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## LEASE AGREEMENT IN MODERN NATIONAL AND EUROPEAN LEGISLATION

**Abstract.** *The purpose* of this research is to clarify particularities of the regulation of a lease agreement under national law and as compared to the current experience of European countries. **Research methods.** The author used general scientific and special methods of scientific cognition. **Results.** The state of legal regulation of leasing in Ukraine is analyzed taking into account the latest innovations. In addition, the author highlights challenging issues in the use of the leasing institution and gives the general characteristic of the peculiarities of national leasing laws. By relying on the study of the provisions of legislative instruments of European countries related to the regulation of leasing, the basic approaches to the definition of leasing in other countries are identified. The peculiarities of modern legislative regulation of contractual leasing relations in European countries are outlined by comparison with national legal regulation. **Conclusions.** According to national laws, the legal structure of a lease agreement is quite complex because it combines the elements of purchase and rent agreements. The definition of a lease agreement available in Article 806 of the Civil Code of Ukraine renders a model which provides for relations of direct and indirect leasing as opposed to the statutory definition of leasing of the better part of the studied European countries. The specific nature of contractual leasing relations and the need to apply the provisions on related types of agreements lead to a different interpretation of the essence of the relevant legal institution and create problems in practice, as evidenced by case law. It is established that in European countries, there is a common approach under which the issues of leasing activities and, in particular, the definition of the contractual structure of leasing are primarily regulated by civil laws, which consolidate the original conceptual models of leasing, basic principles, the content of obligations, the status of the contracting parties, as well as other issues elaborated in special legislation.

**Key words:** lease agreement, European legislation, civil legislation.

### 1. Introduction

It is well known that leasing transactions are an essential and widespread tool of economic activity in many countries, and the leasing services market is sufficiently advanced today in the USA and many countries of the European Union. Dynamic development and growing attention to the leasing sector is driven by the fact that leasing is one of the key means of optimizing production capacity and renewing fixed assets of enterprises, which, in turn, improves the quality and efficiency of manufacturing, progress of many industries, and the economy in general.

Studies on the practical realization of leasing in Ukraine and the world allow concluding that leasing is a powerful tool that has significant potential (Cherep, Koshkarbaev, Mendyhal'yev, 2016; Karintseva, 2016). At the same time, it is obvious that the condition for the proper functioning of the leasing market in Ukraine involves ensuring effective statutory regula-

tion of this legal institution. It provides for complete settlement of relevant legal relations, identification of the legal status of the parties to the lease agreement, requirements for content and form, standardizing types and forms of leasing, and the consequences of breach or undue fulfilment of the terms of the lease agreement.

Some aspects of the legal regulation of leasing relations in Ukraine, the general characteristics and legal nature of leasing, and the analysis of contractual leasing relations with the participation of some special entities are covered in the contributions by many domestic researchers, whose best practices lay groundworks for further scientific activities in a theoretical and practical realm of the operation of the leasing institution in Ukraine (Bielousova, 2009; Ukhanova, 2009; Sichko, 2006; Lovynchuk, 2008; Osadko, 2016; Lepekh, 2021). However, considering the dynamic changes, enhancement, and expansion of international commercial cooperation, tendencies towards intensification, develop-

ment, and complication of contractual relations, including with the participation of foreign entities and because scientific literature mostly deals with general issues of legal characteristic of leasing and leasing entities in Ukraine, the author holds the analysis of the national legal regulation of contractual leasing relations **relevant** and necessary for the doctrine of civil law and law enforcement practice in the context of reviewing a foreign experience of statutory regulation of the relevant legal institution. The abovementioned will provide insight into current practices and approaches to the application of a lease agreement and allow identifying ways to improve national legislation. **The purpose** of this research is to clarify features of the regulation of a lease agreement following national law and compared to the current experience of European countries in this area.

**2. Leasing in national legislation and challenges of its application.** At the level of national legislation, obligations arising under a lease agreement are generally regulated by the Civil Code of Ukraine (hereinafter – CC of Ukraine), which comprises the main provisions of this contractual structure. Moreover, the relevant legal relations are governed by special legislation. First of all, it is about the Law of Ukraine “On Financial Leasing”, which was adopted in a new wording as of 04.02.2021.

In the legal doctrine and world practice of leasing activities, the separation of different types of leasing depending on the selected criteria (the scope of the obligation, the purpose of the entities of leasing, etc.) (Kulyniak, 2008), which is also conveyed at the level of legal systems of each state taking into account the peculiarities of the country’s economy, social needs and legal traditions, is a matter of general observation.

However, when studying the particularities of national and European leasing laws, first of all, it is worth paying attention to the civil legislation of Ukraine, which fixes the original unified principles of the regulation of contractual relations emerging based on lease agreements. Thus, according to Article 806 of the Civil Code of Ukraine (hereinafter – CC of Ukraine), under a lease agreement, one party (a lessor) shall transfer or shall be obliged to transfer for use to another party (a lessee) the property owned by the lessor under the ownership right and acquired without any preliminary agreement with the lessee (direct leasing), or the property specially acquired by the lessor from the buyer (a supplier) in compliance with the specifications and conditions set out by the lessee (indirect leasing) for a definite time and fixed charge (lease payments).

Following the above legal construction, general provisions on purchase and sale and provisions on the supply agreement, unless otherwise provided by law, shall be applied to civil legal relations based on a lease agreement, considering its unique nature. The provisions on rent are also applied to the lease agreement considering the particularities established by the law.

The analysis of the mentioned provisions of civil law shows that the legal structure of a lease agreement is quite complex that causes a somewhat ambiguous interpretation of the essence of the legal institution and creates problems in law enforcement, misunderstandings between participants of civil law relations, which are grounded on lease agreements. In domestic contractual practice, there are known cases when the parties do not have a single interpretation of the nature and consequences of the concluded lease agreement. In particular, it is about the erroneous perception of the leasing obligation exclusively as an obligation arising from an agreement of sale, lease, loan, etc., that leads to erroneously expected legal consequences that are not provided for the contractual leasing relations.

A striking example of challenging issues in the application of a lease agreement is litigation, which is also a result of incomplete statutory regulation of the relevant binding legal relations based on the lease agreement.

For example, in terms of one of the lawsuits concerning the invalidity of a financial lease agreement, the object of which was a car, and the recovery of funds paid under such an agreement, the Supreme Court had to clarify the legal nature of the financial lease agreement and the requirements for a form of its conclusion. Therefore, the court of cassation noted that “the financial lease agreement is mixed by its legal nature and contains elements of the agreements on lease (rent) and purchase-sale of a vehicle that follows from the agreement according to Article 628 of CC of Ukraine (Judgement of the Supreme Court in the case No. 404/4702/18- II as of 01.04.2020).

In another case, a plaintiff filed a lawsuit in court to recognize the agreement valid and declare the ownership of the leased item, believing that he acquired ownership of the leased item by fully complying with the agreement terms for lease payments. When revising the judgment of the appellate court to dismiss the claim, the court of cassation noted that “...Under the lease agreement, the lessor’s property interest means investment and future profitable payback, and the lessee’s property interest – the ability to use and acquire the title to the leased object. The Supreme Court also pointed out that because the finan-

cial lease agreement is subject to the rules of CC of Ukraine, which regulate sale and rent relations, the financial lease agreement, the subject of which was the car, had to be concluded not only in writing but also notarized – the parties did not take into account this fact when concluding the agreement (Judgment of the Supreme Court in the case No. 694/523/18 as of 03.02.2021).

Consequently, the synergy between the state of statutory regulation of leasing relations and the efficiency and stability of the application practice of this civil law institution is apparent.

In this context, it is worth mentioning that statutory regulation of the leasing services market in Ukraine has recently been improved. As mentioned above, the new version of the Law of Ukraine “On Financial Leasing” was adopted on 04.02.2021. The explanatory note to the draft emphasizes that amendments are triggered by an urgent need to bring the legislation in line with modern practices and the best world experience of leasing functioning as one of the most common methods of financing technical re-equipment, eliminating contradictions between definitions, overcoming conflicts between general civil and specific financial laws.

Scientific literature has already paid attention to the need for more detailed regulation of leasing in the Civil Code of Ukraine, laws or bylaws to ensure the specification and unification of terms, taking into account the features outlined in international acts on financial leasing, and address the gaps elucidated by case law (Habriadze, 2019, p. 51).

In particular, among other things, a significant step in ensuring the unity and stability of the leasing practice in Ukraine was the amendment of Chapter 58 of the Civil Code of Ukraine, Art. 809-1, which regulates the relations between the lessee and the lessor in case of invalidation of the lease agreement or the establishment of its nullity, stipulating the lessee’s obligation to redeliver the property to the lessor in the manner and under the conditions fixed in the mentioned article, and determines the obligation and conditions for reimbursement of the amount of lease payments to the lessor for the entire period of use.

However, the author believes that both the 1997 version of the Law and the new version contain a quite imperfect definition of the category “financial leasing” as it does not fully reflect the essence of this legal institution in various aspects of its application and does not comprise clear criteria for distinguishing this contractual construction from related types of agreements. It is worth agreeing with the reasonable comments of the Central Legal Department, proposed towards the 2019 draft law “On Financial

Leasing”, about the vague and too generalized nature of the definition of the mentioned term.

**3. Foreign experience of the legal regulation of contractual leasing relations exemplified by European laws.** In this regard, the practice of other countries in the legal regulation of contractual leasing relations in general and the legislative definition of the leasing contract in particular sparks interest.

The EU accounting rules on leasing, part 2 of paragraph 3, contain the wording of the generalized concept of leasing as an agreement under which the lessor (owner) transfers to the lessee (renter) the right to use the asset in exchange for payment or a number of payments. The document also provides definitions of financial and operating leases.

Article 361 of Chapter 17 “Lease agreement” of the Law of Obligations Act of the Republic of Estonia defines a lease agreement as that under which the lessor undertakes to purchase the leased item specified by the lessee from a specific seller and deliver possession to the lessee, and the lessee undertakes to pay for the use of the leased object.

An analysis of this contractual structure allows the author to conclude that unlike national legislation, which consolidates direct and indirect leasing, Estonia does not fix direct leasing for the statutory regulation of legal relations based on a lease agreement. This is confirmed by the fact that the legislative formulation of the lease agreement has a direct reference to the formula “the lessor undertakes to purchase and deliver...”, while the CC of Ukraine does not restrict the contracting parties from identifying the leased item as the property which belongs to the lessor on the right of ownership and has been acquired by him without prior agreement with the lessee.

Compared to national legal regulation, the transfer of the risk of accidental destruction and accidental damage of the leased object is also determined more bindingly. In particular, Article 364 of the above Law sets forth that the relevant risks pass to the lessee during the transfer of the leased object. As opposed to Article 809 of CC of Ukraine, the mentioned legislative provision directly indicates the moment of transfer of risks and prevents exceptions to general rules and attributing this issue to the discretion of the parties.

The provisions of Chapter XVII “Lease Agreement” of the Civil Code of the Republic of Poland (hereinafter – CC of Poland) regulate the contractual leasing relations in detail. Thus, Article 709-1 stipulates that the financing party undertakes, in the course of its business, to purchase the goods from the specific supplier under the conditions fixed in this agreement and trans-

fer the item to the user for use to receive benefits for some time, and the user undertakes to pay to the financing party the agreed sum – a monetary reward which at least is equal to the price or payment for the purchase of the goods by the financing party.

Therefore, as well as under Estonian law, the rules of CC of Poland do not provide for direct leasing. In addition, it is interesting that in contrast to the provisions of CC of Ukraine, the legislator specifies the sum payable for the use of the leased object within this article when formulating the definition of the lease agreement. Such an approach is reflected in paragraph 2 of Article 5 of the Law of Ukraine “On Financial Leasing” as one of the features that allows one to define leasing as financial, i.e., when concluding a financial leasing contract, the amount of lease payments is equal to or exceeds the initial cost of the object of financial leasing.

In Hungary, the issue of leasing relations is also regulated by the Civil Code. In particular, according to Article 409 of Section LIX “Financial leasing”, under a financial lease agreement, the lessor is obliged to transfer the thing or right (leasing object), which he owns, for use for a specified period, and the lessee is obliged to accept the leasing object and cover payments if: following the agreement, the lessee gains the right to use the leased asset until the end of its economic life or after its completion; or, if the use is agreed upon for a shorter period, the lessee gains the right to buy the leased asset after the agreement’s expiration without any consideration or at well-below market price at the time of entering into the agreement; or the total sum of lease payments reaches or exceeds the market value of the leased asset that was available at the time of contracting.

If in the mentioned states codified civil acts determined the basic principles of regulation of contractual leasing relations, and, for example, the Civil Code of Spain does not fix separate regulation of leasing at all by permitting special legislation to standardize this issue. Thus, the Law on management, control and solvency of credit institutions 10/2014 as of June 26, 2014, attributes to financial leasing transactions those agreements the sole purpose of which is to deliver possession of movable or immovable property acquired for any given purpose in accordance with the specifications of the future user in exchange for compensation consisting

of periodic payments. Leased-out objects must be used exclusively for agricultural, fishing, industrial, commercial, craft purposes, in service or professional activities. At the same time, the financial lease agreement shall consolidate provision for the user’s right to repurchase the leased asset after agreement expiration.

In the Portuguese Republic, leasing relations as an individual and special type of obligation in a group of lease agreements is not regulated by of the Civil Code. They are regulated by special legislation on financial leasing and the activities of leasing companies.

The analysis of national legislation and experience of legal regulation of contractual leasing relations in other European countries allows concluding that there is a more widespread approach under which the issue of leasing activities and, in particular, the contractual structure of leasing is primarily regulated by civil law rules, which fix the original conceptual models of leasing, the basic principles, the essence of binding legal relations, the status of the contracting parties, as well as other matters worked out in special legislation.

**4. Conclusions.** Under national law, the legal structure of a lease agreement is quite complex as it combines the elements of purchase and lease (tenancy) agreements. The definition of the lease agreement available in Art.806 of CC of Ukraine reflects the model which provides for relations of direct and indirect leasing, compared to the laws of studied European countries. The special nature of contractual leasing relations and the need for application of provisions on related types of contracts for their settlement cause a somewhat ambiguous interpretation of the essence of the mentioned legal institution and generates problems in law enforcement, misunderstandings between participants in civil law relations, as evidenced by judicial practice.

Analysis of the legal regulation of leasing in European countries allows the author to conclude that there is a more common approach under which the issue of leasing activities and, in particular, the definition of the contractual structure of leasing is primarily regulated by civil laws, which fix the original conceptual models of leasing, fundamental principles, essence of obligations, status of contracting parties, and others issues that are elaborated within special legislation.

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## ДОГОВІР ЛІЗИНГУ В СУЧАСНОМУ НАЦІОНАЛЬНОМУ ТА ЄВРОПЕЙСЬКОМУ ЗАКОНОДАВСТВІ

**Анотація.** *Метою* дослідження є з'ясування особливостей регламентації договору лізингу за національним законодавством та з огляду на сучасний досвід країн Європи в цій сфері. **Методи дослідження.** Під час дослідження окресленої проблематики застосовано загальнонаукові та спеціальні методи наукового пізнання. **Результати.** Проаналізовано стан правового регулювання лізингу в Україні з урахуванням останніх нововведень, охарактеризовано проблемні питання в застосуванні інституту лізингу та надано загальну характеристику особливостей національного законодавства про лізинг. На підставі вивчення положень законодавчих актів країн Європи щодо регулювання лізингу окреслено основні підходи до визначення поняття лізингу в інших країнах, особливості сучасної законодавчої регламентації договірних лізингових відносин у європейських країнах порівняно з національним правовим регулюванням. **Висновки.** За національним законодавством юридична конструкція договору лізингу є досить складною, оскільки поєднує в собі елементи договорів купівлі-продажу та найму (оренди). У визначенні договору лізингу, що міститься у статті 806 Цивільного кодексу України, відображено модель, яка передбачає відносини прямого та непрямого лізингу, на відміну від законодавчого визначення лізингу в більшості досліджуваних країн Європи. Особлива природа договірних лізингових відносин і необхідність застосування положень щодо суміжних видів договорів зумовлює дещо розрізнене трактування сутності зазначеного правового інституту та проблеми у правозастосуванні, про що свідчить судова практика. Встановлено, що у країнах Європи поширений підхід, за якого питання лізингової діяльності, зокрема визначення договірної конструкції лізингу, унормоване насамперед на рівні актів цивільного законодавства, які встановлюють вихідні концептуальні моделі лізингу, основні засади, зміст зобов'язальних правовідносин, статус сторін договору, а також інші питання, які знаходять свій розвиток у спеціальному законодавстві.

**Ключові слова:** договір лізингу, європейське законодавство, цивільне законодавство.

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## ESSENTIAL CHARACTERISTICS OF NON-JURISDICTIONAL METHODS OF LEGAL PROTECTION: TEMPORAL ASPECT

**Abstract.** *The purpose of the research* is to study the essential and temporal features of non-jurisdictional ways to protect the violated civil law; establish temporal criteria of protective capacity of the right different from the time of realization of the claim. **Research methods.** The author used general scientific and special-scientific methods of cognition which allow considering temporal factors as elements of subjective substantive law and legal relations in general and determining their position in the system of protective mechanism of civil law. **Results.** The main doctrinal concepts concerning the principles of applying such measures of influence on the offender as self-defense and the use of operational protective equipment are studied. It has been established that the non-jurisdictional means have such legal support as a person's appeal to a court. This power consists of a set of actions of the holder of the violated subjective civil law aimed at terminating the violation or other protection without recourse to the competent authority of the state. However, in the temporal context, the legal standardization has various character, and the statute of limitations is not applied for determination of term of protection in similar character. It is important for self-defense to waver at the time of the offense, and it is necessary to follow the general principles of good faith and reasonableness for operational sanctions, since the law in most cases does not set the time of their implementation. In this regard, some aspects of the application of such operational actions as withdrawal from the contract, unilateral change, or termination of the legal relationship at the will of the creditor are considered. It is only important that the plaintiff has the authority to perform these actions, that is, in other words, such authority should be reflected in the law or agreement. It is also necessary that these actions were within the time limit of adequate response. **Conclusions.** The article concludes that the time limits for the exercise of these powers must be established by law. In particular, the legal act should indicate the need to take relevant precautionary actions within a reasonable period from the moment of detection of the violation and the limited duration of the existence of these powers. The time of the specific security powers should be reasonable but not exceed the duration of the violation.

**Key words:** reasonable term, statute of limitations, operative protection.

### 1. Introduction.

The appeal of the entitled person to the competent authorities of the state with a request to protect the violated or disputed right is one of the most effective means of protection for the holders of subjective civil rights. The possibility of law enforcement is part of the subjective substantive right to sue. The purpose of a subjective right is that the subject could legally, within the limits of the powers granted to him by the objective law, take actions aimed at meeting his own needs. At the same time, the judicial method of protection of the violated civil right is not the only option for exercising the right to protection (Kostruba, 2014, p. 116). Moreover, the state cannot always provide compulsory protection of rights promptly and in

a form acceptable to society. Thus, the statutory obligation of the state to exercise the protection of subjective rights of the individual does not preclude the use of other more mobile protection mechanisms. In the literature, the opinion was expressed that the application of the protected person for protection to the state competent authority occurs only in the case when the measures of self-protection did not give positive results (Eliseikin, 1975, p. 10). It is hardly possible to agree with this point of view, as self-defense of the law and other extrajudicial means of its protection are quite autonomous. Moreover, it is unacceptable that the possibility of applying these protective measures only when the violation or danger to subjective civil law could not be eliminated by other protec-

tive means. After all, Art. 20 of the CCU clearly states that the exercise of the right to protection is exercised by a person at his discretion (Antonyuk, 2004, p. 13). This norm should be understood as the fact that a person has the right to decide not only on the issue of protection or refusal but also choose the appropriate form and method.

## **2. Legal substantiation of non-judicial methods of protection of the right.**

After violating a person's subjective civil right, he is free to choose a judicial or non-judicial (non-jurisdictional) form of protection, the method of protection. This authority is a set of actions of the holder of the violated subjective civil right aimed at terminating the violation or other protection without recourse to the competent authority of the state. Powers covered by a non-jurisdictional method of legal protection are divided into the right to prompt influence on the offender and self-defense. Although the plaintiff is legally authorized to choose the method of protection, such a choice in a non-jurisdictional format is often limited, because, as a rule, the means of protection of civil rights are inextricably linked with the nature of the right being protected. Thus, in the protection of property rights, the actions of the actual order can be carried out – self-defense in the form of necessary defense, etc., and in the implementation of protective obligations, operational measures of influence seem the most appropriate and adequate.

At the same time, the law, providing for such methods as self-defense of subjective rights, application of operational measures by the authorized person, etc., mostly does not regulate their temporal factors, does not specify the terms limiting actions of the person the right belongs to. According to the legislator, the actions must be lawful and consistent with the nature of the most protected substantive law. The same can be said for other non-judicial means of protecting violated civil rights. For example, in accordance with Art. 17 of the Civil Code of Ukraine, the protection of civil rights and interests may be exercised by the President of Ukraine, state authorities, authorities of the Autonomous Republic of Crimea or local governments within their own powers. In this situation, unless otherwise provided by legislation defining the scope of these powers, the protection of rights in the administrative order is not limited in time.

As it has been convincingly proven in the literature, the term is an integral and essential element of subjective right (Guyvan, 2014, p. 21-22; Guyvan, 2021, p. 108), it should be recognized that the duration of the creditor's protective powers to self-defense or operational influence

on the offender should be determined based on general legal principles of reasonableness and good faith. In other words, the temporal characteristics of substantive law, without which it cannot exist, for these relations are determined each time by the participants themselves following the nature and scope of the protective action, the order of its commission, etc. In the author's opinion, this approach of the legislator is unjustified, as it allows for broad subjectivity in assessing the correctness of the application of the mentioned measures. Moreover, since the misapplication of non-judicial protective measures against a defaulting debtor can be challenged in court (Guyvan, 2004, p. 37-38), legal uncertainty on this issue gives rise to law enforcement differences. Therefore, this section will explore the issue of temporary regulation of out-of-court remedies.

Demonstrative application of means of protection of the violated right by the right holder is the operative influence on the violator of civil law provided by the legislation of Ukraine. Let's first consider the issues related to the legal nature of this remedy. In modern civilization, there is almost no dispute about the existence and statutory consolidation of such a specific form of civil protection of the violated subjective right as the application of a counterparty that improperly fulfills its obligations, the impact of operational nature aimed at eliminating illegally achieved offender results or to prevent him from achieving such results. It has already been mentioned that their principal feature is the exercise of the protection powers enshrined in the legislation or the contract by the holder of the violated right without recourse to the authorized body of the state. However, the application of such types of influence on the infringer does not eliminate the possibility of the obligated person to appeal their application to a court or a commercial court. Thus, it is clear that by granting the creditor some protection and legal powers or authorizing their dispositive establishment, the state provided the possibility of coercion against the defaulting debtor by unilateral actions of the commissioner.

Given the above nature of the relevant interactions of the participants of the protective obligation, domestic legal science has had and still has lively discussions about the relations between operational influence and state coercion. Thus, B.B. Cherepakhin put forward the thesis that the concept of the right to sue in a broad sense covers any claims of the authorized person presented to the offender both in court and another order to protect his violated right. In this case, this definition is also applied to the implementation of measures of operational influence on the violator, when

the authorized person is given the right to independently ensure the fulfillment of the security obligation (Cherepakhin, 1964, p. 72). This thesis is embodied in the works of A.A. Dobrovolsky that the lawsuit is used as a procedural remedy in both judicial and non-judicial bodies (Dobrovolsky, 1965, p. 5). Modern researchers have developed this concept. In particular, they note that self-defense is a form of state coercion, which characterizes another qualitative state of such coercion, the possibility of which supports the exercise of every subjective right and the fulfillment of every legal obligation (Basin, 2003, p. 421). Understanding the system of measures provided by law, which are based on state coercion and aimed at ensuring the inviolability of rights, elimination of offenses, as protection (Lyashevskaya, 2018, p. 112), these researchers concluded that signs of state coercion occur in both jurisdictional protection and self-defense.

The author cannot support this legal approach. The concept of state and non-state coercion has long been divided in scientific works (Karkhalev, 2009, p. 70). From this point of view, it is quite fair to say that measures of operational influence on the defaulting debtor do not require the use of state coercion. Thus, the application of the latter, firstly, is ensured by the involvement of a special competent state law enforcement agency, and secondly, the mechanism of such application is regulated by relevant procedural law, while coercion as a result of individual protective action of the right holder is much more efficient and less cumbersome. procedural point of view. From a temporal point of view, this approach also deserves critical appraisal, as such a construction could necessitate the application of the statute of limitations on claims that are implemented through non-judicial jurisdictions or even the actions of a law enforcement officer that does not comply with civil law. The impossibility of applying the legal provisions on prescription to cases of non-claim protection of the violated right has already been indicated in our civil doctrine. At the same time, the possibility of judicial protection of the right through the use of state coercion arises after its violation and is limited to certain terms – the statute of limitations.

### **3. The essence of the right to non-judicial protection.**

The protected legal relations, regardless of whether it is implemented with the help of a competent body or independently by the right holder, includes coercive means – sanctions. Thus, protection measures and liability as types of civil sanction can usually be carried out both with the help of a competent body and out of court. The debtor's voluntary

performance of a breach of duty or compensation for damages is an example of the latter. As Y.S. Zhytsynsky correctly noted, most civil law sanctions are shaped in the law as an obligation of the offender to perform particular restorative or compensatory actions due to their focus and property nature (Zhytsynsky, 1966, p. 13). Although the literature has criticized the possibility of covering a voluntary overdue obligation by sanctions (Bratus, 1973, p. 33), it cannot be accepted. The fact is that the content of the protective legal relations, which arise after the violation of regulatory law, contains the obligation of the debtor to suffer the negative consequences of the offense. Such an obligation exists from the moment of violation regardless of whether the claim is made by the managed entity or not. Therefore, it would be completely wrong to link security relations only with the use of state coercion. Coercion is a procedural method of influence, the implementation of which achieves the goal of restoring the violated right, cessation of illegal actions or other positive effect. If the statutory protected duty is performed voluntarily, there is no need for coercion. However, the substantive result will be the same.

If the voluntary implementation of the protection and legal obligation, which arose as a result of violation of subjective substantive law, does not occur, the question arises about the application of certain means of influence to the debtor. In our civilization, the thesis according to which the existence of the possibility to ensure state coercion exercised by a law enforcement body does not deny the existence of other means of protection of the violated or disputed right is practically undeniable. As Y.K. Osipov pointed out, neither the interests of the state, nor the interests of specific subjects of law do not create the need in any case of a civil offense to apply to the bodies endowed with jurisdictional powers. The state has the right to provide the opportunity to exercise the right to the holder, establishing an appropriate framework for appropriate action (Osipov, 1973, p. 94).

There is no consensus in science as to whether there is a type of sanctioned out-of-court operative influence on the violator of the exercise by the commissioner of his protection authority, which arose within the relevant protection-legal relationship as a result of the obligor's failure. Some scholars consider these actions a separate sanction that can be implemented by the person itself (Stoyakin, 1973, p. 15). In principle, we can agree with this position. Indeed, a sanction is a way of influencing an offender. As we have pointed out in previous sections of this paper, sanction is seen in the doctrine as a legal concept that encompasses

both liability and other remedies. In this context, we can consider as a sanction the further imposition on the debtor of the obligation to reimburse the costs associated with this, to pay a penalty. These sanctions are applied in court and are measures of civil liability.

At the same time, the civil law also includes a unilateral change or termination of the legal relationship at the discretion of the creditor (Article 611 of the CCU). In this case, this protective authority within the meaning of this regulation can be exercised both as a result of a relevant claim to the court, and by independent active behavior of the managed person. It is only important that the plaintiff has the authority to perform these actions, that is, in other words, such authority should be reflected in the law or agreement. And, although the doctrine does not end the controversy over the legal nature of such a phenomenon as prompt response to the offender (for example, V.P. Griбанov notes that these measures can not be attributed to sanctions because they are not general in nature and do not improve property state of the creditor (Griбанov, 2000, p. 34), in our opinion, these are still sanctions, moreover – sanctions in the form of civil liability, as they are listed as such in Article 611 of the CCU. Therefore, it is categorically impossible to agree with the opinion of E.O. Krashennnikov that the measures of civil liability are always associated with state influence, and the relevant rights can be exercised only with the help of a jurisdiction (Krashennnikov, 1990, p. 33-34).

But the inclusion of only the measures of civil liability in the concept of sanction does not exhaust its content. Among the types of material consequences of the offense – sanctions – there are also other types of influence that provide protection but do not impose additional burdens on the debtor. In particular, it is a question of restoration of the previous condition of the relation, performance of a duty in kind. Therefore, if the legislator provides the possibility of operative influence of the authorized person on the offender by individual application of liability measures, which are known to lead to a new burden on the obligated person, it is logical to give the creditor the opportunity to independently carry out a security obligation, when its implementation is to take personal action. For example, the creditor may independently choose the goods from a third party, where it is stored, if the debtor does not transfer it within the prescribed period. However, such a rule is still not widespread in the implementation of specific relationships, so we must state that the most appropriate measure of operational influence is the extrajudicial application of sanctions to the violator in the form of civil liability.

Belonging of protection rights to the right holder is authorized in the current civil legislation. It follows both from the general norm of Article 15 of the CCU and from certain norms of substantive law. The important factor is that the exercise of this protection and legal authority always occurs through the commission of active unilateral actions by the managed entity. As for the responsibilities of another party to the protection obligation – the debtor – the infringer, they consist in the passive behavior of the latter, the need to take measures of unilateral protective influence. Thus, the actions of the creditor in this situation are guaranteed (sanctioned) by law and constitute the material content of the law enforcement relationship, according to which the creditor's authority to take active action is opposed by the debtor's passive obligation not to interfere with his right.

If the measures of operative influence of a party in a civil legal relationship on the violator are recognized as one of the ways to protect civil rights and interests, then naturally they should be reflected in the main legal document governing civil relations – in the general part of CCU law. Moreover, the special rules governing certain binding relationships specify such sanctions. For example, one of the most effective means of prompt response to a breach of an obligation is a unilateral waiver of the contract (Luts, 2001, p. 68; Crome, 1900, p. 183). Thus, the landlord has the right to withdraw from the contract and demand the return of the thing, if the tenant does not pay for the use of the thing for three consecutive months (Part 1 of Article 782 of the CCU). As you can see, the creditor party for the breach of the obligation terminates the contract by unilateral action without recourse to the jurisdiction. This is the difference between this response and the termination of the contract at the request of the landlord (Article 783 of the CCU). In the latter case, the decision to terminate the contract is made by the court.

Examples of operational sanctions are often found in special rules of law governing private law. They can be represented by the refusal of the contract or the acceptance of improper performance (for example, Articles 678, 684, 848, 849 of the Civil Code of Ukraine, Articles 268, 270 of the Civil Code of Ukraine), the transfer of a counterparty that does not properly perform monetary obligations, to prepay, limit or terminate the provision of utilities and other services to consumers who violate the privileges of using them, etc. But, again, in general, there is no indication of such operational protection in the Civil Code.

It may not be necessary to introduce rules on operational measures of influence in Chapter

3 of the Civil Code, as it specifies the general methods of legal protection inherent in protection relations in any area of civil law regulation. Operational influence is used only in the implementation of security interactions, which are formed as a result of breach of obligation. In addition, the parties to the obligation may apply operational measures to the counterparty only when they are endowed with the necessary powers under the terms of the contract or by law. Thus, the operative influence on the violator of the right should be qualified as a special way of protection of civil rights, which derives from the obligatory legal relations. **Therefore, it must be specifically reflected in the main act of civil law, for example, in Chapter 51 of the CCU.** Moreover, this specification should relate not only to the definition of such tools and instructions on how to implement them, but also to determine the grounds, timing and procedure for its application.

#### 4. Features of temporal regulation of relations on operational protection.

If the normative act or agreement of the parties to the legal relations prescribes the possibilities, grounds and nature of the operational sanction to the defaulting debtor, the legality of their application to the counterparty in breach of the obligation, as a rule, does not cause discussion. In this case, the arbitrary interpretation of the creditor's right in such a case is illegal. Thus, if, for example, the contract defines the offense for which restriction can be applied, then, in case of legal fact – commission of such a violation – exercise of the creditor's right is lawful. Thus, according to the current Ukrainian legislation, the creditor is the owner of a certain protective subjective right to take operational measures as a unilateral action against a faulty counterparty. Guided by the statutory or contractual scope of powers that make up the content of this right, the entity may take actions that lead to the implementation of the authority enshrined in law. At the same time, the duty of the entitled person is not to go beyond the limits set for the most subjective right. This applies equally to the content of the right itself and the implementation of measures for its implementation. Undoubtedly, the content of subjective law includes the term of its existence.

However, as already mentioned, the legislation generally does not set deadlines for operational protection measures, and this, in our opinion, is its disadvantage. Based on the principles of pragmatism and reasonableness in the implementation of substantive and legal interactions in society and, given the regulatory imperfections of this segment of regulation, the issue of timeliness of operational measures

to influence the offender, we have devoted several special works (Guyvan, 2011, p. 95-102; Guyvan, Monograf., 2014, p. 384-408). One of the main conclusions obtained from these studies is that the duration of operational measures can not be unlimited, and even more so, not set by the lender at its discretion. We are convinced that the expediency of such sanctions (and hence the period of application) should be limited to the duration of the offense, this is the duration of the violation and can be recognized as a period for the application of operational non-jurisdictional measures, unless otherwise specified in the regulation. The relevant rule should be reflected in current civil law.

In the same cases, when the procedure and mechanism of application of certain operational sanctions to a defective counterparty is defined in a special legal act (this usually applies to the provision of various utilities and fixed in the relevant Rules), the entitled party to exercise the right to unilateral action must follow the procedure. of a certain duration provided by law. Moreover, this legislation does not allow the immediate application of these measures after the offense, postponing the implementation of this protection right until a certain point. In some cases, the application of operational measures requires repeated violations of the same right (systematic violation). It is clear that there must be some (reasonable) time between violations. After all, these one-time but repeated violations cannot be qualified as ongoing.

In our opinion, such an approach is justified: the legislation should contain a certain deferral period, intended for the violation to be "ripe" and the protective legal relationship regarding the application of operational influence on the violator to acquire its ability. As for the length of the period during which an operational sanction can be applied, then, again, the law usually does not contain any reservations. Strictly speaking, there is no legal requirement that would limit the period of application of the operational sanction provided for in Art. 615 CCU (unilateral withdrawal from the contract), say one or three years. Moreover, the period of application of operational measures can not be linked to the statute of limitations. In our opinion, this is the situation when, say, the landlord withdraws from the contract in 2021, because the tenant in 2016 for three months in a row did not pay for the use of property, although it can not be considered illegal, but it is illogical. Thus, if we talk about the timing of the operational impact on the violator as a form of protection of rights (Luts, 1993, p. 27), then only in the understanding of the minimum reasonable duration of the operational actions themselves.

### 5. Conclusions.

It is proposed to introduce relevant amendments in the civil legislation (e.g., to set out in a separate article an approximate non-exhaustive list of statutory powers of the creditor in case of breach of obligation by the debtor, as it is found in Art. 236 of the Commercial Code of Ukraine). However, the indication of the existence of such material interactions should not be limited to adjustment. The limits of realization of the specified powers should be established in the same article. In particular, with regard to the temporal regulation

of the mechanism for exercising these rights, it is necessary to point out the need to take relevant preventive actions within a reasonable period from the moment of detection of the violation and the limited duration of these powers. As for the duration of the human rights actions, fixed periods for the application of operational influence on the violator may be established in special norms for certain legal relations. A general rule should contain a note that the term of the relevant protected powers should be reasonable but, in any case, not to exceed the duration of the violation.

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## **СУТНІСНІ ХАРАКТЕРИСТИКИ НЕЮРИСДИКЦІЙНИХ СПОСОБІВ ПРАВОВОГО ЗАХИСТУ: ТЕМПОРАЛЬНИЙ АСПЕКТ**

**Анотація.** *Метою* роботи є вивчення питання про сутнісні та темпоральні ознаки неюрисдикційних способів захисту порушеного цивільного права; встановлення певних часових критеріїв охоронної здатності права, відмінної від часу реалізації позовного домагання. *Методи дослідження.* Використано загальнонаукові та спеціально-наукові методи пізнання, які дають змогу розглянути темпоральні чинники як елементи суб'єктивного матеріального права і правовідношення загалом та визначити їх місце в системі захисного механізму цивільного права. *Результати.* Досліджено основні доктринальні концепції стосовно принципів вчинення таких заходів впливу на правопорушника, як самозахист і застосування оперативних захисних засобів. Встановлено, що ці неюрисдикційні способи мають таке саме юридичне забезпечення, як і звернення особи до суду. Це повноваження являє собою певну сукупність дій носія порушеного суб'єктивного цивільного права, спрямовану на припинення порушення або інший захист без звернення до компетентного органу держави. Однак у темпоральному відношенні правове унормування має різний характер, для визначення строку захисту в такому характері позовна давність не застосовується. Для самозахисту важливо, щоб він відбувся в момент правопорушення, а для оперативних санкцій (позаяк закон у більшості випадків не встановлює час їх здійснення) необхідно керуватися загальними принципами добросовісності та розумності. У цьому сенсі розглянути окремі аспекти застосування таких оперативних дій, як відмова від договору, одностороння зміна чи припинення правовідношення за волевиявленням вірителя. Важливо лише, щоб віритель мав повноваження на вчинення вказаних дій, тобто ця правомочність має бути відображена в законодавстві або угоді. Також необхідно, щоб вказані дії перебували в часових межах адекватного реагування. *Висновки.* Унаслідок розгляду у статті зроблено висновок, що часові межі здійснення вказаних правомочностей необхідно встановити нормативно. Зокрема, у правовому акті варто вказати на необхідність вчинення певних попереджувальних дій упродовж розумного строку від моменту виявлення порушення та на обмеженість тривалості існування зазначених повноважень. Час відповідних охоронних повноважень має бути розумним, проте не перевищувати тривалість порушення.

**Ключові слова:** розумний строк, позовна давність, оперативний захист.

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## PROCEDURAL EFFECTS OF FILING A LAWSUIT AGAINST AN AFFILIATE OF A LEGAL ENTITY IN CIVIL PROCEEDINGS

**Abstract.** *The purpose* of the article is to determine the procedural consequences of filing a lawsuit against a branch office of a legal entity in civil proceedings. **Results.** The article continues to explore new aspects of the problem of improper defendant in civil proceedings. An example is a case in which the Supreme Court formulated the procedural effects of filing a lawsuit against an affiliate that is not a legal entity. Based on the analysis of court practice and theoretical provisions of civil proceedings, the possibility of applying replacement of an improper defendant in connection with filing a lawsuit against affiliate or representative office that is not a legal entity is studied. The definition of "improper defendant" in civil proceedings is revealed, as well as the connection of the parties with the parties to the disputed pecuniary legal relations. It is put forward the case law approach according to which filing a lawsuit against an improper defendant is a ground for rejecting to satisfy the lawsuit against such improper defendant. It is concluded that this approach provides for the existence of a civil proceeding that began and ended with respect to an "improper" defendant. The impossibility of the existence of a civil process with the participation of subjects who do not have civil locus standi, in terms of the lawsuit theory, an element of which the author calls the parties. **Conclusions.** Since the parties (along with the ground and the subject matter) are defined as elements of the lawsuit, the lawsuit cannot exist without the party (plaintiff or defendant). In this regard, it is argued that in the case of filing a lawsuit against an entity that does not have civil locus standi, the procedural institution of replacement of an improper defendant cannot be applied. At the same time, it is substantiated that if at the time of opening the proceedings there is a legal entity – the defendant, but it was incorrectly identified, then there are no grounds for rejecting to open proceedings. It is proposed to provide a mechanism for "determining the correct name of the legal entity – the defendant", referring to the tasks of the court at the stage of preparatory proceedings.

**Key words:** improper defendant, civil locus standi, legal entity, affiliate, lawsuit, termination of proceedings, civil case, civil proceedings.

### 1. Introduction

In terms of scientific publications, the author has already addressed the problem of the improper defendant in civil proceedings and considered it an obstacle to the effective judicial protection of the violated rights of the plaintiff, justifying the need to restore procedural powers to the courts (rights and, at the same time, duties) to replace, on their own initiative, the original, that is, improper defendant by the proper defendant (if the action is brought against a person other than the one to be sued) or additionally involve another person as co-defendant (in case of mandatory procedural complicity on the part of the defendant) (Koroied, 2018).

The issue (that is, the issue of an improper defendant) takes on a new meaning in the light

of the recent decision of the Supreme Court composed of the Joint Chamber of the Civil Court of Cassation in civil case 760/32455/19, which has considered the procedural effects of filing a lawsuit against an affiliate, while it is not a legal person, and has examined the question of refusal of a lawsuit on grounds of improper parties. In this case, the Supreme Court has concluded that cases in which the defendant is an affiliate or representative office are not subject to civil proceedings because there is no party sued to the civil proceedings, and, consequently, a civil dispute cannot be resolved (Judgment of the Supreme Court of the Joint Chamber of the Civil Court of Cassation, 2021).

Therefore, the option of applying replacement of an improper defendant in connection

with filing a lawsuit against an affiliate or representative office that is not a legal person is primarily of scientific and practical interest. The aim of the article is to consider this issue on the basis of the analysis of judicial practice and theoretical provisions of civil procedure.

## **2. Features and definition of an improper defendant in civil proceedings**

An improper defendant in civil proceedings is defined by procedural law scholars as a person established by the court to be not a probable actor of the legal obligations subject to the court judgement, and, in this connection, subject to replacement or a court decision on rejecting the lawsuit (Bychkova, 2010, p. 77). The Supreme Court defines an improper defendant as a person who has been sued by the plaintiff as a defendant established as not to be sued when there is evidence that another person is under an obligation to comply with the plaintiff's demands: proper defendant (Resolution of the Supreme Court composed of the panel of judges of the Third Judicial Chamber of the Civil Court of Cassation, 2020).

According to part 2 of art. 51 of the Civil Procedure Code of Ukraine, if an action is brought against a person other than the person to be sued, the court before the preparatory proceedings is completed, and in the case of a simplified action, before the opening hearing, at the request of the plaintiff, replaces the original defendant with the proper defendant, without closing the proceedings.

In other words, under this procedural provision, one defendant is replaced with another defendant with the status of proper one. In previous publications, the author has already established that the defendant must be a party to and materially concerned in the contentious pecuniary (civil, family, housing, labour, land, etc.) legal relationship with the plaintiff. It is precisely on such grounds that a defendant in civil proceedings is found "proper" (that is, the person to be sued) and it is in respect of such defendant that the lawsuit can be satisfied, that is, that the plaintiff has been provided with the remedy of his rights violated (realization of the objective of civil proceedings) (Koroed, 2018, p. 93).

On the basis of the provisions of, inter alia, civil law, housing law and labour law, the parties to these pecuniary legal relations are natural persons (employers, employees) and legal entities (executive committees of local councils, enterprises and organizations, employers). Moreover, this approach is reflected in the provisions of Civil Procedure Code of Ukraine, referring to defendants as to parties to civil proceedings (part 1, art. 48), and the parties as to participants in a case

(part 1, art. 42), who have rights and obligations (art. 43). The ability to have civil procedural rights and obligations, as well as the potential to be a participant in a case in general, is determined by the civil locus standi that all natural and legal persons have (part 1, art. 46). With regard to the parties (as participants in the case), the Civil Procedure Code of Ukraine further stipulates that the plaintiff and the defendant may be natural and legal persons, as well as the State (part 2, art. 48).

## **3. Features of judicial practice**

The court practice has long developed the approach that an action against an improper defendant is a ground for denying the lawsuit against such an improper defendant. For example, the Supreme Court, in a number of decisions, has taken the legal position that the defendant is an obligatory participant in a civil proceeding, the party to it. The main feature of the parties to a civil proceeding is their personal and direct interest; it is the parties that are the subjects of the legal relations over which the dispute has arisen. In addition, the defendant is the person whom the claimant identifies as infringer of his right. An improper defendant is a person sued by the plaintiff as a defendant but established to be not sued when there is evidence that another person, the proper defendant, is under an obligation to comply with the plaintiff's demands. Under part 4 of article 263 of the Civil Procedure Code of Ukraine, when selecting and applying the provision of law to contentious legal relations, the court takes into account the conclusions on applying the relevant provisions of law set out in the decisions of the Supreme Court. It is the right of the plaintiff to determine the defendants, the subject matter and the grounds of the dispute. On the other hand, it is the duty of the court to establish the identity of the defendants and the validity of the lawsuit in the case. That is, bringing an action against an improper defendant is an autonomous ground for rejecting a lawsuit (Resolution of the Supreme Court of the panel of judges of the Third Judicial Chamber of the Civil Court of Cassation, 2021). The Grand Chamber of the Supreme Court supports this approach, concluding that an action against an improper defendant does not constitute a ground for rejecting to open proceedings, since the replacement of an improper defendant is carried out in the manner prescribed by the Civil Procedure Code of Ukraine. On the basis of the results of the case consideration, the court refuses the lawsuit against the improper defendant and decides on the merits of the lawsuit of the proper defendant. That is, it is the right of the plaintiff to determine the defendants, the subject matter

and the grounds for the dispute. On the other hand, it is the duty of the court to determine whether the defendants are proper and the reasonableness of the lawsuit, and this duty is to be fulfilled during consideration of the case not at the commencement of the proceedings (Resolution of the Grand Chamber of the Supreme Court, 2018). Having found that the action has been brought against an improper defendant and that there are no specific procedural grounds for replacing an improper defendant with a proper defendant, the court dismisses the action against such defendant (Resolution of the Grand Chamber of the Supreme Court, 2020).

Therefore, this approach assumes the existence of a civil proceeding which has started and ended with an "improper" defendant. At the same time, the conclusion by the Supreme Court composed of the Joint Chamber of the Court of Cassation in the case 760/32455/19 generally denies the existence of a civil proceeding (action), which identifies an entity (such as an affiliate) that has no legal personality and therefore no civil capacity, as the defendant.

In our view, however, this position of the Supreme Court could be reinforced by other arguments. For example, it is well known that the parties (such as the plaintiff and the defendant), together with the ground and the subject matter, individualize lawsuit, which is of not only a theoretical but also of a practical significance in determining the identity or difference of the lawsuit with others. In civil procedure law, there is a rule on the inadmissibility of a second presentation and examination of a lawsuit that is identical with a lawsuit that has already been accepted by another court, or that has an enforceable judicial decision. The identification of the subject matter and the ground for an action helps the defendant determine what the claimant requires of him and on what grounds. Finally, knowing what the subject and ground of the action are, enables to establish the limits of court consideration correctly (Isaenkova, 1997, pp. 69–70). Since a lawsuit is a procedural means of initiating proceedings, the parties (as an element of the lawsuit) must therefore have the proper status of a natural or legal person, as defined by law. After all, just as a dead natural person cannot be a defendant in a civil proceeding, an organization without legal personality (or liquidated legal entity) cannot be a participant in a case. And since the parties (along with the ground and the subject matter) are defined as elements of the lawsuit, without the party (plaintiff or defendant), the lawsuit cannot exist.

That is, in the event of an action brought against a subject without civil locus standi, and the procedural replacement of an improper defendant (art. 51 of the Civil Procedure Code of Ukraine) cannot be applied. In practice, however, lawsuits by plaintiffs against dead natural persons (when, for example, the plaintiff is not aware of the death of the defendant, a natural person) or affiliates of legal persons (or liquidated or reorganized legal entities) are not excluded. In such cases, there can be no procedural succession, since under art. 55 of the Civil Procedure Code of Ukraine, the participation in the case of the successor of the party concerned or of a third party at any stage of the proceedings is possible if the death of a natural person or the termination of a legal person have occurred after the opening of the proceedings.

The Supreme Court, composed of a panel of judges of the First Trial Chamber of the Court of Cassation in case 676/5955/18-c, has agreed with the conclusion of the Court of Appeal on the annulment of the decision of the District Court and the termination of the proceedings, since the plaintiff brought an action against an affiliate of the enterprise, which under Article 95 of the Civil Code of Ukraine is not a legal person, and therefore does not have civil locus standi, and therefore cannot be a party to civil proceedings, while noting that the Court of Appeal, by virtue of its procedural powers under the Civil Procedure Code of Ukraine of Ukraine, has been deprived of the possibility to bring a proper defendant before the court of cassation, as well as no such procedural possibility exists for the court of cassation (Resolution of the Supreme Court composed of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation, 2019).

At the same time, in one of the cases challenging disciplinary sanctions, in which a court clerk brought an action against the head of the Chervonozavodsk District Court of Kharkiv, the Supreme Court of Ukraine noted that the lawsuits derive from labour law relations in which the district court is one of the parties. The very fact that the Chervonozavodsk District Court was not indicated in the statement of lawsuit by the defendant could not be a ground for denying it (Ruling of the Judicial Board for Civil Cases of the Supreme Court of Ukraine, 2020). We argue that this approach is more appropriate in ensuring accessibility of justice as a component of the right to go to court. Moreover, it is the task of the court at the stage of the preparatory proceedings, which begins with the opening of proceedings in the case, to make a final determination of the participants in the trial (para. 1

of part 1 and part 2 of art. 189 of the Civil Procedure Code of Ukraine).

In our opinion, therefore, this case cannot apply the resolution by the Grand Chamber of the Supreme Court that the provision "an application shall not be subject to civil proceedings" applies both to lawsuits that are not subject to civil proceedings and to lawsuits that are not subject to court consideration at all (Resolution of the Grand Chamber of the Supreme Court, 2018). Indeed, in our case, the "proper" defendant with civil locus standi existed in law and in fact at the time of the commencement of the proceedings, but the name of the defendant was incorrectly stated (that is, the name of the affiliate was erroneously stated instead of the name of the legal person itself) in the application by the plaintiff, who was legally ignorant. Therefore, in this case (case 760/32455/19 on recovery at work), it cannot be said that such a lawsuit was "not subject to a civil proceeding" or "could not be subject to court consideration at all." Consequently, we argue that this

excludes the possibility of implementing para. 1 of part 1 of art. 186 (a judge rejects commencement of proceedings if the application is not subject to civil proceedings) or para. 1 of part 1 of art. 255 (the court dismisses the proceeding by the ruling if the case is not subject to civil proceedings).

