-небезпечних діянь, яка прогресує у світі загалом і в Україні зокрема, набираючи найбільш небезпечних обертів. Це зумовлене поширенням автоматизації, інформатизації та комп'ютеризації всіх сфер життя, розвитком науки, стрімким розширенням сфери застосування інформаційних технологій. Водночас зростають негативні аспекти – інформаційні технології починають використовуватися у протиправних цілях, як наслідок, відбуваються якісні й кількісні зміни кіберзлочинності, яка набуває дедалі більш професійного, організованого та витонченого характеру. ***Результати.*** У статті вказано на відсутність законодавчо визначених можливостей оперативних підрозділів Національної поліції України реалізовувати завдання щодо виявлення кримінальних правопорушень, які вчиняються в мережі Інтернет, та запобігання їм, у тому числі з припинення поширення та блокування забороненого й обмеженого до обігу контенту, а також фіксувати сліди в разі вчинення таких кримінальних правопорушень. ***Висновки.*** На підставі визначених способів блокування та обмеження обігу забороненого чи обмеженого до обігу контенту в соціальних мережах і відеохостингу робиться висновок про необхідність запровадження нового оперативно-розшукового заходу – комп'ютерного втручання. Надаються пропозиції з внесення змін до Закону України «Про оперативно-розшукову діяльність» щодо нормативного врегулювання запропонованого нового оперативно-розшукового заходу. Підкреслюється, що проведення вказаних вище заходів оперативними підрозділами Національної поліції України має здійснюватися без розшифровування належності акаунту та IP-адреси до правоохоронного органу чи осіб, які в ньому працюють. Зроблено висновок, що на сьогодні в нормативно-правових актах відсутні визначені підстави для припинення поширення та блокування забороненого контенту, зокрема й оперативними підрозділами. Вказане не дає змоги правоохоронним органам здійснювати в законодавчо визначеному полі діяльність, спрямовану на запобігання кримінальним правопорушенням, що вчиняються в мережі Інтернет, та протидії їм. У зв'язку з викладеним пропонується запровадити такий оперативно-розшуковий захід, як комп'ютерне втручання, завдяки якому оперативні підрозділи Національної поліції України можуть здійснювати заходи з негласного виявлення такого кримінального правопорушення, запобігання йому, а також фіксувати сліди в разі його вчинення.

Ключові слова: комп'ютерне втручання, оперативно-розшуковий захід, заборонений контент, оперативні підрозділи, кримінальні правопорушення, мережа Інтернет.

The article was submitted 15.07.2021
The article was revised 04.08.2021
The article was accepted 23.08.2021

UDC 35.07: 351.86: 355.45
DOI https://doi.org/10.32849/2663-5313/2021.7.15

Denys Chyzhov,
PhD in Law, Senior Research Fellow, Scientific Research Institute of State Building and Local Government of National Academy of Law Sciences of Ukraine, 80, Chernyshevskogo street, Kharkiv, Ukraine, postal code 61002, denys_chyzhov@ukr.net
ORCID: *orcid.org/0000-0002-4843-0670*

Chyzhov, Denys (2021). Organizational and legal support of human rights and freedoms in the national security of Ukraine. Entrepreneurship, Economy and Law, 7, 98–103.

ORGANIZATIONAL AND LEGAL SUPPORT OF HUMAN RIGHTS AND FREEDOMS IN THE NATIONAL SECURITY OF UKRAINE

Abstract. ***The purpose*** is to analyse the organizational and legal support of human rights and freedoms in the national security of Ukraine. ***Research methods.*** The paper is executed by applying the general research and special methods of scientific cognition. The key methods of the article are dialectical, comparative and modeling methods, which helped to identify and form appropriate approaches. ***Results.*** The article determines that ensuring the security of man and citizen, society and the state is undoubtedly the top priority of the modern state. Any democratic, legal, social state recognizes security in its country as a priority. At the same time, security must be ensured both for each person and on a nationwide scale. It was shown that these relations have a two-way connection: human rights violations not only breach legal prohibitions, the human position in society, but also negatively affect other elements of the national security system: a society in which violations of the rights and freedoms of its members to consider reliable, responsible, civil; a state in which the rights of its citizens are violated cannot be considered law-governed and democratic, etc. The system of organizational and legal support of human rights and freedoms in the national security of Ukraine is represented by a set of hierarchically organized sources of normative regulation. A four-level system of sources is outlined in the article. ***Conclusions.*** It is concluded that human rights and freedoms today are the most important value which the state must ensure in all spheres of life, including security. The state cannot be otherwise considered legal and one which can participate in international aggression. The insurance of human rights and freedoms in the field of national security of Ukraine should begin with organizational and legal support, i. e., the creation of a reliable legal foundation for state activities to enshrine human rights and freedoms in the field of national security of Ukraine.