#### 4. Conclusions

In view of this, the author argues that article 51 of the Civil Procedure Code of Ukraine should provide for the mechanism of "definition of the correct name of the legal entity, the defendant", referring this to the tasks of the court at the preparatory stage. Thus, when the defendant is identified as a legal entity with civil locus standi, there will be procedural grounds for deciding on the replacement of an improper defendant (if the plaintiff disagrees with the court's determination of the correct name of the legal entity, the defendant). The author believes that this will enhance both the efficiency of civil proceedings in general and the guarantees of accessibility to civil justice.

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## **ПРОЦЕСУАЛЬНІ НАСЛІДКИ ПРЕД'ЯВЛЕННЯ ПОЗОВУ ДО ФІЛІЇ ЮРИДИЧНОЇ ОСОБИ В ЦИВІЛЬНОМУ СУДОЧИНСТВІ**

**Анотація.** *Метою* статті є визначення процесуальних наслідків пред'явлення позову до філії юридичної особи в цивільному судочинстві. *Результати.* У статті продовжується дослідження нових аспектів проблеми неналежного відповідача в цивільному судочинстві. Як приклад розглядається справа, у якій Верховний Суд сформулював процесуальні наслідки пред'явлення позову до філії, яка не є юридичною особою. На основі аналізу судової практики та теоретичних положень цивільного процесу досліджено можливість застосування інституту заміни неналежного відповідача у зв'язку з пред'явленням позову до філії чи представництва, які не є юридичною особою. Розкривається визначення поняття «неналежний відповідач» у цивільному процесі, а також з'ясовується зв'язок сторін з учасниками спірних матеріальних правовідносин. Наводиться вироблений судовою практикою підхід, згідно з яким пред'явлення позову до неналежного відповідача є підставою для відмови в задоволенні позову щодо такого неналежного відповідача. Робиться висновок, що зазначений підхід передбачає існування цивільного процесу, який розпочався та завершився щодо «неналежного» відповідача. Обґрунтовується неможливість існування цивільного процесу за участю суб'єктів, які не володіють цивільною процесуальною правоздатністю, з позиції теорії позову, елементом якого названо сторони. **Висновки.** Встановлено, що оскільки сторони (поряд із підставою та предметом) визначаються як елементи позову, то без сторони (позивача або відповідача) позов існувати не може. У зв'язку із цим аргументовано, що у випадку пред'явлення позову до суб'єкта, не наділеного цивільною процесуальною правоздатністю, процесуальний інститут заміни неналежного відповідача не може застосовуватися. Водночас констатовано, що якщо на момент відкриття провадження у справі юридична особа – відповідач існує, проте її було неправильно визначено, то підстави для відмови у відкритті провадження у справі відсутні. Пропонується передбачити механізм визначення правильного найменування юридичної особи – відповідача шляхом віднесення цього до завдань суду на стадії підготовчого провадження.

**Ключові слова:** неналежний відповідач, цивільна процесуальна правоздатність, юридична особа, філія, позов, закриття провадження, цивільна справа, цивільне судочинство.

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## SYSTEM OF PRINCIPLES OF EXERCISING SUBJECTIVE FAMILY RIGHTS

**Abstract. Purpose.** This publication aims to investigate scientific and theoretical conceptual approaches to statutory consolidation and practical application of the principles of exercising subjective family rights. **Research methods.** The contribution is based on general scientific and special methods of scientific knowledge. **Results.** The author has analyzed main doctrinal approaches to understanding the general legal (general) principles of exercising subjective rights; interbranch (civil law) principles of exercising subjective rights (the principles of free disposition; justice, good faith and reasonableness; inadmissibility of abuse in exercising subjective rights; guaranteed smooth exercise of subjective rights); branch principles of family law (the principles of personal exercise of family rights; priority of interests of family and the child; equality in the exercise of family rights; freedom of a family law agreement) and institutional principles of exercising subjective family rights. It has been proved that the system of principles of exercising subjective family rights comprises a multilevel (hierarchical) structure.

**Conclusions.** As a result of the study, the following system of principles of exercising subjective family rights has been proposed: 1) interbranch (civil law) principles of exercising subjective rights is applied in the subsidiary manner in the field of family law regulation, namely: the principles of free disposition; justice, good faith and reasonableness; inadmissibility of abuse in exercising subjective rights; guaranteed smooth exercise of subjective rights; 2) branch principles of family law towards exercising subjective family rights: the principles of personal exercise of family rights; priority of interests of family and the child; equality in the exercise of family rights; freedom of a family law agreement. At the same time, the author has justified the viewpoint that the branch principles of family law on the exercise of subjective family rights are independent in the system of legal principles.

**Key words:** principles of law, principles of exercising subjective rights, principles of exercising subjective family rights, family law, family legislation, civil law.

### 1. Introduction

V.P. Hrybanov initiated a detailed study of the system of principles of enforcement of rights. The scientist attributed the following fundamentals to the principles of exercising civil rights: legality, good faith, conformity of exercising the right with its purpose, the actuality of exercising subjective rights, cooperation in exercising subjective rights and performing legal duties, and economic efficiency (Hrybanov, 2001). Further scientific studies of the system of principles of exercising subjective rights, which were conducted by both civil law scholar – Ye.V. Vavylin, T.V. Deriuhina, O.O. Kot, M.O. Stefanchuk, Ye.O. Sukhanov, and Yu.V. Tsiukalo, and representatives of the science of family law – V.O. Kozhevnykova, M.A. Kondrashova, L.V. Krasnytska, and M.V. Mendzhul, allow stating that the system of principles

of exercising subjective family rights comprises a multilevel (hierarchical) structure. Moreover, O.O. Kot notes that exercising subjective civil rights is affected by three levels of principles: general legal, branch, and special (institutional) (Kot, 2017, p. 56), thus forming a three-level hierarchy for exercising subjective civil rights. At the same time, the analysis of contributions of the abovementioned scientists shows that a set of principles of exercising subjective family rights is a more complicated phenomenon which, in addition to general, branch, and institutional principles, also includes interbranch principles – principles (fundamentals) of exercising subjective civil rights.

### 2. General legal (general) fundamentals of exercising subjective rights

General legal (general) fundamentals of exercising rights are top in the hierarchy

of principles (fundamentals) of exercising rights. As for their specific list, the legal doctrine lacks a unified opinion in this context. Thus, a broad approach considers such general principles as universal categories, which are peculiar to any legal system as they reflect the best achievements of humankind and are generally recognized by international acts (Rabinovych, 2007; Skakun, 2010; Mendzhul, 2020). In the author's opinion, the above approach is too broad. Therefore, the author believes that the principles which are enshrined in the Constitution of Ukraine and have a profound influence on the legal system as a whole should be regarded as general legal (general) principles of exercising subjective rights. A comparison of relevant professional studies allows attributing the following general fundamentals (principles) to constitutional ones: legality, justice, freedom, humanism, and judicial protection of rights and legitimate interests (Pohrebniak, 2008; Skakun, 2010; Koziubra, 2015; Mendzhul, 2020).

### 3. Interbranch fundamentals of exercising subjective rights

Interbranch principles of exercising subjective rights are the relevant principles (fundamentals) of exercising subjective civil rights, as they 1) are general for the legal regulation of the entire system of private law relations; 2) are original towards family law principles (Krasytka, 2015; Vatras, 2020); 3) are applied in the subsidiary manner to regulate family law relations. Given the latter statement, V.O. Kozhevnykova treats the following principles as common to civil and family law: equality (equality of rights), property independence, the autonomy of the will, and contractual freedom (Kozhevnykova, 2013, pp. 40-42). M.V. Mendzhul also distinguishes a range of civil principles regulating family relations, namely: the principles of agreed (by agreement) regulation of relations between their parties, guaranteeing the secrecy of private life, the inadmissibility of arbitrary interference in private life (Mendzhul, 2020, pp. 93-94). Ye.O. Michurin, in his turn, highlights the principle of contractual freedom noticing that it is "not a fundamental defined by the Family Code of Ukraine but is fixed in the Civil Code of Ukraine and covers, in particular, an antenuptial agreement". At the same time, the scientist stresses that individual provisions for the agreement ("agreement form", "term of agreement", "alteration of agreement", "agreement termination", "invalidation of agreement") to be borrowed from civil law if provisions of a particular agreement between the parties in family law relations do not contradict the fundamentals of family (and civil) laws (Michurin, 2017, p. 113).

The study of research activities on the issue under consideration gives grounds to conclude that in terms of the most general approach, civil law principles (fundamentals) of exercising subjective civil rights are reduced to two basic pillars: discretionary nature and exercise of rights in good faith. Moreover, they "embrace" some "detailing" provisions. Thus, scientists attribute the following to the principle of free disposition: contractual freedom; the autonomy of the will of all participants in legal relations; state's non-interference in private law relations; independence and smooth exercising of rights. The elements of the principle of exercising rights in good faith are justice and reasonableness, the inadmissibility of abuse, the exercise of the right under its purpose, mutual respect, and cooperation of the parties in legal relations, etc. (Volkov, 2007; Vavylyn, 2009). Such a doctrinal separation of components of the principle of free disposition and exercise of rights in good faith allows identifying civil principles of exercising subjective rights, which have interbranch nature during the regulation of private law relations, as follows:

*free disposition:* Some scientists consider the principle of free disposition largely fundamental to the whole realm of private law (Vavylyn, 2009). At the same time, a free disposition is a complex and multifaceted category that is widely applied in legal doctrine without having its textual consolidation in the Civil Code. Although the principle of free disposition is not covered by art. 3 of CC among the fundamentals of civil law, N.S. Kuznietsova rejects doubts about its belonging to the latter (Kuznietsova, 2003, pp. 10–11).

Scientists express fairly diverse judgments about the essence of free disposition and its correlation with other legal principles. The author agrees with O.Ie. Kukhariev on the point that free disposition is based on the legal freedom of the subjects of legal relations, which: allows them to choose a behavioral pattern; allows them to determine the content of legal relations at their discretion, i.e., their rights and responsibilities; ensures a manifestation of the initiative of legal subjects, which encompasses the implementation of statutory freedom (Kukhariev, 2020, p. 12). It should be noted that O.O. Kot puts a similar content in such a principle of the exercise of subjective rights, which he defines as *freedom to exercise subjective civil rights* (the exercise of a subjective right depends solely on the will and discretion of a person) (Kot, 2017, pp.59-61);

– *justice, good faith and reasonableness.* Nowadays, the literature lacks a concurrent point of view on whether "justice", "good faith", and "reasonableness" should be considered as



a single principle or whether they should be distinguished (Tobota, 2020, pp.38-39). At the same time, art. 3 of CC defines these categories as one of the fundamentals of civil law, which, in the author's opinion, primarily concerns the process of enforcement of rights. It is assumed that that this is one of the central ideas of civil law, which "permeates" the entire array of civil rules and regulates the conduct of subjects within any civil law institution. Its legal consolidation is an expected result of social development and is dictated by the need to build social relations (including between participants in legal relations) based on high moral and honest behavior of subjects (Tobota, 2020, pp.38-39). The issue of the content of "justice", "good faith", and "reasonableness" remains controversial, but, in general, these principles are evaluative categories which allow exceeding the scope of traditional "positive law" and determining the compliance of the conduct of subjects predominant in society with moral and ethical requirements in those cases when it is impossible to regulate a particular legal matter "exhaustively";

– *inadmissibility of abuse in exercising subjective rights*. In general, it is about a legal principle which, on the one hand, sets requirements for the exercise of any subjective right, and on the other – determines the permissible limits of enforcement. As noted in the literature, law principles are the working mechanisms that are used to determine the constraints of possible and acceptable conduct of the parties in legal relations (Kuznetsova, 2000, p. 123);

– *guaranteed unimpeded exercise of subjective rights*. Objective law cannot ensure a total absence of obstacles in exercising subjective rights, but it can vest the authorized person with legal guarantees for exercising his/her right (Kot, 2017, p. 80). E.V. Vavilin emphasizes the need to create a legal environment that would be favorable for the operation of the mechanism of exercise of subjective rights. (Vavylyn, 2009, p. 17). This is ensured by statutory consolidation of the provisions prohibiting unlawful interference in private law relations, eliminating obstacles for exercising subjective rights, the system of methods for protecting subjective rights, judicial and extrajudicial mechanisms of protection of the rights and legitimate interests of the individual, ensuring the actual implementation of legal obligations in relation to authorized subject by other participants in legal relations, effective human rights activities of courts and other law enforcement agencies, etc.

#### 4. Branch fundamentals of exercising subjective family rights

As for the branch principles of family law in the context of exercising subjective rights,

the author considers it expedient starting with an analysis of the legislative provisions of foreign states.

Thus, in the Family Code of the Republic of Moldova dated 26.10.2000 No1316-XIV, as well as in FC of Ukraine, an individual chapter 2 of section 1 deals with the issues of realization and protection of family rights. Rules of the code enshrine the provisions of equality within family relations, which comprises the availability of equal rights and responsibilities spouses (part 1 of art. 5); impossibility of assignment of family rights and responsibilities to third parties (part 2 of art. 5); exercise of family rights at one's discretion, unless otherwise provided by law (part 1 of art. 6); exercise of family rights and performance of family duties should not violate the rights and legitimate interests of other family members and third parties (part 2 of art.6); legal protection of family rights, except their implementation contrary to the purpose of the rights or the law (part 1 of art.7); judicial and extrajudicial protection of family rights (parts 2, 4 of art. 7); protection of family rights in the ways prescribed by law (part 3 of art. 7); non-application of limitation of legal claims to the requirements arising from family relations, unless otherwise provided by law (part 1-2 of art. 8).

In the Code on Marriage and Family of the Republic of Belarus as of 09.07.1999 No. 278-Z, there is no separate subsection on the exercise and protection of family rights, but section 1 "General Provisions" prescribes the following principles: guaranteeing legal protection of family rights if they are exercised under their purpose (part 1 of art. 5); exercise of rights arising from family and marital relations without violating the rights and legitimate interests of others (part 2 of art.5); judicial and extrajudicial protection of family rights (art. 6), and others. At the same time, one can note the availability of a provision according to which the state priority task in social policy is to protect marriage, family, and care of motherhood, fatherhood, and childhood (art. 3).

The peculiarity of Georgian legislation is that family relations are regulated by the Civil Code. However, Book 5 "Family Law" of CC of Georgia as of July 26, 1997, No. 786-IIc does not contain general provisions of family law and does not fix a systematized list of basic principles for the exercise and protection of family rights.

Family relations in Romania and the Czech Republic are also regulated by the civil codes. At the same time, Book 2 "On Family" of CC of Romania as of July 17, 2009 and Part 2 "Family Law" of CC of the Czech Republic as of 03.02.2012 do not contain general provisions of family law.

A similar situation occurs in Polish law. Despite the availability of an independent source of family law – the Family and Guardianship Code of the Republic of Poland as of 25.02.1964, there is no rule on the regulation of family relations.

It can be said that not all foreign countries enshrined in law the general fundamentals (principles) of exercising family rights (fulfillment of family obligations). At the same time, their presence is evidence of a sufficiently detailed approach to the statement of the general provisions of family law as the regulatory framework of an independent branch of law, which is inherent in the latest family codes.

Therefore, the study of scientific publications, a comparative examination of national and foreign laws allows identifying the following branch principles of subjective family rights:

– *the principle of personal exercise of family rights*. As defined in Part 1 of art.14 of the Family Code, family rights are closely related to a person and as such may not be transferred to another person. Part 2 of this article includes exceptions to the rule: the rights of a child or a person whose legal capacity is limited are exercised by their legal representatives (or they provide relevant assistance in exercising).

Based on data found in literature, it is concluded that family rights are exercised independently by the person endowed with them (Kozhevnykova, 2019, p. 210) and cannot be transferred to other subjects on basis of an arrangement (Dutko, 2013, p. 136). In general, the author agrees with the above, as family rights are mostly of personal and non-monetary nature and therefore cannot be alienated or delegated. At the same time, FC contains norms which, in the case of relevant conditions or valid reasons, allow exercising some family rights *procedurally (the author's)* by proxy (e.g., submission of an application for marriage registration to the Registry Office) (part 3 of art.28 of FC), and norms which strongly prohibit the participation of a representative in the exercise of family rights (art. 34, art. 223 of FC). Thus, it should be borne in mind that this rule is not absolute and, in some cases, it is permissible to exercise some family rights (primarily property ones) by proxy provided that it does not contradict the law and legal relations;

– *the principle of priority of family and child interests*. This principle appears from some provisions of the Family Code. Therefore, one of the tasks of family laws is to promote the family as a social institution and a union of individuals (part 2 of art.1); the State protects the family, childhood and creates conditions for the strengthening of the family (part 1 of art. 5); regulation of family relations should be carried out with utmost consideration

of the best interests of a child and family members with disabilities (part 8 of art. 7); parental rights cannot be exercised against the interests of the child (part 2 of art. 155.) According to art. 11 of the Law of Ukraine “On Protection of Childhood”, the subject of the main concern and the main duty of parents is to ensure the interests of their child.

The above fundamental (principle) is also found in case law. The judgments of the European Court of Human Rights have repeatedly stated that the children’s interests might be opposed to those of their parents (Olsson v. Sweden (No. 2) dated 27.11.1992 p., Series A, No. 250, arts. 35-36, § 90), and special attention should be paid to the most important interests of the child, which by their importance and nature should prevail over the interests of parents (Hunt v. Ukraine dated 07.12.2006, No. 31111/04, § 54).

The judgments of the Supreme Court regularly emphasize that the rights of parents in relation to the child are derived from the rights of the child to the harmonious development and proper upbringing; the cases involving a child must, first of all, determine and take into account the interests of the child, according to objective circumstances of the dispute, and then – the rights of the parents (**resolutions as of 24.04.2019 in the case No. 300/908/17 (proceedings No. 61-44369sv18); as of 06.06.2019 in the case No. 495/2106/17 (proceedings No. 61-592sv19);** as of 30.03.2021 in the case No. 542/1428/18 (proceedings No. 61-18612sv19). Even in case of any legal conflict, incompleteness, vagueness, or contradiction of the legislation which regulates controversial legal relations concerning the interests of the child, taking into account provisions of art. 3 of the Convention on the Rights of the Child, priority should be given to the best interests of the child (Judgement of the Supreme Court as of 14.05.2021 in case No. 548/2434/19 (proceedings No. 61-2090sv21)).

In general, the author believes that the priority of family and child interests should be decisive in addressing the availability or lack of abuse of rights in exercising subjective family rights;

– *the principle of equality in exercising family rights*. This pillar is a logical extension of the general principle of legal equality of participants in public relations, which is notably peculiar to the regulation of private law relations and follows from some provisions of FC: women and men enjoy equal rights and assume equal responsibilities in family relations, marriage, and family (part 6 of art.7); the mother and the father assume equal rights and responsibilities in respect of the child irrespectively of whether they were married to each other or

not (part 1 of art. 141; part 3 of art. 11 of the Law of Ukraine “On Protection of Childhood”); children have equal rights and responsibilities towards their parents regardless of whether their parents were married to each other (art. 142), including, towards equal upbringing by parents, etc.

The importance of distinguishing this fundamental as a principle of exercising subjective family rights is to root out stereotypes that still prevail in the public consciousness and determine the actual impact on the practice of legal regulation through the unreasonable provision of “benefits” to individual subjects of family relations (“husband” – the head of the family, who must ensure its maintenance and has a “deciding vote” in resolving issues of family life; “a minor child must live with his mother”; “the older child has “more rights” to the property of the parents”, etc.).

In this context, it is essential to emphasize that Parliamentary Assembly Resolution No. 2079 (2015) “Equality and shared parental responsibility: the role of fathers” highlights the importance “to transcend gender stereotypes about the roles supposedly assigned to women and men within the family and is a reflection of the sociological changes that have taken place over the past fifty years in terms of how the private and family sphere is organized”.

The judgments of the European Court of Human Rights have repeatedly paid attention to the equality of parents’ rights in disputes over child custody and the waiver of any gender-based presumptions (Judgements in the case of Sommerfeld v. Germany dated 08.07.2003, Zaunegger v. Germany dated 03.12.2009). Moreover, Judge Carlo Ranzoni representing the Principality of Liechtenstein expressed his opinion in the case “M.S. v. Ukraine” (judgement dated 11.10.2017) focusing on “an important and controversial issue peculiar to Ukraine – the “presumption in favor of the mother” in matters of child care”. The judge noted that such a presumption is not confirmed at the UN level, does not emerge from the Declaration or case law of the European Court, and does not correspond to the policy of the Council of Europe and most member states of the Council of Europe. “Due to the presumption in favor of the mother, national courts reduced the scope of their assessment limited themselves to the identification of the absence of “exceptional circumstances”, and refused to examine further circumstances that would be decisive in guaranteeing the best interests of the child” (Lohvinova, 2017, p. 127).

As of today, it should be noted that national courts follow the principle of equal rights of parents in the upbringing of a child while dealing

with family disputes. Thus, the Supreme Court is strongly focused on protecting the rights and interests of mother and father as equal participants in family relations and avoids discriminatory treatment or humiliation of the father’s role in its judgments. At the same time, the Supreme Court notes that regulations on equal rights and responsibilities of parents in the upbringing of a child cannot be interpreted to the detriment of the interests of the child. When deciding on cases of determining of a child’s place of residence, establishing the procedure for participation in the upbringing of the child, **granting permission for a minor child to travel abroad without the consent of the father**, the courts must principally protect the rights and interests of the child by identifying what best suits his/her interests”; “equality of parents’ rights in relation to the child is derived from the child’s rights and interests for the harmonious development and decent upbringing” (Resolution as of 04.07.2018 **in the case No. 712/10623/17 (proceedings No. 14-244tss18)**; as of 17.10.2018 in the case No. 402/428/16-ц (proceedings No. 14-327 цс18); as of 18.03.2019 in the case No. 215/4452/16-ц (proceedings No. 61-1145св19); as of 20.05.2021 in the case No. 686/27095/19 (proceedings No. 61-2826св21);

– *the principle of freedom of a family law agreement*. As noted in the literature, a characteristic feature of private law is that each of its branches has its own tool of the dispositive method of regulation; accordingly, a family law (family) agreement performs these functions within family law (Kyslova, Kokhtenko, 2019, p. 39). Family law agreements should be understood as agreements concluded by individuals and aimed at establishing, modifying, or terminating family rights and responsibilities (Kharytonov, 2006, p. 54).

The principle of freedom of a family law agreement in exercising subjective family rights is primarily realized in the provisions of part 2 of art.7 of FC according to which family relations can be settled by arrangement (agreement) between their participants. The regulation of family relations by arrangement (agreement) of the parties is also stipulated by art. 9 of FC: subjects of family law can regulate their relations by arrangement (agreement), if it does not contradict statutory requirements and the moral principles of society (part 1).

##### **5. Institutional fundamentals of exercising subjective family rights**

The distinguishing of institutional principles of exercising subjective family rights as the lowest link in the hierarchical system of principles of exercising subjective family rights is an individual and rather controversial

issue. Thus, M.V. Mendzhul marks the option of identifying special principles which are the basis for regulating homogeneous family relations. For example, the institution of marriage is based on the principles of monogamy, voluntary marriage, and freedom of divorce (Mendzhul, 2020, p. 92). The scholar justifies her standpoint by referring to the legal doctrine of the Czech Republic, where the principles of family law are divided into general (the principle of child welfare, the principle of solidarity (mutual assistance), the principle of equality) and the principles which concern some types of family law relations (principle of enhanced protection of marriage and parenthood, principle of monogamy, principle of voluntary marriage, principle of freedom of divorce, principle of equality of men and women in marriage, equality of children born in and out of wedlock) (Mendzhul, 2020, p. 60). In addition to general family principles, N.S. Sherstnieva also highlights the institutional principles of family law by dividing them into: priority (providing priority protection of the rights and interests of minors; priority of family upbringing of children, care for their welfare), mutual (the principle of the voluntary marriage of man and woman; equality of marital rights in the family; settlement of intra-family issues by mutual consent; enforcement of the rights and interests of family members with disabilities) and values (ensuring quality of life, the safety of family, motherhood, fatherhood, and childhood) (Sherstneva, 2007, pp. 12-13).

Therefore, in terms of the doctrine, there are all grounds for distinguishing institutional principles for exercising subjective family rights (e.g., the principle of priority of family

upbringing of the child (part 3 of art. 5 of FC) or the principle of a joint exercise of parental rights (part 1 of art. 157 of FC). In the context of their specific list (system), it is the subject of specialized research on the exercise of individual types of subjective family rights.

## 6. Conclusions

Based on the analysis of scientific publications, comparative study of the rules of civil and family law, foreign law, as well as case law, the author believes that the system of principles of exercising subjective family rights comprises:

1) interbranch (civil) principles of exercising subjective rights, which are applied in a subsidiary manner in family law regulation, namely: the principles of free disposition; justice, good faith and reasonableness; inadmissibility of abuse in the exercise of subjective rights; guaranteed smooth exercise of subjective rights);

2) branch principles of family law for exercising subjective family rights, namely: the principles of personal exercise of family rights (part 1 of art. 14 of FC); priority of family and child interests (part 2 of art. 1, part 1 of art. 5, part 8 of art. 7 and part 2 of art. 155 of FC); equality in the exercise of family rights (part 6 of art. 7, part 1 of art. 141, part 1 of art. 142 of FC, etc.); freedom of a family law agreement (part 2 of art. 7 of FC, art. 9 of FC).

At the same time, the author holds that the branch principles of family law for exercising subjective family rights are independent in the system of legal principles, as they are derived from common law principles, interbranch principles of private law and branch principles of family law, reflect features and specify legal regulation of relations towards exercise (implementation) of subjective family rights.

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## СИСТЕМА ПРИНЦИПІВ ЗДІЙСНЕННЯ СУБ'ЄКТИВНИХ СІМЕЙНИХ ПРАВ

**Анотація. Мета.** Запропонована публікація має на меті дослідити науково-теоретичні концептуальні підходи до нормативного закріплення та практичного застосування принципів здійснення суб'єктивних сімейних прав. **Методи дослідження.** Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання. **Результати.** Проаналізовано основні доктринальні підходи до розуміння загальноправових (загальних) засад здійснення суб'єктивних прав; міжгалузевих (цивільстичних) засад здійснення суб'єктивних прав (принципів диспозитивності, справедливості, добросовісності й розумності, недопустимості зловживання під час здійснення суб'єктивних прав, гарантованого безперешкодного здійснення суб'єктивних прав); галузевих засад сімейного права (принципів особистого здійснення сімейних прав, пріоритетності інтересів сім'ї та дитини, рівності під час здійснення сімейних прав, свободи сімейно-правового договору) та інституційних засад здійснення суб'єктивних сімейних прав. Доведено, що система принципів здійснення суб'єктивних сімейних прав являє собою багаторівневу (ієрархічну) структуру. **Висновки.** У результаті дослідження констатовано, що систему принципів здійснення суб'єктивних сімейних прав становлять, по-перше, міжгалузеві (цивільстичні) принципи здійснення суб'єктивних прав, що в субсидіарному порядку застосовуються у сфері сімейно-правового регулювання (зокрема, принцип диспозитивності, принцип справедливості, добросовісності й розумності, принцип недопустимості зловживання під час здійснення суб'єктивних прав, принцип гарантованого безперешкодного здійснення суб'єктивних прав); по-друге, галузеві принципи сімейного права щодо здійснення суб'єктивних сімейних прав (зокрема, принцип особистого здійснення сімейних прав, принцип пріоритетності інтересів сім'ї й дитини, принцип рівності під час здійснення сімейних прав, принцип свободи сімейно-правового договору). При цьому обґрунтовується позиція, що галузеві принципи сімейного права щодо здійснення суб'єктивних сімейних прав посідають самостійне місце в системі правових принципів.

**Ключові слова:** принципи права, принципи здійснення суб'єктивних прав, принципи здійснення суб'єктивних сімейних прав, сімейне право, сімейне законодавство, цивільне право.

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## SPECIFICITY OF CONSUMER PROTECTION IN CONTRACTUAL OBLIGATIONS

**Abstract.** *The aim* of the article is a scientific and legal analysis of the relations of consumer protection in contractual obligations in modern conditions and a focus on the specificities of such protection. **Results.** The article provides a scientific and legal analysis of the relations between the protection of the rights of natural persons – consumers – in contractual obligations in modern conditions and highlights their specificities. The provisions of the current legislation are analysed, as well as the main doctrinal approaches to understanding consumer contractual obligations and protection of consumers as parties to them. The study highlights that consumer relations, despite their civil nature, objectively require State intervention to protect the more vulnerable side of these relations. However, the author argues that this intervention does not imply that such relations are of public law, but they should be considered as of private law. The consumer contract as the basis for consumer contractual obligations is underlined. For example, it is proved that a consumer contract organically integrates the limitations on freedom of contract of civil-law obligations due to its specificity. The author considers that freedom of contract in consumer relations undergoes transformation in modern conditions (subject to some limitation as compared to classical understanding) in order to create an effective balance between the interests of a strong and a weak party to a contractual relationship. **Conclusions.** It is argued that civil law obligations arising under consumer contracts have their own specificity, determined by their objective and the parties. In addition, it is argued that enhanced consumer protection in consumer relations should be considered an integral and organic part of them, and not merely an additional measure on the part of the State. Finally, the author grounds the increased protection of individuals in consumer contractual relations and the need for State intervention in such relations due to the consumer's natural rights and objective vulnerability to the business entity.

**Key words:** obligations, consumer, consumer protection, balance of interests of parties.

### 1. Introduction

In recent decades, the commercial sector undergoes evolution, globalization and liberalization due to its technological development, digitization and internationalization. Obviously, this is a certain development of social relations, which quite effectively facilitates cross-border trade and access to goods, works and services for consumers from all over the world. As a result, consumers have more opportunities to obtain goods, jobs or services. For example, consumers ordering certain goods with the help of the latest technologies (smartphone, tablet, etc.) via the Internet save a lot of time for shopping, moreover, being able to receive delivery of such goods to a certain place. However, despite the positive aspects of this development, a corresponding increase in consumer insecurity as a weaker party to the relations should be emphasised. Therefore, considering that

the development of consumer relations actually leads to their transformation, new research and rethinking of previous approaches to their understanding are required.

The aim of the article is a scientific and legal analysis of the relations of consumer protection in contractual obligations in modern conditions and a focus on the specificities of such protection.

Consumer law is predominant in the regulatory mechanism for private law relations involving a natural person who purchases a product for private purposes without the intention of making a profit. A large part of the consumer's needs is vital (food, water, medicine, utilities, etc.) and the individual is actually dependent on the economic unit that satisfies such needs and does not always have a choice. Therefore, consumer relations, despite their civil nature, objectively require State intervention to protect the more vulnerable side of these relations. At

the same time, it should be noted that such intervention does not make these relations public.

Consumer law applies to a natural person since the occurrence of contractual obligation or at the pre-contractual stage. Therefore, safeguard and protection of consumer rights should be considered in relation to contractual obligations. For example, under part 1 of article 509 of the Civil Code of Ukraine 435-IV of 16 January 2003 (hereinafter referred to as the CC), an obligation shall be a legal relation where one party (a debtor) shall be obliged to perform an action (to transfer property, to do a job, to render service, to pay money etc.) to the benefit of the other party (a creditor) or to abstain from a certain action (negative obligation), while the creditor shall have the right to claim from the debtor to fulfil his obligation. One of the grounds for civil obligations is a contract.

Contractual obligation is a legal relationship in personam between legally equal and proprietary autonomous persons, arising on the grounds of a concluded contract, which expresses their common will to achieve civil results of a pecuniary or non-pecuniary nature, that arises in case of some debtor's actions in a manner consistent with the creditor's claim and does not affect the rights and legitimate interests of the third persons, non-parties to this legal relationship (Sibilov, 2003).

## **2. Scientific approaches to defining the concept of "freedom of contract"**

As a general rule, civil obligations shall arise on the basis of one of the fundamental pillars of civil law, that is, freedom of contract (part 3 of article 6; part 1 of article 627 of the CC of Ukraine).

In this context, S.A. Perebny has formulated the doctrinal definition of freedom of contract rather succinctly. For example, the author considers that freedom of contract is inherent in civil relations and is recognized and guaranteed by the civil legislation of Ukraine by their ability to independently shape and express their will to make rules of conduct (Pohribnyi, 2009, p. 89). Therefore, in accordance with the principle of freedom of contract, no one may be compelled to enter into civil relations, to choose a counterparty or to define the terms of a contract.

Obviously, as a general civilizational principle, freedom of contract is extremely important in contractual relations, but such freedom cannot be unlimited. For example, according to para. 2 of part 3 of article 6 of the CC of Ukraine, the parties to a contract may not deviate from the provisions of civil law unless expressly specified in these regulations as well as in the event that mandatory nature of the provisions of the civil law results from their content or the substance of relations between

the parties. However, under part 2 of article 627 of the CC of Ukraine, contracts involving a natural person, a consumer, take into account the requirements of consumer protection legislation. Consequently, these provisions reveal that, in certain cases and for a reasonable purpose, freedom of contract may be limited by peremptory provisions of law.

However, A. Osetynska argues that the CC of Ukraine (article 627) proclaims the principle of freedom of contract, but when concluding consumer contracts, the formation of their terms and conditions is subject to considerable restrictions, as both the procedure for concluding and developing the terms of the contract shall be determined primarily by the peremptory provisions of consumer protection law, moreover, in the manner that provides consumers with privileged terms and establishes additional responsibilities for the entrepreneur. Moreover, specificities of consumer protection imply domination of special methods of protection over the generally civil ones established by the CC of Ukraine (article 16) (Osetynska, 2006, p. 93). T.Ya. Skhab-Buchynska argues that the restriction of freedom of contract may be established in law provisions, as well as any other legal restrictions, and concludes that the proliferation of consumer contract is one of the legal instruments by which the legislator extends or narrows freedom of contract (Skhab-Buchynska, 2017).

In our opinion, consumer contracts do not imply that freedom of contract principle is "substantially limited" or "narrowed," but rather that the principle of freedom of contract in consumer contracts differs in expression from the classical understanding of freedom of contract. Nowadays, given the globalization of consumer relations and the increasing status of consumers in world markets, freedom of contract in its fundamental sense is changing. That does not mean it has lost its historical identity. Rather it implies that freedom of contract in consumer relations is transformed (subject to a certain limitation as compared to classical understanding) in order to effectively balance between the interests of a strong and a weak party to a contractual relationship. In other words, it concerns: 1) freedom of contract in commercial relations and 2) freedom of contract in consumer relations (Pozhodzhuk, 2020).

Therefore, freedom of contract in consumer relations takes into account reasonable intervention in a civil law relationship by the State in order to protect a more vulnerable part to that relationship. It is the dual nature of freedom of contract that enables to fully cover the legal and regulatory mechanism for consumer relationship by peremptory provisions of private



law rather than public law. The identification of contractual freedom in consumer relations entails that it is already limited, as it is well established for this relationship, rather than that freedom of contract (in the classical sense) is constantly restricted in consumer relations.

With regards to the doctrinal approaches to the consumer contract, V.Ya. Horblianskyi argues that to classify contracts, including the provision of services, as consumer ones, consideration should be given to the combination of two obligatory elements, namely, the parties and the purpose for which the contract is concluded. The parties are, on the one hand, the customer, a natural person, and, on the other hand, the executor, an entrepreneur, who has the necessary legal personality. The purpose of the contract is to meet a personal need, which is not related to business (Horblianskyi, 2016). Similarly, A.V. Fedoronchuk argues that the main criteria for classifying a civil contract as a consumer one are, first and foremost, the specific parties and the special purpose for which the contract is concluded. If the party to the contract is a natural person concluding it for personal (domestic) use, the contract can be classified as a consumer one (Fedoronchuk, 2015). However, we argue that the consumer contract, taking into account its specific parties, also has a specific purpose, which is not only to satisfy the personal needs of the consumer. For example, the purpose of a business entity that sells goods, renders services or performs work in favour of an individual is to make a profit, and the purpose of the consumer is to satisfy personal needs. Therefore, such different purposes of the business entity and the natural person-consumer, though aimed at satisfying the interests of both parties, make the purpose of the consumer contract specific.

A modern civil regulatory mechanism governing contractual relations involving consumers should be based on a balanced combination of mutually beneficial (mutually conditioned) interests of consumers and entrepreneurs engaged in the sale of goods, performance of works, rendering services (Bogdan, 2015). For example, civil liability law regulates the basic relationship between the natural person and the consumer. Consumer law, as part of civil law, regulates such relations on the basis of their special nature and the status of a natural person. This shows some symbiosis and synergy. At the same time, the specificity of consumer law is in the use of peremptory provisions in regulating these relations.

The issues of State interference in private law relations have been studied repeatedly by representatives of foreign legal science. For example, Professors L.S. Sealy and R.J.A. Hooley

argue that it is important to gain some insight into the relationship between consumer law and commercial law. Some consider consumer law as an application of general commercial law principles in a specific context, although they are largely amended by special consumer legislation (Reynolds, 1982, pp. 93-110). But the differences between the two seem far more fundamental than this approach envisages.

While commercial law deals with transactions in which both parties interact in the course of business, consumer law primarily deals with transactions between ordinary natural persons (consumers) and those who provide goods and services on a commercial basis. While commercial law is based on the assumption that entrepreneurs have roughly equal bargaining power, consumer law provides that the consumer and the business enterprise are economically unequal. In addition, when commercial law is beneficial to businessmen to regulate their own affairs through commercial turnover, such turnover is only peripheral in consumer transactions. These fundamental differences in philosophy mean that while commercial law is not interventional but rather essentially pragmatic in nature, consumer law interferes with contracts between consumers and business suppliers and, in fact, is an instrument of social policy (Sealy, Hooley, 2009, p. 16).

In this context, V.I. Obratcova argues that the focus of the State and society on the protection and defence of the rights and interests of consumers derives from the importance of the protection and safeguard of those rights and interests, and the need to ensure social stability and the political security of the State (Obratcova, 2018). We advocate this perspective since the appropriate degree of protection and safeguard of consumers' rights actually results in ensuring the rights and freedoms of people as society in general, thus achieving the level of law-based State. And in accordance with the constitutional maxim, provided for by Article 1 of the Basic Law of the State, Ukraine is a sovereign and independent, democratic, social and law-based State.

### **3. Specific protection of consumer as parties to contractual obligations**

However, according to an apt statement by Professor O. Bar-Gill, natural persons make mistakes. They suffer from imperfect information and imperfect rationality, and therefore may fail to make choices that maximize their preferences. Few people question the truth of this proposition. Even the most insistent critics of behavioural economics recognize that people "often make serious mistakes in deciding important matters" (Epstein, 2006). The question is not whether people make mistakes. Sure,

they do. The question is whether these mistakes merit legal intervention (Bar-Gill, 2008).

According to the Organization for Economic Cooperation and Development, consumer laws, policies and practices limit fraudulent and misleading and unfair commercial conduct. Such protection is necessary to build consumer confidence and to establish a more balanced relationship between business and consumers in commercial transactions (The Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999). At the same time, according to S.Yu. Baranov, the State regulatory mechanism for relationship involving consumers through special consumer protection legislation, which partially restricts the civil rights of consumer counterparts (sellers, producers, performers), along with freedom of business, is one of the internal economic functions of the State (Baranov, 2012). Therefore, the proper protection and safeguard of the rights of the individual results in the protection and safeguard of the rights of the entire society.

With regards to the essence of consumer relations and the need for State intervention in such relations to properly protect and safeguard consumers' rights in the contractual obligations, the Constitutional Court of Ukraine stated in Decision 15-rp/2011 of November 10, 2011:

*"The Constitutional Court of Ukraine also proceeds from the fact that the State contributes to ensuring the population's consumption of quality goods (works and services), to increasing the well-being of citizens and to the general level of confidence in society. However, the consumer generally objectively lacks the knowledge necessary to make the right choice of products (works, services) from the market and to evaluate contracts for their acquisition, which often are a blank or other standard form (part 1 of article 634 of the Code) (435-15). Therefore, there is a risk for the consumer to be mistaken, or even misled, in purchasing inappropriate credit services. Hence, the State provides special protection to the weaker party to economic relations, as well as the de facto rather than formal equality of the parties to civil relationship, by defining the specificities of contractual legal relations in the field of consumer finance and limiting the principle of freedom of contract. This is done by establishing a special procedure for concluding civil contracts for consumer credit, challenging them, controlling the content and allocating responsibilities between the parties to the contract. In this way, the State simultaneously protects the bona fide seller of goods (works, services) from possible abuse by consumers"* (Decision of the Constitutional Court of Ukraine in the case on the constitutional appeal of citizen Stepanenko Andriy

Mykolayovych regarding the official interpretation of the provisions of paragraphs 22, 23 of Article 1, Article 11, part eight of Article 18, part three of Article 22 of the Law of Ukraine "On Consumer Protection" with the provisions of the fourth part of Article 42 of the Constitution of Ukraine (case on protection of the rights of consumers of credit services)).

In this Decision, the Constitutional Court of Ukraine stated quite unequivocally that in consumer finance relations: 1) the consumer is the weaker party to economic relations; 2) the de facto equality of the parties in such civil relationship are ensured by State interference in these relations. Therefore, given that consumer finance relations are essentially consumer-oriented, this conclusion can be extrapolated to consumer relations in general.

Furthermore, the doctrine of civil law covers similar considerations. For example, according to V.V. Bogdan, a legal balance of the interests of the parties should be achieved, on the one hand, by granting additional ("special") rights to the consumer, their enhanced protection, on the other hand, should not encourage the abuse of the rights granted to them by law in order to exploit their priority position with bad faith (Bogdan, 2015).

Moreover, it should be noted that the Decision of the Constitutional Court of Ukraine vividly illustrates the consideration of the interests of both parties to the consumer contract and not only of the consumer. Such perspective is appropriate, since State intervention in consumer relations along with protection of the natural person shall not allow that person to abuse the right provided. Therefore, State intervention shall be based on a fair balance of interests among the parties to those contractual obligations.

With regard to enhanced consumer protection in contractual obligations, the focus should also be on the direct link between such protection and the consumer rights of an individual. According to A.V. Rabinovych, the fundamental and indispensable manifestation of every human being's existence is its consumption of various pecuniary and non-pecuniary (spiritual, social) goods, that is, its consumer activities. Perhaps, it is not an exaggeration to say that the existence of people is primarily their consumption. Without engaging in a particular consumer activity, no one can live and exist. The ability to engage in consumer activities is reflected, inter alia, in the concept of consumer rights. These rights (abilities) depend primarily on the level of social development achieved, economic, social, spiritual and so forth. After all, a person can consume only those goods that are produced in the process of social production (both pecuniary and non-pecuniary). Consequently,

these abilities are generally social (socio-natural) in origin. In other words, they are generally social ("natural") consumer human rights (Rabinovych, 2007).

Although advocating the idea of natural consumer rights, we argue that the protection of such rights of the consumer as a party to contractual obligations should be based on providing the individual, as a weak party to the consumer contract, with the priority to be protected. Therefore, the author agrees with V.J. Horblianskyi that the possibility of a consumer contract being concluded by an entrepreneur or a legal person to meet the personal needs of its participants belies the principle of a "weak party" of the contract. As a legally aware party to contractual relations, legal entities and entrepreneurs exercise the right to protection, not applying the provisions

of Law of Ukraine 1023-XII "On the Protection of Consumers' Rights" of May 12, 1991, and if these parties are classified as consumers, this may lead to abuse of their rights as consumers (Horblianskyi, 2016).

#### 4. Conclusions

The literature review and analysis of current legislation and court practice enable to conclude that the natural rights of consumers and their objective vulnerability to the business entity are basic factors that determine the specificity of consumer protection of individuals in contractual obligations. This specificity implies that the state intervenes in consumer contractual relations with a view to protecting rights of natural persons as a vulnerable party. Moreover, the different interests of both parties to the contract are considered in order to ensure a fair balance of such interests.

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## **СПЕЦИФІКА ЗАХИСТУ ПРАВ СПОЖИВАЧІВ У ДОГОВІРНИХ ЗОБОВ'ЯЗАННЯХ**

**Анотація.** *Метою* статті є проведення науково-правового аналізу відносин захисту прав споживачів у договірних зобов'язаннях у сучасних умовах та висвітлення особливостей такого захисту. **Результати.** У статті здійснюється науково-правовий аналіз відносин захисту прав фізичних осіб – споживачів у договірних зобов'язаннях у сучасних умовах та висвітлюються особливості цих відносин. Проаналізовано положення чинного законодавства, а також основні доктринальні підходи до розуміння споживчих договірних зобов'язань і захисту прав споживачів як їх учасників. Звертається увага на той факт, що споживчі відносини, незважаючи на їхню цивільно-правову природу, усе-таки об'єктивно потребують державної інтервенції з метою захисту більш вразливої сторони цих відносин. При цьому зауважено, що зазначена інтервенція не робить такі відносини публічно-правовими, а повинна вважатися складовою частиною приватноправових відносин. Особливо приділено увагу саме споживчому договору як підставі виникнення споживчих договірних зобов'язань. Так, доведено, що споживчий договір унаслідок своєї специфіки органічно інтегрує обмеження свободи договору цивільно-правових зобов'язань. На нашу думку, свобода договору у споживчих відносинах у сучасних умовах трансформується (підлягає певному обмеженню порівняно з класичним розумінням) задля створення ефективного балансу інтересів сильної та слабкої сторін договірних відносин. **Висновки.** Доведено, що цивільно-правові зобов'язання, які виникають на підставі споживчих договорів, мають свою специфіку, зумовлену їхньою метою та суб'єктивним складом їх учасників. До того ж стверджується, що підвищений захист прав споживачів у споживчих відносинах варто вважати невід'ємним та органічним їх складником, а не лише додатковим заходом із боку держави. У підсумку зроблено спробу обґрунтувати підвищений захист фізичних осіб у споживчих договірних відносинах і необхідність державної інтервенції в такі відносини природними правами споживача та об'єктивно його незахищеністю перед суб'єктом господарювання.

**Ключові слова:** зобов'язання, споживач, захист прав споживачів, баланс інтересів сторін.

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Syniehubov, Oleh (2021). Efficiency of insolvency practitioners in realizing legitimate expectations of the parties to a bankruptcy case. *Entrepreneurship, Economy and Law*, 9, 37–46, doi: <https://doi.org/10.32849/2663-5313/2021.9.06>

## EFFICIENCY OF INSOLVENCY PRACTITIONERS IN REALIZING LEGITIMATE EXPECTATIONS OF THE PARTIES TO A BANKRUPTCY CASE

**Abstract.** *The purpose* is to determine areas for improving the performance of insolvency practitioners and ensuring the accomplishment of bankruptcy proceedings by an insolvency practitioner. **Research methods.** The article is based on general scientific and special methods of scientific cognition. **Results.** The author has studied areas for improving the efficiency of implementing bankruptcy proceedings considering a pivotal role of insolvency practitioners, who are authorized by the state to satisfy legal expectations of creditors and a debtor. A protected object in bankruptcy cases is creditors' property rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. This stipulates a duty of the state to establish a judicial procedure that permits the national courts to consider cases effectively, in a fair manner, and within a reasonable time. It has been found that in securing the interests of parties to a bankruptcy case, insolvency practitioners are neither private or official actors when exercising the functions of arbitration management: they exercise public functions delegated by the court. The payment system of basic remuneration given actual authority should be revised to provide insolvency practitioners with an inducement to work efficiently. **Conclusions.** The improvement of the performance of insolvency practitioners is determined by: a random assignment by the automation system, which should take into account their reputation, qualification, experience in a specific economic activity that affects their independence; the need for substantiating deprivation of an insolvency practitioner; creditors' control over forming the bankruptcy estate. The insolvency practitioner's exercise of public functions stipulates a positive responsibility of the state for his activity and the availability of balanced and effective control means, keeping in mind regulations of Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

**Key words:** insolvency practitioner, remuneration and cost reimbursement of insolvency practitioner, assignment and deprivation of insolvency practitioner.

### 1. Introduction

The objective of the commercial procedure is to protect violated, unrecognized or disputed rights and legitimate interests of individuals and legal entities and the state effectively, such as the restoration, renewal, recognition of the right that may occur through adhering to the requirements of fairness, impartiality, and timeliness of the consideration of cases referred by the law to the jurisdiction of commercial courts. Bankruptcy proceedings are specific in this context. According to the preamble of the Code of Ukraine on Bankruptcy Procedures (hereinafter referred to as "CUBP") (Kodeks Ukrainy z protsedur bankrutstva), restoration of the solvency of a corporate debtor or declaration of its bankruptcy is carried out to satisfy creditors' demands by applying

bankruptcy proceedings provided by CUBP (Postanova u spravi № 905/2030/19). The objective of relevant proceedings also involves striking a balance between public and, in particular, state interests, the interests of creditors, a debtor, insolvency practitioners, and other parties to bankruptcy cases through subjecting the debtor to various statutory procedures (Aseeva N.V., 2013).

The object of protection in bankruptcy cases are property rights guaranteed by Art. 1 of Protocol No. 1 to the Convention, which stipulates the state duty to ensure a judicial procedure that permits national courts to hear cases effectively, in a fair manner, and within a reasonable time (Sovtransavto Holding v. Ukraine). A tangible-legal aspect of legitimate expectations in transnational and national law

enforcement and interpretive practice of applying Art. 1 of Protocol No. 1 to the Convention is recognized as “property”, the right to claim or the right to expect an “asset”, future property benefit, or the good of an economic value (Slipchenko S. O. (2020), p. 73; Maidanyk R.A., 2019; Maidanyk R.A., 2020; Spasibo-Fateeva, I.V., Krat, V.I., & Pechenyj O.P., et al., 2011) and is the object of civil rights (Sokurenko V.V., 2021). The person’s legitimate expectation of “asset” in the interpretative regard of Art. 1 of Protocol No. 1 to the Convention will depend on the existence of a supposed procedure that will allow the person to present his own position and be heard. The procedural aspect of expectations of the parties to a case, as partially defined above, specifies procedural means designed to protect the subjective right or the right of expectation. The means must meet the objectives of commercial litigation and its principles that may affect the achievement of the purpose of bankruptcy proceedings as a form of commercial litigation: restoring the debtor’s solvency or efficient protection of rights, interests, including legitimate expectations of creditors in which their receivables from a debtor are transformed in case of his insolvency that is intermediated in the organizational relations of participation in the meeting of creditors and the creditors’ committee, which should ensure an option of influence on the protection of the right guaranteed by Art. 1 of Protocol 1 to the Convention (Syniehubov O.V., 2021).

Determining functions related to the implementation of solvency restoration procedures are entrusted to solvency practitioners, who shall guarantee the effectiveness of bankruptcy proceedings. Therefore, the procedure and criteria for their selection, appointment, control means of their activity, creation of a reasonable system of checks and balances given the proportionality principle, removal, selection of other specialists by a practitioner, and appointment of new practitioners in the case have an impact on the efficiency of protection of creditors’ claims or debtor’s solvency restoration. At the same time, the above can mitigate or eliminate the influence of subjective and “human factors”, prevent abuse and illegal actions of insolvency practitioners, respond to errors or ineffective actions, which constitute the content of bankruptcy procedures, promptly.

Issues of the effectiveness of bankruptcy proceedings and the activity of insolvency practitioners within bankruptcy proceedings were the subject of researches by O. A. Belianevych, O. M. Biriukova, O. M. Borieiko, V. V. Hurtovoho, A. A. Butyrskoho, I. A. Butyrskoi, S. V. Zhukova, Yu. V. Kabenoiiuk, V. Ya. Pohrebniaka, B. M. Poliakova, P. D. Pryhuzy,

O. O. Stepanova, B. V. Yarynko, and others. Representatives of modern doctrine and practice point out a lot of problems associated with various procedures involving insolvency practitioners, as well procedures for their appointment, removal, determination of remuneration of insolvency practitioners.

**The purpose** of the article is to identify areas for improving the performance of insolvency practitioners and ensuring the accomplishment of an objective of bankruptcy proceedings by an insolvency practitioner: meeting creditors’ claims with maximum consideration of the debtor’s and public interests or restoring the debtor’s solvency.

**Methodology.** The study highlights essential doctrinal and applied issues of a search for effective legal means of improving the efficiency of arbitration management, determining the legal status of an insolvency practitioner. Keeping in mind the purpose of the research, the author uses methods that have allowed identifying the relevant areas: analysis and synthesis, systems analysis, induction and deduction, formal legal and comparative legal methods, etc.

The study is based on a systems approach, which involves studying the ways of legal influence on the conduct of insolvency practitioners that are statutorily rendered in the ways of their appointment, removal, and payment of remuneration. Systems analysis and synthesis have made it possible to gradually elucidate the inner nature and impact of bankruptcy proceedings on the legal expectations of their participants. In view of this, their role in the system is covered. Systems and structural-functional analyses have allowed specifying a legal status of insolvency practitioners, establishing the means of control over their activities, identifying ways of improving the current legislation regulating bankruptcy procedures.

## 2. Determining the efficiency of the appointment of insolvency practitioners

The European Bank for Reconstruction and Development (the EBRD) presented the generalized procedure for appointing insolvency practitioners in different countries, as follows: creditors appoint an insolvency practitioner in about a third of the world, a court – in another third (Germany, Bosnia and Herzegovina, Egypt, Morocco, and Tunisia), about a quarter of countries conduct appointments randomly following different ways (France, Ukraine, Macedonia, China, Hungary, Serbia, the Slovak Republic, and Slovenia); the Republic of Lithuania pays paid to the nature of business and its size); in other countries, there are various mixed procedures, in particular, the appointment by a court based on the recommendation or by creditors (Bulgaria, Macedonia, Moldova,

Romania, Estonia); the initial appointment may be random with an option of appointing, or subsequent selection of another person (Germany). There are countries where a special state body appoints an insolvency practitioner (Kazakhstan, Latvia, and Croatia) (Donchenko O., 2019; Brydzh K., 2014).

According to the EBRD, an insolvency practitioner appointed to conduct an insolvency case may influence its form and outcome. Despite the financial risks which the creditors face in the case of incompetent management of the bankruptcy estate or debtor's business, creditors are often not allowed to take part in appointing insolvency practitioners actually or effectively. This order is consistent to prevent abuse on the part of creditors but may forfeit creditors' credibility in the procedure and incentives to active participation (Brydzh K., 2014). The current legislation provides for a differentiated approach to appointing, the provisions of which are enshrined in Art. 28 of CUBP.

As for the random selection of insolvency practitioners, researches show that appointment via an automated system may seem objective but, at the same time, may lead to "accidental" results – in most cases, it does not allow identifying a specialist professionally relevant to a particular insolvency case (given business kind and specific industry, the amount of debt, form of ownership, enterprise size). The reputation of an insolvency practitioner is essential for the effectiveness of bankruptcy proceedings and bona fide debtors and creditors. In a random selection, the appointment is not based on the professional achievements of insolvency practitioners that may deprive them of incentives to perform well at work. The consideration of reputation, professional qualities of insolvency practitioners under their appointment is likely to affect their good faith when exercising their powers to keep up reputation (Brydzh K., 2014).

The effectiveness of bankruptcy proceedings is affected by factors related to the competence of insolvency practitioners, taking into account experience and qualification. Under current law, an insolvency practitioner may have an economic or legal education. At the same time, education and experience are critical to bankruptcy proceedings, in particular, the experience of crisis management. In terms of the liquidation procedure, the insolvency practitioner with legal education can be competent enough, considering the involvement of an assistant and the option of attracting specialists in the field of financial and economic, technical knowledge, etc. In the case of reorganization, an insolvency practitioner having experience in crisis management of a particular economic sector, a good reputation (the Qualification Com-

mission can provide the relevant data based on international and domestic ratings) is more likely to conduct the procedure professionally. If creditors are interested in appointing a specialist with a high reputation, then, expecting his solid performance, they should be statutorily entitled to offer increased remuneration to the manager, which will contribute to his integrity, avoidance of shady schemes in bankruptcy proceedings.

The survey of business representatives shows that executives and top managers note that in case of their bankruptcy or status of the creditor of an insolvent business entity, they would focus on integrity, honesty, the reputation of an insolvency practitioner, and his expertise in the branch specifics of the enterprise regardless of whether the restoration of solvency or liquidation procedure takes place.

Therefore, the legislation should provide for a differentiated approach to selection and payment for the professional services of an insolvency practitioner, incl. appointed by a complex randomized selection of an automated system, that would take into account the above provisions. However, the appointment procedure should exclude influence on the selection. This concerns not only a technical aspect but also a legal one: there must be specified restrictions on attempts and rejections of insolvency practitioners proposed by the automated system.

The current randomized order of appointing a specific insolvency practitioner to perform the powers of an administrator of an estate and restructuring manager at the initial stages of the procedure as a way to exclude subjective influence on his activities may be discredited by the creditor committee's right to suspend the insolvency practitioner from duties (para. 4 of Art. 28 of CUBP). The process of reforming bankruptcy proceedings does not always mean working legislative proposals. The draft law "On Amendments to the Code of Ukraine on Bankruptcy Procedure (on the status of an insolvency practitioner)" (Proekt Zakonu pro vnesennia zmin do Kodeksu Ukrainy z protsedur bankrutstva) denies the creditors' committee the opportunity to influence the removal of an insolvency practitioner through applying to the court. These provisions create additional risks of abuse on the part of the insolvency practitioner, and the obligation of proving his inefficiencies or abuses creates further complications for creditors in protecting their legitimate expectations.

According to the EBRD, enabling the most interested parties (creditors), who are within an ace of the maximum losses of property caused by the insolvency of their debtors, to participate in appointing an insolvency practitioner can

contribute to rising competition and improvement of the performance of insolvency practitioners. At the same time, the appointment procedure should ensure, if possible, the exclusion of subjectivity in selecting an administrator (Brydzh K., 2014). A truly independent and competent insolvency practitioner with a high reputation can ensure the efficiency of the formation of the bankruptcy (liquidation) estate and its fair distribution. The appointment of an objectively independent insolvency practitioner not affiliated with parties to bankruptcy proceedings promotes the purpose of bankruptcy proceedings (Konstantynov D, 2021).

To maintain a system of balances under the removal of an insolvency practitioner at the request of the creditors' committee, the request must be motivated and justified. However, the deprivation of creditors of the right to replace the insolvency practitioner at any stage of bankruptcy proceedings means an almost uncontrolled activity of the latter, considering that the commercial court must be independent and only evaluates the validity of doubts about the due performance of the insolvency practitioner's functions.

Judgments on the removal of insolvency practitioners are not subject to a separate appeal to the Supreme Court (para. 1, part 3 of Art. 9 of CUBP), but the relevant complaints can be added to the cassation appeals against decisions that are subject to appeal in cassation (para. 2, part 3 of Art. 9 of CUBP) (Postanova u spravi № 922/3369/19). The case law has two directions in this context: the petition of the creditors' committee is a sufficient ground for the removal of an insolvency practitioner regardless of its grounds and justification in the petition; the creditors' committee shall state in the petition the sound reasons for removing the insolvency practitioner, and the court shall establish their existence to prevent the violation of requirements of the principle of independence of insolvency practitioners. The Supreme Court holds the position that the creditors' committee is not obliged to specify grounds for removal in its petition. However, if the creditors' committee has put forward arguments in favor of removal, in particular, provided for in sub-paras. 1-6, para. 2, p. 4 of art. 28 of CUBP, the court must check them, which is a condition for rendering a judicial decision, and check procedure compliance in general (procedure for convening and conducting meetings and/or creditors' committee, the legality of its formation, etc.), as well as take measures for preventing abuse of procedural rights. The Supreme Court did not resolve the latter issue noting that the exercise of the relevant right by the creditors' com-

mittee does not confirm an abuse of the procedural right (Shabarovskyi B., 2021). In this respect, the Supreme Court fulfilled its function of the unity of case law (Shylo O.H., 2020).

In removing insolvency practitioners, the Commercial Court should proceed, in particular, from the tasks of commercial litigation. If the insolvency practitioner's commission of repeated, gross intentional violations in a specific case or other bankruptcy cases is confirmed by the fact that judgments took legal effect (on removal, the recognition of actions illegal, the invalidity of costs incurred), this may indicate the justification of doubts about the competence, integrity, or independence of the insolvency practitioner.

### 3. Remuneration of insolvency practitioners

Based on the provisions of Art. 30 of CUBP, it is identified the procedure for calculating the remuneration and reimbursement of expenses of an insolvency practitioner. These rules generate a good deal of ambiguous interpretations in the theory and practice of bankruptcy. This concerns the fairness of the fixed amount of remuneration, the determination of its proportionality to the activities performed by the insolvency practitioner, and the effectiveness of his activities. The rules of bankruptcy law in almost all countries of the world establish the principle of payment of remuneration of the insolvency practitioner depending on his performance: in proportion to the satisfied claims of creditors at their expense and on the extent of repaid claims.

According to the position of the Supreme Court, in the absence of assets of the bankrupt, which may cover the services and expenses of the insolvency practitioner, payment should be made at the expense of creditors (Postanova u spravi № 05/5026/1809/2012). Keeping in mind the proportion of the votes of creditors to the number of their monetary claims, the court is entitled to apply the principle of proportionality to the distribution of costs between creditors if there are no funds from the sale of the debtor's property for liquidation (Postanova u spravi № 265/26-02/14/13-08). The Supreme Court also established the position that the sources of payment for the services of the insolvency practitioner are not dependent on the property status of the initiating creditor in the bankruptcy case, his legal status (entity based on private or public ownership, government agency, public organization, etc.), as well as sources of financing of a certain creditor (Postanova u spravi № 05/5026/1809/2012). When initiating bankruptcy proceedings, creditors, who get professional services from the insolvency practitioner and have a legit-



imate expectation of the outcome of his activities (a receipt of “assets”), must be aware of their risks associated with the fact that in terms of bankruptcy proceedings, property and monetary funds for satisfying the debtor’s property claims and covering expenses may not be found, and the insolvency practitioner has a legitimate (based on “the law”) expectation to cover the proceedings, which is the burden of the insolvent debtor’s creditors (Postanova *u spravi* № 910/32824/15). At the same time, the legal certainty, which is a basis for the procedural aspect of creditors’ legitimate expectations, highlights that they should not bear an excessive burden that can be determined through the proportionality of interests. According to the Supreme Court, payment for the services of an insolvency practitioner is not covered by the proceeds from the sale of the debtor’s property or funds received from the debtor’s production activities. It should be covered at the expense of creditors following the principle of proportionality to their monetary claims (Postanova *u spravi* № 905/2030/19). In addition, these provisions require firm guarantees from creditors to control the activities of the insolvency practitioner.

Provisions of the current CUBP provide for the following sources of payment of the insolvency practitioner’s remuneration: a cash advance for three months paid by the initiating creditor; funds from the economic activity of the bankrupt; funds received from the sale of assets, except the collateral. The relevant approach should motivate the replenishment of the liquidation estate and compliance with the terms of bankruptcy proceedings. Draft Law No. 2647 proposes to stipulate the obligation of creditors (in particular, based on a court decision) to pay the remuneration of the insolvency practitioner for the entire duration of bankruptcy proceedings, regardless of the results of his activities. These provisions do not meet the requirements of proportionality of repayment of creditors’ claims.

In this context, the current procedure and one proposed in draft laws to CUBP for payment of the basic and additional remuneration of an insolvency practitioner should be revised in view of the following considerations. In particular, under Art. 30 of CUBP, the remuneration of insolvency practitioners is set for the exercise of their powers. The specific provisions state that the extent of remuneration for the performance of powers of an administrator of estate or liquidator, manager of reorganization, restructuring, sales is fixed in different amounts bound to the minimum salary and the average monthly salary of the debtor’s manager for each month of performance. In practice, these provisions

are implemented in a manner that insolvency practitioners receive the basic remuneration for being a party to the bankruptcy case without taking into account the due exercise of the powers vested in them by the state. The mentioned circumstances must be taken into account when reforming the laws regulating remuneration. Remuneration should be set depending on the powers exercised (piece-rate form of reward grounded on approved tariffs or an hourly rate, the amount of which should be set and approved when appointing an insolvency practitioner) and assessment of their effectiveness and bona fides by relying on a report to be approved by the parties to a case interested in bankruptcy proceeding and commercial court. If there is a dispute between an insolvency practitioner and the parties to the case about the extent of remuneration, the assessment of the performance and real and reasonable time spent during his activities may be based on an audit of bankruptcy proceedings – a party to the case insisting on the inefficiency of the insolvency practitioner should apply to the commercial court. Moreover, the audit may be conducted for other purposes, in particular, to assess the effectiveness of bankruptcy proceedings in using property assets of the debtor. Audit tasks may involve: verification of the financial data rendered in the report of the insolvency practitioner; assessment of the insolvency practitioner regarding the establishment of the bankruptcy (liquidation) estate; check of the balance sheet of the business entity during restructuring, liquidation, etc.; verification of the validity and justifiability of the costs of bankruptcy proceedings, etc.

#### 4. Control over insolvency practitioners

The efficiency of insolvency practitioners is dependent on the nature, degree of control over their activities, direct and indirect (stimulating) influence. The EBRD recommends that the countries, which it invests, permit creditors to affect the level of remuneration of insolvency practitioners, but with consideration of the nature and complexity of the work performed. Given that activities of insolvency practitioners, as a rule, are covered by the debtor’s bankruptcy estate, countries must have a legal framework regulating the issue of monetary remuneration, and the relevant tariff system should be transparent, truly objective, flexible, ensure a sufficient level of remuneration for the efficiency of an insolvency practitioner, avoiding the danger of excessive remuneration in cases in which the satisfactory indicators in the formation of the bankruptcy (liquidation) mass are not achieved. The payment of a basic remuneration of the insolvency practitioner for his position and receipt of official data on

requests from legal entities, public authorities, etc., from state registers, convening a meeting, or the committee of creditors without finding assets is burdensome for creditors or debtors. Remuneration should depend solely on the effectiveness of repayment of creditors' claims, which guarantees the right to form a bankruptcy (liquidation) estate.

The effectiveness of bankruptcy proceedings also depends on the ability of creditors to influence the formation of the bankruptcy (liquidation) mass as parties interested in the outcome of bankruptcy proceedings. According to Draft Law No. 2647, the creditors' rights are narrowed that may cause the renewal of mechanisms for delaying bankruptcy proceedings, as it stipulates the sale of the debtor's property without taking into account their will. It is also proposed to fix an additional remuneration in percentage correlation of the insolvency practitioner, which will reduce the amount of funds received by a creditor, out of the will of the secured creditor and the determination of the maximum amount.

The current CUBP enshrines pro-creditor interests and the right of creditors to outline the terms of sale of the debtor's property, as they are interested in its disposal at the highest price. Draft laws to CUBP propose to reduce the creditors' means of influence on the sale of the debtor's property. The legislation grants the committee of creditors and secured creditors the powers to agree on the sale of property, generation of lots, and stipulation of terms of sale of the debtor's property (para. 8 of art. 48 CUBP: consent to the sale of the debtor's property and approval of the terms of sale of the debtor's property (except for the property that is the subject of security) in the reorganization proceedings under the reorganization plan or bankruptcy procedure). The draft law proposes to deprive secured creditors and creditors of the right to set agree on the terms of sale of the debtor's property and to empower insolvency practitioners and the court. It is submitted to deprive the committee of creditors and a secured creditor (art. 75 of CUBP) of the right to set (agree on) the terms of tender and lots. At the same time, para. 46 of the draft law No. 4409 authorizes a liquidator to sell total assets of a bankrupt in the form of a single property complex or several single property complexes in the manner prescribed by CUBP (Proekt Zakonu pro vnesennia zmin do Kodeksu Ukrainy z protsedur bankrutstva). Relevant provisions lay grounds for abuses due to the option of artificial reduction of the cost of the liquidation estate. The formation of lots can be carried out in such a way that the demand for the debtor's property can be minimized, an opportunity for asset buy-out, e.g., by its final beneficiary, is opened. The

devaluation of the bankruptcy (liquidation) estate may take place, in particular, through putting on auction real estate located in different regions and of different designated use as a single lot, introducing illiquid property as a part of a single property complex into a lot that artificially reduces the cost of valuable assets in its composition (Korobkova O., 2021). Setting the sale price and agreeing on the terms of sale of the debtor's property with the consent of creditors can reduce corruption risks during bankruptcy proceedings. Current legislation fairly laid down clear regulations for establishing the initial price of the re-auction with the consent of a secured creditor or the creditors' committee (para. 5 of Art. 79 of CUBP).

### **5. Legal nature of arbitration management and its efficiency**

A topical issue to be resolved within the framework of ensuring the efficiency of insolvency practitioners, which has not gained unity of positions in civil, economic, administrative, procedural doctrines, concerns the legal status of an insolvency practitioner and the legal nature of arbitration management. The settlement of the above issue will affect the legal nature of control over insolvency practitioners and the substantiation of state responsibility for their actions.

The need for the availability of administrative law procedures for the specific control can be motivated by their underperformance and good faith in bankruptcy proceedings. This refers to various types of participants' abuse in bankruptcy proceedings, which are claimed by practitioners (Kovalenko V., 2006). For effective legal regulation, it is necessary to specify the legal nature of arbitration management and the professional activities of insolvency practitioners. If an insolvency practitioner does not have the status of an enterprise official, an employee, then it is about the delegation of public functions rather than ordinary professional activities, because the procedure for declaring bankruptcy plays a pivotal role in maintaining domestic investment climate and public interests, the effectiveness of which affects the protection of legitimate expectations of a debtor and creditors. Intentional offenses and the abuse of rights by insolvency practitioners shall entail some legal penalties.

Creditors, commercial court and a debtor exert procedural control over the implementation of measures prescribed by para. 2 of art. 12 of CUBP, as well as the absence of abuses on the part of insolvency practitioners in the exercise of their rights under para. 1 of art. of CUBP, and submission of truthful information to the court. Any of these entities must initiate an audit of activities of the insolvency

practitioner in case of violation of reasonable deadlines for discharge of creditors' claims and provisions consolidated in para. 2 of art. 12 of CUBP. Administrative control is entrusted, in particular, to the Ministry of Justice, State Fiscal Service, public – to the self-regulatory organization of insolvency practitioners, disciplinary – to the Qualification Commission. In this regard, it is reasonable to refer to the experience of Germany, where courts shall compile a list of lawyers competent and legally qualified to carry out bankruptcy proceedings. An individual who is independent of creditors, a debtor, and is well versed in economic affairs can become an insolvency practitioner. The selection of a specific insolvency practitioner meets the needs of the relevant procedure, and thus, there is no randomized system (Iarynko B.V., 2019; Poliakov B. M. (Eds.), 2008).

In different areas of national doctrine, arbitration management and the status of an insolvency practitioner are determined through the exercise of public-law functions, or organizational (as an enterprise official for a reorganization manager and liquidator), or as a professional service provider. In this context, Draft Law No. 2647 abolishes the rule according to which an insolvency practitioner (a reorganization manager or liquidator) is equated to an official of the corporate debtor that limits the possibility of bringing the insolvency practitioner to criminal liability for failure to perform organizational and administrative-economic functions. The issue of who is responsible for the activities of a corporate debtor during the reorganization or liquidation when the head is removed and the administrator is not an official remains unsettled. Therefore, it is impossible to bring the insolvency practitioner to the statutory liability for his culpable neglect or undue performance of organizational or administrative-economic functions during the exercise of the powers of the reorganization manager or liquidator of the corporate debtor. At the same time, the actions of the manager, as a person who abused his powers in carrying out the professional activities of the insolvency practitioner, can be qualified under Art. 365-2 of the Criminal Code of Ukraine. If the insolvency practitioner does not have the status of a corporate official, the state must provide other effective means of control and responsibility of insolvency practitioners based on the performance of their public functions. An essential means of monitoring the efficiency of an insolvency practitioner is an audit, which any party to the bankruptcy case can request. In recognizing the activities of arbitration management not as a professional service but a public function, an audit should be conducted by the State Audit Service. An audit

is also a means of establishing the effectiveness of the performance of an insolvency practitioner. In this context, the author once again draws attention to the need for conducting an audit of the professional activities of arbitration management. If audit data indicate abuses, wastage of the bankruptcy (liquidation) estate, they must be the basis for criminal proceedings.

In this regard, it is appropriate to refer to the case-law of the ECtHR. In the case of *Kotov v. Russia*, the ECtHR found a violation of Article 1 of Protocol No. 1 to the Convention in 2010. Due to the illegal actions of the bank insolvency practitioner, the complainant did not receive funds which are bank indebtedness under the statutory principle of proportional distribution of assets among creditors of one queue. The amount awarded by the courts could be regarded as the complainant's "property" under Article 1 of Protocol No. 1 to the Convention. When distributing the assets among "privileged" creditors before other first-queue creditors, the insolvency practitioner acted illegally, and thus, the complainant did not receive his funds. The ECtHR stated that the insolvency practitioner illegally affected the complainant's right to property protection – a monetary obligation of the bank that was in the process of winding up. The ECtHR noted that the state holds responsibility for the wrongful acts of its representative (the insolvency practitioner) and should provide a mechanism that will make it possible to control one's activities effectively (*Kotov v. Russia*, 2010). Over time, in 2012, the ECtHR revised its decision and specified that the complainant was permitted to defend his violated rights, and the State fulfilled its obligations according to Art. 1 of Protocol No. 1 to the Convention. Consequently, the complainant's rights had not been violated. At the same time, five of the seventeen judges considered that Article 1 of Protocol No. 1 had been violated. They relied on the case-law of the European Court, according to which the State is responsible to citizens for the actions of individuals (*Kotov v. Russia*, 2012).

The ECtHR emphasized that an insolvency practitioner is a representative of the state. However, it is essential to have regard to his status specified in the bankruptcy law, which sets out the requirements for candidates for the position of an insolvency practitioner and qualities he must possess but does not explain whether the administrator is an individual or an official. The ECtHR considers that if the law provisions refer to an individual, then the state cannot be granted an absolute discharge given his exercise of administrator's powers and court delegation of such duties (*Costello Roberts in United Kingdom*, § 27). The Court should supervise this process (the opposite example in the ECtHR

ruling in the case (*Katsiuk v. Ukraine*, § 39) under which the liquidator has no any features of a “governmental body” in the sense of Art. 34 of the Convention, because the fact of appointment of the liquidator and approval of his report by the commercial court does not give him the status of a state body). The insolvency practitioner acts under state control while performing statutory powers (*Luordo v. Italy*, § 67-69). Therefore, from the standpoint of the ECtHR and given circumstances of the case, actions or inaction of the insolvency practitioner stipulate the responsibility of the state (*Sychev v. Ukraine*, § 53, 54), not for violation of Art. 6 of the Convention but failure to provide effective procedural means under Art. 13 of the Convention. A state which delegates public functions of carrying out bankruptcy proceedings to an insolvency practitioner cannot be discharged responsibility for the inefficiency of his activities.

#### 6. Conclusions

Given the crucial role of insolvency practitioners in ensuring legitimate expectations in bankruptcy proceedings and their effectiveness, the main concepts for further reform of the legislation regulating the relevant relations should involve: ensuring the independence and competence of insolvency practitioners during their appointment, and thus, they should be appointed solely on a random basis at the ini-

tial stage and after removal; the randomized system should have regard to the reputation of a specialist, a type and branch of economic activity of the business entity, enterprise size, ownership form, the amount of debt; substantiation of the notice of removal of an insolvency practitioner; creditors’ control over the formation of the bankruptcy estate; the implementation of public functions by an insolvency practitioner determines the responsibility of the state for his activities and the availability of proportionate and effective means of control, taking into account the provisions of Art. 13 of the Convention, one of which may be an audit of the activities of the insolvency practitioner.

An insolvency practitioner has a legitimate expectation of covering the costs of the procedure and payment of remuneration for his activities, if it is carried out effectively (based on the “law” of expectation), which is a burden of creditors (a creditor) of the insolvent debtor that must be moderate and justified. The relevant remuneration should be determined by the proportion of the actions taken during the exercise of powers within arbitration management to the creditors’ satisfied claims. These provisions stipulate the development of another remuneration system, which is agreed between an insolvency practitioner and the creditors’ committee, as well as approved by the court.

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## **ЕФЕКТИВНІСТЬ ДІЯЛЬНОСТІ АРБІТРАЖНИХ КЕРУЮЧИХ У ЗАБЕЗПЕЧЕННІ ПРАВОМІРНИХ ОЧІКУВАНЬ УЧАСНИКІВ СПРАВИ ПРО БАНКРУТСТВО**

**Анотація.** Метою статті є визначення напрямів підвищення ефективності діяльності арбітражних керуючих та забезпечення арбітражним керуючим досягнення мети процедур банкрутства. **Методи дослідження.** Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання. **Результати.** Досліджено напрями підвищення ефективності здійснення процедур банкрутства з огляду на визначальну роль арбітражних керуючих, яка на них покладена державою, у забезпеченні правомірних очікувань кредиторів та боржника. Об'єктом захисту у справах про банкрутство є майнові права кредиторів, гарантовані Конвенцією про захист прав людини і основоположних свобод, яка зумовлює обов'язок держави забезпечити судову процедуру, що дає змогу національним судам ефективно, справедливо й у розумний строк розглядати справи. Визначено, що у процесі забезпечення інтересів сторін справи про банкрутство арбітражні керуючі під час здійснення функцій арбітражного управління є не приватними або службовими особами, а здійснюють публічні функції, які їм делеговані судом. З метою стимулювання арбітражних керуючих до ефективних результатів має бути переглянута система оплати основної винагороди залежно від фактично здійснених повноважень. **Висновки.** Підвищення ефективності діяльності арбітражних керуючих визначається такими ознаками: встановленням рандомізованого призначення автоматизованою системою, що вплине на їх незалежність, яка має враховувати їхню репутацію, кваліфікацію, досвід роботи в певній галузі господарської діяльності; необхідністю обґрунтування відсторонення арбітражного керуючого; контролем кредиторів над формуванням конкурсної маси. Здійснення арбітражним керуючим публічних функцій зумовлює позитивну відповідальність держави за його діяльність та наявність пропорційних, ефективних засобів контролю з огляду на вимоги ст. 13 Конвенції про захист прав людини і основоположних свобод.

**Ключові слова:** арбітражний керуючий, винагорода та відшкодування витрат арбітражного керуючого, призначення й відсторонення арбітражного керуючого.

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## INTEGRATION PROCESSES IMPACT ON LABOUR RELATIONS DEVELOPMENT IN UKRAINE

**Abstract.** The *purpose* of the article is to study and analyse integration processes and their impact on the development of labour relations in Ukraine. The concept and specificities of modern integration processes in the world and Ukraine are considered. Their influence on the development of domestic labour relations is determined. The article studies trends towards the expansion of international labour relations and international labour law. **Results.** It is stated that the process of integration in the field of employment and occupation has greatly influenced and affected the domestic legislative definition of the basic principles of Ukrainian labour law. Integration is a comprehensive and gradual process, which is a combination of legal standards of different legal systems, transformations through interaction of various legal norms and the formation of a single legal system for regulating social relations. It is established that the mere proclamation by law of the basic principles of labour relations does not solve the problem, since the State also needs to develop a mechanism for the proper implementation of these provisions by the actors engaged in labour relationship, that should be implemented in the new legislative initiatives by our country. The accession to the World Trade Organization had a significant integration impact on shaping modern labour relations in Ukraine. The process was lengthy and involved two main components: bilateral and multilateral negotiations and the signing of market access agreements for goods and services with member countries of the Working Group of the World Trade Organization; harmonization of Ukrainian legislation in accordance with the requirements of World Trade Organization agreements. It is underlined that since national and international labour law cannot exist and develop in isolation in the context of global integration processes, the issue of studying the impact of integration processes in current conditions remains relevant, as well as their impact on the development and improvement of labour law relations in Ukraine. **Conclusions.** It is concluded that the development of integration processes in the world and in Ukraine seeks to contribute to improving the adjustment of international and domestic labour law, increase the effectiveness of legal regulatory mechanisms for labour relations, and protect labour rights.

**Key words:** integration, labour relations, labour law, integration processes, International Labour Organization, Association Agreement with the European Union.

### 1. Introduction

The Ukrainian State has already took a confident course of integration into the world community, which is the prerequisite for international relations nowadays. As Ukraine aspires to be a full-fledged member of the international community, measures to join international organizations and associations are required to achieve this objective. However, in choosing foreign policy, the impact of integration processes on domestic processes should be primarily taken into account.

The accession of Ukraine to the International Labour Organization (hereinafter ILO), signing and ratification of its declaration, conventions and protocols and other harmoniza-

tion processes of domestic and international labour law are aimed at making new and amending previous provisions on labour law in order to improve domestic labour legislation.

Since domestic and international labour law cannot exist and develop in isolation in the context of global integration processes, the issue of studying the impact of integration processes in current conditions remains relevant, as well as their impact on the development and improvement of labour law relations in Ukraine.

The aim of the article is to study and analyse integration processes and their impact on the development of labour relations in Ukraine.

The general basis of studies on integration processes can be found in the works by O.V. Kar-

tunov, V.V. Kopyika, I.Yu. Matiushenko, A.O. Olefir, Yu.V. Palahniuk, A.V. Uniiat, O.A. Fursova, Yu.R. Futalo, T.M. Tsyhankov, Yu.V. Shyshkov, et al. In labour law, certain aspects of the topic have been studied in the works by legal scholars, such as M. Baimuratov, V. Butkevych, V. Denysov, O. Zadorozhnii, M. Korostarenko, I. Lukashuk, V. Mytsyk, V. Muraviov, V. Oplyszko, V. Plavych, P. Rabinovych, M. Cherkes, and others. However, the study of the impact of integration processes on labour law relations in Ukraine is poorly regulated.

## 2. Integration as a regular process of social and legal development

In explanatory dictionaries, the concept of “integration” is considered as: a unification into a single whole (Bilodid, Buriachok, 1973, p. 35), and a process of convergence and connection of sciences alongside the processes of their differentiation (Obnorskii, 1952, p. 489).

According to Ye.H. Potapenko, the legal integration is a regular process of social and legal development, which, due to the application of legal means and the establishment of a qualitatively homogeneous legal framework, promotes the gradual integration of social (political, economic, cultural, legal, information) systems into a higher single consolidated social system, as well as maintaining the integrity and unity of the already existing social system. The category “legal integration” is compound, which in the broadest sense covers all unifying processes mediated by law (Potapenko 2010, pp. 9-10).

Furthermore, the interpretation of integration as a process and integration as a set of relations is under discussion. Some scholars believe that “integration as a process” is global, and “integration as relations” is formed due to the transformation of the economic, political and social situation of individual territories, regions (Bulatova, 2004, p. 121).

Therefore, integration is a comprehensive and gradual process, which is a combination of legal standards of different legal systems, transformations through interaction of various legal norms and the formation of a single legal system for regulating social relations.

The basic prerequisites for the integration processes are:

1. An appropriate level of economic development and market maturity of the integrating countries.
2. Geographical proximity of the integrating countries, common borders in most cases and historical economic ties.
3. Common challenges countries are facing in economic development, financing, regulation of economy and political cooperation.
4. The demonstration effect. Integrated countries tend to positive changes: faster devel-

opment, lower inflation and unemployment that have positive psychological impact on other countries in the region.

5. “Domino effect,” that is, after most of the countries of the region have become members of an integration union, other countries, which have stayed outside it, have some difficulties in reorienting their economic ties (Futalo, 2016, p. 78).

Nowadays, due to convergence of the legal systems of continental law, the dominance of international law over national law should be seen as a result of the globalization impact on national law (Vasechko 2010, p. 37).

Modern integration processes have reached a high level, for example, the European Union, established in 1992 in after the signing of the Maastricht Treaty, is at the last stage of integration and is an economic union (Zahorskyi, Krasivskyi, Kyrychuk, Kohut, & Kotovska, 2016).

In addition, Decisions of European Community bodies, which are generally binding and have supreme legal force over the domestic legislation of Member States, exemplify a growing trend towards the rule of European law over domestic law.

Furthermore, these processes are present in domestic labour law. According to the Charter of the International Labour Organization (1919), each ILO member State should submit regular reports to the International Labour Office on the implementation of ratified Conventions in national law and practice. The Committee of Experts on the Application of Conventions and Recommendations of the Council examines them and prepares a joint report for the International Labour Conference. In doing so, it may comment on additional measures to implement the Conventions by Governments concerned or request the necessary information. The report of the Committee of Experts is considered by the tripartite Committee on the Application of Standards of the International Labour Conference.

However, in accordance with the Constitution of Ukraine and the Law of Ukraine “On International Treaties,” the international treaties of Ukraine in force become part of the domestic legislation after their ratification, and consequently our State undertakes to implement them.

This trend was particularly intensified after the signing of the Association Agreement between Ukraine and the European Union on 27 June 2014 through the reform of the domestic legislation of Ukraine with a view to achieving the integration of Ukraine into the legal system of supranational international organization (Petrov, 2015, p. 33).



### 3. Association of Ukraine and the European Union

Furthermore, since the signing of the Association Agreement and the granting of visa-free treatment to our citizens, the number of migrants to the countries of the European Union has doubled.

Considering the integration features of the Association Agreement between Ukraine and the EU, it should be emphasized that this transaction does not open free access to the labour market for Ukraine but contains rules for the employment of Ukrainian specialists in EU Member States. Part 4 of the Agreement entitles individuals to stay temporarily in the EU and Ukraine for economic purposes. Primarily, this legitimizes legal work of qualified specialists, as well as of company managers, in the EU. In addition, Ukrainian lawyers, auditors, architects, IT specialists and other specialists in twelve specialties will be able to legally provide their services in EU countries. It is believed that today the differentiation of employment of foreigners and stateless persons has become discriminatory in respect of these subjects of law in Ukraine (Chyzhmar, 2016, p. 29).

The signing or non-signing of the Agreement does not affect Ukraine's visa-free regime, and article 19 of the Agreement does not provide for the automatic authorization of Ukrainians to work legally in the EU. This requires separate agreements between Ukraine and the EU Member States on labour immigration, as stipulated in Art.18 of the Association Agreement, with mandatory application of its Section 4 (Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part, 2014).

Moreover, the process of integrating Ukraine into the world community impacts on the formation of the basic principles of labour law. The generally recognized principles of labour law are in a number of international Conventions and Declarations of the ILO, in the preamble to the ILO Constitution, and in the Declaration of the aims and purposes of the International Labour Organization, the ILO Declaration on fundamental principles and rights at work and the ILO Declaration on Social Justice for a Fair Globalization.

However, I.Ya. Kiselev argues that the issue of identifying a list of generally accepted principles of international law (including in the field of labour) is complex and controversial (Kiselev, 1999, p. 591).

For example, according to the principles relating to fundamental rights at work, the Geneva Declaration of 1998 included

the four legal categories, as follows: 1) freedom of association and the effective recognition of the right to collective bargaining; 2) the elimination of all forms of forced or compulsory labour; 3) the effective prohibition of child labour; 4) the elimination of discrimination in respect of employment.

An analysis of the ILO Constitution and its main Declarations enables to highlight generally recognized principles of international labour law, such as the principle of humanity (humanism) in the field of employment and occupation, including the granting of human working conditions to employees, which do not violate their fundamental rights and freedoms; the principle of social justice, including the provision of equal opportunities for all to participate in the fair distribution of wages, working hours and other working conditions, as well as the minimum living wage; the principle of equal pay for equal work; the principle of freedom of speech and freedom of association of workers and employers; and the principle of social partnership, including equal rights and cooperation of workers' representatives.

The process of integration in the in the field of employment and occupation has affected and reflected in the domestic legal definition of the basic principles of Ukrainian labour law.

First, the basic principles of labour law are enshrined in the Constitution of Ukraine. For example, the article 43 of the Basic Law of our State actually embodies the principle of freedom of work, as well as the principle of humanism, which is manifested in elimination of forced labour.

With regard to the Labour Code of Ukraine, no single article makes a list of all the principles governing labour relations. These principles should be embodied in a new codified instrument and formulated in accordance with generally recognized international legal principles in the field of employment and occupation.

In addition, the elimination of discrimination in employment is an important issue in the integration of domestic labour law with international law. In Ukraine, the legal regulatory mechanism for the prohibition of discrimination in labour relations remains unsettled.

The Charter of Fundamental Rights of the European Union, in addition to enshrining the principle of the elimination of discrimination in international instruments, also contains these provisions (Charter of Fundamental Rights of the European Union, 2000). In particular, they contain provisions on basic principles, which embody a single general principle of non-discrimination: equality between people without regard to racial or ethnic origin; the establishment of common standards,

aimed at ensuring equal rights in employment and occupation; the principle of equal opportunities and equal treatment of men and women in employment and occupation.

Therefore, the mere proclamation by law of the basic principles of labour relations does not solve the problem, since the State also needs to develop a mechanism for the proper implementation of these provisions by the actors engaged in labour relationship, that should be implemented in the new legislative initiatives by our country.

The accession to the World Trade Organization (hereinafter WTO) had a significant integration impact on shaping modern labour relations in Ukraine. The process was lengthy and involved two main components: bilateral and multilateral negotiations and the signing of goods and services market access agreements with member countries of the WTO Working Group; harmonization of Ukrainian legislation in accordance with the WTO requirements.

It is the scope of international trade that is an important indicator of the degree of integration of the countries of the world. Current international trade is characterized by:

- First, the dynamic integration process resulting from the liberalization of international

trade on the basis of the WTO trade rules harmonization and new regional trade agreements;

- Second, a slower growth due to a slower economic development of the industrialized countries and of the world economy in general;

- Third, the uneven intensity of trade caused by differences in the socio-economic development of countries and regions of the world (Hordieva, 2017, p. 29).

#### 4. Conclusions

Therefore, Ukraine's accession to the WTO has contributed to: first, Ukraine's status as a full-fledged participant in international trade enabling to participate in regional unions and associations; second, access to the international dispute settlement mechanism; third, the impact of the activities of international trade organizations on the Ukrainian labour market, that requires to adopt new legal regulations on their work in our territory and the development of an effective mechanism for resolving labour disputes that may arise in the course of their activities.

Thus, the development of integration processes in the world and in Ukraine strives to contribute to improving the adjustment of international and domestic labour law, increase the effectiveness of legal regulatory mechanisms for labour relations and protect labour rights.

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## **ВПЛИВ ІНТЕГРАЦІЙНИХ ПРОЦЕСІВ НА РОЗВИТОК ТРУДОВИХ ПРАВОВІДНОСИН В УКРАЇНІ**

**Анотація.** *Метою* статті є аналіз стану інтеграційних процесів та їх впливу на розвиток трудових відносин в Україні. **Результати.** У статті розглянуто поняття та особливості сучасних інтеграційних процесів у світі й Україні, визначено їх вплив на розвиток національних трудових відносин. Досліджено тенденції щодо розширення міжнародних трудових відносин та міжнародного трудового права. Зазначено, що інтеграційні процеси в галузі праці значною мірою вплинули на вітчизняне законодавче визначення основних принципів трудового права України та відобразились на ньому. Інтеграція є комплексним і поетапним процесом, який полягає в поєднанні правових стандартів різних правових систем, проведенні трансформаційних процесів за допомогою взаємодії різних норм права та формуванні єдиної правової системи регулювання суспільних відносин. Визначено, що тільки законодавче проголошення основних принципів здійснення трудових відносин не вирішує проблему, оскільки державі також необхідно розробити механізм, який забезпечував би належне виконання суб'єктами трудових правовідносин вказаних положень, що має втілюватися в нових законодавчих ініціативах нашої держави. Значний інтеграційний вплив на формування сучасних трудових відносин в Україні здійснив вступ до Світової організації торгівлі. Цей процес був тривалим і передбачав два головні складники: по-перше, проведення двосторонніх і багатосторонніх переговорів та підписання угод із доступу до ринків товарів і послуг із країнами – членами Робочої групи Світової організації торгівлі; по-друге, гармонізацію законодавства України відповідно до вимог угод Світової організації торгівлі. **Висновки.** Наголошено на тому, що оскільки національне та міжнародне трудове право в умовах глобальних інтеграційних процесів не можуть існувати й розвиватися ізольовано одне від одного, то актуальним залишається питання дослідження впливу інтеграційних процесів, які відбуваються в умовах сьогодення, на розвиток і вдосконалення трудових правовідносин в Україні. Зроблено висновок про те, що розвиток інтеграційних процесів у світі та Україні покликаний сприяти вдосконаленню адаптації міжнародного й національного трудового права, підвищити ефективність механізмів правового регулювання трудових відносин, забезпечити захист трудових прав.

**Ключові слова:** інтеграція, трудові відносини, трудове право, інтеграційні процеси, Міжнародна організація праці, Угода про Асоціацію з Європейським Союзом.

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Koshykov, Denys (2021). The concept and content of public policy on state economic security. *Entrepreneurship, Economy and Law*, 9, 52–57, doi: <https://doi.org/10.32849/2663-5313/2021.9.08>

## THE CONCEPT AND CONTENT OF PUBLIC POLICY ON STATE ECONOMIC SECURITY

**Abstract. Purpose.** The aim of the article is to identify the concept and content of public policy on the economic security of the State. **Results.** Public policy on economic security is considered as the process of adopting legal regulations or managerial decisions in the field of economic security and the subsequent monitoring of their implementation; as a specific course (area) of economic security determined by the leadership of the State and implemented by authorized public administrators; as organizing and purposeful influence of authorized public administrators on public relations in the field of economic security by means of forms and methods defined by law. The objective of public policy on the economic security of the State is defined as creating conditions for the organization and development of public economic relations and ensuring social and economic rights and freedoms of citizens, as well as creating conditions for the further development and growth of the national economy and its competitiveness. It is proved that public policy on economic security of the State can include several components: 1) the legal and regulatory framework, consisting of laws and regulations on economic security and the regulatory mechanism for economic relations; 2) the institutional framework, composed of the competent public administration bodies and their officials authorised by law to ensure the economic security of the State; 3) the organizational framework, containing the principles, forms and methods of implementing public policy on economic security. **Conclusions.** It is established that, in accordance with the objectives of public policy on the economic security of the State, its sub-types are a regulatory and institutional policy on economic security, policy on economic rights of citizens, policy on the development of the national economy and economic relations, policy on digitalization of economic relations, economic and financial literacy of the population, law enforcement policy on economic security.

**Key words:** economic security, national security, public policy, administrative law framework, actors, administrative legislation, optimization.

### 1. Introduction

Economic security is an integral part of establishing an effective system of national security in Ukraine, since the deterioration of the economic situation may lead to a decline in industrial production, the bankruptcy of banks, the State budget's shortfall in funds for the development of strategic sectors of the economy, and social support for the population, which may have negative consequences in the form of unemployment, rising crime rates, threats of riots and the like.

Therefore, the State, acting through the competent bodies, should set a strategy for the development of all key sectors in order to streamline economic relations and ensure their stability and predictability, take adequate measures to improve the well-being of the population, taking into account objective economic

laws. This course is generally referred to as public policy. Thus, it can be concluded that public policy on economic security requires a more detailed scientific study on the identified issues of social and world development.

In the current circumstances of state development resulting from the world economic crisis and constant changes in national legislation regulating economic relations in Ukraine, the content of public policy on the economic security of the State should be reconsidered.

### 2. The content of state policy on the economic security of the state

In a general social sense, policy is defined as the process in which a group of people, whose views or interests differ at the initial stage, makes a collective decision to bring the group together as a whole, which is introduced as a general course of action (Miller, 2000, p. 282). Policy is

also considered as the sum of three interrelated aspects: 1) social life; 2) one of the activities of social actors; 3) a certain type of social relations (between individuals, small groups, etc.) (Vasilik & Vershinin, 2001, p. 267).

From O.S. Vasiliev's perspective on policy as a manifestation of social activity, its separate elements are: 1) diversity of views. Policy assumes different views on certain situations, events, phenomena, etc. These views are most often associated with either the formulation of the ultimate goal or the consideration of different means of achieving the objective; 2) the decision-making mechanism. It is policy that determines how to reach agreement on collective decisions. Such ways mainly consist of three types of means: persuasion, negotiation, final decision; 3) decision-making procedure. The policy assumes that a decision made is considered as authoritative by a particular community of people. This decision becomes a policy as a course of action for this group of people (Vasyliiev, 2014).

However, many academic writings consider policy from the perspective of state activities as art (science or practice) of the administration of the State or different political entities (Beliaikov & Matveicheva, 2009, p. 344).

This definition is quite consistent with the subject matter of the study, and therefore, a special type of policy – public policy on economic security – should be considered when analysing the role of the State in ensuring economic security. Theoretical works devoted to the organization and implementation of public policy defines it as:

- Activities of the State and its institutions aimed at ensuring public order, coordinating and subordinating various social interests, achieving social harmony and organizing the management of public development (Lohunova & Shevchenko, 1999, p. 116).

- Conscious activities of authorities and institutions of state administration at various levels aimed at regulating social relations, ensuring their stability and development in accordance with a defined objective, a mode of public administration, which includes the formulation and implementation of political programmes for economic, social, cultural and political development (Rebkala & Tertychky, 2000 p. 6; Kolodii, 2000, p. 503).

Based on general theoretical and specific definitions of public policy, one can conclude that to conclude that its typical features are:

- Public policy is related to certain acts of the State represented by its bodies and authorized officials. In addition, political parties may participate in the implementation of public policy as a voluntary association of citizens who

are supporters of a national programme of social development aimed at promoting the formation and expression of citizens' political will. The participation of representatives of civil society in the implementation of public policy is also not excluded;

- Public policy may be both the activities and inactivity of authorized actors: public administration, political parties, etc.;

- The objective of public policy should be defined as regulation of some social relations in specific fields of state activities for their organization, protection and further development;

- A key aspect of public policy is the guarantee of rights and freedoms of natural and legal persons, facilitating their realization, protecting and restoring them in the event of violations;

- On the one hand, public policy should comply with the provisions of the legislation in force and, on the other hand, facilitate creation of legal provisions aimed at solving relevant social and economic problems, regulating and protecting social relations;

- The public policy measures are ensured by administrative authority of the certain actors, i.e., the application of administrative coercion measures;

- Public policy is accompanied by the adoption of state managerial decisions in the form of normative and individual managerial acts, as well as social and economic development programmes.

Therefore, based on a general theoretical analysis of the content of the concepts "politics" and "public policy", one can argue that public policy on the economic security of the State is a system of legislative, organizational and managerial measures enshrined in the legislation in force, which are implemented mainly by authorized public administrators with the participation of political parties, civil society institutions and representatives of business in order to organize and develop public economic relations and to ensure social and economic rights and freedoms of citizens, as well as to create conditions for the further development and growth of the national economy and the competitiveness of the State in the global economic environment.

The main features of public policy on economic security are:

1. Compliance with the provisions of the current legislation of Ukraine and consideration of the objective laws of the economy.

2. Realization of citizens' social and economic rights and freedoms and establishment of the environment for the further development and growth of the national economy.

3. Implementation by specially authorised public administrators. Political parties, as well

as representatives of civil society and the business environment, may be involved in these processes.

4. Implementation by means of special provisions of law, mainly of an administrative and legal nature, since they are adopted by authorized bodies of public administration for the implementation of legislative provisions. In this case, the administrative and legal regulatory mechanism ensures economic security of the State.

5. A set of forms and methods provided by law, among which the issuance of administrative acts, as well as methods of persuasion and coercion, takes pride of place.

6. Multi-level implementation (national, regional, local level).

7. Multi-pronged policies, as economic security of the State includes financial, macro-economic, productive, energy, foreign economic and investment-innovation security.

8. Coordination and continuity in the establishment of a system of specially authorized bodies for its implementation, strategic and tactical decision-making, control over the obtained result and adjustments if necessary.

9. The criteria developed by the State, through its authorized bodies, to assess the effectiveness of economic security policies.

Moreover, the objective of public policy on the economic security of the State is the creation of environment for the organization and development of public economic relations and ensuring social and economic rights and freedoms of citizens, as well as the creation of the environment for the further development and growth of the national economy and its competitiveness. This objective is first and foremost achieved through the establishment of an appropriate legislative framework for economic security, as well as the establishment of an effective administrative and legal framework for the implementation of its provisions and regulations.

These features of public policy on economic security and its definition make it possible to argue that public policy on economic security can be understood as:

1) the process of adopting legal regulations or managerial decisions in the field of economic security and the subsequent monitoring of their implementation;

2) a specific course (area) of economic security determined by the leadership of the State and implemented by authorized public administrators;

3) an organizing and purposeful influence of authorized public administrators on public relations in the field of economic security by means of forms and methods defined by law.

Public policy on economic security of the State contains several elements:

1. The legal and regulatory framework that includes laws and regulations on economic security and the regulatory mechanism for economic relations. The regulatory framework also includes state and regional programmes for socio-economic development. The relevant laws and by-laws of Ukraine, as well as the international instruments ratified in accordance with established procedure, constitute the actual legal and regulatory framework for making public policy on economic security. The instruments under consideration can be grouped into those containing strategic and conceptual provisions for making public policy on economic security (laws, Strategies, Concepts), as well as those created to implement the provisions of the resolutions of the Cabinet of Ministers, State programmes, orders of central executive bodies, etc.