Key words: rights and freedoms, enforcement of rights, national security, organizational and legal support, rule of law state, obligations of the state.

1. Introduction

Ukraine is a sovereign and independent state, which found itself in a forced adversary resisting Russian aggression. Currently, the Russian Federation remains a source of a protracted threat to Ukraine's national security, stability and international democratic values worldwide. This provides rationale for introducing an effective strategy aimed at ensuring the termination of hostilities and the restoration of the territorial integrity of Ukraine within its internationally recognized state border based on international law (Vseukrainskyi Forum, 2021). The mentioned provisions are available on the official website of the All-Ukrainian Forum "Ukraine 30", part of which was devoted to the country's security issues (May 11–13). In this context, our country needs constant updating and enhancement in terms of legal and organizational support of human rights and freedoms in the sphere of Ukrainian national security. The relevance of the chosen course is evidenced by the holding of the All-Ukrainian Forum "Ukraine 30" and consideration of fundamental issues related to ensuring the country's security. In light of this, the author believes that such issue under study as organizational and legal support of human rights and freedoms in the sphere of the national security of Ukraine is hot-button and needs a new scientific enquiry.

2. Analysis of recent research and publications

It should be noted that there are no specialized studies of organizational and legal support of human rights and freedoms in the sphere of national security of Ukraine. Some aspects of the subject were studied by various

scientists. For instance, V. A. Lipkan analyzed the theoretical and methodological principles of management in the sphere of national security of Ukraine (Lipkan, 2005). H. A. Honcharenko examined the issue of security management in Ukraine (Honcharenko, 2020). Legal foundations of military security of Ukraine are investigated in E. L. Streltsov's monograph (Streltsov, 2016). O. P. Dzioban explored various aspects in numerous works: in his monograph, he undertook an analysis of national security in the framework of social transformations (research and provision methodology) (Dzioban, 2006), looked at national security through worldviews and theoretical and methodological principles (Dzioban, 2021), philosophical and legal aspects human rights and national security (Dzioban, Zhdanenko, 2020). One should pay attention to the International Conference on the Constitution Day of Ukraine "Human Rights and National Security: the role of the constitutional jurisdiction" took place, which was attended by the Chairman and judges of the Constitutional Court of Ukraine, the retired judges of the Constitutional Court of Ukraine, representatives of state authorities, heads and judicial bodies of constitutional jurisdiction of foreign countries, representatives of the diplomatic corps and international organizations, as well as national and foreign scholars (Prava liudyny i natsionalna bezpeka, 2021).

The main purpose of this research is to analyze the organizational and legal support of human rights and freedoms in the national security of Ukraine.

3. Research results

The top priority of the modern state is undeniably to ensure the security of a man and citizen, society and the country. Any democratic, legal, social state recognizes security in its country as a priority. At the same time, security must be ensured both for each individual at the national level. We believe that these relations are bidirectional ones: human rights violations not only infringe legal limitations, the human position in society, but also negatively impact other elements of the national security system: a society in which the rights and freedoms violations can not be considered reliable, responsible, civil; a state in which the rights of its citizens are violated cannot be considered legal, democratic, etc. When it comes to ensuring the rights and freedoms of a man and citizen, this is the most important element in the system of national security.

To comfirm this thesis, the author uses the provisions of the Fundamental Law of Ukraine as an example. Thus, Article 3 of the Constitution of Ukraine stipulates that "an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees outline the content and direction of the state. Human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State" (Konstytutsia Ukrainy, 1996).

A noteworthy scientific analogy of the two-way connection between state security and human rights is provided by W. Burke-White. He formulated three well-founded hypotheses linking the degree of human rights violations with the manifestations of interstate aggression, namely: 1) states that systematically violate the rights and freedoms of their citizens are highly likely to participate in international aggression; 2) states in which the rights and freedoms of man and citizen are protected sufficiently and well, are unlikely to take part in international aggression; 3) states in which the rights and freedoms of man and citizen are respected may be involved in international intervention only on the basis of international law and in order to protect the rights and freedoms of citizens from violations by their own state (Burke-White, 2004). Therefore, one may conclude that human rights and freedoms today are the most important value that the state must ensure in all spheres of life, including security. The state cannot be otherwise considered legal and potentially be regarded to be able to take part in international aggression.