2. The institutional framework composed of competent public administration bodies and their officials authorised by law to ensure the economic security of the State in terms of issuing legal and individual regulations, applying state coercion. Moreover, the institutional component includes the Verkhovna Rada of Ukraine empowered to adopt Ukrainian laws in the relevant field, the President of Ukraine, who is the Chairman of the National Security and Defence Council of Ukraine, other state bodies entrusted with the protection of economic rights and freedoms of natural and legal persons, as well as the state.

These actors should be divided into two main groups: those responsible for formulating public policy on economic security and those responsible for implementing that policy. The first is the Verkhovna Rada of Ukraine and the President of Ukraine. The executive authorities and bodies of local self-government are mainly the implementors of public policy on economic security. In particular, the Cabinet of Ministers and other central executive authorities ensure the economic independence of Ukraine and the implementation of the State's domestic and foreign economic policy; take measures to ensure the economic rights and freedoms of individuals and citizens, the implementation of budgetary, financial, price, investment, tax, structural and sectoral policies, and draw up State-wide economic development programmes; ensure equal conditions for the development of all forms of ownership; legally regulate in fields of their responsibility (economy, finance, investment, energy, etc.). In addition, certain central executive bodies are responsible for monitoring the economic security of the State (Law of Ukraine

on the Cabinet of Ministers of Ukraine, 2014; Law of Ukraine "On Central Executive Bodies", 2011).

3. The organizational framework which, in the author's opinion, contains the principles, forms and methods of implementing public policy on economic security of the State. The main forms of exercising the powers by the relevant actors are the issuance of legal regulations: laws and by-laws: decisions, orders, orders, etc. Moreover, it should be noted that the central executive authorities are responsible for monitoring the implementation of regulations on economic security. These powers are exercised in the form of checks, inspections and other administrative coercive measures, i.e., administrative liability.

Therefore, the analysis of these components of public policy on economic security allows arguing that a system of economic security consists of:

Objective	To organise and develop public economic relations, ensure the realization of citizens' social and economic rights and freedoms, create conditions for the further development and growth of the national economy and ensure the competitiveness of the State in the global economic environment
Policy Makers	Supreme state authorities, executive authorities and bodies of local self-government, institutions of civil society
Object	Social economic relations, economic rights and freedoms
Instruments	Rulemaking, organizational actions, methods of persuasion and coercion, etc.

### 3. The task solved by the state policy on economic security

Given the above-mentioned concerning the constituent elements of the system of public policy on economic security, its key tasks at the present stage of the development of Ukraine are as follows:

1) To improve the provisions of current Ukrainian legislation in the economic sector by developing key laws and adopting strategic programmes in the field of economic security;

2) To establish an effective institutional system to implement the State's economic security strategy, to identify its key actors, their competences and the basis for cooperation and coordination;

3) To involve representatives of the business environment, specialized trade unions, representatives of small businesses and the scientific economic community in the development and implementation of economic security programmes and measures;

4) To increase the economy's resilience to the impact of external and internal challenges and threats, to improve the investment climate in the country, the budgetary planning processes and the socio-economic development of the regions, and the financial security system, as well as to optimise the regulatory and tax burden;

5) To develop an appropriate economic culture and financial literacy of the population;

6) To introduce modern information and communication technologies into the system of economic relations, enabling to improve the processes of economic transactions, to minimize the risks of parties and to facilitate financial and other services for the population;

7) To ensure the harmonious integration of Ukraine into the European and world economic security environment and the development of equitable and mutually advantageous economic relations with other States; as well as the State's participation in countering world economic threats and transnational economic crime;

8) To make legal and organizational grounds for citizens to exercise their economic rights and freedoms (rights to property, to entrepreneurial activities, etc.), to protect and restore them in the event of violations;

9) To form a fundamentally new system of control and law enforcement bodies entrusted with tasks in the field of economic security, and to exclude uncharacteristic powers from the subject matter competence of existing actors of law enforcement, in particular, with regard to interference in economic relations;

10) To adequately protect the information and communication infrastructure of the Ukrainian economy: payment systems, information banks, data registers, personal data of economic entities, etc.;

11) To lay the groundwork and take systematic measures against corruption, violations of anti-monopoly legislation, financial and economic crimes, especially those committed by organized criminal groups, and against the legalization of funds, illegally obtained.

Considering the list of tasks of public policy on economic security, sub-types can be distinguished as follows:

1. Regulatory and institutional policy on economic security. Its main objective is to establish an appropriate regulatory framework for economic relations and effective system of state bodies responsible for making public policy on economic security; for establishing an appropriate coordination mechanism for their activities and interaction.

2. Policy on economic rights of citizens and legal entities. The aim is to ensure

and implement constitutional and regulatory guarantees for the exercise by citizens of their economic rights and increase the level of individual economic security and economic security of economic entities.

3. Policy on development of the national economy and economic relations. It involves targeted measures for the growth of sectors of the national economy, stability of the national currency, growth of GDP, industrial production, energy independence and investment attractiveness of the country.

4. Policy on digitalization of economic relations, economic and financial literacy of the population. It is aimed at consisting economic relations with the modern digital world characterized by introducing innovative developments and modern digital management systems into the economy, raising the awareness of the population about economic issues and their rights and obligations in the field of economy and economic security.

5. Law enforcement policy on economic security. It is implemented by specially authorized bodies of the State, that is, "law enforcement ones," and manifested by counteracting the most common economic offences (crimes, administrative misdemeanours), corruption, money laundering, financing of terrorism, cross-border economic crime.

#### 4. Conclusions

By relying on the conducted research, it is expedient to make the following conclusions and generalizations:

1. Public policy on state economic security is the system of legislative, organizational and managerial measures enshrined in current legislation of Ukraine mainly implemented by authorized public administrators with the participation of political parties, civil society institutions and business representatives in order

to organize and develop public economic relations and to ensure social and economic rights and freedoms of citizens, as well as to create conditions for the further development and growth of the national economy and the competitiveness of the State in the global economic environment (Koshykov, 2020).

2. Public policy on economic security can be understood as the process of adopting legal regulations or managerial decisions in the field of economic security and the subsequent monitoring of their implementation; as a specific course (area) of economic security determined by the leadership of the State and implemented by authorized public administrators; as organizing and purposeful influence of authorized public administrators on public relations in the field of economic security by means of forms and methods defined by law.

3. Public policy on economic security of the State has several components: the legal and regulatory framework, which includes laws and regulations on economic security, as well as the regulatory mechanism for economic relations; institutional composed of competent public administration bodies and their officials authorised by law to ensure the economic security of the State; the organizational framework which, in the author's opinion, contains principles, forms and methods of implementing public policy on economic security.

4. In accordance with the objectives of public policy on economic security of the State, its sub-types are a regulatory and institutional policy on economic security, policy on economic rights of citizens, policy on development of the national economy and economic relations, policy on digitalization of economic relations, economic and financial literacy of the population, law enforcement policy on economic security.

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## ПОНЯТТЯ ТА ЗМІСТ ДЕРЖАВНОЇ ПОЛІТИКИ У СФЕРІ ЗАБЕЗПЕЧЕННЯ ЕКОНОМІЧНОЇ БЕЗПЕКИ ДЕРЖАВИ

**Анотація.** *Метою статті* є визначення поняття та змісту державної політики у сфері забезпечення економічної безпеки держави. **Результати.** Запропоновано державну політику у сфері економічної безпеки розуміти в таких аспектах: як процес ухвалення законодавчих актів або управлінських рішень у сфері економічної безпеки та подальший контроль за їх виконанням; як певний курс (напрямок) у сфері економічної безпеки, який визначений керівництвом держави та реалізується уповноваженими суб'єктами публічної адміністрації; як організуючий цілеспрямований вплив уповноважених суб'єктів публічної адміністрації на суспільні відносини у сфері економічної безпеки за допомогою нормативно визначених форм і методів. Метою державної політики у сфері забезпечення економічної безпеки держави визначено як створення належних умов для впорядкування та розвитку суспільних економічних відносин, забезпечення реалізації соціально-економічних прав і свобод громадян, а також створення умов для подальшого розвитку та зростання рівня національної економіки, забезпечення її конкурентоспроможності. Доведено, що у структурі державної політики із забезпечення економічної безпеки держави можна виділити декілька складових елементів: 1) нормативно-правовий, до якого входять законодавчі та підзаконні акти з питань забезпечення економічної безпеки, а також регулювання економічних відносин; 2) інституційний, який становлять уповноважені органи публічної адміністрації та їх посадові особи, які мають нормативно закріплені повноваження щодо забезпечення економічної безпеки держави; 3) організаційний, який містить принципи, форми й методи реалізації державної політики у сфері забезпечення економічної безпеки. **Висновки.** Встановлено, що з огляду на завдання державної політики у сфері забезпечення економічної безпеки держави її підвидами є нормативно-інституційна політика у сфері економічної безпеки, політика забезпечення економічних прав громадян, політика розвитку національної економіки та економічних відносин, політика цифровізації економічних відносин, політика забезпечення економічної та фінансової грамотності населення, правоохоронна політика у сфері економічної безпеки.

**Ключові слова:** економічна безпека, національна безпека, державна політика, адміністративно-правові засади, суб'єкти, адміністративне законодавство, оптимізація.

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## MODERN APPROACHES TO DETERMINING TYPES OF INCENTIVES APPLIED TO LOCAL SELF-GOVERNMENT EMPLOYEES

**Abstract.** *The relevance of the article* is in the fact that to ensure a psychological, non-pecuniary, social and economic effect of the incentives applied to local self-government officials, they should be used on a case-by-case basis, that is, depending on individual merits of each employee. This, in turn, implies the presence of various types of incentives, which will be considered in this study. **Results.** All existing incentives can be grouped into: 1) pecuniary incentives, i. e., those related to pecuniary reward for the employee (money, valuable gifts); and 2) incentive of non-pecuniary (moral) character. The above classification, undoubtedly, is relevant for the employees of local self-government bodies. Therefore, the types of pecuniary incentive should include: a) bonus, b) pecuniary assistance; c) monetary award; d) compensation payments; etc. In turn, the non-pecuniary incentive should include: a laudatory order; early termination of disciplinary penalty; rewarding with a diploma, certificate of appreciation, other departmental awards of the public authority; Merit promotion in the manner prescribed by the Law "On Civil Service"; government award recommendations and the government award (a greeting letter, gratitude, certificate of appreciation). **Conclusions.** To date, their single list has not been generated, which is logical and understandable. This differentiation is related to the specific nature of the work or the service performed by the employee. However, the analysis makes it possible to state that pecuniary incentives are the most common and promising to date. Consequently, effective mechanisms for calculating indicators to be taken into account in determining the amounts of awards should be developed. Moreover, while the lawmaker empowers the employer to apply other types of incentives, in practice the managers of state-owned enterprises (institutions, organizations) are often not interested in expanding the types of incentives at the enterprise, but rather subjectively allocate available financial and pecuniary resources to reward workers. This gap, in the author's view, needs to be addressed immediately.

**Key words:** encouragement, employees, initiative, moral encouragement, material stimulation, labor collective.

### 1. Introduction

In order to ensure that the incentives applied to local self-government officials really have the necessary psychological, non-pecuniary, social and economic effect, they should be used on a case-by-case basis, that is, depending on individual merits of each employee. This, in turn, implies the presence of various types of incentives, which will be considered in this study. It should be noted that current literature review reveals a considerable number of approaches to determination of types of incentives for workers. First of all, it is due to the fact that the Labour Code of Ukraine, in particular article 143, provides for that any incentive contained in the rules of internal labour procedure approved by work collectives may be applied

to employees of enterprises, institutions, organizations. This, in turn, is an enabling environment for employers. All this has been reflected both in scientific literature and in special legal regulations on the activity of different agencies and organizations (for example: Disciplinary statute of the National Police of Ukraine; Disciplinary statute of the Armed Forces of Ukraine, or individual by-laws, such as collective agreements, statutes, etc.).

The most common classification of incentives is into pecuniary and non-pecuniary stimulation. Yu.I. Palkin argues that pecuniary and non-pecuniary incentives are an indissoluble unity. They develop, mutually enriching and reinforcing each other. "We cannot establish a democratic, legal, social, state-organized

society only on the basis of pecuniary interest. The focus on the vital importance of pecuniary incentives in no case should decrease the importance of non-pecuniary incentives for work. Underestimation of the non-pecuniary factor is an enabling environment for the occurrence of greed" (Palkin, 1975, pp. 110-111). I.V. Marchenko stresses that, first, the problem of pecuniary and non-pecuniary stimulation of effectiveness of different categories of employees as a legal form of incentive has been and now is of importance in the doctrine of labour law; second, human needs are always expressed in a concrete form of spiritual, pecuniary, social interests and require their regulatory mechanism as an incentive for effective and productive work; third, the general concept of the incentive should be considered as a combination of different motives, which form motivation for realization of existing interests of an individual, social group (team), society in the results of labour; fourth, the categories of stimulation as legal forms of incentive correlate as a whole and part, so they require to be consolidated in the draft Labour Code of Ukraine (Marchenko, 2015, p. 58).

## 2. Legislative framework for incentives

According to the law-maker's perspective on the types of incentives applied to employees, it should be noted that article 143 of the Labour Code does not give an approximate list of incentives for success in work, it is established that any form of incentive contained in internal labour regulations, approved by work collectives, can be applied to employees of enterprises, institutions, organizations (Arsentieva, 2016). This type of incentives can be applied to employees for exemplary performance of labour duties, innovation, increase of effectiveness, other successes. According to N.M. Khutorian, this group includes measures of the non-pecuniary and pecuniary incentives established at the enterprise. It can be a laudatory order, rewarding with a valuable gift, bonuses, etc. Therefore, the scientist argues that the determining factor in the application of any incentive to employees is the policy on incentives at an individual enterprise within the framework of general operating forms (Babaskin, Baraniuk, Drizhchana, et al. 2004, p. 464).

To date, to apply the incentives, the heads of enterprises use the Standard internal labour regulations for workers and officials of enterprises, institutions, organizations, approved by Resolution 213 of the State Committee of Labour of the USSR of July 20, 1984. The main substantive elements of the Standard internal labour regulations are as follows: 1) general provisions relating to observance of labour discipline; 2) the procedure for hiring

and firing employees; 3) basic rights and duties of employees; 4) basic duties of the employer; 5) working time and procedure of its use; 6) incentives for employees for success in their work; 7) penalties for violation of labour discipline. According to para. 21 of the Standard internal labour regulations for exemplary performance of labour duties, such as increase of effectiveness, improvement of quality of production, long and perfect work, innovations in work and other achievements in work, the following incentives are applied: a) a laudatory order; b) bonuses; c) rewarding with a valuable gift; d) awarding with a Certificate of Appreciation; e) entering into the Book of Honour, on the Board of Honour (Resolution of the USSR State Committee for Labour and Social Affairs On Approval of the Standard Rules of Internal Labour Regulations for Workers and Employees of Enterprises, Institutions, and Organizations, 1984).

In addition, article 269 of the draft Labour Code of Ukraine provides that for success in work and diligent performance of labour duties, measures of non-pecuniary and pecuniary incentive can be applied to employees, such as a laudatory order, awarding with a diploma, bonus, rewarding with a valuable gift. The internal labour regulations, legal regulations of the employer may establish other types of incentive. Employees are rewarded for special labour services in the established manner with departmental awards and State awards (Draft Labour Code of Ukraine, 2014).

In accordance with the Disciplinary Statute of the National Police of Ukraine, the following types of incentives may be applied to police officers: 1) early termination of disciplinary penalty; 2) entering into the Board of Honour; 3) monetary incentive; 4) rewarding with a valuable gift; 5) additional paid leave for up to five days; 6) encouragement with departmental awards of the National Police of Ukraine; 7) encouragement with departmental awards of the Ministry of Internal Affairs of Ukraine; 8) early nomination of a special rank; 9) nomination of a special rank one degree higher than the rank provided by the occupied position; 10) encouragement with an official reward of the Ministry of Internal Affairs of Ukraine "Firearm"; 11) encouragement with an official reward of the Ministry of Internal Affairs of Ukraine's "Steel Arms" (Law of Ukraine On the Disciplinary Statute of the National Police of Ukraine, 2008).

Under the Disciplinary Statute of the Armed Forces of Ukraine, the following incentives may be applied to military personnel: a) approval; b) appreciation; c) additional extraordinary short leave pass from the loca-

tion of a military unit or ship on the shore (for military servicemen and cadets of higher military educational establishments, military educational units of higher education institutions); d) informing parents or staff at the place of employment or training of a military servant before the conscript (entry) for military service about his/her exemplary performance of military duty and incentives received; e) additional leave for up to 5 days (for military servicemen); e) merit certificate; e) a valuable gift; f) bonus; g) entering the name of the military servant in the Book of Honour of the military unit (ship); h) early nomination of the next military rank; i) honourable breastplates; k) departmental awards [7].

The disciplinary statute of civil protection service provides that the following types of incentive may be applied to members of the rank-and-file and command staff: 1) early termination of disciplinary penalty; 2) a laudatory order; 3) rewarding with a valuable gift or bonus; 4) rewarding with a merit certificate of a body or unit of civil protection; 5) entering the surname on the Board of Honour of the body or unit of civil protection; 6) entering the surname on the board of Honour of a specially authorized central executive body on civil protection; 7) early nomination of another special rank; 8) nomination of another special rank one degree higher than the rank provided by the occupied position; 9) honourable awards of specially authorized central executive body for civil protection; 10) Ukrainian State and government award recommendations (Law of Ukraine On the Disciplinary Statute of the National Police of Ukraine, 2008).

The provisions of the Law of Ukraine "On Civil Service" are of interest with regard to the scientific issues under study. In particular, article 53 provides for that for impeccable and effective civil service, for special merits, the following types of incentive are applied to civil servants: 1) a laudatory order; 2) rewarding with a diploma, certificate of appreciation, other departmental awards of the public authority; 3) early nomination of a rank according to the procedure defined by this Law; 4) government award recommendations and governmental awards (a greeting letter, gratitude, certificate of appreciation); 5) State award recommendations. The incentive to civil servants who occupy positions of categories "B" and "C" are applied by the head of the civil service, and to civil servants who occupy posts of category "A," by a nominator (Law of Ukraine On Civil Service, 2015).

Therefore, to sum up the scientific perspectives and the legislative vision on the existing types of incentive for different categories

of employees, it should be noted that approaches to classification are diverse and types of incentive are various. However, the analysis makes it possible to state that all existing incentives can be grouped into: 1) pecuniary incentives, i.e., those related to pecuniary reward for the employee (money, valuable gifts); and 2) incentives of non-pecuniary (moral) character. The above classification, undoubtedly, is relevant to the employees of local self-government bodies. Therefore, the types of pecuniary incentive should include: a) bonus, b) pecuniary assistance; c) monetary award; d) compensation payments; etc. Thus, the non-pecuniary incentives should include: a laudatory order; early termination of disciplinary penalty; rewarding with a diploma, certificate of appreciation, other departmental awards of the public authority; merit promotion in the manner prescribed by the Law "On Civil Service"; government award recommendations and the government award (a greeting letter, gratitude, certificate of appreciation). The author will consider each of the types of incentives in detail.

### 3. Pecuniary incentives for employees

In the current economic and social context, it is pecuniary incentives that should be under focus. Pecuniary incentives are real rewards that have been promised in advance for high-performance and high-quality work. The author advocates the H.I. Koryttsev's opinion that pecuniary incentive always takes the form of monetary support for workers and, along with moral satisfaction, provides the worker with additional pecuniary income (Koryttsev, 2012). Pecuniary incentives for employees require the head of the local self-government to take into account the following: the interrelation with the work done, the results achieved in terms of quantity and quality of work; correlation between the various forms of pecuniary incentive; the simplicity, clarity and precision of the stimulation system with regard to incentives and penalties; and the way in which the pecuniary incentive is perceived by the workers; combining pecuniary incentive with other types of incentives (Vynohradskyi, & Shkanova, 2002).

The most common type of pecuniary incentive is the bonus. The bonus, according to H.A. Kapina, is a form of encouragement, calculated in a fixed sum of money or as a percentage of the basic wage, the employer is obliged to pay the employee for the result of the work performed in the manner prescribed by law (Kapina, 2009). O.S. Halchenko holds that the bonus is a monetary reward paid to employees for achieving high-quality and quantitative performance. The scientist argues that the main purpose of the bonus system for employees, accord-

ing to the personal contribution of the employee to the final results of the enterprise, is to ensure: a) the interest of each employee in identifying and realizing the assets and potentials of increasing the results of individual and collective work; b) the validity of the wage ratios of different groups and categories of workers, based on their role in the production process, qualification and professional experience, complexity of work and functions performed; c) the level of responsibility and creative activity; d) the correlation between the amount of remuneration and the work effort of the employee, based on the results of individual work, and the assessment of the personal contribution to the final results of the work of the enterprise; e) the extent to which the wages of employees are increased by personal efforts; f) active involvement of workers of small work teams in the evaluation of the results of each employee and in the distribution of collective earnings (Halchenko, 2010).

Therefore, bonuses are the payment of a reward to an employee for certain achievements in his or her work performance, calculated according to established indicators and paid in the manner prescribed. Bonuses for employees, including those who work in local self-government bodies, can be: for certain achievements and high work performance; annual bonuses (for example, in the form of the thirteenth salary); bonuses on the occasion of professional holidays and so forth. It should be noted that in the Law of Ukraine "On service in local self-government bodies," the concepts of "bonus," "remuneration," "pecuniary assistance" are not mentioned at all. Nor does it contain any reference to other legal regulations on the grounds and manner of payment of bonuses and pecuniary assistance to officials of local self-government. However, the Law 2493-III contains two regulations on the issues under consideration. According to the first one (art. 9), every local self-government official has the right, along with his or her other fundamental legal rights, to remuneration depending on his or her post, rank, quality, experience and length of service. According to the second one (part 5 of art. 21), officials of local self-government are granted annual leave of 30 calendar days, unless the laws of Ukraine provide for a longer leave, with a health benefit equal to the official salary (Vrublevskiy, 2018). Consequently, this type of incentives should be legislated, in particular in the Law of Ukraine "On service in local self-government bodies." This is also due to the fact that the bonus is one of the most frequently applied and effective ways of rewarding the category of employees under study.

The next type of pecuniary incentive is pecuniary assistance to local self-govern-

ment employees. Pecuniary assistance may be established as compulsory in accordance with Ukrainian law. This is generally the case for workers in the public sector. Pecuniary assistance, depending on the nature of the payment, may be grouped into systematic assistance, to all or most workers, and one-time assistance to individual workers in connection with certain circumstances, due to which it is paid. Systematic pecuniary assistance may be the payment of an annual basic leave, in view of environmental condition, on the celebration of the employee's jubilee or the like. The pecuniary assistance does not require the worker to submit an application, while the payment is made on the ground of an order by the manager in view of the fact which is the ground for payment (for example, the employee's jubilee is itself the ground for the payment of pecuniary assistance without application). The one-time payment includes assistance in connection with difficult family circumstances, payment for medical treatment and care to the employee of the enterprise and/or members of his or her family, the rehabilitation of the employee's children, burial, etc. This type of pecuniary assistance is paid on the ground of a person's application, must contain a description of the circumstances giving grounds for payment and must contain evidence of the circumstances (Ivasiuk, & Kravchuk, 2019).

Considering this type of incentive, it should be noted that sub-para. 3 of para. 2 of Resolution 268 "On streamlining the structure and conditions of remuneration of employees of the staff of executive authorities, prosecutors, courts and other bodies" provides for the right of the heads of the local self-government bodies, within the approved wage fund, to pay workers pecuniary assistance for health improvement when granting annual leave in an amount not exceeding the employee's average monthly salary. This provision means that if funds are available, the head can decide to pay the average monthly salary. In addition, the specific procedure for the provision of pecuniary assistance should be established in the Regulations on pecuniary assistance to workers, which are annexed to the collective agreement (Resolution of the Cabinet of Ministers of Ukraine On streamlining the structure and conditions of remuneration of employees of the staff of executive authorities, prosecutors, courts and other bodies, 2006). Therefore, the amount of the "health improvement" for the officials of the local self-government bodies is limited to the minimum and maximum: assistance for health improvement is obligatorily paid in the amount of the official salary, and, if funds are available, in the amount not exceed-

ing the average monthly salary. It should be noted that according to sub-para. 3 of para. 2 of Resolution 268, pecuniary assistance for health improvement is paid to LSG employees, that is, employees, in addition to officials, can also receive it. Nevertheless, for them "health improvement" assistance is not obligatory payment. If the head has decided to provide it, it should not exceed the average monthly salary. If the estimated amount for such assistance is insufficient, it can be paid less, based on financial capacity (Resolution of the Cabinet of Ministers of Ukraine On streamlining the structure and conditions of remuneration of employees of the staff of executive authorities, prosecutors, courts and other bodies, 2006).

Therefore, it is clear that pecuniary assistance, regardless of its nature (either one-time or systematic), is an important form of incentive for all categories of workers, including those who work in local self-government bodies. In fact, its existence and possibility of application is a priori an important reaffirmation of the value of an employee as a professional and a human being. Pecuniary assistance, in our opinion, accentuates the loyalty of the employer and increases the quality and efficiency of the relationship between the parties to the relevant employment relations.

The type of incentive such as monetary award should be under focus. The payment of monetary award has traditionally been governed by separate Regulations on bonuses, pecuniary assistance and monetary award of employees. Such regulations are drawn up in accordance with the Constitution of Ukraine and the Labour Code of Ukraine, Laws of Ukraine "On remuneration," "On service in local self-government bodies," "On collective agreements and agreements," "On trade unions, their rights and guarantees of activities," Resolution 268 of the Cabinet of Ministers of Ukraine of March 9, 2006, "On streamlining the structure and conditions of remuneration of employees of the staff of executive authorities, prosecutors, courts and other bodies," Order 77 of the Ministry of Labour and Social Policy of Ukraine of October 2, 1996 "On terms of remuneration of employees engaged in the service of executive authorities, local self-government and their executive bodies, prosecutors, courts and other bodies," Resolution 1049 of the Cabinet of Ministers of Ukraine of January 20, 1993 "On bonuses for length of service for employees of executive authorities and other State bodies" with amendments and additions.

In the author's view, such awards should be given to:

First, the employees, who during the year performed their work qualitatively and effi-

ciently, actively participated in the work with the public, ensured stable development of the local self-government unit;

Second, employees who have been working in local self-government for a long time, for example: 5, 10, 15 years and longer. This is a specific assessment of the employee's loyalty and the importance of his/her contribution to the performance of the body.

The final type of pecuniary reward that should be under focus is compensations. Compensations are payments intended to compensate an employee for pecuniary expenses incurred in connection with the performance of his or her duties (Prokopenko, 1998, p. 355). Such additional expenses are incurred by the employee on official business trips, which are the employee's travel on the order of the head of the enterprise for a certain period of time to another location for the performance of an official assignment outside his/her permanent place of work. Daily subsistence allowance, travel to and from the place of travel, rental of accommodation is paid (Prokopenko, 1998, p. 355).

#### 4. Non-pecuniary incentives for employees

The next group of incentives that can be applied to employees of local self-government bodies are non-pecuniary (moral incentives). I. Antonova and T. Matskevych argue that the effective application of non-pecuniary incentives require: making regulations on the status of non-pecuniary incentives, according to the established rules, and workers' awareness of them; making greater use of various forms of non-pecuniary incentives in the interest of creativity and activism; providing non-pecuniary encouragement with pecuniary means of incentives; ensuring the appropriate interaction of pecuniary and non-pecuniary incentives, continuously improving them in accordance with new tasks, changes in content, organization and working conditions; informing the working team about every non-pecuniary encouragement given to a worker; presenting awards and commendations in a solemn atmosphere; encouraging workers in a timely manner, as soon as a certain level of success has been achieved; developing new forms of incentives and establishing strict moral responsibility of each employee for the work assigned; analysing the effectiveness of incentives; strict observance with the established procedure for recording promotions in the worker's work record (Antonova, & Matskevych, 2009, p. 103).

The most common forms of non-pecuniary incentives for local self-government employees are:

– A laudatory order. Appreciation is a form of incentive that is of a moral and psychologi-

cal nature and is communicated to the person who has achieved success by performing his/her official duties orally or in writing. T. Koliesnik argues that the content of this incentive is a public expression of appreciation by the employer to the employee, mainly for achievements in the workplace such as: improvement of performance in comparison with previous periods, exceeding of the plan; progress in the early taking measures to improve the organization of production and work and to improve the quality of output (work performed and services rendered); the high performance of their duties; successful implementation of activities, projects, active participation in activities or projects, etc. However, the application of such incentives is usually regulated in a specific local regulation (such as Regulations on non-pecuniary incentives for employees) or in a more general instrument (for example, in Regulations on pecuniary and non-pecuniary incentives for the employees of the organization, Internal work rules, Regulations on incentives for employees) (Koliesnik, 2016, p. 154).

– Early termination of disciplinary proceedings. This type of incentive is used only in terms of: first, the disciplinary action has fulfilled its educational function; second, the employee has indeed corrected and continues to perform his/her work at a high level.

– Awarding a diploma, a certificate of appreciation and other departmental awards of the public authority. This certificate is usually awarded to individual employees and teams who used to receive an incentive such as a laudatory order. A certificate of appreciation implies the public presentation of a document attesting to the recognition of the employee's

merits by the management of the organization. The local regulation of the organization may provide for a one-time bonus for an employee in connection with the award of the certificate of appreciation. The most frequent grounds for awarding certificates of appreciation to employees are: high results in a particular field of work; professional excellence; substantial contribution to the development of the organization; innovation and other achievements in the work; exemplary performance of work duties, exemplary and long-term work in the organization etc. (Koliesnik, 2016, p. 155).

– Merit promotion in the manner prescribed by the Law "On Civil Service".

### 5. Conclusions

The study of the types of incentives that can be applied to both the general category of workers and public officials enables to argue that to date, their single list has not been generated, which is logical and understandable. This differentiation is related to the specific nature of the work or the service performed by the employee. However, the analysis reveals that pecuniary incentives are the most common and promising to date. Consequently, effective mechanisms for calculating indicators to be taken into account in determining the amounts of awards should be developed. Moreover, while the lawmaker empowers the employer to apply other types of incentives, in practice, managers of state-owned enterprises (institutions, organizations) are often not interested in expanding the types of incentives at the enterprise, but rather subjectively allocate available financial and pecuniary resources to reward workers. This gap, in the author's view, needs to be addressed immediately.

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## СУЧАСНІ ПІДХОДИ ДО ВИЗНАЧЕННЯ ВИДІВ ЗАОХОЧЕНЬ ПРАЦІВНИКІВ ОРГАНІВ МІСЦЕВОГО САМОВРЯДУВАННЯ

**Анотація. Мета.** Актуальність статті зумовлена тим, що для того, щоб заохочення, які застосовуються до працівників органів місцевого самоврядування, справді мали необхідний психологічний, моральний, соціальний та економічний ефект, вони повинні використовуватися диференційовано, тобто залежно від індивідуальних заслуг кожного працівника. Це своєю чергою зумовлює наявність різних видів заохочень, дослідженню яких і



присвячена представлена стаття. **Результати.** Усі існуючі заохочення можна поділити на дві великі групи: матеріальні заохочення, тобто такі, що пов'язані з матеріальною винагородою для працівника (гроші, цінні подарунки), та заохочення нематеріального (морального) характеру. Зазначена класифікація, безперечно, є актуальною і для працівників органів місцевого самоврядування. Отже, до видів матеріального заохочення варто віднести премію, матеріальну допомогу, грошову винагороду, компенсаційні виплати тощо. Своєю чергою до заохочень морального характеру необхідно віднести оголошення подяки; дострокове зняття дисциплінарного стягнення; нагородження грамотою, почесною грамотою, іншими відомчими відзнаками державного органу; дострокове присвоєння рангу в порядку, визначеному Законом України «Про державну службу»; представлення до нагородження урядовими відзнаками та відзначення урядовою нагородою (вітальний лист, подяка, почесна грамота). **Висновки.** На сьогодні єдиний перелік видів заохочень, які можуть застосовуватися як до загальної категорії працівників, так і до державних службовців, не сформовано, що є цілком логічним і зрозумілим. Така диференціація пов'язана зі специфікою роботи працівника (проходження ним служби). Однак проведений аналіз дає змогу говорити про те, що нині найбільш поширеними й перспективними є саме матеріальні заохочення. А відтак постала нагальна необхідність розроблення дієвих механізмів щодо розрахунку показників, які мають бути враховані під час визначення сум матеріального заохочення. Також, незважаючи на те, що законодавець залишає за роботодавцем можливість застосування інших видів заохочень, на практиці виявляється, що керівники державних підприємств (установ, організацій) найчастіше не лише не зацікавлені в розширенні видів заохочень на підприємстві, а й досить суб'єктивно розподіляють наявні фінансові та матеріальні ресурси для заохочення працівників. І ця прогалина, на нашу думку, потребує негайного усунення.

**Ключові слова:** заохочення, працівники, ініціатива, моральне заохочення, матеріальне стимулювання, трудовий колектив.

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## ESTABLISHMENT AND DEVELOPMENT OF INFORMATION AND LEGAL SUPPORT OF THE NATIONAL POLICE OF UKRAINE

**Abstract. Purpose.** The aim of the article is a retrospective analysis of the information and legal support of law enforcement bodies. **Results.** The article is a retrospective analysis of information and legal support of the National Police of Ukraine. It is proven that the development of information support for activities of law enforcement bodies are interrelated with the evolutionary stages of information technology development. Six stages in the development of information support for law enforcement bodies are identified and analysed. The study reveals that: for the first time, the Ministry of Internal Affairs introduced the Instruction on keeping records in internal affairs bodies in 1961, and specifically the formation of the scientific and practical basis for information support of the law enforcement bodies of Ukraine began in the early 1970s; at that time, the Republican Research Information Centre of the Ministry of Internal Affairs of the Ukrainian SSR (now the Department of Information and Analytical Support of the National Police of Ukraine) was launched with its data processing centres in all regional Internal Affairs Directorates that were equipped with Minsk-type computers and later with EU media. It is revealed that the specificity of making information systems at that time was that information was not processed centrally, which had affected and sometimes made it impossible for law enforcement officers to have direct access to a unified database. **Conclusions.** The police's competence with regard to the information, information and analytical support, making and application of information resources are set out in article 25 of the Law of Ukraine "On National Police." The legal regulations governing activities in this area are analysed. It is theoretically justified that a positive novelty in the legal regulatory mechanism for information support to police activities is the legislative consolidation of the police's information and analytical activities, their powers in this field, the list of databases, as well as liability for misuse of information resources. It is established that the use of information technology in the performance of the National Police, with appropriate legal support, may become one of the main factors in strengthening the rule of law in our country.

**Key words:** stages of development, information support, legal support, information portal, integrated information network.

### 1. Introduction

The establishment of a legal basis for information support of activities of the National Police is historically inextricably linked to the establishment and development of their institutional and functional system. The active development of information processes and the introduction of new inventions, achievements and technol-

ogies into production and management processes have driven not only the progressive development of our State but have also contributed to the increase in the number of crimes and the improvement of the means and methods of committing them. Therefore, the development of qualitative parameters for information support to the National Police of Ukraine

and the legal basis for its use are increasingly relevant. It allows finding new ways of crime prevention, promoting effective and accurate decision-making for the detection of crimes that has been already well understood at its level in ancient times.

The development of information systems in the activities of the National Police of Ukraine in current circumstances is rapidly improving, but issues of the day occur, since now the information systems and their legal support cannot fully realize their objective.

The problem of information and legal support of the activities of law enforcement bodies has been studied in the historical context in the works by S. Banakh, A. Volodko, R. Kaliuzhnyi, M. Kryshchanovych, I. Katerynychuk, M. Perepelytsia, T. Tankushyn, V. Tkachenko, I. Khort, A. Frolov, A. Yankovska. However, the dynamics of the information society development in general, as well as the ongoing reform of the National Police of Ukraine, demonstrate the relevance of this issue.

The aim of the article is a retrospective analysis of the information and legal support of activities of law enforcement bodies.

## 2. The role of information support of law enforcement agencies

In modern conditions, the legal basis for information support of the activities of the National Police of Ukraine opens up new possibilities for crime prevention, promotes effective and accurate decision-making for crime detection, including in "hot pursuit."

According to legal scholars, the development of information support in law enforcement is important. For example, A. Frolova argues that in many cases the priority of information support in the process of effective administration in the internal affairs bodies and functioning of the entire law enforcement system is confirmed by the practice of combating crime. The important role of the information system in law enforcement bodies has been approved at the legislative level, in particular by Orders of the Ministry of Internal Affairs of Ukraine (Frolova, 2002, p. 55).

According to I. Katerinchuk, the study of the genesis of information support of law enforcement bodies, including the legal basis for their use, reveals a link between the development of information support to law enforcement activities and the evolutionary stages of information technology. The scientist identifies six stages in the development of information support to law enforcement bodies. In the first stage, human speech emerges, which greatly facilitates the exchange of information in personal contact, as well as the accumulation of information resources, the presence

of persons responsible for their storage. In the second stage of evolution, writing emerged, and the first printing press in 1445 marked the beginning of the third stage of information technology development that lasted about 500 years, an important achievement of which was the emergence of information support to law enforcement bodies depending on their activities. During the fourth period (the late XIX – the beginning of the XX century) of the information evolution means of communication were invented and spread: radio, telegraph, telephone, etc. In 1907, a number of legal regulations were adopted and contributed to the improvement of information and analytical work of the police, in particular "Regulation on security departments," "Instruction on organization and conduct of internal (undercover) surveillance" (Katerynychuk, 2015). At this period, the first theoretical works on judicial record-keeping and registration occur. For example, the famous criminologist V. Lebedev published the book *Art of crime detection*, which contained detailed scientific information on fingerprinting, anthropometry and forensic photography of the police. In 1915, S. Trebugov published a practical guide for forensic investigators, *The basics of criminal technology: Scientific and technical methods of crime investigation*, revealing information related to crime registration (Tregubov, 2002). With the advent of the first electronic computing machines (computers) in 1946, the fifth evolution stage of information technology began, and in the sixth stage up to this day, a microprocessor and a personal computer were invented (Banakh, 2019, p. 12).

It should be noted that in 1917-1921, law enforcement bodies, such as the Gendarmerie, the Hetmanschyna Guard, the People's Militia Directorate, the Intelligence and Counterintelligence Service, the Office of the Procurator, the Security Service and other special services, responsible for combatting crime, the law and order, as well as lawful conduct in the State, were established in the territory of modern Ukraine. In addition to undercover method, external surveillance and other operational practices, information analysis was also widely applied.

Until 1960, Ukraine did not have a unified system of registration in law enforcement bodies; only in 1961 the Ministry of Internal Affairs introduced an Instruction on keeping records in internal affairs bodies. The establishment of the scientific and practical basis for information support to the law enforcement bodies of Ukraine began in the early 1970s. At that time, the Republican Research Information Centre (RRIC) of the Ministry of Internal Affairs of the Ukrainian SSR (now the Depart-

ment of Information and Analytical Support of the National Police of Ukraine) was launched with its data processing centres in all regional Internal Affairs Directorates that were equipped with Minsk-type computers and later with EU media. The information centres have become centres for the collection of basic information and technical tools for the data-processing, functional automated information systems that have had their specific objective, tasks, level of operation and so on. According to R. Kaliuzhnyi and V. Tkachenko, at that time the automated information systems used in law enforcement did not differ significantly from those used in other branches of the national economy (Kaliuzhnyi, & Tkachenko, 1991, p. 65). The specificity of making information systems at that time was that information was not processed centrally, which had affected and sometimes made it impossible for law enforcement officers to have direct access to a unified database.

The establishment of a unified database containing all the necessary information for the performance of law enforcement functions was impeded by the following factors: first, the lack of technical capacity of the information centres of the Soviet law enforcement system; second, underutilization of the latest programming resources of the time. The purpose of using information and analytical support to bodies was statistical analysis of information, criminal records and monitoring of consideration of reports and allegations of crimes and offences (Kryshtanovych, 2012).

### **3. Formation of information and legal support for the activities of the National Police of Ukraine**

At the beginning of 1980, the government of the USSR developed and adopted the Strategy "Automation of information support to management activities," which was based on the idea of creation of an automated workplace (AWP) for the employee of internal affairs bodies. This Strategy determined the development of a complex for automating the intellectual work of an individual employee and transmitting information "from bottom to top" and "from the periphery to the centre" (Tankushyna, 2011). In 1985, a unified automated databank was established, which concentrated the information required by law enforcement to perform their functions. Automated operational information systems were installed in all duty units of the internal affairs bodies. The system contained a suite of software, information, organizational and technical tools used to collect and store information, as well as to monitor and report at duty stations. In 1988, the Department of Technical Means of Crime Prevention and Detection was established, which was later

reorganized into the Information Technology Department of the National Academy of Internal Affairs of Ukraine.

Undoubtedly, the improvement of the system of information support to internal affairs bodies has contributed to increase in crime prevention and control in the country. The persuasive factor was that electronic computing machines had enabled law enforcement officers to automate routine and labour-intensive work and to use them to enhance their ability to perform the relevant duties. The use of the computer has enabled law enforcement officers to identify trends and patterns in the fight against crime and the enforcement of public order (Khort, 2015).

The focus should be on all available assistance in the use of the latest information-processing tools in the field of investigative and reference work. In particular, such automated information systems (AIS) as: "Administrative practice," "Prophylaxis-Search," "Delivered," "Numbered things," "Person," "Patrols," "Legal regulations" and others have already proved their effectiveness at the first stage of their implementation. For example, in the few months of operation AIS "Prophylaxis-Search" contributed to a 16% reduction in the number of crimes committed by persons previously convicted in the capital, and thanks to AIS "Statistics" the number of unreliable indicators on solving crimes decreased. At that time, the computer was also used to combat economic crime and a number of methods and tools were introduced for retrospective analysis of the activities of organizations in various sectors of the economy. In the nineties of the last century the sectoral information system "Legal regulations" was launched and later transformed into information systems "Law," "Legislation," "Legal regulations of Ukraine."

In 1991, the Ministry of Internal Affairs began to set up the first local computer network, to which the heads of the Ministry of Internal Affairs and the leading services of the structural departments of law enforcement bodies were given access. Undeniably, in 1992, the publication of the main legal regulation on information relations in Ukraine, the Law of Ukraine "On Information" (Law of Ukraine On Information, 1992) was the beginning of the formation of the unified system of data processing of the Ministry of Internal Affairs, where information was processed in a unified way, based on common inputs and reference materials for different tasks.

In 1998, the Ukrainian internal affairs bodies introduced a computer system for information collection and dissemination by electronic mail, which contributed to better

reporting prompt information on the commission of offences and other high-profile events to the heads of regional departments and the staff of the Ministry of Internal Affairs.

In 2000, the information network consisted of local computer networks of structural units of the Ministry of Internal Affairs of Ukraine and its regional units, which were merged into the unified information system. The local networks of each structural unit operated independently and autonomously. The relevant structural unit of the Ministry of the Internal Affairs established and maintained local computerized databases, which were accessed according to the official needs of the employees (Perepelytsia, Volodko, 2016; Kryshchanovych, 2016).

In 2002, the Ministry of Internal Affairs established the Department of Information and Analytical Support (DIAS), responsible, inter alia, for the development and introduction of information technologies in the performance of the internal affairs bodies of Ukraine (Iankovska, 2010, p. 80). In addition, the DIAS provided such electronic data as "Missing citizens," "Persons hiding from authorities," "Unidentified corpses," "Cultural values," "Mobile phones," "Wanted vehicles," "Wanted firearms" etc.

In 2006, on the basis of the DIAS the Ministry of Internal Affairs considered the establishment of an operational and analytical unit, responsible for the development of operational and analytical structures in the central bodies and regional police units, however, the objective and clear duties were not defined. In this connection, in 2007 the Ministry of Internal Affairs created instead a Department of Strategic Analysis and Estimating and the Information Technology Sectors (ITS) within city, district and line internal affairs bodies (Kryshchanovych, 2012).

It should be noted that the further increase in the crime rate in Ukraine has motivated the improvement of existing and the development of new approaches in the work of internal affairs bodies. One of the priority tasks of information support was to establish a unified integrated information network in the MIA of Ukraine, which would contain all previously recorded and new information for the purposes of operational searches. In order to solve this problem, a suite of software of the information and search system "AWPOO" (automated working place of the operative officer), developed in 2003 by the Directorate of the MIA of the Luhansk region, was taken as a basis, and in 2009, on the grounds of the Regulations on the Integrated Information and Search System of the Internal Affairs Bodies of Ukraine,

it was introduced as a reference system in all regional units of the MIA.

The Integrated Information Search System (IISS) is a set of organizational, administrative, software and information and telecommunications tools for the processing of reference and information, operational and search records and provides authorized user with access to information resources of the IISS. This provision clearly defines the objectives of the operation of the IISS: to integrate information resources existing in internal affairs bodies and units into a unified information and analytical complex through the use of the latest information technologies, computer and telecommunication equipment to support the operational and official duties of internal affairs bodies and units and to enhance their effectiveness to counter and prevent crime (Order of the Ministry of Internal Affairs of Ukraine On approval of the Regulations on the Integrated Information Search System of the Bodies of Internal Affairs of Ukraine, 2009).

In accordance with the Regulations on the Integrated Information and Search System of the Internal Affairs Bodies of Ukraine, the Algorithm for user action on making IIPS was developed for use in the performance of official duties in the field of law enforcement. At the same time, regional and central IIPS information records are available only to authorized IIPS users. Currently, the IIPS involves 19 computer information subsystems (AIS "Person," AIS "Fingerprint accounting," AIS "Unsolved crimes," AIS "Orion," etc.).

Undeniably, the Law of Ukraine "On the National Police" (Law of Ukraine On the National Police, 2015) is an important and leading regulatory instrument of information support to the police, since it empowers the police to use information and analytical support, to establish and use information resources. In other words, it can be interpreted as a positive novelty in the legal and regulatory framework for this sector as compared to the previous state of the legal regulatory mechanism is the legislative consolidation of the information analysis by the police, their powers in this field, the list of databases, as well as liability for misuse of information resources.

#### **4. The current state of information and legal support of the National Police of Ukraine**

In order to increase effectiveness in this area of service, at the end of 2015, the Department of Information Support and Coordination of Police Activities '102' (DISCP) was established in the National Police of Ukraine to take measures under Ukrainian legislation aimed at information and analytical, information

and search support to law enforcement activities and protection of personal data during processing in the structural units of the National Police of Ukraine. The DISCP was later reorganized as a Department of Information and Analytical Support (DIAS), focused on: information and search, analytical support; participation in drafting of legislation of the Ministry of Internal Affairs on matters within the competence of the police and related to information and analytical support, as well as processing of personal data in police bodies and units.

In the context of law enforcement reform, the legal and regulatory framework for using opportunities of information support to the National Police of Ukraine and the Ministry of Internal Affairs of Ukraine during the prevention of crime and the detection of crimes, including in “hot pursuit,” has been improved. For example, in 2016, the Ministry of Internal Affairs of Ukraine, with a view to determining the procedure for the operation of the Unified Digital Departmental Telecommunication Network of the MIA and the rules for cooperation between the Ministry of Internal Affairs, the National Guard and the central executive authorities, guided and coordinated by the Minister of Internal Affairs of Ukraine, with regard to access to the resources and services of the Unified Digital Departmental Telecommunication Network of the Ministry of Internal Affairs, the relevant regulations were adopted (Order of the Ministry of Internal Affairs of Ukraine On the Regulations on the Unified Digital Departmental Telecommunication Network of the Ministry of Internal Affairs, 2016; Order of the Ministry of Internal Affairs of Ukraine On approval of the Instruction on the procedure for mutual use of video surveillance systems of the Security Service of Ukraine, the Department of State Protection of Ukraine, the Ministry of Internal Affairs of Ukraine and the National Police of Ukraine, 2016).

In 2017-2020, the MIA of Ukraine issued a number of other legal regulations in this area of service activities, namely on the functioning of the integrated information and search system “Information portal of the National Police of Ukraine” (IPNP) (Order of the Ministry of Internal Affairs of Ukraine On approval of the Regulations on the automated information system for the operational purpose of the unified information system of the Ministry of Internal Affairs, 2017), establishment and maintenance of information subsystems “Harpoon” (Order of the Ministry of Internal Affairs of Ukraine on approval of the Instruction on

formation of the information subsystem “Harpoon” of the information and telecommunication system “Information portal of the National Police of Ukraine”, 2018), “Unified Accounting” (Order of the Ministry of Internal Affairs of Ukraine On approval of the Instruction on formation and maintenance of the information subsystem “Unified Accounting” of the information and telecommunication system “Information Portal of the National Police of Ukraine”, 2019), “Road accident” (Order of the Ministry of Internal Affairs of Ukraine On approval Instruction on formation and maintenance of the information subsystem “Road accident” of the information and telecommunication system “Information portal of the National Police of Ukraine”, 2020) and others.

Similarly, the National Police, which is part of the Ministry of Internal Affairs, work to improve the legal basis for the use of information. In particular, the Regulation on the Internet system in the telecommunication network of the National Police of Ukraine was approved in 2017 (Order of the Ministry of Internal Affairs of Ukraine On approval Regulations on the Internet system in the telecommunication network of the National Police of Ukraine, 2017); and in the following year, regulations provided for the monitoring of the use of SIM cards for mobile communication devices used to work with NPU information resources (Order of the National Police of Ukraine On Approval of the Procedure for Control over the Use of SIM Cards for Mobile Communication Devices Used to Work with Information Resources of the National Police of Ukraine, 2018).

### 5. Conclusions

To sum up, the development of the informatization of the State law enforcement system in Ukraine has been consistent with European and global trends. It began in the 18th and 19th centuries and peaked in the 20th and 21st centuries. Nowadays, relations in the field of information support of the activities of the National Police are still being regulated at the legislative level, since new approaches are constantly being developed to ensure the information security of existing information systems in the NPU and the MIA of Ukraine. Furthermore, new information and analysis products are introduced in the work of the various units of NPU and the range of actors able to use them are broadened. The use of information technologies in the performance of the National Police, with appropriate legal support, may become one of the main factors in strengthening the rule of law in our country.

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**СТАНОВЛЕННЯ ТА РОЗВИТОК ІНФОРМАЦІЙНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ НАЦІОНАЛЬНОЇ ПОЛІЦІЇ УКРАЇНИ**

**Анотація.** *Метою* статті є ретроспективний аналіз інформаційно-правового забезпечення діяльності вітчизняних правоохоронних органів, зокрема Національної поліції України. **Результати.** Доведено, що розвиток інформаційного забезпечення діяльності правоохоронних органів пов'язаний з еволюційними етапами розвитку інформаційних технологій. Визначено та проаналізовано шість етапів розвитку інформаційного забезпечення правоохоронних органів. Встановлено, що вперше у правоохоронних органах запроваджено Інструкцію з діловодства в системі Міністерства внутрішніх справ України в 1961 р., натомість сам процес формування науково-практичної основи інформаційного забезпечення діяльності правоохоронних органів України розпочато на початку 1970-х рр. Тоді ж було створено Республіканський науково-дослідний інформаційний центр МВС УРСР (нині Департамент інформаційно-аналітичної підтримки Національної поліції України) із центрами обробки даних в усіх обласних управліннях внутрішніх справ. Виявлено, що специфіка створення інформаційних систем того часу полягала в тому, що інформація не оброблялася централізовано, що впливало на прямий доступ правоохоронців до єдиної бази даних, а іноді й унеможливило його. **Висновки.** Повноваження поліції щодо інформаційного, інформаційно-аналітичного забезпечення, створення й застосування інформаційних ресурсів визначені у статті 25 Закону України «Про Національну поліцію». Проаналізовано правові норми, що регулюють діяльність у цій сфері. Теоретично обґрунтовано, що позитивним нововведенням у нормативно-правовому механізмі інформаційного забезпечення діяльності поліції є законодавче закріплення інформаційно-аналітичної діяльності поліції, її повноважень у цій сфері, переліку баз даних, а також відповідальності за неправомірне використання інформаційних ресурсів. Встановлено, що використання інформаційних технологій у діяльності Національної поліції України за належного правового забезпечення може стати одним із головних чинників зміцнення законності в нашій державі.

**Ключові слова:** етапи розвитку, інформаційне забезпечення, правове забезпечення, інформаційний портал, інтегрована інформаційна мережа.

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## ELEMENTS OF AN ADMINISTRATIVE OFFENSE (MISDEMEANOR) IN COMBATING BULLYING (HARASSMENT)

**Abstract.** *The purpose* of the publication is to highlight and characterize the elements of an administrative offense (misdemeanor) in combating bullying (harassment) in Ukraine, which define the act as illegal and together are the basis for bringing a person to administrative responsibility. **Research methods.** Based on general scientific methods of cognition (empirical analysis, synthesis, system analysis, concretization, induction, and deduction), the author has put forward the definitive characteristic of an administrative offense (misdemeanor) in counteraction to bullying (harassment) through specifying and characterizing its features. **Results.** The main features of an administrative offense (misdemeanor) in combating bullying (harassment) are identified: illegality (violation of the rights of the child protected by law and other regulations); guilt (acts are usually committed intentionally); socially harmful acts (actions or inaction of psychological, physical, economic, sexual nature, which cause significant harm to the victim of bullying); administrative punishment (liability for bullying is provided by the penal part of art. 173-4 of the Code of Ukraine on Administrative Offense), as well as specific features distinguishing it from other types of administrative offenses (misdemeanors): “consciously” – an element is available when characterizing the guilt of juveniles and (or) minors persons, which means awareness of the action, not the consequences, and is sufficient to bring the perpetrator to administrative responsibility; “recurrence” of socially harmful acts of physical, psychological, moral, sexual, economic nature, including with the use of electronic communications, i.e., committing two or more acts of violence within a particular period for the incurrance of administrative liability for bullying (harassment). **Conclusions.** It is proposed to understand an administrative offense (misdemeanor) in combating bullying (harassment) as illegal, intentional, and (or) deliberate, repetitive socially harmful acts in the form of psychological, physical, economic, sexual violence, including with the use of electronic communications, which entail administrative liability.

**Key words:** bullying, illegality, guilt, actions, administrative punishment.

### 1. Introduction

**Relevance of the topic.** With every passing day, Ukraine’s anti-bullying policy is gaining momentum in the fight against the socially adverse phenomenon – bullying (harassment). Besides the positive aspects of the implementation of legislation on combating bullying (harassment), there are also challenging ones, incl., the adequate classification of the act and its subsequent qualification. To eliminate this shortcoming, it is essential to identify elements of an administrative offense (misdemeanor) in combating bullying (harassment), which has determined research relevance.

**Literature review.** It is worth mentioning many domestic and international scientists have taken an interest in the issue under

consideration and counteraction to bullying (harassment). However, it should be noted that the vast majority of these studies have been conducted through the prism of psychology (D. Olweus, H. O. Alieksiienko, L. I. Lushpaiu, I. I. Sydoruk, N. V. Lesko, et al.). In addition, there is a lack of legal studies devoted to the relevant issue – some contributions belong to I. H. Bukhtiarova, V. K. Kolpakov, V. A. Kryzhanovska, O. M. Poshtarenko, I. D. Pastukh, O. H. Strelchenko, L. M. Sukmanovska, and others.

**The purpose** is determined by the urgency of the research and involves highlighting and characterizing the elements of an administrative offense (misdemeanor) in combating bullying (harassment) in Ukraine.

**Material statement.** In order to distinguish the features of an administrative offense (misdemeanor) in the field of combating bullying (harassment), first of all, it is necessary to characterize the category of “bullying” and “administrative offense” (misdemeanor).

It should be noted that the scientific realm contains a pluralism of opinions about the concept of bullying; the author presents some of them.

Thus, N. Lashchuk states that bullying is intentional, not aimed at self-defense, long-term physical or psychological violence by an individual or a group which has domination over the individual and mainly occurs in organized groups for a specific personal purpose (Lashchik, 2020, p. 22).

I. Zvarych interprets bullying as the aggressive behavior of a person, including a child, towards peers, each other to humiliate, intimidate, bully, which often includes physical violence to persuade a person to one’s own rules in school, class, team, group (Zvarych, 2020, p. 4).

From the above definitions, it appears that bullying is manifested in organized groups in the form of physical or psychological violence. At the same time, the scientists are not limited to the educational environment in favor of the Ukrainian legislation on combating bullying.

Latino, A. L., Carella, T., Pedale, R. et al. point out that bullying is systematic abuse of power and is described as aggressive behavior or intentional infliction of harm to peers, which repeats under upsetting the balance of power (Latino A.L., Carella T., Pedale R., 2019, p. 115).

In the context of an administrative offense (misdemeanor), the legal definition is enshrined in the Code of Ukraine on Administrative Offenses (CUAO) and is defined as “an illegal, guilty (intentional or negligent) act or omission that trespasses against public order, property, rights, and freedoms of citizens, the established order of management and entails administrative liability” (Kodeks Ukrainy pro administratyvni pravoporushennia).

## 2. The main elements of an administrative offense (misdemeanor) in combating bullying

It is worth mentioning that an administrative offense (misdemeanor) of bullying (harassment) is characterized by essential features which together give rise to bringing a person to administrative responsibility.

Thus, analyzing Art. 9 of CUAO, there are four main features of an administrative offense (misdemeanor):

- Illegality;
- Guilt (intent or negligence);
- Socially harmful acts (action or omission);

- Administrative punishment.

The author describes each of them:

1. Illegality as a feature of an administrative offense (misdemeanor) means that only a socially harmful, guilty act can be an offense (misdemeanor), which is enshrined in CUAO. In other words, if the actions are not envisaged in CUAO, it is not an offense (misdemeanor).

Administrative illegality, as a formal feature of an offense (misdemeanor), is a legislative “assessment” of the harmfulness of the act from which the administrative legislation protects public relations.

One could address the connection between illegality and social harm under which illegality is an external manifestation of the offense (misdemeanor), and social harm – internal.

It should be noted that CUAO gives an exhaustive list of offenses (misdemeanors); thus, if the act has socially harmful consequences but is not directly envisaged in CUAO, it cannot be considered an offense (misdemeanor).

2. Guilt is a mandatory element of an administrative offense (misdemeanor) and consists of the internal psychological attitude of the person to the act he/she has committed.

Articles 10 and 11 of CUAO enshrine the forms of guilt: intent and negligence. Therefore, an administrative offense shall be considered committed deliberately if the perpetrator realized the unlawful nature of his/her action or inaction, foresaw its harmful consequences and desired them, or knowingly allowed consequences to occur (Kodeks Ukrainy pro administratyvni pravoporushennia).

An administrative offense shall be regarded as committed through negligence if the perpetrator foresaw harmful consequences of his/her action or inaction but recklessly relied on their prevention or did not foresee some consequences, although he/she had to and could foresee them (Kodeks Ukrainy pro administratyvni pravoporushennia).

Consequently, guilt is an important criterion for recognizing an act as an administrative offense. Therefore, no matter how socially harmful the action or inaction, if they are not found guilty, the administrative offense doesn’t take place, and thus, the person cannot be prosecuted.

3. One of the characteristic features of an administrative offense (misdemeanor) is its harmfulness to society. The essence of this feature is its objectivity because an administrative offense (misdemeanor) is the result of human consciousness, will, and behavior, which manifests itself in two forms: action (active human behavior) and inaction (passive human behavior). Act (action or inaction), as an element of an administrative offense (misde-

measur), causes (or may cause) harm to public relations, which are protected by administrative law. Moreover, harm can be tangible, moral, physical, etc.

To distinguish the act which is considered an administrative offense (misdemeanor) from other similar offenses fixed by part 2 of art. 9 of CUAO, it is explicitly stated that administrative liability for offenses enshrined in CUAO arises "if these violations, by their nature, do not entail criminal liability"; (Kodeks Ukrainy pro administratyvni pravoporushennia).

4. The author emphasizes that according to Art. 9 of CUAO, which defines administrative offense (misdemeanor), administrative punishment is an independent and mandatory element of an administrative offense (misdemeanor). In other words, if the act is an administrative offense (misdemeanor), the penal part of the article obligatorily provides for liability in the form of administrative penalties and measures of influence.

Bullying (harassment) as a type of an administrative offense (misdemeanor) is also characterized by the above essential features which make it possible to recognize the act as illegal and bring a person to administrative responsibility.

The social harmfulness of bullying (harassment) is evident in the fact that actions of psychological, physical, economic, sexual nature cause significant harm to the victim of bullying and adversely affect her/his future public position.

An administrative offense in combating bullying (harassment) is most often expressed in actions that involve psychological, physical, economic, sexual violence.

DOCUDAYS UA International Human Rights Documentary Film Festival project, in terms of its anti-bullying campaign, introduces examples of the abovementioned features of harassment: "verbal abuse or intimidation using offensive words, i.e., constant insults, threats, and disrespectful comments about someone (about appearance, religion, ethnic affiliation, disability, mode of dress, etc.); physical intimidation or bullying through aggressive physical horriification consists of repeated blows, kicks, footsteps, blocking, pushing and touching in an undesirable and inappropriate manner; social intimidation or bullying with the use of isolation tactics means that someone is intentionally not allowed to participate in group work, dining at the dinner table, games, sports, or social activities"(Vseukrayinska initsiatyva DOCUDAYS UA Vydly bulinhu ta kiberbulinhu).

An administrative offense in combating bullying (harassment) can also be

expressed in the form of inaction: "A failure of the head of the educational institution to inform the authorized units of the National Police of Ukraine about bullying (harassment) of a participant in the educational process" (p. 5 of art. 173-4 of CUAO) (Kodeks Ukrainy pro administratyvni pravoporushennia).

Illegality in the field of combating bullying means that persons, by their actions (inaction), violate the child's rights protected by law and other regulations, in particular, the right to education and a safe educational environment.

The legal bullying (harassment) framework comprises: the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, UN Security Council's Resolution 1325 "Women, Peace, Security"; Laws of Ukraine: "On the Protection of Childhood", "On Protection of Public Morality", "On Prevention and Counteraction to Domestic Violence", "On Ensuring the Rights and Freedoms of Internally Displaced Persons", "On Amendments to Certain Legislative Acts of Ukraine on Combating Bullying (Harassment)", "On Education"; the Decree of the President of Ukraine "On urgent measures to prevent and combat domestic violence, gender-based violence, protection of the rights of victims of such violence"; Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Interaction of Subjects Carrying Out Measures in the Field of Prevention and Counteraction to Domestic Violence and Gender-Based Violence; Orders of the Ministry of Education and Science"; Orders of the Ministry of Education and Science "On Approval of the Regulations on Psychological Service in the Education System of Ukraine"; "Some Issues of Response to Bullying (Harassment) and the Use of Measures of Pedagogic Influence in Educational Institutions"; Letters of the Ministry of Education and Science of Ukraine: "Guidelines for interaction of teachers in educational institutions and cooperation with other bodies and services for the protection of children's rights", "On approval of guidelines for detection, response to domestic violence and interaction of teachers with other bodies and services"; "Guidelines for preventing and combating violence"; "Recommendations for educational institutions on the application of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Combating Bullying (Harassment)", "On Creating a Safe Educational Environment in Educational Institutions and Prevention of Bullying (Harassment)", etc. (Derzhavna naukova ustanova Instytut modernizatsiyi zmistu osvity. Zakonodavchi ta normatyvno – pravovi akty shchodo zapobihannya ta protydyi nasylstva).

Para. 1 of Art. 173 – 4 of CUAO expressly lists illegal actions: actions of psychological, physical, economic, sexual violence, including with the use of electronic communications means.

Administrative offenses of bullying (harassment) are usually committed intentionally (when the perpetrator was aware of the illegal nature of his/her action or inaction, foresaw its harmful consequences, and wanted them or knowingly allowed the consequences) (Kodeks Ukrainy pro administratyvni pravoporushennia).

Administrative punishment for bullying (harassment) is provided by Art. 173-4 of CUAO and occurs if the actions, by their nature, do not entail criminal liability. Thus, acts that have the elements of bullying (harassment) “entail the imposition of a fine of fifty to one hundred non-taxable minimum incomes or public works for the period from twenty to forty hours” (Kodeks Ukrainy pro administratyvni pravoporushennia).

### 3. Specific elements of an administrative offense (misdemeanor) in combating bullying

It is worth mentioning that an administrative offense (misdemeanor) in combating bullying (harassment) is characterized by specific elements distinguishing it from others:

1. *Conscious nature.* It is essential to keep in mind the fact that subjects of bullying (harassment) are juveniles and (or) minors who, due to their age, cannot fully realize the harmful effects on the person – a victim of bullying (harassment). Therefore, when characterizing the guiltiness of juveniles and (or) minors, the author proposes to highlight such a feature as *consciousness*, which means the awareness of actions, not consequences, and is sufficient to bring a perpetrator to administrative responsibility.

2. *Repetition frequency.* Given that one of the typical (mandatory) elements of bullying (harassment) is regularity (frequency), socially harmful effects of physical, psychological, moral, sexual, economic violence, including the use of electronic communications, shall contain this feature, i.e., a person must commit two or more violent actions for the incurrence of administrative liability for bullying (harassment).

Based on the above, the author proposes to understand an administrative offense (misdemeanor) in combating bullying (harassment) as illegal, intentional and (or) deliberate, repetitive socially harmful acts shown in the form of psychological, physical, economic, sexual violence, including the use of means of electronic communications, which entail administrative liability.

### 4. Conclusions

Thus, the analysis of elements of an administrative offense (misdemeanor), as well as in the field of combating bullying (harassment), allows identifying and characterizing main (illegality; guiltiness; socially harmful acts; administrative punishment) and specific (“consciously” and “repetition frequency”) features.

The author puts forward the legal category of an administrative offense (misdemeanor) in combating bullying (harassment) – illegal, intentional and (or) deliberate, repetitive socially harmful acts in the form of psychological, physical, economic, sexual violence, including the use of electronic communications, which entail administrative liability.

The prospect of further research is to formulate the author’s position on administrative liability for bullying (harassment) and thus, improve the current legislation of Ukraine.

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## ОЗНАКИ АДМІНІСТРАТИВНОГО ПРАВОПОРУШЕННЯ (ПРОСТУПКУ) У СФЕРІ ПРОТИДІЇ БУЛІНГУ (ЦЬКУВАННЮ)

**Анотація.** *Метою* публікації є висвітлення та характеристика ознак адміністративного правопорушення (проступку) у сфері протидії булінгу (цькуванню) в Україні, які визначають діяння протиправним та в сукупності є підставою для притягнення особи саме до адміністративної відповідальності. *Методи.* На підставі загальнонаукових методів пізнання (емпіричного аналізу, синтезу, системного аналізу, конкретизації, індукції й дедукції) запропоновано дефінітивну характеристику адміністративного правопорушення (проступку) у сфері протидії булінгу (цькуванню) шляхом виокремлення його ознак і надання їх характеристики. *Результати.* Визначено головні ознаки адміністративного правопорушення (проступку) у сфері протидії булінгу (цькуванню), зокрема: 1) протиправність (порушення охоронюваних законом та іншими нормативно-правовими актами прав дитини); 2) винність (діяння, як правило, вчиняються умисно); 3) суспільна шкідливість (дії чи бездіяльність психологічного, фізичного, економічного, сексуального характеру, які несуть істотну шкоду для жертви булінгу); 4) адміністративна караність (відповідальність за булінг передбачена санкцією ст. 173-4 Кодексу України про адміністративні правопорушення). Також з'ясовано специфічні ознаки булінгу, які вирізняють його з-поміж інших видів адміністративних правопорушень (проступків): а) «свідомо» (ознака в характеризованні винності малолітніх т/або неповнолітніх осіб, яка полягає лише в усвідомленні дії, а не наслідків, і є достатньою для притягнення винного до адміністративної відповідальності); б) «повторювальність» суспільно шкідливих дій фізичного, психологічного, морального, сексуального, економічного характеру, у тому числі із застосуванням засобів електронних комунікацій (тобто вчинення особою двох чи більше насильницьких актів із певним проміжком у часі для настання адміністративної відповідальності за булінг (цькування)). *Висновки.* Запропоновано під адміністративним правопорушенням (проступком) у сфері протидії булінгу (цькуванню) розуміти протиправні, умисні та/або свідомі, повторювальні суспільно шкідливі діяння у формі психологічного, фізичного, економічного, сексуального насильства, у тому числі із застосуванням засобів електронних комунікацій, за які передбачена адміністративна відповідальність.

**Ключові слова:** булінг, протиправність, винність, діяння, адміністративна караність.

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## MEASURES TO PREVENT CORRUPTION OF OFFICIALS OF THE NATIONAL POLICE OF UKRAINE

**Abstract. Purpose.** To define the concept of corruption, its features, anti-corruption measures used by the National Police of Ukraine; to study foreign experience in preventing corruption in the police; to outline proposals for improving existing legislation. **Research methods.** The paper is based on general scientific and special methods of scientific knowledge. **Results.** The author has defined the concept of corruption and its features. The ways of preventing corruption in the National Police of Ukraine and the practice of foreign countries in preventing corruption in the police have been analysed. Suggestions have been made to improve ways of preventing corruption in the National Police. **Conclusions.** The prevention of corruption is an essential component of the internal organizational activities of the National Police of Ukraine, which is aimed at ensuring such principles of the National Police as the rule of law, legality, respect for human rights and freedoms, etc. The National Police carries out a set of measures, which can be divided into institutional-regulatory and organizational, designed to prevent corruption. However, unfortunately, the level of trust in the relevant public body remains low enough. In this context, it is advisable to address foreign experience with further formation of anti-corruption policy in the National Police. At the same time, it is worth emphasizing that foreign experience should be applied given national specifics. For example, it would not be appropriate to introduce the institution of accountability of the police head following the case of the United States, as this may lead to a “vicious circle” in which the head is responsible for a subordinate and therefore is not interested in prosecuting the latter. Thus, the prevention of corruption of officials of the National Police of Ukraine is an important component of not only the anti-corruption policy of the National Police but also the anti-corruption policy of the state, which should be supported both by regulatory measures and specific measures to eliminate corruption risks including precautionary measures and liability measures to be applied in case of inefficiency of the former.

**Key words:** National Police of Ukraine, corruption, corruption risk, illegal profit, bribe.

### 1. Introduction

Corruption is a phenomenon that has long parasitized society. Aristotle noted that officials “are sometimes prone to bribing and thus, often sacrifice state affairs for the sake of pandering. Therefore, it would be better if they were under control” (International. «Corruption perceptions index 2018», p. 192). Nowadays, corruption is a burning issue as well that is confirmed by the 2018 Corruption Perceptions Index published by Transparency International, which ranks Ukraine 120<sup>th</sup> and gives 32 points out of 100 (About the National Police: Law of Ukraine dated 02.07.2015 No 580-VIII).

Corruption prevention is of great importance in public authorities, which deal with maintaining the rule of law, ensuring legality,

compliance with a legal order, respect for human rights and freedoms because the listed affects social life. The National Police of Ukraine also belong to such authorities as the Law of Ukraine “On the National Police” (About Prevention of Corruption: Law of Ukraine dated 14.10.2014 № 1700-VII) gives the body sweeping powers to counteract administrative and legal crimes, solve them, and bring guilty persons to liability. This causes a wide range of corruption risks, and therefore, it is essential to determine preventive measures.

Many domestic and foreign scientists (Abramovska O. R., Ivantsov V. O., Lukauskaitė E., Onyshchuk O. O., Romanov M. V., Titunina K. V., Shatrava S. O., et al.) whose contributions are key sources for identifying

preventive measures in the fight against corruption in the National Police of Ukraine dealt with corruption manifestations, incl. within law-enforcement bodies.

## **2. Corruption manifestations in the police: concepts, elements, and particularities**

Before identifying the basic principles of corruption prevention among officials of the National Police of Ukraine, it is necessary to clarify what corruption means. At present, there is no legal definition of “corrupt practices”. However, the Law of Ukraine “On Prevention of Corruption”, Art. 1, defines corruption as “the use by a person referred to in Part One, Article 3 of this Law of granted official powers or powers associated with opportunities to obtain unlawful benefit or receipt of such benefit or receipt of a promise/offer of such benefit for himself/herself or others, or respectively the promise/offer or granting of an unlawful benefit to the person referred to in Part One, Article 3 of this Law or upon his/her request to other persons or entities with a view to persuade the person to misuse his/her official powers or associated opportunities” (Bilodid I.K., 1980). Art. 3 of the Law attributes persons authorized to perform the functions of government or local self-government to potential subjects of corruption crimes. Art. 1 of the Law of Ukraine “On the National Police” establishes that the National Police is the central executive body (About Prevention of Corruption: Law of Ukraine dated 14.10.2014 № 1700-VII). As a result, one can conclude that officials of the National Police of Ukraine may be a potential subject of corruption. The Academic Explanatory Dictionary of the Ukrainian Language notes that a manifestation is a particular action or process that makes someone’s state, feelings, intentions, etc., clear and noticeable. (Report on the implementation by the National Police of Ukraine during 2017 of the State Program for the implementation of the principles of state anti-corruption policy in Ukraine (Anti-Corruption Strategy) for 2015-2017 and the Anti-Corruption Program). In view of the above, it is established that corruption practices are relevant acts revealing corruption. Thus, corruption practices of officials of the National Police are acts when an official of the National Police uses his powers or related opportunities to obtain an illegal benefit or accepts it or promise/offer of such a benefit to himself/herself or others, or a promise/offer, or the provision of an illegal benefit to an official of the National Police, or at his/her request to other natural or legal persons to persuade a person to misuse his official powers or related opportunities.

By relying on the above definition, one can distinguish the following elements of corruption practices in the National Police:

- an official of the National Police is the obligatory actor of the so-called “corruption” relations. Exclusively Art. 18 of the Criminal Code of Ukraine contains the definition of the concept “official”: “officials are persons who permanently, temporarily, or by special authority perform the functions of the representatives of the government or local self-government, as well as permanently or temporarily hold positions in state authorities, local self-government bodies, enterprises, institutions, or organizations related to the performance of management or administrative-economic functions, or perform such functions under special authority, which a person is granted by an authorized body of state power, local government, central government body with special status, authorized body or official of the enterprise, institution, organization, court, or the law” (Criminal Code of Ukraine: Law of Ukraine dated 05.04.2011 № 2341-III). Consequently, one can mark that an official of the National Police of Ukraine is a person whose powers involve performing the functions of the National Police of Ukraine, that is, a police officer. According to para.1 of Art. 17 of the Law of Ukraine “On the National Police”, a police officer is “a citizen of Ukraine who has taken the oath of allegiance to the Ukrainian people, serves in the police holding a particular post, and has a special police rank” (About Prevention of Corruption: Law of Ukraine dated 14.10.2014 № 1700-VII);

- they are usually manifested in the acts related to the adoption or, conversely, non-adoption of a decision, rendering of which is part of the duties of a police officer (for example, dismissal of the investigator from the pre-trial investigation by the relevant head of the National Police), or related opportunities (for example, familiarization with the files of an administrative case by the third parties who don’t bear on matters);

- the decision is made or, conversely, not made due to the police officer’s receipt of an illegal benefit or the receipt of a promise of its provision, etc. Adoption or non-adoption of a decision is not mandatory; it is sufficient to obtain an illegal benefit or promise of its provision, etc. to confirm corruption.

According to Annex 3 to the 2017 Report on the implementation by the National Police of Ukraine of the State Program for the Implementation of the State Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2015-2017 and the NPU’s Anti-Corruption Program for 2017, 32 corruption risks were



revealed in the National Police of Ukraine; they can be divided into the following five groups:

1) related to police officers' unjustified discretionary powers (the use of official vehicle, use of information provided by the Motor (Transport) Insurance Bureau of Ukraine, etc.);

2) related to the dishonesty of a police officer (in particular, during public procurement, the investigator's dishonesty during a pre-trial investigation (when deciding to cease criminal proceedings, etc.), dishonesty during the processing of requests for information and appeals of citizens, dishonesty in the provision of administrative services (issuance of weapons permits), etc.);

3) related to the poor regulation of some procedures (for example, the lack of the agreed procedure for processing reports of corruption);

4) related to the influence of third parties (in particular, in cases of granting police officers state and government awards; the influence of third parties on employees of the Legal Department of the National Police representing the interests of the police in court);

5) other risks (delays in conducting specific background checks of candidates for particular positions; conflict of interest, etc.) (On approval of the Methodology for assessing corruption risks in the activities of public authorities: Decision of the National Agency for Prevention of Corruption dated 02.12.2016).

According to Methodology for corruption risk assessment in the activities of government authorities approved by the Decision of the National Agency on Corruption Prevention dated 02.12.2016, No. 126, corruption risk is "the likelihood of a corruption offense or a corruption-related offense, which will negatively affect the achievement of specific goals and objectives by a government body" (On approval of the Methodology for assessing corruption risks in the activities of public authorities: Decision of the National Agency for Prevention of Corruption dated 02.12.2016). Based on the above definition, it is concluded that corruption risk is a direct prerequisite for the emergence of corrupt practices. Therefore, the prevention of corruption should primarily cover activities to eliminate corruption risks.

### 3. On basic mechanisms for preventing corruption in the National Police of Ukraine

The Anti-Corruption Program of the National Police of Ukraine approved by the Order of the National Police as of March 20, 2019, No. 246 stipulates that "activities of the National Police of Ukraine on corruption prevention and detection include the creation and implementation of preventive anti-corruption mechanisms, elimination of potential corruption offenses, and iden-

tification of corruption risks arising during the exercise of their powers" (Anti-corruption program of the National Police of Ukraine for 2019-2021). Onyshchuk O. O. defines corruption prevention as "avoidance, preliminary obstruction of corruption" (Onyshchuk O.O., 2010, pp. 35-37). In other words, prevention should be defined exclusively as a preventive activity aimed at suppressing corruption. The Academic Glossary defines activities as "a set of actions or means of achieving, implementing something" (Report on the implementation by the National Police of Ukraine during 2017 of the State Program for the implementation of the principles of state anti-corruption policy in Ukraine (Anti-Corruption Strategy) for 2015-2017 and the Anti-Corruption Program). Therefore, measures to prevent corruption of National Police officials should be regarded as a set of preventive actions and means aimed at suppressing and averting corrupt acts committed by National Police officials.

In the author's opinion, the analysis of existing legislation allows separating two groups of measures to prevent corruption of officials of the National Police of Ukraine. Thus, the measures can be divided into general, i.e., inherent in all public authorities, including the National Police, and special, which are carried out exclusively by the National Police. In particular, according to S.O. Shatrava, the former comprises the execution of an anti-corruption examination of regulations; restrictions on gifts; outreach activity; restrictions on dual job-holding and activity overlapping; restriction on joint work of close persons; settlement of conflict of interest; auditing; establishment and administration of the Unified State Register of Persons Who Have Committed Corruption or Corruption-Related Offenses; establishment and administration of the Unified State Register of Declarations of Persons Authorized to Perform the Functions of the State or Local Self-Government, etc. (Shatrava S. O., 2018, p. 431). These methods are characterized by the fact they take place within of state power and self-government, other state bodies, enterprises, institutions, and organizations, and, as a rule, are established by interbranch regulations. In particular, they are represented by the Law of Ukraine "On Prevention of Corruption", "On Prevention and Counteraction to Legalization (Laundering) of Criminal Proceeds, Terrorist Financing, Financing of Proliferation of Weapons of Mass Destruction", "On Civil Service", etc.

As for special measures preventing corruption of officials of the National Police, they, in turn, are divided into statutory-institutional and organizational.

The first group of special anti-corruption measures consists of measures related to the creation of an institutional system of structural units and officials whose activities are aimed at preventing corruption; approval of anti-corruption regulations.

First of all, such units should include the Corruption Prevention and Lustration Department of the National Police of Ukraine, which was established by the Order of the National Police of Ukraine No. 160 as of 23.02.2017 (Regulations on the Office for the Prevention of Corruption and Lustration of the National Police of Ukraine: Order of the National Police of Ukraine). The Department's powers cover: the interpretation of anti-corruption laws to police officers, identification of a conflict of interest, keeping records of employees of the National Police of Ukraine prosecuted for committing corruption offenses, etc. In addition to the mentioned unit, the Commission on Corruption Risk Assessment and Monitoring of the Anti-Corruption Program of the National Police of Ukraine was introduced by the Order No. 150 as of 22.02.107 (On approval of the Regulations on the Commission for Corruption Risk Assessment and Monitoring of Implementation of the Anti-Corruption Program of the National Police of Ukraine: Order of the National Police of Ukraine dated 22.07.107). The Commission's competence embraces the setting of the scope of official activities of bodies and units of the National Police vulnerable to corruption risks, identification of corruption risks, coordination of the annual anti-corruption program, etc. Some persons are entitled to handle anti-corruption issues in the National Police of Ukraine: Head of the National Police of Ukraine, his deputies, chiefs of various divisions and departments (Department of Internal Security, Department of Communications, Office for the Prevention of Corruption and Lustration of the National Police).

Activities of the above bodies and officials are based on the Anti-corruption program of the National Police of Ukraine approved by the Order of the National Police No. 246 as of 20.03.2019 (Anti-corruption program of the National Police of Ukraine for 2019-2021), which is developed to establish a complex of standards, rules, and procedures laying the groundwork for prevention, detection, and countering corruption in the National Police of Ukraine.

The second group of special anti-corruption measures includes measures related to the statutory enshrinement of relevant regulations designed to specify the powers of a police officer, improve some procedures, etc. The peculiarity of these measures is that they are derived

from the former. Thus, the authorized bodies and officials identify the relevant corruption risks while exercising their powers. This, in turn, allows creating a regulatory framework to combat them. The measures are characterized by the fact that they are carried out to prevent the so-called "current manifestations of corruption" found out by the above bodies during the assessment of corruption risks.

In 2018, the National Police took a great deal of anti-corruption measures, including, the development and approval of the Order "On the introduction of the information sub-system "Official Motor Transport" into bodies and departments" No. 439 as of 27.04.2017 (the system is designed to limit too wide-ranging discretionary powers of a police officer regarding the use of official transport and strengthen control over the use of vehicles); approval of the Commission on examining documents and other physical storage media containing official information, the Order of the National Police of Ukraine as of 02.05.2018, No. 444 amended the List of records constituting official information in the system of the National Police of Ukraine to prevent potential dishonesty of police officers when using the data; it was formed commissions on transfer, discarding, inventorying property to ensure transparency of decisions on the use of the real estate, repairs, lease, etc.; one hundred and twelve FORD and FIAT vehicles equipped with GPS and video surveillance cameras, etc. were purchased and handed over to the territorial units of the National Police to control the movement of arrested and detainees during their escorting (On approval of the Methodology for assessing corruption risks in the activities of public authorities: Decision of the National Agency for Prevention of Corruption dated 02.12.2016).

#### **4. Foreign experience in preventing corruption of police officers: the experience of Lithuania, Latvia, and the USA**

Despite the measures taken by the National Police, in 2018, the American Chamber of Commerce in Ukraine presented the Results of the chamber corruption perception survey in Ukraine 2017, demonstrating that the police are among the most corrupt bodies in the country, including courts, local governments, prosecutors, etc. (American Chamber of Commerce in Ukraine. Results of chamber corruption perception survey, 2017). In this regard, it is essential to analyze the experience of foreign countries in preventing police corruption and identify priority areas for Ukraine.

*The Republic of Lithuania.* According to Transparency International, the peak level of police corruption in Lithuania was revealed in traffic control units (Transpar-

ency International Lietuvos skyrius. TILS susipažįsta su Policijos departamentu vykdoma corruption corruption. TILS Direktorius R. Juozapavičius discusses with the police department of vadovais apie corruption police tyrimus and corruption pr). In particular, there were frequent occurrences when a traffic offender could avoid administrative liability by passing a bribe and a police officer, in turn, deleted information about the offense from the relevant media (wiped data from a breathalyzer, a radar speed gun, etc.). This problem was solved by the implementation of the Anti-Corruption Police Program for 2012-2014, which prescribed the creation of a unified information system. The system automatically sent data from the devices recording offences to the system, and thus, some police officers could not delete data and had to bring perpetrators to liability (Elvyra Lukauskaitė, 2016, p. 37).

Moreover, just like in Ukraine, Lithuanian police experienced cases of the police's misuse of official vehicles. The deprivation of individual units of official vehicles and their registration in the unified system of police transport solved the problem. Nowadays, a police officer who needs an official car must log in to the system and fill in data on the intended usage of an official vehicle. In addition, every vehicle is equipped with a satellite monitoring system (Elvyra Lukauskaitė, 2016, p. 38).

**The Republic of Latvia.** In Latvia, the Corruption Prevention and Combating Bureau of the Republic of Latvia, which is an individual state body subordinated to the Cabinet of Ministers, is entrusted to fight against corruption in law enforcement agencies. The Bureau has enormous enough anti-corruption powers, including: audit of officials of all state bodies, verification of their declarations, detection of conflicts of interest, pre-trial investigation of all corruption crimes committed in state institutions, etc. (Korupcijas novēršanas un apkarošanas biroja likums dated 01.05.2002). Thus, bringing police officers to liability for all corruption offenses (both administrative and criminal) is the responsibility of an independent body, the Corruption Prevention and Combating Bureau, which guarantees an impartial investigation into the case.

Moreover, in accordance with the Rules of Monthly Work Remuneration and Special Allowances for Officials Holding Particular Ranks in the Ministry of the Interior and the Penitentiary Administration adopted by the Cabinet of Ministers, police officers are provided with an allowance for "a direct fight against serious crimes" (bribery belongs to this category of crimes). Thus, police officers can

expect a bonus of up to 285 euros for the detention of bribe-takers.

Cooperation with the media was another quite effective way to prevent corruption. As a result, citizens seldom offer bribes in fear of criminal prosecution and damage to their reputation, as the media often elucidate bribery cases. (Antykorrupcyonnaia set OESR v stranakh Vostochnoi Evropi y Tsentralnoi Azyy. Predotvrashchenye korrupcyi na otraslevom urovne v stranakh Vostochnoi Evropi y Tsentralnoi Azyy na prymere sfery obrazovaniya, dobivaiushchei otrasly y polytsyy, 2017, p. 58).

**The United States of America.** The USA has considerable and successful experience in combating corruption, including within the police, as evidenced by the 2018 Corruption Perceptions Index published by Transparency International, which found the United States 22<sup>nd</sup> out of 180 and provided 71 scores out of 100 possible. The US police have a wealth of experience in applying anti-corruption measures, among which are the following:

1. Some states have restrictions for relatives of a police officer to engage in some entrepreneurial activities (in particular, activities related to gambling business, trade of lottery, alcohol, gambling, casino, etc.). Moreover, a police officer who has resigned from the police is subject to some restrictions: the police officer cannot act as a representative in cases he has been involved in as a police officer; he cannot represent the interests of persons in disputes against the police during the year, etc.) (Abramovskaia O.R., 2019, p. 125).

2. Responsibility of the head. For example, in case of corruption offences, the Los Angeles Police Department draws up a report about corruption investigation, and the head of the relevant police agency is obliged to provide written explanations about the actions of his subordinate and determine the further measures to prevent similar corruption practices in the future (Abramovskaia O. R., 2019, p. 125).

3. Impartial internal control. Every police office comprises the Internal Control Department, which doesn't recruit staff but invites them in person. A person who has worked for several years in this department is transferred to other departments: it guarantees the impartiality of the employee of the internal control department and is a safeguard against the emergence of so-called "ties". The Internal Control Department can send out undercover staff to other departments. The department directly investigates crimes committed by police officers of other departments (Foreign experience in the fight against corruption: News of the Office for the Prevention of Corruption and Lustration of the National Police of Ukraine).

4. Financial security. A US police officer has a sufficient level of financial security, which encompasses a salary, varying with a state and post, special allowances, bonuses etc. can reach 200 thousand dollars a year, health insurance, mortgage benefits, pensions, which is 50 percent of a salary, and if the experience exceeds 30 years – 75 percent of a salary (Foreign experience in the fight against corruption: News of the Office for the Prevention of Corruption and Lustration of the National Police of Ukraine).

### 5. Conclusions

Prevention of corruption is an important component of the internal organizational activities of the National Police of Ukraine, which is aimed at ensuring such principles of the National Police as the rule of law, legality, respect for human rights and freedoms, etc. The National Police carries out a set of measures, which can be divided into institutional-regulatory and organizational, designed to prevent corruption. Unfortunately, the level of trust in this public body remains low enough – 30.4% (Study of the Kharkiv Institute for Social Research on a joint project with the Kharkiv Human Rights Group with the support of the European Union «Fight against torture, ill-treatment and impunity in Ukraine»). In this regard, it is advisable to take into account foreign experience with further formation of anti-corruption policy in the National Police. At the same time, it is worth emphasizing that foreign experience should be applied given national specifics. For example, it would not be appropriate to introduce the institution of accountability of the head of the police following the case of the United States, as this may lead to a “vicious circle”: the head is responsible for a subordinate, and therefore, is not interested in prosecuting the latter. At the same time, it would be expedient to make the following amendments keeping in mind a foreign experience:

1. Improving financial security of police officers, the introduction of bonuses for refusal to receive illegal benefits, and record of relevant offenses by modifying paragraph 12 of the Procedure and conditions of payment of cash security to police officers of the National Police and cadets of higher educational institutions of the Ministry of Internal Affairs with specific training conditions. Improving financial security would be one of the keys to dissuading a police officer from corrupt practices because one of the primer reasons for corruption is the need for additional earnings.

2. Amendments to the Code of Ukraine on Administrative Offenses, in particular, to sanctions of the articles of Chapter 13-A “Administrative Offenses Related to Corruption”, in

terms of increasing fines and the option of confiscating items or money if they were obtained through corruption – it should be applied not only to repeated offenses but also the first offense. At the same time, liability for corruption offenses is an extreme measure of influence that shall be preceded by preventive measures, which must be aimed at avoiding, averting, and making it impossible to commit acts of corruption.

3. To create an effective anti-corruption system, it would be relevant to amplify the institutional and regulatory measures designed to prevent corruption creating a mechanism of independent external control following the path taken by Lithuania. Thus, this requires supplementing para. 1 of art. 16 of the Law of Ukraine “On the National Anti-Corruption Bureau of Ukraine” by authorizing NABU to keep anti-corruption control over the National Police of Ukraine, which will be carried out in the manner approved by the Cabinet of Ministers of Ukraine.

4. Given the positive experience of Lithuania, the burning issue is to mitigate the effect of the human factor through maximum automation and informatization of control systems. For regulatory support of this measure, it would be necessary to amend art. 40 of the Law of Ukraine “On the National Police of Ukraine” by extending it with part 3 “Storage and use of information obtained through technical devices and means that have the functions of photo and filming, video recording, or means of photo and filming, video recording is carried out using an automated information collection system. In addition, to ensure the operation of this system, it is necessary to develop and adopt a relevant regulation, which is approved by the order of the National Police of Ukraine. This novelty makes it impossible for a police officer to delete evidence of an offense committed by the person who has provided an illegal benefit. Moreover, a system of preliminary analysis and prediction of relevant offenses can be an effective anti-corruption tool. The system allows identifying existing problems during career, shortcomings of the executive team, preconditions for the misuse of official powers of police officers, etc. It relies on an analysis of the major elements of police activity: the identity of the police officer, his tasks, the composition of the shift, the route, etc.

5. The cooperation of the National Police with the public and the media should be an essential aspect of preventing corruption. Thus, it is necessary to inform the public about the inadmissibility of providing illegal benefits to the police, highlighting the negative consequences of corruption, etc.

Consequently, the prevention of corrupt practices of officials of the National Police of Ukraine is the critical part of both the anti-corruption policy of the National Police and the anti-corruption policy of the state,

which should be supported by regulatory measures and specific measures to eliminate corruption risks comprising preventive measures and penalties to be applied in case of inefficiency of the former.

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## ЗАХОДИ ЗАПОБІГАННЯ КОРУПЦІЙНИМ ПРОЯВАМ ІЗ БОКУ СЛУЖБОВИХ ОСІБ НАЦІОНАЛЬНОЇ ПОЛІЦІЇ УКРАЇНИ

**Анотація.** *Мета* статті – визначити поняття корупційного прояву та його ознаки, заходи запобігання корупційним проявам, що використовуються Національною поліцією України, а також дослідити зарубіжний досвід із запобігання корупції в поліції та надати пропозиції щодо вдосконалення чинного законодавства в зазначеній сфері. *Методи дослідження.* Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання. *Результати.* Визначено поняття корупційного прояву та його ознаки. Проаналізовано способи запобігання корупційним проявам у Національній поліції України та практику зарубіжних держав із запобігання корупції в поліції. Надано пропозиції щодо вдосконалення способів запобігання корупційним проявам у Національній поліції України. *Висновки.* Запобігання корупційним проявам є важливим складником внутрішньоорганізаційної діяльності Національної поліції України, що спрямовується на забезпечення таких принципів діяльності поліції, як верховенство права, законність, дотримання прав і свобод людини тощо. Національна поліція України проводить досить багато заходів, спрямованих на запобігання корупційним проявам, які можна поділити на інституційно-нормативні та організаційні, однак рівень довіри до цього державного органу, на жаль, залишається на досить низькому рівні. У зв'язку із цим доцільним є врахування зарубіжного досвіду під час подальшого формування антикорупційної політики в Національній поліції України. Водночас варто наголосити

на тому, що зарубіжний досвід повинен застосовуватися з урахуванням національних особливостей. Так, наприклад, недоцільним є впровадження інституту відповідальності керівника органу поліції за прикладом США, оскільки це може призвести до ситуації «замкнутого кола», за якої керівник буде нести відповідальність за підлеглого, а тому не буде зацікавлений у притягненні його до відповідальності. Отже, запобігання корупційним проявам із боку службових осіб Національної поліції України є важливою складовою частиною не тільки антикорупційної політики Національної поліції України, а й антикорупційної політики держави загалом, що повинна забезпечуватися як заходами нормативного регулювання, так і конкретними заходами, спрямованими на усунення корупційних ризиків. Ці заходи повинні включати в себе попереджувальні заходи та заходи відповідальності, які мають застосовуватися в разі неефективності перших.

**Ключові слова:** Національна поліція України, корупція, корупційний прояв, корупційний ризик, неправомірна вигода, хабар.

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Tanko, Andrii (2021). Foreign police experience in ensuring rights, freedoms and legitimate interests of citizens. *Entrepreneurship, Economy and Law*, 9, 88–95, doi: <https://doi.org/10.32849/2663-5313/2021.9.13>

## FOREIGN POLICE EXPERIENCE IN ENSURING RIGHTS, FREEDOMS AND LEGITIMATE INTERESTS OF CITIZENS

**Abstract. Purpose.** The aim of the article is to analyse international standards on the activities of law enforcement officers in ensuring the rights of citizens, as well as the experience of police units of some countries in implementing them. In the article, the author studies the system of international standards for the activities of law enforcement agencies in observing the rights, freedoms and legitimate interests of citizens. **Results.** Among the key legal regulations, the article analyses the Code of Conduct for Law Enforcement Officials, the European Code of Police Ethics, the Resolution of the Parliamentary Assembly of the Council of Europe on “Declaration on the Police” and others. The work enables to determine the key principles of police activity in safeguarding the rights and freedoms of citizens: the rule of law, prohibition of discrimination, limited use of coercion and firearms, presumption of innocence, prohibition of torture and other degrading punishments, the right to protection and urgent medical care, zero tolerance for corruption and the provision of adequate conditions for detainees. **Conclusions.** The experience of the Republic of Kazakhstan and the Republic of Georgia in reforming their own police systems and introducing world best practices in protecting the rights and legitimate interests of citizens is analysed. The author identifies these countries’ main developments and innovations, worthy to be studied and incorporated into domestic police activities, such as: introduction of front-line police offices, and modules for the reception of citizens’ communications, equipping of offices for investigative actions with surveillance cameras, establishment of separate police units for the protection of women and children from violence, introduction of specialization of investigators in cases involving women and children, operation of specialized Inter-agency coordination bodies for the prevention of domestic violence; implementation of international projects of human rights protection; the processing of information banks on the investigation of crimes related to the fight against human trafficking and the activities of the police public safety management centres.

**Key words:** police, human rights, rule of law, law enforcement, Georgia, Kazakhstan.

### 1. Introduction

The modern mission of the Ministry of Internal Affairs of Ukraine, of which the National Police is an integral part, is based on the principles of a safe environment for human activity; a rapid and competent response to emergencies and events threatening personal or public security; public security and law enforcement, as well as minimum violations of human rights and fundamental freedoms in the activities of the Ministry of Internal Affairs; rapid access of people to effective mechanisms for the restoration of violated rights.

Therefore, ensuring the rights and freedoms of citizens by the police is a relevant and necessary condition for strengthening public con-

fidence in State institutions and an atmosphere of public order, the integration of the national law enforcement system into the world and Europe.

Moreover, the development of national law enforcement should be based on the best practices of the world, which have proved to be effective in strengthening the rights, freedoms and legitimate interests of natural and legal persons, consequently, their study and implementation in the work of the National Police of Ukraine becomes relevant and necessary.

Literature review. V. Halai, V.M. Beschasnyi, K.L. Buhaichuk, S.M. Zabroda, A. Sokolenko and others have contributed, to some extent, to research on the protection and obser-



vance of the rights and freedoms of citizens by the police abroad. However, it should be noted that in these and other scientific works many researchers have simply stated the existence of international agreements, conventions and rules on human rights, or they considered the relevant police activities only on the basis of the provisions of the appropriate police laws. In addition, we believe that this issue requires detailed scientific research in order to highlight the specific measures applied by foreign police in the field of public relations being investigated.

The aim of the article is to analyse international standards on the activities of law enforcement officers in ensuring the rights of citizens, as well as the experience of police units of some countries in implementing them.

## 2. Principles of use of force and firearms

First of all, it should be noted that many special international instruments and recommendations by the United Nations and the Council of Europe, have established standards for the performance of police bodies and units responsible for the rights and freedoms of citizens. For example, according to the Code of Conduct for Law Enforcement Officials, approved by General Assembly Resolution 34/169, in the performance of their duties law enforcement officials must respect and protect human dignity, maintain and uphold the human rights of all persons. Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty, and they should ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required (Banchuk, 2013, pp. 9-11).

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on 27 August 1990, state that: these persons, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened (Banchuk, 2013, pp. 14).

Furthermore, Resolution 690 (1979) of the Parliamentary Assembly of the Council of Europe on the "Declaration on the Police" indicates that a police officer should fulfil the duties the law imposes upon him by protecting his fellow citizens and the community against violent and other dangerous acts, as defined by law. He shall not cooperate in the tracing, arresting, guarding or conveying of persons who, while not being suspected of having committed an illegal act, are searched for, detained

or prosecuted because of their race, religion or political belief. A police officer having the custody of a person needing medical attention shall secure such attention by medical personnel and, if necessary, take measures for the preservation of the life and health of this person (Resolution of the Parliamentary Assembly of the Council of Europe "Declaration on the Police", 1979).

The Recommendation of the Committee of Ministers to Member States of the Council of Europe "On the European Code of Police Ethics" of 19 September 2001 established the guiding principles for police activities to respect and ensure the rights and freedoms of citizens, in particular:

- The police, and all police operations, must respect everyone's right to life;
- The police shall not inflict, instigate or tolerate any act of torture or inhuman or degrading treatment or punishment under any circumstances;
- The police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective;
- The police must always verify the lawfulness of their intended actions;
- The police shall provide the necessary support, assistance and information to victims of crime, without discrimination (European Code of Police Ethics, 2001).

*A Manual for Police Trainers* by the United Nations states that respect for human rights by law enforcement agencies actually increases their effectiveness. In units that respect human rights systematically, police officers have already learned to be effective in addressing and preventing crime-related problems. In this regard, respect for human rights by the police is not only a moral, legal and ethical imperative, but also a practical requirement for law enforcement. When police officers demonstrate respect for, encourage and protect human rights, the public's confidence is enhanced, the positive cooperation of citizens with police bodies and units is enhanced, and the police are seen as an integral part of society, which fulfils an important social function (Office of the United Nations High Commissioner for Human Rights, 2002, p. 32).

Thus, it should be noted that international instruments basically set out the following standards of police activities: 1) respect for the rights of citizens; 2) prevention of the excessive use of force and weapons; 3) prevention of torture and other acts, degrading treatment; 4) guarantee of the right to protection; 5) provide medical and other assistance; 6) promote cooperation with civil society and build mutual trust.

The following should analyse the practical experience of individual countries in implementing the standards in their activities.

The unified system of internal affairs agencies in Kazakhstan consists of the police, the penitentiary system, military investigative bodies, the National Guard and protection bodies. The Police are made up of the Criminal Police, the Administrative Police, Investigation Units, Inquests and other units.