The state should strive to ensure national security, which the legislator offers to understand as "the protection of state sovereignty, territorial integrity, democratic constitutional order and other national interests of Ukraine from real and potential threats". Moreover, "the national interests of Ukraine are vital interests of man, society and the state, the implementation of which guarantees the state sovereignty of Ukraine, its progressive democratic development, as well as safe living conditions and welfare of its citizens" (Pro natsionalnu bezpeku Ukrainy, 2018). From the auhtor's point of view, the essence of "vital human interests" is not limited to "interests". Primarily, this referes to human rights and freedoms and then, the objects of his interests. Moreover, it seems extremely difficult to distinguish vital interests from others: each person has his original list of vital interests. Besides, under different

circumstances, the priority of interests will be different. According to O. P. Dzioban and S. B. Zhdanenko, the most crucial factors that determine the overall level of society development, as well as the national security of the individual state, are such characteristics as "human freedom", "human development" and, as a consequence, "human rights" (Dzioban, Zhdanenko, 2020, p. 10). This means that the rights and freedoms of the individual are the highest state priority and, respectively, the object of national security. Thus, there is every reason to assume that ensuring the rights and freedoms of the individual is a kind of national security criterion, the level of the country democracy.

It is worth mentionning that the United Nations Organization stipulates that "the protection of human rights in any country should be carried out in the following areas of its security: economic security, food security; health safety; environmental safety; personal security; public safety; political security". It stands to reason that all these areas of security can be attributed to national security. It is highly unlikely that national security is ensured at the appropriate level in a country where the environmental security of the population or the personal security of every citizen is not guaranteed, etc.

From our standpoint, ensuring human rights and freedoms in the sphere of national security of Ukraine should begin with organizational and legal support, that is creating a reliable legal foundation for state activities to ensure human rights and freedoms in the field of national security of Ukraine.

V. O. Antonov considers the system of national security of Ukraine as one that intrinsically combines a number of subsystems and elements, which is due to the objective laws of human development, society and the state and is considered an open dynamic system in the set of its most important internal and external relationships (Antonov, 2017, p. 219). We hold that a separate subsystem that is part of the national security system of Ukraine basically is the system of its organizational and legal support, which we propose to understand a set of interconnected elements that together ensure the state of protection of the main objects of national security of our state.

The Law of Ukraine "On National Security of Ukraine" stipulates that "the legal basis of state policy in the spheres of national security and defense is the Constitution of Ukraine, as well as other laws of Ukraine, international treaties approved by the Verkhovna Rada of Ukraine and issued in compliance with the Constitution and laws of Ukraine, other normative legal acts" (Article 2). Thus, the legislator defined the hierarchy of state policy legal regulation sources in the spheres of national security and defense. We believe that this approach can undoubtedly be implemented to determine the organizational and legal support of human rights and freedoms in the sphere of national security of Ukraine. It should be noted though that traditionally the hierarchy of sources of legal regulation of any relations in Ukraine is determined as follows: the Constitution of Ukraine, international treaties approved by the Verkhovna Rada of Ukraine, laws of Ukraine, bylaws, and so on and so forth. Therefore, we propose to explicate the organizational and legal support of human rights and freedoms in the field of national security of Ukraine using the latter approach.

First, organizational and legal support takes place at the level of the Constitution of Ukraine. We believe that the Constitution enshrines rights and freedoms related to the sphere of national security, which are not directly related to this sphere, but regulate it. In fact they basically include: the inalienable human right to life; the right to respect for human dignity; the right to liberty and security of person; inviolability of the home; secrecy of correspondence, telephone conversations, telegraph and other correspondence; freedom of movement, free choice of place of residence, the right to leave the territory of Ukraine freely, except for restrictions established by law; the right to freedom of thought and speech, to free expression of one's views and beliefs; the right to freedom of thought and religion; the right to freedom of association in political parties and public organizations to exercise and protect their rights and freedoms and to satisfy political, economic, social, cultural and other interests, except for restrictions established by law in the interests of national security and public order, population health care or protection of the rights and freedoms of others; the right to participate in the state administration, in all-Ukrainian and local referendums, to freely elect and be elected to bodies of state power and bodies of local self-government; the right to peaceful assemblies, without weapons and to hold meetings, rallies, marches and demonstrations, the holding of which shall be notified in advance to the executive authorities or local self-government bodies; the right to send individual or collective written appeals or personally apply to public authorities, local governments and officials of these bodies, which are obliged to consider the appeal and give a grounded response within the relevant time frame, etc. (Konstytutsia Ukrainy, 1996). Ensuring these human and civil rights and freedoms is the basis

of their organizational and legal support and will maintain the national security of Ukraine.