## **2. System of internal affairs bodies of the Republic of Kazakhstan**

The Local Police Service consists of units of District Police Inspectors, Juvenile Police, Protection of Women against Violence, Patrol Police, etc. It is interesting to note that the relevant law contains a provision whereby a district police inspector reports at least once every quarter to the population living in the administrative unit of the relevant administrative and territorial unit (Law of the Republic of Kazakhstan On the Internal Affairs Bodies of the Republic of Kazakhstan, 2014).

According to the Address of the President of the Republic of Kazakhstan "Growth of Welfare of Kazakhs: Increase in Income and Quality of Life" the Ministry of Internal Affairs developed "Roadmap" on modernization of Internal Affairs bodies for 2018-2021, which was subsequently approved by Decision 897 of the Government of Kazakhstan of 27 December 2018. The Roadmap provides for 9 areas of reform, including the elimination of inappropriate police functions, new formats for work with the population, new evaluation criteria, and the elimination of causes and conditions contributing to corruption (Resolution of the Government of the Republic of Kazakhstan on approval of the Roadmap for the modernization of the internal affairs bodies of the Republic of Kazakhstan for 2019-2021, 2018). Within the framework of these tasks and with a view to improving the exercise of the rights and freedoms of citizens, the police bodies have planned the activities as follows:

1) development and implementation of a new system of evaluation criteria for the performance of the police, including indicators that objectively reflect the quality of the performance of the tasks assigned to the police and the assessment of the overall security and performance of the police by the population;

2) public outreach regarding the positive perception of the police;

3) creation of internal affairs bodies' specialized premises (front offices) for reception of citizens with convenient location and working hours; implementation of a qualitative staffing for work in front offices and regular services, providing them with special psychological training;

4) consideration of the development and introduction of a mobile application to

inform the police bodies of public order violations (photo, video) by citizens with a feedback function (service model of interaction).

At the beginning of 2021, police officers of Almaty showed the first front office and the module for reception of citizens by the police. Currently, the city has 12 front offices and 5 modules for reception of citizens. According to the police, the modules for the reception of citizens are situated taking into account the crime situation. For the convenience of the applicants, a juvenile affairs inspector, a public security inspector, a duty investigator and a local police inspector are present at these facilities.

The premises have everything necessary for work and a place to eat. At night, the module goes on working. According to law enforcement officers, so far, people come to them mostly for advice. All citizens' complaints are recorded in a special register and, if necessary, the complainants are referred to the district police department.

Front offices, as well as modules, have all the conditions for a comfortable stay of visitors: an organized modern reception with consultants, transparent stalls with regular criminal and administrative police officers. Citizens can obtain competent answers to their questions, submit an application or receive legal clarifications. Front offices have a waiting room, an advisory sector, a checkpoint, toilets. The main objective of the law enforcement bodies in introducing this innovation is to reduce times of waiting and the receipt of applications, as well as to ensure the right of citizens to file complaints to the police (Abramova, 2020).

In 2020, Order 358 of the Minister of Internal Affairs of the Republic of Kazakhstan of 24 April 2020 approved "Policeman's Standard" to strengthen the image of the police and to ensure the rights and freedoms of citizens by personnel in their performance, and to strengthen the moral education and image of police bodies. According to its provisions, police service is an expression of special trust by society and the State and requires high personal and professional qualities of police officers. Police officers should always remember that every individual and citizen of the Republic of Kazakhstan must feel safe and consider a police officer as one's defendant ready to assist in need and able to protect one's life, health, rights and freedoms, honour and dignity against criminal and other unlawful attacks.

In their professional activities, police officers should: vigorously repress offences; take fair and logical actions to exclude violations of the law and oppression of the rights of citizens, including persons in custody or detention;

to act honestly, impartially, to act vigorously against corruption; to respect the constitutional rights of citizens to privacy; to be polite and tactful communicating with citizens, especially children, women, persons with disabilities and older persons, and to be sensitive and impartial regarding their appeals and statements; to provide necessary assistance, including first aid (Prikaz Ministra vnutrennikh del Respubliki Kazakhstan Ob utverzhdennii Standarta politceiskogo, 2020).

In addition, in the Department of Economic Investigation in the city of Nur-Sultan, in order to ensure the transparency of the interrogation all investigator offices have been equipped with video surveillance cameras with wide-format monitors in the waiting rooms. In this way, the relatives and friends of the persons interviewed may observe the course of the investigation. According to the police authorities, the innovations enable to ensure the rule of law, the security of citizens, the transparency of the work of departmental staff, and the avoidance of unlawful methods of obtaining evidence, to prevent corruption and reduce complaints from participants in criminal proceedings (Official website of the President of the Republic of Kazakhstan <<https://www.akorda.kz/ru>; Website of the Ombudsman in the Republic of Kazakhstan <<https://www.gov.kz>>).

In February 2021, the Ministry of Internal Affairs of Kazakhstan increased the number of internal affairs units for the protection of women and children against violence by 129, and units for minors by 448; in addition, specialized female and child investigators were introduced in the police (Multimedia information and analytical portal «informburo» <<https://informburo.kz>>).

### 3. System of internal affairs of Georgia

Next, the experience of Georgia should be analysed, since it was one of the first post-Soviet countries to initiate a wide-ranging reform of the police and bring its activities into line with international and European standards.

The Police of Georgia is a system of law enforcement agencies within the structure of the Ministry of Internal Affairs, which, within its competence, is responsible for preventing and responding to violations of Georgian legislation and for protecting public safety and legal order. According to Article 8 of the Law “On Police,” the police officer in his/her performance strictly adheres to the principles of respect for fundamental human rights and freedoms, legality, non-discrimination, proportionality, exercise of discretionary powers, political neutrality and transparency. The forms, methods and means of police action

must not violate human dignity and the honour of human life, physical integrity, property rights and other fundamental rights and freedoms (Official site of the Ministry of Internal Affairs of Georgia <<https://police.ge>>). The Human Rights and Investigation Quality Monitoring Department operates within the Ministry of Internal Affairs of Georgia, which, within its competence, ensures timely response and effectiveness of the ongoing investigation of crimes in the following areas: domestic crime, violence against women, crimes motivated by discrimination and intolerance, human trafficking, crimes committed by minors, crimes against life and health.

The Department also ensures the development and implementation of a methodology for the investigation of crimes, develops proposals for the planning and implementation of preventive measures and submits them to the relevant units of the Ministry, has the right to submit proposals to the competent department of the Ministry of Internal Affairs on the introduction of legislative changes with regard to guaranteeing the rights of citizens, and ensure the study and analysis of the recommendations of the Public Defender (Ombudsman) of Georgia and non-governmental organizations working in the field of human rights protection (Official site of the Ministry of Internal Affairs of Georgia <<https://police.ge>>). The structural units of the Department are:

1. Human Rights Department supervises the investigation of criminal cases, the preparation of investigation reports, procedural documents and recommendations.

2. Investigation Quality Monitoring Department prepares analysis, recommendations and tools. It also conducts research to improve the quality of the investigation and provides overall supervision of the Office of Victim and Witness Coordinator.

3. Tbilisi and Regional Investigation Quality Monitoring Departments (Official site of the Ministry of Internal Affairs of Georgia <<https://police.ge>>).

Resolution 630 of the Government of Georgia of November 25, 2014 adopted the composition of the Interdepartmental Council for the Prevention of Domestic Violence. It includes, inter alia, the Deputy Minister of Internal Affairs of Georgia, the Director of the State Fund for Protection and Assistance to Victims of Trafficking of Human Beings, the Head of the Main Criminal Police Department of the MIA of Georgia, the Director of the Patrol Police Department of the MIA of Georgia, Rector of the Academy of the MIA of Georgia. The main tasks of the Interdepartmental Council are to promote and coordi-

nate the effective implementation of the functions assigned to the relevant State bodies in the field of preventing and combating domestic violence and providing assistance to victims of domestic violence; to make proposals on the prevention of domestic violence, elimination of the causes that contribute to the commission of such unlawful acts for further submission to the Government of Georgia; to cooperate with State bodies of Georgia and the non-governmental sector, international and local organizations working in this field, as well as to develop joint proposals for subsequent submission to the Government of Georgia.

Furthermore, according to the Law of Georgia "On Combating Trafficking in Human Beings," the Ministry of Internal Affairs of Georgia establishes a single information bank to identify the perpetrators and systematize the information available about them, which will include information on investigative activities and full progress in the investigation of crimes, including those related to trafficking in human beings (Official site of the Ministry of Internal Affairs of Georgia <<https://police.ge>>).

The police of Georgia, in cooperation with international organizations and partner countries, carries out a number of important projects and programmes in the field of observance of human rights and freedoms by the law enforcement agencies of the country, implementation of best law enforcement practices in the activities of the Ministry of Internal Affairs and its components. In particular, the following projects are ongoing:

1. "Fight against discrimination, hate crimes and hate speech in Georgia." The aim of the project is to exchange experience in combating discrimination, hate speech and hate crimes, to increase professional competence of police officers, to bring Georgian legislation in line with European standards (DANEP).

2. "Promotion of an integrated approach to preventing violence against women and strengthening gender equality in Georgia." The aim of the project is to strengthen the capacity of parties concerned, including the Georgian police, involved in preventing violence against women and combating domestic violence, as well as in protecting the rights of victims. Project duration is 2020-2022, with funding provided by the Council of Europe.

3. "Support of juveniles in pre-trial investigation (JADES)." The aim of the project is to train police officers and investigators to work with juvenile victims and offenders, to promote better conditions in temporary detention facilities in accordance with European standards, to monitor the observance of the rights and free-

doms of persons in the activities of the police. Project duration is 2019-2021, with funding provided by the Council of Europe.

A system for referral and protection of children has been introduced into the practice of the Georgian police, which provides for the implementation of procedures to protect children from any form of violence, intentional or unintentional harm. On 31 May 2010, the Minister of Labour, Health and Social Affairs of Georgia, the Minister of Internal Affairs of Georgia and the Minister of Education and Science of Georgia issued a joint order approving the procedures for the referral and protection of children. The actors participating in these procedures are the Patrol Police Department and the district directorates of the territorial bodies of the MIA of Georgia, institutions, schools, specialized children's institutions, day-care centres, medical institutions and the like.

The powers of the patrol police and district services in these procedures are to detect violence against children, prevent offences and protect victims of violence. When informed of such offences, the patrol police will arrive to the scene immediately. In territorial subdivisions where the areas of activity of the structural subdivisions of the Patrol Police Department of the MIA of Georgia are not defined, local police administrations perform this function.

Upon arrival at the scene, the patrol police or the neighbourhood police apply this algorithm: to examine and assess the situation, to interview potential victims, offenders, family members, witnesses, neighbours; to decide on the condition of the child (these actions should be primarily related to the safety and health of the child); call an ambulance or, at least, take the child to a medical institution for emergency medical treatment; take the child to a safe environment with parents or family members or alone and issue a prohibition document in cases provided for by law (Official site of the Ministry of Internal Affairs of Georgia <<https://police.ge>>).

The Public Safety Management Centre "112" has proved to be a very effective institution in the field of provision of public services. It combines three emergency management centres in Georgia: patrol police, fire and rescue service and emergency medical assistance ([www.112.gov.ge](http://www.112.gov.ge)). Service 112 receives emergency calls from all over Georgia 24 hours a day and serves the population in six languages (Georgian, Russian, English, Armenian, Azerbaijani and Turkish). In addition, sign language interpreters can answer video calls (Koshkenova & Tabliashvili, 2019, pp. 18-19). In 2018, mobile applications

were launched in Georgia with functions such as secret sending of the alarm signal to Service 112 (SOS) and correspondence with the operator ('chat'). Thus, a person in danger can secretly call a rescue service or inform the operator of the situation. The application itself establishes the location of the person, which significantly reduces the response time of the rescue service or police. This app is free, accessible in Georgian, English and Russian (Koshkenova & Tabliashvili, 2019, pp. 22).

#### 4. Conclusions

The study permits making the following conclusions and overviews, reflecting current trends in this field:

1. The United Nations and Council of Europe's legal instruments establish the basic standards for the work of police officers in a democratic society. The basic principles and rules for police officers to exercise their powers may include:

- In the performance of their duties, the police must respect and ensure the rights of citizens, must respect and protect human dignity and must avoid any discrimination in their activities;

- Police officers must use coercive measures, including firearms, only in exceptional cases and to the minimum extent required;

- In their relations with persons detained, the police must ensure that their health is protected and that they are given the necessary assistance;

- Ill-treatment, torture and other forms of inhuman or degrading treatment or punishment are prohibited in the police;

- Police officers must treat a detained or suspected person in accordance with the principle of presumption of innocence, and that every suspect of a criminal offence has certain rights.

2. Since 2018, the authorities and the MIA of Kazakhstan have been systematically implementing reforms of the law enforcement system, implementing both regulatory and organiza-

tional measures. The most significant achievements of Kazakhstan include:

- approval of Policeman's Standard;
- introduction of front-line police offices and modules for the reception of citizens' communications;

- equipping of offices for investigative actions with surveillance cameras;

- reactivation of the internal affairs units for the protection of women and children against violence and introduction of specialization of investigators in cases involving women and children.

3. Georgia was one of the first countries of the former post-Soviet area to initiate systemic reforms in the law enforcement, the basic idea of which was to bring police activities closer to recognized world standards. Among the experiences of the Georgian police that need to be studied for their introduction into national practice are:

- establishment of an independent Human Rights and Investigation Quality Monitoring Department;

- functioning of the Interdepartmental Council for the Prevention of Domestic Violence;

- establishment of a single data bank on the investigation of crimes related to combating trafficking in human beings;

- implementation of the projects "Fight against discrimination, hate crimes and hate speech," "Promotion of an integrated approach to preventing violence against women and strengthening gender equality," "Support of juveniles in pre-trial investigation (JADES)";

- implementation of a national mechanism for the referral and protection of children;

- creation of a single Public Safety Management Centre "112."

The promising areas for further research may be the analysis of criteria for the effectiveness of police activities in ensuring the rights and freedoms of citizens.

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## ЗАРУБІЖНИЙ ДОСВІД ДІЯЛЬНОСТІ ОРГАНІВ ПОЛІЦІЇ ЩОДО ЗАБЕЗПЕЧЕННЯ ПРАВ, СВОБОД ТА ЗАКОННИХ ІНТЕРЕСІВ ГРОМАДЯН

**Анотація. Метою** статті є здійснення аналізу міжнародних стандартів діяльності співробітників правоохоронних органів у сфері забезпечення прав громадян, а також вивчення досвіду підрозділів поліції деяких країн щодо їх практичної реалізації. У статті досліджено систему міжнародних стандартів діяльності правоохоронних органів стосовно дотримання прав, свобод та законних інтересів громадян. **Результати.** З-поміж основоположних нормативних актів з окресленої проблематики у статті проаналізовані Кодекс поведінки службовців органів правопорядку, Європейський кодекс поліцейської етики, Резолюція Парламентської Асамблеї Ради Європи «Про Декларацію про поліцію» тощо. На підставі проведеної роботи визначені ключові принципи діяльності поліції щодо забезпечення прав і свобод громадян, зокрема: верховенство права, заборона дискримінації, обмежене застосування примусу та вогнепальної зброї, презумпція невинуватості, заборона катувань та інших покарань, що принижують гідність людини, право особи на захист і невідкладну медичну допомогу, нульова толерантність до корупції, забезпечення належних умов тримання затриманих осіб. **Висновки.** Проведений аналіз досвіду Республіки Казахстан та Республіки Грузія щодо реформування систем органів поліції цих країн та запровадження передового світового досвіду захисту прав і законних інтересів громадян. Серед основних напрацювань і нововведень цих країн, що заслуговують на вивчення та впровадження в національну поліцейську діяльність,

виділені такі: запровадження роботи фронт-офісів поліції та модулів прийому звернень громадян; обладнання кабінетів для проведення слідчих дій камерами спостереження; створення окремих підрозділів поліції щодо захисту жінок і дітей від насильства; запровадження спеціалізації слідчих у справах щодо жінок та дітей; функціонування спеціалізованих міжвідомчих координаційних органів із питань запобігання домашньому насильству; реалізація міжнародних проєктів у сфері захисту прав людини; ведення інформаційних банків даних щодо розслідування злочинів у сфері протидії торгівлі людьми; діяльність центрів оперативного управління поліції.

**Ключові слова:** поліція, права людини, законність, правопорядок, Грузія, Казахстан.

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## PURPOSE, TASKS AND PRINCIPLES OF ADMINISTRATIVE REGULATION IN THE SECURITY SECTOR OF UKRAINE

**Abstract.** *The research purpose* is to identify prevailing problems in the relevant area based on the study of administrative fundamentals for the support of the security sector and provide suggestions to prevent and overcome them. **Research methods.** The contribution relies on general scientific and special methods of scientific knowledge. **Results.** The author provides conceptual approaches to defining the category of the security sector of Ukraine through the prism of the administrative framework it is grounded on. The essence of principles, purpose, and objectives of the security sector and the fundamentals of their statutory regulation is clarified and covered. Attention is paid to a range of legislative acts that outline the powers of subjects tasked with ensuring the national security of the country. The author highlights shortcomings of the current legal groundwork of the country and provides suggestions for its improvement. **Conclusions.** Having made an in-depth analysis of the administrative framework the security sector of Ukraine is based on, the author concludes the following: it is essential to divide statutory principles the domestic security sector relies on into institutional and normative, which will reduce the regulatory workload of the legislator and entities entrusted to ensure national security. Although the current National Security Strategy separates the tasks and goals of the latter into some logical groups, it does not refer to the tasks conditioned by strategic planning and forecasting policy. European integration processes of Ukraine necessitate considering the proposals and recommendations of international bodies on national security – one of such recommendations is the division of the security sector into some areas with further differentiation of administrative bases between the latter.

**Key words:** public security, entities entitled to ensure state security, administrative law fundamentals of national security, National Security Strategy.

### 1. Introduction

The Basic Law of Ukraine defines democracy as a universal model of functioning of the country's political system. First of all, it is expedient to interpret a democratic regime given its values, among which are people's rule, diversity, openness, transparency, and freedom of the country. One cannot fail to agree that a democratic regime is regarded as a universal political value (Rudych, 2011, pp.161-162). Such approaches to the definition of democracy allow suggesting state mechanisms designed to ensure it. In this context, it is worth discussing the personal security of the country and each individual, the enforcement of rights and freedoms of the latter reflecting the focal areas of a democratic society.

The above confirms the need to advance domestic national security as guarantees of sustainable functioning of the state amidst global policy and give pride of place to its development and regulatory support of the legislator.

Such scientists as Balan M.I., Kovalchuk T.I., Korystin O.Ie., Svyrydiuk N.P. Ponomarov S. P. et al. dedicated their contributions to administrative law support of the security and defense sector of Ukraine, threats in the civil security sector of Ukraine, planning and forecasting as an essential prerequisite for the country's security.

Despite the availability of system researches on the administrative support of the security sector, the study of the latter remains a topical issue and requires further developments and suggestions for improvement.



## 2. Principles of administrative regulation of the security sector: framework of functioning

Any focal point of public policy needs relevant developments and scientific approaches the latter relies on, and the security sector is no exception. The research is based on the methodological principles, guidelines, and tasks arising in national security. Today, there is an urgent need to find qualitatively new administrative and legal tools to influence the organization and support of the security sector (Ponomarov, 2018, pp. 2-3) The above demands the state to generate and improve the system of bodies, means, and organizational principles of state security.

The primary element of state security determines the principles of its operation. The legal literature interprets the principles as a basis of a particular system, original universal ideas which render the guidelines of a legal phenomenon (Kovalchuk, Korystin, Svyrydiuk, 2019, pp. 71-73) the pioneer idea, a mandatory requirement for the regulator of social relations (Hubskeyi, Korableva, Lutchenko, 2006, pp.115-116).

In turn, the author understands the principles of administrative regulation of the security sector as thought-starters and mandatory requirements, which must be applied to subjects of the security sector and determine the essence and focus of their activities.

The latter is enshrined in some laws and bylaws; the Law of Ukraine "On National Security of Ukraine", which highlights the following principles of state policy on national security and defense, is undoubtedly one of the most substantial acts aimed at regulating public safety:

- the rule of law, accountability, legality, transparency, and compliance with the principles of democratic civil control over the functioning of the security and defense sector, and the use of force;
- observation of international law, participation in international peacekeeping efforts in the interests of Ukraine, interstate systems and mechanisms of international common security;
- advancement of the security and defense sector as the main tool for implementing state policy on national security and defense (On National Security of Ukraine: Law of Ukraine dated 21.06.2018).

The Military Security Strategy of Ukraine approved by the Decree of the President of Ukraine as of March 25, 2021, No. 121 / 2021 allows specifying the following principles (fundamentals) of functioning of the security sector:

- maintenance of stability and interaction;
- democratic civilian control;
- encouragement of innovative solutions;
- program-project management of defense resources (About the decision of the National Security and Defense Council of Ukraine of March 25, 2021 "On the Strategy of Military Security of Ukraine": Decree of the President of Ukraine dated 25.03.2021).

In general, it can be stated that if the law outlines more general principles inherent in any sphere of public life, and bylaws, as prescribed in legal theory, clarify the law and lean towards defining and disclosing specific principles of state security.

Keeping the analysis of principles, the security system is based on, it is expedient to refer to the so-called special laws that determine the fundamentals of activities of entities entrusted to ensure security both within the country and abroad. Thus, the Law of Ukraine "On the National Police" states that policing relies on the rule of law, respect for human rights and freedoms, legality, openness, transparency, political neutrality, interaction with citizens on the partnership, continuousness (About the National Police: Law of Ukraine dated 02.07.2015). The Law of Ukraine "On the Security Service of Ukraine" stipulates that its activities are grounded on such principles as legality, respect for the rights and dignity of the individual, non-partisanship, and responsibility to the people of Ukraine. Special attention is paid to the principles of combining unity of command and collegiality, conspiracy and publicity (About the Security Service of Ukraine: Law of Ukraine dated 25.03.1992).

Taking into account the above, it appears that the competence of bodies entitled to ensure national security is determined within the framework of separate laws. However, this does not mean that relevant entities should not follow the general principles set out in the basic laws. In this regard, the author proposes a concept of division (classification) of fundamentals (principles) of the security sector.

It is telling that that the National Security and Defense Council of Ukraine (hereinafter – NSDCU), being one of the key entities supporting national security (the author has stood her ground in this regard in previous studies) does not contain any references to the fundamentals (principles) of its activities in the regulatory framework, which is the Law of Ukraine "About the National Security and Defense Council of Ukraine" (About the National Security and Defense Council of Ukraine: Law of Ukraine dated 05.03.1998). The author considers this fact a gross blunder of legal drafting methodology and supports the need to deter-

mine the principles of activities of the relevant body in terms of legislation. First of all, such an extreme position is due to the fact that in the current political realities, NSDCU has assumed the role of the judiciary, pre-trial investigation bodies and public prosecution. Nowadays, there is a trend according to which NSDCU, on the one hand, acts as a guarantor of national security, on the other hand, restricts the rights of a particular group of persons. In this regard, the author believes that the legislator shall specify not only the scope of NSDCU but also outline an area of competence that would guarantee a reasonable balance between the interests of the nation and the individual.

Based on the analysis conducted by the author, fig. 1 shows the concept of the division of principles of the security sector in general terms:

### 3. Purpose and tasks of administrative regulation in the security sector: statutory basis and implementation challenges

Proceeding to the purpose and objectives of administrative regulation in the security sector of Ukraine, it is appropriate to state that its purpose is to obtain a predicted result in the form of the protection and defense of the state and society; the task should be regarded as purposeful activities of the security sector aimed at addressing challenges, which threaten or may pose a potential threat to the adequate existence of the state and society.

In addition to the Law of Ukraine "On National Security of Ukraine", a statutory definition of goals and objectives of the security sector is found in the Decree of the President of Ukraine "On the Decision of the National Security and Defense Council of Ukraine as of September 14, 2020 "On the National Security Strategy of Ukraine (About the decision of the National Security and Defense Coun-

cil of Ukraine of September 14, 2020 "On the National Security Strategy of Ukraine": Decree of the President of Ukraine; Strategy dated 14.09.2020). The Law itself generally outlines the purpose and objectives of the security sector through a prism of recognition of man as the highest social value and democratic values. However, the Law refers to the National Security Strategy of Ukraine, which is considered the fundamental document of long-term planning specifying the main directions of the state policy on national security (On National Security of Ukraine: Law of Ukraine dated 21.06.2018).

Therefore, the National Security Strategy allows defining the goals and objectives of the security sector from various perspectives. The author believes that the latter should be grouped under the relevant areas – the author represents them in the following way (Table 1).

Thus, the strategic policy of the state outlined by the National Security Strategy specifies the powers of the state in three major dimensions, namely:

- the priority directions of the state policy are designed to ensure the development of the most important security processes;
- a policy aimed at ensuring national interests – it ensures the stability and coherence of democratic processes within the country;
- reforming the security sector, which should be understood as the state's response to shortcomings found in the security sector.

It should be noted that a separate section of the Strategy identifies problems that currently exist or may arise in the national security sector: COVID-19, escalation of international conflicts, hybrid warfare, destructive propaganda, a lack of adequate modernization of the Ukrainian army, imperfection, and fragmentation of the Ukrainian legisla-

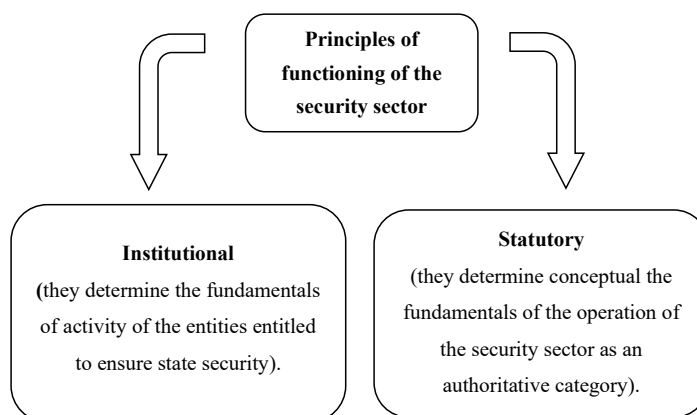


Figure 1. Classification of fundamentals (principles) of the security sector

tion. Given the above, it would make sense to discuss the need to enshrine in the Strategy tasks aimed at solving both current problems and tasks of planning and forecasting in the sphere of national security.

In particular, the author shares the position of Balan M.I., who highlights the need for predicting and conducting a comprehensive, not limited in time, policy and the necessity to shift strategic plans into the monitoring of the threat to national security (Balan, 2019, p. 147).

It is worth mentioning that the introduction of strategic (forecasting) planning processes into the system of objectives will provide a reasonable balance between current and potential problems that may arise in the future in the country's security system.

**4. International experience of legal regulation of the security policy of states**

In discussing security sector objectives, it is impossible to ignore the international actors entrusted to ensure it. It is primarily

about international organizations, their bodies, and officials. Thus, one of such entities is Geneva Centre for Security Sector Governance (hereinafter – DCAF, Foundation). The foundation proposed the following concept of the security sector (fig. 2) (Geneva Center for Security Sector Governance), according to which its goals and objectives should be formed.

This approach stipulates rationalization and guarantees the maximum efficiency of functioning of the security sector as a whole. It is appropriate to point out that the national security strategy does not delimit its purpose within some areas, much less distribute them between specific actors that somewhat violates the principle of legal certainty, which is the basis of a democratic society.

In addition, there is the concept under which the state outlines more general provisions of the security sector without specifying particular measures focused on its strengthening and advancement. Undoubtedly, there are pro-

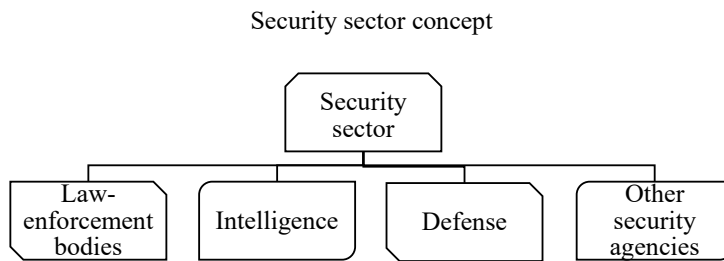


Figure 2. Security sector structure

Table 1

The purpose and objectives of the security sector

Priority areas	Policy aimed at ensuring national interests	Security sector reform
Restoration of peace and security in the temporarily occupied territories	Improvement of sanctions policy	Bringing the army in line with NATO norms, principles, and standards
Counteraction to the aggression of the Russian Federation	Negotiation policy with the aggressor nation under the auspices of mediation	Strengthening the combat potential of the armed forces
Development of partnership with neighboring countries and international organizations	Claim-related work in international institutions	Advancement and strengthening of the defense-industrial complex
Ukraine's full membership in the European Union	Introduction of the national sustainability system	Strengthening the system of democratic civilian control
Strengthening security and cybersecurity systems	Supporting of economic and environmental development of the country	Optimization of the structure of the bodies of the entities entitled to ensure national security
Prevention and counteraction to corruption risks	Prevention of risks that may undermine national security (intelligence and subversive activities, separatism, terrorism, extremism)	Ensuring the automation of the country's defense potential

visions currently available in the Strategy, but it would be wiser to outline a scope of tasks in the context of their division between the security spheres and the relevant bodies – the same concerns the principles of their activities. It is worth consolidating the latter within the Strategy. The above seems relevant given the analysis of current legislation, which is designed to provide statutory support for domestic security actors, that scarcely enshrines the operating principles of the latter.

### 5. Conclusions

Keeping in mind an in-depth analysis of the administrative framework Ukraine's security sector relies on, it is expedient to make the following conclusions:

– It is noteworthy that the principles defined in the legislation, which are a basis

of the domestic security, should be divided into institutional and regulatory that will reduce the regulatory workload of the legislator and entities designed to ensure national security.

– Although the current National Security Strategy divides the tasks and goals of the latter into certain logical groups (proposed by the author in table 2), it does refer to tasks stipulated by strategic planning and forecasting policy.

– European integration processes of Ukraine necessitate considering the proposals and recommendations of international bodies on national security – one of such recommendations is the division of the security sector into particular areas with further differentiation of administrative operation bases between the latter.

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## МЕТА, ЗАВДАННЯ ТА ПРИНЦИПИ АДМІНІСТРАТИВНОГО РЕГУЛЮВАННЯ В СЕКТОРІ БЕЗПЕКИ УКРАЇНИ

**Анотація.** *Мета* статті – на основі дослідження адміністративних основ забезпечення сектору безпеки виокремити проблеми, що наразі наявні у визначеній сфері, та надати пропозиції, спрямовані на їх подолання й запобігання їм. *Методи дослідження.* Роботу виконано на підставі загальнонаукових і спеціальних методів наукового пізнання. *Результати.* Наведено концептуальні підходи до визначення категорії сектору безпеки в Україні крізь призму адміністративно-правових основ, на яких він ґрунтується. З'ясовано та розкрито зміст принципів, мети й завдань сектору безпеки та основ їх нормативно-правового регулювання. Приділено увагу низці законодавчих актів, що окреслюють повноваження суб'єктів, на яких покладено завдання із забезпечення національної безпеки на території країни. Акцентовано увагу на недосконалоостях наявного правового забезпечення безпеки країни, надано пропозиції щодо його вдосконалення. *Висновки.* Унаслідок поглибленого аналізу адміністративних основ, на яких ґрунтується сектор безпеки України, констатовано, що ці засади доцільно поділяти на інституційні та нормативні, що має на меті зменшити нормативне навантаження на законодавця та суб'єктів, покликаних забезпечувати національну безпеку. Чинна Стратегія національної безпеки хоча й поділяє завдання та цілі національної безпеки на певні логічні групи, проте не містить посилань на завдання, зумовлені стратегічним плануванням і прогностичною політикою. Євроінтеграційні процеси в Україні зумовлюють необхідність врахування пропозицій і рекомендацій міжнародних органів у сфері забезпечення національної безпеки. Однією з таких рекомендацій є поділ сектору безпеки на певні сфери з подальшим розмежуванням адміністративних основ діяльності між ними.

**Ключові слова:** публічна безпека, суб'єкти, покликані здійснювати забезпечення державної безпеки, адміністративно-правові основи національної безпеки країни, Стратегія національної безпеки.

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## CURRENT REGULATORY FRAMEWORK FOR MAKING PUBLIC POLICY ON FIREARM CIRCULATION IN UKRAINE

**Abstract. Purpose.** The aim of the article is to form a relevant scientific understanding of the current state of affairs in the regulatory framework for making public policy on firearm circulation in Ukraine. **Results.** The article contributes to forming a relevant scientific understanding of the current state of affairs in the regulatory framework for making public policy on firearm circulation in Ukraine. The author outlines the regulatory framework for making public policy in this field, the system of which is based on the Constitution of Ukraine (paragraph 4 of the preamble, articles 2, 17 and 27) and a set of laws and by-laws of administrative legislation. A critical analysis of the provisions of the legal regulations makes it possible to argue that the current state of the regulatory framework for making public policy on firearm circulation in Ukraine reveals problems, such as the absence of a special law on firearm circulation (although relevant Draft Laws of Ukraine have been continuously submitted to the national parliament since 1998); a complex of provisions of current legislation on firearm circulation in the State reveals the absence of an appropriate mechanism and reliable guarantees for a number of Ukrainian citizens' fundamental rights granted to them by the Constitution of Ukraine (first of all, part 2 of art. 27, and part 1 of art. 92); insufficient quality of the legal regulatory mechanism for public relations in the field of firearm circulation. It is established that the regulatory framework for making public policy on firearm circulation in Ukraine consists of a set of laws and by-laws, which can be grouped into a conditional and complex system of regulations determining the legal regime of firearm circulation in the State. **Conclusions.** The conclusions to the article summarize the results of the study and emphasise that the solution to most of the problems identified is possible through the creation (taking into account the development of scientific thinking on the substance and content of public policy on firearm circulation) of a special legal regulation on firearm circulation in Ukraine (in which civil circulation of firearms will also be legalized), as well as the arrangement ("codification") of relevant legal regulations.

**Key words:** public policy on firearm circulation, regulatory framework, regulatory act, firearm circulation, regulatory mechanism, implementation of public policy, reform of legislation, making public policy.

### 1. Introduction

According to national scholars (Barovska 2010; Burbyka 2007), the regulatory framework is a set of legal regulations as well as internal documents that identify the legal status of the object to be legally regulated, determine its content (internal structure), govern its activity (functioning, objectification) and the relations that arise during the functioning (objectification) of this object. Therefore, in the context of making public policy on firearm circulation, the regulatory framework for these public legal processes is a process of law-making (regarding formulation of new provisions, amendments of existing provisions or repeal of existing pro-

visions), as well as the results of this law-making activity (in the form of a provision created, a provision amended or a provision repealed), which: 1) make public policy in this field; 2) provide for the rules and standards for the implementation of this policy; 3) implement public policy on firearm circulation. In other words, the legal and regulatory framework for making public policy on firearm circulation in Ukraine is, on the one hand, an individual manifestation of making this public policy, and, on the other hand, a basis for the proper flow of firearms circulation in the State.

However, it should be noted that circulation of weapons is almost the least regulated

sector of public life in Ukraine, although it is characterized by a multitude of legal regulations which may not compensate the qualitative value by their quantitative value. Nevertheless, the intensive law-making, as well as the large number of scientific studies on the topic, have not produced the expected results for a long time, that is, the quality of the legal and regulatory framework for this important issue remains very low. This proves: 1) the difficulty of providing legal and regulatory support to making public policy on firearm circulation in Ukraine; 2) the need for a comprehensive analysis of the current state of affairs in such support, which is complicated by the fact that: to date, the legal and regulatory framework for making public policy on firearm circulation in Ukraine has not yet been the subject of administrative law research.

The regulatory framework for making public policy on firearm circulation in Ukraine has not yet been the subject of a comprehensive study reflecting the actual and current state of affairs in the regulatory framework for making public policy in this field. In addition, many national scientists have already in one way or another studied the legal and regulatory framework for firearm circulation in Ukraine, among them: O.M. Bokii, I.V. Vasyliiev, S.V. Didenko, A.V. Korniiets, V.I. Kurylo, S.P. Paranytsia, A.S. Pashyieva, and others. The scientific findings of these scientists may constitute the theoretical basis for a critical analysis of the current state of affairs in the regulatory framework for making public policy on firearm circulation in Ukraine.

Consequently, the aim of this scientific article is to form a relevant scientific understanding of the current state of affairs in the regulatory framework for making public policy on firearm circulation in Ukraine. This aim will be achieved by implementing the following *tasks*: 1) on the basis of a comprehensive analysis of national administrative legislation containing the provisions governing firearm circulation in Ukraine, to outline a system of laws and by-laws that govern making public policy in this field; 2) to highlight the main problems of the current state of affairs in the legal and regulatory framework for making public policy on firearm circulation in Ukraine; 3) to summarize the results of the study in the conclusions to the article.

## **2. Regulatory framework for the formation and implementation of state policy on arms circulation in Ukraine**

A comprehensive analysis of the current legislation in Ukraine permits concluding that the regulatory framework for making public policy on firearm circulation in the country

today consists of groups of legal regulations, as follows:

1. Laws and other regulations of the Parliament relating to firearm circulation:

1) The Constitution of Ukraine (paragraph 4 of the preamble, articles 2, 17 and 27);

2) Statutory legal regulations regarding individual issues of firearm circulation, in particular, the Law of Ukraine "On the National Police" (clauses 21 and 22 of part 1, clauses 16 and 17 of part 2 of art. 23 etc.), "On the State Bureau of Investigation" (clause 8 of part 1 of art. 7, para. 1 of part 2 of art. 18), "On the State Service of Special Communication and Information Protection of Ukraine" (part 11 of art. 10, para. 4 of clause 29 of part 1 of art. 14, clause 24 of part 1 of art. 15) and others;

3) Legal regulations and parliamentary resolutions, provisions thereof regulate special issues of firearm circulation, in particular Resolution 2471-XII of the Verkhovna Rada of Ukraine of 17 June 1992 (annexes 1 and 2), Law of Ukraine 3808-XII "On Physical Culture and Sport" of 24 December 1993 (part 1 of art. 1, part 15 of art. 48) etc.;

2. By-laws regulating various aspects of firearm circulation in Ukraine, namely:

1) Issues relating to the operation of the permitting system and the authorization (licence) of objects of the permitting system, as well as to monitoring (supervision) of compliance with the relevant legislation (clauses 2, 4 of Section I, clauses 9 and 11 of Section II of Resolution 576 of the Cabinet of Ministers (hereinafter referred to as the CM) of Ukraine of 12 October 1992; Order 82 of the Ministry of Internal Affairs (hereinafter referred to as the MIA) of 4 February 2019; clause 1 of Order 252 of the Ministry of Health of Ukraine (hereinafter referred to as the MH) of 20 October 1999, clause 8 of Annex 5 of Order 246 of the MH of 21 May 2007);

2) Issues relating to manufacture, repair of firearms and the acquisition, storage, transport and use of firearms, maintenance of shooting ranges, firing fields and stands, in particular these regulations are: a) have general significance (for example, Resolution 1000 of the CM of 2 December 2015, Resolution 1207 of 27 December 2018; Order 622 of the MIA of 21 August 1998); b) cover specific groups of actors that engage in activities that require the acquisition, carrying and use of weapons (departmental weapons), etc. (in particular, Resolution 575 of the CM of 12 October 1992, Resolution 1953 of 25 December 2002; Orders 358 of the MIA of 27 April 2020, 183 of 27 March 2009, 619 of 6 July 2016, 694 of 20 July 2016 (and similar orders, in particular Order 347/631 of the Ministry of Defence of Ukraine and the MIA of Ukraine of 7 July 2016,

Order 344/1260 of the Department of the State Guard of Ukraine and the MIA of Ukraine of 29 November 2016, Order 1300/366 of the National Anti-Corruption Bureau of Ukraine and the MIA of 16 December 2016, Order 149/358 of the Foreign Intelligence Service of Ukraine and the MIA of Ukraine of 2 May 2018 and a number of other by-laws), 523 of 24 July 1996, 379 restricted of 13 June 2000, Order 86 of the Main Directorate for the Protection of Aquatic Bioresources of the State Committee for Fisheries of Ukraine of 15 June 1998; Order 227 of the Ministry of Education and Science, Youth and Sport of Ukraine of 15 March 2011; Order 343 of the Ministry of Defence (hereinafter referred to as the MD) of Ukraine of 17 July 2018, etc.); c) have statutory and organizational significance (Order 619 of the Administration of the State Special Communication and Information Protection Service (hereinafter referred to as the State Special Communication) of Ukraine of 5 October 2016; Order 650 of the MIA of 28 July 2017, etc.); d) relating to awards in the form of firearms and melee weapon (Order 693 of the MD of 23 October 2012).

A critical analysis of this series and at the many other legal instruments that form the legal and regulatory framework for public policy on firearm circulation enables to conclude regarding the current state of affairs in the legal and regulatory framework for making public policy on firearm circulation in Ukraine that:

1) Currently, no special legislation on firearm circulation exists in Ukraine. It should be noted that the urgent need for a legislative mechanism for the firearms circulation in the State has been recognized as such almost since the proclamation of Ukraine's independence. As a result, on May 13, 1998 Draft Law of Ukraine 1032 "On Arms" was submitted to the National Parliament (on the initiative of the Government) and was withdrawn on December 24, 1999. In the following years, almost two dozen more draft laws were registered in the Ukrainian Parliament, to a greater or lesser extent, aimed at regulating public relations in the field of firearm circulation;

2) The total number of provisions of current legislation on firearm circulation in the State indicates the absence of an appropriate mechanism and reliable guarantees for the exercise by Ukrainian citizens of a number of fundamental rights granted to them by the Constitution of Ukraine. First, with this regard, it is part 2 of article 27 of the Basic Law of Ukraine, which guarantees every citizen the right to protect his or her life and health and the life and health of others from unlawful encroachments. In

addition, it should be noted that part 1 of article 92 of the Constitution of Ukraine provides that human and civil rights and freedoms, guarantees of these rights and freedoms and the legal regime governing property, including arms, require to be regulated purely by law;

3) The inadequacy of the legal regulatory mechanism for public relations in the field of firearm circulation, which is a problem, *inter alia*, due to the fact that:

a) to date, virtually all issues related to firearm circulation have been resolved by by-laws of the MIA of Ukraine (also by joint orders with other central executive authorities) and other departments;

b) a number of legal regulations make legislation scattered, in particular with regard to regulating specificities in the acquisition of non-military firearms, ammunition, knives, pneumatic weapons and other articles and materials, which are subject to the authorization system in the Armed Forces of Ukraine, the Foreign Intelligence Service of Ukraine, the State Border Service of Ukraine and the State Special Communications Service of Ukraine, the State Bureau of Investigation, the Department of the State Guard of Ukraine, the National Anti-Corruption Bureau of Ukraine and some other State bodies. The analysis of the instructions regulating the relevant issues enables to conclude that the provisions of these instructions do not specify the real features of the acquisition of the relevant items of the authorization system in each of these bodies, since in fact, these are documents with common provisions, which differ only in terms of the names of the bodies involved in the acquisition of the items in question. In this context, it would be appropriate to make an instrument (parts of the instrument) that would contain: first, provisions on the acquisition of non-military firearms, their ammunition, which are subject to the authorization system; second, the range of actors to whom the provisions apply. Moreover, when certain features of the acquisition of such items in a given State body require further clarification, they may be further developed in the statutory regulations of these State bodies;

c) a number of by-laws in this field are obsolete and in fact duplicate the provisions of Soviet legislation, which in conjunction with the new legal provisions, lead to contradictory regulations on firearm circulation. This is also manifested in the contradiction between such legislation and the principles of the law relating to firearm circulation in the State (not fully respecting the principle of humanitarianism, justice, equality, etc.);

d) a number of existing regulations on firearm circulation and self-defence equipment



refer to legislation on firearm circulation, on the certification of the authorisation system objects, etc. that for years (sometimes for decades) have not been in force in Ukraine. For example, the references we have already considered: 1) clause 3 of para. 2 of Regulations approved by Resolution 706 of the CM of Ukraine of 7 September 1993 is no longer in force (since 1 January 2018) under the Decree 46-93 of the CM of Ukraine of 10 May 1993; 2) clause 1 of para. 2 of Order 619 of the MIA of Ukraine of 6 July 2016, sub-clause 2 of clause 1 of Order 694 of the MIA of Ukraine of 20 July 2016, sub-clause 2 of clause 1 of Order 695 of the MIA of Ukraine of 20 July 2016 are not in force (since 11 May 2021), as well as Order 1644 of the MIA of Ukraine of 29 December 2015. Next, in Order 650/272 of the MIA of Ukraine and the State Customs Committee of Ukraine "On approval of the Procedure for the importation from abroad and exportation from Ukraine of special self-defence equipment charged with lacrimal and irritating substances" of 19 October 1993, clause 2 provides for that the relevant authorizations for business entities are issued in consistency with contracts on the supply or sale of self-defence equipment, namely, in accordance with the procedure established by the Instruction approved by Order 164 of the MIA of Ukraine of 25 March 1993, which has not been in force as early as 7 October 1998. Furthermore, sub-clause 1.2 of clause 1 of Order 379 restricted of the MIA of Ukraine of 13 June 2000 states that the legal basis for the use and application of the equipment is the Regulations approved by Resolution 49 of the Council of Ministers of the Ukrainian SSR of 27 February 1991, which has been invalid since 30 December 2017;

r) the absence of a proper legal regulatory mechanism for a large number of issues arising in the field of firearm circulation. Moreover, this conclusion is based not only on contemporary challenges to which this legislation does not effectively respond, but also on established social relations in the field of firearm circula-

tion. In particular, there is no State register of arms owners, no official general classification of firearms, and no legal basis for the activities of shooting sports organizations.

### 3. Conclusions

The regulatory framework for making public policy on firearm circulation in Ukraine is a set of laws and by-laws, which may be grouped into a conditional and complex system of regulations determining the legal regime of firearm circulation in the State. Moreover, the complexity of the system of legal regulations considered in this scientific article is excessive and unjustifiable from the perspective of regulatory economy, since it makes the legislation on firearm circulation in Ukraine, which is the framework for making public policy in this field, unclear. This issue is considerably complicated by the fact that the current state of affairs in the legal and regulatory framework for making public policy on firearm circulation in Ukraine is characterized by a variety of problems, specially issues such as: 1) The special law on firearm circulation does not exist; 2) The legislation on firearm circulation does not provide for an appropriate mechanism and reliable guarantees for a number of Ukrainian citizens' fundamental rights, which can be implemented in the field of firearm circulation; 3) The ideological underlay of the legislation on firearm circulation is based on the Soviet concept of regulating social relations in the field of firearm circulation; 4) A number of provisions of the legislation on firearm circulation in Ukraine are obsolete, contradictory and contain references to regulations have not been in force for years (for decades), etc. The solution to most of the problems identified is possible through the creation (taking into account the development of scientific thinking on the substance and content of public policy on firearm circulation) of a special legal regulation on firearm circulation in Ukraine (in which civil circulation of firearms will also be legalized), as well as the arrangement ("codification") of relevant legal regulations.

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## АКТУАЛЬНИЙ СТАН НОРМАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ФОРМУВАННЯ ТА РЕАЛІЗАЦІЇ ДЕРЖАВНОЇ ПОЛІТИКИ У СФЕРІ ОБІГУ ЗБРОЇ В УКРАЇНІ

**Анотація.** *Метою* статті є формування актуальної наукової думки стосовно поточного стану нормативно-правового базису формування й реалізації державної політики у сфері обігу зброї в Україні. *Результати.* З'ясовано нормативно-правову основу формування та реалізації державної політики у сфері обігу зброї в Україні, систему якої становить Конституція України (зокрема, абз. 4 преамбули, ст. ст. 2, 17 і 27) та сукупність законодавчих і підзаконних актів адміністративного законодавства. На підставі критичного аналізу норм виокремлених нормативно-правових актів обґрунтовується думка про те, що поточний стан нормативно-правового забезпечення формування й реалізації державної політики у сфері обігу зброї в Україні характеризується такими проблемами, як: 1) відсутність спеціального законодавчого акта про обіг зброї (хоча з 1998 р. відповідні проекти законів України повсякчас подавалися до національного парламенту); 2) загальна сукупність положень чинного законодавства про обіг зброї в державі вказує на відсутність належного механізму та надійних гарантій реалізації громадянами України цілої низки фундаментальних прав, наданих їм Конституцією України (насамперед ч. 2 ст. 27, ч. 1 ст. 92); 3) недостатня якість правового регулювання суспільних відносин у сфері обігу зброї. З'ясовано, що нормативно-правове забезпечення формування й реалізації державної політики у сфері обігу зброї в Україні виявляється в сукупності нормативно-правових актів законодавчого та підзаконного характеру, що можуть бути згруповані в умовну та складну систему актів, які визначають правовий режим обігу зброї в державі. **Висновки.** Унаслідок проведеного у статті аналізу наголошується на тому, що вирішення більшості з виокремлених проблем можливе шляхом створення (з урахуванням розвитку наукової думки щодо сутності та змісту державної політики у сфері обігу зброї) спеціального законодавчого акта про обіг зброї в Україні, у якому буде легалізовано й цивільний обіг вогнепальної зброї, а також упорядкування («кодифікації») відповідних нормативно-правових актів.

**Ключові слова:** державна політика у сфері обігу зброї, нормативно-правова основа, нормативно-правовий акт, обіг зброї, правове регулювання, реалізація державної політики, реформа законодавства, формування державної політики.