Second, the international treaties and international obligations of our state comprise the following element in the organizational and legal support of human rights and freedoms in the field of national security of Ukraine. They are as follows: the Universal Declaration of Human Rights of 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the International Covenant on Economic, Social and Cultural Rights of 1966, the International Covenant on Civil and Political Rights of 1966. These regulations stipulate fundamental human rights, which are guaranteed at the international level and must be ensured by each member state of these international instruments.

Third, the organizational and legal support of human rights and freedoms in the field of national security of Ukraine is enshrined by the laws of Ukraine, in particular the Law of Ukraine "On National Security of Ukraine", which lays the foundations and principles of national security and defense, goals and basic principles of public policy that will guarantee society and every citizen protection from threats. In addtition, the following laws of Ukraine can be referred to this link of normative-legal provision: "On the principles of domestic and foreign policy", "On public associations", etc.

Fourth, the bylaws which include the National Security Strategy of Ukraine of September 14, 2020, which was approved by the Decision of the National Security and Defense Council of Ukraine and approved by the President of Ukraine. It is worth noting that the National Security Strategy of Ukraine is entitled "Human Security – Country Security". This reaffirms the twofold link between the security of the individual and the security of the whole country. As defined by the Strategy, the priorities of Ukraine's national interests and national security are: independence and state sovereignty; restoration of territorial integrity within the internationally recognized state border of Ukraine; social development, first of all development of human capital; protection of the rights, freedoms and legitimate interests of the citizens of Ukraine; European and Euro-Atlantic integration (Stratehiya natsionalnoi bezpeky Ukrainy, 2020). Thus, at the level of relevant regulations, the protection of the rights, freedoms and legitimate interests of the citizens of Ukraine is a priority of national interests, and human security is an integral part of the country's security.

Moreover, regulatory and legal support includes the Resolution of the Verkhovna Rada of Ukraine "On the main directions of state policy of Ukraine in the field of environmental protection, use of natural resources and environmental safety" of 1998 (Postanova Verkhovnoi Rady Ukrainy, 1998); the Decision of the National Security and Defense Council of Ukraine of March 23, 2021 "On challenges and threats to national security of Ukraine in the environmental sphere and priority measures to neutralize them" (Rishennia Rady natsionalnoii bezpeky i oborony Ukrainy, 2021) and other regulations. Given the limited scope of the present study, we will dwell on these regulations.

4. Conclusions

The article determines that the top priority of the modern state is ensuring the security of a man and citizen, society and the state. Any democratic, legal, social state recognizes security in its country as a priority. At the same time, security must be ensured for each person as well as nationwide. The author proves that these relations have a two-way connection: human rights violations not only breach legal prohibitions, the human position in society, but also have a negative impact on other elements of the national security system a society in which the rights and freedoms of its members are violated cannot be considered reliable, responsible, civil; a state in which the rights of its citizens are infringed cannot be considered legal, democratic, etc. It all starts with ensuring the rights and freedoms of man and citizen and this is the most crucial element in the system of national security. It is concluded that human rights and freedoms today are the indispensable values that the state must ensure in all spheres of life, including security. The state cannot be otherwise considered legal and virtually able to participate in international aggression.

In the author's opinion, the protection of human rights and freedoms in the field of national security of Ukraine should begin with organizational and legal support, i.e., creation of a reliable legal foundation for state activities to ensure human rights and freedoms in the field of national security of Ukraine. We believe that a separate subsystem, that is part of the national security system of Ukraine, is the system of its organizational and legal support, which we propose to understand a set of interconnected elements that together ensure the state of protection of the main objects of national security of our state. The system of organizational and legal support of human rights and freedoms in the sphere of national security of Ukraine is represented by a set of hierarchically organized sources of normative regulation. In the article we outline a four-level system of sources. First, organizational

and legal support takes place at the level of the Constitution of Ukraine, which enshrines rights and freedoms relating to national security. Further, in the field of national security of Ukraine, there are relevant international treaties and international obligations. Third, there are the relevant laws of Ukraine, as follows: "On National Security of Ukraine", "On the Principles of Domestic and Foreign Policy", "On Public Associations", etc. Fourth, there are the bylaws, such as National Security Strategy of Ukraine, Resolution of the Verkhovna Rada of Ukraine "On the Main Directions of the State Policy of Ukraine in the Field of Environmental Protection, Use of Natural Resources and Ensuring Environmental Security", as well as Decisions of the National Security and Defense Council of Ukraine "On Challenges and Threats to National Security of Ukraine in the Environmental Sphere and Priority Measures for Their Neutralization" and other regulations.

References:

Antonov, V.O. (2017). Konstytutsiyno-pravovi zasady natsionalnoi bezpeky Ukrainy: monohrafiia [Constitutional-legal principles of national security of Ukraine: monograph] / ed. by Yu.S. Shemshuchenko. Kyiv: TALKOM (in Ukrainian).

Burke-White, W.W. (2004). Human Rights and National Security: The Strategic Correlation. *Harvard Human Rights Journal*, no. 17, pp. 254. Retrieved from: https://www.law.upenn.edu/cf/faculty/wburkewh/workingpapers/.pdf (in English).

Dzioban, O.P. (2006). Natsionalna bezpeka v umovakh sotsialnykh transformatsiy (metodolohia doslidzhennia ta zabezpechennia): monohrafiia [National security in terms of social transformations (research methodology and support): monograph]. Kharkiv: Konstanta (in Ukrainian).

Dzioban, O.P. (ed.). (2021). Natsionalna bezpeka: svitohliadni ta teoretyko-metodolohichni zasady: monohrafiia [National security: worldview and theoretical and methodological principles: monograph]. Kharkiv: Pravo (in Ukrainian).

Dzioban, O.P., Zhdanenko, S.B. (2020). Prava liudyny i natsionalna bezpeka: filosofsko-pravovi aspekty vzaiemozviazku [Human rights and national security: philosophical and legal aspects of the relationship]. *Informatsiya i pravo: naukovyi zhurnal*, no. 2, pp. 9–22 (in Ukrainian).

Honcharenko, H.A. (2020). Upravlinnia sektorom bezpeky Ukrainy: problemy teorii ta praktyky [Management of the security sector of Ukraine: problems of theory and practice]. Kharkiv: Pravo (in Ukrainian).

Konstytutsia Ukrainy [The Constitution of Ukraine] (1996). *Vidomosti Verkhovnoi Rady Ukrainy,* no. 30, art. 141 (in Ukrainian).

Lipkan, V.A. (2005). Teoretyko-metodolohichni zasady upravlinnia u sferi natsionalnoi bezpeky Ukrainy: monohrafiia [Theoretical and methodological principles of management in the field of national security of Ukraine: monograph]. Kyiv: Tekst (in Ukrainian).

Postanova Verkhovnoi Rady Ukrainy "Pro Osnovni napryamy derzhavnoi polityky Ukrainy u haluzi okhorony dovkillia, vykorystannia pryrodnykh resursiv ta zabezpechennia ekolohichnoi bezpeky" [Resolution of the Verkhovna Rada of Ukraine "On the Main Directions of the State Policy of Ukraine in the Field of Environmental Protection, Use of Natural Resources and Ensuring Environmental Safety"] (1998). *Vidomosti Verkhovnoi Rady Ukrainy*, no. 38–39, art. 248 (in Ukrainian).

Prava liudyny i natsionalna bezpeka: rol orhanu konstytutsiinoi yurysdyktsii: Mizhnarodna konferentsia z nahody Dnia Konstytutsii Ukrainy [Human rights and national security: the role of the body of constitutional jurisdiction: International Conference on the occasion of the Constitution Day of Ukraine] (2019). Retrieved from: https://ccu.gov.ua/novyna/prava-lyudyny-i-nacionalna-bezpeka-rol-organu-konstytuciynoyi-yurysdykciyi-mizhnarodna-1 (in Ukrainian).

Rishennia Rady natsionalnoii bezpeky i oborony Ukrainy "Pro vyklyky i zahrozy natsionalnii bezpetsi Ukrainy v ekolohichnii sferi ta pershocherhovi zakhody shchodo yikh neitralizatsii" vid 23 bereznia 2021 r. [Decision of the National Security and Defense Council of Ukraine "On challenges and threats to Ukraine's national security in the environmental sphere and priority measures to neutralize them" dated March 23, 2021] (2021). *Uriadovyi kurier*, no. 57 (in Ukrainian).