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## GUILT AS AN ELEMENT OF A TAX OFFENSE

**Abstract.** The authors substantiate the relevance of the issue under consideration, which is closely related to bringing a taxpayer to justice under the updated version of the Tax Code of Ukraine; from now, it can take place only if there is a set of elements of an offense involving core element – guilt. **The purpose** of the article is to analyze the essence and legal regulation of guilt as an element of a tax offense, and the tasks embrace analysis of the concepts and categories, including “guilt”, “intent”, “unreasonable, dishonest and without due diligence”, establishment of a legal basis, which ensures the functioning of the relevant institution, the determination of methodological principles, and the development of recommendations for applying the concept of guilt of a taxpayer for the committed tax offense. **Research methods:** the methodological ground of the study is a set of general and special methods used in the science of financial law. **Results.** Attention is paid to the conceptual and categorical framework of the institution of responsibility in law, taking into account the peculiarities of taxation. By relying on the analyzed scientific opinions and provisions of normative legal acts, the authors additionally argue that the body of a tax offense consisting of such components as object, actus reus (physical element), subject, mens rea (mental element) comprises features (elements) established by tax law the combination of which allows considering an illegal act as a tax offense. Among the listed features are those that are not absolute. In particular, it refers to the guilt of an act. Considerable emphasis is put on the category of the taxpayer’s bona fides. Approaches to its understanding by the scientific community and its use in law enforcement practice are analyzed. It is highlighted a correlation between the procedure for establishing the taxpayer’s guilt and the effect of the presumption of guilt / innocence in terms of tax liability. The authors have interpreted a range of other concepts, including “act against all sense” and “act without due diligence”. The stand of the State Tax Service of Ukraine on the development of a methodology for performing tax control measures in the part of implementing the concept of bringing a taxpayer to financial responsibility in case of proving his guilt is shown. In December 2020 and March 2021, it prepared the relevant information and recommendations. **Conclusions.** By relying on the current case law of applying the concept of the taxpayer’s guilt in a tax offense, the authors have concluded about the content and features of the guilt category in tax law. Based on research findings, the authors have put forward methodological fundamentals for the application of the concept of the taxpayer’s guilt for the committed tax offense in practical activity of the domestic fiscal authority.

**Key words:** tax law, tax offense, guilt as part of offense, taxpayer, tax obligation, supervisory agency.

### 1. Introduction

The vast majority of study guides on law theory contains a separate chapter devoted to behavior in law, i.e., its characteristics as to compliance with provisions of legal rules. Branch legal rules comprise formally-obligatory criteria which allow conducting a legal assessment of actions, conduct, inactivity of the parties to legal relations in the relevant realm.

Entering into legal relations, participants seek to exercise their rights and freedoms and meet their interests and needs. If their conduct damages legitimate private and/or public interests and is contrary to legal rules, it is illegal. The offense is a kind of unlawful conduct which is characterized by specific features. Their presence makes it possible to qualify unlawful conduct as a violation of legal rules

and may result in bringing a person to legal liability. It is about the act of a person which has an external manifestation, is dangerous to the public, and breaches a particular legal rule. The features complete the characteristics of offenses committed by individuals, namely: the conscious, willed nature of the act and its guiltiness.

Taking into account outcomes of the study of the conceptual and categorical framework of the tax law of Ukraine (Baik, 2019), it is emphasized that scientists divide features of a tax offense into objective and subjective. Objective features of a tax offense are 1) social damage which lays the groundwork for public security; 2) illegality; 3) punishability. Subjective features of a tax offense are 1) guiltiness; 2) sanity (passive dispositive capacity).

The set of the above subjective and objective features determining an illegal act as a tax offense constitute the body of the tax offense (Podatkove pravo, 2012), which is a sole reason for bringing a violator of the tax law to liability. The body of a tax offense, consisting of such components as object, actus reus (physical element), subject, mens rea (mental element), is characterized by the features (elements) established by the tax law the combination of which allows considering an illegal act as a tax offense. Among the above features are those that are not absolute. In particular, it refers to the guilt of the act.

There are two main types of representation of the guilt concept in legal doctrine, namely: 1) legal liability arises exclusively for a guilty act; 2) legal liability arises for both the guilty act and the innocent act (Oleshko, 2011).

Guilt in law theory is considered as the principal condition for the incurrance of legal liability for the person who committed the offense. M. Kucheriavenko marks guilty conduct (along with the public danger of the act and the illegality of actions or omissions) among the features of a tax offense (Kucheriavenko, 2016). The general theoretical construction shows that the following is not regarded as an offense: the infliction of harm in the absence of guilt; the act is not illegal, conscious, and willful. According to O. Skakun, it is accidental, complex, innocent, has exclusively external features of an offense. Thus, an innocent act does not entail legal liability (Skakun, 2009). The authors state that determining the essence of guilt is a key aspect in studying the body of any offense. A. Bryzghalin, Z. Budko, O. Hedziuk, D. Hetmantsev, E. Dmytrenko, O. Domin, A. Ivanskyi, M. Kucheriavenko, O. Pokataieva, Yu. Rovynskyi et al. laid the general theoretical grounds of guilt as an element of a tax offense.

## 2. Guilt as an element of the body of an offense, incl. of a tax offense

Legal doctrine generates the definition and terminology of an offense. The consolidation of some definitions at the legislative level (in Ukraine – the Tax Code of Ukraine (hereinafter – TCU) takes place due to law-making activity. At the same time, neither the definitions of concepts provided in Art. 14 of TCU nor other articles of the basic tax law interpret “guilt”.

With the development of society and the state and complication of legal relations, the institution of legal responsibility is subject to transformational changes, and its rules are revised and improved. Amendments to TCU made in January 2020, incl. in terms of the qualification of a tax offense, the amount of liability for a tax offense and mitigating circumstances, did not provide a statutory definition of guilt and resulted in active discussion of updating the guilt concept in tax law by scholars and practicing lawyers.

A tax offense, as well as the offense in general, is characterized by the following features: social harm or socially dangerous of conduct; illegality; conscious act of will; activity or omissions, guiltiness, and punishability. In the absence of the above features, the act cannot be considered an offense. This is stipulated by the fact that legal rules can affect the acts of will of a person controlled by human consciousness. In other circumstances, a prescribed rule cannot be implemented.

The above aspects are applicable only towards an individual because the individual has intellect, i.e., the ability to act voluntarily. Therefore, this statement is based on the psychological concept of guilt (Joffe, 1955) predominant in the scientific and practical scope. S. Pepeliaev distinguishes intellectual and volitional criterion in guilt and notes that their different combination forms the basis of the division of guilt into forms (Pepeljaev, 2000). The presence of a person’s free will to commit a tax offense is a criterion of guilt in the form of intent. Under such conditions, it is assumed that the perpetrator was aware of the illegal nature of his actions (omissions), wanted, or knowingly allowed ensuing their harmful consequences. In other circumstances, the person who committed the offense was not aware of the illegal nature of his actions (omissions) or did not want / anticipate the onset of socially detrimental consequences but had to and could realize them – it is about negligence.

Methods of proving guilt have not yet been developed in financial law. It is believed that the net result is that guilt transited to the category of legal presumption from the category

of a subject of proving that gave rise to a rather negative phenomenon: formally declaring the presumption of innocence, the domestic legislator constructed a mechanism of the presumption of guilt. The authors admit the fact that there is no unambiguous evidence that would unequivocally confirm the genuine mental processes occurring in the perpetrator's mind. As A. A. Ivanskyi highlights, the legislator interprets the perpetrator's guilt not as the genuine psychological processes that took place in his mind but as those which, in his (legislator's) opinion, took place in the mind of the perpetrator (Ivanskyi, 2008). The scientist notes that the clarification of psychological processes, which took place in the perpetrator's mind, is conducted by authorized persons at their discretion and understanding based on their assessment of the state and a conscious experience of the perpetrator.

If the subject of a financial offense is an individual, then, according to the principles of the concept, there are no discussions about establishing his guilt. However, it is known that legal entities can be the subjects of financial relations (government agencies, local government bodies, enterprises, institutions, organizations, etc.). In this case, the guilt of a legal entity is considered as the guilt of its officials or employees, or another approach may be used to establish the guilt of the perpetrator. Domestic tax legislation does not single out an article that would elucidate the concept and features of the guilt of a legal entity-taxpayer.

Not supporting psychological theory, the authors do not share the view that "the guilt of an individual who has committed a tax offense should be regarded as his mental attitude to his illegal act of the violation of tax law and awareness of ensuing socially harmful (socially dangerous) consequences.

The authors believe that the normative theory, which is an alternative to the psychological understanding of guilt, deserves special attention. It interprets guilt not as a conscious act but as a characteristic of the preparator's activity in a particular context (Puginskiy, 1979). Although such a definition of guilt is permissible towards all taxpayers as subjects of a tax offense – it has positive nature compared to the previous approach – the practical identification of guiltiness with the wrongful conduct of a person causes mixing of concepts and requires their clear statutory consolidation.

Scientists put forward a rational proposal to combine individual aspects of these approaches to understanding guilt, which together will address interrelated issues. A. Ivanskyi insists that guilt as intent or negligence should be an integral element of any offense, incl. finan-

cial (Ivanskyi, 2008). The authors agree with the scientist in terms that "the very principle of responsibility for guilt is a progressive achievement of the theory of responsibility, as it is a significant guarantee of individualization and validity of responsibility". D. Hetmantsev, T. Kushnarova, A. Selivanov, and other scholars also stressed the need to enshrine guilt in financial legislation, in particular, tax law, as well as the principle of financial liability if there is guilt.

Today, Article 23 of the Criminal Code of Ukraine defines guilt: guilt is a person's mental attitude to a committed act or omission prescribed by this Code and its consequences in the form of intent or negligence. The following articles of the Code define intent and negligence and name their types. Thus, there is direct and indirect intent. Direct intent means that a person was aware of the socially dangerous nature of his action (acts or omissions), foresaw its socially dangerous consequences, and wanted them to occur. Indirect intent means that a person was aware of the socially dangerous nature of his action (acts or omissions), foresaw its socially dangerous consequences, but didn't want them to occur, and consciously assumed their occurrence (Article 24 of the Criminal Code of Ukraine. According to the rules of criminal law, negligence is divided into criminal illegal self-esteem and criminal illegal carelessness.

The Code of Ukraine on Administrative Offenses didn't enshrine the definition of "guilt", but guilty activity is a characteristic feature of an administrative offense under Art. 9 of the Code. Therefore, an administrative offense (misdemeanor) is an illegal, guilty (intentional or negligent) act or omission which trespasses against public order, property, rights and freedoms of citizens, the established order of management, and entails administrative liability under the law. The proposed definition indicates the types of guilt of the person who committed the offense, such as intent and negligence.

According to civil law, guilt is the basis for liability for breach of obligation (Article 614 of the Civil Code of Ukraine). In this context, it is established the following: a person who violated the obligation is liable for his guilt (intent or negligence) unless otherwise provided by contract or law. A person is innocent if he proves that he has bent every effort to fulfill the obligation properly; the person who violated the obligation proves the absence of guilt.

### **3. Theoretical and methodological principles of establishing the guilt of a taxpayer for the committed tax offense**

Pursuant to Art.109 of TCU, a tax offense is an illegal, guilty (in cases directly provided

by TCU) act (action or omission) of a taxpayer (including similar persons), controlling bodies and/or their officials (officers), other entities in cases directly provided by TCU. The peculiarity of such a definition is the consolidation of a new independent feature of the offense – the guilty act (action or omission) of the offender.

Novelties of tax laws include the provisions of para. 109.3 of Art. 109 of TCU and para. 111.3 of Art. 111 TCU, namely:

- in the cases specified in para. 119.3 of Art. 119, paras. 123.2–123.5. of Art. 123, para. 124.2, 124.3 of art. 124, paras. 125<sup>1</sup>.2–125<sup>1</sup>.4 of Art. 125<sup>1</sup> of TCU, a necessary condition for bringing a person to financial responsibility for the committed tax offense is the establishment of the person's guilt by monitoring bodies;

- bringing a natural or legal person to financial responsibility for a tax offense, which provides for the establishment of the person's guilt by monitoring bodies, does not enshrine the presumption of guilt of a natural person or officials (officers) of a legal entity in cases of bringing the natural person or officials (officers) of the legal entity to the liability of other types and does not release from the obligation to prove it in the manner prescribed by law.

Consequently, the establishment of the person's guilt for the committed tax offense is possible in case of its proof by the fiscal authority. For example, in the USA, a taxpayer shall not be held liable if he provides evidence that he has shown concern and precaution (such a degree of care and precaution as a reasonable, cautious person would have shown) but violated the law because of circumstances he could not control. In the United Kingdom of Great Britain and Northern Ireland, a taxpayer is obliged to state a justified reason for his contempt of legal obligations, otherwise such contempt will be interpreted as “a failure to do what any intelligent person would do”.

In this context, the authors consider it reasonable to pay attention to the interrelations between the procedure for establishing the guilt of the taxpayer and the effect of the presumption of guilt / innocence in tax liability. In the USA, the presumption of taxpayer's guilt is applied even if a person is charged with a criminal offence. Thus, the legislation of many foreign countries enshrines the presumption of guilt/innocence among the conceptual framework of bringing a person to justice for violating tax legislation.

Based on the achievements of legal science, it is noted that liability for guilt is a principle of substantive law and the presumption of innocence – of procedural. Tax law is characterized by a combination of substantive and procedural rules within one system. Although the pre-

sumption of innocence is a constitutional principle (according to Art. 62 of the Constitution of Ukraine), its legal influence goes beyond criminal procedure, acquiring interbranch significance. Branch specifics affect the content and application of the presumption of innocence within a particular branch, sub-branch, and institution of law (Demin, 2003).

In the context of domestic tax legislation, paragraphs 4.1.4 of Article 4 of TCU enshrine the presumption of legality of taxpayer's decisions, if the rule of law or other normative legal act issued based on the law, or if the rules of different laws or normative legal acts presuppose ambiguous (diversified) interpretation of rights and obligations of taxpayers or monitoring authorities; as a result, it is possible to make decisions in favor of both the taxpayer and the monitoring authority.

Article 112 of TCU elucidates cases when a taxpayer is held guilty:

- establishing a person's compliance with the rules and regulations for violation of which TCU provides for liability, but a failure of the person to take sufficient measures to comply with them;

- monitoring body's proof that a taxpayer acted imprudently, unscrupulously and without due diligence in performing actions or committing inactions, which entail liability.

**As for proving reasonableness, good faith and due diligence**, scientific literature often defines them as the limits of the exercise of subjective rights. Good faith is a characteristic feature of the behavior of the subject of legal relations if the person, who carries it out, is aware of his responsibility to other members of society, focuses on the honest performance of their obligations, follows socially useful intentions. In exercising rights and responsibilities, the legal essence of reasonableness is the need of participants to balance their actions with the goals of objective right, legal patterns of behavior, rights, freedoms, and legitimate interests of others, as well as society and the state. Prudence is discussed as a caution, predictability of future actions, etc.

“Being a bona fide taxpayer means having some advantages” – taxpayers made this conclusion in 2012, associating the taxpayer's good faith with automatic VAT refunds and indicating that entrepreneurs must be strongly aware of the need for full and timeous payment of taxes (Sobuckij, 2012). At the same time, it is mentioned the positive (during the last 36 months) tax history of taxpayers, which will help reduce procedure duration. In this context, one can conclude that bona fides and conscientious performance of the tax obligation are interchangeable categories.

TCU uses the concept “good faith” in several articles, and only in one of them – in terms of financial liability for a tax offense (para. 112.2 of Art. 112 of TCU). The definition of “good faith” has been discussed in scientific contributions for a long time (Karmalita, 2019). The concept of “good faith” has a dual nature. In the objective sense, good faith means requirements for the conduct of an indefinite circle of participants in civil relations set by the rules of law and customs of business. In the subjective sense, good faith is an assessment of the conduct of the subject of legal relations for compliance with the rules of morality established in society, respect for the rights of other participants in legal relations (Bakalinska, 2011). Criteria of good faith may involve the taxpayer’s complete and timely fulfillment of his obligation to pay taxes and fees; the absence of elements of a tax offense in the actions of a person (Pashkov, 2004). When analyzing cases of mala fide found in the case law, S. Savseris points out that a “dishonest taxpayer” is a person who implements fictitious and fraudulent transactions to obtain tax benefits (Savseris, 2006). There is a similar approach requiring the use of judicial doctrines (concepts) developed by foreign and domestic case law as criteria for confirming mala fide (Ardashev, 2005).

The taxpayer’s commission of actions or inaction without due diligence is another component of establishing his guilt by the controlling body. Due diligence means that the taxpayer must express reasonable diligence in selecting a counterparty: to establish its legal capacity, the authority of persons acting on its behalf, and, in an ideal scenario, clarify the good faith of the counterparty in terms of tax payment (Putilin, 2009). A. Pilipenko structures the terminological understanding of the phrase “due diligence” in which the word “due” corresponds to the commission of particular legal actions by business entities (Pilipenko, 2018). In his opinion, the term “prudence” should be interpreted in the applied sense as a variation of actions that have an element of potential internal economic security, which allows the business entity to carry out its activities without reputational and entrepreneurial risks. Thus, when selecting a counterparty, the economic entity must take sufficient and reasonable efforts to verify the reliability and capabilities of an individual to implement the relevant agreement. However, it is of paramount importance to clarify what an entity should do (what expresses the sufficiency of the measures taken) when selecting a counterparty to avoid the claims of regulatory authorities.

Consequently, in selecting a counterparty, the entity shall take reasonable and sufficient

efforts to verify the reliability and capabilities of the entity to fulfill its obligations. There remains an open issue about what efforts the business entity should take (what expresses the adequacy of the efforts taken) when selecting a counterparty to avoid claims from fiscal authorities in the future. Efforts aimed at obtaining the following documents from the counterparty may seem reasonable from the taxpayer’s perspective: charter or memorandum of association; copies of the state registration certificate; copies of a VAT number; documents confirming the authority of the person signing the contract; copies of the license to carry out the activities provided for in the contract, in case of its licensing.

In science and practice, the doctrine of tax due diligence is used as a legal precondition for obtaining a tax benefit. N. Blazhivska emphasizes that good faith taxpayers need to prepare the evidence base, which would confirm the manifestation of due diligence in selecting a counterparty. Thus, before making the deal, a “prudent” VAT payer in Ukraine should at least, but not limited to, check his counterparty for tax “integrity” by relying on available databases, as well as be ready to give evidence to prove the validity of the counterparty’s choice, etc. (Blazhivska, 2019).

In foreign countries, monitoring bodies, in their consultations and explanations, provide a taxpayer with recommendations on how to assess their risks and set guidelines for identifying reasonable prudence when checking their counterparties. However, the rules of domestic legislation do not stipulate the obligation of the taxpayer to check its counterparties additionally. It is not specified what information about one’s counterparty the taxpayer must check to comply with the doctrine of tax due diligence.

D. Alexandrov, Judge of the Supreme Court of the Republic of Belarus, emphasizes that the principle, underlying the tax laws of many countries of the world, focuses on obedient conduct, exclusion of taxpayer’s gaining any benefit from his illegal actions for tax savings and unjustified advantages over other taxpayers and provides for the implementation of a set of measures aimed at general tax compliance by taxpayers (Aleksandrov, 2019). It is necessary to state that the legislation of the Republic of Belarus makes it possible to create a “portrait” of a bona fide taxpayer consistently following a risk-based approach. This is also about the expediency of introducing “tax history” into the practice of tax authorities which will differentiate taxpayers according to the degree of their good faith.

The good faith of a taxpayer is manifested in his tax culture, which directs him to indepen-

dent, voluntary fulfillment of the tax obligation in strict accordance with statutory provisions. In the case of finding the taxpayer's abuse of an option to fulfill the tax obligation independently, he loses the trust of the state and he must pay a settled amount of taxes to the budget. According to para. 4 of Article 33 of the Tax Code of the Republic of Belarus, the grounds for adjustments are as follows:

- misrepresentation of data on business transactions, taxable items, which are rendered in accounting, tax returns, other elements and information necessary for deduction and payment of taxes (fees);
- the main (business) purpose of the business transaction: non-payment, incomplete payment, offset or refund of taxes (fees);
- lack of reality of the conducted business transaction.

At the same time, the legislator recognizes the following as important components of the taxpayer's good faith: the taxpayer's active exercise of his right to check data on the reliability of the counterparty's reputation using open state information resources (sub-para. 1.13, para. 1 of Art. 21 of the Tax Code of the Republic of Belarus); the taxpayer's fulfillment of the obligation to ensure the verification of primary accounting documents for their compliance with the legislative requirements (sub-para. 1.16, para. 1 of Art. 22 of the Tax Code of the Republic of Belarus).

In the 2015-2017 cases, foreign judicial practice took into account the following evidence to verify the legality of the decisions of monitoring authorities about additional tax assessment for businesses which had counterparties with increased risk of tax offenses: coordination of actions of the payer and counterparty to establish a sort of statutory compliance to obtain tax saving; the complex nature of the taxpayer's actions within the tax scheme (the commission of such actions in conducting ordinary business activities is excluded); conducting transactions involving goods that were not manufactured or could not be manufactured in the quantity specified in the primary accounting document, etc. The criteria of the monitoring body, which laid the foundation for the conclusion on proving the guilt of the taxpayer, comprised: explanations of the director of the organization on the formal nature of his status and failure of the contractor's employees to carry out construction works; explanation of the founder of the counterparty for the formal nature of the state registration of a legal entity at the request of third parties; counterparty's lack of staff; the counterparty's long-term failure to run financial and economic activities, submit tax returns to the tax

authority; invalidity of the passport in the name of the counterparty due to the death of its true owner; discrepancy of the shipping point specified in the consignment note with the location of the counterparty; absence in the consignment note of data on actually concluded agreements, numbers of shipping manifest; the column "Goods accepted" in the consignment note is signed by a person who is not responsible for the transaction; the absence of contractual relations between the consignee and the owner of the warehouses specified in the consignment note as the shipping point; analysis of data on the flow of funds in the current account of the counterparty indicates their transfer as tax payments in the minimum amount, the lack of costs for real financial and economic activities (incl. capital lease, telephony services, payment of wages, etc.).

As you can note, the qualifying elements of establishing the guilt of the taxpayer are put forward to the economic activity of the taxpayer (in particular, to prepare for it during the selection of contractors, to keep tax records during the preparation of primary documents and calculate the amount of tax liabilities).

Today, judicial staff also pays a lot of attention to the updated concept of guilt in tax law. They are concerned about striking balance between the interests of taxpayers and the state. They point out that they are authorized to make a final decision on the interpretation of guilt and application of the relevant TCU provisions, and hope to develop a well-established practice within this category of cases (Khanova, 2021).

The Judgement of the Supreme Court in case No. 826/6821/13 as of 17.12.2020 stated that tax due diligence is a legal precondition for obtaining a tax benefit, which means that good faith taxpayers must take care of arranging an evidence base that would confirm due diligence in selecting a counter party. Domestic case law shows that the very tax authorities and judges are not ready to modify Art. 109 of TCU. Judgements of Kharkiv District Administrative Court in case № 520/8790/21 as of 14.07.2021 and Dnipropetrovsk District Administrative Court in case № 160/9112/21 as of 12.08.2021 just copy provisions of the code and neither indicate any interpretation of guilt, nor provide the features of guilt of a taxpayer. The Judgment of Odessa District Administrative Court in the case No. 420/5497/21 as of 28.07.2021 contains the following provision: given legal instructions for the rules of retail sale of alcohol products by business entities, i.e., the availability of relevant licenses and prohibitions on their sale without payment transactions recorders (PTR) and not in the designated



place, the entity may be prosecuted for violating the rules, i.e., committed illegal acts. The authors regard the above as an example of proving the guilt of a taxpayer.

The State Tax Service of Ukraine recognizes the importance of developing a tax control methodology in terms of implementing the concept of bringing the taxpayer to financial liability provided that his guilt is proved. It has elaborated the relevant recommendations in December 2020 and March 2021 (Letters of the State Tax Service as of 31.12.2020 № 24242/7/99-00-20-01-02-07 and as of 26.03.2021 № 7485/7/99-00-18-02-02-07).

#### 4. Conclusions

Ukraine has recently faced a tendency for narrowing the scope of existing individual rights because the legislator is guided by the financial and economic capacity of the state and seeks to maintain a fair balance between the interests of man, society, and the state. One is put in mind of the well-known postulate of Roman law: *bona fides semper praesumitur, nisi malam fidem adesse probetur* – *bona fides* is always presumed until malicious intent is proven.

Basic requirements for legal support of private and public interest in taxation are preciseness of rules, observance of taxation principles and tax law, consistent law enforcement practice, reliable protection of legitimate interests in case of violation (Karmalita, 2019). The authors believe that the legislator's regulatory use of the concepts of reasonable-

ness, good faith and due diligence in TCU has reinforced the tendency of law enforcement practice to analyze the conduct of taxpayers carefully. However, it is important to prevent arbitrary assessment by the monitoring authority in terms of the obligation to prove the level of competence of the authorized entity.

Summing up the outcomes of this article, it should be noted that:

1) the legal doctrine lacks the unity of views on the category of guilt as an element of a tax offense. One of the key points in applying the concept of taxpayer's guilt may comprise a combination of statutory and psychological approaches in its definition;

2) TCU today does not define the criteria of good faith, reasonableness and due diligence of the taxpayer. In the absence of a consistent legal consolidation of the concept, features and consequences of bad faith, unreasonable and imprudent conduct of the taxpayer, the efforts of the controlling authority to prevent harm to the public interest due to abuse of rights by taxpayers are discretionary powers;

3) when assessing the actions/inaction of a taxpayer with a "fictitious" counterparty, first of all, one has to assess the degree of involvement of each party in the offense, identify the direction of actions of a particular taxpayer for violating the law, and determine its good faith, reasonableness and due diligence – this requires the use of unconditional and expressly interpreted evidence.

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**ВИНА ЯК ЕЛЕМЕНТ ПОДАТКОВОГО ПРАВОПОРУШЕННЯ**

**Анотація.** У статті обґрунтовується актуальність визначеної тематики, що тісно пов'язана з питанням притягнення до юридичної відповідальності платника податків в умовах дії оновленої редакції Податкового кодексу України: відтепер юридична відповідальність може мати місце лише на підставі наявності складу правопорушення з важливим елементом – виною. **Метою** статті є аналіз сутності та нормативно-правового регулювання вини як елементу податкового правопорушення. Її досягненню сприяють такі завдання: здійснення аналізу понять і категорій, зокрема «вина», «умисел», «нерозумно, недобросовісно та без належної обачності»; визначення нормативно-правового підґрунтя, що забезпечує функціонування відповідного інституту; визначення методологічних засад та розроблення рекомендацій щодо застосування концепції вини платника податків за вчинене податкове правопорушення. **Методи дослідження.** Методологічна основа дослідження представлена комплексом загальнонаукових і спеціальних методів, які застосовуються в науці фінансового права. **Результати.** Акцентується на понятійно-категоріальному апараті інституту відповідальності у праві з урахуванням особливостей сфери оподаткування. На підставі проаналізованих наукових думок та положень нормативно-правових актів додатково аргументується, що склад податкового правопорушення з такими компонентами, як об'єкт, об'єктивна сторона, суб'єкт, суб'єктивна сторона, – це встановлені нормами податкового права ознаки (елементи), сукупність яких дає змогу вважати протиправне діяння податковим правопорушенням. Серед перелічених ознак є такі, що не є абсолютними (зокрема, ідеться про винність діяння). Значну увагу приділено категорії добросовісності платника податків. Проаналізовано підходи до її розуміння в наукових колах, а також використання у правозастосовній практиці. Акцентовано на співвідношенні порядку встановлення вини платника податків та дії презумпції винності/невинуватості у сфері податкової відповідальності. Розтлумачено низку інших понять, зокрема «діяти нерозумно» та «діяти без належної обачності». Продемонстровано позицію Державної податкової служби України щодо вироблення методології проведення заходів податкового контролю в частині реалізації концепції притягнення до фінансової відповідальності платника податків за умови доведення його вини, якою у грудні 2020 р. та в березні 2021 р. було підготовлено інформацію та відповідні рекомендації. **Висновки.** На підставі ознайомлення з актуальною практикою застосування суддями концепції вини платника податків у податковому правопорушенні зроблено висновки щодо змісту й особливостей категорії вини в податковому праві. У результаті дослідження запропоновано методологічні засади застосування концепції вини платника податків за вчинене податкове правопорушення у практичній діяльності вітчизняного податкового відомства.

**Ключові слова:** податкове право, податкове правопорушення, вина у складі правопорушення, платник податку, податкове зобов'язання, контролюючий орган.

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## PROTECTION OF VULNERABLE PEOPLE AND GROUPS: PHILOSOPHY AND INTERPRETATION PRACTICE FOR UKRAINIAN COURTS AND ARBITRATIONS

**Abstract. Purpose.** The research deals with historical and legal issues for the improvement of human rights protection system. Among them, the most challenging issues touch upon vulnerable people and groups. First of all, the relevance of the subject of research and some problems have been identified. Problems have acquired an international and trans-cultural character in modern jurisprudence. In particular, recent works devoted to the problems of legal protection of vulnerable persons are outlined.

**Research methods.** From a methodological point of view, this study represents a system of methods that will form the basis for the development of a new legal interpretation theory. The possibilities of these methods have demonstrated an example of hermeneutic reconstruction and etymological analysis of the related basic terms and concepts. **Results.** This analysis allows us to make a preliminary conclusion that words, which mean such category of people as: outsiders, marginalized and alienated individuals, excluded groups and persons, an outlaw, form the core of the terminology relating to the vulnerable groups issue. Legal and doctrinal definitions and classifications of vulnerable persons in international instruments and scientific works were compared. The conceptual framework for the system of the vulnerable people and groups protection was specified. A separate system of international legal protection of the rights of vulnerable persons is not available yet. Therefore, the general procedure of international and national legal protection of human rights applies to them. The need to apply discretion of the subjects of human rights and the jurisdictional bodies that protect these rights should be taken into account. It is noted that discretion is necessary to combat the abuse of subjective rights, which is most specific for the protection of vulnerable persons. **Conclusions.** The most important conclusion is that the foundation of international and local systems for the protection of the vulnerable persons' rights is the case law of the European Court and national courts. Therefore, a key role in this process belongs to interpretation on the basis of the discretion of subjects for such rights.

**Key words:** human rights, vulnerable people and groups, case-law, protection of vulnerable persons, abuse, discretion.

### 1. Introduction

The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly in Paris on the 10<sup>th</sup> December 1948 (General Assembly resolution 217 A) as a common standard for all peoples and all nations. Thus, this milestone document affirms in its first article that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (United Nations, n.d.).

However, the effectiveness of the principles of freedom and equality is significantly limited by practical inequalities. A negative message about the future of the global order is a lamentable fact, that is, the formation of specific sectors of the population called vulnerable people and groups.

Protection of vulnerable people is both a problem for underdeveloped countries and the international community. Despite efforts and socially important goals of the European Union (EU) and the United States to reduce or eliminate disparities for the well-being of the people, significant risk factors continue in the vulnerable populations of those countries.

The core of human vulnerability is the low level of moral and material stability, which is generally called *poverty*.

At the same time, poverty is defined, commonly presented, as a condition of being unable to obtain or provide a standard level of life for themselves and families. It exists in every country in varying degrees and is unlikely to disappear anytime soon. The United States is considered the world's richest country, and 34 million of its residents are living in poverty (Debt.com, 2021).

It is a challenge not only to some, but to all, and this issue should be addressed by both national and global policies. For the above reasons, this problem has acquired an international and trans-cultural character in modern jurisprudence.

Studies by domestic authors are among recent works devoted to the problems of legal protection of vulnerable persons: Yuri Belousov, Zlata Shvets, Viktor Semenyuk, Viktor Chuprunov, Sergei Shvets. Scientific articles by Alexandra Timmer and Lourdes Peroni (Timmer & Peroni, 2013) are noteworthy, as well as a systematic study by Yussef Al Tamimi (Al Tamimi, 2015). The most important works about the ECHR's interpretation are the publications by David John Harris, Michael O'Boyle, Colin Warbrick (Harris et al, 2009, pp. 5-21), Jukka Viljanen (Viljanen, 2008).

However, there is a clear lack of works clarifying the legal nature of vulnerable persons and, the most importantly, their general typology, which is designed to ensure a reliable qualification of the relevant persons.

Accordingly, there is a need to scrutinize and investigate this subject from new methodological points in order to re-examine a range of classical philosophical disputes, involving such doctrines as legal positivism, natural law, and legal interpretivism.

### 2. The methodological framework for assessing legal interpretation practice of human rights

From a methodological point of view, this study represents a system of methods which will form the basis for the development of a new legal interpretation theory. The foundation of such a theory is a "triune" system of methodology.

1. The system of general methods is directly formed on the basis of: philosophical hermeneutics, the philosophy of common sense, and the doctrine of European legal interpretivism.

Legal interpretivism, which is positioned as a "middle" way, seeks to reconcile the mechanics of the "quantitative" approach of legal positivism and the metaphysical speculation of the "qualitative" natural law approach.

At the same time, the philosophy of interpretivism gives holistic methods for clear priority. This is primarily manifested in the significance to take into account the clarification not of the "letter" but of the "spirit" of the law fact when evaluating the results of each act of interpretation.

The specificity of legal interpretivism is that the main subjective criterion is not the common sense of the abstract average person, but the common sense of the main subjects of law enforcement, especially for judges and arbitrators. Thus, the key to clarification of the essence of legal interpretation is its highest form – judicial and arbitration discretion.

"The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer from law within and beyond the law we have" (Dworkin, 1986, p. 407).

2. Special methodology is presented as a systemic unity of dogmatic, comparative and hermeneutic methods of law science. The third method is leading and involves the use of three main techniques: paradigmatic reconstruction, discretion and modeling.

Special attention should be given to construction as a useful compilation of hermeneutic techniques. It is usually conveyed in the following meaning: "the act of a lawyer or

court in interpreting and giving meaning to a statute or the language of a document... when there is some ambiguity or question about its meaning. In constitutional law, there is a distinction between liberal construction (broad construction) and strict construction (narrow construction). Liberal construction adds modern and societal meanings to the language, while strict construction adheres closely to the original language and intent without interpretation" (Law.com, n.d.).

3. The logical-linguistic and sociological methods for the meaningful study of documents and content analysis are the most productive among the applied methods. The choice of these methods is stipulated by the requirement to develop a terminological system of interpretive law as a logical-conceptual framework of theoretical construction, built on the basis of the hermeneutic method.

For these reasons, the possibilities of these methods demonstrate an example of hermeneutic reconstruction and etymological analysis of the related basic terms and concepts.

### 3. A historical reconstruction of the vulnerable people concept

The analytical techniques, historic reconstruction and etymological analysis have been proved to be the most effective for the paradigmatic reconstruction of the concept of vulnerable people.

Over the period of the empirical research, the data from *Online Etymology Dictionary* (around 30 words) were analysed (Online Etymology Dictionary, n.d.).

All the received data were distributed into three groups of words.

Notions denoting an overview of vulnerability, first and foremost, have been interpreted. Twelve words came under the first category: *fool, wretch, refuse, harlot, truant, waif, ribald, gad, knave, varlet, misfit, and abject*.

The second group comprises notions representing social isolation and exclusion. It included the following words: *outcast, pariah, ronin, Ishmael, izgoi, exile, ejection, relegate, diaspora*.

The third group is composed of the words denoting the *legal consequence* of the vulnerable state: *outlaw, friendless, bandit, furtive, fugitive, rogue, picaroon*.

Emphasizing universal vulnerability, the work introduces the reimagining of the notion and typology of the vulnerable people and groups in human rights law. All the aforementioned facts lead to the following conclusions:

This analysis allows us to make a preliminary conclusion that words, which mean such category of people as: outsiders, marginalized

and alienated individuals, excluded groups and persons an outlaw, form the core of the terminology relating to the vulnerable groups issue.

Instruments of human rights usually set out additional guarantees for persons belonging to the vulnerable people and groups.

It should be noted that the usable instruments of international law exist, but on the occasion, individuals, their communities and national institutions ignore them for their own ends.

Better socialization of vulnerable people can eliminate a major cause of vulnerability– marginalization and alienation of these persons.

### 4. Legal definition of "vulnerable people and groups": experience and problems

This historical reconstruction is the base of modeling (construction) an orderly terminology used to understand the essence and legal nature of vulnerability state.

In spite of its apparent simplicity, defining the concept of vulnerable people and groups is the extremely difficult problem.

Thus, at the level of official projects, it declares although the word "vulnerable" is now widely used in various spheres of life, the exact definition of this concept remains unattainable (Miles, n.d., p. 13).

It is regrettable that some scientific researchers support the assessment of such situation (Al Tamimi, 2015).

Therefore, it is helpful to take advantage of such a working definition: Vulnerable persons are called "particular groups who, for various reasons, are weak and vulnerable or have traditionally been victims of violations and consequently require special protection for the equal and effective enjoyment of their human rights" (Icelandic Human Rights Centre, n.d.).

We recognize that this definition, though valuable, would need further elaboration, clarification and development, including validation and piloting through alternative interpretation.

It is necessary to take into account attempts for the formal definition of vulnerable persons in international instruments.

In particular, there is Article 3 (f) of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, which provides the following legal definition:

"f) "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself" (Hague Conference on Private International Law, 2007).

At the same time, notion "interpretation" is close to the concept of "translation". An international legal discourse demonstrates that these terms are often used in parallel and, sometimes,

interchangeably. Therefore, there are diverse questions to be raised about the concepts.

We also acknowledge the importance of a culture of translation as an element of "accident" prevention during the legal interpretation.

The fact is that the Ukrainian word "urazlyvyi" is difficult to translate into English (there is a so-called undefined translatability) and, as linguists say, is a word with a "linguistic semantic component".

A fundamental distinction should be made between ukr. *urazlyvyi* (eng. Vulnerable) and the concepts ukr. *vrazlyvyi* (eng. Susceptible) with ukr. *urazhenyi* (eng. affected, amazed, disbarred). These words are mistaken for synonyms due to the usual alternation of the corresponding letters. It is the circumstance that must be taken into account when interpreting the text of the legal content.

Only ignoring this guideline can explain the unfortunate inaccuracy of the English translation for the relevant part of the Criminal Code of Ukraine (CCU) in Legislationline.org, the online human rights legal database (2002) (OSCE, n.d.).

Thus, in the text of Art. 149, 258-1 and 303 CCU, "urazlyvyi stan osoby" is translated as "vulnerable state of a person".

However, in note 2 to Art. 149 of the Criminal Code, a slightly different term "a susceptible state of a person" is used. Conversely, this judgment should be interpreted as a "sensitive human condition".

As a result, our foreign colleagues in the process of international legal cooperation must be warned about this inaccuracy every time.

It is difficult to explain why the legislative body, the Verkhovna Rada of Ukraine, does not always agree on the meaning of the same terms in different areas of legislation.

For example, the drafters of the Law of Ukraine as of April 9, 2015 № 329-VIII "About the natural gas market" use a certain term in Art. 16 regardless of the relevant articles of the Criminal Code. The English version of this term is represented in the unofficial translation of this Law not as sensitive or susceptible, but as vulnerable consumers (Naftogaz of Ukraine, 2016).

The use of the adjective "vulnerable" in relation to the noun "consumer" raises reasonable doubts. Thus, the mental unity of the current legislation is ruthlessly destroyed.

The Verkhovna Rada cunningly avoids this problem and uses technical tricks. The legislator does not provide an authentic interpretation of this concept in the Law, and in Part 1 of Art. 16, refers to the fact that the criteria for classifying consumers as "vulnerable" are set by the Cabinet of Ministers of Ukraine.

### 5. Basic approaches to the classification of vulnerable people and groups

Vulnerable persons and groups are usually classified as: women and girls, children, refugees, stateless persons, national minorities, migrant workers, disabled persons, elderly persons, HIV positive persons and AIDS victims, lesbian, gay and transgender people, and other vulnerable segments of the civilian population. They are increasingly becoming the direct targets of violence, discrimination, persecution, intolerance and exploitation.

Vulnerable populations, within the United States, typically include such categories of persons: (1) the economically disadvantaged; (2) racial and ethnic minorities; (3) the uninsured; (4) low-income children; (5) the elderly; (6) those with human immunodeficiency virus (HIV); (7) those with other chronic health conditions, including severe mental illness (Robert Wood Johnson Foundation, 2001).

In the United Kingdom and other Commonwealth countries, it is now proposed to show a separate sub-category: people infected with coronavirus COVID-19 and most of them at the risk of getting seriously ill. They are known as *clinically extremely vulnerable* (NHS, 2021).

The identification of the different types of vulnerable people on the basis of separate criteria was the most realistic and effective way to clarify the nature of this social group. The following classification criteria are established:

1. The classification of vulnerable people based on personal characteristics is the most widespread: (a) by gender: women and girls; (b) by age: children and elderly persons.

2. On the grounds of citizenship or belonging to a certain local community. Such groups consist of the category of persons restricted in their freedom of movement and related rights to work and asylum: foreign citizens and stateless persons, migrant workers, refugees, internally displaced persons, illegal migrants, homeless persons (persons with no fixed abode) or people without a fixed address, street sleepers.

3. On ethnic grounds: minority indigenous peoples, other races / specie, different racial groups, national minorities and ethnic minority group.

4. On the basis of religion: representatives of religious minorities, separate groups of the population united by the faith non-traditional for the majority of the population (minority faith-based groups) and separate religious communities (different religious congregations). Nowadays, in comparison with Antiquity and the Middle Ages, active atheists are quite vulnerable to this feature.

5. By the state of health: disabled persons, HIV positive persons and AIDS victims, mentally ill.

6. By sexual orientation: lesbians, gays, bisexuals, transgender people and other persons who can be classified as LGBT-communities.

7. On political grounds: opposition figures (opponents), lustrated persons, separatists or secessionists, extremists, anarchists, dissidents, deportees, etc.

8. On the basis of criminal law: representatives of the criminal world (criminals), including recidivists, detainees or detained persons, prisoners, war prisoners or prisoners-of-war, probationers, probation parolees, persons with a criminal record or persons with previous convictions, etc.

The position of some judges is considered to be appropriate, which additionally distinguishes the following categories of vulnerable persons and groups: 1) persons who find themselves in a difficult financial situation (have low incomes due to unemployment, a lack of a breadwinner, physical disabilities, low level of professional training, etc.); 2) spouses who have serious conflicts in the family; 3) incomplete and disadvantaged families in which the child is raised by only one parent, or in which there are serious conflicts; 4) children who have problems related to their socialization and schooling, as well as their families; 5) people who are in a state of stress due to events that traumatize their psyche (retirement, death of a loved one, etc.).

The presented classification is not complete and final. This is not an exhaustive list of persons for the requirement of particular protection, as many other groups suffering from discrimination and oppression have not been discussed in this part.

#### **6. The conceptual framework for the protection system of vulnerable people and groups protection**

A separate system of international legal protection of the vulnerable people's rights does not yet exist. Therefore, the general procedure applies to them for the international and national legal protection of human rights.

Thus, in the modern world, there is a universal holistic system of international legal protection of human rights.

The main sources for understanding the concept of international legal protection are so-called universal human rights instruments, which primarily comprise the following:

1. The International Bill of Human Rights, which includes:

The Universal Declaration of Human Rights (UDHR), adopted by a resolution of the UN General Assembly on December 10,

1948, as well as two pacts adopted by resolutions of the UN General Assembly on December 16, 1966, namely: The International Covenant on Civil and Political Rights of 1966 and its two optional protocols;

The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and its Optional Protocol.

2. In addition to the Bill of Human Rights, several other conventions are singled out, which together form the Core of International Human Rights Instruments, including:

The United Nations Convention on the Elimination of All Forms of Racial Discrimination (ICERD), was adopted in 1965 and it entered into force in 1969;

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in 1981;

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted in 1984 and entered into force in 1987;

The United Nations Convention on the Rights of the Child (CRC) was adopted in 1989 and it entered into force in 1990;

The United Nations International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) was adopted in 1990 and it entered into force in 2003;

The United Nations International Convention for the Protection of All Persons from Enforced Disappearance (CED) was adopted in 2006 and it entered into force in 2010;

United Nations Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006 and it entered into force on 3 May 2008.

Together with this Core, the rest of the international humanitarian conventions create the whole array of international human rights instruments.

The European system of human rights protection is formed by the regional international conventions of the Council of Europe. According to the latest data from the Treaty Office of the Council of Europe, there were 225 international treaties of the Council of Europe. (Council of Europe, n.d.).

As everyone knows, the basic one is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which was opened for signature on November 4, 1950, and entered into force on September 3, 1953.

The European Court of Human Rights = Cour européenne des droits de l'homme (ECtHR) was established to provide proce-



dural supranational support for the implementation of this European Convention.

The ECtHR is competent to issue more than ten types of decisions (Court's judicial formations), of which three types are the main ones: (1) inadmissibility decision, (2) decision on inadmissibility or admissibility; (3) judgment.

Thus, the main source of legal interpretation was formed in the field of human rights protection in the law of the Council of Europe. This is the case law of the ECtHR, which includes the following acts:

interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms;

interpretation of a previously issued resolution at the request of the Committee of Ministers of the Council of Europe;

with some reservations, the case law of the ECtHR includes advisory opinions on the interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms on matters not related to cases.

#### **7. The discretionary nature of the protection of vulnerable persons and counteraction to abuse of their rights: a problem statement**

There is no dispute that any international human rights instruments implemented by the authorities should be rooted in domestic law.

However, there must be safeguard in the domestic legal system to secure against arbitrary interference from the State. The ECtHR points out that the law should be phrased in a way that is reasonably understandable for that are affected by it. Any law phrased in a way that opens for discretionary assessments should ensure that "...the scope of the discretion and the manner of its exercise are indicated with sufficient clarity..." to ensure the individuals protection against arbitrary interference (Olsson v. Sweden (No.1), 1988, para.61, Margareta and Roger Andersson v. Sweden, 1992, para.75) (Trond, 2019, p. 69).

Such a legal remedy, which provides variability and a certain freedom of action, is the discretion of the subjects of human rights and jurisdictions that protect these rights. In other words, it is «the freedom to decide what should be done in a particular situation» (Lexico.com, n.d.).

Modern researchers of human rights protection note that in this area "discretion is used in many forms every day. ... Within the ECtHR discretion is exercised by all decision-making bodies of the Court. In short, discretion is exercised at all bureaucratic levels. In the legal sphere, judicial discretion is an important part of the decision-making. Discretion enables legal

rules to be interpreted and, therefore, makes the rules applicable to the different merits of each case" (Trond, 2019, p. 20-21).

In particular, judges in child welfare systems are granted discretion in making decisions about family structures, which are characterized in the literature as immensely difficult. However, these sources require interpretation and are open to contrasting views (Juhasz, 2020, p. 8).

It is important to note that discretion is needed to combat the abuse of objective law and subjective rights, which is the most specific to protecting vulnerable people.

Unlike other areas of law, the qualification of certain persons as vulnerable is absolutely insufficient for the application of international legal instruments and acts of national legislation. It is critical to identify the fact of abuse of the rights of some persons in a vulnerable situation. Such qualification cannot be carried out on the basis of legal norms, which are also abused in these cases. Consequently, there is an urgent need for discretion.

In terms of legal protection of the vulnerable people's rights, various authors have described the difficulties in accurately predicting future abuse "because of the complexity of the causal influences on the individual" (Mitchell, 2009, p. 88-89).

Therefore, abuse is the "root and nerve of the whole proceeding" in the protection of vulnerable persons (Holmes, 2018, p. 19-44).

However, the need for its detection is exacerbated by the fact that the "multiplicative" impact of combinations of factors increases the risk of harm to vulnerable people (Juhasz, 2020, p. 1).

#### **8. Conclusions**

These conclusions are not the last word on the subject. It only allows synthesizing thoughts, which have been mentioned in the paper, to demonstrate the importance of this ideas, and propelling a reader to a new view of the subject.

Consequently, the following reduction is proposed:

1. It is expedient to distinguish in principle the concepts: (1) "Vulnerable People and Groups", (2) "Vulnerable Persons", (3) "Vulnerable position of a certain person" or "The Person in a Vulnerable Situation). Thus, it is possible to define vulnerability as the position of a certain person in the appropriate state under certain circumstances (in a vulnerable situation).

2. Clarification of the general characteristics of all three concepts through the in-depth meaningful development of the basic concept of "vulnerability" allows us to consider this conceptual triad as: (1) common vulnerabil-

ity of the group; (2) potential vulnerability of the person; (3) personal / articular vulnerability of the person.

3. Human rights are protected as natural and legal rights at the national and international levels. However, it should be borne in mind that it is not the human rights objects that are protected, but the people themselves from being violated in their natural and legal rights to these objects. Such an understanding should help to

protect all people everywhere from severe political, legal, and social abuses (Nickel et al., 2013).

4. Based on the fact that the foundation of international and local systems of protection of the rights of vulnerable persons is the case law of the European Court and national courts, a key role in this process belongs to litigation. Therefore, an interpretation based on the discretion of the subjects of such rights is crucial for understanding the need for judicial protection.

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## **ЗАХИСТ УРАЗЛИВИХ ОСІБ ТА ГРУП: ФІЛОСОФСЬКА Й ІНТЕРПРЕТАЦІЙНА ПРАКТИКА ДЛЯ УКРАЇНСЬКИХ СУДІВ ТА АРБИТРАЖІВ**

**Анотація. Мета.** У статті автор досліджує актуальні питання захисту прав уразливих осіб, здебільшого герменевтичні, а саме визначення базових понять та їх класифікацію. Актуальність порушеної проблематики зумовлена прикритим фактом формування певних верств населення, які вважаються уразливими особами та групами. Ця проблема в сучасній юриспруденції набула міжнародного і транскультурного характеру. Є необхідність ретельного вивчення цього предмета, причому з нових методологічних позицій, для переосмислення низки класичних філософських спорів, що торкаються таких доктрин, як правовий позитивізм, природне право та інтерпретивізм. **Методи дослідження.** Правовий інтерпретивізм є ядром застосовуваної методології. Він позиціонується як «серединний» шлях і намагається примирити механіку «кількісного» підходу юридичного позитивізму та метафізичну умовляність «якісного» підходу філософії природного права. Аналітичні методи, історична реконструкція та етимологічний аналіз виявилися найбільш ефективними для парадигматичної реконструкції поняття уразливих осіб. **Результати.** За час емпіричного дослідження проаналізовано дані етимологічного інтернет-словника (близько 30 слів). Цей аналіз дає змогу зробити попередній висновок про те, що слова, які позначають такі категорії людей, як аутсайтери, маргінальні й відчужені особи, виключені групи та особи поза законом, становлять ядро термінології, що стосується проблеми уразливих груп. Визначення різних типів уразливих осіб на основі окремих критеріїв виявилось найбільш реалістичним та ефективним способом з'ясування природи цієї соціальної групи. Виявлено, що окремої системи міжнародно-правового захисту прав уражених осіб поки що немає. Тому щодо них застосовується загальний порядок міжнародного й національного правового захисту прав людини. Варто враховувати необхідність застосування

дискреції суб'єктів прав людини та юрисдикційних органів, які ці права захищають. Зазначається, що дискреція необхідна для боротьби зі зловживанням суб'єктивними правами, що є найбільш специфічним для захисту уразливих осіб. **Висновки.** На відміну від інших галузей права, у праві прав людини кваліфікації певних осіб як уразливих абсолютно не досить для застосування міжнародних правових інструментів та актів національного законодавства. Необхідно встановити факт зловживання правами певних осіб, що потрапили в уразливу ситуацію. Така кваліфікація не може здійснюватися на основі правових норм, якими в цих випадках також зловживають. Саме тому виникає гостра потреба в дискреції. Тому логічним є висновок про те, що зловживання – це «корінь і нерв усього процесу» у сфері захисту уразливих осіб. Необхідність його виявлення посилюється тим фактом, що «мультиплікативний» вплив комбінацій різних факторів збільшує ризик заподіяння шкоди уразливим особам.