Stratehiya natsionalnoi bezpeky Ukrainy vid 14 veresnia 2020 r. [National Security Strategy of Ukraine of September 14, 2020] (2020). Retrieved from: https://www.president.gov.ua/documents/3922020-35037 (in Ukrainian).

Streltsov, E.L. et al. (2016). Pravovi osnovy voiennoi bezpeky Ukrainy: monohrafia [Legal foundations of military security of Ukraine: monograph]. Lviv: Natsionalna akademia sukhoputnykh viisk (in Ukrainian).

Vseukrainskyi Forum "Ukraina 30": Bezpeka krainy (11–13 travnia 2021 r.) [All-Ukrainian Forum "Ukraine 30": Security of the country (May 11–13, 2021)] (2021). Retrieved from: https://ukraine30.com/national_security (in Ukrainian).

Zakon Ukrainy "Pro natsionalnu bezpeku Ukrainy" [Law of Ukraine "On national security of Ukraine"] (2018). *Vidomosti Verkhovnoi Rady Ukrainy*, no. 31, art. 241 (in Ukrainian).

Денис Чижов,
кандидат юридичних наук, старший науковий співробітник, Науково-дослідний інститут державного будівництва та місцевого самоврядування Національної академії правових наук України, вул. Чернишевська, 80, Харків, Україна, індекс 61002, denys_chyzhov@ukr.net
ORCID: *orcid.org/0000-0002-4843-0670*

ОРГАНІЗАЦІЙНО-ПРАВОВЕ ЗАБЕЗПЕЧЕННЯ ПРАВ ТА СВОБОД ЛЮДИНИ У СФЕРІ НАЦІОНАЛЬНОЇ БЕЗПЕКИ УКРАЇНИ

Анотація. ***Метою статті*** є аналіз організаційно-правового забезпечення прав і свобод людини у сфері національної безпеки України. ***Методи дослідження.*** Стаття виконана із застосуванням загальнонаукових та спеціальних методів наукового пізнання. Провідними методами дослідження були діалектичний, компаративний і метод моделювання, які дали змогу виокремити та сформувати відповідні підходи. ***Результати.*** У статті визначено, що забезпечення безпеки людини та громадянина, суспільства та загалом держави є, безперечно, найголовнішим пріоритетом сучасної держави. Будь-яка демократична, правова, соціальна держава визнає пріоритетною безпеку у своїй країні. При цьому безпека має забезпечуватися як щодо кожної особи, так і на загальнодержавному рівні. Автором доведено, що ці відносини мають двосторонній зв'язок: порушення прав людини не лише порушує законодавчі заборони, становище людини в суспільстві, а й негативно впливає на інші елементи системи національної безпеки. Так, суспільство, у якому відбуваються порушення прав і свобод його учасників, не можна вважати надійним, відповідальним, громадянським; державу, у якій відбувається порушення прав її громадян, не можна вважати правовою, демократичною тощо. Констатовано, що окремою підсистемою, яка входить до системи національної безпеки України, є система її організаційно-правового забезпечення, під якою запропоновано розуміти комплекс взаємопов'язаних елементів, що в сукупності забезпечують стан захищеності основних об'єктів національної безпеки нашої держави. Система організаційно-правового забезпечення прав і свобод людини у сфері національної безпеки України представлена комплексом ієрархічно впорядкованих джерел нормативного регулювання. У статті визначено чотирирівневу систему таких джерел. ***Висновки.*** Зроблено висновок про те, що права і свободи людини сьогодні становлять найважливішу цінність, яку держава має забезпечувати в усіх сферах життєдіяльності, зокрема й у сфері безпеки. В іншому разі держава не може вважатися правовою та потенційно сприйматиметься як така, що може брати участь у міжнародній агресії. Забезпечення прав і свобод людини у сфері національної безпеки України має розпочинатися з організаційно-правового забезпечення, тобто створення надійного правового фундаменту для державної діяльності щодо забезпечення прав та свобод людини у сфері національної безпеки України.

Ключові слова: права та свободи, забезпечення прав, національна безпека, організаційно-правове забезпечення, правова держава, зобов'язання держави.

The article was submitted 14.07.2021
The article was revised 03.08.2021
The article was accepted 25.08.2021

NOTES