**Ключові слова:** права людини, уразливі особи та групи, прецедентне право, захист уразливих осіб, зловживання правом, дискреція.

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## DISCRETIONAL NATURE OF SUBJECTIVE REASONABLENESS

**Abstract.** *The purpose* of the article is to clarify a specific nature of the reasonableness category as a means of achieving the flexibility of legal regulation and, most particularly, as the scope of judicial discretion during the external evaluation of the conduct of participants in civil law relations. **Research methods.** The paper is based on general scientific and special methods of scientific cognition. **Results.** The article characterizes the reasonableness principle of tortious liability in the discretionary realm as a requirement for extending the scope of law enforcement discretion of the judgment of tortious liability for the tortfeasor's civil offense from the perspective of conformity and commensuration. The contribution also justifies the expediency of extending the scope of discretionary law enforcement considering the evaluative dimension of the principles of justice, good faith, the rationality of tortious liability that, in the context of solving a civil case, allows keeping in mind its particular characteristics, addressing more meticulously and approaching flexibly to the protection of the rights and legitimate interests of the injured party in legal relations, guaranteeing relevance of the judgment, contributing to the development of consistent case law. **Conclusions.** The reasonableness principle of tortious liability can be applied in civil law only to evaluate measures of tortious liability for the tortfeasor's civil offense. It is about reasonableness, conformity, commensuration, and, certainly, equity of the penalties, as the primary objective of tortious liability in civil law is the restoration of violated rights and legitimate interests through the tortfeasor's recovery of inflicted losses (damages).

**Key words:** principle of justice of tortious liability, principle of good faith tortious liability, principle of reasonableness of tortious liability, injured party, tortfeasor, offence, civil liability.

**1. Introduction.** Effective legal regulation of public relations stipulates the use of some technical and legal remedies, which could ensure its flexibility and accuracy. It is referred to legal remedies that make it possible to calculate the effect of a legal prescription accurately. One of such remedies is reasonableness that is quite logical given the nature of law as a product of the human mind, and this principle must be used in legal regulation to the fullest.

The uniqueness of reasonableness as a principle is manifested not only in the fact that it is a means of achieving flexibility of legal regulation but also the inner limit of the law-enforcer's discretion while defining the evaluative concept. The latter aspect covers the discretionary nature of subjective reasonableness, because the court, as a law enforcement body, must both analyze specific legal documents (acts) mechan-

ically and understand the principles and goals underlying their adoption.

*The purpose* of the article is to clarify a specific nature of the reasonableness category as a means of achieving the flexibility of legal regulation and, most particularly, as the scope of judicial discretion during the external evaluation of the conduct of participants in civil law relations. To reach the purpose, it is necessary to complete the following tasks:

- to elucidate the essence of the discretionary nature of subjective reasonableness of tortious liability in civil law;
- to outline for what purpose and in which cases the principle of the reasonableness of tortious liability is applied in civil law;
- to establish whether it is possible to apply the principle of reasonableness of tortious liability in civil law to assess the tortfeasor's

conduct and ascertain the measure of damages within tortious obligations.

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

## 2. The concept of judicial discretion

The generally accepted concept of judicial discretion has not yet been formed in legal science, as the court's discretion is "a dynamic category which changes due to both the development of social, political and legal life of society and the state and the degree of compliance with basic principles of law by the subjects of such powers, i.e., by the very judges, and citizens to whom they apply" (Kryzhova, 2015, pp. 159–162). At the same time, the analysis of doctrinal definitions of judicial discretion has allowed the authors to single out the universally recognized properties of this phenomenon. First, judicial discretion is exercised by a special subject – a judge; secondly, judicial discretion is reduced to the relative freedom of choice from a set of possible decisions; thirdly, judicial discretion is limited to the relevant right and the court's scope of its powers.

In practice, the establishment of clear statutory and moral boundaries for exercising judicial discretion seems the most challenging among the above properties. Legal literature has the traditional standpoint noting that the boundaries of judicial discretion should be distinct, strict limits of choice which the judge is not authorized to break meeting the current legislation. However, there is no well-defined vision of the types of limits of judicial discretion and the criteria for their determination.

According to O.A. Panasiuk, the limits of judicial discretion are divided into: 1) objective (consisting of: a) factual, i.e., when there are facts of the case confirmed by case evidence driving the judge's specific choice); b) legal (there are rules of procedural law, exclusively ones which allow court discretion); 2) subjective (Panasiuk, 2011, pp. 248–258). Thus, in substantiating the thesis that judicial discretion does not exist without limits, A.S. Petrova classifies them as: 1) those that are set by the regulatory prescriptions of the law (they can be called legal), and 2) those which depend on moral characteristics, the culture of a judge, etc. (moral and legal) (Petrova, 2017, p. 156–163).

The authors believe that the limits of judicial discretion can be identified and grouped following types of the court activity. In particular, scientists believe the processes of court judgment comprise: the interpretation of principles and norms of law; overcoming conflicts between principles and rules of law; the application of alternative and optional rules of law; the application of certain principles and rules

of law; filling gaps in regulations and other forms of law. By relying on the above, the authors conclude that the limits of judicial discretion are manifested in the process of using a legal analogy, solving law conflicts, and applying the principles of law by the court (including ones which are of an evaluative nature).

## 3. Purpose and limits of application of reasonableness of tortious liability in civil law

While covering the discretionary nature of subjective reasonableness, the authors highlight that the courts consider this principle in civil procedure not only and not so much from the perspective of the conduct of participants in the procedure as in terms of the application of the legal construction of judicial discretion. Therefore, the reasonableness principle in civil law and procedure, when deciding about the measures of tortious liability, is an evaluative category combining objective and subjective features, which on the one hand depends on the discretion of the judge and, on the other – the set of legal and factual circumstances of the consideration of a particular civil case by the same judge. Given the above, the authors deem it expedient to enshrine in law the reasonableness category in the general procedural rules relating to the legal status of the court. This will help ensure judges' uniform understanding while exercising their discretion.

Despite the obvious objective need to apply the general principles of civil law (primarily reasonableness and justice) to judicial coercion, many civil law scholars have worries about the emergence of so-called "judicial arbitrariness" because of the unlimited (broad) interpretation of evaluative concepts by judges (primarily of reasonableness, justice) that may result in a situation when any subjective right can be "legally" violated (neglected) using an official reference to the fact that a holder of right exercised it in bad faith or unreasonably. Contrary to the above, L.M. Nikolenko notes that in the context of interpreting actions of the parties in dispute, the judge's subjectivity is reduced to a minimum, because discretionary powers are exercised publicly (Nikolenko, 2013, pp. 32–36). In N.A. Huralenko's opinion, guarantees against judicial arbitrariness, first of all, comprise the moral and legal position and sound academic background of judges. Further, the scientist rightly emphasizes that the adoption of moral laws does not guarantee their "adequate" implementation, which must also comply with moral fundamentals and principles. The moral essence of any legal process, principally one which includes the discretion element, is stipulated not only by the ethical basics of law but also moral requirements

applied to persons who carry out procedural activities” (Huralenko, 2012, pp. 292–304).

According to legal doctrine, the reasonableness principle is closely related to the principle of good faith. Scientists see the dual nature of the principles of reasonableness and good faith in the unity of objective and subjective principles. For example, K. Adams holds that reasonableness is an objective category, and good faith, on the contrary – a subjective concept because it provides for a personal assessment of one’s actions (Adams, 2011). Partially agreeing with the above standpoint, the authors note the following. Acting as the principles of civil law, reasonableness and good faith fix the scope of possible subjective behavior. At the same time, these principles manifest themselves more likely as internal boundaries (limits) of private, in particular, judicial vision. As for the very reasonableness, it introduces subjective-worldview principles into the legal relations and thus, subjects independently assess the value of the balance of opposing interests, mutual encumbrances (obligations) are harmonized due to which reasonableness is an individual boundary for prescriptions established by law. The reasonableness concept is used in common law countries, especially in the law of England, as an equivalent of good faith. Moreover, the Principles of European Contract Law emphasize that “reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable” (Bakalinska, 2012, p. 150–154).

Some authors, interpreting the reasonableness category in its subjective (non-discretionary) terms, hold that “an abstract clever person (subject of law) should be able not only to participate in legal relations, be a holder of rights and obligations but also recognize similar civil rights for other individuals. At the same time, such recognition in legal relations appears in respect and observance of “other man’s” civil rights and modeling personal behavior in such a way as not to violate the limits of other people’s rights” (Volkov, 2008, pp. 161–166). If the above position is regarded from the perspective of this research, achieving the goal of “recognition of the rights of others” seems possible precisely due to the reasonableness of tortious liability because measures of tortious liability must be fair, proportionate, and reasonable, and statutory means of rights protection should be characterized by similar features.

In the course of the research, the authors found that the criteria of reasonableness and good faith, together with the justice principle, are most often used by courts while exercising their discretion if any legislative gaps.

The relevant rule is enshrined in para. 2 of art. 6 of the Civil Code of Ukraine noting: “in case of failing to use the law analogy for the regulation of civil relations, they shall be regulated according to the general foundations of civil legislation (law analogy). A similar provision is found in the Resolution of the Plenum of the Supreme Court of Ukraine “On Judgment in a Civil Case” as of 18.12.2009, para. 2 of which states: “if matters in controversy are not regulated by law, the court uses the law controlling similar relations (law analogy), and in the absence of one – the court proceeds from the general principles of law (analogy of law). Keeping in mind the extreme complexity of applying the analogy of law, the authors conclude that the judge shall make great intellectual efforts and have a reasonable approach to choosing the civil rule which will fit in such a situation (Tobota, 2008, pp. 51–56).

**4. Application of the reasonableness of tortious liability to determine the extent of damages in tortious obligations.** In addition to the analogy of law, the limitations of judicial discretion are also found during the court’s application of law principles (including those which have an evaluative nature). The authors emphasize that the reasonableness principle, as the very evaluative category, is actively and widely used by courts in disputes over compensation for damages (especially for compensation for non-pecuniary damage) and even more often in combination with the principle of justice, because these principles can be recognized as the only guideline for setting the specific amount of compensation. Consequently, when deciding on the relevant category of cases, courts are guided by their own understanding of “reasonableness” and “justice, while the parties are often dissatisfied with the amount of compensation determined by the court (sometimes even both parties). The complexity of setting reasonable compensation under the application of such a method of protection of civil rights and interests as compensation for non-pecuniary damage is driven by the fact that the latter is characterized by intangible forms of its implementation. In this regard, the authors believe that the court should follow non-property criteria, which comprise reasonableness, justice, and good faith, to determine the amount of non-pecuniary compensation while exercising its discretion.

The dependence of judicial discretion on reasonableness in resolving cases of damages provides for, on the one hand, the need for the court to find out all the circumstances of the tort and, on the other hand, establish an adequate and reasonable amount of compensation by making a fair and reasoned decision.

Both in terms of compensation for pecuniary damage and recovery of compensation for non-pecuniary losses caused by violations of personal non-property rights of civil law subjects, the amount of the debtor's compensation obligation should not exceed the sum of pecuniary sanction necessary and sufficient for the balanced implementation of compensatory and preventive functions of civil liability (Prymak, 2014, pp. 85–89). Thus, if the victim's claims for compensation for non-pecuniary damage are inflated, inadequate and do not rely on the principle of reasonableness, the courts, using discretion, are authorized to reduce compensation (Otradnova, 2007, p. 120–123).

In all the above cases regarding the sum of compensation in tortious obligations, the authors attribute an extremely crucial role to judicial discretion, which allows protecting and restoring violated rights fully with regard to reasonableness and justice of measures of civil liability. At the same time, the achievement of such a goal is impossible without the high professionalism of the judiciary. Therefore, the burning issue of today is the optimization of limits of judicial discretion so that, on the one hand, “a qualified and bona fide judge has the amplest opportunities to take into account the circumstances of a particular case to the utmost, and on the other – an unqualified or mala fide judge cannot improperly use or abuse granted discretion” (Huralenko, 2012, pp. 292–304). However, a judge having any qualification level must “exercise his discretion reasonably” while executing his discretionary powers.

## 5. Conclusions

1. Discretionary nature of the subjective reasonableness of tortious liability in civil law is defined as a requirement for updating the scope of law enforcement discretion of the evaluation of measures of tortious liability for a civil offense committed by the tortfeasor from the perspective of adequacy and proportionality.

2. The reasonableness of tortious liability can be applied in civil law only to assess the measures of tortious liability for a civil offense committed by the tortfeasor. It is about reasonableness, adequacy, proportionality and, definitely, justice of the measures, because the primary purpose of tortious liability in civil law is to restore violated rights and legitimate interests through the offender's recovery of damages. If the victim's claims for compensation for non-pecuniary damage are inflated, inadequate and do not rely on the principle of reasonableness, then the courts, using discretion, are authorized to reduce compensation. As for the sum of damages in tortious obligations, the authors attribute an extremely crucial role to judicial discretion, which allows protecting and restoring violated rights fully with regard to reasonableness and justice of measures of civil liability.

3. The application of the principle of reasonableness of tortious liability in civil law to assess the tortfeasor's conduct, which is illegal, is impossible, because illegal behavior contrary to law cannot be regarded reasonable under any circumstances. However, the application of the reasonableness principle is essential while setting the amount of damage in tortious obligations.

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## **ДИСКРЕЦІЙНИЙ ХАРАКТЕР СУБ'ЄКТИВНОЇ РОЗУМНОСТІ**

**Анотація.** *Мета* статті полягає у з'ясуванні особливої природи категорії розумності як засобу досягнення гнучкості правового регулювання та як масштабу суддівського розсуду під час зовнішнього оцінювання поведінки учасників цивільних правовідносин. *Методи дослідження.* Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання. *Результати.* У статті охарактеризовано принцип розумності деліктної відповідальності в дискреційному змістовому спрямуванні – як вимогу актуалізації розширення сфери впровадження правозастосовного розсуду оцінки мір деліктної відповідальності за вчинене деліквентом цивільне правопорушення з позицій адекватності та співмірності. Також у статті обґрунтовано доцільність розширення сфери розсудового правозастосування з огляду на оціночний вимір принципів справедливості, добросовісності, розумності деліктної відповідальності, що своєю чергою дасть змогу під час вирішення кожної цивільної справи брати до уваги її конкретні особливості, більш ретельно враховувати та гнучко підходити до захисту прав і законних інтересів потерпілого в деліктних правовідносинах, забезпечувати обґрунтованість прийнятого рішення, сприяти виробленню сталої судової практики. *Висновки.* Принцип розумності деліктної відповідальності в цивільному праві може бути застосований виключно з метою оцінки мір деліктної відповідальності за вчинене деліквентом цивільне правопорушення. Ідеться про розумність, адекватність, співмірність і, звичайно, справедливість цих заходів, адже первинною ціллю деліктної відповідальності в цивільному праві є відновлення порушених прав та охоронюваних законом інтересів шляхом здійснення деліквентом відповідного відшкодування завданих збитків (шкоди).

**Ключові слова:** принцип справедливості деліктної відповідальності, принцип добросовісності деліктної відповідальності, принцип розумності деліктної відповідальності, потерпілий, деліквент, правопорушення, цивільно-правова відповідальність.

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## PERSPECTIVES FOR THE IMPOSITION OF INDIVIDUAL TYPES OF PUNISHMENT IN UKRAINE

**Abstract. Purpose.** The aim of the article is to characterize the main trends in the imposition of punishment in Ukraine, its particular types, as well as a scientific analysis of the recent draft laws in this field. **Results.** The relevance of the article is that one of the components of public policy on combating crime is punishment, which is the most important means of influencing potential offenders and persons who have already committed criminal offenses to deter them from committing crimes (general prevention) or same commission of repeated crimes (special prevention). Thus, the effectiveness of the policy on criminal penalties largely determines the effectiveness of the entire system of combating crime in Ukraine and is one of the significant and complex problems of domestic legal science and criminal policy of the state. The article studies the implementation of criminal punishment and its individual types on the basis of official statistical data, which has an independent significance for both legislative and law enforcement activities. It is proved that the criminal policy of Ukraine is characterized by a steady trend of increasing use of alternatives to imprisonment and release from punishment. The calculated statistical indicators show a situation when exemption from criminal punishment with probation is applied in more cases than other types of criminal punishment. It is emphasized that the fight against crime is a complex, systematic and multifaceted activity in the field of social management and has its own goals, objectives, directions, object, subjects, means, principles, the correct definition of which is the key to the effectiveness of this activity. It is found that around the world, criminal policy increasingly advocates alternatives to isolating those responsible for criminal offenses from society. **Conclusions.** It is concluded that the criminal policy of Ukraine is characterized by a steady trend of increasing use of alternatives to imprisonment and release from punishment. As illustrated by the above calculations, exemption from criminal punishment with probation is applied in more cases than other types of criminal punishment. At the same time, the share of such persons is gradually decreasing.

**Key words:** punishment, penalization, criminal record, criminal offense, crime, convicts, probation supervision.

## 1. Introduction

In view of new objective realities connected with the implementation of the officially proclaimed course for integration into Europe in all sectors of public life, the development of the legal State in Ukraine and the reform of national legislation on combating crime, the content of this activity changes accordingly. The problem of effectiveness of such activity does not lose its relevance, because in the current political and socio-economic situation the counteraction to crime becomes one of the important and actual vectors of social stabilization.

One of the components of public policy on combating crime is punishment, which is the most significant measures against potential offenders and persons who have already committed criminal offenses, with the aim of preventing them from committing crimes (general prevention) or from committing repeated crimes (special prevention). Therefore, the effectiveness of policy on criminal punishment largely determines the effectiveness of the entire system of countering crime in Ukraine and is one of the significant and complex problems of domestic legal science and criminal policy of the State.

In specific domestic and foreign literature, the issues of effective imposition of criminal punishment and its individual types are covered in the works by T.A. Bushuieva, I.M. Halperin, P.S. Dahel, A.P. Kozlov, A.I. Korobiev, V.N. Kudriavtsev, N.F. Kuznietsova, N.A. Lopashenko, A.A. Muzyka, V.V. Stashys, Ye.L. Streltsov, P.L. Fris, O.I. Shynalskyi, and others. However, despite the unconditional importance of scientific study in this field, some of the challenging issues of the subject are poorly studied. Moreover, literature review fragmentary reveals the problems of modern judicial practice in Ukraine, in particular, the application of certain types of punishment.

The aim of the article is to characterize the main trends in the imposition of punishment in Ukraine, its specific types, as well as a scientific analysis of the recent draft laws in this field.

## 2. General principles of criminal punishment

As it is known, the fight against crime is a complex, systemic and multifaceted activity in the field of social administration that has its objectives, tasks, vectors, object, actors, means, principles, proper, the proper definition of which guarantees effectiveness of this activity.

Considering the objective of criminal policy of the State, it should be noted that it is impossible to eradicate criminal offenses as a kind of social practice, to eliminate their determinants completely, as well as it is unrealistic and scientifically unjustified to overcome crime. The only realistic tasks required in

the fight against crime are to retain the number and spread of criminal offenses at a minimum level acceptable to society; to reduce the danger of such encroachments; to prevent criminal activity as a business, occupation; to restrict the interrelation of criminality and other negative social phenomena (especially corruption and shadow economy); to eliminate or reduce socially negative consequences of crime.

The public danger of criminal offenses and the offender is reflected in the sanctions of criminal law through such measures as the types and extent of punishment, that is, in the quantitative terms of the criminalization of such offenses, their penalization, which is the process of determination of punishability of socially dangerous acts, as well as their practical punishability, namely, the process of imposition of a criminal punishment in the judicial practice (Korobeev, 1987, p. 137). The similar definition is formulated by P.S. Dagal and T.A. Bushuieva, who argue that the penalty is statutory consolidation and practical implantation of the types and amount of punishment imposed for crimes (Dagal, Bushueva, 1981, p. 49).

Therefore, penalisation can be both legislative (determination of type and limits of punishment by a criminal provision) and law-enforcement (imposition of punishment in practice) (Turlova, 2015, p. 121).

Attempts to assess the conformity of criminal punishment with actual application of its certain types (legal penalisation) as the conceptual task of combating crime should be based on empirical method, in particular statistical analysis of law application practice (Polishchuk, 2021, p. 207).

Statistics of the State Judicial Administration of Ukraine (Judicial power of Ukraine, 2021) (form of statistical report no. 6 "Report on persons brought to criminal responsibility and types of criminal punishment" (till 2018, "Report on the number of persons convicted, justified, in whose respect cases are closed, a mentally incompetent person, in whose respect compulsory measures of medical character and types of criminal punishment are applied)) enable to analyse the state of affairs and trends in criminal punishment in Ukraine, in particular to study the structure of criminal records and the practice of imposing certain types of punishment.

One of the steady trends in criminal policy is the strengthening of humanitarian tendencies in the application of criminal punishment, which is evident in the stable decrease of absolute and relative parameters of punishment in the form of imprisonment. For example, while in the Soviet times in 60-70-s, the share of imprisonment in the structure of criminal records was 53-66 % of convicted persons (Cherkasov,

2004, p. 143), up to 2000 years it decreased twice to 32%.

According to the diagram in Fig. 1, in 2010, the indicator (number of persons sentenced to imprisonment for a certain term and lifelong imprisonment) decreased to 24,2 %, and in 2020, (Fig. 2) it was 19,1 %.

It should be considered as a positive trend in criminal policy in Ukraine. The overwhelming majority of scientists, who have studied this problem, argue that the application of severe punishment (in particular imprisonment) has practically no preventive effect. For example, studies of German criminologists (Ortmann, 1993) enable Kh. Kuri and O. Ilchenko to argue that "the results of criminological studies unanimously reveal that severe criminal punishment has, if any, a slight impact on crime level, and has a small preventive effect. Moreover, punishment in the form of imprisonment has significant negative consequences. Their application requires additional intensive rehabilitation measures to motivate people to change behaviour. A simple "serving one's term in prison" as punishment causes, as a rule, only fixing of criminal behaviour, habits and attitudes, due to the powerful influence of the prison subculture" (Kury, Ilchenko, 2013).

### 3. Development of alternative types of punishment

Therefore, criminal policy increasingly advocates alternatives to isolating those guilty

of criminal offenses from society. The Draft Law of Ukraine "On amendments to the Criminal Code of Ukraine, the Criminal Procedure Code of Ukraine with regard to the development of the system of probation, increase of alternatives to deprivation of liberty and an enabling environment for reducing recidivism" (Draft Law of Ukraine On amendments to the Criminal Code of Ukraine, the Criminal Procedure Code of Ukraine with regard to the development of the system of probation, increase of alternatives to deprivation of liberty and an enabling environment for reducing recidivism, 2021) reveals the legislative attempts to join this global trend, because one of its proposals is the introduction of a new kind of punishment, that is, probation supervision, which provides for the limited rights and freedoms of the defendant, with a view to correct and prevent committing new offenses, without the isolation of the convicted from the society.

In our opinion, we should pay attention to controversial provisions of the Law, such as: in connection with the proposed amendments to the Criminal and Criminal Procedure Codes of Ukraine, it is expedient to make corresponding changes to the Law of Ukraine "On Probation"; Article 59<sup>1</sup> of the Draft Law "On Probation Supervision" does not specify which categories of convicted persons should be subject to probation supervision (the grav-

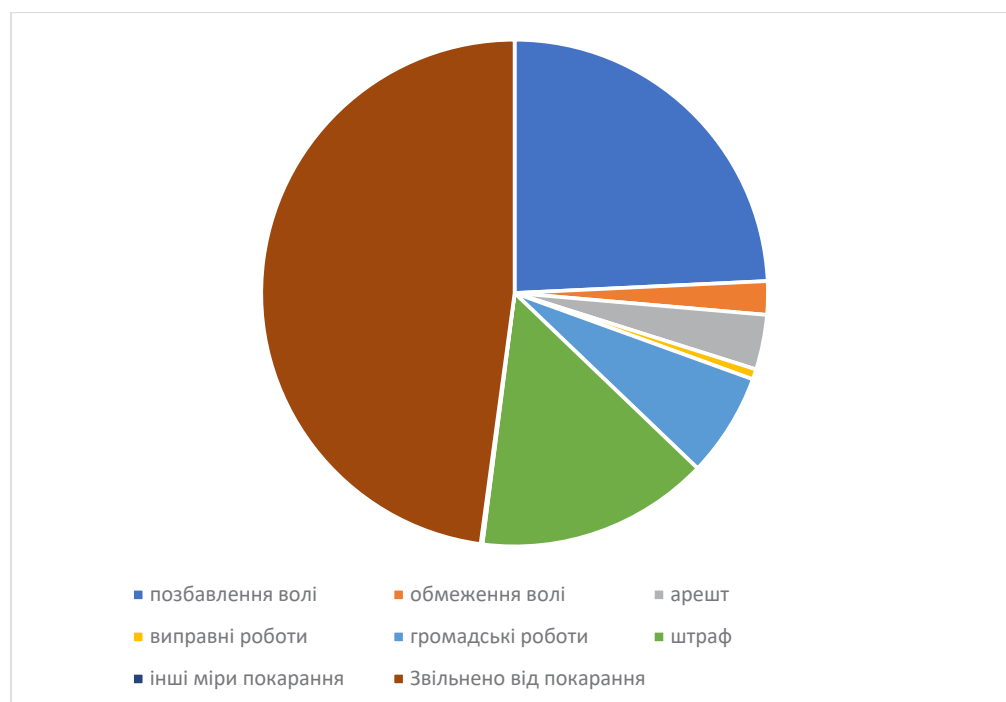


Figure 1. Structure of criminal records in Ukraine as of 2010

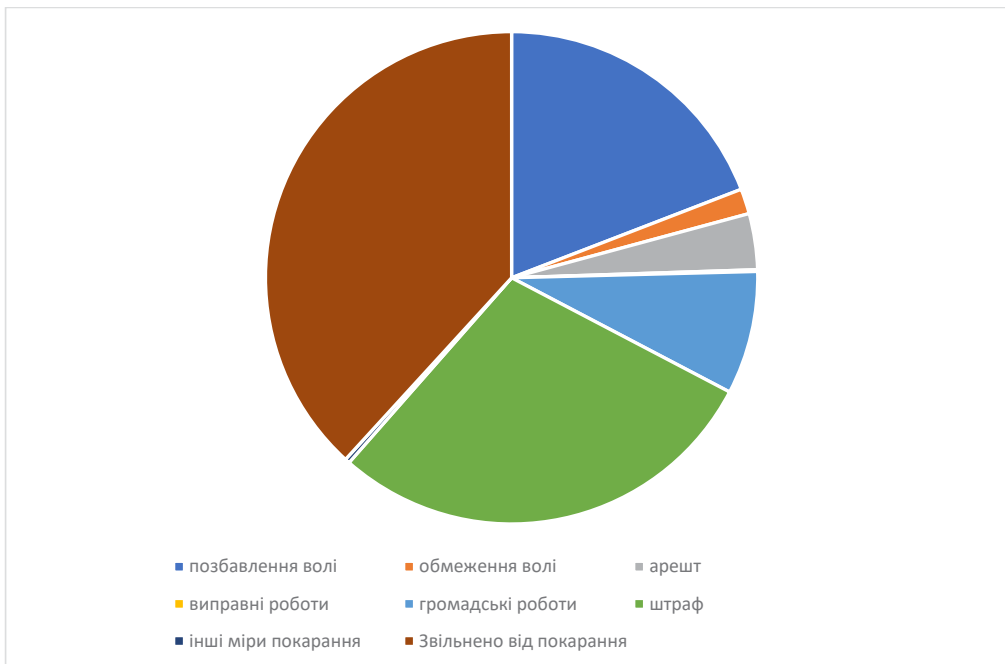


Figure 2. Structure of criminal records in Ukraine as of 2020

ity of the crime, recidivism, convictions, form of guilt, etc.), that is, it is necessary to consider both the degree of danger of the offense and the social danger of the offender (in the case of grave and exceptionally grave crimes, such punishment is out of the question, as in this case it cannot ensure the balance between public security and fair punishment for the crime committed); it is not quite clear whether the law-makers are logical to remove from the list of criminal punishments the restriction of liberty, which has been applied for a long time to a sufficiently large category of convicted persons (in 2020, these are 1116 convicted persons (1,7% of the totality) and which, with proper organization of its execution is a rather effective type of punishment, with which the proposed probation supervision could co-exist, because they absolutely do not interfere with each other (so why the law-makers have provided for such types of punishment, which in practice are not applied in general or cases of such punishment are rare: corrective work, detention in a disciplinary battalion, service restriction for servicemen, deprivation of the right to take certain positions or to engage in certain activities

(as the main punishment)); the proposal to limit the use of punishment in the form of arrest by a category of military personnel is also insufficiently grounded.

#### 4. Conclusions

The authors' study of modern judicial practice in Ukraine shows that Ukrainian criminal policy is characterized by a steady trend towards increasing application of alternative to deprivation of liberty types of punishment and exemption from punishment. The above calculations proves that exemption from criminal punishment with probation is applied in more cases than other types of criminal punishment. At the same time, the share of such persons is gradually decreasing. For example, the share of the persons who have been released on probation in the totality of the convicted persons was 47.9% in 2010, and 38.2% in 2020.

Therefore, the comparative analysis of actual penalisation in Ukraine for 2010-2020 years in the context of quantitative evaluation and prospects of imposition of certain types of punishment permits assuming that the process of improving the system of punishment and its further humanization will not be limited.

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## **ДЕЯКІ ПИТАННЯ ЩОДО ПЕРСПЕКТИВ ЗАСТОСУВАННЯ ОКРЕМИХ ВИДІВ ПОКАРАННЯ В УКРАЇНІ**

**Анотація.** Метою статті є надання характеристики основних тенденцій застосування покарання в Україні, окремих його видів, а також науковий аналіз останніх законопроектів у цій сфері. **Результати.** Актуальність статті полягає в тому, що одним зі складників державної політики у сфері протидії злочинності є інститут покарання, що є найбільш вагомим засобом впливу на потенційних правопорушників та осіб, які вже вчинили кримінальні правопорушення, з метою утримання їх від вчинення злочинів (загальна превенція) або ж учинення повторних злочинів (спеціальна превенція). Отже, дієвість політики у сфері кримінальних покарань значною мірою зумовлює ефективність усієї системи протидії злочинності в Україні та є однією зі значущих і складних проблем вітчизняної правової науки та кримінальної політики держави. У статті на основі офіційних статис-

тичних відомостей досліджено реалізацію кримінального покарання та його окремих видів, що має самостійне значення як для законотворчої, так і для правозастосовної діяльності. Доведено, що кримінальна політика України характеризується стійкою тенденцією до дедалі ширшого застосування альтернативних позбавленню волі видів покарань і звільнення від покарання. Розраховані статистичні показники засвідчують ситуацію, коли звільнення від кримінального покарання з випробуванням застосовується в більшій кількості випадків, ніж інші види кримінального покарання. Наголошено на тому, що протидія злочинності є складною, системною та багатоаспектною діяльністю у сфері соціального управління, вона має свої цілі, завдання, напрями, об'єкт і суб'єктів, засоби та принципи, правильне визначення яких є запорукою ефективності цієї діяльності. З'ясовано, що в усьому світі кримінальна політика дедалі більше схиляється на користь альтернатив ізольованості від суспільства осіб, винних у вчиненні кримінальних правопорушень. **Висновки.** Констатовано, що кримінальна політика України характеризується стійкою тенденцією до дедалі ширшого застосування альтернативних позбавленню волі видів покарань та звільнення від покарання. Як ілюструють наведені розрахунки, звільнення від кримінального покарання з випробуванням застосовується в більшій кількості випадків, ніж інші види кримінального покарання. Водночас характерне також поступове зменшення частки таких осіб.

**Ключові слова:** покарання, пеналізація, судимість, кримінальне правопорушення, злочин, засуджені, пробачійний нагляд.

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## DEFINITION OF THE TERM “REHABILITATION” IN CRIMINAL PROCEDURE LAW OF UKRAINE

**Abstract.** *The aim of the study* is to analyse some definitions of the term of rehabilitation of persons unlawfully prosecuted and, consequently, to synthesise the author's perspective on this term, which should correspond to modern legislative trends. **Results.** The relevance of the article is determined by the fact that the criminal procedure legislation and the derivative legal science of criminal procedure never stand still and always continue the search to legislate unregulated relations and improve existing legal regulations. To date, the concept of rehabilitation is not finally resolved. It must repeal unlawful procedural decisions of law enforcement agencies and fully restore previously lost and limited rights of a rehabilitee. The Ukrainian criminal procedure legislation in force and the science of criminal procedure are in a state of continuous change and search with regard to regulating current or legislating unregulated legal relations. Nowadays, the problem of regulating rehabilitation relations in criminal proceedings has become acute, first of all, there is no definition of the term “rehabilitation”, which would provide a relevant and legal interpretation of the above phenomenon in criminal proceedings. The aim of the article is to analyse some definitions of the term of rehabilitation of persons unlawfully prosecuted and thus, synthesise the author's perspective on this term, which should correspond to modern legislative trends. The article analyses the authors' definitions by legal scholars: Bezliepkin B.T., Tadzhyiev T.T., Shylo N Ya., Skvortsov M.M., Boitsova L.V., Vitske R.E., Antonov V.I., Klimov H.Z., Rohachev S.O., Shumylo M Ye., Koval O., Mazur M.R., and Kaplina O.V. **Conclusions.** In the course of investigation, the author concludes that in most cases the definitions render the term “rehabilitation” in the “broad” meaning, and the author emphasizes that the term “rehabilitation” in criminal proceedings should be considered as a process inseparable from the criminal procedure and have features, namely: observance of the principle of publicity, compensation for pecuniary and non-pecuniary damage, and complete (comprehensive) restoration by public authority/authorities of the lost rights of a person unlawfully prosecuted (suspect, accused, convict). Finally, the author's definition of the term “rehabilitation” is given.

**Key words:** criminal procedure, institute of rehabilitation, cancellation of the decision, restoration of rights.

### 1. Introduction

The criminal procedure legislation and the derivative legal science of criminal procedure never stand still and always continue the search to legislate unregulated relations and improve existing legal regulations. To date, the concept of rehabilitation is not definitively resolved. It must repeal unlawful procedural decisions of law enforcement agencies and fully restore previously lost and limited rights of a rehabilitee.

To date, the law has not established a procedure for the rehabilitation of persons unlawfully prosecuted in criminal proceedings. Nevertheless, despite the presence of many scientific proposals on the definition of this term, there is no official term of “rehabilitation”.

The issue of rehabilitation has been under focus of many well-known researchers: B.T. Bezliepkin, L.V. Boitsova, O.V. Kaplina, A.O. Orlova, M.I. Pastukhov, O.O. Podopryhora, M.S. Strohovych, T.T. Tadzhyiev, D.V. Tatianin, M.Ye. Shumylo, A.M. Smirnova, et al. However, a scientific analysis of the provisions on rehabilitation provided for in the CPC of Ukraine requires further analysis and the regulatory mechanism.

In the study by A.M. Smirnov, the focus is on the concept of recovery for damages caused to victims of justice and abuse of power (Smirnov, 2004, pp. 42-62).

In turn, G.O. Yashina emphasises a set of rehabilitation provisions of foreign countries and rehabilitation provisions of repressed peo-



ples and victims of political repression (Yashina, 2015, pp. 56-104).

The aim of the study is to analyse some definitions of the term of rehabilitation of persons unlawfully prosecuted and thus, synthesise the author's perspective on this term, which should correspond to modern legislative trends.

## 2. Features of defining terms in the legislation of Ukraine

To date, Ukrainian domestic legislation does not provide a clear answer as to how and in what manner to observe the principle of criminal procedure declared in Art. 2 of the CPC of Ukraine, namely "... *that every person who has committed a criminal offence shall be prosecuted to the extent of his or her guilt, no innocent person shall not be accused or convicted, no person shall not be subjected to ungrounded procedural compulsion...*" (Criminal Procedure Code of Ukraine, 2012), which, in the author's opinion, should be implemented through the institution of rehabilitation in criminal proceedings. Therefore, regarding the term "rehabilitation," or according to some scholars "legal rehabilitation," nowadays no unanimous perspective exists. The following terms under study permits concluding that most of scientists understand the term "rehabilitation" in a broad sense. The author holds that the national legislation in force allows the term "rehabilitation" to be considered in a narrow context due to the nature of the latter, that is, "rehabilitation in criminal procedure."

Soviet lawyer B.T. Bezlepkin argues that rehabilitation "*should be considered as the acquittal of the defendant or the termination of a criminal case in respect of a convicted person, an accused person, or a suspect due to the absence of an event or constituent elements of a crime, or due to the lack of the proof of the commission of a crime in respect of these persons*" (Bezlepkin, 1975, p. 13). In our opinion, this term does not correspond to the complete picture of the phenomenon of "rehabilitation" since it does not provide for a procedure for recovery of lost rights to an individual.

Therefore, according to T.T. Tadzhiyev, rehabilitation in criminal proceedings "*is a decision of the competent law enforcement body, prescribed in a criminal procedure regulation, that states that the absence of event or the constituent elements of a crime or that participation in the commission of a crime of this person is not proven*" (Tadzhiyev, 1991, p. 15). T.T. Tadzhiyev's perspective is consistent with that of B.T. Bezlepkin and does not include a component of the participation of State authorities in the full restoration of lost rights as a result of unlawful criminal prosecution.

N.Ya. Shylo argues that rehabilitation is "*not only the termination of criminal proceedings or*

*the acquittal by a court of persons illegally prosecuted, the legal grounds and the range of actors, but also the legal effects (for example, restoration of the reputation and honour of innocent people and compensation for material damage)*" (Shilo, 1981, p. 16). On the basis of this definition, N.Ya. Shylo does not determine the leading role of state bodies in rehabilitation measures, since it is the latter that have sufficient competence to realize the full and final restoration of the lost rights of a person. The author's term implies a number of features, bypassing its specific essence. It should also be noted that the category of "termination of criminal prosecution" may include the termination of criminal proceeding which is carried out not only on rehabilitative grounds.

According to M.M. Skvortsov, "*rehabilitation in the social sense of its content should entail complete and unquestionable restoration of the reputation of the unlawfully accused, restoration of his/her former rights, recovery for material damages caused*" (Skvortsov, 1970, p. 111). When the author argues that studies "rehabilitation" in criminal procedure relations, he recognizes that the above phenomenon cannot exist in isolation from the science of criminal procedure at the present stage of the development of legal science, therefore, it should imply solving the problem of the very criminal procedure. This is more narrow, concrete than solving abstract "social problems." "Incorrect accusation" also does not provide the participant of a rehabilitative relations with the possibility of final restoration of lost rights, since the term "incorrect accusation" can be interpreted simultaneously in several meanings: how incorrectly, improperly, erroneously an indictment against a particular person has been made; an erroneous indictment may be made on the basis of a mistake by an authorized person (intentional or unintentional), or insufficient evidence or evidence obtained by unlawful means. Therefore, on the other hand, the term "incorrect accusation" can be used as in respect of the person guilty, but guilty of committing another crime. In such a case the participation of such a person in rehabilitation activities is inappropriate, the act of rehabilitation will be of useless legal force, or in other case only measures of so-called "partial rehabilitation" are permitted for such a person that does not completely reveal the full essence of the term "rehabilitation."

L.V. Boitsova argues that rehabilitation is "*the return of lost rights and benefits, elimination of legal restrictions related to unlawful conviction, prosecution, deprivation of liberty of innocent persons, as well as restoration of further legal capacity*" (Boitsova, 1990, p. 8). Moreover, while L.V. Boitsova properly identifies a list

of the activities and means by which a person should be reinstated in his or her lost rights, but no chief executive (addressee) of such activities is identified, which is directly the State represented by its bodies and officials. The author has not provided for an obligation on the part of the State to compensate rehabilitees for property damage caused.

R.E. Vitske defines the concept of “rehabilitation” as follows: *“This is a procedure for restoring the rights and freedoms of a person unlawfully unjustly subjected to criminal prosecution and compensation for the harm caused to him/her, as well as restoration of reputation, honour of innocent citizens”* (Vitske, 2007, p. 11). Vitske’s definition quite aptly states that “rehabilitation” in criminal procedure is first and foremost a practice. But this definition is somewhat general, since the phrase “innocent citizens” enables ambiguous interpretations. Citizens may be innocent due to unlawful accusations and to criminal, disciplinary, administrative, civil and other charges.

According to V.I. Antonov, rehabilitation is “annulment of legal effects of repression, restoration of legal position and reputation of a person, as well as compensation for damages caused” (Antonov, 2001, p. 11). In this case, the author defines the concept of “rehabilitation” in a broad meaning. Nevertheless, as we have already stated, modern legal science cannot envisage rehabilitation separately from criminal proceedings, nor can the specific scope of legal relations and the actors involved in the implementation of rehabilitation be defined.

With regard to the definition of G.Z. Klimova, it can be concluded that the latter along with the previous two terms, proposed by scientists, also provides a definition of rehabilitation in the same broader context, *“Rehabilitation is a legal means of correcting gross investigative and judicial errors. It occurs there and when the fact of unlawful prosecution is involved”* (Klimova, 2005, p. 93).

S.O. Rogachev considers that *“rehabilitation is a recognition by the State, through the person conducting the initial inquiry, the investigator or the court, of the unlawfulness of the criminal prosecution of a person by issuing a decision, determination of a sentence or a sentence and providing an opportunity for the rehabilitee to restore the violated rights and to recover all damages caused”* (Rogachev, 2009, p. 154). Rehabilitation is an objective process carried out in accordance with the principles of criminal procedure. The role of the person conducting the initial inquiry, the investigator or the court is merely an instrument whose decision should be aimed at eliminating prior errors committed and establishing an offence by fal-

sification, as a further obligatory ground for the opening of disciplinary/criminal proceedings on the facts revealed. Providing an opportunity for restoration does not constitute a de facto remedy. Rehabilitation was in fact a guarantee of ensuring that all perpetrators have brought to justice and that innocent persons have not been liable. Therefore, the possibility of ensuring the restoration of lost human rights should not be a substitute for the actual restoration of lost rights in the event of establishing the unlawfulness of the decisions.

### 3. State responsibility to a person in criminal proceedings

Domestic scientists in the field of criminal procedure advocate similar approach to the nature and observance of the principle of publicity. For example, according to M.Y. Shumylo, *“Rehabilitation is a form of implementing the principle of State responsibility to the person in criminal proceedings. It is an institution of public law in which the law-restoring criminal procedure relations is regulated on the basis of formality, using under subsidiary terms provisions in civil, labour, pension and other branches of law, where the leading actor is the State in the person of the court”* (Shumylo, 2019, p. 600). Therefore, in the author’s view, the concept of responsibility to one person is erroneous, since the State is a systemically important collective actor that realizes its interests through the state authorities, as an instrument for the realization of socially important needs. Consequently, to oppose the State and one person is, according to the author, somewhat inappropriate. Rehabilitation, as an integral part of criminal proceedings, is itself part of public law and therefore the principle of publicity may not be defined as leading in the process of rehabilitation.

According to O. Koval, *“Rehabilitation in criminal proceedings is a system of social and legal measures provided for by law aimed at the full restoration of previous human rights that have been unlawfully prosecuted or convicted, and compensation for damage caused”* (Koval, 2012, p. 144). Thus, a person may be considered criminally liable if he or she acquires the status of a convicted person. In such a case, it would be advisable to mention either the “unlawfully prosecuted” or the “wrongfully convicted,” since the contents of these wordings are identical.

O.V. Kaplina argues that *“rehabilitation is a set of social and legal measures aimed at full restoration of the previous rights of a citizen unlawfully prosecuted or convicted, and compensation for damage caused”* (Kaplina, 1998, p. 183). This term does not generally cover the process of rehabilitation, nor does the leading role of the State is considered, since the latter,

through its legislation, requires the observance of the fundamental principles of criminal procedure and through its bodies, ensures them in the social and legal sphere. Furthermore, the latter does not provide the full set of measures to eliminate all suspicions and charges which is the priority of criminal procedure responsibility.

M.R. Mazur concludes that *“the Ukrainian lawmaker considers rehabilitation as an acquittal for a person, the termination of a criminal case against him/her on rehabilitative grounds, and the subsequent restoration of his/her violated, restricted rights as an effect of rehabilitation. Therefore, a person is rehabilitated if in respect of him/her such acts are pronounced, issued (adopted) and who has the right to restoration of violated rights and legitimate interests and the right to compensation for damage caused”* (Mazur, 2011, p. 174). This definition by M.R. Mazur does not indicate that a consistent list of these decisions cannot exist in isolation from the public sphere, especially from law enforcement officials, authorised in specific criminal proceedings and other officials of public authorities, whose activities in the rehabilitation process engage the restoration of lost rights on the basis of a rehabilitation decision. That is, the public authorities in general. Thus, having defined the list of decisions necessary for rehabilitation, the latter has missed the key relationship of the “human-State,” which, in our opinion, should also be reflected in the definition.

Therefore, rehabilitation in criminal proceedings should have the following characteristics: observance of the principle of publicity, compensation for pecuniary and non-pecuniary damage, and complete (comprehensive) restoration by public authority/ authorities of the lost rights of a person, unlawfully prosecuted (suspect, accused, convicted). According to V.K. Voloshina, *“The public nature of criminal procedure entails the existence of a system of controlling and supervisory powers designed to prevent possible arbitrariness on the part of the officials conducting the proceedings, to protect citizens from exposing to groundless accusations, condemning, from unlawful restriction of rights and freedoms”* (Voloshyna, 2012), in other words, the principle of publicity in criminal proceedings is based on the exist-

tence of a system of State bodies with powers of control and supervision, and characterized by the binding nature of the decisions taken to ensure the protection of the rights and freedoms of everyone party to criminal proceedings. The basis of civil liability of officials conducting criminal proceedings to persons aggrieved by such decisions, that is, the basis for compensation for pecuniary and non-pecuniary damage, prescribed in the provisions of art. 130 of the CPC of Ukraine. In the author’s opinion, such basis derives from the principle set out above in art. 2 of the CPC of Ukraine. A complete (comprehensive) restoration of the lost rights by state authorities is regulated by art. 130 of the CPC of Ukraine, as well as by Law 266/94VR of Ukraine “On the procedure for compensation for damage caused to a citizen by unlawful actions of bodies of inquiry, pre-trial investigation, prosecutor’s office and court” of January 01, 1994. Such measures provide for, on the basis of a court judgment on unlawfulness of the decisions, actions or omissions of bodies conducting investigative activities, bodies of pre-trial investigation, the Prosecutor’s Office and the court, the return of illegally seized property and, in the event that it is not possible to make a return in kind, its cost is reimbursed from the enterprises, institutions and organizations to which it is donated (part 1 of art. 4), reinstatement in their labour (art. 6), residential (art. 9) and other rights (service, pension, other personal and property rights, etc.) (art. 15) (Law of Ukraine On the procedure for compensation for damage caused to a citizen by unlawful actions of bodies of inquiry, pre-trial investigation, prosecutor’s office and court, 1994).

#### 4. Conclusions

The above features allow the author to present his own understanding of the term of rehabilitation in criminal proceedings as follows: “Rehabilitation is a procedure defined by the Criminal Procedure Law, which provides, on the basis of publicity, for the full restoration of property and non-property rights to the person unlawfully prosecuted, as well as compensation for pecuniary and non-pecuniary damage on the grounds of a rehabilitation decision, which is binding on all State authorities and officials.”

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## ВИЗНАЧЕННЯ ТЕРМІНУ «РЕАБІЛІАЦІЯ»

### У КРИМІНАЛЬНОМУ ПРОЦЕСУАЛЬНОМУ ПРАВІ УКРАЇНИ

**Анотація.** Актуальність статті полягає в тому, що кримінальне процесуальне законодавство та похідна від нього правова наука кримінального процесу ніколи не стоять на місці, постійно й безперервно продовжують пошуки з унормування неврегульованих відносин і вдосконалення чинних нормативно-правових актів. На сьогодні не досить вирішені питання інституту реабілітації, який повинен не лише скасувати незаконно прийняті процесуальні рішення правоохоронних органів, а й повністю та остаточно повернути раніше втрачені й обмежені права реабілітанта. **Метою** статті є аналіз деяких визначень терміна «реабілітація осіб, незаконно притягнутих до кримінальної відповідальності» та подальший синтез авторського бачення цього поняття, яке має відповідати сучасним законодавчим тенденціям. **Результати.** Чинне українське кримінальне процесуальне

законодавство та наука кримінального процесу перебувають у стані безперервних змін і пошуків з урегулювання чинних актів або унормування ще не врегульованих правовідносин. На сьогодні гостро постала проблема з урегулювання реабілітаційних правовідносин у кримінальному процесі. Зокрема, відсутнє визначення терміна «реабілітація», який надав би актуальне й легальне визначення вказаного явища у кримінальному процесі. У статті міститься аналіз авторських визначень таких науковців-правників: Б.Т. Безлепкіна, Т.Т. Таджикиєва, Н.Я. Шида, М.М. Скворцова, Л.В. Бойцовой, Р.Е. Віцке, В.І. Антонова, Г.З. Климова, С.О. Рогачева, М.Є. Шумила, О.М. Коваль, М.Р. Мазур, О.В. Капліної. **Висновки.** У ході дослідження зроблено висновок, що в більшості випадків учені розуміють термін «реабілітація» в «широкому» його тлумаченні. Натомість автор наголошує на тому, що поняття «реабілітація» у кримінальному процесі варто розуміти як процедуру, що є невід'ємною від кримінального процесу. Ця процедура характеризується такими ознаками, як дотримання принципу публічності, відшкодування майнової та немайнової шкоди, усебічне (комплексне) поновлення органами/органом державної влади втрачених прав особи, незаконно притягнутої до відповідальності (підозрюваного, обвинуваченого, засудженого). Надано авторське визначення терміна «реабілітація».

**Ключові слова:** кримінальний процес, інститут реабілітації, скасування рішення, поновлення прав.

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## **НОТАТКИ**